

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1936 – MEEE/ITB/04/2023 – Invitation to Bid (ITB) for the Award of Financial Support for Electricity from Renewable Resources of Energy Installations with a Capacity from 40KW up to less than 200KW**

**13<sup>th</sup> November 2023**

The Board,

Having noted the letter of objection filed by Mr Franco Vella acting for and on behalf of Express Trailers Ltd, (hereinafter referred to as the appellant) filed on the 2<sup>nd</sup> October 2023;

Having also noted the letter of reply filed by Dr Frank Luke Attard Camilleri acting for the Ministry for the Environment, Energy and Enterprise (hereinafter referred to as the Contracting Authority) filed on the 11<sup>th</sup> October 2023;

Having heard and evaluated the testimony of the witness Ms Romina Vella (Representative of Express Trailers Limited) as summoned by Dr Luke Valletta acting for Express Trailers Limited;

Having heard and evaluated the testimony of the witness Mr Ian Busuttil (Representative of Express Trailers Limited) as summoned by Dr Luke Valletta acting for Express Trailers Limited;

Having heard and evaluated the testimony of the witness Mr Albert Zahra (Chairperson of the Evaluation Committee) as summoned by Dr Luke Valletta acting for Express Trailers Limited;

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by representatives of the parties;

Having noted and evaluated the minutes of the Board sitting of the 7<sup>th</sup> November 2023 hereunder-reproduced.

#### **Minutes**

#### **Case 1936 – MEEE/ITB/04/2023 – Invitation to Bid (ITB) for the Award of Financial Support for Electricity from Renewable Sources of Energy Installations with a capacity from 40KW up to less than 200KW**

The Invitation was issued on the 4<sup>th</sup> July 2023 and the closing date was the 12<sup>th</sup> July 2023. The estimated value of this tender, excluding VAT, was € 0.14/kWh for a maximum allocation of 344kW

On the 2<sup>nd</sup> October 2023 Express Trailers Ltd filed an appeal against the Ministry for the Environment, Energy and Enterprise as the Contracting Authority objecting to their disqualification on the grounds that their bid was deemed to be administratively not compliant.

A deposit of € 5,000 was paid.

There were three bids.

On the 7<sup>th</sup> November 2023 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Mr Richard Matrenza as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

**Appellant – Express Trailers Ltd**

Dr Luke Valletta	Legal Representative
Mr Franco Vella	Representative

**Contracting Authority – Ministry for the Environment, Energy and Enterprise**

Dr Frank-Luke Attard	Legal Representative
Mr Albert Zahra	Chairperson Evaluation Committee
Ms Lara-Ann Mangion	Secretary Evaluation Committee
Eng Peter Mifsud	Evaluator
Mr John Paul Ellul	Evaluator
Ms Elena Lia	Evaluator
Mr Gianfranco Abela	Representative
Eng Phyllis Micallef	Representative

**Preferred Bidder – DAB Electronica Ltd**

Invited to attend but declined the offer.

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Luke Valletta Legal Representative for Express Trailers Ltd said that Appellant was deemed to be not complaint on the basis that page 42 of the tender submissions had not been endorsed. Such endorsement was not necessary and exclusion therefore was not justified.

Dr Frank Luke Attard Legal Representative for the Ministry for the Environment, Energy and Enterprise (MEEE) said that the page in question referred to State Aid and it was mandatory that it should be signed and even after a rectification had been sent this shortcoming was not corrected.

Dr Valletta requested that witnesses be heard.

Ms Romina Vella (580478M) called to testify by the Appellant stated on oath that she was an Assistant Manager at Appellant Company, had processed the bid offer and attended to the rectification request. This request referred to page 42 of the dossier but did not indicate which one of the pages 42 it was. When requested to clarify this point the Contracting Authority simply stuck to their previous reply.

In reply to a question from Dr Attard witness again stressed that Appellant was given no indication as to which page 42 it was referring .

Questioned by the Chairman witness stated that in the tender submissions there were two pages bearing number 42.

Mr Ian Busuttil (354928M) called to testify by the Appellant stated on oath said that he had overseen that all the tender requirements had been met. The Appellant was advised that there were certain discrepancies in the State Aid submissions although technically it had submitted all that was required.

In reply to a question from Dr Attard, witness said that page 42 gave guidance on submissions on State Aid and all points had been met.

Mr Albert Zahra (098572M) called to testify by the Appellant stated on oath that he was the Chairperson of the Evaluation Committee. He had overseen the evaluation process and ensured that a rectification note had been sent referring to the missing endorsement on page 42 which had not been submitted. There was a distinct difference between the two pages numbered 42. According to the witness there was no request in the tender that every page had to be endorsed.

This concluded the testimonies.

Dr Valletta said that the Evaluation Committee had decided that page 42 was not endorsed yet seeing the 6<sup>th</sup> September note there is uncertainty to which page 42 the Authority was referring. Nowhere in the bid was there a request that every page had to be endorsed and the whole bid should not be rejected since there is no clarity as to which particular page the Authority was referring to. On the aspect of proportionality why should the whole bid be rejected for the sake of a signature? Court of Appeal Case 112/2021/1 was cited as stating that the lack of a signature has no bearing on a bid as the contents are not affected. The Evaluation was unjust and the bid did not merit disqualification but merits re-evaluation as the bid was not changed.

Dr Attard concluded by saying that the offer was irregular as the State Aid form was incomplete and even a rectification request failed to remedy this.

There being no further submissions the Chairman thanked the parties and declared the hearing closed.

End of Minutes

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**Hereby resolves:**

The Board refers to the minutes of the Board sitting of the 7<sup>th</sup> November 2023.

Having noted the objection filed by Express Trailers Ltd (hereinafter referred to as the Appellant) on 2<sup>nd</sup> October 2023, refers to the claims made by the same Appellant with regard to the tender of reference MEEE/ITB/04/2023 listed as case No. 1936 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Luke Valletta

Appearing for the Contracting Authority: Dr Frank Luke Attard Camilleri

Whereby, the Appellant contends that:

- a) We hereby submit our formal objection based on the fact that Page 42, as specified by the Chairman of the Evaluation Committee for MEE/ITB/04/2023, solely comprises instructions

pertaining to the completion of specific forms that are appended to the ITB. It is pertinent to note that this page does not mandate an endorsement. This is the sole reason our bid has been rejected.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 11<sup>th</sup> October 2023 and its verbal submission during the hearing held on 7<sup>th</sup> November 2023, in that:

- a) In its objection the Appellant stated that the last page of the State Aid Declaration Form (i.e. page 42 of the Invitation to Bid (ITB) document) required no endorsement and as such the Appellant included in its offer to the Contracting Authority an incomplete State Aid Declaration Form with the said page 42 missing.
- b) As clearly stated on page 5 of the Invitation to Bid (ITB) document bidders shall inter alia submit a "State Aid Declaration Form including details of any other aid received or to be received on the same RES Installation other than the aid being requested in response to this ITB, if applicable and in accordance with the declaration (Volume 1, Section 2, FORM 5)".
- c) Pursuant to Clause 15.2 of the Invitation to Bid (ITB) document's Volume 1, Section 1, the Tender Evaluation Committee issued a Request for Rectification/Clarification to the Appellant clearly requesting it to inter alia submit a properly endorsed copy of page 42 of the Invitation to Bid (ITB) document.
- d) The Appellant failed to include a copy of page 42 of the Invitation to Bid (ITB) document in its reply to the above-mentioned Request for Rectification/Clarification and its offer was subsequently rejected on this basis.
- e) The Contracting Authority submits that the above-mentioned Clause 15.2 clearly states that the bidders' failure to comply to any clarification/rectification request/s shall result in the bidders' offer not being considered any further.
- f) The issue that this case presents to the Public Contracts Review Board is one of defining the limits of a contracting authority's obligation to act proportionally.
- g) Having already given the Appellant the opportunity to correct its State Aid Declaration Form, the Tender Evaluation Committee could not simply ignore the Appellant's incomplete State Aid Declaration Form or request a fresh clarification/rectification without infringing the tender terms in breach of the principle of self-limitation.
- h) The Contracting Authority treated all economic operators equally and without discrimination as prescribed in Regulation 39(1) of the Public Procurement Regulations (S.L. 601.03) and issued the Appellant a Request for Rectification/Clarification in full compliance with the principles of equal treatment and transparency as per Regulation 62(2) of the same Public Procurement Regulations.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties including the testimony of the witnesses duly summoned, will now consider Appellant's grievances.

- a) Reference is made to the rectification request issued on 6<sup>th</sup> September 2023 whereby within it, in one specific point it was stated that *"The State Aid Declaration Form, as per template provided in Volume 1 Section 2 – Form 5, is not complete. Therefore, you are requested to provide a properly **endorsed** copy of Page 42, **which is currently missing from the submission**. Furthermore, it is necessary to declare the size of the business endeavor (sic), as indicated on Page 39 of the ITB"*. (bold emphasis added)
- b) From the above and from the testimony under oath of Mr Albert Zahra, this Board notes that there were two (2) issues that were raised by the Evaluation Committee and needed to be tackled by the economic operator, now appellant. These relate to the:
  - i. Endorsement of said page 42
  - ii. Actual submission of page 42
- c) Initially, this Board does not agree with witness Ms Romina Vella when she stated *"This request referred to page 42 of the dossier but did not indicate which one of the pages 42 it was."* The Board notes that the rectification request made it amply clear that reference was made to the "State Aid Declaration Form". Separate bullet points were used by the Evaluation Committee to segregate each point raised in the rectification request. This specific point started with the words *"The State Aid Declaration Form,... as per template provided in Volume 1 Section 2 – Form 5 "* It was therefore amply clear!
- d) Even though this Board agrees with argumentation brought forward by appellant that the endorsement or lack thereof is not proportionally material to bring about the exclusion and non-compliance of the appellant's bid (reference to Court of Appeal cases 221/22/1 of 26<sup>th</sup> October 2022 and 112/2021/1 of 31<sup>st</sup> August 2021) there is however another point to contend with.
- e) Prior to the endorsement of such page 42 there was the issue of non-submission of such page / part of document. The Evaluation Committee had clearly pointed out to the appellant that such page was missing from its original bid. It eventually issued the said rectification request on 6<sup>th</sup> September 2023. The appellant failed to submit such a document / page. Therefore, in this Board's opinion, the Evaluation Committee was correct in its interpretation that this should have led to the technical non-compliance of the appellant. The issue of the endorsement, which would have come at a later stage, is therefore irrelevant because the requested document / page was not even submitted!

Therefore, this Board does not uphold the grievance of the appellant.

**The Board,**

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) Does not uphold Appellant's Letter of Objection and contentions,
- b) Upholds the Contracting Authority's Notice of Award,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

**Mr Kenneth Swain**  
Chairman

**Mr Lawrence Ancilleri**  
Member

**Mr Richard A Matrenza**  
Member