

## PUBLIC CONTRACTS REVIEW BOARD

### **Case 1937 – MEEE/ITB/03/2023 – Invitation to Bid (ITB) for Support for Electricity from Installations Producing Electricity from Renewable Energy Sources with a Capacity Equal to or Larger than 1000KW**

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

The Board,

Having noted the letter of objection filed by Dr Clarence Busuttill and Dr Thomas Barbara Sant acting for and on behalf of Luxury Living Technologies Limited, (hereinafter referred to as the appellant) filed on the 9<sup>th</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 17<sup>th</sup> October 2023;

Having heard and evaluated the testimony of the witness Dr Christopher Mizzi (Chairperson of the Evaluation Committee) as summoned by Dr Matthew Paris acting for Luxury Living Technologies Limited;

Having heard and evaluated the testimony of the witness Mr Jonathan Orlando (Representative of the Planning Authority) as summoned by Dr Matthew Paris acting for Luxury Living Technologies 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 1937 – MEEE/ITB/03/2023 – Invitation to Bid (ITB) for Support for Electricity from Installations Producing Electricity from Renewable Energy Sources with a Capacity Equal to or Larger than 1000kW**

The Invitation was issued on the 17<sup>th</sup> February 2023 and the closing date was the 30<sup>th</sup> May 2023.

The estimated value of this tender, excluding VAT, was stated as *'shall not exceed the limits established by the Categories in Table Clause 14.3 in case of solar voltaic installations or the limit of 0.137€/kW in the case of the renewable energy installations for a maximum allocation of 19,000kW'*

On the 9<sup>th</sup> October 2023 Luxury Living Technologies 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 not compliant with the Bid Form's conditions.

A deposit of € 20,000 was paid.

There were fifteen 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 – Luxury Living Technologies Ltd**

Dr Matthew Paris	Legal Representative
Dr Clarence Busuttill	Legal Representative
Dr Naomi Genovese	Legal Representative
Dr Zach Esmail	Legal Representative
Mr Jean Paul Busuttill	Representative
Mr Carlo Mifsud	Representative

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

Dr Frank-Luke Attard	Legal Representative
Dr Christopher Mizzi	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

**Recommended Bidder – Melita Solar Ltd**

Dr Stephanie Mifsud	Legal Representative
Mr Kevin Borg	Representative
Mr Martin Debono	Representative
Mr Daniel Debono	Representative

**Recommended Bidder – Lufthansa Technik Malta**

Mr Jean Paul Gravina	Representative
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**Recommended Bidder – San Niklaw Farm**

Invited to attend but declined the invitation

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

Dr Matthew Paris Legal Representative for Luxury Living Technologies Ltd (herein after referred to as LLT) said that although the appeal was based on three points he will be dealing with two points. The tender requested either a planning application approval or a screening letter. The second point dealt with the period of validity of the Bids. There was failure on the part of the Contracting Authority to abide by the 90 days validity clause thus treating themselves and the bidder differently.

Dr Frank Luke Attard Legal Representative for the Ministry for the Environment, Energy and Enterprise (hereinafter MEEE) stated that the Screening Letter was applied for late even after the rectification and not submitted to the Authority in time.

Dr Christopher Mizzi Legal Representative for the Ministry said that the validity point raised by the Appellant binds the bidder to keep its offer open and the fact that the 90 days elapsed before the award was determined was in favour of the bidders.

Appellant requested that witnesses be heard.

Dr Christopher Mizzi (24787G) called to testify by the Appellant stated on oath that he was the Chairperson of the Tender Evaluation Committee (TEC) and detailed the make up of the Committee and explained the process followed in evaluating the bids. He stated that the first meeting of the TEC was held on the 14<sup>th</sup> June 2023 followed by further meetings on 20<sup>th</sup> June, 22<sup>nd</sup> June, 27<sup>th</sup> June, 4<sup>th</sup> July, 31<sup>st</sup> August, 14<sup>th</sup> September and 19<sup>th</sup> September. According to the witness there was no reason why the initial meeting was not held till 15 days after the closing date of the tender. The evaluation was done online and there was no fixed timetable nor any reason for certain long gaps between meetings. Meetings were dependent on availability of TEC members. They did not discuss the fact that the decision extended beyond 90 days nor was any notification issued in respect of this.

Dealing with the question of Appellant's disqualification, witness stated that what LLT submitted before the 30<sup>th</sup> May 2023 was not a screening letter but an Acknowledgement of a Screening Request dated 12<sup>th</sup> May. The Invitation Call had the same terms as a tender and therefore the TEC could not accept that document. Rectification was requested on the 1<sup>st</sup> September on several items which were all replied to and acceptable, except the screening letter where again a Planning Application document bearing reference PA 04994/23 was submitted but not a screening letter.

Mr Jonathan Orlando (401271M) called to testify by the Appellant stated on oath that he is the Manager of Special and European Projects at the Planning Authority (PA). He was referred to the application by Appellant and said that document in itself was not complete as according to S.L. 552/13 there were specific requirements and time limits to be observed. The initial submission by Appellant was on 7<sup>th</sup> May 2023. The PA replied within five days. On the 14<sup>th</sup> August, in a letter which refers to a specific application and a specific site, the PA informed the Appellant that it was ready to start to process the application for a screening letter. A subsequent letter dated 3<sup>rd</sup> October indicated some outstanding issues and further documents required to validate the application. The fees on the application were paid.

Questioned by Dr Mizzi witness stated that the letter of the 12<sup>th</sup> August was merely a request for documents whilst the 14<sup>th</sup> August letter stated that the PA was ready to start the process. The actual screening letter is the document dated 3<sup>rd</sup> October 2023 and no other previous documents issued were such.

This concluded the testimonies.

Dr Paris stated that the requisite of the tender was to ascertain that the site had a planning permit or alternately a screening letter to meet the requirements of S.L. 552/13. Article 3 (5)(a,b,c,d) refers to the screening letter requirements which were all fulfilled by the Appellant and the necessary fees paid as confirmed by witness. Appellant indicated that Article 3(5)(a) was also met. Therefore the Authority had the comfort of knowing that all requirements were met. The document dated 14<sup>th</sup> August from the PA satisfies those requirements. This is a case of substance over form and the TEC must not stop at the title but consider the whole text. Proportionality also has a place in this as the

requirements were satisfied and no prejudice was suffered as all parties treated the same (refer *Polaris Case*) even though the screening letters of other parties were not as extensive as those of the Appellant whilst the Melita Solar bid was incomplete as payment was lacking.

The Authority cannot insist on only mandatory being met and the TEC is bound by the PPR and does not have a free hand. The TEC claims that the 90 days apply only to one side. In Article 17 of the tender dossier the period of 90 days is an obligation only on the bidder. In the event of exceptional circumstances the Authority may request an extension but this must be in writing. Witness confirmed that in this case there were no extraordinary circumstances and no indication was given of such and therefore the Authority could not extend. In PCRB Case 1434 it was held that the principle of exceptional circumstances cannot be self-inflicted whilst in Case 1821 it was held that there was no request for extension, which was also recognised in Case 1895. In this present case there were no exceptional circumstances and no request for extension.

The rectification request, continued Dr Paris, was on the 1<sup>st</sup> September and the argument has been put forward that the tender expired on 28<sup>th</sup> August. If one referred to Clause 32.1 of the tender it is clear that the TEC is constrained by the validity period of 90 days and then only exceptional circumstances allow it to be extended. Any award after the validity date is null and self-limitation binds the Authority to follow the Regulations. This has been confirmed in several past cases. If the Authority failed in its obligation the award must be cancelled.

Dr Mizzi stated that as regards the permits three scenarios were available and the TEC could not move away from the tender. The call was for a screening letter but in this instance the letter was tabled after the award and that was sufficient to disqualify the bid. The process of obtaining a screening letter is not the same as actually having the letter and there is no substance in this claim and thus the decision of the TEC was justified. The 90 days validity is there to ensure that the bid is not bound over 90 days and safeguards the bidder from being bound beyond the 90 days. The bid bond is also for 90 days. The request for an extension is not mandatory and neither is the claim that the tender 'dies'.

The Chairman thanked the parties for their submissions 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 Luxury Living Technologies Limited (hereinafter referred to as the Appellant) on 9<sup>th</sup> October 2023, refers to the claims made by the same Appellant with regard to the tender of reference MEEE/ITB/03/2023 listed as case No. 1937 in the records of the Public Contracts Review Board.

Appearing for the Appellant:

Dr Matthew Paris, Dr Clarence Busuttil, Dr Naomi

Genovese & Dr Zack Esmail

Appearing for the Contracting Authority:

Dr Frank Luke Attard Camilleri &

Dr Christopher Mizzi

Whereby, the Appellant contends that:

- a) ***1<sup>st</sup> grievance - The Appellant has complied with the Requirements under Clause 15.1.4.1 -***  
The ITB expressly stated under Clause 15.1.4.1. - Permit-Relation Documents that a Screening Letter issued by the Planning Authority has to be submitted. From months before, the Appellant had already been in the process of obtaining such Screening Letter from the Planning Authority and this purports the fact that the Appellant's intentions were always in good faith to satisfy all the requirements of the ITB. The site in Mqabba where the Screening Letter by the Planning Authority was pending is of a sizeable portion, to be specific 26,000 sqm, and as one may understand such process by the Planning Authority as well as the architects involved can take time. The application process with the Planning Authority for the Screening Letter has been completed by the Appellant on the 14 August 2023 by paying the requested application fee. This means that it has been completed, approved, and that no further recommendations, submissions, requests, and/or consultations were necessary for this application. From thereon, it meant that it was merely a matter of time until such Screening Letter is issued by the Planning Authority, something which the Appellant had no control on. The delay in issuing a Screening Letter was solely attributed to the fault of another Government authority and it shall not punish the Appellant for the shortcomings of a third-party by completely disqualifying it from the ITB. The MEEE should have accepted the Acknowledgement of a Complete Screening Request as it knows that the issuance thereof of the letter is merely a certain eventuality, as in fact happened on the 3rd October 2023.
- b) ***2<sup>nd</sup> grievance - MEEE failed to honour the period of validity of Bids -***  
The MEEE had failed to honour the period of validity of Bids which must remain valid for a period of ninety (90) days after the deadline for the submission of bids. The period of days being referred to above is that calculated in calendar days, and by the day of the deadline for the submission of bids, that is 30th May 2023, to the actual email sent by the MEEE to the Appellant requesting clarifications and/or rectifications, that is 26<sup>th</sup> September 2023, the period of days is actually that of one-hundred and nineteen (119) days. By acting outside the period of validity of Bids, the MEEE has acted ultra vires and beyond its allowable granted period of time in order to assess the compliance of a bid or otherwise. The MEEE has applied two weights two measures and is literally applying double standards when not accepting the Acknowledgement of a Complete

Screening Request and not recognizing that it was merely a matter of time for the other government authority to issue the Screening Letter following its completion on 14th August 2023.

- c) ***3<sup>rd</sup> grievance – the disqualification of MEEE is still not final since an appeal is permitted to be lodged before this Honourable Board.***

The MEEE has on the 29th September 2023 published and announced the final and approved list of Bidders of the above-mentioned ITB and replaced the Appellant's bid and allocated it to 4 bidders. This has been executed when the MEEE is well cognizant that the period of appeal is still valid till the 9th October 2023. By replacing the Appellant's bid and allocating it to 4 different bidders, the MEEE has denied itself (and the general public who will benefit from such), the benefit of the cheapest offer by rejecting the Appellant's bid on this basis in terms of Bid Price per kWh in Euro and allocating it to a higher and more expensive bidder. This discrepancy would reflect an overpayment of circa €1,000,000 should the Appellant's bid be rejected. Since the disqualification of the Appellant is still not in force pending the final decision by this Honourable Board, by publishing the final and approved list of bidders, the MEEE has once again acted abusively and contrary to the ITB requirements. During appeal stage it shall be permitted to an appellant to present new evidence, whether orally or documentary. This legal remedy is well enshrined in local legislation regulating procedural matters. In this case, the reason is that should the Acknowledgement of a Complete Screening Request is not accepted as the required document as per Clause 15.1.4.1. - Permit-Relation Documents, as perhaps the required final document could not be obtained during the evaluation of the ITB, the Appellant shall be permitted to present the Screening Letter issued by the Planning Authority on 3rd October 2023.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 17<sup>th</sup> October 2023 and its verbal submission during the hearing held on 7<sup>th</sup> November 2023, in that:

- a) ***1<sup>st</sup> grievance – Compliance of the Appellant's Bid***

As clearly stated in the Invitation to Bid (ITB) document's Volume 1, Section 1, Clause 15.1.4.1(a)(i), bidders for solar photovoltaic installations, who are not yet in possession of an appropriate development permission, shall submit a screening letter issued by the Planning Authority. The Appellant failed to submit the aforementioned mandatory screening letter with its initial offer to the Contracting Authority and submitted instead a 'Screening Initial Submission Requirements' document outlining the requirements which the Appellant had to satisfy for the Planning Authority to consider its application for a screening letter complete, which document is clearly not the screening letter required by the aforementioned Clause 15. 1.4. 1(a)(i). 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 Clarification/Rectification to the Appellant clearly requesting it to *inter alia* submit the screening letter required by the above-mentioned Clause 15. 1.4. 1(a)(i). The Appellant failed to submit the screening letter required by the above-mentioned Clause 15.1.4.1(a)(i) in its

reply to the above-mentioned Request for Clarification/Rectification and submitted instead an 'Acknowledgement of Complete Screening Request' which again is clearly not the screening letter required by the aforementioned Clause 15. 1.4.1(a)(i). The Appellant's offer was subsequently rejected on this basis. Furthermore, in its objection the Appellant confirmed that it completed the Planning Authority's process for the screening letter on the 14th day of August, 2023 and this when it could have easily done so immediately on and/or after the 17th day of February 2023 given that the Invitation to Bid (ITB) document was published on the latter date. As such, the Appellant had ample time to obtain the required screening letter and its failure to submit the said screening letter is only attributable to its carelessness. Moreover, 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. Having already given the Appellant the opportunity to submit the required screening letter, the Tender Evaluation Committee could not simply ignore the fact that the Appellant failed to submit the required screening letter or request a fresh rectification/clarification without infringing the tender terms in breach of the principle of self-limitation.

b) ***2<sup>nd</sup> Grievance: Period of Validity of Bids -***

In its second grievance, the Appellant is arguing that the Evaluation Committee failed to honour the period of validity of bids, and thus breached the doctrine of self-limitation. The principle of self-limitation is seen as a corollary to the principles of equal treatment and transparency and was given its due importance during the evaluation, such that the Evaluation Committee adhered to the terms of the Invitation to Bid (ITB) document. The case law of the General Court of the Court of Justice of the European Union (CJEU) defines clearly that the doctrine of self-limitation cannot be read without reference to the principle of equal treatment of economic operators: *"It must be borne in mind at the outset that where, in the context of a call for tenders, the contracting authority defines the conditions which it intends to impose on tenderers, it places a limit on the exercise of its discretion and, moreover, cannot depart from the conditions which it has thus defined in regard to any of the tenderers without being in breach of the principle of equal treatment of candidates. It is therefore by reference to the principles of self-limitation and respect for equal treatment of candidates that the Court must interpret the tender specifications, for the purpose of establishing whether, as the applicant maintains, those specifications could permit the Joint Undertaking to accept the deviations."* Therefore, the objective of the doctrine of self-limitation is to enforce the principle of equal treatment, inter alia, in accordance with Regulation 39(1) of the Public Procurement Regulations (S.L. 601.03) so that all tender conditions apply to all bidders equally. It is clear according to the above-cited case law that, even if for the sake of the argument it is to be accepted that the Contracting Authority has not honoured the period of validity of bids, this omission does not alter the tender requirements. The bidders were still bound by the same tender requirements, and therefore, no bidder was disadvantaged and a level playing field was maintained. Therefore,

given that there is no doubt that all bidders had been treated equally there could have been no breach of the principle of self-limitation.

c) **3<sup>rd</sup> Grievance: Appeal before the PCRB -**

Contrary to what the Appellant is alleging in its objection, on the 29th day of September, 2023 the Contracting Authority published the recommendations for award in line with the Invitation to Bid (ITB) document's Volume 1, Section 1, Clause 32.4. The Contracting Authority reminds the Appellant that once an appeal has been lodged in terms of Regulation 270 of the Public Procurement Regulations (S.L. 601.03) the award process is suspended *ipso jure* by operation of Regulation 275 of the same Regulations, and pursuant to the Invitation to Bid (ITB) document's Volume 1, Section 1, Clause 32.3 the list of bidders recommended for award will only be formally finalised following the outcome of this appeals process. Moreover, the Contracting Authority submits with respect, that it is a basic principle of administrative law that the Board cannot substitute its discretion for that of the administrative authorities. Contrary to the Appellant's expectations, the Board cannot, therefore, issue an award decision itself or otherwise declare that a bidder is compliant or not or accept the Appellant's tardy screening letter as if it were the Tender Evaluation Committee.

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) **1<sup>st</sup> grievance – Screening Letter –**

- i. Relevant to this grievance is section 15.1.4.1 Permit-related Documents of the ITB which states *“The bidder shall submit one of the following documents, as applicable: (a) For Solar Photovoltaic Installations: where the bidder is not yet in possession of an appropriate development permission, a **screening letter issued by the Planning Authority shall be submitted** (applicable for solar photovoltaic installations only); OR .....*” (bold emphasis added)
- ii. Also relevant is Mr Jonathan Orlando's testimony under oath when questioned on the various letters presented by the appellant during this appeal, in relation to section 15.1.4.1, that *“The actual screening letter is the document dated 3rd October 2023 **and no other previous documents issued were such.**”* (bold emphasis added)
- iii. This Board notes that what the ITB requested was clear and unambiguous. If the economic operator was opting for the first option provided by section 15.1.4.1 of the ITB, it had to mandatorily present a 'screening letter'. Reference is made to section 15.1.4.1(i) by the use of the word “shall”.



- iv. However, with its initial submission, the appellant submitted a 'Screening Initial Submission Requirements' which is certainly not what the ITB requested. This was also corroborated during the testimony of Mr Jonathan Orlando.
- v. This Board notes that the Contracting Authority duly issued a rectification request whereby again, the appellant did not regularise its position.
- vi. Arguments by appellant that the evaluation committee had to delve into and analyse S.L. 552/13 Article 3(5) are not entertained by this Board as it is the Planning Authority the only responsible Authority that is to issue this type of document (i.e. Screening Letter) after all the due processes are vetted and concluded. Any analysis into this matter by the evaluation committee, as is being requested by the appellant, and conclusion that documents submitted by appellant could somehow replace the actual document which was **clearly** requested by the ITB would without a shadow of a doubt constitute a breach in the principle of self-limitation which the evaluation committees are bound to observe. Therefore, this grievance of the appellant is strongly rejected.

b) **2<sup>nd</sup> grievance – Validity Period –**

- i. Relevant to this grievance is paragraph 17 of the ITB document and it is only with respect to what is listed therein that this grievance is to be decided upon.
- ii. Paragraph 17.1 mainly states that the bids are to remain valid for a period of ninety (90) days. This was not breached by either party.
- iii. Paragraph 17.2 states that *“The Contracting Authority **may** consider cancelling the ITB in the event that the evaluation process has not been concluded by the end of the validity period of the submitted bids.”* (bold emphasis added). It was duly ascertained through the testimony of the Chairperson of the Evaluation Committee that no such consideration was discussed and / or considered. Therefore, in the eyes of the Evaluation Committee the evaluation process was to proceed ahead.
- iv. Paragraph 17.3 states that *“In **exceptional circumstances** the Contracting Authority **may request that bidders extend the validity of bid.** Such requests and the responses to them must be made in writing. A bidder may refuse to comply with such a request, in which case the bid will no longer be considered for award.”* (bold emphasis added)
- v. From all of the above, this Board concluded that A) the contracting authority ‘may’ consider cancelling the ITB. i.e. it is not mandatorily obliged to. Such a decision (to cancel) was not taken by the Evaluation Committee; B) the exceptional circumstances debate comes ONLY into force if and when the bidders are requested to extend the validity of their bids. This request was also never issued by the Evaluation Committee and hence is deemed irrelevant to proceedings.
- vi. Once that the bidders were not requested to extend the validity of their bids (vide paragraph 17.3) and the evaluation committee did not decide on the cancellation of the

process (vide paragraph 17.2), this Board concludes that on the expiration of the 90 days period, the bidders were no longer liable for damages should they not accept to proceed to the signing of the contract should they be recommended for award.

- vii. On the other hand, paragraph 17.2 leaves it in the hands of the Evaluation Committee / Contracting Authority to decide on whether to cancel the process or otherwise.
- viii. Once a decision to cancel has not been made and a request to extend the validity of bids was also not made, this Board opines that the evaluation process could continue but the bidders would no longer be liable for damages should they not accept to proceed to the signing of the contract should they be recommended for award.

Therefore, this grievance of the appellant is not being upheld.

c) **3<sup>rd</sup> grievance – Disqualification –**

On the 29<sup>th</sup> September 2023, the Contracting Authority published the **recommendation** for award in line with established protocol. Within such letter it is duly stated that “***Right of Recourse: Bidders are informed that any objection to the decisions listed above must reach the office of the Public Contracts Review Board at Notre Dame Ditch, Floriana, by not later than 9<sup>th</sup> October 2023, 12:00pm (noon), against a deposit of €20,000 (twenty thousand euros).***” (bold emphasis added). Once the Contracting Authority has only issued a recommendation for award, provided a right of recourse and not proceeded to sign any contracts with recommended bidders, it is this Board’s opinion that Regulation 275 of the Public Procurement Regulations which states “*The Department of Contracts, the Sectoral Procurement Directorate or the contracting authority involved, as the case may be, shall be precluded from concluding the contract during the period of ten calendar days allowed for the submission of appeals. The award process shall be completely suspended if an appeal is eventually submitted.*” has been fully adhered to.

Therefore, this grievance, even by the Appellant’s own initial submissions during the hearing is thereby exhausted and does not merit any further comments.

**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