



The Secretary,
The Public Contracts Review Board
Notre Dame Ravelin Floriana FRN 1600 Malta

16th December 2023

Dear Sir,

Reasoned Letter of Reply of the Malta Council for Science and Technology to:

Letter of objection by Irreco Ltd (offer ID: 000200397) of 25, Dun Karm Street, Naxxar in relation to:

"TIMBER BEAMS RESTORATION WORKS AT ESPLORA MAIN BUILDING – OPTICS AREA USING ENVIRONMENTALLY FRIENDLY MATERIALS"

Tender Reference: SPD1/2023/097

Reference is hereby made to the official objection filed on the 7th December 2023 by Irreco Ltd (hereinafter referred to as the 'Appellant' or 'Bidder') in respect of the Tender in caption and Malta Council for Science and Technology (MCST) (hereinafter referred to as the 'Contracting Authority') respectfully submits the following reply:

At the outset, the Contracting Authority asserts that, in accordance with Section 1, Article 6 of the Tender Document, the primary criterion for the current call for tenders is the price meaning that the contract is to be awarded to the tenderer submitting the cheapest priced offer satisfying the administrative and technical criteria. Therefore, the award is also contingent upon the tenderer also meeting the specified administrative and technical criteria and not simply providing the cheapest price.

1. With reference to the Appellant's objections as listed in its objection letter, the Contracting Authority contends that the Appellant's bid was technically non-compliant and could therefore not be evaluated further due to the following reasons as provided in the regret letter dated 1st December 2023 (Annex A):

"through a rectification the bidder was request to submit evidence for two GPP criteria (spreading rate and weather resistance) and to clarify on one key expert. The bidder answered with the stipulated timeframe, however the offer is deemed technically non[1]complaint since for the two GPP Criteria, the bidder submitted a self-declaration claiming that the products offered have the EU eco[1]label, however no actual attestation of this was provided."

2. At the outset, it is to be noted that in relation to the Literature to be submitted as part of the Tenderer's Technical Offer, this section fell under note 2 as clearly indicated in the Tender Document, thus allowing the Contracting Authority to request Tenderer to 'either clarify/rectify any incorrect and/or incomplete documentation, and/or submit any missing documents within five (5) working days from notification.'

Notes to clause 5 as included in the Tender document state that:

Notes to Clause 5:

1. Not applicable for departmental tenders.

2. Tenderers will be requested to either clarify/rectify any incorrect and/or incomplete documentation, and/or submit any missing documents within five (5) working days from notification.

All Rectifications are free of charge.

3. No rectification shall be allowed. Only clarifications on the submitted information may be requested.

Requests for Clarifications and/or Rectifications concerning a previous request dealing with the same shortcoming shall not be entertained.

In view of the fact that the verifications required in relation to “Spreading rate” (item 3.1.5 of the Literature lists) and in relation to “Weather resistance” (item 3.1.6 of the literature list) could not be identified by the Tender Evaluation provided by the Appellant in its tender submission, the Tender Evaluation Committee, they were required to request a rectification in terms of Notes to clause 5 of the Tender document. This clearly establishes that the Tender Evaluation Committee has every legal right to request further clarification or rectifications in relation to the Literature provided by Appellant at evaluation stage and unless such clarification/rectification is provided by the Tenderer to the satisfaction of the evaluation committee within the stipulated period of five (5) working days from notification, then the evaluation committee is bound not to consider further the offer.

Furthermore, ‘Requests for Clarifications and/or Rectifications concerning a previous request dealing with the same shortcoming shall not be entertained.’ and therefore the evaluation committee was not in a position to request further clarifications or rectifications concerning the same request, following the submission made by tenderer wherein he failed to address the shortcomings highlighted by the evaluation committee.

3. Section 3 (pg 38 onwards) of the tender document specifically relates to the technical requirements concerning the paint formulation to be used by the contractor to whom the tender is awarded where it is clearly stated what the tenderer is to provide and thus the Appellants objection on the basis that since the call was ‘price based’ technical specifications and requirements are to be limited to what is requested in the Tender document, in actual fact continues to assert the evaluation committee’s decision since the Tender document in fact required that the Appellant provide literature, including supporting documentation relating to the verification required, as well as the provision of documentation supporting Tenderer’s submission and declarations.

3.1. The following claim by Appellant that the tender document did not require the submission of document in relation to this technical requirement is therefore factually incorrect and finds no basis at law:

La darba d-Dokument tas-Sejha ma kienx jitlob is-sottomissjoni ta’ xi dokument ghal dan l-iskop, fil-qafas tal-principju ta’ *self-limitation* tal-Awtorita’ Kontraenti, self-declaration kellha tibbasta biex wiehed jitqies technically compliant.

3.2. Contrary to what was requested in the tender document and the eventual clarification/rectification request made by the evaluation committee, the Appellant, in fact, failed to provide the attestation of

the Spreading rate and weathering resistance as specified in the GPP Document and, as a result, did not fulfil the GPP Criteria outlined in the attached tender document:

<p>Spreading rate</p> <p>The paint shall achieve an efficient spreading rate according to the applicable performance requirement in Table 7.</p> <p>Table 7 Spreading rates for specific paint products</p> <table border="1"> <thead> <tr> <th>Type of paint</th> <th>Spreading rate¹ (m² /l)</th> </tr> </thead> <tbody> <tr> <td>White paints and light-coloured paints (including finishes and intermediates)</td> <td>- indoor: 8 - outdoor: 6 - indoor & outdoor: 8</td> </tr> <tr> <td>Tinting systems²</td> <td>8</td> </tr> <tr> <td>Primers and undercoats</td> <td></td> </tr> <tr> <td> a. opaque</td> <td>8</td> </tr> <tr> <td> b. with specific blocking/sealing, penetrating/binding properties</td> <td>6</td> </tr> <tr> <td> c. with special adhesion properties</td> <td>6</td> </tr> <tr> <td>Thick decorative coatings</td> <td>1m² per kg of product</td> </tr> <tr> <td>Elastomeric outdoor paints</td> <td>4</td> </tr> </tbody> </table> <p><i>Notes:</i></p> <p>¹The spreading rates apply at a hiding power of 98%</p> <p>²Only base should be tested</p>		Type of paint	Spreading rate ¹ (m ² /l)	White paints and light-coloured paints (including finishes and intermediates)	- indoor: 8 - outdoor: 6 - indoor & outdoor: 8	Tinting systems ²	8	Primers and undercoats		a. opaque	8	b. with specific blocking/sealing, penetrating/binding properties	6	c. with special adhesion properties	6	Thick decorative coatings	1m ² per kg of product	Elastomeric outdoor paints	4
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<p>Verification:</p>	<p>The tender shall provide a test report using the following methods, or their equivalent:</p> <ul style="list-style-type: none"> • ISO 6504/1 (Paints and varnishes – determination of hiding power – Part - 1: Kubelka-Munk method for white and light-coloured paints); • ISO 6504/3 (Part 3: determination of contrast ratio (opacity) of light-coloured paints at a fixed spreading rate); • NF T 30 073 for paints specially designed to give a three-dimensional decorative effect or which are characterised by a very thick coat. <p>Products which have been awarded the EU Ecolabel for paints and varnishes, as established in Commission Decision (EU) 2014/312/EU are deemed to comply.</p>																		
<p>Weathering resistance (only outdoor paints)</p> <p>Masonry, wood and metal paints shall demonstrate resistance to the possible forms of weathering-induced deterioration in Table 8.</p> <p>Masonry paints shall be exposed to artificial test conditions for 1000 hours, wood and metal paints for 500 hours.</p>																			

<p>This shall be demonstrated according to the recommended test methods, or their equivalent, under artificial weathering conditions. Corrosion resistance for metal paints shall also include blistering.</p> <p>Tests should be performed on the tinting base.</p> <p>Table 8 Weathering resistance tests</p> <table border="1"> <thead> <tr> <th>Weathering induced deterioration</th> <th>Performance requirement</th> <th>Recommended test</th> </tr> </thead> <tbody> <tr> <td>Decrease of gloss¹</td> <td>Less than or equal to 30% of its initial value</td> <td>ISO 2813</td> </tr> <tr> <td>Chalking</td> <td>1,5 or better (0,5 or 1,0)</td> <td>EN ISO 4628-6</td> </tr> <tr> <td>Flaking</td> <td>Flake density 2 or less, flake size 2 or less</td> <td>ISO 4628-5</td> </tr> <tr> <td>Cracking</td> <td>Crack quantity 2 or less, crack size 3 or less</td> <td>ISO 4628-4</td> </tr> <tr> <td>Blistering</td> <td>Blister density 3 or less, blister size 3 or less.</td> <td>ISO 4628-2</td> </tr> <tr> <td>Corrosion²</td> <td>Rusting equal to or better than Ri2</td> <td>ISO 4628-3</td> </tr> </tbody> </table> <p>¹Not applicable to mid-sheen and matt-finishes (refer to Annex 1 for details). ² For anti-rust paints</p>		Weathering induced deterioration	Performance requirement	Recommended test	Decrease of gloss ¹	Less than or equal to 30% of its initial value	ISO 2813	Chalking	1,5 or better (0,5 or 1,0)	EN ISO 4628-6	Flaking	Flake density 2 or less, flake size 2 or less	ISO 4628-5	Cracking	Crack quantity 2 or less, crack size 3 or less	ISO 4628-4	Blistering	Blister density 3 or less, blister size 3 or less.	ISO 4628-2	Corrosion ²	Rusting equal to or better than Ri2	ISO 4628-3
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Verification:	<p>The tenderer shall provide test results demonstrating performance of the paint according to the requirements listed in Table 8. With the exception of corrosion for metal paints the artificial weathering conditions shall reflect the conditions described in ISO 11507 or (for outdoor wood finishes) QUV accelerated weathering apparatus with cyclic exposure with UV(A) radiation and spraying according to EN 927-6 or their equivalent. For corrosion the relevant atmospheric corrosivity categories in EN ISO 12944-2 and the accompanying procedures specified in EN ISO 12944-6, or equivalent, shall be used. Anti-rust paints for steel substrates shall be tested after 240h salt spray following ISO 9227 or equivalent. Products which have been awarded the EU Ecolabel for paints and varnishes, as established in Commission Decision (EU) 2014/312/EU are deemed to comply with the above criteria.</p>																					

4. Failure to fulfil attestation criterion

- 4.1. With reference to Appellant's objection, relating to Appellant's failure to adhere to the requisites of providing attestation of GPP Criteria, the Contracting Authority contends that the tender document required that the bidder submits test results of the above two criterion.
- 4.2. Contrary to the Appellant's assertion in its objection, the Tender Document explicitly mandated that the bidder submits essential documentation attesting to the GPP Criteria. While the Appellant did provide actual brochures and literature for the remaining GPP Criteria, they omitted to submit any documentation for the criteria in question. Consequently, the Contracting Authority sought rectification. In response, the Appellant submitted a self-declaration form, which, regrettably, fails to meet the verification standards outlined above.
- 4.3. As stated by the Courts of Justice of the European Union in **Cartiera dell'Adda SpA v CEM Ambiente SpA** "the contracting authority must comply strictly with the criteria which it has itself established, so that it is required to exclude from the contract an economic operator who has failed to provide a document or information which he was required to produce under the terms laid down in the contract documentation, on pain of exclusion (see, to that effect, judgment in Manova, C-336/12, EU:C:2013:647, paragraph 40). That strict requirement on the part of contracting authorities has its origins in the principle of equal treatment and the obligation of transparency deriving from that principle, to which those authorities are subject in accordance with Article 2 of Directive 2004/ 18."
- 4.4. The Appellant was given the opportunity to clarify/rectify its submission by highlighting/indicating the requisite information in the GPP criteria or alternatively to submit new literature, however it failed to furnish the requisite evidence and documentation and, instead, submitted a self-declaration form for spreading rate and weathering resistance. These self-declarations, however, are evidently insufficient and do not meet the necessary standards as outlined in the GPP Criteria. The submitted self-declaration form, on its own, raises concerns about the Appellant's comprehension of the tender's objectives and the services specified therein. It suggests a lack of understanding regarding their ability to fulfil the required services.
- 4.5. It is on the basis of these factual considerations that the Contracting Authority came to the conclusion that the Appellant is non-compliant as no actual evidence or attestation relating to the established technical criteria was provided.
- 4.6. The request for technical rectifications in fact included 4 rectification requests. Where these requests were addressed adequately and sufficiently by the Appellant (rectification requests Nos 2 to 4) the evaluation committee accepted the rectification provided. This confirms, that while the rectification requests that were adequately addressed by Appellant were to the satisfaction of the Evaluation Committee and

were accepted accordingly, Rectification no. 1 was not addressed by the appellant since it simply provided a declaration as opposed to what was requested in the request for Rectification no 1 were the rectification request stated that:

“The bidder is requested to highlight/ indicate from the original submitted Technical Literature or else submit new literature for the GPP criteria (...omissis) (emphasis added)

- 4.7. By not providing what was requested, in the technical component, the Tender Evaluation Committee was precluded from evaluating further Appellants tender offer and this led to the offer’s disqualification on the basis of it not being technically compliant. The Evaluation Committee, in terms of the Criteria of Award (section 6, pgs 8-9 of the Tender Document’), was legally correct in refraining from evaluating the offer further since, contrary to what is being alleged by Appellant, the Criteria for Award was not solely based on the cheapest priced offer but also on such offer *‘satisfying the administrative and technical criteria’*.
- 4.8. It was in fact the obligation of the Appellant to provide the required documentation to satisfy the requirement of the tender and eventually of the rectification request. It is clear that by providing a declaration without providing any documentary evidence to support such a declaration, the Appellant fell short of its obligations and the Evaluation committee cannot be expected to go out of its own way to adapt the information provided, or the lack of it, to what was in fact technically required.

In NQUAYMT konsorzju kompost minn (i) Bonnici Bros. Services Limited (C57464) u (ii) Korfezdeniz ins Taah. San. Ve Tic. Ltd. Sti, soċjeta` estera v. (i) Aġenzija għal Infrastruttura Malta (ii) EXCEL SIS ENERJĠ ÜRETİM CONSTRUCTION konsorzju kompost minn (i) Excel Investments Limited (C81721) u (ii) Sis Enerji Uretim Anonim Sirketi (Reg. No 642964), decided on the 20th of June 2022, the Court of Appeal stated:

“L-eċċess fil-manjamina` u fit tfittix sabiex jiġu salvati offerti akkost ta` kollox mhux espressjoni ta` proporzjonalita` imma huwa sproporzjon kontra min kien “compliant” mill-bidu nett. Din il-Qorti mhux l-ewwel darba li tirribadixxi li kull oblatur irid, sa mill-bidu nett mal-offerta tiegħu, isegwi rigorozimament dak li trid is-sejha għall-offerti u m’għandux jippretendi li jiġi mitlub “jirranġa” l-offerta biex ikun kompatibbli ma’ dak mitlub.”¹

Conclusion

It is worth noting that should Appellant’s offer have been evaluated further, and the fact that certain mandatory evidence in the form of documentation or information was not provided by Appellant in terms of the requisites established in the Tender document ignored by the evaluation committee, this would have resulted in a disproportionate and excessive attempt

¹ App. Ċiv. 35/22/1 MC/JRM/TM dec. 22/06/2022

to save Appellant's offer which would have caused a grave injustice to the bidders who were in fact technically compliant from the start, without the need of any rectification to their offer.

In view of the above, whilst reserving the right to make further written and oral submissions and further representations, the Contracting Authority respectfully submits that the Evaluation Committee carried out the Evaluation process in a just, fair and transparent manner and in this respect, humbly requests the Public Contracts Review Board to uphold the Contracting Authority's decision in the award of the tender in question to AXD Co Ltd.

Yours Sincerely,



Dr. Joseph Gerada

List of Witnesses

1. All witnesses indicated by Appellant to Testify on the Tender and other facts relevant to the case.
2. Any other witnesses permissible at law.

List of Documents:

1. Annex A – Regret Letter Dated 1st December 2023