

PUBLIC CONTRACTS REVIEW BOARD

Case 1954 – SPD1/2023/111 – Works Tender for Waterproofing Works Over the Cafeteria at Esplora Interactive Centre, Kalkara

29th January 2024

The Board,

Having noted the letter of objection filed by Dr Joseph Camilleri on behalf of Mamo TCV Advocates acting for and on behalf of Derek Garden Centre Co Ltd, (hereinafter referred to as the appellant) filed on the 4th December 2023;

Having also noted the letter of reply filed by Dr Joseph Gerada on behalf of Legis Services Malta Consortium acting for and on behalf of Malta Council for Science and Technology (hereinafter referred to as the Contracting Authority) filed on the 14th December 2023;

Having heard and evaluated the testimony of the witness Perit Sergio Degabriele (Architect – Proposed Key Expert for Derek Garden Centre Co Ltd) as summoned by Dr Joseph Camilleri acting for Derek Garden Centre Co Ltd;

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 23rd January 2024 hereunder-reproduced.

Minutes

Case 1954 – SPD1/2023/111 – Works Tender for Waterproofing Works over the Cafeteria at Esplora Interactive Science Centre, Kalkara

The tender was issued on the 5th October 2023 and the closing date was the 26th October 2023.

The estimated value of this tender, excluding VAT, was € 108,363.

On the 4th December 2023 Derek garden Centre Co Ltd filed an appeal against the Malta Council for Science and Technology objecting to their disqualification on the grounds that their bid was not technically compliant.

A deposit of € 542 was paid.

There were two bids.

On the 23rd January 2024 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Ms Stephanie Scicluna Laiviera as members convened a virtual public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Derek Garden Centre Co Ltd

Dr Joseph Camilleri	Legal Representative
Mr Nick Balzan	Representative
Perit Sergio De Gabriele	Representative

Contracting Authority – Malta Council for Science and Technology

Dr Joseph Gerada	Legal Representative
Mr Wayne Caruana	Representative
Mr Louis Cordina	Representative

Recommended Bidder – LBA Ltd

Mr Daniel Abela	Representative
-----------------	----------------

Department of Contracts

Dr Mark Anthony Debono	Representative
------------------------	----------------

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

Dr Joseph Camilleri Legal Representative for Derek Garden Centre Co Ltd gave a broad outline of the contract details on which two offers were received with the award given to the cheaper price. The Appellant's bid was in fact the cheaper one but it was informed that due to the lack of a copy of the qualification at MQF Level 7 for key expert number 2 it had been disqualified. In the case of the mentioned key expert, Perit De Gabriele, several documents were submitted including Master of Architecture, which is equivalent to MQF Level 7. The main area of studies is stated as Architecture and Conservation Studies. The query arose once the qualification had already been forwarded to the Contracting Authority since Perit De Gabriele forwarded a copy of his Perit warrant but the Authority requested a certificate on the Architecture and Conservation studies. This request did not make sense as the Europass Diploma Supplement indicates clearly that this was the main area of studies and it begs the question why the Europass was not considered sufficient. The Authority's claim that the submission was incomplete is a change of goalposts as it is clearly mentioned that Perit De Gabriele has the qualification required further substantiated by an indication of the credits obtained to acquire the right qualification. The Appellant should not suffer for the shortcomings of the Authority which now claims that there are pages or credits missing and one gets the suspicion that the certificate was overlooked at evaluation stage and this is being justified by claiming that pages are missing – pages which are not relevant to the case anyway.

Dr Joseph Gerada Legal Representative for the Contracting Authority said that prices had to be matched by technical compliance and in this regard the Authority is clear that the certificate is missing. [The Europass document was shown on a share screen]. Paragraph 1 states that the purpose of the Pass is to provide support data on the qualification, specifically to supplement the original qualification. The tender asked for the qualification which was not submitted. Rectification followed but still the qualification was not submitted. The crucial point here, said Dr Gerada, is that the qualification of the other key witness was submitted, so it was known what was required. There was no option except to exclude the offer.

Perit Sergio De Gabriele (436592M) called to testify by the Appellant stated on oath that the role requested in the tender was for an Architect in Conservation. The Europass Diploma Supplement refers to himself who undertook the course in 2016.

In reply to questions from Dr Gerada, witness stated that he was aware that the tender requested proof of qualification and confirmed that he was requested to provide this. He submitted both the Europass Diploma and a copy of his warrant with the former document referring to a qualification obtained from the University of Malta and which could not have been issued without a degree.

This concluded the testimony.

Dr Camilleri said that the argument has already been made. What the Authority wanted was a copy of the qualification – one is not issued without the other as the Diploma Supplement is proof that the degree already exists and the Supplement provides additional data to an already existing qualification. This is important because the call asked for demonstration of an MQF Level 7 in Architecture and Restoration. Now the goalpost have been changed again and one cannot ignore the reasoned reply, when in paragraph 3.3 it states that its pages that are missing not the qualification. What else does the Authority expect?

Dr Gerada referred to paragraph 3.3 which in the last sentence states that no certificates were provided – these facts have not changed – without the certificate the Supplement is just a Supplement. Reference was made to the *NQUAYMT* case citing the *dictum* about an offer being compliant from the beginning.

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

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 23rd January 2024.

Having noted the objection filed by Derek Garden Centre Co Ltd (hereinafter referred to as the Appellant) on 4th December 2023, refers to the claims made by the same Appellant with regard to the tender of reference SPD1/2023/111 listed as case No. 1954 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Joseph Camilleri

Appearing for the Contracting Authority: Dr Joseph Gerada

Appearing for the Preferred Bidder: Mr Daniel Abela

Whereby, the Appellant contends that:

- a) In terms of the tender dossier, "Key Expert 2" is meant to be a: *"Restoration Architect and Structural Engineer (Perit) as per Chapter 390 Periti Act, holding a valid warrant issued by the Periti Warrants Board enabling him/her to practice locally and in possession of a Qualification from an educational institution, at MQF Level 7 or equivalent, with specialisation in building conservation or equivalent. The chosen expert will be responsible for the restoration works on site."*
- b) For the purposes of its offer, Appellant proposed as its Key Expert 2 Perit Sergio Degabriele. In its bid, as originally submitted, Appellant presented a Key Expert Form providing information about its experts. Specifically in relation to Sergio Degabriele, Appellant submitted: • A detailed CV and • A Europass Diploma Supplement issued by the University of Malta, clearly indicating that Perit Sergio Degabriele obtained a Masters in Architecture, equivalent to MQF Level 7 - This is the information which, according to the regret letter, was deemed missing and led to the rejection of the offer.
- c) The rectification request issued by the Contracting Authority, included a request for "copies of qualifications of Key Expert 1 and 2". With specific reference to Key Expert 2, having already provided the above-mentioned Europass Diploma as part of its bid, Appellant provided, in addition, a copy of the Perit's warrant to practice.
- d) It is therefore submitted that the basis for the rejection of the Appellant's bid is clearly mistaken as a copy of the Key Expert's "qualification from an educational institution, at MQF Level 7 or equivalent" had been duly provided. The rejection is therefore without basis in fact or at law.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 14th December 2023 and its verbal submission during the hearing held on 23rd January 2024, in that:

- a) With reference to Appellant's objection, relating to Appellant's failure to supply a copy of the qualifications for Key Expert 2, the Contracting Authority contends that the tender document required that the bidder must engage a Restoration Architect and Structural Engineer holding a valid warrant in terms of Maltese law and is in possession of a Qualification from an educational institution, at MQF Level 7 or equivalent with specialisation in building conservation or equivalent.
- b) At the outset, it is crucial to note that Esplora is located within a Grade 1 Historical Building. Given this context, substantial importance is placed on the necessity of having a Key Expert serving as a Restoration Architect and Structural Engineer with specialisation in building conservation. Contrary to the Appellant's objection, the qualifications of this Key Expert were not provided, prompting the Contracting Authority to firstly request rectification. Regrettably, this deficiency remained unaddressed.
- c) Despite the Appellant's claim of submitting the Europass Diploma Supplement and additionally also the Perit Warrant to address this deficiency, the Supplement was found to be incomplete,

comprising only one page out of seven as clearly indicated in the page numbering of the document provided (far right bottom corner). Consequently, the Contracting Authority encountered challenges in verifying the completed units in the Masters Course and thus, could not confirm whether the Key Expert possessed qualifications with specialisation in building conservation or equivalent. Furthermore, no certifications were provided and the Perit's Warrant to practice is in no way a certification of specialisation in building conservation or equivalent.

- d) According to Notes to Clause 5, the Contracting Authority was then unable to seek further clarifications or rectifications on the same deficiency following a prior request. With the Appellant failing to provide the necessary information even after the Contracting Authority's request for additional details, the Appellant is deemed non-compliant.
- e) Further to the above, the Key Experts Form explicitly states that Key Experts whose qualifications do not meet the minimum requirements, in terms of equivalency or where the equivalency is uncertain or cannot be determined, will be rejected. Due to the Appellant's failure to provide a copy of the qualifications, the Contracting Authority was unable to verify whether equivalency has been adhered to. Consequently, the application of the Appellant was rejected.
- f) It is also clear that the Appellant was aware of the requirements requested in terms of qualifications since in the case of Key Expert Marco Putzulu Caruana, for example, Appellant in fact provided copies of the qualification certificates of the Key expert.

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 witness duly summoned, will now consider Appellant's grievances.

- a) Most relevant to this appeal is the following extract from the tender dossier. Reference is made to page 5 Section 1 – Instruction to Tenderers, paragraph 5 (C) (iii) whereby it was stated that:
“..... *For Key Experts, bidders must submit the following documents: V. Updated CVs and **Qualifications/ Warrant Certificates** (if applicable) for each key expert (Note 2)*” (bold emphasis added)
- b) The Board notes that, with reference to Key Expert 2, it is not being contested that the appellant filed a ‘Europass Diploma Supplement’ and a Warrant for Perit Sergio De Gabriele. However, whilst there is no doubt that Mr Sergio De Gabriele is a duly warranted Perit, were these documents enough to satisfy the tender requirements?
- c) The Evaluation Committee, in the Board's view, correctly interpreted that the Europass Diploma Supplement should not be considered as equivalent to the ‘Qualification Certificate’ requirement as stated above.
- d) The Board opines that whilst it agrees with Appellant's argumentation that “one is not issued without the other.....” and therefore there is an element of substance over form which could prevail, it is also important for Evaluation Committees to respect the principle of Self Limitation.

- e) In the Board’s view, the Evaluation Committee duly respected this and issued a call for rectification clearly outlining that they were after ‘copies of qualifications’. This also to adhere to the principle of achieving a same level playing field between all economic operators participating in the tender process. The appellant cannot argue that such a request was ambiguous since the same request was made for other Key Experts and it was duly complied with by the same appellant.
- f) Therefore, this is more a case of the appellant not acting as a *bonus pater familias* whereby it was provided with the opportunity to rectify its position but again failed to exercise due care in satisfying what were clear tender requirements.
- g) The Contracting Authority is therefore right when in its reasoned letter of reply it quoted the following extract from the NQUAYMT v Agenzija ghal Infrastruttura Malta, Excel Sis Enerji Uretim Construction decided on 20th June 2022
“L-eccess fil-manjamina u fit tfittix sabiex jigu salvati offerti akkost ta kollox mbux espressjoni ta’ proporzjonalita imma huwa sproportzjon kontra min kien “compliant” mill-bidu nett. Din il-Qorti mbux l-ewwel darba li tirribadixxi li kull oblatur irid, sa mill-bidu nett mal-offerta tiegħu, isegwi rigorozimament dak li trid is-sejba għall-offerti u m’ghandux jippretendi li jigi mitlub “jirrangà” l-offerta biex ikun kompatibbli ma dak mitlub.”

Hence, this Board does not uphold the Appellant’s grievances.

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 decision in the recommendation for the award of the tender,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Mr Lawrence Ancilleri
Member

Ms Stephanie Scicluna Laiviera
Member