

# **PUBLIC CONTRACTS REVIEW BOARD**

## **Case 1963 – SPD8/2023/117 – Works Tender for the Design, Manufacture and Commissioning of Pergolas at Gnien l-Indipendenza, in Birzebbugia – Project Green**

**14<sup>th</sup> February 2024**

The Board,

Having noted the letter of objection filed by Dr Stephen Thake on behalf of Thake Desira Advocates acting for and on behalf of Mr Charlo Vella, (hereinafter referred to as the appellant) filed on the 22<sup>nd</sup> January 2024;

Having also noted the letter of reply filed by Dr Jonathan Thompson and Dr Kristina Friggieri on behalf of DF Advocates acting for Project Green (hereinafter referred to as the Contracting Authority) filed on the 31<sup>st</sup> January 2024;

Having heard and evaluated the testimony of the witness Mr Luke Cassar (Chairperson of the Evaluation Committee) as summoned by Dr Jonathan Thompson acting for Project Green;

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 8<sup>th</sup> February 2024 hereunder-reproduced.

### **Minutes**

#### **Case 1963 – SPD8/2023/117– Works Tender for the Design, Manufacture and Commissioning of Pergolas at Gnien L-Indipendenza, in Birzebbuga – Project Green**

The tender was issued on the 25<sup>th</sup> October 2023 and the closing date was the 15<sup>th</sup> November 2023

The estimated value of this tender, excluding VAT, was € 48,500.

On the 22<sup>nd</sup> January 2024 Mr Charlo Vella filed an appeal against Project Green objecting to his disqualification on the grounds that his offer was not technically compliant.

A deposit of € 400 was paid.

There were three bids.

On the 8th February 2024 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Dr Vincent Micallef as members convened a virtual public hearing to consider the appeal.

The attendance for this public hearing was as follows:

**Appellant – Mr Charlo Vella**

Dr Stephen Thake Legal Representative  
Mr Charlo Vella Representative

**Contracting Authority – Project Green**

Dr Jonathan Thompson Legal Representative  
Dr Kristina Friggieri Legal Representative  
Mr Luke Cassar Chairperson Evaluation Committee  
Mr Silvano Cutajar Secretary Evaluation Committee  
Ms Marthese Saliba Evaluator  
Ms Jessica Galea Evaluator  
Ms Marisa Debono Evaluator

**Preferred Bidder – Hardware Merchants Ltd**

Mr John Spiteri Representative

**Department of Contracts**

Dr Mark Anthony Debono Legal Representative

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

Dr Stephen Thake Legal Representative for Mr Charlo Vella repeated verbatim the wording from the letter sent to Appellant as the reason for his exclusion and why it was stated that he did not conform. That is not correct. The grounds given are incorrect and invalid as the tender document did not specify material and colour. Bidder had specified that his offer complied with all requirements and conditions and was therefore compliant.

Dr Jonathan Thompson Legal Representative for Project Green said that the grounds for disqualification were that Appellant was technically non-compliant and this resulted from his failure to deal with the rectification sent to him. Appellant did not provide answers to his shortage in information and what was requested was not replied to. Ticking all the boxes did not justify or satisfy the requirements of the tender.

Dr Mark Anthony Debono Legal Representative for the Department of Contracts said that the Board should follow the reasons for the disqualification; the rejection letter was clear why the Appellant was not compliant.

Dr Thake objected to evidence being given to explain the reasons for the disqualification. This should have been explained from the start. The reason for the disqualification has already been given.

Dr Thompson said it was in order to provide proof and then object if necessary. It was up to the Board to decide.

Dr Debono said that once the Appellant is contesting the rejection letter it is only right that the preferred bidder should be allowed to put its case.

The Chairman directed that the Board will allow proof according to the powers given to it by Regulation 90(2) of the PPR. The Board will decide on any extraneous questions put.

Dr Thompson said that the evidence will merely clarify the reason for the rejection.

Dr Thake stated that the Authority was claiming one thing and trying to prove a different point.

Mr Luke Cassar (736390M) called to testify by the Contracting Authority stated on oath that he is an Assistant Director at Project Green and was the Chairperson of this evaluation committee. In dealing with the three stages of an evaluation, witness said that at technical stage the technical form is a questionnaire requiring the ticking of boxes with a further stage requesting a literature list. The tender required submissions on the material and colour of the pergolas. Appellant did not provide a literature list so a rectification was sent. In reply Appellant sent a brochure illustrating several types of pergolas without identifying which type and colour he was proposing to provide. This left the evaluators with no option but to disqualify.

Dr Thake reiterated that he was objecting to any evidence given by the witness and did not wish to make any final submissions.

Dr Thompson said that the Authority would rely on its written submissions.

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 8<sup>th</sup> February 2024.

Having noted the objection filed by Mr Charlo Vella (hereinafter referred to as the Appellant) on 22<sup>nd</sup> January 2024, refers to the claims made by the same Appellant with regard to the tender of reference SPD8/2023/117 listed as case No. 1963 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Stephen Thake

Appearing for the Contracting Authority: Dr Jonathan Thompson & Dr Kristina Friggieri

Whereby, the Appellant contends that:

- a) The offer made by the said Charlo Vella was clearly much cheaper than the offer made by Hardware Merchants Ltd, such that, in accordance with the announced criteria for award, the tender should have been awarded to the said Charlo Vella.
- b) The grounds given for the disqualification of the (sic) as being non-compliant are incorrect and invalid. Nowhere in the tender document is the tenderer caused to confirm that the material supplied is as per Section 3 of the Tender Dossier Technical Specifications. This is incorrect. The

said Charlo Vella had in the Tenderer's Technical Offer filed and transmitted through the EPPS Portal, stated as follows *"I declare that further to the above submitted technical specifications, I have read. and understood the requirements and specifications outlined in Section 2 - Special Conditions and in Section 3 - Terms of Reference of the Tender Document. I also hereby declare that further to the above submitted technical specifications, the supplies to be provided shall be in conformity and in full compliance with all requirements, specifications and conditions outlined in Section 2 - Special Conditions and in Section 3 - Terms of Reference of the Tender Document."*

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 31<sup>st</sup> January 2024 and its verbal submission during the hearing held on 8<sup>th</sup> February 2024, in that:

a) First Ground of Appeal –

The Complainant's first ground of appeal on the basis of which he objected to the Contracting Authority's decision is that since his offer was cheaper than that made by Hardware Merchants Ltd, the tender should have been awarded to the Complainant. Section 1, clause 6.1 of the Tender Dossier states the following: *"The sole award criterion will be the price. The contract will be awarded to the tenderer submitting the cheapest priced offer satisfying the administrative and technical criteria."* Additionally, the Rejection Letter clearly stipulated that the offer made by Hardware Merchants Ltd is the cheapest compliant offer. Therefore, the bidder will be awarded the tender if the offer is both the cheapest and complies with the administrative and technical criteria.

b) Second Ground of Appeal -

The Complainant's second ground of appeal on the basis of which he objected to the Contracting Authority's decision is that since he made the general declaration that the submitted technical specifications and the supplies to be provided are in conformity and in full compliance with the conditions stipulated in Section 3 and Section 3 of the Tender Document, his submission is fully compliant. This Board has consistently emphasised that a tender document constituted a contract between the contracting authority and any interested persons, and the resulting requirement that each of them abides by what is stated therein. The Complainant failed not once, but twice, to adhere to the Tender Dossier. The Complainant's Clarification Response did not comply with the instructions stipulated in the Tender Dossier or the Rectification Letter. No literature was submitted as per item 1.1 of the uploaded Literature List, and the statements in Clauses B.1.05 and B.1.12) of Part B of Section 3 of the Tender Dossier were neither confirmed. The Complainant simply submitted a 46-page brochure with different types of Pergolas without stating which Pergola is being offered and what type of material is being used. It is evident, from the above, that the Complainant failed to meet the requirements stipulated in the Tender Dossier given that the Complainant's Submission and his subsequent reply to the Rectification Letter are grossly vague and inadequate.

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) ***First ground of appeal -***

With regards to the first ground of appeal, i.e. cheaper offer, this Board has on numerous occasions stated that this line of argumentation would **only** become relevant if and when an offer is both administratively and technically compliant. Since the rejection letter sent to appellant raises a point on technical non-compliance and the 'Criteria for Award' is clearly stated as being "*The sole award criterion will be the price. The contract will be awarded to the tenderer submitting the cheapest priced offer **satisfying the administrative and technical criteria.***" (bold & underline emphases added), then the only bone of contention will need to revolve on the second ground of appeal which is contesting the technical compliance aspect.

b) ***Second ground of appeal -***

With regards to the second ground of appeal, reference is made to the rejection letter sent to Mr Charlo Vella on the 12<sup>th</sup> January 2024. Such letter makes ample reference to technical non-compliance whilst it also makes specific reference to the rectification letter sent to the economic operator (Mr Charlo Vella).

Therefore, reference needs now to be made to the rectification letter which was sent to Mr Vella duly stating that "*No literature was submitted from your end*" and that "*This falls under Note 2 which means that submissions are rectifiable.*" This, in the Board's opinion shows that the evaluation committee exercised due care and diligence when evaluating the offer as submitted by Mr Vella.

The rectification letter was also in line with the requirements of the Literature List which duly required economic operators to "*Kindly provide the following information i) technical literature including material of the pergolas; ii) catalogue/illustrations of the pergolas including colour.*" Moreover, the tender dossier in Section 1 paragraph 5 (C) (iii) duly states that "*Literature as per Form marked 'Literature List' to be submitted with the Technical offer at tendering stage. The **scope of the literature is to corroborate a fully compliant technical offer (Note 2).***" (bold & underline emphasis added).

It was also noted that the appellant's reply was very vague, whereby he only supplied a lengthy catalogue of pergolas without stating which pergola is being offered and what type of material is being used.

It is this Board's opinion that the Evaluation Committee duly afforded the right of rectification but it was same appellant who did not exercise due care and diligence when submitting his original offer and replying to the rectification request in a hasty manner. Originally no literature was submitted and then a general catalogue was submitted without specifying required details.

The rejection letter was also well drafted when it made reference to Section 3 of the tender dossier. Section 3 of the tender dossier, in paragraph B.1.11 duly makes reference to technical literature

when it states “*During tendering stage the bidder is requested to provide technical literature, catalogue/ illustrations.....*”, i.e. being all items subject matter to the rectification request.

This Board, hence, cannot but completely reject both grievances 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 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**

**Dr Vincent Micallef**  
**Member**