

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1952 – SPD1/2023/097 – Timber Beams Restoration Works at Esplora Main Building – Optics Area using Environmentally Friendly Materials**

**26<sup>th</sup> April 2024**

The tender was issued on the 18<sup>th</sup> September 2023 and the closing date was the 24<sup>th</sup> October 2023.

The estimated value of this tender, excluding VAT, was € 145,762.20.

On the 7<sup>th</sup> December 2023 Irrecs 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 € 729 was paid.

There were four 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 – Irrecs Ltd**

Dr Alessandro Lia	Legal Representative
Architect Paul Dalli	Representative

#### **Contracting Authority – Malta Council for Science and Technology**

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

#### **Recommended Bidder – AXD Co Ltd**

Mr Nyal Xuereb	Representative
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#### **Department of Contracts**

Dr Mark Anthony Debono	Representative
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Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Alessandro Lia Legal Representative for the Appellant requested that the evidence of the Evaluation Committee members be heard first.

Mr Wayne Caruana (16694M) called to testify by the Appellant stated on oath that he was the Procurement Director at the Contracting Authority and although he was not a member of the evaluation team he could reply to any questions posed as he was familiar with the evaluation.

Dr Lia said that the appeal was on the interpretation of a particular clause and he required the evidence of the person who carried out the adjudication and none other. It was normal practice that members of the evaluation team always attended appeal hearings and he was insisting on this.

The Board concurred that this was the normal practice.

In the absence of any evaluator the Chairman stated that he had no option except to defer the hearing to the 12<sup>th</sup> March 2024 at 10.00am and the Authority were directed to ensure that members of the Evaluation Committee be present.

End of Minutes

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## SECOND HEARING

On the 23<sup>rd</sup> April 2024 the Public Contracts Review Board composed of Dr Charles Cassar as Chairman, Ms Stephanie Scicluna Laiviera and Mr Lawrence Ancilleri as members convened a virtual public hearing to consider further this appeal.

The attendance for his public hearing was as follows:

### **Appellant – Irrecs Ltd**

Dr Alessandro Lia	Legal Representative
Architect Paul Dalli	Representative

### **Contracting Authority – Malta Council for Science and Technology**

Dr Joseph Gerada	Legal Representative
Ms Emily Agius	Evaluator
Mr Jonathan Micallef	Evaluator
Mr Wayne Caruana	Representative
Mr Louis Cordina	Representative
Mr Ezekiel Barbara	Representative

### **Recommended Bidder – AXD Co Ltd**

Mr Nyal Xuereb	Invited but did not attend
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### **Department of Contracts**

Dr Mark Anthony Debono	Representative
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Dr Charles Cassar Deputy Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Lia Legal Representative for Irrecs Ltd requested that witnesses be heard first.

Ms Emily Agius (271786M) called to testify by the Appellant stated on oath that she was one of the evaluators of the tender. She was referred to a phrase in the letter of disqualification “no actual attestation of this was provided” and asked to explain what the Evaluation Committee (EC) meant by it. Witness explained that a test for the spreading rate and weatherability of the product offered was requested but was not provided. Nor indeed was the alternative proof of an EU ECO label submitted. One of these documents was required as proof that the requirements of the tender were met. However, the appellant only provided a self-declaration which did not meet the required criteria.

[A screen shot of the rectifications sought was displayed].

These according to the witness gave the appellant the chance to submit either a test or to confirm that the product has the ECO label – this would have been sufficient to meet the tender requirements.

Questioned by Dr Gerada, witness stated that literature lists were required to be submitted which were provided except that which indicated that the test met the standards or had the ECO label; instead appellant provided a self-declaration with a document from the local supplier of the product but no proof of the ECO label or supporting information.

In reply to a question from Dr Debono witness said that the request for this information was in line with the Public Procurement Regulations (PPRs) requirements.

This concluded the testimony.

Dr Lia said that if a product is ECO labelled nothing else is required and products so labelled are deemed to comply. The rectification was not clear as it only requested an indication and therefore there was no need to submit any document. It is not fair that appellant was excluded for not providing something that was not asked for. The tender offered a choice and hence the request for the test result was not necessary as the ECO label was provided in lieu. This situation was similar to the *Executive Security Services vs LESA* Case (Court of Appeal 221/2022) where the Court did not accept the contracting authority’s decision that a self-declaration could not be accepted because it had to be signed. If something is not stated in the tender it cannot be requested. The product is compliant as a self-declaration has the same effect as any document.

Dr Joseph Gerada for the Authority stated that what the tender requested is what had to be provided. Appellant claims that there were no requests that had not been met but in fact the tender requested a literature list which clearly stated what was required to substantiate the offer with a declaration that all products meet that requirement. The literature list requests supporting documents and manufacturers’ confirmation that the product reaches a certain level or is ECO certified, therefore, proof was required that ECO standards were reached. The appellant provided a self-declaration so a rectification was sent to give it the chance to provide what was required. Bidder did not provide the ECO label or certificate but instead submitted a declaration from the local supplier with scant details. Although the tender was based on price the bid had still to be compliant. The Court case referred to is not appropriate to this case as a self-declaration was not required. The EC are bound by self-limitation provisions and in this case they had no alternative except to disqualify. The Board was referred to the cases referred to in the letter of reply and to the letter in general.

Dr Debono said that the Department of Contracts requires that the principles of the PPRs should be followed and that tenders should be saved wherever possible.

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

End of Minutes

## **Decision**

This Board noted the objection filed by Irrecs Ltd. (herein after referred to as the appellant).

The objection refers to the claims filed on the 7th December 2023 made by the same appellant against Malta Council for Science and Technology (herein after referred to as the Contracting Authority) regarding the tender SPD1/2023/097 listed as case No.1952 in the records of the Public Contracts Review Board, and its verbal submissions during the hearing held on 23rd April 2024.

The Board also noted the Contracting Authority's letter of reply filed on 18<sup>th</sup> December 2023 and its verbal submissions and those of the Department of Contracts during the hearing on 23rd April 2024, as well as the testimonies of:

Ms Emily Agius cited by the Appellant.

Main Grievance:

Appellant contended that;

When a product bears an ECO label, it is considered to meet all necessary criteria. The rectification was not clear as no additional documentation was requested for compliance verification. Therefore, in cases where only an indication of compliance is requested, without a specific requirement for supporting documents, it is not fair to penalise a bidder for not providing documentation that was not explicitly requested.

The above was counter argued by the Contracting Authority as follows:

The tender explicitly outlined its requirements by requesting a literature list that clearly specified the necessary documentation to substantiate the offer. . The literature list explicitly asked for supporting documents and manufacturers' confirmation regarding the product's compliance with a certain level or that the product had ECO certification. Hence, it was indeed necessary to provide evidence demonstrating adherence to ECO standards. Furthermore, a rectification was issued in this respect.

The Board opines that:

Given the focus of the arguments on whether a self-declaration stating that a product bearing an ECO label would suffice to meet the tender's requirements without further documentation,

the Board will consider this aspect. It should ascertain whether bidders were obliged to provide any literature or documentation to fulfil the tender's requirements.

Going through the tender specifications, the Board notices that,

A. Section 2, Article 5C (ii) Specifications, clearly states that 'literature list' to be submitted with the technical offer at tendering stage. The scope of the literature list is to collaborate a fully compliant technical offer. Page 8

B. Section 3. Green Public Procurement And Verifications pages 38 to 42, the Bidder was requested to verify the specifications requested and was sent a rectification to enable it to conform.

Verification; The Tenderer had to provide either:

A) A test report carried out according to ISO 11890-2

or

Confirmation that the product has been awarded the EU Ecolabel for paints and varnishes

The Appellant was provided with an opportunity to rectify its submission by either indicating the necessary information according to the GPP criteria or submitting new literature. Despite this, they failed to provide the required verification and documentation. Instead, they submitted a self-declaration form for the spreading rate and weatherability of the product from the local supplier.

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

- a) Does not uphold the Appellant's Letter of objection.
- b) Upholds the Contracting Authority's decision in the award of the tender.
- c) Directs that the deposit paid by the Appellant is not to be reimbursed

**Dr Charles Cassar**  
Chairman

**Mr Lawrence Ancilleri**  
Member

**Ms Stephanie Scicluna Laiviera**  
Member