

PUBLIC CONTRACTS REVIEW BOARD

Case 1271 – CT 2156/2017 – Tender for the Provision of Cleaning Services to Mater Dei Hospital and Sir Anthony Mamo Oncology Centre

The publication date of the call for tenders was the 26th April 2018 whilst the closing date of the call for tenders was 19th June 2018. The estimated value of the tender (exclusive of VAT) was € 41,590,323.

On the 21st January 2019 Servizi Malta Ltd filed an appeal against the Central Procurement and Supplies Unit (CPSU) as the Contracting Authority objecting that their bid was found to be not financially compliant. A deposit of € 50,000 was paid.

There were five (5) bidders.

On 27th February 2019 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – Servizi Malta Ltd

Dr Antoine Cremona	Legal Representative
Dr Clement Mifsud Bonnici	Legal Representative
Mr Jason Degiorgio	Representative
Ms Claudine Sullivan	Representative

Recommended Bidder – Mediclean JV

Dr Pawlu Lia	Legal Representative
Dr Lorna Mifsud Cachia	Legal Representative
Mr Fabio Muscat	Representative
Mr Wilson Mifsud	Representative

Contracting Authority – Central Procurement and Supplies Unit (CPSU)

Dr Stefan Zrinzo Azzopardi	Legal Representative
Ms Celia Falzon	Chairperson Evaluation Committee
Ms Rita Tirchett	Member Evaluation Committee
Ms Carmen D’Amato	Member Evaluation Committee
Mr Steve Ellul	Member Evaluation Committee
Mr Charlot Muscat	Member Evaluation Committee
Mr Karl Farrugia	Representative
Dr Alison Anastasi	Representative

Department of Contracts

Dr Franco Agius	Legal Representative
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Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties and invited them to make their submissions.

Dr Antoine Cremona Legal Representative of Servizi Malta Ltd stated that the rejection letter received from the Contracting Authority was very terse; however in their reply to the letter of objection the latter added reasons which were not in the original letter of rejection. This will obviously have a bearing on the allocation of costs of the appeal. Even the so called preliminary plea has a bearing on the case on which it may be unable to proceed. However the view is that this is just another objection – another attempt to have two bites at the cherry. There is no similarity in this case to a preliminary plea – it is just another attempt to reinforce the exclusion. On the main substantive reason of the Appellants’ appeal the Contracting Authority’s decision to exclude is totally out of proportion.

The Chairman asked if the Appellants were intending to deal with this preliminary plea and the substantive appeal at today’s hearing and, in that case if Appellants needed more time to consider their submissions.

Dr Clement Mifsud Bonnici Legal Advisor of Servizi Malta Ltd submitted that the Appellants accept that they would be dealing with the point raised as a preliminary plea at today’s hearing and that they were prepared to discuss today the points arising from the preliminary plea, but asked the Board to take cognisance of the additional allocation of the costs of the appeal.

The Chairman proposed a short recess to enable the Board to consider the above submission.

On resumption of the hearing the Chairman stated that the Board had discussed this point, and the submissions made, and decided that the additional objection raised was not a preliminary plea but is additional information which should have been included in the rejection letter. As a

Board they are asking Appellant if they wished to deal with this point not as a preliminary plea but as an additional reason for rejection.

Dr Cremona said that the process the Authority used to introduce this new factor did not merit to be considered as part of this appeal but would treat it as an additional reason.

Dr Franco Agius Legal Representative of the Department of Contracts said that the additional reason for disqualification simply reinforced the reservations made in the original offer. The Department of Contracts letter of the 25th January strengthened the reason for refusal.

Dr Stefan Zrinzo Azzopardi Legal Representative of the CPSU agreed that the reply given in the Authority's letter was short in reasons for the rejection. When asked for further information the further point was added – now referred to as a preliminary plea. The point, however, is that the offer contained a reservation and that is what needs to be discussed.

Dr Mifsud Bonnici said that the rejection letter was akin to a telegraphic message in that it was insufficient to give grounds for a proper appeal and Appellants were therefore obliged to seek further information. The Department of Contracts reply then added another plea, not known at the time of the appeal – it was important to bear this in mind in view of the additional costs.

Dr Cremona said that the issue was a classic example of flouting European and local laws on the principle of proportionality and the obligations which contracting authorities are bound by under the Public Procurement Regulations (PPR). There were no reservations in Appellants' bid: it was an offer with an additional proposal that 9% of the bid be revised according to the Retail Price Index. The Contracting Authority should have accepted the offer and ignored the proposal – instead it disqualified the whole bid, throwing the principle of proportionality out of the window. This decision falls dramatically short of a proportional approach.

Dr Agius said that this rejection was not a question of proportionality. Bidder included a proposal in his bid and nowhere was there any indication that that proposal could be ignored. Regulation 62 of the PPR states that the financial bid cannot be changed. The tender conditions made the proposal part of the bid – consequently there was no level playing field and no transparency in the offer. The Appellant was responsible for the offer and the intention behind his proposal was not to expose themselves to risk, and the Contracting Authority was correct in their decision as this was not a mistake.

Dr Cremona queried why the Appellant was being accused by the Contracting Authority of facts that were unfounded. His clients' proposal was over and above an offer - it is neither a contradiction nor a reservation, and the Authority should have discarded the additional part not the whole offer.

Dr Zrinzo Azzopardi said that one is here dealing with public procurement not a private company deal where one could pick and choose what suited. The whole offer is a proposal – so what part of that proposal was the Authority to choose?

Dr Cremona said that Servizi Malta's offer itself was completely compliant and the proposal which was self-standing was on top of that offer and could be easily eliminated without affecting the bid. Referring the Board to the financial offer one would see that all the necessary tables had been completed in full – the proposal to adjust came on top of this and if it was ignored the offer was totally correct.

Dr Mario Aquilina (41381M) called as a witness by Appellants testified on oath that he is a Senior Lecturer in the Department of English and Language Proficiency at the University of Malta. He has occupied this position for 17 years and has a Doctorate from Durham University. He has done considerable research and has a number of publications to his name. He was contacted by Mr Jason Degiorgio to give advice on the use of certain phrases in the English language but had had no prior acquaintance of the firm Servizi Malta. He was questioned particularly on paragraphs 16 to 20 of the financial bid and asked to give his interpretation of the use of certain phrases in those paragraphs. His opinion (tabled as Doc 1) was that the paragraphs referred to formulated a proposal; there was no indication that should this proposal not be met the offer would be withdrawn; it did not exclude that the service provider would bear the costs of changes himself if the proposal was not accepted, and that that there was no expression of an obligation.

Questioned by Dr Agius on interpretation of the phrase 'No such impacts have been factored in our calculations at this stage' witness was of the opinion that what Appellant meant was that they had not taken these costs at this stage but it does not state that these costs are not included.

At the conclusion of this testimony the Chairman made the point that the issue was not the interpretation of the English language but if the reservation affected the final price.

Ms Celia Falzon (473265M) called as a witness by the Appellants testified on oath that she was the Chairperson of the evaluation committee. She stated that she had no experience or qualification in the management of cleaning operations, but was familiar with what was required in hospital cleaning. Witness confirmed that a Mr Noel Abela had been appointed as the technical expert to advise the committee. At the financial stage three offers were still compliant – in due course as part of the evaluation process the committee looked in detail at the financial figures, checked the workings and drew up a table of comparative figures. It was noted at that stage that Appellant had an additional proposal to the financial offer. They referred to the tender documents to be guided on how to proceed and decided that the committee had no option but to reject the Appellants' offer; without divulging the financial figures the proposal was then referred to the Department of Contracts for their advice which was that the offer should be discarded.

Dr Mifsud Bonnici said that there are two arguments to rebut the reasons for the rejection of Appellants' offer. The wording of paragraphs 16 to 20 of the financial bid were not a reservation and the point of calling a witness was to give a technical perspective to the use of language. The

Department of Contracts did not seem certain themselves on the wording to use – in the correspondence they first used the word ‘proposal’ which turned to ‘reservation’ in a subsequent letter. There was no qualification in their clients’ offer that if the proposal was not accepted the bid was not valid. He referred to Case 1257 recently decided by the PCRB where in the financial bid form there was a handwritten note indicating that there was a separate price and the Board decided that the only valid price was the one on the bid form. Likewise the evaluating committee should not disqualify on a hypothetical point, and they should deal with the aspect of proportionality and appreciate the need for clarifications which was not used. He referred to CJEU Cases (particularly T221/02 and T195/08) where it was held that in exceptional cases the Contracting Authority was obliged to seek information if anything was unclear or if there was any doubt; indeed witness Mrs Falzon in her testimony had indicated that there were doubts. The action taken was too rigid and goes against the EU directive that the least onerous path should be chosen before a decision is made – instead the Authority had chosen the most excessive course – disqualification. The principle of clarification is an obligation not a choice.

Dr Cremona added that the EU decisions and the local courts had emphasised the aspect of proportionality and the need to adhere to this principle.

Dr Agius dealing with the point of proportionality said that the CJEU rulings were rigorous on dealing with obvious clerical mistakes. In this case there was no mistake but a reservation that the price could be changed after the contract is signed. The Director of Contracts is certain that there is no doubt that the reservation gives ground for disqualification otherwise the level playing field is gone. This was not a case of the Authority choosing the least onerous route – it was merely following the CJEU rulings in the Nexans and Mati Sud cases. Allowing the reservation to be ignored or to be removed would be tantamount to rectification of the offer. When witness Dr Aquilina was asked to interpret the phrase ‘cost impact’ his answer was that it meant that the price was not fixed but may change. This would have disadvantaged the other bidders.

Dr Mifsud Bonnici said that the General and the Special Conditions is what binds the contractor and therefore he is not at liberty to change them. If the Authority were concerned by the so-called reservation why was no clarification sought? Why was the whole tender discarded when there was obviously ambiguity? He quoted from an October 2017 judgement in the High Court of Justice in the UK (Hersi & Co) which included a summary of existing case law and wherein it was stated that a duty to seek clarification may arise where a tender is ambiguous, and the ambiguity probably has a simple explanation and is capable of being easily resolved. The measure taken by the Contracting Authority in this case was excessive, when they could easily have sought a clarification.

Dr Cremona re-iterated the point that the offer was self-standing and the proposal could easily have been ignored.

Dr Zrinzo Azzopardi said that the table in the financial bid and offer was technically conditioned by the reservation. The Contracting Authority cannot accept conditional offers where the price is unclear. There was one document before the Board and they should rule that it cannot accept rectification.

Dr Agius stated that if the offer were to be accepted the reservation would be part of the contract. No fixed price had been tendered by the Appellant and it was therefore difficult to interpret what the real cost was.

Dr Mifsud Bonnici requested permission from the Board to be allowed to make brief written submissions mainly to further amplify the rulings on cases he had made reference to during this hearing.

Dr Agius objected to the re-opening of submissions.

The Chairman stated that the Board had heard all it needed to hear and the submissions made were final and it is in a position to come to a decision. He then thanked the parties for their submissions and declared the hearing closed.

This Board,

having noted this Objection filed by Servizi Malta Limited (herein after also referred to as the Appellants) on 21 January 2019, refers to the claims made by the same Appellants with regard to the Tender of Reference CT 2156/2017 listed as Case No 1271 in the records of the Public Contracts Review Board, awarded by the Central Procurement and Supplies Unit (herein after also referred to as the Contracting Authority).

Appearing for the Appellants:

Dr Antoine Cremona

Dr Clement Mifsud Bonnici

Appearing for the Contracting Authority:

Dr Stefan Zrinzo Azzopardi

Appearing for the Department of Contracts:

Dr Franco Agius

Whereby, the Appellants contend that:

- a) the “*rejection letter*” did not specify the reasons why the Contracting Authority deemed that their offer was not financially compliant. At the same instance, the Contracting Authority, in their reply to the Appellants’ objection, mentioned additional alleged claims which precluded the latter from filing a proper appeal;

- b) their second contention refers to the fact that, together with their total quoted price as duly requested, they submitted a proposal, which was

construed incorrectly to imply a “*reservation*” of the price, by the Contracting Authority. In this respect the Appellants maintain that the Evaluation Committee should have applied the principle of proportionality by either seeking clarification or disregarding the proposal.

This Board also noted the Contracting Authority’s ‘*Letter of Reply*’ dated 25 January 2019 and its verbal submissions during the hearing held on 27 February 2019, in that:

- a) the Central Procurement and Supplies Unit contend that the additional information contained in its “*Letter of Reply*” to the Appellants’ objection was submitted, at the latter’s request, to amplify the reasons for the rejection of their offer;**

- b) the Contracting Authority also maintains that, there was no justifiable cause for the Evaluation Committee to apply the principle of proportionality. At the same time, the Committee could not ignore or rectify the Appellants’ offered price; as otherwise, it would have**

breached the principle of level playing field and equal treatment with other competing bids.

This same Board also noted the testimony of the witnesses duly summoned by Servizi Malta Limited, namely;

1. Dr Mario Aquilina

2. Ms Celia Falzon

This Board noted the preliminary plea submitted by the Contracting Authority in its “*Reasoned Letter of Reply*” dated 25 January 2019, which reads as follows:

“Preliminary Plea

Before entering into the merits of the case during the drafting of this reply, the following condition was also noted in the financial offer

Exceptional Cost Impacts 1

We would expect the eventual contract to cater for exceptional cost impacts which may be beyond the control both of the Hospital and Servizzi Malta.

No such impacts have been factored into our calculations at this stage. Exceptional cost impacts could arise from new regulations. For instance, while we have placed quality at the forefront throughout this proposal, new health and safety, hygiene or environmental regulations, and/or additional taxes relating thereto, may be promulgated during the term of the contract. Such changes will have a material and immediate impact on our costs.

20. As provided for in the Tender Document we would expect that any changes in the VAT rate applicable to the contract would result in an immediate change, upwards or downwards as appropriate, in our prices. Similar adjustments would be needed in the event of other fiscal changes which may impact on the performance of the contract, e.g. changes in employer NIS contributions.”

After a short recess to discuss and decide on the above mentioned plea, this Board arrived at the conclusion that, it should not be treated as a preliminary plea, but rather additional information regarding the reasons for the Appellants' offer rejection which, in this Board's opinion, should have been included in the Central Procurement and Supplies Unit's "*Letter of Rejection*", and in this regard, Servizi Malta Limited were asked whether they wished to defer the hearing to a later date, to enable same to present their submissions on this additional information; however the Appellants agreed to discuss and make their submissions, on the additional information, during this Public Hearing. In this respect, the hearing on the merits of the case resumed.

This Board, having examined the relevant documentation to this Appeal and heard submissions made by the parties concerned, including the testimony of the witnesses duly summoned, opines that the issues that merit consideration are twofold namely:

A. The Additional Claims for Servizi Malta Limited's Offer Rejection;

B. The Adjudication Process on Servizi Malta Limited's Offer

1. The Additional Claims for Servizi Malta Limited's Offer Rejection

This Board, as it has on many occasions, must emphasize on the Contracting Authority, the importance of transmitting the specific reasons for a Bidder's offer rejection. It is to be acknowledged that the Appellant must be in a position to be aware as to why his offer is being rejected and at the same instance, at what stage and on what particular item, of the Tender Document, his offer has defaulted, in order to be in a rightful position to appeal the decision taken by the Central Procurement and Supplies Unit. It must also be noted that, the latter admitted that the reasons for the Appellants' offer rejection could have been further amplified and that the additional explanations submitted in their reply to the Appellants' objection represented such missing information which was requested by the latter through a request dated 15 January 2019. This Board would respectfully point out that, although such an instance should not be repeated, the lack of information in the "*Letter of Rejection*" does not, in substance, affect directly the main issue why the Appellants' offer was rejected on the basis of financial non-compliance.

2. The Adjudication Process on Servizi Malta Limited's Offer

The main alleged reason for the rejection of the Appellants' offer was that apart from submitting the total bid price, they also included a proposal relating to a desired revision of the quoted price in accordance with changes in the retail price index, so that the Contracting Authority deemed such a proposal to reflect a reservation of the quoted price. At this stage of consideration, this Board would refer to an extract from the financial offer submitted by Servizi Malta Limited, as follows:

“Pricing

16. The principal component of our operating cost structure relates to personnel wages and therefore the annual cost of living adjustment announced by Government will have a material impact on our cost base. We are therefore proposing that the rate we are quoting is to be reviewed each year as follows:

- 91% of our proposed rate, representing payroll costs, would be revised in line with the Government's cost of living adjustment;***

- *The remaining 9% would be revised in line with changes in the Retail Price index.*

17. The first review would therefore be due in November-December 2018 to discuss the revisions to the rate to be applied from January 2019.”

The above two clauses forming part of the Appellants’ financial offer are stipulating a reservation to the quoted fixed price in that, the Cost of Labour included in the price will be adjusted by the Cost of Living Adjustment increases during the duration of the contract and 9% of the quoted price will be revised in accordance with any changes in the retail price index. In this respect, this Board opines that, reference is always being made to the quoted price submitted by the Appellants and in the same offer, the latter are qualifying their quote by the above mentioned conditions.

Clause 17 above confirms even more, an additional condition in that, the first review of the quoted price is to take effect in November-December 2018 and to discuss future revisions to be applied from January 2019.

This Board is also concerned about the contents of “*Exceptional Cost Impacts*” as described in the Appellants’ Financial Offer, which reads as follows,

“Exceptional Cost Impacts

18. We would expect the eventual contract to cater for exceptional cost impacts which may be beyond the control both of the Hospital and Servizi Malta. No such impacts have been factored into our calculations at this stage.

19. Exceptional cost impacts could arise from new regulations. For instance, while we have placed quality at the forefront throughout

this proposal, new health and safety, hygiene or environmental regulations, and/or additional taxes relating thereto, may be promulgated during the term of the contract. Such changes will have a material and immediate impact on our costs.

20. As provided for in the tender document we would expect that any changes in the VAT rate applicable to the contract would result in an immediate change, upwards or downwards as appropriate, in our prices. Similar adjustments would be needed in the event of other fiscal changes which may impact on the performance of the contract, e.g. changes in employer NIS contributions.”

This Board would point out that the conditions laid out in the Tender Dossier must be respected and adhered to at all times and in this respect, this same Board would refer to Clause 1.1 of the “*Instructions to Tenderers*” wherein it is clearly stated that:

“No account can be taken of any reservation in the Tender regards the Tender Document, any disagreement, contradiction, alteration or deviation shall lead to the Tender offer not being considered any further.”

In this regard, this Board opines that, the financial offer as submitted by Servizi Malta Limited contained certain reservations which conditioned directly the quoted price of their offer and this Board is credibly convinced that the conditions laid down by the Appellants’, in their financial offer did not constitute a proposal but rather a qualification to the price quoted in their financial bid form.

- 3. With regards to Servizi Malta Limited’s contention that the Central Procurement and Supplies Unit should have applied the proportionality principle, by either seeking clarification or by ignoring the submitted proposal, this Board, would have considered the resultant outcome if any of the claimed actions were taken by the Evaluation Committee, as follows:**

3.1 Clarification

It is a known maxim to all interested parties that clarifications can only be made, by the Contracting Authority, on submissions made. In this particular case the Appellants' submissions included a proposal, which was not requested in the first place and secondly, there was no justifiable need, on the part of the Evaluation Committee, to seek clarifications, as the text and contents of the proposal were clear and direct. In such instances, there was no room for a clarification. Had the Evaluation Committee sought a clarification, it would have breached the principles of equal treatment, transparency and self limitation. Clarifications relating to the financial offer should only be made to correct arithmetical mistakes and not to determine which offer the Bidder intends to adopt, should his offer be successful. This Board would respectfully point out that clarifications should not be used as a tool to alter or choose which offer the Bidder intends to apply whilst, at the same instance, the Evaluation Committee is bound by the principle of self-limitation and equal treatment. In

this regard, this Board opines that in such circumstances, the Evaluation Committee could not ask for clarifications, as there was no justifiable cause to do so.

3.2 Ignoring the Proposal

With regards to the Appellants' claim that the Central Procurement and Supplies Unit, if in doubt, should have ignored the Appellants' proposal, this Board would respectfully point out that by ignoring a financial proposal, the Evaluation Committee, would have also effected a change in the Appellants' financial offer, as the latter offered two possible financial options.

The conditions in a Tender Document must be respected and adhered to at all times and the Tender conditions did not request a proposal, but a fixed price for the period of the contract. At the same instance, by ignoring the Appellants' proposal, the Evaluation Committee would have shifted the goal posts and breached the principle of self-limitation during the Evaluation Process.

This Board opines that, after considering the facts of this case, Servizi Malta Limited, by submitting a proposal, which was not asked for, had, in effect, made a reservation to the quoted price in the Financial Bid Form.

4 The Testimony of Dr Mario Aquilina

On a concluding note, this Board would respectfully point out that the testimony of one of the witnesses, namely, Dr Mario Aquilina, had no bearing at all on the merits of this case but was rather an interpretation of linguistic words used by the Appellants in their financial offer, which, in the opinion of this Board, do not relate to the real issue of this Appeal.

In conclusion, this Board opines that:

- a) the Central Procurement and Supplies Unit's "*Letter of Rejection*" should have included the additional information so mentioned in the**

latter's "*Reasoned Letter of Reply*" to the objection filed by Servizi Malta Limited;

- b) the proposal submitted by the Appellants represented a reservation to the quoted fixed price in their financial bid form;**
- c) No clarifications could be sought by the Evaluation Board as this would have constituted a rectification, which is in breach of the Public Procurement Regulations, in this particular instance;**
- d) The Evaluation Committee could not ignore the Appellants' Financial Proposal, as this would have breached the principles of equal treatment, transparency and self-limitation.**

In view of the above, this Board,

- i) upholds the first contention made by Servizi Malta Limited;**
- ii) does not uphold the Appellants' second contention;**

iii) upholds the Contracting Authority's decision in the award of the Tender;

iv) directs that an amount of twenty thousand euro (€ 20,000), is to be retained from the deposit paid by Servizi Malta Limited.

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member

12th March 2019