

PUBLIC CONTRACTS REVIEW BOARD

Case 1285 – CT 2374/2018 – Tender for the Provision of Environmentally Friendly Cleaning and Ancillary Services in an Environmentally Friendly Manner to Saint Vincent De Paul Long Term Care Facility

Call for Remedies before the Closing Date for Competition

The publication date of the call for tenders was the 20th December 2018 whilst the closing date of the call for tenders was 28th February 2019. The estimated value of the tender (exclusive of VAT) was € 17,070,268.

On the 8th February 2019, Servizi Malta Ltd filed a Call for Remedy against St Vincent de Paul Long Term Care Facility as Contracting Authority claiming that the issue of a clarification note was irregular and illegal and other additional factors.

On 20th March 2019 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – Servizi Malta Ltd

Dr Clement Mifsud Bonnici	Legal Representative
Mr Jason Degiorgo	Representative

Contracting Authority – St Vincent de Paul Long Term Care Facility

Mr Etienne Bartolo	Representative
Ms Marica Saliba	Representative
Ms Karen Muscat	Representative

Department of Contracts

Dr Franco Agius	Legal Representative
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Others

Mr Peter Paul Zammit LP	Representative X Clean
Mr Denis Xuereb	Representative X Clean
Mr Adzic Malgam	Representative X Clean

Dr Anthony Cassar, Chairman of the Public Contracts Review Board, welcomed the parties and invited submissions.

Dr Clement Mifsud Bonnici Legal Representative of Servizi Malta Ltd said that there were three grounds of objection on this tender which covered cleaning and ancillary services. The first and major one concerned the change in the stipulation by the Contracting Authority that at tendering stage bidders had to provide a copy of certificates issued by the VAT and the Social Security Departments indicating that all payments and contributions were up to date. On the 31st January 2019, the day when bids were due to be submitted, the Department of Contracts issued a clarification note stating that the requested certificates need not be presented at tendering stage but shall be requested only on the signing of the contract by the winning bidder. In other words the original specification was changed through a clarification to set it aside. This created confusion in the mind of bidders as it contradicted the specific instructions in the tender. It also creates a problem as it should be taken for granted that bidders' payments should be up to date and the Contracting Authority's original reason for including this specification was to ensure that a bidder had a certain financial standing. Certificates should still be submitted with the tender offer otherwise the Contracting Authority would be unable to judge if a bid was compliant. The requirement to file the certificates with the bid must stand and be re-instated in the original tender document – the clarification varied the criteria and is not allowed under the Public Procurement Regulations (PPR). The certificates should be scrutinised by the evaluation committee and the Public Contracts Review Board. The Director of Contracts is not allowed to change the wishes of the Contracting Authority by making concessions especially bearing in mind the value of the tender.

Dr Franco Agius Legal Representative of the Director of Contracts stated that contrary to Appellants' claim the criteria were not changed – the clarification merely ensured that bidder is compliant through his obligation to pay taxes and other eligibility requirements. The law makes provision for this by stating that it is not necessary to satisfy debts but to be able to show that one is able to pay them by providing, for example, agreements to settle tax arrears. The vital instance is the time of the signing of the contract and the bidder might be in arrears at that moment although he had a clean financial bill at the bidding stage. There is a CJEU case backing this line of argument. It was a mistake on the part of the Contracts Department that the tender had been issued in this form.

The Chairman asked if there was any objection on the part of the Authority to ask for the certificates twice as the financial situation of a bidder might change between bid and award.

Dr Agius, continuing his submissions said that the Chairman's point highlighted the practicality of the risk in a change in situation. The Contracting Authority is trying to facilitate competition and ensure that there are no artificial barriers. The criteria have not changed and nothing was to be gained by asking for the certificates twice when it was only the award stage that mattered.

Dr Mifsud Bonnici said that he felt certain unease at the Department of Contracts arguing strongly against the removal of the clarification - there must have been a reason why it was suddenly decided that it was required. Moreover this clarification contravenes Regulation 38 (1) of the PPR in that it does not provide additional information or remove inconsistencies – the wording in the tender was clear and did not require any clarification. The law does not allow this type of clarification.

The Chairman made the point that once the certificates were originally requested it made one wonder why the requirements were changed – if it had not been, this call for remedy would not have been necessary.

Dr Agius, in reply said that the Director of Contracts had made a mistake in requesting the certificates at the tender stage.

Dr Mifsud Bonnici then moved to the other grounds of objection. On the point regarding the submission of the Equality Mark - to prove that the economic operator was an equal opportunity employer - this was impractical and excessive as it takes months to obtain and is not regulated by law. The Authority should reformulate this condition to an open criterion that the operator fulfils the legal requirements of equal opportunities and practices diversity and fulfils the employment regulations. The requirement of the Equality Mark will create bias in the minds of the members of the evaluation committee.

In respect of the third claim Dr Mifsud Bonnici said that the employment conditions criteria request for ‘any other proposed measure’ did not offer a guide as to how it will be measured - this created difficulties as it was not capable of being assessed. There should be neutral rather than specific guidelines and should be capable of being assessed at the evaluation stage. This requirement also transgressed the PPR principles and should be set aside.

Dr Agius said that the need for an Equality Mark was not essential and the words ‘equivalent procedure’ in the tender means that the bidder has to prove equality of opportunity to qualify. The Government has obligations for equal treatment and non-discrimination and this is reflected in this requirement. In regard to ‘any other proposed measure’, it is up to the bidder to propose measures over and above those listed in the tender. Any proposal that improves the working conditions of employees’ is to be encouraged and will be given the maximum two points. There is no question of assessment on this point – you either propose a measure or you do not – it is not subject to interpretation. In any instance, if no proposal is made one is only looking at not being awarded 1% of 2 marks which is negligible.

The Chairman questioned why this point was included if it did not affect the outcome. Overall there were several points that need to be clarified for bidders and the Board will ensure that they are clarified.

Dr Mifsud Bonnici in his concluding remarks said that this matter of 1% creates grounds for a further appeal as it is not very clear and needs clarifying if it is to avoid further objections. There is no consistency in this tender. On the one hand there is a clarification note on tax certificates on the premise that it is opening competition but conversely there is insistence on the Quality Mark which is difficult to obtain and restricts competition – general requirements apply in certain sections of the tender but not in others.

The Chairman thanked the parties for their submissions and declared the hearing closed.

This Board,

having noted this Call for Remedies filed before the Closing Date of Competition by Servizi Malta Limited (herein after referred to as the Appellants) on 8 February 2019, refers to the claims made by the same Appellants with regard to the Tender of Reference CT 2374/2018 listed as Case No 1285 in the records of the Public Contracts Review Board and issued by St Vincent de Paul Long Term Care Facility (herein after referred to as the Contracting Authority).

Appearing for the Appellants: Dr Clement Mifsud Bonnici

Appearing for the Contracting Authority: Mr Etienne Bartolo

Appearing for the Department of Contracts: Dr Franco Agius

Whereby, the Appellants contend that:

- a) their first Objection refers to the fact that through a clarification issued by the Contracting Authority, on the very last day of submissions, the**

Contracting Authority changed the original specifications thus, creating unnecessary confusion to the detriment of prospective bidders. In this regard, Appellants maintain that the specifications should remain as originally stipulated in the Tender Document;

b) with regards to the “*Equality Mark*” condition, they are contending that such a condition should be more open, as long as the economic operator proves that he provides equal opportunity within its labour force;

c) with regards to the item “*any other proposed measure*”, the Appellants insist that, a form of yardstick should be stipulated so that the Evaluation Committee will assess such a condition in an objective manner.

This Board also noted the Contracting Authority’s ‘Letter of Reply’ dated 13 February 2019 and its verbal submissions during the Public Hearing held on 20 March 2019, in that:

a) St Vincent de Paul Long Term Care Facility maintains that the issue of the clarification note denoting that, the submission of the certificates to

be imposed at award stage was implemented to correct a mistake in the original Tender;

b) with regards to the “*Equality Mark*”, the Contracting Authority contends that an equivalent procedure to prove equal opportunities would suffice;

c) the Contracting Authority also confirms that any proposal that improves the working condition of employees will be given the maximum of two points and in this respect, there is no assessment involved.

This Board, having examined the relevant documentation to this “*Call for Remedies*” and heard submissions made by the parties concerned, opines that there are two issues raised by Servizi Malta Limited which deserve due consideration.

1. The Change of Conditions to the Tender

With regards to the Appellants’ first concern, this Board would refer to Clause 7 (B) (b) which dictates the following:

“The Economic Operator shall provide:

- i) The Economic Operator confirms that they already have or can commit to obtain, prior to the commencement of the contract, a Full Indemnity Insurance and Public Liability Cover Policy to cover up to One Million Euro (€ 1,000,000) per occurrence, with unlimited number of occurrences. This information is to be submitted online in the ESPD as per Question Reference number 4B.5 and 4B.5.1.*
- ii) The minimum credit facility required for the duration of this project is Two Million Euro (€2,000,000). During the adjudication stage, the tenderer may be requested to submit a statement by a recognised bank certifying such credit facilities. In the case of a consortium/joint venture the aforementioned statement must cover all members/companies forming the consortium/joint venture. This information is to be submitted online with the ESPD as per Question Reference number 4B.6 and 4B.6.1.*
- iii) Certificate or Proof from the VAT department that all money due to the VAT department are paid and no amounts are due (Note 2)*
- iv) Certificate or Proof from the Social Security Department or Inland Revenue Department that all Social Security Contributions, class 1(employee and employer) and class 2, are fully paid and no amounts are due (Note 2)”*

Clauses (iii) and (iv), mentioned above indicate clearly that the Contracting Authority, quite appropriately, is taking all the necessary precautions to ensure that, due to the magnitude of this Tender, economic operators are up to date with the payments of VAT, Income Tax and Social Security Payments.

This Board notes that the original closing date of submissions was 31 January 2019. On the same date, through the Electronic Public

Procurement System, the Appellants were informed of a change to the above mentioned clause, as follows:

“Question 5 Requirements

Is the tenderer eligible for tendering should they not provide the certificate/proof from the VAT and Social Security Department as stated in Tender Document Section 7 (B) iii, iv

Answer 5 The requirements at Clauses 7 (B)(b)(iii) and 7 (B)(b)(iv) of the Tender Document shall be in the form of a declaration on the tender response Format. The certificate/proof of such declaration shall be requested and submitted only by the winning Bidder prior to the signature of the contract.”

Through this clarification, the Contracting Authority is reversing the condition to submit certificates at the Tendering Stage, to a submission of same at award stage.

- 2. At this stage of consideration, this Board would point out that, it is quite appropriate for the Contracting Authority not to request certificates or other documentation at Tendering Stage, so that the European Single Procurement Document will serve its purpose. This Board also notes that the clarification reversing such a condition was communicated to all bidders on the day of the closing date of submissions, that is 31 January 2019 and at the same instance, this Board was made aware**

that such a clarification was issued, due to the fact that, the Contracting Authority realised it had made a mistake in requesting certificates, at Tendering Stage. However, this Board would acknowledge the fact that, due to the magnitude of this Tender, it is normal and appropriate, for the Authority, to request certificates of the kind in question, at Tendering stage, so that, potential economic operators who satisfy and can produce certificates, at that stage, can be identified and evaluated accordingly, at evaluation stage. In other words, such a condition will serve as a filter to the offers which are capable of delivering the Tendered Works and are in conformity with fiscal and labour regulations.

- 3. This Board is somewhat concerned in that, the Clarification to reverse the condition of submission of offers was issued on the very last day of submission of offers, when all potential Bidders were supposed to be in a possession of such certificates ready for submission. At the same instance, one must also consider the fact that what was requested in Clause 7 (B) (b) (iii) and (iv) represents, in advance, a means of identifying potential bidders who already satisfy this criteria, prior to the evaluation process stage. In this regard, this Board will be more comfortably assured of transparency, if the clarification note dated**

31 January 2019 relating to Question 5 and its relative answer is completely disregarded and the condition, as stated in the Tender Document, stays as it is. It is up the Contracting Authority, at award stage, to request, updated certificates from the successful economic operator.

4. “Equality Mark”

With regards to Servizi Malta Limited’s second contention, this Board would refer to Clause 9.3, (Evaluation Grid), as follows:

<i>Equality Mark/Legal Requirements</i>	11) Evidence that the economic operator is an Equal Opportunities employer in line with the Equality Mark of Equivalent	Add-On	4
	12) Proof that the economic operator meets the Legal Requirements for the employment of disabled people	Add-On	4

The Authority, quite rightly, imposed the condition with regard to the economic operators’ provision of equal opportunity and in this respect, one must establish the criteria for the allocation of marks so that, the subjectivity element is suppressed to the bare minimum. In this respect,

from submissions made, this Board was made aware that, equivalent measures taken by the economic operator, to prove that conditions of equal opportunities exist, will carry maximum marks so that any proposal which improves the working conditions of employees will be allocated full marks for this particular section. On the other hand, if the Bidder does not propose any provisions for the improvement of these conditions, the allocation of marks will be 1% of 2 marks less. In this regard, and to avoid any ambiguities, this Board opines that, any form of proof of the provision of equal opportunities and any form of proposal for the improvement of employees working conditions, are to be allocated full marks for this section of the Evaluation Grid.

In conclusion, this Board opines that:

- a) although, St Vincent de Paul Long Term Care Facility has the right to issue clarifications to correct any error in the original Tender Document, in this particular case and instance, this Board takes into consideration the facts namely; the issue of such a clarification on the very last day of the submissions of offer, the magnitude of the Tender and the fact that Bidders, by the date of the issuance of the clarification note, should have already been in possession of the certificates, so that,

for the sake of transparency and equal treatment, it directs that Clarification 5 in Clarification Note Number 2, is to be set aside;

b) apart from the certificates, as originally requested in the Tender Document, the Contracting Authority will request updated certificates at the award stage;

c) to avoid any ambiguities, the Board confirms that with regards to the Equality Mark and Legal Requirements as stipulated in Clause 9.3 (Evaluation Grid), full marks are to be given for these two particular items, as long as the Bidder proves that, equal opportunities exist within his organisation and that he also specifies a provision for the improvement of employees' working conditions.

In view of the above, this Board,

i) upholds the contentions made by Servizi Malta Limited;

ii) directs that Clarification 5 of Note Number 2 is to be completely set aside;

iii) through submissions made by St Vincent de Paul Long Term Care Facility, confirms that, with regards to the allocation of points with reference to “*Equality Mark/Legal Requirements*”, as long as proof is submitted by Bidders that they cater for such benefits, they are to be awarded full marks, without any references to any particular standard or regulatory body;

iv) directs the Contracting Authority to issue the necessary amendments to the Tender Document, through a clarification note.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

1st April 2019