

PUBLIC CONTRACTS REVIEW BOARD

Case 1286 – 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 31st January 2019 but extended to 14th February 2019. The estimated value of the tender (exclusive of VAT) was € 17,070,268 (if including potential cost).

On the 4th January 2019, X Clean Ltd filed a Call for Remedy against St Vincent de Paul Long Term Care Facility as Contracting Authority claiming that the eligibility criteria should be reconsidered and struck off.

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 – X Clean Ltd

Mr Peter Paul Zammit LP	Legal Representative
Mr Denis Xuereb	Representative
Mr Herman Depasquale	Representative
Mr Adzic Malgam	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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Dr Anthony Cassar, Chairman of the Public Contracts Review Board, welcomed the parties and invited submissions.

Mr Peter Paul Zammit Legal Representative for X Clean Ltd stated that this tender is being contested on two points – the minimum value of services effected and the period of time in which it was effected. The European Directives on procurement (2014/23 and 2014/24) state that Small and Medium Enterprises (SMEs) must be an integral part of the procurement process and it is abhorrent to exclude them by not having a level playing field. It is difficult to comprehend how the figure of € 12m over three years was decided upon. The bidder is being asked to provide today proof that over the last three years they have had a turnover of € 12m when the Appellant has a turnover of under € 4m per annum this year with figures below that for previous years. It is not right that the figure should be based on monetary value but on the bidders' ability to have the necessary workers to undertake the contract.

Dr Franco Agius Legal Representative of the Department of Contracts said that Public Procurement Regulation (PPR) 232 para 1 sets the criteria on which experience of the economic operator can be established. In this case the set requisite was that over a three year period the operator has provided similar cleaning services overall. Regulation 28 of the European Directives lays down that all cleaning services can be taken into account, and the figure of € 12m was taken to give an indication of the cumulative experience in the last three years. To assist SMEs to reach this target there is open to them the possibility of joint ventures or a degree of sub-contracting. Although anyone can bid within the set criteria the Government must hedge against the risks of a bidder not being up to standard and the figure chosen is proportionate to the value of the tender. On the other hand the Contracting Authority must be comfortable that the selected bidder has the commercial muscle to undertake the work.

Mr Zammit said that nowhere in Annexe 12 of Directive 2014/24 does it state that the selection criteria must be capped. Three past years cannot match three future years as business situations alter, and it is neither proportionate nor acceptable. A statement of work undertaken in those three years should be sufficient – indeed the European regulations rely on technical ability not monetary value.

On this point Dr Agius said that the Appellant was not correct as monetary values were part of the experience and in this instance what was being demanded was proportionate to the value of the project. Article 4.1 of the bid documents project man hours over the years 2019/2021.

Mr Zammit again said that the factual work undertaken should be taken into consideration not its value. There is an incremental value in wages and costs and it is the hours worked that is the basic line of this tender.

Mr Denis Xuereb Representative of X Clean Ltd said that the total turnover of his work at Saint Vincent de Paul over three years was € 5.46m and for the total work undertaken in the same period the turnover was € 11.48m. On the basis of this tender he would be excluded from bidding due to a very small difference of some € ½m turnover.

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 X Clean Limited (herein after referred to as the Appellants) on 4 January 2019, refers to the claims made by the same Appellants with regard to the Tender of reference CT 2374/2018 listed as Case No 1286 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: Mr Peter Paul Zammit LP

Appearing for the Contracting Authority: Mr Etienne Bartolo

Appearing for the Department of Contracts: Dr Franco Agius

Whereby, the Appellants contend that:

- a) their main concern refers to the fact that, one of the conditions in the Tender Document, is that, the economic operator must prove that he has carried out similar works during the years 2016, 2017 and 2018 which in total amount to a minimum of € 12,000,000. In this regard, the**

Appellants maintain that such an amount precludes Small and Medium Enterprises from participating, apart from the fact that, through similar experiences, the Tendered works would not justify such capping being imposed by the Contracting Authority.

This Board has also noted the Contracting Authority's "*Reasoned Letter of Reply*" dated 7 February 2019 and also its verbal submissions during the hearing held on 20 March 2019, in that:

- a) St Vincent de Paul Long Term Care Facility maintains that the capping of similar works carried out over three years, does not limit the scope of competition, in that, the prospective Bidder can also subcontract the tendered works to third parties, the latter of whom accumulated experience in such services. In this regard, the Contracting Authority insists that, the capping of € 12,000,000 over three years is proportional to the volume and magnitude of the tendered project.**

This Board, after having examined the relevant documentation to this "*Call for Remedy filed before the Closing Date of Competitions*" and heard submissions made by the parties concerned, opines that the issues which merit consideration are:

- 1. Limitation of Competition;**

2. Capping of similar works carried out at € 12,000,000

1. Limitation of Competition

- a) **With regard to X Clean Limited's first concern, in that, the capping of € 12,000,000 worth of similar services over the mentioned three years, will limit the participation of Small and Medium Enterprises, this Board, would, first and foremost, point out that the Contracting Authority has the prerogative to impose conditions, with regard to experience, in order to ensure that, the services being Tendered for, will be executed by competent economic operators, who already acquired the necessary knowledge and know-how, as to the mode of execution and delivery of these works**
- b) **This Board would also point out that Small and Medium Enterprises have the opportunity to reach the stipulated experience level and volume, through subcontracting, the latter of which activity is not being limited by the Contracting Authority. There exist other possibilities for the Small and Medium Enterprises to participate such as, through joint ventures, partnerships etc, at the same instance, this Board has also noted that the stipulated amount of € 12,000,000 over three years, allows all types of cleaning services so that, yet again, although the Tender is for cleaning and ancillary services at a particular facility, the**

Contracting Authority is widening the opportunity for Small and Medium Enterprises, by accepting experience to include any type of cleaning services carried out.

In this regard, this Board does not find any justifiable cause to deem such a stipulated condition, with regard to experience, as limiting the opportunities for Small and Medium Enterprises to participate.

2. Capping of similar works carried out at € 12,000,000

a) With regards to the Appellants' concern, in that, experience should not be capped, this Board would respectfully point out that the capping in volume and monetary terms of experience, is not capriciously dictated and as such capping would determine the following:

- Suitability to pursue the commercial activity concerned**
- The economic and financial Standing of the Economic Operator**
- The technical and professional ability of the Economic Operator so that the requirements shall be limited to those that are appropriate to carry out the tendered works.**

All of the above requisites must be related and proportionate to the subject matter of the contract.

b) Although such a maxim may seem to be a limiting factor for the Small and Medium Enterprises, the latter have other alternative remedies

through which they can participate. In this regard, it is imperative that some form of level of experience is established, hence a capping which can be expressed in monetary terms with regards to the volume of works of a similar nature over a period of time and in this particular case, a capping of € 12,000,000 over a period of three years.

- c) Capping should be proportionate to the contract value and in this particular instance, this Board, after having reviewed the magnitude of the project, in monetary terms, opines that a capping of € 12,000,000 spread over the three years 2016, 2017 and 2018, is proportionate and reasonable.**

In conclusion, this Board opines that:

- a) the capping of € 12,000,000 over the years 2016, 2017 and 2018, is proportionate to the value of the tendered services;**
- b) such capping amount does not limit the participation of the Small and Medium Enterprises as the latter have remedies to participate through joint ventures, partnerships and subcontracting.**

In view of the above, this Board,

- i) does not uphold the contentions made by X Clean Limited;**

ii) directs that the capping of € 12,000,000 is reasonable and proportionate to the value of works/services being tendered for.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

1st April 2019