

PUBLIC CONTRACTS REVIEW BOARD

CT 2025/2020 Lot 1

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The Provision of Cleaning Services using Environmentally Friendly Cleaning Products for Entities within the Active Ageing and Community Care

Case 1553

DATE: 8th April 2021

This Board,

Having noted the Appeal filed by X Clean Limited, (hereinafter referred to as the Appellant) and the contents of the correspondence sent by Mr Peter Paul Zammit L.P. on behalf of appellant and received by the Board on the 25th January 2021.

Having also noted that the Contracting Authority replied to the Appeal by reply filed by Dr Mario Mifsud and Dr Christian Camilleri on behalf of the Active Aging and Community Care received by the Board on the 3rd February 2021.

Having also noted the reply filed by Dr Alessandro Lia on behalf of Dibaw Services Joint venture received by the Board on the 2nd February 2021.

Having taken cognisance of all the acts and documentation filed, as well as the submissions made by the legal representatives of the parties.

Having noted and evaluated the minutes of the Board sitting of the 23rd March 2021 hereunder re-produced:

Case 1553 – CT 2025/2020 – Tender for the Provision of Cleaning Services using Environmentally Friendly Cleaning Products for Entities within the Active Ageing and Community Care (AACC) –LOT 1

The tender was published on the 15th May 2020 and the closing date was the 16th June 2020. The value of the tender for two lots was €3,659,861 (excluding VAT).

On the 25th January 2021 X Clean Ltd filed an appeal against Active Ageing and Community Care as the Contracting Authority objecting to their disqualification on the grounds that their bid failed to satisfy the Best Price Quality Ratio (BPQR) criterion for award.

A deposit of €17,765 was paid.

There were nine (9) bidders and ten (10) bids on Lot 1 and 8 (eight) bidders on Lot 2.

On 23rd March 2021, the Public Contracts Review Board (PCRB) composed of Dr Ian Spiteri Bailey as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members, convened a public virtual 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 Herman Depasquale	Representative

Contracting Authority – Active Ageing and Community Care

Dr Christian Camilleri	Legal Representative
Mr Joseph Delicata	Chairperson Evaluation Committee
Ms Mary Grace Balzan	Secretary Evaluation Committee
Ms Antoinette Zahra	Member Evaluation Committee
Ms Carmel Camilleri	Member Evaluation Committee

Preferred Bidder – DIBAW JV

Dr Alessandro Lia	Legal Representative
Mr Wilson Mifsud	Representative
Mr Gianluca di Lascio	Representative

Dr Ian Spiteri Bailey, Chairman of the Public Contracts Review Board welcomed the parties. He noted that since this was a virtual meeting all the parties agreed to treat it as a normal hearing of the Board in line with Article 89 of the Public Procurement Regulations (LN 174.04).

He noted that the late submission of fresh documents or written pleadings by Appellants would not generally be considered. Regulation 90 only allows amendments to written pleadings already submitted. This is further confirmed by paragraphs 270 to 276 of the Manual of Procedure although verbal submissions are allowed at the hearing.

The appeals on Lot 1 and Lot 2 submitted by Appellants were identical and all parties confirmed and agreed that the submissions made in this Case apply also to the appeal on Lot 2. Page | 3

Mr Peter Paul Zammit LP Legal Representative for X Clean Ltd stated that the basis of the appeal is that the Evaluation Committee failed to check if the preferred bid was abnormally low. There is a range of cases heard by the Public Contracts Review Board on the need on the part of authorities to check on this point. There are large differences in figures submitted on this tender and DIBAW JV is 40% cheaper than Appellants bid. Public Procurement Regulation 96 obliges the evaluation committee to investigate suspected low offers.

Mr Zammit said that there was another contention relating to points deducted in regard to wages for the year 2023 not being declared. More points should have been deducted in this case of missing information. The evaluators should have used discretion regarding the self-certification demanded in section 5 (c) (1) in the Instructions to Tenderers and this affected the points awarded.

Dr Christian Camilleri, Legal Representative for Active Ageing and Community Care said that his comments apply to both Lots. The Evaluation Committee followed the correct procedure throughout in their adjudication. In regard to the claim that the preferred bid was abnormally low it must be noted that all tenderers show similar rates for workers' wages using figures laid down in Government Circulars. The difference in the bids is in the administrative costs and which over three years amount to a global difference of one quarter of a million Euro.

The deduction in points in the technical section was explained in the letter of reply. The deductions were on criteria which were not mandatory but add-ons and therefore had no effect on the service offered.

Dr Alessandro Lia Legal Representative for Dibaw JV said he could not comprehend where the claimed figure of 40% difference in the bids came from. The figure submitted by the preferred bidder did not indicate that it is low when compared to the figure stated in the tender in paragraph 1.3 of the Instructions to Tenderers. This is a fishing expedition cloaked under a generic appeal based on presumption of what the bidder was intending – CJEU Cases 196/2010 and 324/2011 deal specifically with this type of exercise. No proof has been provided that the deduction of points was not justified, and the decision of the Authority should be confirmed.

The Chairman re-iterated that as declared at the start of the hearing all submissions apply to both appeals by X Clean Ltd. He then thanked the parties for their submissions and declared the hearing closed.

Hereby resolves:

That reference is first being made to the submissions filed by Legal Procurator Mr Peter Paul Zammit and dated 22nd March 2021, which were received by the Board late in the evening on the eve of the sitting. The Board declared such written submissions as inadmissible and decided, by decree during the same mentioned sitting, to do away with such submissions and deem them as never having been presented. In this respect, the Board made reference to article 90 of SL 174.04:

- (1) The Review Board shall be empowered to order or permit amendments of written pleadings and to engage any expert to assist it in its investigations.*
- (2) It shall also have the power to determine the procedure for the hearing of all complaints lodged before it and shall ensure that during the public hearing all interested parties are given the opportunity to make their case.*

The Board furthermore made reference to paragraphs 270 – 276 of the Manual of Procedure which states:

After the preparatory process is duly completed, the authority responsible for the tendering process shall forward to the Chairman of the Review Board all documentation pertaining to the call for tenders in question including files, tenders submitted, The secretary of the Review board shall inform all the participants of the call for tenders, the Department of Contracts, the Ministerial Procurement Unit and the Contracting Authority of the date or dates as the case may be when the appeal will be heard.

The Board hence considered that by law, not only is the Board entitled to regulate its own procedure as long as all parties are given the opportunity to make their case, but it may only allow, following the closure of the written pleadings' procedure, also referred to as the "preparatory process", solely amendments to written pleadings and not any written submissions or notes in addition to the note of objection/appeal and/or reply filed within the statutory 10 days allowed. The Board gave the appellant's representative all the opportunity to make oral submissions during the sitting, as was in fact done, and on this basis, the written pleadings filed on the eve of the sitting were declared to be inadmissible.

In so far as the merits of the Appeal are concerned, the Board notes that appellant claims that the Evaluation Committee failed to check if the preferred bid was abnormally low, it being alleged to be 40% lower than the appellant's bid.

To this, the preferred bidder rebutted by saying that the 40% figure cannot be comprehended and one wonders how the appellant came to this conclusion, whereas the legal representative to the contracting authority stated that the appellant as well as the preferred bidder had similar rates for worker's wages using the figures laid down in Government circulars and the main difference was in the administrative cost which over the period of 3 years, amounted to a global difference of around $\frac{1}{4}$ of a million Euro.

The Board, having evaluated the Evaluation Report and the final ranking of the administratively and technically compliant tenders, which classified Dibaw Services first and the appellant X Clean Limited second, in both Lot 1 and Lot 2, cannot but concur with the contracting authority's and the preferred bidder's submissions and reject the appellant's claim that the preferred bidder's bid is abnormally low. The preferred bidder's bid is around 18% less (and not 40%) than the estimated procurement value for the call in question and only around 8% less than the bid submitted by the appellant company.

Furthermore, as the contracting authority insists, whereas the hourly worker's cost rate from Monday to Sunday for both bidders (appellant and the preferred bidder) were practically identical, the main difference between the two bidders' offer emerged from the Additional/Administrative Costs.

In terms of article 243 of SL 174.04, it is in the contracting authority's discretion to determine whether a bid is abnormally low or otherwise, in which case the contracting authority may seek clarifications and explanations from the bidders. The Board is not satisfied that the appellant has shown or proven that the contracting authority should or ought to have sought such clarification/explanations nor is it satisfied that there were reasons in fact and at law which should have driven the contracting authority in using its discretions differently. Nor is the Board satisfied that the contracting authority should have rejected the preferred bidder's bid in terms of article 243(5) of the mentioned subsidiary legislation. In any case, it is hereby highlighted that the appellant company failed to prove or submit any reasons for rejection in this respect, except for the allegation that the preferred bidder's bid was 40% less.

For these reasons this ground of appeal is being rejected.

The second ground of appeal, referred to by the appellant as a further ground to the primary one above discussed and dismissed, relates to the appellant's claim that the points deducted in regard to wages for the year 2023 were not being declared. The Board considers that the appellant failed to satisfactorily prove his ground of appeal, which was based on the premise that the appellant "*had grounds to believe*" and which in itself, already suggests that the appellant was not basing its ground of appeal on concrete proof and/or reasoning. This Board feels that the appellant was expected and was obliged to be specific as to what he was complaining about and not present a general objection with the possible intention of embarking on a fishing expedition.

The contracting authority, on the other hand, explained, to the satisfaction of the Board, that the marks lost by the preferred bidder in the technical section emerged from an 'Add On criteria' which is not mandatory, and hence of minimal importance as it is not deemed to prejudice the quality of the service to be operated.

Based on the above considerations, the second ground of appeal is thus also being rejected.

The Board,

Having evaluated all the above concludes and decides:

- a) To dismiss the appeal submitted by X Clean Limited, and
- b) To order that the deposit paid by the appellant upon filing of this appeal should not be refunded back to the same appellant.

Ian Spiteri Bailey
Chair

Dr Charles Cassar
Member

Lawrence Ancilleri
Member