

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1563 – CT2493/2020 – Tender for the Provision of Assessments of Various Collective Agreements to Pensioners and Assessment Services of New, Tentative and retrospective Claims received by MFCS (The Tender Procedure) Lot 1.**

24<sup>th</sup> May 2021

The Board,

Having noted the letter of objection filed by Dr Steve Decesare on behalf of Camilleri Preziosi Advocates acting for and on behalf of Pricewaterhouse Coopers, (hereinafter referred to as the appellant) filed on the 8<sup>th</sup> March 2021;

Having also noted the letter of reply filed by Dr Anita Giordimaina on behalf of Ministry for Social Justice and Solidarity, the Family and Children's Rights (hereinafter referred to as the Contracting Authority) filed on the 17<sup>th</sup> March 2021;

Having also noted the letter of reply filed by Dr Clement Mifsud Bonnici and Dr Calvin Calleja on behalf of Ganado Advocates acting for and on behalf of Pensions Consultancy Limited (hereinafter referred to as the Preferred Bidder) filed on the 18<sup>th</sup> March 2021;

Having noted and evaluated the minutes of the Board sittings of the 13<sup>th</sup> April 2021 and 20<sup>th</sup> May 2021 hereunder-reproduced;

#### **Minutes**

#### **Case 1563 – CT 2493/2020. Tender for the Provision of Assessments of Various Collective Agreements to Pensioners and Assessment of New, Tentative and Retrospective Claims Received.**

The tender was published on the 13<sup>th</sup> November 2020 and the closing date was the 22<sup>nd</sup> December 2020. The value of the tender for Lot 1 was € 360,000 (excluding VAT).

On the 8<sup>th</sup> March 2021 Pricewaterhouse Coopers (PwC) filed an appeal against the Ministry for Social Justice and Solidarity, the Family and Children's Rights (Ministry) as the Contracting Authority objecting to their disqualification on the grounds that their bid failed to satisfy the Best Price Quality Ratio (BPQR) award criteria.

A deposit of € 1,800 was paid.

There were three (3) bidders.

On 13<sup>th</sup> April 2021 the Public Contracts Review Board (PCRB) composed of Dr Ian Spiteri Bailey as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

**Appellant – Pricewaterhouse Coopers**

Dr Steve Decesare	Legal Representative
Mr Bernard Attard	Representative
Ms Katya Gatt	Representative

**Contracting Authority – Ministry for Social Justice and Solidarity, the Family and Children’s Rights**

Dr Anita Giordimaina	Legal Representative
Mr George Cremona	Member Evaluation Committee
Mr Mark Schembri	Member Evaluation Committee

**Preferred Bidder – Pensions Consultancy Ltd**

Dr Clement Mifsud Bonnici	Legal Representative
Dr Calvin Calleja	Legal Representative
Mr Gaetano Borg	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 then stated that his brother was a partner in one of the parties involved in this appeal and asked if the said parties found any objection to him hearing this case. After deliberation parties all agreed that they had no objection. The Chairman further said that in line with existing regulations and a Board decree it will not consider the submissions filed outside the statutory time limits which meant that Appellant’s written submission of 7<sup>th</sup> April 2021 will be excluded. He then invited verbal submissions.

Dr Steve Decesare Legal Representative for Pricewaterhouse Coopers dealt with the basis of the appeal which hinged on what the tender stated regarding the financial side. And particularly in:

- page 3 – “estimated procurement value.....is that of € 360,000”
- page 6 (5D) – “a financial offer calculated on the basis of ..... Grand Total”
- page 8 (6.2) – “the offer with the lowest price....”
- page 19 (3.1) – “All costs associated are included in the contract price”.

Further, article 16.4 of the General Rules Governing Tenders stipulates the method of evaluation of the tender and that the best financial offer must be awarded.

Dr Decesare went on to state that two clarifications have been issued and that these form part of the tender – however he does not accept the preferred bidder’s contention that the clarification stated that evaluation is to be assessed on an hourly basis as the second clarification requiring the bidder to submit a global price. The letter from the Contracting Authority informed PwC that their offer was not accepted and included a table showing the overall scores of all bidders. Since both Appellant and preferred bidder scored 100% on the technical score therefore the only reason why PwC was not granted the tender must have been due to the financial offer and which makes it obvious that the evaluation was based on the hourly rate not on the lowest price offer. In paragraph 4.3 of their letter of reply the Ministry concede that the tender stated that the financial offer is the contract price not the hourly rate. The preferred bidder did not give a total contract price but a price based on a

calculation of the hourly rate multiplied by a capped number of hours, as against a capped price. Appellant offered both an hourly rate and a global price and submits that the offers of the two other bidders are invalid as they did not quote a global price as requested in the tender.

According to Dr Decesare the preferred bidder claims that the failure on their part to quote a global price should on grounds of proportionality and lack of transparency not be a reason to set aside their offer. PwC could not know what the other bids were until the receipt of the rejection letter and therefore there is no case of lack of transparency. The evaluation could not have been carried out according to established regulations and to the tender requirements. Public Procurement Regulations in article 39 obliges the Authority to treat offers equally, transparently and proportionately and making their choice on that basis.

Appellant referred to the following PCRB cases as being relevant in regard to the financial offer:

- Case 1114 which set out that the obligation of self-limitation and includes the Contracting Authority in that obligation.
- Case 1410 which held that the Public Procurement regulations apply in all circumstances even if there is only one tenderer
- Case 788 where the price submitted erroneously included VAT but the Board decided to exclude nonetheless
- Case 1013 where it was held that the merit of a lower price offer does not alter the award criteria.

The various decisions in the above Cases support the claim that the financial offer had to be based on a total contract price – the lack of it in the other two bids should have led to their disqualification as they were evaluated solely on an hourly rate submission. Apart from the fact that the PwC offer was sixty thousand Euro cheaper the evaluation committee should not have made the assumption on hours offered, more so since it was based on the wrong concept. It also ignored the offer of software tools by PwC which would provide a more efficient service thus making the Committee's decision on the number of hours one of the bidders was offering totally out of order. Reference was made to PCRB Case 1290 and CJEU Case 415/2010, endorsed by Court of Appeal decision 8/16, that discretion must not override the tender terms and Case 1317 where the evaluation committee breached self-limitation by ignoring the terms of the tender. If one followed the above quoted opinions then it becomes clear that the evaluators acted *ultra vires* in their adjudication. PwC is bound by their offer of a fixed price and cannot claim more money or stop the service unlike the probable outcome once the capped hours of the alternative offer are exhausted.

Finally Dr Decesare referred to three cases in support of Appellant's claim:

- Case 893 – not up to the evaluation committee to question the price offered
- Case 898 – not in the Board's jurisdiction to delve into the question of price (decision upheld by the Court of Appeal)
- Case 910 – it is not the jurisdiction of the Board whether the bidder makes a profit or a loss.

Dr Anita Giordimaina Legal Representative for the Ministry for Social Justice and Solidarity, the Family and Children's Rights stated that she is generally relying on the written submissions to rebut Appellant's contentions. Clause 6.1 of the tender instructions makes it very clear that the evaluation would be carried out according to the outcome of the grid indicating rate per hour and no other

criteria will be used. The best value for money criterion had to consider both the hourly rate and the number of hours and the evaluation committee noted the difference in hours offered by bidders varying from 153 hours per week in one case to 32 hours in another. The offer of software was not included in the financial bid form and the evaluators could only take into account what was offered and did not undertake or work out any calculations as has been claimed – they merely considered the output of service. PwC claimed that the rate of the preferred bidder was abnormally low only when they realised how high their hourly rate was. It is a fact that the BPQR outcome is worked out automatically by the system and no calculations are carried out – the system is transparent in itself. The reference to paragraph 4.3 of the letter of reply, referred to by Appellant, makes it clear that the hourly rate is a component of the total contract price that reflects the hours allotted. The PCRB should confirm the Authority's decision.

Dr Clement Mifsud Bonnici Legal Representative for Pensions Consultancy Ltd said that he agreed with the starting point of Appellant regarding transparency, equal treatment and self-limitation but disagreed with his interpretation of the tender terms. The unit of measurement in the financial bid form was the hourly rate and that was the yardstick to be used, and this is confirmed also in the various clarifications. It is incorrect to appeal the evaluation decision on the basis of Clause 5D of the tender when the hourly rate was the yardstick. The financial bid form was set out in the style of a BOQ and one cannot just consider the grand total – the Board should look at it from this angle. As a clear indication that the hourly rate was the yardstick two out of three bidders used that in their offer. The evaluation committee indicated how they reached their conclusions as to the cheapest offer. Since the financial offer is a note 3 item no corrections or changes are allowed. Case 1114 was incorrectly used as a reference as this Case dealt with the changing of goal posts through changing of the BOQ, whilst in Case 1444 there was a discrepancy between the grand total and the bid form but it was correctly changed to reach the unit of measurement, and accepted. The suggestion to exclude bidders for submitting hourly rate offers is extreme and all PwC are trying to do is to eliminate competition.

Dr Mifsud Bonnici stated that that the financial offer is of less importance than the tender requirements and the evaluation process and as regards the abnormally low bid claim, one must first ask if the contract can be fulfilled and is it a case of one strong bidder trying to exclude others from the market? Reference was made to PCRB Case 1400 which dealt with a question of supply of a product at an extremely low price and in that instance the Board was not shy in considering if the offer was viable. The offer of software on such a short term contract as this is a smokescreen – the important point was the yardstick.

Dr Decesare made the point that the Contracting Authority was obliged to seek further information on what seems to be an abnormally low offer, but this appears not to have happened and the Board should take note of this. Three offers were received – in one case the hourly rate was given but the number of hours was capped whilst in another global total was not submitted; it is therefore clear that the three bidders understood the tender requirements differently. PwC clearly showed its intention from the design stage to completion of the tender process and it is not up to the preferred bidder to comment on the software costs – it is up to the economic operator to decide if they wish to make a profit or a loss on a contract. The calculation of prices was based not on some automatic formula but through a simple sum of dividing one figure by another. The EPPS does not determine price but simply publishes offers. Clarifications can sometimes change the tender terms.

Dr Mifsud Bonnici said that the Contracting Authority was perfectly in order to issue clarifications in line with Article 38 (4) of the PPR. It was emphasised several times that the yardstick for the evaluation was the hourly rate not the global price. The failure to include the global price by a bidder does not mean that there was a lack of transparency in the evaluation.

Dr Giordimaina stated that claiming that a bidder may not have wanted to make a profit on an offer is rather simplistic as everyone works for a profit. It must be borne in mind here that when one is dealing with public funds one must look for the most favourable offer which happens to be the one of the preferred bidder.

End of Minutes

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## **SECOND HEARING**

On the 20<sup>th</sup> May 2021 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a second public virtual hearing to discuss the Case further.

The attendance for this public hearing was as follows:

### **Appellant – Pricewaterhouse Coopers**

Dr Steve Decesare	Legal Representative
Mr Bernard Attard	Representative
Mr Nicolai Borg Sant	Representative

### **Contracting Authority – Ministry for Social Justice and Solidarity, the Family and Children’s Rights**

Dr Anita Giordimaina	Legal Representative
Ms Rita Calleja	Representative
Mr Edward Buttigieg	Chairperson Evaluation Committee
Mr Mark Schembri	Member Evaluation Committee

### **Preferred Bidder – Pensions Consultancy Ltd**

Dr Clement Mifsud Bonnici	Legal Representative
Dr Calvin Calleja	Legal Representative
Mr Gaetano Borg	Representative

Mr Kenneth Swain 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. He introduced himself and went on to explain that this second hearing was necessary due to a change of Chairman since the first hearing.

He requested the parties to confirm the submissions made at the first hearing to enable the Board to come to a decision in this Case.

All the parties signified their agreement to this procedure and confirmed the submissions made at the first hearing.

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

End of Minutes

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**Hereby resolves:**

The Board refers to the minutes of the Board sittings of the 13<sup>th</sup> April 2021 and 20<sup>th</sup> May 2021.

Having noted the objection filed by Pricewaterhouse Coopers (hereinafter referred to as the Appellant) on 8<sup>th</sup> March 2021, refers to the claims made by the same Appellant with regards to the tender of reference CT 2493/2020 listed as case No. 1563 in the records of the Public Contracts Review Board.

The Board is also noting that there was a ‘Reasoned Reply’ filed on 7<sup>th</sup> April 2021 by Dr Steve Decesare on behalf of Camilleri Preziosi Advocates acting for Pricewaterhouse Coopers with further submissions. In this respect the Board has received an application from Dr Clement Mifsud Bonnici on behalf of Ganado Advocates acting for Pensions Consultancy Limited for this reply to be deemed inadmissible. The Board upholds Dr Clement Mifsud Bonnici’s application and invites all interested parties to follow the procedures as set out in the Regulations. All parties within the hearing will still have their opportunity to submit their verbal submissions hence no party should feel aggrieved to not having the opportunity to a fair hearing. Written submissions, after the Objection Letter filed by the Appellant and Reasoned Letters filed by the Contracting Authority and Preferred Bidder, will not be accepted if they are outside the statutory dates specified in the Regulations. .

Appearing for the Appellant: Dr Steve Decesare

Appearing for the Contracting Authority: Dr Anita Giordimaina

Appearing for the Preferred Bidder: Dr Clement Mifsud Bonnici & Dr Calvin Calleja

Whereby, the Appellant contends that (*in summary*):

**a) Disqualification –**

- i. Firstly, the estimated value is listed as €360,000, with tenderers being “free to submit financial offers above or below this value”. The €360,000 figure, clearly, does not relate to an hourly rate for the services provided, but rather the estimated total price for all the services. Accordingly, a financial offer of €17 or €45 is evidently not correct.

- ii. Secondly, the financial offer is specified as one to be calculated on the basis of Delivered Duty Paid (Grand Total) for all the services rendered. The same provision specifies that in the case of any discrepancy between the information provided in the Financial Bid Form and the grand total in the Tender Response Format, the latter shall prevail.

***b) Most Economically Advantageous Tender***

- i. Firstly, the Tender Document expressly stated, in various parts, that the financial offer was the total contract value.
- ii. Secondly, the method adopted by the Contracting Authority fails to determine which offer was the most economically advantageous.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 17<sup>th</sup> March 2021 and its verbal submission during the virtual hearings held on 13<sup>th</sup> April 2021 and 20<sup>th</sup> May 2021, in that:

- a) ***Disqualificaiton*** – it is true that the Tender Document states that the financial offer for the Tender Procedure is the total contract price, not the hourly rate. The point is however that the hourly rate is a component of the total contract price that shall reflect the hours that shall be allotted to a particular task. The bid offered by the objector yielded far less working hours in terms of output than that of the recommended bidder.
- b) ***Most Economically Advantageous Tender*** – In determining which of the 3 bids was the most economically advantageous tender, the Evaluating Committee was of the opinion that it should evaluate the hourly rate and the resultant number of hours such rate would yield over the estimate total value of the tender.
- c) There is no discrepancy between the information provided in the Financial Bid Form and the grand total in the tender response form structure.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 18<sup>th</sup> March 2021 and its verbal submission during the virtual hearings held on 13<sup>th</sup> April 2021 and 20<sup>th</sup> May 2021, in that:

- a) ***Disqualification*** –
  - i. *Hourly rate in the financial bid form* – Appellant inadvertent omission of the clarification notes which constitute part of the Tender in-caption. In particular, Question 3 of the first clarification note “*that the fee to be offered should have been tendered as an hourly rate*”. And that clarificaiton notes are to be construed as an ‘integral part of the procurement document’.

- ii. *Clause 5(D) of Section 1 Instructions to Tenderers* – there is no discrepancy between information provided in the financial bid form and the grand total in the tender response format, but in any case even if there was a discrepancy “*the total [of the financial bid form] can be arithmetically worked out and/or corrected if, as, and when necessary/ applicable.*” Hence clause 5(D) does not apply to this Tender.
  - iii. *Disqualification is Disproportionate* – Appellant’s demand for disqualification is fundamentally incompatible with the general principles of public procurement *inter alia* the duty on contracting authorities to act proportionately.
- b) **Most Economically Advantageous Tender** – i) the Appellant has no intention to spend more than 32 hours per week on the performance of the 3 items comprising Lot 1 or ii) on the basis of the capping provided by the Recommended Bidder (being 135 hours per week), that the Appellant intended to drive down its hourly rate by a significant amount such that instead of having an hourly rate of €60 as indicated in the tendering bid, the Appellant would end up with an hourly rate of €14.15.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties, will consider Appellant’s grievances, as follows:

a) **Disqualification** –

With regards to the Appellant’s first grievance, the Board makes reference to the following points

- i. Clarification Note No. 1 dated 23<sup>rd</sup> November 2020 whereby in Question No 3. “*Financial Bid Form Lot 1 – Kindly clarify whether the fee based is per hr or per case.*” The reply of the Contracting Authority was “*Fee is based per hour.*”. Moreover, Regulation 38(5) states “*When issued in the clarification notes, the additional information and the supporting document shall form integral part of the procurement document.*”.
- ii. The Board opines that in this case there was no discrepancy and *Clause 5(D) of Section 1 Instructions to Tenderers* is not applicable since “*the total [of the financial bid form] can be arithmetically worked out and/or corrected if, as, and when necessary/ applicable.*”.

With regards to the Appellant’s first grievance, the Board does not uphold Appellant’s first grievance.

b) **Most Economically Advantageous Tender**

Here again, the Board makes reference to both Clarification Notes issued by the Contracting Authority whereby *'emphasis'* was given to the hourly rate. Therefore, the Board opines that the Evaluation Committee was right in its assessment of the BPQR mechanisms. the Board does not uphold Appellant's second grievance.

**In conclusion this Board opines that;**

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

- a) Does not uphold Appellant's Letter of Objection and contentions,
- b) Upholds the Contracting Authority's decision in the recommendation for the award of the tender,.
- c) Directs that the deposit paid by Appellant not to be reimbursed.

**Mr Kenneth Swain**  
**Chairman**

**Mr Lawrence Ancilleri**  
**Member**

**Mr Carmel Esposito**  
**Member**