

PUBLIC CONTRACTS REVIEW BOARD

Case 1617 – CT 3064/2020 – Tender for the Acquisition, Installation and Commissioning of the Spatial Lab enhancement Lot 2

11th August 2021

The Board,

Having noted the letter of objection filed by Dr Antoine Cremona, Dr Clement Mifsud Bonnici and Dr Calvin Calleja on behalf of Ganado Advocates acting for and on behalf of Joseph Cachia and Son Ltd, (hereinafter referred to as the appellant) filed on the 21st June 2021;

Having also noted the letter of reply filed by Dr Lara Attard acting for Ministry for Finance and Employment, the Director of Contracts and Planning Authority (hereinafter referred to as the Contracting Authority) filed on the 30th June 2021;

Having heard and evaluated the testimony of the witness Mr Keith Portelli (Chairperson of the Evaluation Committee) as summoned by Dr Lara Attard acting for Ministry for Finance and Employment, the Director of Contracts and Planning Authority.

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

Having noted and evaluated the minutes of the Board sitting of the 5th August 2021 hereunder-reproduced.

Minutes

Case 1617 – CT 3064/2020. Supply Tender for the Acquisition, Installation and Commissioning of the Spatial Lab Enhancement

The tender was published on the 29th January 2021 in two lots and the closing date was the 23rd March 2021. The value of the tender on Lot 2 was € 595,000.

On the 21st June 2021 Joseph Cachia and Son Ltd Ltd filed an appeal against the Planning Authority as the Contracting Authority in regard to Lot 2 on the grounds that their offer was deemed administratively non-compliant and on the subsequent cancellation of the tender.

A deposit of € 2,975 was paid.

There were two (2) bidders.

On 5th August 2021 the Public Contracts Review Board (PCRB) composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Dr Vincent Micallef as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellant – Joseph Cachia and Son Ltd

Dr Clement Mifsud Bonnici	Legal Representative
Dr Calvin Calleja	Legal Representative
Ms Daniela Sciberras	Representative
Ms Maronna Filletti	Representative

Contracting Authority – Planning Authority

Dr Lara Attard	Legal Representative
Mr Kevin Portelli	Chairperson Evaluation Committee
Mr Joseph Gauci	Member Evaluation Committee
Mr Omar Hili	Member Evaluation Committee
Mr Frank Farrugia	Member Evaluation Committee

Department of Contracts

Mr Nicholas Aquilina	Representative
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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 then asked Appellant’s representative to make his submissions.

At the start of the hearing Dr Lara Attard Representative for the Planning Authority requested the Board’s permission to call a witness.

Mr Keith Portelli (315174M) called as a witness by the Contracting Authority testified under oath that he was the Chairperson of the Evaluation Committee and stated that two offers on lot 2 had been received in regard to this tender. Appellant’s offer was not administratively compliant as it had not been submitted as a joint account between Joseph Cachia and Son (Cachia) and Microgeo Srl. A European Single Procurement Document (ESPD) form was not submitted by the latter firm but was required to ensure that there were no problems. The Contracting Authority had no option but to disqualify as it could not check if there were any issues.

Dr Clement Mifsud Bonnici Legal Representative for Joseph Cachia and Son Ltd said that the appeal revolves around the interpretation of the pooling agreement entered into between Cachia and Microgeo. The way it was interpreted by the Evaluation Committee goes against the principles of proportionality and self limitation as no joint agreement exists between these two parties – simply put, Microgeo had the knowledge and experience to meet the tender terms. The bid was rejected as the Authority expected an ESPD to be submitted when Microgeo was being solely used for their experience. The pooling agreement declares that Cachia intends to participate and therefore has legal standing and Microgeo is authorising Cachia to rely on their experience. It is surprising that the Authority instead of clarifying this point, if it was not clear, concluded that it was a joint venture agreement. The importance they give to the clause on joint and several liability is misplaced as that clause applies between the parties in the agreement and not to the Authority in regard to the bid.

Appellant's bid was cheaper but excluded by the Authority which whilst claiming that they have abided by the Public Procurement Regulations and the Rules Governing tenders have breached the principles of self limitation and proportionality.

Dr Attard said that the pooling agreement was contradictory. It stated that Microgeo is not to participate but it later states that it is assisting in the project. The Authority sought clarification on two points, one of which was regarding the relationship between Cachia and Microgeo as they did not understand what the relationship was and whose responsibility it was to deal with any problems arising. The Authority's interpretation is correct as this is a joint venture with the ESPD missing and which therefore does not give the full picture.

On the point of proportionality it was pointed out that prior to taking its decision the Authority approached Appellant for clarification – after that it was not feasible to keep seeking further clarifications; in the circumstances the action taken was proportionate as they could not deal with uncertain situations.

Dr Mifsud Bonnici rebutted these claims. The bidder is committed and if awarded the contract they are ready to sign in their own name. The pooling relationship with Microgeo clearly states that it is not a joint venture and there is no need for a joint ePPS account submission. The administrative part is the easiest part of the evaluation and Appellant cannot understand the reticence of the Authority to accept the points made.

Dr Attard reiterated that joint and several liability means that both parties are responsible and therefore there is a joint venture agreement.

Dr Mifsud Bonnici explained again that the joint and several liability is only between the parties in the pooling agreement and does not create a joint agreement with other parties.

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

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 5th August 2021.

Having noted the objection filed by Joseph Cachia and Son Ltd (hereinafter referred to as the Appellant) on 21st June 2021, refers to the claims made by the same Appellant with regards to the tender of reference CT 3064/2020 listed as case No. 1617 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Clement Mifsud Bonnici & Dr Calvin Calleja

Appearing for the Contracting Authority: Dr Lara Attard

Whereby, the Appellant contends that:

a) **Reasons which are wrong in fact and law** –

- i. The Contracting Authority provided that the Appellant's bid was non-compliant since "*the tender offer was submitted from the ePPS account of Joseph Cachia and Son Ltd and not a joint ePPS account*". From the reason provided in the Rejection Letter, it appears that the Contracting Authority erroneously construed the 'business relationship' between the Appellant and its principal to be one of 'joint venture, consortium, or association' when it is not. Presumably, and due to the misconstruction of the business relationship, the Contracting Authority invoked Article 9.3 of the General Rules Governing Tender.
- ii. The Pooling / Teaming Agreement, which was only submitted upon insistence by the Contracting Authority, does not provide for any joint venture, consortium or association between the parties, rather, it expressly excludes it.

b) **Proportionate manner** –

- i. The Appellant contends that the Contracting Authority has failed to act in a proportionate manner with respect to the Appellant and its bid as required not only by general principles as emerging from the EU treaties, Directive 2014/24 but specifically by Regulation 39(1) of the PPR.
- ii. Plainly put, the 'legitimate objective' of a competitive tender procedure is that Government gets the best value for money when purchasing services, works or supplies. Tender processes attempt to emulate real market conditions to attract bidders to submit their best offer financially and qualitatively. The emulation of real market conditions cannot be obtained if bidders are set aside expeditiously and without due process. Such reasons for rejection cannot 'exceed the limits of what is appropriate and necessary' to achieve competition for Government procurement needs.
- iii. The Contracting Authority went straight for the most onerous option.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 30th June 2021 and its verbal submission during the virtual hearing held on 5th August 2021, in that:

a) **Reasons which are wrong in fact and law** –

- i. The objecting company submitted a pooling agreement to prove that there is not the existence of a 'joint venture, consortium or association', as the objecting company was solely relying on the capacity of MICROGEO SRL as it had the 'suitable requisites and economic-financial and technical organisation capacity in the sector covered by the tender in particular it has Technical and Professional Ability.
- ii. The above mentioned scenario would theoretically fall within the remit of Article 2 of the General Rules Governing Tenders, however this is disproved by the pooling agreement itself, when it is declared that between the two entities there is a 'joint and several liability'.
- iii. In a contract, joint and several liability is the product of the common acceptance of the parties involved to undertake to fulfil the same obligations in the contract together but also to fulfil these obligations separately. Therefore the Appellant is not solely relying on the capacities of MICROGEO SRL, but has developed a partnership with the entity, which partnership falls within the scope of Article 9.3 of the General Rules Governing Tenders.

b) **Proportionate manner** –

- i. Prior to disqualifying the bid, the objecting company was given the opportunity to regulate itself. Therefore, it cannot be upheld that the Contracting Authority has opted to utilise the most onerous option straight away.
- ii. The necessity and the legitimate aim which explain the actions undertaken by the Contracting Authority are based upon the fact, that since the entities mentioned in the pooling agreement are to be considered as being joint and severally liable, they both should have: 1) Applied through the EPPS as a Joint Venture 2) Submitted separate ESPDs of the two companies for checking the eligibility criteria.
- iii. The above should be done so as to ensure that none of the bidders have partaken in any misconduct, that may ultimately be detrimental to the public interest.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties including the testimony of the witness duly summoned, will consider Appellant's grievances, as follows:

- a) The main point in contention in this case revolves around what is being referred to as the *'Pooling Agreement'*. A rectification request was put forward by the Evaluation Committee to the bidder, now Appellant, to indicate the business relationship that Joseph Cachia & Son Limited and Microgeo Srl have in this tender offer. The Appellant uploaded the *'Pooling Agreement'*, dated 22nd March 2021, entered into by Joseph Cachia & Son Limited and Microgeo Srl.
- b) In respect to this *'Pooling Agreement'*, this Board notes that:
 - i. There are various instances whereby it is being amply declared that there is no joint venture, consortium and / or association between the two parties to this agreement, whereby it is stated:
 - ii. *"Microgeo Srl does not intend to participate in the aforementioned tender and it will not participate in the same tender even indirectly through subsidiaries, parent companies or associates."*
 - iii. *"that between Microgeo Srl and Joseph Cachia & Son Limited there are no other links or forms of connection than those that are created as a result of the signing of this contract."*
 - iv. *"Microgeo Srl declares that it is not participating in the tender on his own or in association or in consortium, nor that it is in a situation of control with one of the other companies taking part in the tender"*
 - v. *"Microgeo Srl declares it undertakes not to enter into contracts of identical content as this with other operators in relation to this tender"*
 - vi. An element of ambiguity might be perceived in the *'Pooling Agreement'* where it is stated *"in consideration of the joint and several liability of Microgeo Srl, JCS (Joseph Cachia & Sons Ltd) undertakes in the event of actual award of the contract to allow Microgeo Srl to constantly check and monitor the progress of the service....."*
- c) When considering all the above points, this Board opines that the Evaluation Committee was in breach of the concepts of Self Limitation & Proportionality when it assessed this *'Pooling Agreement'* to constitute a Joint Venture agreement between Joseph Cachia & Son Limited and Microgeo Srl by just referring to point (b)(vi) above, without asking for clarifications after its upload by the Appellant company. This more so when 'Administrative Compliance' does not fall within the remits of 'Note 3' and more leeway is allowed to the Evaluation Committee in order to save a tender bid if through Clarifications and Rectifications, the bids can be assessed as compliant.

This Board upholds Appellant's grievances.

The Board,

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

- a) To uphold the Appellant's concerns and grievances;
- b) To cancel the Letter of Rejection dated 11th June 2021 sent to Joseph Cachia & Son Limited;
- c) To order the contracting authority to re-evaluate the bid submitted by Joseph Cachia & Son Limited in the tender through a newly constituted Evaluation Committee composed of members which were not involved in the original Evaluation Committee.
- d) After taking all due consideration of the circumstances and outcome of this Appeal directs that the deposit be refunded to the Appellant.

Mr Kenneth Swain
Chairman

Dr Charles Cassar
Member

Dr Vincent Micallef
Member