

PUBLIC CONTRACTS REVIEW BOARD

Case 1621 – CT 2135/2020 – Tender for Cleaning Services Using Environmentally Friendly Products at MIP Head Office Birkirkara and Safi Aviation Park - Lot 1

7th September 2021

The Board,

Having noted the letter of objection filed by Dr Gianluca Cappitta on behalf of Mifsud & Mifsud Advocates acting for and on behalf of General Cleaners Co Ltd, (hereinafter referred to as the appellant) filed on the 14th June 2021;

Having also noted the letter of reply filed by Dr Elian Scicluna on behalf of 8 Point Law acting for INDIS Malta Ltd (hereinafter referred to as the Contracting Authority) filed on the 12th August 2021;

Having also noted the letter of reply filed by Dr Lara Attard acting for Director of Contracts filed on the 13th August 2021;

Having heard and evaluated the testimony of the witness Mr Nicholas Aquilina (Assistant Director at the Department of Contracts) as summoned by the Public Contracts Review Board.

Having heard and evaluated the testimony of the witness Mr Jason Grech (Assistant Director at the Department of Contracts) as summoned by the Public Contracts Review Board.

Having heard and evaluated the testimony of the witness Mr Ramon Fenech (Works Manager for General Cleaners Co Ltd) as summoned by Dr Gianluca Cappitta acting for General Cleaners Co Ltd.

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 24th August 2021 hereunder-reproduced.

Minutes

Case 1621 – CT 2135/2020. Tender for Cleaning Services using Environmentally Friendly Products at MIP Head Office Birkirkara and Safi Aviation Park (LOT 1)

The tender was divided into Lot 1 and Lot 2.

The tender was published on the 18th June 2020 and the closing date was the 21st July 2020. The value of the tender excluding VAT on Lot 1 was € 149,074.80.

On the 11th June 2021 General Cleaners Co Ltd filed an appeal against Indis Malta Ltd as the Contracting Authority objecting to their disqualification on Lot 1 on the grounds that they had failed to submit an offer

A deposit of € 745 was paid.

There were eleven (11) bidders and thirteen (13) bids, on Lot 1.

On 24th August 2021 the Public Contracts Review Board (PCRB) composed of Mr Kenneth Swain 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:

Appellant – General Cleaners Co Ltd

Dr Gianluca Cappitta
Mr Ramon Fenech

Legal Representative
Representative

Contracting Authority – Indis Malta Ltd

Dr Elian Scicluna
Mr Keith Buttigieg

Legal Representative
Representative

Director of Contracts

Dr Lara Attard
Dr Christina Busuttil
Mr Nicholas Aquilina

Legal Representative
Legal Representative
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 noted that the appeals on Lot 1 and Lot 2 were identical on all points and he therefore intended to deal with both appeals together. However there was a preliminary plea which had to be dealt with and requested submissions on this point.

Dr Lara Attard Legal Representative for the Director of Contracts said that Appellant had no *locus standi* and the appeal was filed beyond the statutory time limit (*fuori termini*) and should not be considered by the Board. Appellant had not submitted a bid and hence did not have *locus standi* or indeed juridical interest. The Board would be setting a dangerous precedent if it considered the appeal as this could lead to hold-ups in tenders in the future. The dates of the objection spoke for themselves bearing in mind that the latest date to appeal was the 3rd May 2021.

Dr Gianluca Cappitta Legal Representative for General Cleaners Co Ltd said that the first plea of the appeal is precisely regarding the claim that no bid was made and he would be requesting evidence on this point. Appellant claims that up to the closure of the tender he had used the system correctly and only the final submission failed.

As regard the second plea the appeal was filed late precisely because the notice of award was only received once Appellant had made enquiries chasing the outcome of the bid.

At this stage the Chairman said that the Board wishes to hear the evidence of a representative of the Director of Contracts regarding the EPPS process when bids are submitted.

Dr Cappitta said that it is also necessary to hear the evidence of the Appellant.

Dr Attard said that this must be on the basis that no new submissions were introduced by the Appellant in his evidence.

Mr Nicholas Aquilina (109067M) called as a witness by the PCRB testified on oath that he is an Assistant Director at the Department of Contracts. He stated that he is not familiar with this particular case however the terms of a tender stipulate that it is the bidder's responsibility to upload bids in time.

Mr Jason Grech (185071M) called as a witness by the PCRB testified on oath that he is an Assistant Director in charge of Procurement at the Department of Contracts. He stated that the ePPS records all movements regarding the submission of tenders. In the case of the bid by the Appellant he appears to have prepared a draft of the offer but the final version was not submitted. There were several attempts made by Appellant to activate the ePPS - on the 13th and 14th July 2020 enquiries were made by General Cleaners on the tender stage; on the 14th July three documents were downloaded with further downloads on the 16th and 17th July. The economic operator on the 22nd July queried why his submission did not appear on the screenshot and was informed that all submitted offers appeared on the screen. It is only the bidder that can check if an offer was submitted and it is not possible that a successful submission does not appear on the ePPS since if there is an issue with the system it is holistic and it affects all offers. Appellant did not even attempt to submit an offer.

Mr Ramon Fenech (489683M) called as a witness by Appellant testified on oath that he is the Works Manager for General Cleaners Co Ltd and was responsible for the submission of tenders very frequently. He outlined the process he followed in preparing this tender culminating in submitting the final bid on 17th July 2020. No acknowledgement was received and on the 22nd July through an e-mail he contacted the Department of Contracts querying why his firm's name did not appear on the list of participants. He was then informed that no submission had been received but he was not requested to provide data from his computer. He was also in touch with the Contracting Authority. He was advised on the 1st June that an award had been made.

Questioned by Dr Elian Scicluna Legal Representative for Indis Malta Ltd witness stated that he had no confirmation that his bid had been uploaded and that he entered his appeal in June.

In reply to questions from Dr Attard witness stated that he had not checked the schedule of results which was available to everyone to pursue. He confirmed that on the 22nd July 2020 he started querying why his firm's name did not appear on the list and also that he was aware that the appeal had a May deadline, although he did not check this information on a daily basis. He confirmed that he did not take any action till a year later.

At this stage the Chairman said that the Board had enough information to be able to reach a conclusion on this preliminary plea. He thanked the parties for their submissions and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 24th August 2021.

Having noted the objection filed by General Cleaners Co Ltd (hereinafter referred to as the Appellant) on 14th June 2021, refers to the claims made by the same Appellant with regards to the tender of reference CT 2135 / 2020 – Lot 1 listed as case No. 1621 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Gainluca Cappitta

Appearing for the Contracting Authority: Dr Elian Scicluna

Appearing for Department of Contracts: Dr Lara Attard

Whereby, the Department of Contracts' preliminary plea is based on the following:

- a) **Locus Standi and Juridical Interest –**
 - i. the objecting company is requesting the opportunity to appeal the award of the tender CT 2135/2020. However, the objecting company has failed to clearly outline upon which Articles of the regulation the claim is based upon.
 - ii. The objecting company lacks locus standi and thus it has no juridical interest in the procurement procedure in question. The juridical interest test is failed on the basis that the objecting company is not itself a bidder as it did not submit a bid.
- b) **The Inadmissibility of the Appeal –**
 - i. The appeal is inadmissible because it was submitted *fuori termine*.
 - ii. The objecting company has failed to submit an objection within the prescribed prescriptive period outlined within the Public Procurement Regulations (“PPR”).
 - iii. The tender was awarded on the 22nd of May 2021. However, the recommendation attachment was issued on the 23rd April 2021. Such recommendation attachment was available to the public and the public was duly notified that during the session held on Thursday, 25 March 2021, the General Contracts Committee made the recommendation for a preferred bidder. Within this recommendation attachment, it was announced that any objection to the decision listed above must reach the Public Contracts Review Board by not later than the 3rd May 2021.

This Board, after hearing submissions made by the Department of Contracts', Appellant's and Contracting Authority's legal representatives, opines that the issue that merits immediate attention is whether the appeal was filed according to the PPR S.L. 601.03.

a) **Appeal filed 'fuori termini' -**

Regulation 271 of the PPR clearly states that:

"the objection shall be filed within ten calendar days following the date on which the contracting authority of the authority responsible for the tendering process has by fax or other electronic means sent its proposed award decision or the rejection of a tender or the cancellation of the call for tenders after the lapse of the publication period."

This Board notes that the Contract Award Notice was issued on the 22nd May 2021. This also *ex admis*is by Appellant. Hence the letter of objection dated 4th June 2021 and filed at PCRB on 14th June 2021 is considered to be *fuori termine* by this Board. Moreover, since no bid was submitted, the Appellant is deemed to have no *locus standi*.

b) **The Inadmissibility of the Appeal –**

This Board opines that the General Rules Governing Tenders V4.1 are very clear in stating in Rule 9.4 that:

"Prospective tenderers take full responsibility to submit their electronic tender response (offer) well before the tender submission deadline in order to avoid last minute upload restrictions. Tender offers must be fully uploaded/ accepted by the ePPS prior to the deadline for submission of offers, that is, tenders in transit upon tender submission deadline will be rejected."

The Appellant company did not provide any proof that it has received any form of acknowledgement from the ePPS system declaring that tender bid has been successfully uploaded or otherwise.

It is also noted that:

- The Appellant company, as testified under oath by Mr Ramon Fenech, contacted the Department of Contracts in writing, only after the closing date of bids for the tender.
- It was stated under oath by Mr Jason Grech that: i) the witness did not even attempt to submit an offer and ii) it is not possible that a successful submission does not appear on the ePPS since if there is an issue with the system it is holistic and it affects all offers.

Hence this Board upholds the Preliminary pleas of the Department of Contracts

The Board,

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

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member