

PUBLIC CONTRACTS REVIEW BOARD

Case 1622 – VLC/01/2021 – Cleaning of Unattended Public Conveniences in Victoria, Gozo Using Environmentally Friendly Products

20th September 2021

The Board,

Having noted the letter of objection filed by Mr Jeffrey Farrugia acting for and on behalf of Be Clean Ltd, (hereinafter referred to as the appellant) filed on the 7th May 2021;

Having also noted the letter of reply filed by Dr Larry Formosa and Dr Anna Sultana acting for Victoria Local Council (hereinafter referred to as the Contracting Authority) filed on the 14th May 2021;

Having also noted the letter of reply filed by Dr Jonathan Mintoff acting for Mr Jason Farrugia (hereinafter referred to as the Preferred Bidder) filed on the 12th May 2021;

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 9th September 2021 hereunder-reproduced;

Minutes

Case 1622 – VLC/01/2021. Tender for Cleaning of Unattended Public Conveniences in Victoria, Gozo using Environmentally Friendly Products

The tender was published on the 9th February 2021 and the closing date was the 8th March 2021. The value of the tender excluding VAT was € 117,000.

On the 7th May 2021 Be Clean Ltd filed an appeal against Victoria Local Council as the Contracting Authority objecting to their disqualification on the grounds that they had failed to satisfy the BPQR criteria.

A deposit of € 400 was paid.

There were five (5) bidders.

On 9th September 2021 the Public Contracts Review Board (PCRB) composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Mr Richard Matrenza as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellant – Be Clean Ltd

Dr Mario Scerri
Mr Jeffrey Farrugia

Legal Representative
Representative

Contracting Authority – Victoria Local Council

Dr Larry Formosa

Legal Representative

Preferred Bidder – Mr Jason Farrugia

Dr Jonathan Mintoff

Legal 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. There were preliminary pleas which had to be dealt with and he requested submissions on these point.

Dr Jonathan Mintoff Legal Representative for Mr Jason Farrugia said that the first preliminary plea concerned the incorrect deposit paid on appeal. Both article 32 and article 273 of the Public Procurement Regulations (PPRs) state that the deposit must be paid on the total contract value and thus the €400 paid by Appellant was below the required figure of € 585. Reference was made to the Karta Converters Case where the Court of Appeal held that it was the responsibility of the bidders to regulate themselves in accordance with the legal requirements. Reference was also made to the Munxar Local Council Case with regard to the responsibility of ensuring that the correct deposit was paid. On this basis alone the appeal should not be heard.

The second preliminary plea concerns the appeal by Be Clean Ltd which gives no reasons for their complaint but merely asks for clarification on certain points. This is purely a fishing expedition and is not justified.

Dr Mario Scerri Legal Representative for Be Clean Ltd stated that the amount of the deposit was dependent on the offer made. A bidder expected the Contracting Authority to advise the correct amount required – in this case this was stated as € 400.

As regard the plea that this is a fishing expedition Appellant maintains that there is no fixed format for an appeal which was prepared by a lay person and legal involvement only happened at a later stage. The appeal is based on the suspicion that the preferred bidder does not have the necessary number of employees to fulfil the contract or to adhere to health and safety requirements.

Dr Larry Formosa Legal Representative for the Victoria Local Council said that the deposit was based on the offer for one year and was therefore correct. The appeal as filed was correct and its merits should be considered by the Board.

After a short recess the Chairman said that the Board had deliberated on the preliminary pleas made and was of the view that the value of the contract as shown in the tender was the determining factor on the payment of the deposit. The Board would again recommend that Appellants should follow what the PPRs state when determining the amount of deposits. On the second pleas the Board notes that this was a BPQR based evaluation and the cheapest price was therefore not the awarding criterion. Again the Board encouraged Appellants to submit appeal letters in line with Regulations.

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

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 9th September 2021.

Having noted the objection filed by Be Clean Ltd (hereinafter referred to as the Appellant) on 7th May 2021, refers to the claims made by the same Appellant with regards to the tender of reference VLC/01/2021 listed as case No. 1622 in the records of the Public Contracts Review Board.

Appearing for the Appellant:	Dr Mario Scerri
Appearing for the Contracting Authority:	Dr Larry Formosa
Appearing for Preferred Bidder:	Dr Jonathan Mintoff

Whereby, the Preferred Bidder's preliminary pleas are based on the following:

a) **Deposit –**

- i. The said tender is for a three-year period (i.e. the whole tender), thus, the annual estimated procurement value shall be multiplied by 3, thus, amounting to one hundred and seventeen thousand Euro (€117,000), this, as per standard practice. Therefore, the deposit should be that of five hundred and eighty-five Euro (€585) and not that of Eur400.
- ii. However, the objection lodged by the appellant on the 7th May 2021, is only accompanied by a deposit of four hundred Eur (€400.00). This, in breach of Regulation 273 of the Public Procurement Regulations.

b) **Reasons/Grievances of the Objector –**

- i. The PPR also regulates the manner in which an objection should be filed, and the formal requirements / contents for a valid objection. Regulation 270 states “..... *may file an appeal by means of an objection before the Public Contracts Review Board, which shall contain in a very clear manner the reasons for their complaints.*”
- ii. However, the objection filed by the objector leaves much to be desired, particularly by stating the following: “... *we are kindly asking the Public Contracts Review Board to clarify our company doubts mainly on the individual being awarded such bid...*”

- iii. The objection is a fishing expedition cloaked under a generic appeal / objection based on presumption or a doubt about the preferred bidder. Thus, the objector did not provide any proof as to why the Contracting Authority's decision to award the contract to the Preferred Bidder should be reviewed.

This Board, after hearing submissions made by the Preferred Bidder's, Appellant's and Contracting Authority's legal representatives, will consider the Preliminary Pleas as follows:

a) **Deposit –**

- i. This Board opines that regulation 273 of the Public Procurement Regulations (PPR) is very clear when it states *“The objection shall only be valid if accompanied by a deposit equivalent to 0.50 per cent of the estimated value set by the contracting authority of the **whole tender**.....”*.
- ii. In this particular case, Section 1 of the Tender Dossier, paragraph 1.2 states *“..... the time-limits for the execution of the contract shall be one year, extendable yearly up to a maximum of 3 (three) years but not exceeding end of 2023...”*. Hence, even though the initial period of the contract shall be of one year, it is extendable by a further two years, bringing the potential “whole tender” as mentioned in regulation 273 of the PPR to three years.
- iii. Section 1 of the Tender Dossier, paragraph 1.3 states “€39,000 excluding VAT per annum”.
- iv. Hence this Board is of the opinion that the total Estimated Procurement Value is set at €117,000. This would bring the deposit value to be paid on appeal as per regulation 273 of the PPR to €585.
- v. The Contracting Authority did state in its letter informing bidders, that if they wish to appeal, a deposit of €400 was to be lodged. This Board, however, has on numerous occasions advised that “Contracting Authorities should refrain from making misleading statements but should strictly indicate what the law states, the appellant company should have always adhered with the provisions of the law, irrespective of such misleading statements”. (PCRB Case 1557).

This Board upholds this preliminary plea of the Preferred Bidder.

b) **Reasons/Grievances of the Objector –**

- i. This Board refers to regulation 270 of the PPR, which states *“..... may file an appeal by means of an objection before the Public Contracts Review Board, which shall contain in a very clear manner the reasons for their complaints.”*
- ii. It is being noted that the Appellant provided no proof and no argument to substantiate the “company doubts” as per his Objection Letter dated 6th May 2021. What the Appellant is requesting, in essence, is for the PCRB to re-do the evaluation already done by the

Evaluation Committee. The argument that the Objection Letter has been drafted by a lay person is no reason for it not to adhere to the Laws of Malta.

- iii. Finally, it is also being noted that Award Criterion in this specific tender, is the BPQR, hence even though the cheapest technically compliant financial bid will be awarded maximum points in the financial evaluation, it does not necessarily mean that the award will be going to that bidder with the cheapest financial offer.

This Board upholds this preliminary plea of the Preferred Bidder.

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

Mr Lawrence Ancilleri
Member

Mr Richard Matrenza
Member