

PUBLIC CONTRACTS REVIEW BOARD

Case 1653 – CT 2263/2019 – Tender for the Supply, Delivery, Installation, Testing and Commissioning of Various Laboratory Furniture, produced with Environmentally Friendly Materials and Processes, for the Department of Metallurgy and Materials Engineering, at the University of Malta

14th January 2022

The Board,

Having noted the letter of objection filed by Dr Clement Mifsud Bonnici and Dr Calvin Calleja on behalf of Ganado Advocates acting for and on behalf of Evolve Limited, (hereinafter referred to as the appellant) filed on the 10th September 2021;

Having also noted the letter of reply filed by Dr Carlos Bugeja on behalf of Prolegal Advocates acting for and on behalf of University of Malta (hereinafter referred to as the Contracting Authority) filed on the 28th September 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 16th November 2021 hereunder-reproduced;

Minutes

Case 1653–CT 2263/2019. Tender for the Supply, Delivery, Installation, Testing and Commissioning of Various Laboratory Furniture, Produced with Environmentally Friendly Materials and Processes, for the Department of Metallurgy and Materials Engineering, at the University of Malta

The tender was published on the 24th June 2020 and the closing date was the 25th August 2020. The value of the tender excluding VAT was €485,879.62

On the 10th September 2021 Evolve Ltd filed an appeal against the University of Malta as the Contracting Authority objecting to their disqualification on the grounds that their bid was deemed to be technically not compliant.

A deposit of € 2,429.40 was paid.

There were four (4) bidders.

On 16th November 2021 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Dr Vincent Micallef as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Evolve Ltd

Dr Clement Mifsud Bonnici	Legal Representative
Mr Miguel Pellegrini Petit	Representative
Mr John Montanaro	Representative
Mr Zach Muscat	Representative

Contracting Authority – University of Malta

Dr Carlos Bugeja	Legal Representative
Dr Jurgen Micallef	Legal Representative
Mr Elton Baldacchino	Secretary Evaluation Committee
Ms Carolina Sofia	Member Evaluation Committee

Preferred Bidder – Al-Nibras for Science and Technology Ltd

Mr Roderick Abela	Representative
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Department of Contracts

Dr Kristina Busuttil	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. Prior to inviting submissions he said that there was an application to expunge the letter of reply from the Contracting Authority which had been filed outside the statutory time limit. This was agreed to by the Board.

Dr Clement Mifsud Bonnici Legal Representative for Evolve Ltd started by requesting that total confidentiality was maintained on the contents in the submissions of Appellant's bid.

He went on to state that this was an exceptional case as proportionality was difficult to prove. Appellant's offer should be considered since the reason for rejection was due to a small error i.e. using a wrong name for an item of furniture. Instead of rejecting the offer the Evaluation Committee should have gone a step further and the PCRБ oversight of the award guarantees that in accepting this appeal they will not prejudice any other party. Applying the principle of proportionality ensures fairness in accepting the cheapest offer. In Court of Appeal case 362/2014/1 (Cassar Petroleum vs Gozo Channel) paragraph 15 it was held that the objective of a tender is to obtain the cheapest price in considering the proportionality conflict between two parts of a bid and according to paragraph 16 the bidder was given the opportunity to insert a new document which might have been overlooked.

Examining the technical literature and the financial bid form it is clear that there was a clerical error – instead of seeking to clarify this, the Authority chose disqualification when there was no change in the bid as the price offered was clear in the financial bid. In Court of Appeal Case 237/2021/1 the technical compliance form was missing and bidder was not allowed to gain an advantage by providing new information – in this instance no changes are requested and procurement principles have not been infringed. CJEU Cases C599/10, C131/16 and C 523/16 generally confirm decisions that correction of

a tender where appropriate is allowed if it does not lead to a change in the tender. In this Case no rectification or alteration is sought.

Dr Carlos Bugeja Legal Representative for the University of Malta said that there is a difference between the technical offer and the financial bid and hence the reason for rejection. The Authority had to practice self limitation in their evaluation and Appellant was now requesting a change in PCRБ procedures.

Dr Jurgen Micallef Legal Representative for the University of Malta stated that the point at issue came under Note 3 so the evaluators could not make assumptions. This was not a case of missing but of incorrect information and the principle of equal treatment could not be ignored.

Dr Mifsud Bonnici said that if one considers the claims made by the Authority that equated to ignoring the principle of proportionality. In PCRБ Case 1432 an obvious mistake made in the stated measurements led to the Board confirming that this was a clear clerical error – in this instance there are no assumptions as the financial bid is clear.

Mr Roderick Abela Representative for the preferred bidder said that on previous tender the bidder was eliminated as it inserted an extra figure in their offer. This appeal comes under Note 3 and is therefore not rectifiable.

The Chairman 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 16th November 2021.

Having noted the objection filed by Evolve Limited (hereinafter referred to as the Appellant) on 10th September 2021, refers to the claims made by the same Appellant with regards to the tender of reference CT 2263/2019 as case No. 1653 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Clement Mifsud Bonnici

Appearing for the Contracting Authority: Dr Carlos Bugeja & Dr Jurgen Micallef

The Board refers to the 'Reasoned Reply' filed on 28th September 2021 by Dr Carlos Bugeja acting for Prolegal Advocates with further submissions. In this respect the Board has received an application from Dr Clement Mifsud Bonnici on behalf of Ganado Advocates acting for Evolve 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, in this specific case Regulation

276(c). 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.

Whereby, the Appellant contends that:

- a) On 31 August 2021, the Appellant was informed by means of a letter from DoC that its offer was found to be technically not compliant. The Rejection Letter stated that the reasons for technical non-compliance were the following: *“Reference is made to Item 18 which requested a Mobile Under Bench lockable 4-drawer unit - 500mm width’ as per Article 4.6.4 of the Technical Specifications and the prospective bidder offered a ‘Safety Cabinet - FWF 90 make DÜPERTHAL’ which has nothing to do with what was requested. Since the Technical Form falls under Note 3, permitting ‘NO RECTIFICATIONS’ this offer was deemed technically non-compliant and cannot be assessed any further.”* The Rejection Letter further explained that the Tender was being awarded to a recommended bidder whose financial offer was €90,000 more expensive.
The Appellant submits that the reason for technical non-compliance was an obvious clerical error made in the compilation of the Technical Form where the product quoted for Items 16 and 17 should have been quoted for Item 18, but, by way of an oversight, a "cabinet" was quoted instead of the “underbench unit”
- b) The Appellant's objection is based on DoC's and the Contracting Authority's failure to act proportionately in the evaluation of its bid Regulation 39(1) of the PPR clearly stipulates that *‘contracting authorities [...] shall act in a transparent and proportionate manner’*. The principle of proportionality requires that measures adopted by contracting authorities, including those adopted during the evaluation process, do not exceed the limits of what is appropriate and necessary in order to achieve the objectives pursued and that when there exists a choice between several appropriate measures, recourse must be had to the least onerous one.
- c) DoC and the Contracting Authority had at least two "choices" when dealing with the patently obvious clerical error made by the Appellant in the compilation of the Technical Form: The first and most proportionate choice, would have been to request the Appellant to clarify whether it wished to indicate "Safety Cabinet - FWF 90 make DÜPERTHAL" under Item 18 of the Technical Form or whether it wished to indicate "Waldner underbench unit movable (steel, powder-coated)" instead- which was already indicated for Items 16 and 17. The second and most onerous choice was the disqualification of the Appellant's offer on the basis of the alleged technical non-compliance.
- d) DoC and the Contracting Authority went for the latter choice and this constitutes a breach of the duty to act proportionately for the following reasons:
 - i. The Appellant had already offered "Waldner underbench unit movable (steel, powder-coated)" for Items 16 and 17, and therefore, it would not have changed the offer in any

substantial or material way-whether from a technical or financial perspective. Therefore, this could have never resulted in a "rectification" prohibited by Note 3.

- ii. The Appellant's oversight in the compilation of the Technical Form is patently an "obvious clerical error" from the fact that Items 16, 17 and then 18 were listed consecutively.
- iii. The Waldner underbench unit movable (steel, powder-coated) offered in Items 16 and 17 satisfies the technical specifications for Item 18.
- iv. In the Financial Bid Form, the unit price quoted for Item 18 was the same as that for Item 16 and 17. The Appellant submits that this is conclusive evidence that the suggested request for clarification would not have changed in any material way the financial offer of the Appellant and that, therefore, the mention of the "cabinet" instead of a "underbench unit" was an obvious clerical error. The Appellant refers to the price quoted by the Appellant under items 2.27, 2.28, 2.29, 2.30, 4.06, 4.07, 12.05, 12.06 of the Financial Form, which are all the same, and which all refer to "Mobile Under Bench" in line with technical specifications 4.6.3, 4.6.4.
- v. DoC and the Contracting Authority implicitly recognised that this was a clerical error, in particular, when it states that "Safety Cabinet - FWF 90 make DÜPERTHAL' which has nothing to do with what was requested.
- vi. The "objective pursued" by the Tender was the selection of the cheapest bid, and therefore, the evaluation committee when it rejected the Appellant's bid, it exceeded the limits of what is appropriate and necessary to achieve the objective of the Tender and rather it bound itself to choose a bid which was €90,000 more expensive

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties, will now consider Appellant's grievances.

The Board notes and refers to:

- a) Court of Appeal case 362/2014/1 Cassar Petroleum Services Limited vs Gozo Channel Limited u d-Direttur General tad-Dipartiment tal-Kuntratti whereby it was held that:

“Għalkemm din is-silta hija dwar legiżlazzjoni, tgħodd ukoll għal miżuri ta’ implimentazzjoni u decizjonijiet mehuda tahtom. Din il-gorti għalhekk tagħraf illi għandha qabel xejn tara x’inhu l-għan ewlieni tas-sejba għal offerti għax ma dan għandha tkejjel il-proporzjonalità tal-miżuri mehuda biex jinkiseb. Fil-każ tallum l-għan ewlieni kien illi Gozo Channel tixtri n-nafta bl-orhos press.

Ma humiex sejrin jinkisru l-principju tat-trattament ugwali, il-principju ta bla diskriminazzjoni, il-principju ta għarfien reciproku u l-principju tat-trasparenza jekk, bla ma jinbidlu l-kondizzjonijiet tal-offerta nfisha, jingħata

zmien biex jingieb document illi, forsi bi zvjista, ma tqegbidu mad-dokumenti tal-offerta, waqt li certament ma jkunx qiegħed jithares il-principju tal-proporzjonalita jekk offerta vantagguza tigi mwarra għax ma ngiebu document li għad jista jingieb.”

- b) Criteria for Award as per Tender Dossier Section 1 paragraph 6.1 is *“The sole award criterion will be the price. The contract will be awarded to the tenderer submitting the cheapest priced offer satisfying the administrative and technical criteria.”*

Therefore, the Board opines that when considering the main issue at hand, it is essential that the Criteria for Award is duly kept in mind.

Consequently, what needs to be considered is whether the Contracting Authority would have acted diligently / proportionately or otherwise would it have went for the option of a clarification on item 18.

The Board opines, that should the Contracting Authority have opted for such an approach, in this specific case, it would not have constituted a new offer by the Appellant. This is an obvious case of a ‘genuine human error’

Finally 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 ‘Notice of Award’ letter dated 31st August 2021;
- c) To cancel the Letters of Rejection dated 31st August 2021 sent to Evolve Limited;
- d) To order the contracting authority to re-evaluate and reintegrate the bid received from Evolve Limited in the tender through a newly constituted Evaluation Committee composed of members which were not involved in the original Evaluation Committee, whilst also taking into consideration this Board’s findings;
- e) after taking all due consideration of the circumstances and outcome of this Letter of Objection, directs that the deposit be refunded to the Appellant.

Mr Kenneth Swain
Chairman

Dr Charles Cassar
Member

Dr Vincent Micallef
Member