

PUBLIC CONTRACTS REVIEW BOARD

Case 1652 – SPD2/2021/031 – Tender for Cleaning Services at the Correctional Services Agency

7th January 2022

The Board,

Having noted the letter of objection filed by Dr Jonathan Mintoff and Dr Larry Formosa acting for and on behalf of Mr Alistair Bezzina, (hereinafter referred to as the appellant) filed on the 2nd August 2021;

Having also noted the letter of reply filed by Dr Mario Mifsud acting for the Correctional Services Agency (hereinafter referred to as the Contracting Authority) filed on the 10th August 2021;

Having heard and evaluated the testimony of the witness Dr Kathleen Xerri (Senior Legal Council at the Office of the Information and Data Protection Commissioner) as summoned by Dr Jonathan Mintoff acting for Mr Alistair Bezzina;

Having heard and evaluated the testimony of the witness Ms Doreen Seracino as summoned by Dr Christian Camilleri acting for Correctional Services Agency;

Having heard and evaluated the testimony of the witness Mr Randolph Spiteri (Chairperson of the Evaluation Committee) as summoned by Dr Christian Camilleri acting for Correctional Services Agency;

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 11th November 2021 hereunder-reproduced;

Minutes

Case 1652–SPD2/2021/31. Tender for Cleaning Services at the Correctional Services Agency

The tender was published on the 23rd April 2021 and the closing date was the 14th May 2021. The value of the tender excluding VAT was €92,415

On the 30th August 2021 Mr Alistair Bezzina filed an appeal against the Correctional Services Agency as the Contracting Authority objecting to his disqualification on the grounds that his bid was deemed to be technically non-compliant.

A deposit of € 462 was paid.

There was eleven (11) bidders.

On 11th November 2021 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri 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 – Mr Alistair Bezzina

Dr Jonathan Mintoff	Legal Representative
Mr Alistair Bezzina	Representative

Contracting Authority – Correctional Services Agency

Dr Christian Camilleri	Legal Representative
Mr Randolph Spiteri	Chairperson Evaluation Committee
Mr Silvio Farrugia	Member Evaluation Committee
Mr Keith Darmanin	Member Evaluation Committee
Mr Dylan Grima	Member Evaluation Committee
Mr Alan Falzon	Member Evaluation Committee
Ms Doreen Seracino	Representative
Mr Charles Lia	Representative

Preferred Bidder – Apex Community Services Ltd

Ms Pamela Mizzi	Representative
Ms Stephanie Bonello	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 then invited submissions.

Dr Jonathan Mintoff Legal Representative for Mr Alistair Bezzina claimed that he had not received the requested score allocation sheet from the Contracting Authority following a request made to the PCRB.

The Chairman pointed out that having looked at Dr Mintoff's request it transpires that such request was erroneously directed to the PCRB. According to PPR 242 (2) this should have been sent to the Contracting Authority. Under the circumstances the Board will hear the Case on its merits.

Dr Mintoff requested that witnesses be heard first.

Dr Kathleen Xerri (186289M) called as a witness by the Appellant testified on oath that she is Senior Legal Council at the Office of the Information and Data Protection Commissioner. She stated that displaying the name and surname on a name tag could lead to identification of an individual. The Commission suggests that as least details as possible should be used but would accept just a name. There was no legal basis to give details if individuals were not meeting public.

In reply to a question from Dr Christian Camilleri Legal Representative for the Correctional Services Agency witness stated that she was not aware of the tender details or where the name tags would be used.

Ms Doreen Seracino (237768M) called as a witness by the Contracting Authority testified on oath that bidders, successful or otherwise, were notified of the award outcome with an indication of points awarded to the successful bidder. No further requests had been received for any other information. Appellant had been disqualified on three points – firstly he offered shorts when the tender requested long trousers. Due to the nature of the Agency and Health and Safety (H&S) ramifications long trousers were essential; this point was actually acknowledged by Appellant himself in his H & S policy statement and was a mandatory point in the tender.

The H&S Policy submitted had points deducted as it provided information that was not suitable for the location the tender referred to and was not specific to the Agency. As to the name tags, for security reason it was essential to have name tags which bidder failed to provide a sample of, even with the name blanked out.

Questioned by Dr Mintoff witness stated that the Evaluation Committee felt that the H&S statement did not supply sufficient information. Appellant had not indicated even what type of name tag he was offering; their use was regulated by the Agency. In witness' view public officers did not require a specific qualification to judge on H&S issues.

Mr Randolph Spiteri (192173M) called as a witness by the Authority testified on oath that he is the Operations Administrator at the Agency and was the Chairperson of the Evaluation Committee. He testified that the Agency required long trousers as part of the uniform as that was the code at work at the Agency. Whilst bidder was not failed on the point of the name tags it was still a fact that these were required for maximum security whilst the H&S report submitted was vague and general in context and did not refer specifically to the requirements of the Agency.

This concluded the testimonies.

Dr Mintoff stated that Clause 1.4 of the Standard Operating Instructions on Tenders specifies that members of evaluation committees have to have competence on the subject matter of the tender. Witness does not tick this box as he was not qualified in H&S matters. As regard the name tags the tender did not give the option of providing a blank tag and bidders should not be expected to provide something that was not stated or is not legal, besides working with prisoners made divulging names a sensitive matter. Whilst it is accepted that the summer uniform offered shorts it was clear that trousers were available in the winter uniform. PCRB Case 1650 dealt precisely with points on the details of uniforms – so why did the Authority not seek clarification or use the principle of proportionality. The tender should be re-evaluated by a different committee.

Dr Camilleri said that if the competence of the Evaluation Committee was being doubted the objection should have been raised prior to tendering – it was not even raised in the appeal. In PCRB Case 1646 the competence of the evaluators was not considered as sufficient to lead to a cancellation of the tender. Clarifications were not allowed as this came under Note 3. The bidder did not state that long trousers were also available with the summer uniform but simply offered shorts and the Authority were bound by self limitation rules. On the H&S aspect the Authority requested 200 words applicable to the particular location where the work would be taking place – most points offered had no validity to the tender and were not specific or applicable; hence points were deducted in line with what the submission merited. The tender offer did not request a particular name on a tag but it was made clear that it was compulsory.

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 11th November 2021.

Having noted the objection filed by Mr Alistair Bezzina (hereinafter referred to as the Appellant) on 2nd August 2021, refers to the claims made by the same Appellant with regards to the tender of reference SPD2/2021/031 as case No. 1652 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Jonathan Mintoff & Dr Larry Formosa

Appearing for the Contracting Authority: Dr Mario Mifsud

Whereby, the Appellant contends that:

a) **The Mandatory Criteria:**

That the Objector's bid was deemed non-compliant on two basis;

- i. B5(a) criteria was not met since according to the Contracting Authority the shorts submitted were not acceptable and no image of trousers was submitted;
- ii. C 2(viii) criteria was not met since according to the Contracting Authority the Health and Safety Resources - Report outlining the resources to be provided was not provided in full.

That this conclusion is completely unfounded and this for the following reasons:

- i. the Objector did in fact submit an image of the trousers. Although this has been submitted under the sub-heading "Winter" this is to be found in the same document submitted and is intended to show and prove that the Objector will provide the trousers to his employees during the course of the contract. The Objector has submitted an additional item, i.e. the shorts. This was an additional submission which gives the contracting authority more options than actually requested.
- ii. The Health and Safety Resources report was in fact submitted and it is evident that the Contracting Authority failed to take cognisance of its contents.

Without prejudice to the above, should it result that any of the submitted documentation was not clear, the evaluation board should have sought the relevant information/ clarification from the Objector, this within the parameters of Clause 5 (note 3) of the Tender Document.

In this case, by virtue of Clause 5 - Note 3 it establishes how for certain lack of clarity, the contracting authority shall retain (i.e. 'save') a seemingly unclear submittal by requesting a clarification -and not a rectification- of the content of the tender.

In this case, the Contracting Authority and/or Evaluation Committee did not even seek an Evaluation Clarification from the Objector regarding such matter and frivolously rejected the objector's offer, when the Contracting Authority and/ or Evaluation Committee could have requested this information and obtained a better financial result.

b) **Name Tag:**

For clause B5(B) - an add on criteria -, the tender requested from bidders, *“to provide visual/ image/ photo of Tag to be worn by cleaner/ s (including name and surname of cleaner and company logo) as per Terms of Reference Article 8.4. (Add on)”*

For this add-on criteria, the evaluation committee did not award points to the objector, because he did not provide an image of the name tag. On this point, the objector refers to another case heard before this Honourable Board [Case 1526], whereby on a similar matter, a witness [Dr. Kathleen Xerri LL.D] from the Office of the Information Data Protection Commissioner (IDPC), was called to testify before this Honourable Board. In the quoted case, the witness confirmed that the name and surname of an employee on a name tag, is considered as personally identifiable information / personal data -in line with domestic and EU data protection legislation-, and it is the current practice to give minimal information regarding employees. Moreover, one of the fundamental principles of the data protection legislation (i.e the GDPR), is that of data minimisation.

The data minimisation principle [i.e. Article 5(1) (c) of the GDPR] states:

“1. Personal data shall be: (c) adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed (data minimisation)”

This Board also noted the Contracting Authority’s Reasoned Letter of Reply filed on 10th August 2021 and its verbal submission during the virtual hearing held on 11th November 2021, in that:

a) **The Mandatory Criteria**

- i. Firstly, the objector bid was deemed non-compliant as it failed to pass mandatory criteria therefore although as the objector claims being the cheapest on the basis of the “Best Price Quality Ratio- BPQR”, Mr. Alistair Bezzina failed to pass the technical/ mandatory

requisites and thus the Contracting Authority could not proceed to the financial evaluation.

- ii. Secondly, the objector bid was deemed non-compliant as it failed the mandatory Criteria B5(a) was not met since according to the Contracting Authority the shorts submitted was not acceptable as it was specified that for summer the uniform consists of shorts only. That this is definitely not acceptable since a trousers was specifically requested for both summer and winter uniform. That in addition, a shorts goes against the health and safety policies.
 - iii. The objector bid was deemed non-compliant as it failed another mandatory Criteria C2(viii). This criteria was not met since the Contracting Authority specifically requested a write-up of approximately 200 words outlining the Health and Safety resources whilst the objector submitted a report which although was voluminous it failed to show what the objector will specifically provide. However, the contracting authority still awarded 3 points out of 5 points.
 - iv. The contracting authority points out that when it comes to mandatory criteria there is no place for ratification. This is in accordance with the evaluation procedure being objective and fair amongst all tenderers.
- b) **Name Tag:** The objector bid failed to pass the Add-On criteria when it comes to name tags criteria B5(b). The Contracting Authority requested a visual/image/photo of Tag to be worn by cleaner's (including name and surname of cleaner and company logo) as per Terms of Reference 8.4 which the objector bid failed to submit completely in the application without reason. In his objection letter the objector is claiming that he did not submit the tag because of data protection however this is not a valid excuse since the contracting authority only requested a sample tag not an actual one.

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 witnesses duly summoned, will consider Appellant's grievances, as follows:

- a) **Criterion B5(a)** – This criterion was specific when it stated “*Summer: T-Shirt/polo shirt including company name/logo, dark colour trousers and non-slip footwear.*” The Board notes that:
 - i. This criterion is listed as ‘*Mandatory criteria*’
 - ii. The Appellant, in its offer for the summer uniform, provided an image of shorts rather than trousers

- iii. It was only in the winter uniform whereby trousers were listed by the Appellant.
- iv. PCRB case 1650, as argued by the Appellant during their final submissions, is deemed irrelevant to this specific case, as in that case there was not an issue between summer / winter uniforms. The appellant had listed black shoes, rather than ‘nonslip black shoes’ but also within its bid it had listed *‘Any personal protective equipment (PPE) which may be required throughout the entire contract duration.’*
- v. In this specific case, in a non-ambiguous manner, the Contracting Authority requested ‘trousers’ for the summer uniform, while the Appellant is offering ‘shorts’. The ‘trousers’ are only listed in the specific winter uniform section.
- vi. If the Contracting Authority would have approached the Appellant with regards to this issue, this Board opines that this would have led to a rectification, which was not allowed under Note 3, and a breach of the Self Limitation concept would also be evident.

Therefore, this Board does not uphold this grievance of the Appellant.

b) **Criterion C2(viii)** – With regards to this grievance, the Board notes that:

- i. The Appellant was not awarded the full points which were possible in the sub section of the evaluation grid.
- ii. The award criterion for this tender was the BPQR (Best Price Quality Ratio)
- iii. As stated on numerous occasions by this Board, in the BPQR method of evaluation, the Evaluation Committee is to be ‘afforded’ an element of *‘leeway’* in the way it proceeds with its business of evaluation. It is after all their main responsibility for such an appointment in this respective committee. This element of *‘leeway’* needs to be exercised *“...in a professional, detailed and meticulous manner and always within the remit of the Public Procurement Regulations and the specific Tender document in question.”* (PCRB Case Ref: 1577) *“Hence the Evaluation Committee still must proceed with the appropriate diligence in full cognisance of its rights, powers, duties and obligations.”* (PCRB Case Ref: 1583)
- iv. The argument brought forward by the Appellant that the witness is not qualified in Health & Safety matters is deemed irrelevant since witness stated under oath that he is responsible for the operations of the Contracting Authority. This Board opines that such responsibilities, when keeping in mind the type of facility run by the Contracting Authority, that health & safety issues are part and parcel of the daily operations and ran high on the agenda of such officers.
- v. In this regard, the Board opines that no specific evidence has been brought forward to show the contrary.

The Board does not uphold this grievance of the Appellant.

- c) **Name Tag** – With regards to this grievance, the Board notes that:
- i. The Appellant did not provide a ‘name tag’ as requested by criteria B5(b) of the Tender Dossier
 - ii. Even though in his letter of reply, the Appellant raises issues relating to the data protection of such a request, no request for clarifications was sent by the Appellant during the tendering stage and neither a Call For Remedies under Regulation 262 of the PPR was applied for.
 - iii. The ‘Name Tag’ was requested by Contracting Authority due to the sensitiveness of the location where the service is to be provided. This as confirmed by Mr Randolph Spiteri under oath.
 - iv. The testimony under oath of Dr Kathleen Xerri confirmed that even though less information (on the name tag) would be ideal, requesting a name and surname would not automatically deem this request illegal but the Data Commissioner would need to analyse on a case-by-case basis. She also confirmed that she was not aware of the specific tender details or where the name tags would be used.

The Board does not uphold this grievance of the Appellant.

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

Dr Vincent Micallef
Member