

PUBLIC CONTRACTS REVIEW BOARD

Case 1675 – MIP/TQF/GGX/D0066/20 – Tender for the Provision of General Cleaning Services at the Gozo Innovation Hub Xewkija 2nd Call

19th January 2022

The Board,

Having noted the letter of objection filed by Dr Gianluca Cappitta acting for and on behalf of General Cleaners Co. Ltd, (hereinafter referred to as the appellant) filed on the 29th October 2021;

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

Having also noted the letter of reply filed by Dr Jonathan Mintoff acting for Sultech & Co (hereinafter referred to as the Preferred Bidder) filed on the 8th November 2021;

Having heard and evaluated the testimony of the witness Mr Keith Buttigieg (Chairman of Evaluation Committee) as summoned by Dr Jonathan Mintoff acting for Sultech & Co;

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 18th January 2022 hereunder-reproduced;

Minutes

Case 1675 – MIP/TQF/GGX/D006/20 – Tender for the Provision of General Cleaning Services at the Gozo Innovation Hub Xewkija (2nd Call)

The tender was issued on the 18th March 2021 and the closing date was the 14th April 2021. The value of the tender, excluding VAT, was € 109,806.

On the 29th October 2021 General Cleaners Co Ltd filed an appeal against INDIS Malta as the Contracting Authority objecting to their disqualification on the grounds that their bid was considered to be technically not compliant.

A deposit of € 549.03 was paid.

There were five (5) bidders.

On the 18th January 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – General Cleaners Co Ltd

Dr Gianluca Cappitta

Legal Representative

Contracting Authority – INDIS Malta

Dr Elian Scicluna

Legal Representative

Mr Keith Buttigieg

Chairperson Evaluation Committee

Ms Janella Camilleri

Secretary Evaluation Committee

Mr Brian Gatt

Member Evaluation Committee

Ms Chantelle Vassllo

Member Evaluation Committee

Ms Antoinette Catania

Member Evaluation Committee

Preferred Bidder – Sultech & Co

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. He then stated that Dr Mintoff on behalf of the preferred bidder had raised a preliminary point on which the Board will hear submissions.

Dr Jonathan Mintoff Legal Representative for Sultech & Co requested that witnesses be heard first.

Mr Keith Buttigieg (8879M) called as a witness by the preferred bidder testified on oath that he was the Chairperson of the Evaluation Committee. He stated that the budget figure of € 109,806 stated in the tender was for a period of twelve months. The equivalent rate for a fourteen month period would have been € 128,107.

Dr Mintoff referred to the decision in PCRB Case 1622 which on the same point decided that PPR 278 applies and that the deposit must be based on the whole tender value including extensions, renewals etc. The tender budget value is based on twelve months but should have been based on 14 months. The point has been made in the past that the Contracting Authority should not state the amount of deposit but simply advise appellants to follow the law. A CJEU case held that the onus to adhere to the letter of the law rests with the objector who was expected to be well-informed and diligent.

Dr Gianluca Cappitta Legal Representative for General Cleaners Co Ltd said that in cases heard in the Appeal Court the amount of deposit required is advised- similarly in this case Appellant deposited the amount requested. The 14 month period is not stated in the tender and the real value of the tender is as stated and the tender might or might not run for fourteen months; what is certain is the period of twelve months – the rest is optional. It is unjust that

the objector should suffer due to the wrong information being given and it would be an equitable remedy for that objector to be given the chance to correct the misguided information supplied.

Dr Elian Scicluna Legal Representative for INDIS Malta said that the guaranteed period of the tender was clearly twelve months.

The Chairman proposed a short recess to enable the Board to consider the points raised. On resumption he stated that the Board would be deferring the hearing a will decide on the validity of the preliminary plea raised in due course.

There being no further submissions the Chairman declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 18th January 2022.

Having noted the objection filed by General Cleaners Co. Ltd (hereinafter referred to as the Appellant) on 29th October 2021, refers to the claims made by the same Appellant with regards to the tender of reference MIP/TQF/GGX/D006/20 listed as case No. 1675 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Gianluca Cappitta

Appearing for the Contracting Authority: Dr Elian Scicluna

Appearing for Preferred Bidder: Dr Jonathan Mintoff

Whereby, the Preferred Bidder's preliminary plea is based on the following:

- a) **The Estimated Procurement Value, Deposit and Validity of the objection –**
 - i. Procurement Calls are preceded by meticulous and comprehensive research, which comprise of a detailed financial exercise establishing a realistic Estimated Procurement Value (including a breakdown of all relevant costings) based on current market prices. Thus, when a Contracting Authority calculates the Estimated Contract Value, it must do so in line with the above, whilst observing Regulation 28(1) of the PPR. Regulation 28(1) reads as follows:-

“The calculation of the estimated value of a procurement procedure shall be based on the total amount payable, net of VAT, as estimated by the contracting authority, including any form of option and any renewals of the contracts as explicitly set out in the procurement documents”

This implies that the estimated value shall also include the value (net of VAT) of any extension/renewal.

- ii. Section 1, clause 1.2 of the Tender Document reads as follows:-

“The place of acceptance of the service shall be The Innovation Hub, at Xewkija Industrial Estate, Gozo, the time-limits for the execution of the contract shall be twelve (12) months with a possible extension of two (2) months from the commencement order which shall be issued within two (2) weeks from the signing of the contract, and the INCOTERM2010 applicable shall be Delivery Duty Paid (DDP).”

So, the estimated value of a procurement should be that for fourteen (14) months.

- iii. Reference is also made to Section 1, clause 1.3 of the Tender Document which reads as follows:-

“The Estimated Procurement Value for this Call for Tenders has been based on comprehensive research including appropriate financial analysis. In the context of this procurement, the Estimated Procurement Value, based on market research, is that of €109,806.00 excluding VAT”

- iv. However, the above-quoted budget does not reflect the law and the spirit of the law i.e. Regulation 28(1) PPR. The reason being that the standard template issued by the Director of Contracts for Call for Tenders below Threshold, require that the value indicated in Section 1, Clause 1.3 shall not to include the Potential Cost [i.e. that of renewals].

- v. For this case, it is critical to refer to the Manual of Procedures [page 37] issued by the same Director which also replicates the PPR, i.e, that “The calculation of the estimated value of a procurement procedure shall be based on the total amount payable, net of VAT, as estimated by the Contracting Authority, including any form of option and any renewals of the contracts as explicitly set out in the procurement documents.”

- vi. In view of the above, the estimated value of a procurement in line with Regulation 28(1) of the PPR covering fourteen (14) months is that of €128,107 exc. VAT (and not €109,806.00 exc VAT].

- vii. The crux of the issue, is regulation 273 of the PPR. The PPR regulates and establishes the formal requirements for the validity of an objection lodged, including the deposit that shall be accompanied with every objection. Regulation 273 reads as follows:-

“273. 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 or if the tender is divided into lots according to the estimated value of the tender set by the contracting authority for each lot submitted by the tenderer, provided that in no case shall the deposit be less than four hundred euro (€400) or more than fifty thousand euro (€50,000) which maybe refunded as the Public Contracts Review Board may decide in its decision.”

The said tender caters for a total of fourteen (14) months (i.e. the whole tender), thus, the estimated procurement value as outlined above should be that of at least €128,107, this, as per standard practice. Therefore, the deposit that should have been paid by the Objector ought to be of six hundred and forty Euro and fifty-four cents (€640.54) and not of five hundred and forty-nine Euro and three cents (€549.03).

This Board, after hearing submissions made by the Preferred Bidder's, Appellant's and Contracting Authority's legal representatives including the testimony of the witness duly summoned, will now consider the Preferred Bidder's Preliminary Plea.

- a) Reference is made to the following:
 - i. Regulation 28(1) of the Public Procurement Regulations S.L. 601.03 ("PPR") which states: *"The calculation of the estimated value of a procurement procedure shall be based on the total amount payable, net of VAT, as estimated by the contracting authority, including any form of option and any renewals of the contracts as explicitly set out in the procurement documents"*.
 - ii. The Tender Dossier whereby in paragraph 1.2 of Section 1 states: *"The place of acceptance of the service shall be The Innovation Hub, at Xenkija Industrial Estate, Gozo, the time-limits for the execution of the contract shall be **twelve (12) months with a possible extension of two (2) months** from the commencement order....."* (Bold & underline emphasis added)
 - iii. The Tender Dossier whereby in paragraph 1.3 of Section 1 states: *"The Estimated Procurement Value for this Call for Tenders..... based on market research, is that of €109,806.00 excluding VAT"*
 - iv. The testimony under oath of Mr Keith Buttigieg, Chairman of the Evaluation Committee whereby he stated that the *"budget figure of €109,806 stated in the tender was for a period of twelve months. The equivalent rate for a fourteen-month period would have been € 128,107. **The budget figure of €109,806 stated in the tender was for a period of twelve months.** The equivalent rate for a fourteen-month period would have been €128,107."* (Bold & underline emphasis added)
 - v. Regulation 273 of the PPR whereby: *"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....."*
 - vi. The Rejection Letter dated 19th October 2021 sent to the Appellant company whereby the Contracting Authority advised General Cleaners Co. Ltd that in order to file an appeal, a deposit of €549.03 has to be included / settled.
- b) At this point, this Board opines that what the PPR require is self-explanatory, i.e. the 0.50 per cent should be calculated on the estimated value set by the contracting authority of the whole tender. The whole tender, in this case, is to be taken as the 14 (fourteen) months, i.e. the initial twelve (12) months with the possible extension of two (2) months. This in order to conform to regulation 28(1) of the PPR.

- c) Therefore, the Contracting Authority was wrong in stating that the deposit to be lodged should amount to €549.03, but should have amounted to €640.54.
- d) The Board now refers to PCRB Case 1557 whereby it was stated *“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”*. The Board opines that this case / preliminary plea is similar in nature and the same argument is to be observed.
- e) Moreover, as stated in *Karta Converters Ltd vs Dipartiment tal-Kuntratti*, decided on 27th May 2015, it was stated *“Ma jistax illum is-soġjeta appellant tisserjana dan l-iżball fatali tagħha għaliex kien jispetta lilha li tottempra ruħha mad-dettami tas-sejba bħala a reasonably well informed and normally diligent tenderer.”*

Therefore, this Board upholds the Preferred Bidder’s preliminary plea. However, it will again remark to the Contracting Authority that the ‘Rejection Letters’ sent out to tender participants who would not have been awarded the tender, ought to be drafted with much more care and diligence especially when stating facts and / or interpreting specific regulations of the law. The Contracting Authorities are to be seen as a ‘tool’ in order to achieve the objectives of Public Procurement Process, two of which are the achievement of transparency in the whole procurement process and the achievement of a level playing field between all prospective bidders. Such misleading statements as were made in this case certainly do not aid in attaining these objectives.

The Board,

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

- a) Upholds the Preliminary Plea as submitted by the Preferred Bidder,
- b) Directs that the objection lodged by the Appellant as not valid,
- c) Upholds the Contracting Authority’s decision in the recommendation for the award of the tender,
- d) Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Mr Lawrence Ancilleri
Member

Dr Charles Cassar
Member