

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1684 – MFED746/2021 – Open Call/Negotiated Procedure for the Provision of Cleaning Services in State Schools and Educational Facilities (including Summer) in Malta and Gozo using Environmental Friendly Products**

**1<sup>st</sup> March 2022**

The Board,

Having noted the Call for Remedies filed by Dr Elian Scicluna on behalf of 8 Law acting for and on behalf of E.C Municipals Limited, (hereinafter referred to as the appellant) filed on the 3<sup>rd</sup> December 2021;

Having also noted the letter of reply filed by Dr Simon Cachia acting for Ministry for Education (hereinafter referred to as the Contracting Authority) filed on the 14<sup>th</sup> December 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 22<sup>nd</sup> February 2022 hereunder-reproduced.

#### **Minutes**

#### **Case 1684 – MFED746/2021 – Open Call/ Negotiated Procedure for the Provision of Cleaning Services in State Schools and Educational Facilities (including Summer) in Malta and Gozo using Environmentally Friendly Products.**

#### **Remedy before Closing Date of a Call for Competition**

The tender was issued on the 26<sup>th</sup> November 2021 and the closing date was the 6<sup>th</sup> December extended to the 20<sup>th</sup> December 2021. The value of the tender on Lot 11, excluding VAT, was € 197,413.33

On the 3<sup>rd</sup> December 2021 E.C. Municipals Ltd filed an application for a remedy before the closing date of a call for competition against the Ministry for Education as the Contracting Authority claiming that the Regulations 262 (1)(a) of the Public Procurement Regulations had not been followed.

A deposit of € 987.07 was paid.

On the 22<sup>nd</sup> February 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Ms Stephanie Scicluna Laiviera and Mr Richard Matrenza as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

## **Appellant – E.C. Municipals Ltd**

Dr Marcien Vassallo

Legal Representative

## **Contracting Authority – Ministry for Education**

Dr Simon Cachia

Legal Representative

Dr Kristina Busuttil

Legal Representative

Mr Anthony Cachia

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. It was also noted that the Board will only consider the appeal in regard to Lot 11 based on the deposit paid. He then invited submissions.

Dr Marcien Vassallo Legal Representative for E.C. Municipals Ltd confirmed that the appeal was based solely on Lot 11. Appellant was aggrieved that the time of only ten days allowed for submissions was too short on a tender which requested such detailed requirements. Further the call was not published on the ePPS but only on the Ministry's website. Since the award was based on the BPQR system further time was required to assess the submissions diligently. A similar tender issued for the same service to be provided over three years allowed a much longer period of four weeks for submissions. The extension for submissions was only agreed after the offer had been submitted. The claim by the Contracting Authority that the call was issued under Regulation 154 of the PPR is erroneous since once the call was published in the Government Gazette it must be considered as a call under Regulation 262. Appellant has in fact filed a prohibitive injunction in the Courts claiming that Regulation 262 was applicable in this case.

Dr Simon Cachia Legal Representative for the Ministry for Education said that the issue was whether this was an open call or a negotiated procedure without publication. If one referred to the published call then it is obvious that it was issued under regulation 154. This is what was requested from the Department of Contracts and what was accordingly approved by that Department. The title of the call makes it clear that it was a negotiated procedure and hence the requirements of Regulation 262 are irrelevant. In good faith the Ministry opened the call to encourage competition and it cannot be accused of not allowing participation.

Without prejudice to the rest of the submissions, said Dr Cachia, the claim that not enough time was allowed for submissions is incorrect as a time of ten days was sufficient to enable the submission on one lot to be completed. Regarding the injunction the Court was not the right channel to contest the procedure and the matter was referred to the PCRB leading to the Appellant withdrawing the injunction.

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

## End of Minutes

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### Hereby resolves:

The Board refers to the minutes of the Board sitting of the 22<sup>nd</sup> February 2022.

Having noted the objection filed by E.C Municipals Limited (hereinafter referred to as the Appellant) on 3<sup>rd</sup> December 2021, refers to the claims made by the same Appellant with regard to the tender of reference MFED746/2021 listed as case No. 1684 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Marcien Vassallo

Appearing for the Contracting Authority: Dr Simon Cachia

Whereby, the Appellant contends that:

- a) Regulation 262(1)(a) S.L. 601.03 –
  - i. this regulation grants prospective candidates the possibility to appeal if certain clauses are impossible to be met. More specifically, this appeal, revolves around the 10 days that is allowed for bids to be submitted. The publication process was not as per normal procedures, i.e. publication on the ePPS platform. For some reason the publication was done on the Ministry for Education website. This led to time-wasted from the end of the Appellant.
  - ii. As per regulation 116 when the value exceeds €5,350,000 (in this case it is more than €9,000,000), the Contracting Authority needs to provide at least thirty five days for bids to be submitted from the date of publication. In this case the CA only provided ten days and did not publish the on the portal of the European Union.
- b) Regulation 262(1)(b) S.L. 601.03 –
  - i. The procedure that should be followed is that the tender should be published on the ePPS, the portal for eprocurement. In this case, the publication was only done on the Ministry for Education website. Even more so, the prospective bid could not be submitted online but is to be submitted in a ‘tendering box’
  - ii. Irrespective if this procedure is an ‘open call/negotiated procedure’, it still had to make use of the ePPS platform.

- c) Regulation 262(1)(e) S.L. 601.03 –
- i. The first 2 grievances constitute unlawful behaviour from the part of the Contracting Authority *vis a vis* Public Procurement Regulations, hence in accordance with Regulation 262(1)(e) this procedure is to be cancelled.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 14<sup>th</sup> December 2021 and its verbal submission during the virtual hearing held on 22<sup>nd</sup> February 2022, in that:

- a) On 22<sup>nd</sup> November 2021, the Contracting Authority requested the approval of the Department of Contracts as per Regulation 154(1)(c) for the procedure to be a 'Negotiated Procedure without Prior Publication'. However, the Contracting Authority did not request approval to negotiate with specific operators but wanted all those interested to have the opportunity to participate.
- b) On 23<sup>rd</sup> November 2021, this request was acceded to.
- c) It is also being stated that, this procedure, apart from being published on the Ministry of Education website, was also published in the Government Gazette. In this publication, the term of ten days for submission of bids was extended to 20<sup>th</sup> December 2021.
- d) In reference to the Objection Letter, the Appellant is declaring *"Dan l-appell qiegħed isir b'riferenza għal-lot numru 11 iżda l-aggravji li ser jigu sollevati huma applikabbli għal-lots kollha u għas-sejba in generali"*. Hence the appellant is declaring that their juridical interest rests solely on Lot 11.
- e) This is a 'Negotiated Procedure' in terms of Regulation 150 and 154 of the PPR and not an Open Call, hence the Regulations referred to by the Appellant do not apply.
- f) Regulation 262(1)(a) S.L. 601.03 – in relation to this grievance it is Regulation 154(1)(c) that takes 'precedence' on the time limits and not regulation 116 as stated by the appellant. Therefore, the Contracting Authority was not limited to the thirty-five days term.
- g) Regulation 262(1)(b) S.L. 601.03 – As already stated this is a Negotiated Procedure in accordance with Regulation 154(1)(c) and hence regulations 150 and 154 apply. Nowhere in these regulations it is stated that publications are to be done on the ePPS. On the contrary, these are regulations for a 'Negotiated Procedure without Prior Publication'.
- h) Regulation 262(1)(e) S.L. 601.03 – this grievance is based on the other 2 grievances. The Contracting Authority did in fact follow procedure in terms of the law. Hence this grievance should also be rejected.

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

- a) The Board considers that the main issue to be analysed and decided upon is whether this procedure falls within the remits of an 'open call' or a 'negotiated procedure without publication'. This for various reasons, with the main ones being:
  - i. whether the regulations listed in the letter of appeal, i.e. 262(1)(a), 262(1)(b) and 262(1)(c) are relevant or otherwise to this appeal and
  - ii. Whether the time limits of regulation 116 (1) apply or otherwise
- b) This Board immediately notes that the Contracting Authority obtained an approval from the Department of Contracts, dated 23<sup>rd</sup> November 2021 to conduct a negotiated procedure in terms of Regulation 154 (c) of the Public Procurement Regulations.
- c) Regulation 154 (c) deals with matters of 'extreme urgency'. Therefore the time limits of thirty five days referred to by the Appellant, are superseded by regulation 116(5) which drastically reduces this term.
- d) Being a Negotiated Procedure without Publication, there is no obligation on the Contracting Authority to publish such a call on the ePPS.

Hence, this Board does not uphold Appellant's grievances.

**The Board,**

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

- a) Does not uphold Appellant's contentions regarding the call for Remedies.
- b) Directs that the deposit paid by Appellant not to be reimbursed.

**Mr Kenneth Swain**  
Chairman

**Ms Stephanie Scicluna Laiviera**  
Member

**Mr Richard Matrenza**  
Member