

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1702 – CT 2175/2021 ( Re-Issue CT2521/2020) – Tender in Lots, for the Provision of Cleaning Services using Environmentally Friendly Cleaning Products, to Heritage Malta Sites and Museums - Lot 1**

**11<sup>th</sup> April 2022**

The Board,

Having noted the letter of objection filed by Dr Gianluca Cappitta and Dr Paul Radmilli on behalf of Mifsud & Mifsud Advocates acting for and on behalf of General Cleaners Co. Ltd, (hereinafter referred to as the appellant) filed on the 14<sup>th</sup> January 2022;

Having also noted the letter of reply filed by Dr Alessandro Lia on behalf of Lia & Aquilina Advocates acting for and on behalf of Heritage Malta (hereinafter referred to as the Contracting Authority) filed on the 24<sup>th</sup> January 2022;

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by the legal representatives of the parties;

Having noted and evaluated the minutes of the Board sitting of the 24<sup>th</sup> March 2022 hereunder-reproduced;

#### **Minutes**

#### **Case 1702 – CT 2175/2021 – Tender, in Lots, for the Provision of Cleaning Services using Environmentally Friendly Cleaning Products to Heritage Malta Sites and Museums**

#### **Lot 1**

The tender was issued on the 27<sup>th</sup> May 2021 and the closing date was the 1<sup>st</sup> July 2021. The value of the tender, on this Lot, excluding VAT, was € 495,188.68.

On the 14<sup>th</sup> January 2022 General Cleaners Co Ltd filed an appeal against Heritage Malta as the Contracting Authority objecting to their disqualification on the grounds that their offer was deemed not to be best placed under BPQR criteria.

A deposit of € 2,476 was paid on this Lot.

There were ten (10) bidders.

On the 24<sup>th</sup> March 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman Mr Lawrence Ancilleri and Ms Stephanie Scicluna Laiviera 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 – Heritage Malta**

Dr Alessandro Lia

Legal Representative

Mr Vince Pulis

Chairperson Evaluation Board

Ms Lindsay Farrugia

Member Evaluation Board

Mr Mark Mizzi

Representative

**Recommended Bidder – Apex Community Services Ltd**

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 reminding the parties to limit their contentions in view of the many points raised in the appeal.

Dr Gianluca Cappitta Legal Representative for General Cleaners Co Ltd said that the appeal letter was fully detailed on Appellant's grievances and so was the letter of reply so he will deal with his submissions on a limited basis. On the grievance regarding the Collective Agreement, Appellant did have such an agreement registered – however the Department of Industrial and Employment Relations (DIER) did not issue confirmations of the registration.

Dr Alessandro Lia Legal Representative for Heritage Malta said this point could easily be clarified by having a member of the Tender Evaluation Committee (TEC) testify if other bidders had submitted such certification or confirmation.

The Chairman said that the Board will proceed with hearing the case and on the outcome of the arguments and decide if further evidence was required on this point.

Dr Cappitta confirmed that Appellant's submissions are according to the letter of appeal. It seemed however as if the goalposts had been changed in assessing its bid. As an example he quoted the one hour response time which Appellant offered – however in their reply the Authority changed the requirement from 'response time' to 'effective replacement'. Similarly on transport criteria; points were deducted as it was claimed that no provision for alternative transport had been offered – this is not correct as from the wording of the submission it is obvious that the offer of free transport was there - but the TEC claims that the transport offered was not free.

On the methodology submission it is being claimed that the submissions should have referred to Museums and Heritage Sites – this cannot be agreed beforehand as each site is specific and needs different treatment. Appellants submission was detailed on special events cleaning. As

regard the collective agreement Appellant was registered with the DIER and his registration had been accepted on other tenders without confirmation and it was unfair to use other economic operators' submissions as the yardstick. The testimony of the DIER would be valid on this point.

Dr Lia said that the request for witnesses should have been made before the hearing – proof was required in the tender submission and cannot be produced at this stage. Other economic operators had supplied proof and merely claiming that Appellant was registered is not enough to meet this criterion. As to the claim about the response time there was no change of goal posts – the response time of the Appellant did not state the time needed to complete the plans but merely to initiate them. Article 6.1.1 makes very clear what was required. Similarly in dealing with staff sickness Appellant deals with initiation of process not completion.

Appellant absolutely ignored the difference in site cleaning requirements in Museum and Heritage Sites. Section 3 of the tender deals with the specific requirements. Section 4.2.5 specifies the type of service required on sites operations which differentiates between the types of cleaning expected which Appellant seems to have ignored. The transport allowance (page 13 of the tender and which was not mandatory) clearly expects evidence that employees are paid a travel allowance; this was not indicated in the submissions. The Contracting Authority did not need to use its discretion as the requirements were very clear and Appellant failed to meet them.

There being no further submissions the Chairman thanked the parties and 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 24<sup>th</sup> February 2022.

Having noted the objection filed by General Cleaners Co. Ltd (hereinafter referred to as the Appellant) on 14<sup>th</sup> January 2022, refers to the claims made by the same Appellant with regards to the tender of reference CT 2521/2020 listed as case No. 1702 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Gianluca Cappitta

Appearing for the Contracting Authority: Dr Alessandro Lia

Whereby, the Appellant, in their Letter of Objection, contends that:

a) **Evaluation Criteria B.2 - Contingency Plans: Sick Personnel**

For this criterion, marks were deducted for the following reason:- *'Bidder submitted adequate measures to cater for sickness including transport from a 3rd party. However, response time in 1 hour was not mentioned'*. In this regard, the appellant submitted a policy document concerning Sick Personnel. Therefore the basis of the non award of points on the basis that 'response time in 1 hour was not mentioned' is factually incorrect. The appellant has submitted that the response time is between 15 and 30 minutes, which obviously are within 1 hour. Hence, the appellant insist that full points ought to be awarded for this criterion.

b) **Evaluation Criteria B2: Contingency Plans: 'Industrial Actions**

For this criterion, marks were deducted for the following reason:- *'Adequate submission with client communication included. Response time mentioned is 1-2 hours'*. With respect, this criterion on the Tender document does not state that points will be deducted if a possible response time of over one hour is indicated. The Tender document requires that a detailed write up is provided, which write up was indeed provided. In any case, a Response Time of one to two hours should be considered favourably in a scenario where business is disrupted as a result of Industrial Action. It is therefore the appellants firm believe that the deduction of points for this criteria is wholly unjustified when considering the level of detail provided in its submission as required by the Tender and also when considering the efficiency committed to by the appellant and the honest time frame indicated for mitigating such a situation. One can hardly think of any other situation wherein a disruption of business results from Industrial Action the situation is mitigated within such a short time frame unless such industrial action is put off. Therefore, the appellant holds firm that the full award of points would be fair for this criteria.

c) **Evaluation criteria B2: Contingency Plans: Special Events Cleaning and Preparation of Area**

For this criterion, marks were deducted for the following reason:- *'Good Submission as regards to Human resource Allocation and Procedure, However, did not mention, any details as regards to planning of the Event area and the implementation of the Cleaning Service before and after the event takes place'*. For such a requirement, the Tender document simply required that the bidder submits a write up that demonstrates how the bidder will achieve the goal of setting up and cleaning the area. With respect, the appellant cannot understand how its submission does not adequately address this requirement. The appellant's submission clearly demonstrates that it is well equipped and prepared to cater for such special events.

d) **Evaluation criteria B.4: Methodology: Work method**

For this criterion, marks were deducted for the following reason:- *'Very good and well- explained Work Method submission including ISO Standards although generic. Specific mention to museum sites would have been better'*.

e) **Evaluation criteria B.4: Methodology: Resources**

For this criterion, marks were deducted for the following reason:- *'Same document as for work method submitted. Whilst this includes some resource distribution solutions, it does not mention resources such as equipment and material. Also, this is a generic submission with no detail to museums (actually, it may be for a Jobsplus contract).'*

f) **Evaluation criteria B4: Methodology: Risks**

Marks were deducted for this criterion for the following reasons:- *'Same document for other criteria incorporating mainly company quality policy (and relating to a contract at Jobsplus). What was required was a list of perceived risks to the Museums cleaning contract as well as specific mitigation actions'*. The appellant is making the below submissions for all of the above three (3) criteria. It is humbly but firmly being submitted that the operator cannot be expected to make submissions specific to museum sites at submission stage. As clearly indicated on the Tender document even with reference to the Terms of Reference indicated therein, no requirement was asked of prospective bidders to provide a method statement or particular detail in connection with museum sites. Rather, the Tender document clearly stipulates in Article 4.2.5 of its Terms of Reference that *'The cleaning system to be employed in the particular spaces in the various sites and museums shall be agreed beforehand with Heritage Malta'*.

g) **Evaluation criteria C.2: Employment Conditions: (VII) Collective Agreement**

Marks were deducted for the following purpose:- *"Bidder submitted a valid Collective agreement however no DIER registration proof was submitted'*. The appellant humbly remarks that its Collective Agreement has long been registered with DIER. However, despite several requests demanding proof of such registration, such as a registration certificate, DIER has repeatedly informed the appellant that it does not produce such proof but simply has a record of registration of such certificates.

h) **Criterion C.2: Employment Conditions: (VIII) Transport Allowance**

Marks were deducted for this criterion for the following reason:- *'Submission states such provision will be only if necessary, which means it is not being provided'*. With respect, the evaluation committee's conclusion that since the submission state that such provision will be made only if necessary cannot be interpreted as if though it is 'not' being made. The interpretation of such a submission should be interpreted to mean that it is being made, but only where necessary. What the evaluation committee seems to have missed is that through its submissions, the appellant has indicated various times that transportation, even free, is catered for.

i) **Evaluation Criterion C.2: Employment Conditions: (IX) Health and Safety Resources**

Marks for this criterion have been deducted on the basis that:- *'Submitted detailed and generic Health and Safety Report. No reference is made to Heritage Malta environment, museums and sites'*. This criterion is being challenged on the same grounds mentioned above applicable to method statements. It is humbly but firmly being submitted that the operator cannot be expected to make submissions specific to museum sites at submission stage.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 24<sup>th</sup> January 2022 and its verbal submission during the virtual hearing held on 24<sup>th</sup> March 2022, in that:

a) **Evaluation Criteria B.2 - Contingency Plans - Sick Personnel**

In their submission, General Cleaners Co Ltd, submitted a description of their policy in such cases. Policy states that employees are to report sick at least 3 hours prior to start of shift (although same submission states that policy "depends on when the employee feels sick and it could be that reporting is acceptable closer to the start of the shift"). Policy also states that a replacement is identified and replacement process continues. Policy states that this process is triggered within 15 - 30 minutes of report. In fact, the wording of the appellant's submission states that the "Time to initiate the plan" is 15- 30 minutes. Although truly, in the same sentence there are the words "response time", this conflicts with the words immediately preceding this. "Response time", as requested in the tender document, refers to the response time for 'complete execution', so much so, that the tender requires that the Contractor "effect[s] immediate replacement(s) within a maximum of 1 (one) hour". The wording provided by the appellant indicates that the response time of 15-30 minutes refers solely to the time required to initiate (as expressed) the plan, rather than to execute a replacement.

b) **Evaluation Criteria B.2 - Contingency Plans: Industrial Actions**

The Contracting Authority abided by the letter of the tender document in the sense that any service affected due to industrial action, must be replaced and on site within a maximum of two (2) hours. In their submission, General Cleaners Co Ltd explain their action plan in such an emergency, which plan includes identification of workers who are not participating in the industrial action, with the purpose of allocation as substitute to the absent workers. The only specific time frame that the Evaluation Committee found in this particular submission, was that the action plan would initiate between 1 and 2 hours from start of industrial action. There is no indication when the substitute workers would actually be on site as requested by the criteria. Once again, it is the sole responsibility of the tenderer to submit clear information which is not subject to any interpretation. Whilst the Contracting Authority deems the information submitted to clearly exclude one of the requisites indicated in the tender document (since it excludes an execution response time), even if, in the worst case scenario and without prejudice, should have referred to the execution response time, the appellant certainly did not explain this in a clear and uninterpretable manner.

c) **Evaluation Criteria B.2: Contingency Plans: Special Events Cleaning and Preparation of Area"**

During its evaluation, the Evaluation Committee could only conclude that this criterion required submission of a list of measures, an eventual contractor would take in the eventuality of a (one-off) special event organised by Heritage Malta to be held on one of its premises. Such preparation would include

organisation and management of the Contractor's resources on this site in these special circumstances. Such list could include need to be sure of employing the right number of personnel and making sure of cleaning material and equipment availability and other such needs. In their submission, General Cleaners Co Ltd, submitted a contingency plan for a situation where the Contracting Authority would require flexibility in working hours, describing how the Contractor would go about to resolve this need. Thus, the Evaluation Committee deemed that the Economic Operator did not interpret the requirement as per criterion and did not understand the criterion fully. The minimum marks allocated to this criteria (.25 marks out of a maximum of 5 marks) reflected this interpretation. Such allocation also reflects a quality evaluation process between the various bids, undertaken by the Evaluation committee, in the process of establishing the grade of quality submission. The fact that the submission by General Cleaners Co Ltd, did not (once again) mention, either "museum" or "site" or "Heritage Malta" potential needs, again weighed against generic submissions by Economic Operators and awarded more, those submissions which included such specifics.

- d) **Evaluation Criteria B.4: methodology - Work Method**  
**Evaluation Criteria B.4: methodology - Resources**  
**Evaluation Criteria B.4. Methodology: - Risks**

General Cleaners Co Ltd, submitted their General Operations Manual, which the Evaluation Committee evaluated as being very comprehensive but also noted that the submission is generic and did not include any references specific to this Tender. Being a BPQR award criteria, the Evaluation Committee was not solely looking at compliance with the requirement but also what added value each bidder could demonstrate in its submission and how submissions can be implemented in Museums and sites envisaged in this contract. It is quite clear that, although, cleaning services do not include "rocket science", method statements regarding cleaning in, for example, a block of apartments, is certainly different to cleaning services to be performed in a Hall filled with priceless artefacts at MUZA. The Contracting Authority could certainly conclude, from General Cleaner's submissions, that whilst its submission certainly concerned "cleaning services", it did not mention, let alone address, the specific requirements of cleaning services required for the museums and sites pertaining to Heritage Malta,

- e) **Evaluation criteria C2 (VII) – Collective Agreement**

In its appeal, Appellant states that its Collective Agreement has long been registered with DIER and that despite several requests demanding proof of such registration, DIER has repeatedly informed the appellant that it does not produce such proof but simple has a record of registration of such certificates. During the evaluation process, the Evaluation committee interpreted the criterion as requiring submission of a Collective Agreement and that such Agreement is registered with the DIER. It also required the submission to include a) a copy of the collective agreement and b) valid proof that the agreement was registered with the DIER. Since the appellant's submission included only a copy of the Collective Agreement, only 50% of the 3 points allocated could be awarded. All other Economic Operators' bids were similarly evaluated and scored. It is not within the remit of the Evaluation Committee to comment on Appellant's remarks referring

to other tenders' evaluations. Moreover, it is forbidden at law that the Contracting Authority reveals or discloses information pertaining to other economic operators.

f) **Criterion C.2. Employment Conditions (VIII) Transport Allowance**

This was an add-on criteria and the Evaluation Committee, in its evaluation, looked for evidence that was to be provided by the Economic Operators, that employees are paid a transport allowance by either submitting a copy of the payslip or through the Contract Agreement. In their submission, General Cleaners submitted an extract from their Contract Agreement which states that company will provide transport if employee requires transport and that only in absence of such provision and with the consent of the employee, will the employee's transport be used. The Evaluation Committee could not find the evidence of a transport allowance through this submission. The minimum (add-on) markings were allocated to bidder for this non-conformance.

g) **Evaluation Criterion C.2: Employment Conditions: (IX) Health and Safety resources**

The Evaluation Committee had evaluated the submission and found a very well presented generic document. This tender was awarded on a Best Price Quality Ratio criteria. A generic document could be evaluated as being compliant, but for a quality document, the Evaluation Committee expected the tenderer to make specific reference to the tender subject. In the document submitted by General Cleaners Co Ltd, the word 'Museum', 'artefact', 'museum visitor' 'heritage' or 'Heritage Malta' are never mentioned, and it is clear that the submission was not made in line with the requirements of the tender, but it was merely replicated from other cleaning services bids.

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 that there are a number of grievances in this appeal which deal with similar issues. Therefore, initially, this Board will deal with the specifics of two (2) specific grievance. Finally, this Board will delve into the legal argumentation with references to past PCRБ cases and Court of Appeal case law.

a) **Specific Grievances**

- i. **Evaluation Criteria B.2 - Contingency Plans - Sick Personnel** –The Tender Dossier, in paragraph 6.1.1 of section 3 stated “In the event that any of the Contractor’s personnel and / or direct management staff report sick at short notice and / or for any reason fail to report for duty, the Contractor shall effect immediate replacement(s) within a maximum of 1 (one hour).....” The Board opines that this requirement is clear and unambiguous when it states “within a maximum of”, i.e. the process would need to be finalised. The wording of the appellant within its bid, refers to the initiation process and not the



completion of the process. Hence, this Board finds itself in agreement with the Evaluation Committee.

- ii. **Evaluation Criteria B.4: methodology** – This Board notes that the award criterion for this tender is the BPQR method, i.e. quality matters! The Appellant company was comprehensive in its submission, but the methodology provided was lacking in specifics. When submitted a bid which is being awarded by BPQR, it is essential to be specific. The Tender dossier makes numerous references to the sites and museums which need to be cleaned including references to the artefacts and exhibits on show which require special treatment for their ‘conservation’ needs. If other bidders were more specific in their submissions, it is the true nature of BPQR evaluation, that bids meeting the minimum criteria are not awarded the most points on technical matters.

b) **Past PCRB and Court of Appeal cases:**

- i. In PCRB Case 1583, this Board stated:

*“ii. It must be noted that the evaluation and eventual award of such tender was to be based on the BPQR method of evaluation.*

*iii. In this 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. As per previous PCRB case (Ref: 1577) 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.” Hence the Evaluation Committee still must proceed with the appropriate diligence in full cognisance of its rights, powers, duties and obligations. In this regard, the Board opines that no specific evidence has been brought forward to show the contrary.”*

- ii. The above argumentation was upheld on appeal in Court of Appeal case 205/21/1 whereby the court stated:

*“Kollox ma’ kollox, din il-Qorti tqis li l-Bord ta ragunijiet korretti u sufficjenti biex jimmotiva d-decizjoni tiegħu. Wiehed ifakkar li l-pjan ta’ kontinġenża f’ każ ta’ azzjoni industrijali huwa allokat hames punti u dawn il-punti kellhom jiġu allokat diskrezzjonalment mill-kumitat evalwattiv minn punt wiehed sal-massimu ta’ hames punti. Dan jfisser li jeżiżi element ta’ suġġettività mogħtija lill-kumitat evalwattiv mid-dokument tas-sejba għall-offerti stess. Din il-Qorti ma tara xejn irragonevoli fid-decizjoni li għal dan il-pjan tal-appellanti ngħataw żewġ punti u nofs, u din il-Qorti ma tarax li għandha tiddisturba d-diskrezzjoni kif użata mill-kumitat evalwattiv f’ dan il-każ.”*

Therefore, this Board does not uphold Appellant’s grievances.

**In conclusion this Board;**

Having evaluated all the above and based on the mentioned 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 to Apex Community Services Ltd,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

**Mr Kenneth Swain**  
Chairman

**Mr Lawrence Ancilleri**  
Member

**Ms Stephanie Scicluna Laiviera**  
Member