

PUBLIC CONTRACTS REVIEW BOARD

Case 1733 – CfQ SVP 04/2022 – Call for Quotations for the Provision of Waste Collection Services Using Environmentally Friendly Transportation Services at St Vincent De Paul Long Term Care Facility

30th May 2022

The Board,

Having noted the letter of objection filed by Dr Marycien Vassallo on behalf of 8 Point Legal acting for and on behalf of WM Environmental Limited, (hereinafter referred to as the appellant) filed on the 3rd May 2022;

Having also noted the letter of reply filed by Dr Noel Bezzina on behalf of Bezzina Legal acting for St Vincent De Paul Long Term Care Facility (hereinafter referred to as the Contracting Authority) filed on the 11th May 2022;

Having also noted the letter of reply filed by Dr Jonathan Mintoff and Dr Larry Formosa acting for Bezzina Ltd (hereinafter referred to as the Preferred Bidder) filed on the 19th May 2022;

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 25th May 2022 hereunder-reproduced.

Minutes

Case 1733 – SVP 04/2022 – Call for Quotations for the Provision of Waste Collection Services using Environmentally Friendly Transportation Services at St Vincent De Paul Long Term Care Facility

The tender was issued on the 8th March 2022 and the closing date was the 15th March 2022. The value of the tender, excluding VAT, was € 10,000.

On the 3rd May 2022 WM Environmental Ltd filed an appeal against St Vincent De Paul Long Term Care Facility as the Contracting Authority objecting to their disqualification on the grounds that their bid was deemed to be not the cheapest offer.

A deposit of € 400 was paid.

There were three (3) bids.

On the 25th May 2022 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 – WM Environmental Ltd

Dr Marycien Vassallo Legal Representative

Contracting Authority – St Vincent De Paul Long Term Care Facility

Dr Noel Bezzina	Legal Representative
Ms Karen Muscat	Chairperson Evaluation Committee
Ms Claudia Muscat	Secretary Evaluation Committee
Mr Anthony Caruana	Member Evaluation Committee
Mr Noel Vidal	Member Evaluation Committee
Ms Marica Saliba	Representative

Preferred Bidder – Bezzina Ltd

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 invited submissions.

Dr Marycien Vassallo Legal Representative for WM Environmental Ltd said that the grievances were as stated in the written submissions – namely that the tender did not specify the term of the call and the preferred bidder's offer was abnormally low. The amount which the tenderer will receive is not stated and the price offered by the preferred bidder is not related to the required amount of collections.

Dr Noel Bezzina Legal Representative for St Vincent de Paul Long Term Care Facility stated that the duration of the tender is very clear; this apart from a further clarification note making it very clear and unequivocal that the tender ran was until the funds are exhausted. It is noted that there was no precontractual remedy sought if there was any doubt on this point. Since this was a call for quotations rather than a tender there was no obligation to delve into whether bids were low. A circular from the Director of Contracts confirms this point and there was no anomaly.

Dr Mintoff Legal Representative for Bezzina Ltd said that he agreed with the submissions by Dr Bezzina. Appellant had sought neither clarification nor precontractual remedy regarding the terms of the tender and in the case of abnormally low tenders the Court of Appeal had made it clear that it was up to the bidder what price to bid even if that meant that it was operating at a loss.

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 25th May 2022.

Having noted the objection filed by WM Environmental Limited (hereinafter referred to as the Appellant) on 3rd May 2022, refers to the claims made by the same Appellant with regard to the tender of reference CfQ SVP 04/2022 listed as case No. 1733 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Marycien Vassallo

Appearing for the Contracting Authority: Dr Noel Bezzina

Appearing for the Preferred Bidder: Dr Jonathan Mintoff

Whereby, the Appellant contends that:

- a) **The Call does not specify the term (time period) of the Call** - From a reading of the tender document, it transpires that the Call fails to set the term (time period) which the Call is intended to cover. Whilst the financial bid makes reference to the period of one month for quotation purposes, there is no other indication of the period that the services will be required for. Such failure prejudices prospective bidders in providing an accurate financial bid. Despite the one month period mentioned in the financial bid, it is unclear whether the call is being requested for a month, a number of months or even years - so much so that the financial bid provides that the figures indicated are only an estimate for evaluation purposes.
- b) **Preferred Bidder's offer is abnormally low** - The preferred bidder's tendered offer should have been disqualified since it is abnormally low. In addition to the number of skips and collection times, the vehicles used in carrying out the service must have engines EURO IV standards according to Directive 2005/55/EC. For the abovementioned services the preferred bidder quoted the price of €6,877.80 excluding VAT which price has to include also all fees, tariffs and charges for landfill end disposal for all arising wastes from Contracting Authority's facility. According to the Call, the estimated tender value is set at €10,000 excluding VAT, hence €3,122.20 higher than that quoted

by preferred bidder. Whilst appellant acknowledges that the Contracting Authority is not bound with the estimated procurement value, such value is used as an indication for the tendered offers. This value is usually based on comprehensive research including appropriate financial analysis. In appellant's view, the preferred bidder's offer is abnormally low when considering the offers tendered by the other economic operators especially in view of the landfill end disposal fees.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 11th May 2022 and its verbal submission during the virtual hearing held on 25th May 2022, in that:

- a) **The Call does not specify the term (time-period) of the Call -** In this regard, the Contracting Authority submits that the CfQ stipulated that the estimated procurement value of the CfQ is that of Euro 10,000 excluding VAT. This means that, the intended duration / term of the call was that required until the value of Euro 10,000 is reached. Contrary to what is being submitted by the Appellant, the CfQ clearly indicates the parameters establishing the duration of the Call. In fact, Clarification Note No.1, issued by the Contracting Authority following certain queries made by prospective bidders, stipulated that *"The length of the contract is until the allocated budget of Euro 10,000 exc. VAT referred to in Section 1.3 is reached."* In view of such, the Contracting Authority respectfully disagrees with the Appellant's objection in this regard since as already stated, the CfQ indicates the intended duration of the CfQ, that is. until the amount of Euro 10.000 is used.
- b) **Preferred bidder's offer is abnormally low -** In this regard, the Appellant is stating that the preferred bidder's tendered offer "should have been disqualified since it is abnormally low". The Contracting Authority submits that, by virtue of Legal Notice 196 of 2020, the Public Procurement Regulations ('PPR'), S.L. 601.03, were amended and extended to cover a wide array of tenders. Regulation 243 of the PPR stipulates that *"Contracting authorities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services"*. Additionally, the Regulation further prescribes a list of explanations which are to be provided by prospective tenderers in their submissions. It is to be noted however that the Regulation makes specific reference to tenders and not to a calls for quotations (a distinction which is particularly defined in Regulations 100 (2) and 101 of the PPR) which therefore excludes the applicability of Regulation 243 (Abnormally low tenders) to calls for quotations, In fact, Contracts Circular No. 12/2020 issued by the Department of Contracts following the promulgation of Legal 196 of 2020 explains that *"...the provisions of Abnormally Low Tenders are now applicable to procurement with an estimated value exceeding Euro 10,000 excluding VAT."* Besides the fact that Contracting Authorities have a certain degree of discretion in assessing abnormally low prices / tender offers as decided by previous board decisions, in this particular case, the Contracting Authority was under no obligation to require economic operators to explain their price or costs proposed, since the call was a call for quotations for an estimated value of Euro 10.000.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 19th May 2022 and its verbal submission during the virtual hearing held on 25th May 2022, in that:

- a) The objector laments that the dossier for the said Call for Quotation "fails to set the term" i.e. the time period which the Call is intended to cover. At the outset it must be pointed out that Objector's contentions on this issue and at this particular stage are not justified as the Objector had the opportunity and remedy to either seek clarifications or submit a call for remedy prior the closing date of submission of offers, as per Regulation 262 of the PPR. The Objector did not file any call for remedies and decided to participate in Call.
- b) This grievance of the Objector is also manifestly unfounded for several reasons. The Objector is confounding the rules applicable to Tenders and those applicable to Quotations. Quotations are not subject to Regulation 243 as this is only applicable to Tenders. In this regard the legal principle *ubi lex voluit dixit, ubi noluit tacuit* applies. As rightly stated by the Contracting Authority's reply Contract Circular No. 12/2020 further clarifies this point in that it expressly states that *"..the provisions of Abnormally Low Tenders are now applicable to procurement with an estimated value exceeding Euro 10,000 excluding VAT."*

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) **First Grievance - The Call does not specify the term (time-period) of the Call** – This Board opines that the Contracting Authority was clear in its communication when in Clarification No 1 it stated: *"The length of contract is until the allocated budget of €10,000 exc VAT referred to in Section A.3 is reached"*. If the Appellant found this reply as being ambiguous, it had tools at its disposal, such as putting forward more clarification requests and finally filing a Call for Remedies objection as per Regulation 262 of the Public Procurement Regulations. It cannot at this stage lament about details, or lack of, which were known to it as from the beginning of the tender procedure.
- b) **Second Grievance - Preferred bidder's offer is abnormally low** – This Board agreed with the argumentation as presented by the Contracting Authority. Reference is made to Contracts Circular No 12/2020 whereby *"Applicability of an Abnormally Low Tender – Further to Legal Notice 196 of 2020, which came into force on 15 May 2020, Regulation 243 of S.L. 601.03 and Regulation 174 of S.L. 601.05 (both of which relate to 'Abnormally Low Tenders') have not been amended and extended to cover a wider array [array??] of tenders. This means that this concept is no longer just limited to above threshold procurement. Thus, the provisions of Abnormally Low Tenders are now applicable to procurement with an Estimated Value **exceeding** Eur10,000 excluding VAT."* (bold & underline emphasis added). The Board opines that this circular is very clear in demonstrating that the 'Abnormally Low Tenders' concept is applicable to those tender exceeding the Eur10,000 excluding VAT threshold. The procedure under appeal is a CfQ, not a tender. Moreover, this particular CfQ has an Estimated Procurement Value set at Eur10,000,

hence not exceeding the threshold referred to in Circular No 12/2020. Therefore, the ‘Abnormally Low Tenders’ concept is not applicable to this CfQ.

Hence, this Board does not uphold the 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 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

Dr Charles Cassar
Member

Dr Vincent Micallef
Member