

PUBLIC CONTRACTS REVIEW BOARD

Case 1737 – SPD7/2021/076 – Services – Provision of Services for an Evaluation for the Funding Support made Available for Education and Employment through ESF in Malta during the 2014-2020 Programming Period Lot 2

16th August 2022

The Board,

Having noted the letter of objection filed by Mr Michael Zarb and Dr Silvio De Bono acting for and on behalf of Deloitte Idea Consortium, (hereinafter referred to as the appellant) filed on the 4th April 2022;

Having also noted the letter of reply filed by Dr Peter Fenech on behalf of Iuris Advocates acting for and on behalf of Planning and Priorities Coordination Division (hereinafter referred to as the Contracting Authority) filed on the 14th April 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 sittings of the 26th May 2022 and 9th August 2022 hereunder-reproduced.

Minutes

Case 1737 – SPD7/2021/076 – Tender for the Provision of Services for an Evaluation for the Funding Support made available for Education and Employment through ESF in Malta during the 2014-2020 Programme Period (LOT 1)

The tender was issued on the 21th November 2021 and the closing date was the 10th January 2022. The value of the tender, excluding VAT, was € 74,000 (for Lot 1 only).

On the 4th April 2022 Deloitte Idea Consortium filed an appeal against the Ministry for the Economy, EU Funds and Lands (MEFL) Planning and Priorities Coordination Division as the Contracting Authority objecting to their disqualification based on the points deducted in the evaluation process.

A deposit of € 400 was paid.

There were seven (7) bids.

On the 26th May 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Vincent Micallef 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 – Deloitte Idea Consortium

Dr Silvio De Bono

Legal Representative

Mr Michael Zarb Representative
Ms Sandy Beiruty Sleiman Representative

Contracting Authority – Planning and Priorities Coordination Division (MEFL)

Dr Peter Fenech Legal Representative
Ms Therese Fiorini Chairperson Evaluation Committee
Ms Romina Bartolo Representative

Preferred Bidder – EMCS Advisory Consortium

Mr Stefano Mallia Representative
Ms Alison Mizzi 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 Silvio Debono Legal Representative for Deloitte Idea Consortium objected to the meeting being held virtually.

Dr Peter Fenech Legal Representative for Ministry for the Economy, European Funds and Lands had no objections.

The Chairman very much regretted that Dr Debono had objected so late when the invitation to have a virtual meeting or in person had gone out on the 17th May. This will delay this case due to the heavy backlog of cases to be heard. The case was deferred to the 2nd August at 9.00am.

End of Minutes

SECOND HEARING

On the 9th August 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Ms Stephanie Scicluna Laiviera and Mr Richard Matrenza as members called a public hearing to consider this appeal.

The attendance for this public hearing was as follows:

Appellant – Deloitte Idea Consortium

Dr Silvio De Bono Legal Representative
Ms Sandy Beiruty Sleiman Representative
Mr Alexei De Bono Representative

Contracting Authority – Ministry for Economy, EU Funds and Lands

Dr Peter Fenech Legal Representative
Dr Romina Bartolo Legal Representative
Ms Therese Fiorini Representative
Mr Jonathan Vassallo Representative

Preferred Bidder – EMCS Advisory Consortium

Ms Alison Mizzi Representative

Mr Stefano Mallia (participated virtually)

Representative

The Chairman welcomed the parties and noted that since the appeal in this Case and a parallel case where very similar the two cases were heard simultaneously.

Dr De Bono Legal Representative for Deloitte Idea Consortium (Deloitte) said that the cases should be heard individually although the appeals were on the same grounds.

Dr Peter Fenech Legal Representative for the Ministry for the Economy, EU Funds and Lands said that although there were two appeals the points were very similar and two decisions will be given.

The Chairman directed that the two cases will be heard together but the outcomes will deal with any differences that might arise. He then invited submissions and Appellants should choose any two or three points of contention and deal with those points, taking as read all other points that were being contested on similar grounds.

Dr De Bono stated that he wants to deal with every point contested. The outcome of the evaluation was such that Deloitte were the cheapest or near the cheapest whilst the preferred bidder was lower down in ranking. He was not objecting to the tender terms or the criteria but to the way the evaluation was judged. There must be objectivity in judging the criteria and for there to be objectivity there must be standards of performance so that the same ruler will be used as a measure. Regulation 239 of the PPR sets the procedure for the award criteria.

Dr Fenech said it would be impossible to expect every possible point to be covered. It is accepted by all bidders that the criteria were well set as there were no requests for clarifications. It is the Board's role to check if the standards of performance were observed and it is up to them to ensure that the criteria and the parameters were correctly observed and evaluated.

Dr De Bono said he was not seeking to change the parameters – what was in question is the application of those criteria. He was not doubting the competence of the Board but wanted to establish how the marking grid was applied. Is that grid available, asked Dr Debono.

Dr Fenech pointed out that 'there is what there is' and it is up to the Board to ensure that it was followed.

Mr Stefano Mallia Representative for EMCS Advisory Consortium mentioned that the normal procedure was to raise the point beforehand if there was anything unclear in a tender.

Dr De Bono referred to three points in the grid (2.3; 3; 2.2v) and said that there were no standards of performance to guide the bidder as to what was required by the Contracting Authority or on what basis were the marks awarded.

Dr Fenech pointed out that if there was any elements of uncertainty there are tools to clarify them. The responses by the Authority are detailed and dealt with point by point with reasons given. The element of criteria was dealt with correctly. Basically everything is transparent and detailed but if not clear or could have been bettered there were measures which could have been taken; criteria were well defined and if not to Appellant's satisfaction then it should have sought clarification. There is no basis for this appeal.

Mr Mallia agreed that the criteria were all clear and descriptive and re-iterated that the time to deal with anything that was unclear was during the clarification period.

Dr De Bono said that the performance criteria grid was not provided – in its absence the choice of the best submission is purely subjective. There are anomalies in the choice of marks which was done purely arbitrarily.

Dr Fenech stated that he cannot accept the point regarding arbitrariness. The Appellant is seeking reasons on the award of points. The evaluation summed up the opinion of evaluators with reasoning for the award of those points. The criteria broke up the tender requirements with a point by point analysis of the decisions. If the argument is on the standard of performance this was clearly detailed in the tender. Appellant's claim is not doubting the way the tender was evaluated but the performance standards – if one were to take this claim to its natural conclusion then the whole evaluation process is null and applies to all bidders. The appeal is not on clear grounds and should be denied.

The Chairman thanked the parties for the submissions and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sittings of the 26th May 2022 and 9th August 2022.

Having noted the objection filed by Deloitte Idea Consortium (hereinafter referred to as the Appellant) on 4th April 2022, refers to the claims made by the same Appellant with regard to the tender of reference SPD7/2021/076 – Lot 2 listed as case No. 1737 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Silvio De Bono

Appearing for the Contracting Authority: Dr Peter Fenech

Appearing for the Preferred Bidder: Mr Stefano Mallia

Whereby, the Appellant contends that:

- a) Criterion 1.1 Compliance with the Terms of Reference – In view that there is no specific criteria relating to this, the justification '*more detail could have been provided*' in both cases is subjective. Being BPQR, clear criteria should have been produced to reflect which points were omitted.

- b) Criterion 2 Strategy Criterion 2.1 General characteristics – Kindly note that part of this justification does not apply to the response provided as Jobsplus was not mentioned in this section. This justification was erroneously reproduced from the evaluation report for Lot 1. Hence points should be reconsidered.
- c) Criterion 2.2 Overall evaluation and methodology (part A) – We disagree with the statement that *a number of control measures were not adequately covered*, as the following measures were included in the response:
- i. Data integrity
 - ii. Random quality checks
 - iii. Validity
 - iv. Data security
 - v. Data verification
 - vi. Conducting Cronbach alpha tests as a measure of reliability
 - vii. Consistency

The above should be deemed sufficient to award points accordingly.

- d) Criterion 2.2 Overall evaluation and methodology (part C) - Kindly note that the evaluation criteria did not specifically request a link to be made to the strategic management of each step of the implementation.

Kindly note that the evaluation criteria did not request a description of how risks and issues will be managed.

Being BPQR, clear criteria should have been produced to reflect which points were omitted.

This was addressed under: Communication of requested analyses subsection indicating:

- i. Reports presented will include analysis and key findings and be accompanied by tabularised extracts of response data and the statistical results
 - ii. Key subsections per task
- e) Criterion 2.3 Quality Assurance - No requirements were provided in the evaluation criteria nor in the tender document, hence the answer reflected the standard operating procedure for quality assurance to be adopted by the bidder. Being BPOR, clear criteria should have been produced to reflect which points were omitted.
- f) The evaluation criteria did not request that division of responsibilities should be by Key Experts. Additionally, the roles of Key experts were previously delineated in Section 2.2 Overall evaluation and methodology.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 4th April 2022 and its verbal submission during the hearings held on 26th May 2022 and 9th August 2022, in that:

- a) From an analysis of all the six reasons of objection, the Contracting Authority notes that all of the appellant's grounds of objection relate mainly to the allocation of marks/points which have been awarded by the evaluation committee when assessing the appellant's offer (TID 166722), and this in terms of the Evaluation Grid of the Tender Document (CAT ID: SPD7/2021/076 - Tender for the Provision of Services for an Evaluation of the Funding Support made available for Education and Employment through ESF in Malta during the 2014-2020 Programming Period).
- b) Considering the above, in light with the fact that the award criteria in this tender was that of best price quality ratio (BPQR), the Contracting Authority primarily submits that the scope of these review proceedings shall be strictly limited to assess whether the evaluation committee which has been appointed by the Contracting Authority has acted in a diligent and fair manner in accordance with the constitutional principles governing public procurement and within the remit / scope of powers as afforded to it by the Tender Document which gave rise to the appeal in question.
- c) As regards the criteria of reasonableness' whilst, the Contracting Authority appreciates that the appellant may not be in agreement with the assessment conducted by the evaluation committee, however, the fact alone that the appellant does not agree with the points allocated does not mean that the evaluation committee acted in an 'unreasonable' manner.
- d) In this case, the evaluation committee did not exercise its duties in an 'unreasonable manner'. Neither are there any 'grave and compelling reasons' on the basis of which this Board may 'substitute' the discretion vested in the evaluation committee, and consequently the appellant's appeal shall be wholly dismissed.

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 main point of contention is the amount of points given by the Evaluation Committee in their assessment of the bid by the Appellant economic operator in relation to certain evaluation criteria which were duly mentioned and referred to in the rejection letter sent by the Contracting Authority to the Appellant.
- b) It must be noted that the evaluation and eventual award of such tender was to be based on the BPQR method of evaluation and not on the cheapest administrative and technically compliant offer.
- c) As has been duly explained in PCRB case 1583 Executive Security Services Ltd vs Servizz.Gov, 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.

- d) Therefore, what this Board will further analyse is whether:
- a. the same level playing field was afforded to all economic operators who participated in this tendering procedure,
 - b. proper professionalism and diligence was exercised by the Evaluation Committee and
 - c. the Evaluation Committee exceeded any of its granted powers and therefore did not observe the fundamental principle of self-limitation which evaluation boards are obliged to respect and follow.
- e) It must be noted that apart from written and verbal submissions, the Appellant provided no tangible proof as to why it doesn't agree with the points afforded to it by the evaluation committee. No members of the evaluation committee were asked to testify and / or be challenged on their 'interpretation' or otherwise.
- f) What the Appellant is requesting, i.e. points are to be awarded with specific reference to 'Standards of Performance', is in this Board's opinion nothing more than requesting that the award criteria of this tender to be 'transformed' from BPQR into a cheapest compliant offer being awarded the contract. By implementing what the Appellant is requesting would remove the most important element of BPQR, i.e. the quality element. In this Board's opinion the 'Evaluation Grid' as drafted in the tender dossier is very detailed, clear and unambiguous and therefore all economic operators knew what was expected of them. However, it is also important to point out that those 'criteria' listed within such grid would be the 'least' to be achieved. Any economic operator who offers something better, i.e. goes the extra mile, is to be afforded the maximum points. Other operators are to be then provided 'pro-rata' marks according to the leeway afforded to the evaluation committee.

Hence, the Board opines that, when considering all the above points, it can be deduced that the Evaluation Committee did in fact use the "same ruler" to evaluate all the bids it had in front of it. This resulted in a same level playing field for all the prospective bidders and more importantly the concept of 'Self Limitation' has been observed. Therefore, the 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 decisions in the recommendation for the award of the different lots as originally made,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Ms Stephanie Scicluna Laiviera
Member

Mr Richard Matrenza
Member