

PUBLIC CONTRACTS REVIEW BOARD

Case 1748 – SPD6/2021/094 – Tender for the Cleaning Services for the Regulator For Energy and Water Services

22nd June 2022

The Board,

Having noted the letter of objection filed by Dr Amadeus Cachia acting for and on behalf of ACJ Cleaning & Hospitality Services, (hereinafter referred to as the appellant) filed on the 23rd May 2022;

Having also noted the letter of reply filed by Ing Marjohn Abela acting for the Regulator for Energy and Water Services (hereinafter referred to as the Contracting Authority) filed on the 31st 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 20th June 2022 hereunder-reproduced.

Minutes

Case 1748 – SPD6/2021/094 – Tender for the Provision of Cleaning Services for the Regulator for Energy and Water Services

The tender was issued on the 21st January 2022 and the closing date was the 15th February 2022. The value of the tender, excluding VAT, was € 34,000.

On the 23rd May 2022 ACJ Cleaning & Hospitality Services filed an appeal against the Regulator for Energy and Water Services as the Contracting Authority objecting to their disqualification on the grounds that their offer was not technically compliant.

A deposit of € 400 was paid.

There were seven (7) bids.

On the 20th June 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri Mr Richard Matrenza as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – ACJ Cleaning & Hospitality

Dr Amadeus Cachia

Legal Representative

Contracting Authority – Regulator for Energy & Water Services

Dr Andre Buttigieg
Eng Mark Camilleri
Mr Roderick Buhagiar
Eng Kyle Zammit
Mr Glenn Attard

Legal Representative
Chairperson Evaluation Committee
Member Evaluation Committee
Member Evaluation Committee
Member Evaluation Committee

Departemnt of Contracts

Dr Mark Anthony Debono

Legal Representative

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Amadeus Cachia Legal Representative for ACJ Cleaning & Hospitality Services said that Appellant would rely on the written submissions to make his case. He mentioned that due to the Covid pandemic there are delays in the Jobplus process to issue invoices. It is not in the spirit of the law to penalize people in circumstances that were not their fault. Appellant's bid was the lowest offer.

Engineer Mark Camilleri Representative for the Regulator for Energy & Water Services said that the lowest price was irrelevant as this a BPQR tender. The Evaluation Committee was bound by the terms of the tender regarding the requirement to employ disabled individuals which means that the Appellant was not in line with requirements and according to Note 3 these could not be rectified. On the matter of the collective agreement Appellant was awarded minimum points – this was not a mandatory requirement. There were three other headings under which Appellant failed to garner maximum points and his points total was still well below those of other parties.

Dr Cachia stressed that the price offered was on the lower side and on the point of the employment of disabled persons Appellant was not at fault.

Engineer Camilleri concluded by saying that the other parties had no difficulty submitting the necessary documents on the disability issue and Appellant's points total was still short even if the points on this point were awarded.

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 20th June 2022.

Having noted the objection filed by Dr Amadeus Cachia (hereinafter referred to as the Appellant) on 23rd May 2022, refers to the claims made by the same Appellant with regard to the tender of SPD6/2021/094 listed as case No. 1748 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Amadeus Cachia

Appearing for the Contracting Authority: Ing Mark Camilleri

Whereby, the Appellant contends that:

- a) The appellant humbly submits that notwithstanding that his financial offer was the best offer, he still was not awarded the tender mainly due to this reason:
“1. Technical offer submitted by ACJ Ltd was considered as non-compliant with the Technical Specifications. The following specifications submitted in the Technical Offer are not compliant to the Tender Document: - C1 (i) Equal Opportunities (proof that the economic operator meets the Legal requirements for the employment of disabled people.) (Mandatory). The criterion for equal opportunities as per Jobsplus requirements was not met in the submitted documentation”
- b) That with all due respect the appellant humbly submits that the reason given with regards the fact that the company does not have in its possession a NCPE Certification is unfounded. ACJ Cleaning & Hospitality Services is committed to offer equal opportunities to all and does not hinder the possibility that disabled people work within our company. Every member of the team is treated with respect and dignity, and we also expect that to be reciprocated. In fact, a disabled individual already works within the ACJ Cleaning & Hospitality Services Company however notwithstanding that an employee already works with the company to be in line with the 2% quota the company needs to employ another employee. Moreover, the company has in the past few months tried to employ individuals and is still seeking to employ individuals [through the Lino Spiteri Foundation] but at the moment no ideal candidates have arisen. An email from Ms. Moira Falzon [executive and schemes coordinator of the Compliance, Migration & Public Sector Employment Services] explaining that invoices for the years 2019 and 2020 have not yet been issued due to the COVID-19 situation. Thus, since the appellant's company was formed in 2020 they could not pay any fine that is due to be in line with the 2% quota since the invoices have not yet been issued as can be seen from the attached email from Ms. Moira Falzon. Thus, the appellant's company is not at fault in not being in line with the 2% quota and consequently no points should be deducted from the technical score with regards to this criterion.
- c) Without prejudice to the above another criterion in which the appellant was not awarded full points was with regards the fact that no collective agreement was provided by the Company. The appellant states that under Maltese law there is no legal obligation for the employer to have a collective

agreement in place. Moreover, the Company declared through a submitted declaration that although there is no collective agreement in place and registered with the Department of Industrial and Employment Relations, there is no difficulty that the employees have a collective agreement in place. Thus, the appellant's company is not at fault with regards to this criterion and consequently no points should be deducted from the technical score with regards to this criterion.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 31st May 2022 and its verbal submission during the virtual hearing held on 20th June 2022, in that:

a) Technical Compliance –

The Contracting Authority submits that, at the time of bids submission for tender offer SPD6/2021/094 Tender for the Provision of Cleaning Service for the Regulator for Energy and Water Services, the document presented by the objector marked as "Doc 'A' - Jobsplus Documentation" attests non-adherence to the mandatory requirement under Technical Requirements Section C - Social Aspects, paragraph C1 (i), in terms of the Technical Offer (Organisation & Methodology):

"Proof that the economic operator meets the Legal requirements for the employment of disabled people".

In terms of Part 3: Technical Compliance of the General Rules Governing Tenders v4.4, it is stated that: *"To be considered for this Evaluation, tenderers must submit a completed Technical Offer. Literature may also be requested with the technical offer so that the Evaluation Committee will corroborate the technical compliance of the offers."*

In terms of rule 6.2 of the Tender Document, the Evaluation Grid in Section C1 provides that: *"For Mandatory requirements, if the Declaration/Proof/List/Picture/Template (or any other information as requested in each criterion) is not provided or else it is not in line with the specified requirements, automatically a score of '0' shall be allotted and the bidder shall be disqualified."*

"For other Mandatory criteria, whereby the specific criterion within the BPQR allows for a gradation of points a range from 0 up to 100% of the marks per criterion may be allotted. If a score of '0' shall be allotted, the bidder shall be disqualified."

If zero points had been allocated to the tenderer for this mandatory criteria, the bidder would be disqualified. In terms of the objection, the objector had not, at tendering stage, been compliant with the 2% quota and attempts to excuse such non-compliance stating that it could not pay the applicable fines to remedy this.

However, the Contracting Authority submits that such justification is not permissible since it does not substitute the required proof. Different decisions of the Public Contracts Review Board and

the Court of Appeal have affirmed the doctrine of self-limitation whereby the evaluation committee is bound to process tender offers in accordance with the requirements of the tender document. Moreover, the Contracting Authority could not ask for rectification since this criterion falls under Note 3.

The Contracting Authority submits that should a new document have been allowed to be submitted to rectify the above declaration this would breach Note 3. Therefore, the submitted declaration at tendering stage was the only one that could be evaluated and this criterion was found technically not compliant.

b) Collective Agreement -

With respect to the second ground of objection submitted by the objector regarding the Technical Requirements Section C - Social Aspects, paragraph C2 (f): Collective Agreement. This criterion was an (add-on), meaning that all bidders having a collective agreement in place were given full points whilst those without a collective agreement in place were given the identical low score. The same criterion was used for all bidders.

In terms of the Section 6.2 of the Tender Document, it is stated that: *“For Add-on requirements, if the Declaration/Proof/List/Picture/Template (or any other information as requested in each criterion) is not provided or else it is not in line with the specified requirements, automatically a score of '1%' shall be allotted.”*

Moreover, the objector's request to this Board to award the tender to the lowest priced bid that was compliant with all technical requirements should also be dismissed as the criteria for the adjudication of this tender is not based on the cheapest price but is reliant on the Best Price Quality Ratio (BPQR) criteria for award purposes.

The objector has accepted the terms and the conditions of the call for tenders when submitting its offer since this is presented in the Tender document section 6: Criteria for Award sub paragraph 6.1: *“The contract will be awarded to the tenderer submitting the offer with the Best Price/Quality Ratio /BPQR) in accordance with the below.....”*.

If the objector disagreed with the inclusion of such add-on requirement, it should have sought redress a priori through the application of the appropriate remedies at Law and not after having submitted its tender offer and the award being issued.

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) Technical Compliance – 1st grievance –

- i. The Board notes that the tender dossier is very clear and unambiguous in page 12, paragraph 6.2 when it states: *“For Mandatory requirements, if the Declaration/Proof/List/Picture/Template (or any other information as requested in each criterion) is not*

provided or else it is not in line with the specified requirements, automatically a score of '0' shall be allotted and the bidder shall be disqualified."

- ii. Criterion C1 is listed as an 'Mandatory' and required *"Proof through appropriate documentation from Jobsplus (or equivalent) that the economic operator meets the Legal requirements for the employment of disabled people."*
 - iii. Documentation provided by Jobsplus states *"I hereby confirm that to-date, your company ACJ Cleaning & Hospitality Services has one (1) RDP persons in employment but you still need one (1) more RDP to be in line with the 2% quota. Kindly note that this can change if you increase the Company's turn over by employing new staff."*
 - iv. This Board notes that the Evaluation Committee assessed such document as per the requirements of the Tender Dossier whilst duly observing the principle of Self Limitation imposed on it.
 - v. Moreover, no proof was provided by Appellant to demonstrate that there was no level playing field in the evaluation of such criterion.
- b) Collective Agreement – 2nd grievance –
- i. The Board notes that the tender dossier is very clear and unambiguous in page 12, paragraph 6.2 when it states: *"For Add-on requirements, if the Declaration/Proof/List/Picture/Template (or any other information as requested in each criterion) is not provided or else it is not in line with the specified requirements, automatically a score of '1%' shall be allotted."*
 - ii. Criterion C2(f) is also listed as an 'Add-on'.
 - iii. Thereby, it is this Board opinion that the evaluation committee fully understood and correctly interpreted this specification of the tender document when they provided the minimum points to the Appellant when he provided no collective agreement. A declaration stating that 'it finds no difficulty for employers to have a collective agreement in place' is not to be deemed the same as having a collective agreement in place. The tender dossier did not provide an allowance for such or for example to have a collective agreement finalised by a specific time period from award of such contract.

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

Mr Lawrence Ancilleri
Member

Mr Richard Matrenza
Member