

PUBLIC CONTRACTS REVIEW BOARD

Case 1749 – SPD2/2021/033 – Tender for the Cleaning Services at the Agency for Welfare of Asylum Seekers (AWAS)

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 Ms Charmaine Caruana acting for the Agency for the Welfare Services of Asylum Seekers (hereinafter referred to as the Contracting Authority) filed on the 2nd June 2022;

Having heard and evaluated the testimony of the witness Ms Charmaine Caruana (Chairperson of the Evaluation Committee) as summoned by Dr Antonios Katsampoulas acting for the Agency for the Welfare Services of Asylum Seekers;

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 1749 – SPD2/2021/033 – Tender for Cleaning Services at the Agency for the Welfare of Asylum Seekers (AWAS)

The tender was issued on the 17th November 2021 and the closing date was the 10th December 2021. The value of the tender, excluding VAT, was € 29,150.

On the 23rd May 2022 ACJ Cleaning & Hospitality Services filed an appeal against the Agency for the Welfare of Asylum Seekers 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 nine (9) 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 – Agency for the Welfare of Asylum Seekers

Dr Antonios Katsampoulas

Legal Representative

Ms Charmaine Caruana

Chairperson Evaluation Committee

Ms Rebecca Demarco

Secretary Evaluation Committee

Ms Brenda Said

Member Evaluation Committee

Ms Marisa Sapiano

Member Evaluation Committee

Mr Charles Lia

Member Evaluation Committee

Ms Doreen Seracino

Representative

Preferred Bidder – Apex Community Services

Ms Stephanie Bonello

Representative

Department 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 be relying 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 and Appellant should not be excluded. Appellant's bid was the lowest offer whilst the collective agreement was only an add-on and not necessary.

Dr Antonios Katsampoulas Legal Representative for the Agency for the Welfare of Asylum Seekers said that the tender was clear in the requirements of the certificates which had to be produced and which were not presented. If Appellant had any doubts about these it could have made use of Regulation 262 of the PPRs.

Ms Charmaine Caruana (498084M) called to testify by the Contracting Authority confirmed on oath that two documents were not provided in the submission of the Appellant and therefore lower marks were awarded in one section and nil in the mandatory one.

Questioned by Dr Cachia witness confirmed that this was a BPQR tender and that the Appellant had the best financial offer and if no points had been deducted the tender would have been awarded to the Appellant.

This concluded the testimony.

Dr Cachia said that the Appellant had offered the best financial bid and had been punished because he could not pay the fine whilst he had no obligation to submit a collective agreement.

Dr Katsampoulas said that the tender criteria were not on price but on meeting the overall requirements which were not met.

There being no further submission the Chairman 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 SPD2/2021/033 listed as case No. 1749 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Amadeus Cachia

Appearing for the Contracting Authority: Dr Antonios Katsampoulas

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 due to these two reasons which were given by the Department of Contracts in his technical offer:
“1. Criterion 1.14 C - Social Aspects C1 - Equal Opportunities (i) Evidence that the Economic Operator is an equal opportunities employer, in line with Equality Mark certificate issued by NCPE (or equivalent). A copy of the NCPE Equality Mark Certificate (or equivalent) is to be provided. (add-on) - Applied for NCPE Certification but are not as yet in possession of it. NCPE Certificate not provided
2. Criterion 1.22 Kindly upload copy of a Valid Collective Agreement registered with DIER (or an equivalent foreign Authority) as per criteria C2(Vii) of the evaluation grid – No Collective agreement provided”
- b) That with all due respect the appellant humbly submits that the first reason given was with regards the fact that the company does not have in its possession a NCPE Certification. 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 the second reason given by the Department of Contracts was 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 2nd June 2022 and its verbal submission during the virtual hearing held on 20th June 2022, in that:

- a) Pleas - By way of preliminary plea, the Contracting Authority hereby pleads that the Evaluation Committee assigned to the present procurement is granted a degree of discretion or leeway', which should not allow this Board substituting such faculty.' In any instance, the purpose of the best price quality ratio is the search for the best value for money. Without prejudice to the discretion which is afforded to the Evaluation Committee, the Public Contract Review Board may only review the decision thereof in so as a correct application of such discretion has been made. As shall be proven at the eventual public hearing of the present objection, the Evaluation Committee has carefully and thoroughly examined the tender offers submitted by the respective tenderer, namely the objector and the recommended tenderer and issued its decision only after having adhered to all award specifications indicated in section 6 of the tender document.
- b) NCPE Certification - With reference to the element of equality which the award criteria in the tender document required the economic operator to have NCPE Certification, the economic operator insists that it can dispense with the same document and has presented detailed information about it implementing a number of equal opportunity practices for its employees. In terms of regulation 239 of the Public Procurement Regulations, 2016, contracting authorities are to specify, in the procurement documents, the relative weighting given to each of the criteria

chosen to determine the most economically advantageous tender. Therefore, since the procurement document had been required by the Contracting Authority as part of the award criteria in the tender document and which had not been provided by the economic operator criteria, it cannot expect to be given marks on such award criterion. The authority is restricted in its decision-making and has to adhere to the relevant parameters listed in the tender document.

- c) Collective Agreement - In the second instance, the objector has contested the necessity of the collective agreement as forming part of the award criteria specified in the procurement document. The Contracting Authority refers to the legislative framework underpinning the award criteria, in terms of the best price quality criteria, for the services sought to be procured and which has its source inter alia in Regulation 239 et seq of the Public Procurement Regulations, 2016. The Public Procurement Regulations illustrate a non-exhaustive list of award criteria as long as these are related. The Contracting Authority submits that the award criteria as laid down in the tender document, including the collective agreement requirement is necessary and is linked to the subject-matter of the contract, since it is intrinsically related thereto. Collective agreements are governed by the Employment and Industrial Relations Act, Cap. 452 of the Laws of Malta. Therefore, the Contracting Authority had every right to request the production thereof since the employment conditions of the individuals carrying out the cleaning services should be known to the same and that such specifications allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria. Beyond national law requirements, the Contracting Authority refers to page 39 of document of Making Socially Responsible Public Procurement Work: Good Practice Cases of the European Commission whereby the Commission specifies that economic operators and/or bidders are required to submit documentation including contract agreements.
- d) Regulation 262 - Should the objector have had any query or compliant (sic) regarding the necessity of such award criteria in the tender document, it should have sought to address the same issue before the awarding of the contract, through a clarification note or in terms of the pre- contractual remedy under regulation 262 of the Public Procurement Regulations, 2016.

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

- a) NCPE Certification – 1st grievance –
- i. The Board notes that the tender dossier is very clear and unambiguous in page 11, paragraph 6.1 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 C1(i) is also listed as an 'Add-on'.
 - 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. It must be noted that the evaluation and eventual award of such tender was to be based on the BPQR method of evaluation. 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 must still 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.
- b) Collective Agreement – 2nd grievance –
- i. The Board notes that the tender dossier is very clear and unambiguous in page 11, paragraph 6.1 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(vii) 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