PUBLIC CONTRACTS REVIEW BOARD

Case 1759 – CT2287 / 2021 – Tender for the Provision of Environmentally Friendly Cleaning Services Including Summer in State Schools and Educational Facilities in Malta and Gozo

11th July 2022

The Board,

Having noted the letter of objection filed by Professor Ian Refalo and Dr John Refalo on behalf of Refalo Advocates acting for and on behalf of All Clean Services Ltd, (hereinafter referred to as the appellant) filed on the 28th March 2022;

Having also noted the letter of reply filed by Dr Simon Cachia acting for the Ministry for Education and Sports and Dr Mark Anthony Debono acting for the Department of Contracts (hereinafter referred to as the Contracting Authority) filed on the 7th April 2022;

Having heard and evaluated the testimony of the witness Mr George Psaila (Chairperson of the Evaluation Committee) as summoned by Dr John Refalo acting for All Clean Services Ltd;

Having heard and evaluated the testimony of the witness Mr Louis Cordina (Assistant Director at the Department of Contracts) as summoned by Dr Simon Cachia acting for the Ministry for Education and Sports;

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 7th July 2022 hereunder-reproduced;

Minutes

Case 1759 – CT 2287/2021 – Tender for the Provision of Environmentally Friendly Cleaning Services including Summer in State Schools and Educational Facilities in Malta and Gozo (split into 12 Lots)

The tender was issued on the 19th November 2021 and the closing date was the 21st December 2021. The value of the tender, excluding VAT, was € 28,952,880 for three years.

On the 28th March 2022 All Clean Services Ltd filed an appeal against the Ministry for Education as the Contracting Authority objecting to their disqualification on Lot 2, Lot 6, Lot 7 and Lot 8 on the grounds that their offer failed to satisfy the criterion for award.

A deposit of € 64,638 was paid covering all four lots.

There were seven (7) bidders.

On the 7th July 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Dr Vincent Micallef as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – All Clean Services Ltd

Dr John Refalo	Legal Representative
Ms Rodianne Brincat	Representative
Ms Itiana Abela	Representative

Contracting Authority – Ministry for Education, Sport, Youth, Research and Innovation

Dr Simon Cachia	Legal Representative
Mr George Psaila	Chairperson Evaluation Committee
Mr Joseph Zerafa	Evaluator
Mr Simon Farrugia	Evaluator
Ms Jacqueline Pace Delicata	Evalautor
Ms Maria Galea	Representative
Ms Josette Sant	Representative

Preferred Bidder – General Cleaners Co Ltd

Mr Ramon Fenech	Representative

Department of Contracts

Dr Mark Anthony Debono	Legal Representative

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and before inviting submissions asked for approval that one of the Board members will be participating on line. This was approved.

Dr John Refalo Legal Representative for All Clean Services Ltd said that the best offer had been prejudiced on the point of a missing collective agreement. This item which was an add-on makes an absurdity of the law. There was also a preliminary point raised by the Contracting Authority regarding the requirement to seek a precontractual remedy. Appellant is not obliged to do this as the law states 'may' and not 'shall'. The high fees involved in seeking a remedy under Regulation 262 makes this prohibitive when Appellant at that stage has not even decided if it is going to submit a bid.

Dr Simon Cachia Legal Representative for the Ministry for Education said that the whole point of a 262 appeal was precisely to offer a remedy to enable contestation of clauses in a tender. If Appellant felt that the add-on clause should not have been there it could have been contested. However illegality of the clause was only claimed after the award was known. On the merits of the case the Public Procurement Regulations (PPR) allow the inclusion of collective agreements as one of the requisites of a tender – this is not only permitted but recommended as best practice. There is a Court of Appeal decision on this and the EU Commission recommends it.

Mr George Psaila (444565M) called as a witness by Appellant testified on oath that he was the Chairperson of the Tender Evaluation Committee (TEC). Referred to Question 28 – D1 of the tender witness stated that General Cleaners claim that an employment agreement covers all aspects of employment both for employers and employees. The collective agreement is more detailed that an employment contract, covers many employment aspects and is in line with social responsibility. In the tender this was a mandatory clause and the TEC was following the tender criteria and it was a question of either one had a collective agreement or not. All clauses in the collective agreement submitted in

the bids had been checked and points awarded on a range of 0 to 100. The TEC also checked that the employees had a written contract and the collective agreement was requested as an add-on. If a bidder presented only a collective agreement it would not have been sufficient to meet the tender requirements.

In reply to a question from Dr Cachia witness stated that if no collective agreement was submitted in the bid the bidder would be awarded one point – no one was disqualified if they did not submit an agreement.

Mr Louis Cordina (121783M) called as a witness by the Contracting Authority testified on oath that he is an Assistant Director at the Department of Contracts (DoC). He referred to the EU 2014 Directive which states that public purchasing has wider implications like innovation and the social aspect. Since then the DoC sought ways to implement the requirements by seeking better quality service including for workers. These criteria have been implemented since 2016 and enforced especially in the case of precarious work. The DoC always ensures that the Directive is followed and the clause regarding the requirement for a collective agreement is embedded in their terms. This is approved by the EU as best practice.

Questioned by Dr Refalo witness stated that the criteria regarding the collective agreement had been cleared and registered with the Department of Industrial and Employment Relations which indicated what should be included – this ensures validity.

This concluded the testimonies.

Dr Refalo said that there was not much to add to the letter of objection. Employees could have all terms of employment covered in one contract – either a contract of employment or a collective agreement, as the latter would make the former null. Under Chap 452 of the laws of Malta giving two contracts would be tantamount to breaking the law. Even if one accepts the social aspect angle it still should not be included in the clauses of a tender. It does not follow that a collective agreement gives an employee better terms whilst the employment contract gives total protection. Further if the need for a collective agreement is an add-on it does not make sense to make it mandatory. Appellant's bids are cheaper.

On the point of precontractual remedy it is economically impossible for an economic operator to pay the high deposits requested whilst the request for a collective agreement is against the law concluded Dr Refalo.

Dr Cachia said that there seems to be a difficulty on the part of the Appellant as to whether the collective agreement is illegal or a useful tool. Only one point is being contested in the tender – the one on which Appellant was not compliant. A collective agreement gives greater security to employees. Appellant is claiming that the clause requesting a collective agreement is illegal – not only is it legal but it is recommended as best practice. On the preliminary point Appellant had the possibility of contesting the clause in the tender before participating in it.

There being no further submissions the Chairman thanked the parties and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 7th July 2022.

Having noted the objection filed by All Clean Services Ltd (hereinafter referred to as the Appellant) on 28th March 2022, refers to the claims made by the same Appellant with regards to the tender of reference CT2287 / 2021 listed as case No. 1759 in the records of the Public Contracts Review Board.

Appearing for the Appellant:	Dr John Refalo
Appearing for the Contracting Authority:	Dr Simon Cachia

Whereby, the Appellant contends that:

a) Preliminary issue - The Tenderer is raising an objection in the sense that the maximum amount payable for an appeal under regulation 273 is of €50,000. Objector has, on a without prejudice, paid the sum of €64,000 in view of this appeal. The point being made here is that the subdivision of a tender in various lots, whilst permissible at law, cannot be such as to require a tenderer filing an appeal from any or all of the said lots to pay an amount in excess of the said ceiling of €50,000. In this respect one also notes that in actual fact it is clear that the Department of Contracts and all tenderers were looking at this Tender as one and this is reflected both in the pricing and in the ranking and award of each of the 12 lots.

b) Merits -

   i. The offer made by the Objector is indisputably and absolutely the cheapest for each lot under discussion. This results very clearly not only when you compare the offer with General Cleaners but also against all other tenderers.

   ii. The Objector has a perfect score sheet on the technical aspect meeting all the mandatory requirements. The only requirement that is not met is an "add-on" requirement, ie: *'Question 28 - D1 (vi) A valid Collective Agreement in place'*

   iii. The requirement as per Question 28 – D1 (vi) is not a permissible requirement in respect of this tender and this for a number of reasons.

   iv. It is certainly laudable that the Contracting Authority seeks to award tenders to operators that abide by their social responsibility towards their employees. Thus one can understand the inclusion of mandatory provisions that require the employees to be provided (for example) with a written contract. However, the adjudicating criterion, ie the requirement (as an add-on) that there be a collective agreement in place, is not a criterion that could be validly imposed as a condition on this tender.

v. The requirement in question ie that there be a collective agreement in place is not linked to the subject matter of the contract in that it is does not relate to the services to be provided and does not comply with fundamental principles of EU law.

vi. First of all one notes that the Tender (see question D1.iii) requires the employees to be given an employment contract. Objector has obtained full marks for this mandatory question. This means that all the employees intended to be deployed on the contract have in place a contract that regulates their employment.

vii. One must also raise the point that the employment of cleaners is subject to a National Standard Order which according to section 5(1) of Cap.452 *"shall be the recognised conditions of employment for the employees concerned."* The conditions of employment of cleaners in Malta are determined by the Private Cleaning Services Wages Council Wage Regulation Order (S.L452.76). SL452.74 provides for the establishment of a *"Wages Council which operates for all employees who work with establishments providing private cleaning services."*

viii. This apart from the fact that the Government also has minimum conditions in place applicable to those employees deployed in a public function and which conditions are proven to be adhered to by the Objector.

ix. When there is a collective agreement in place the employee's conditions of employment are governed by the collective agreement and NOT by an individual agreement in writing with the individual employee. Effectively the collective agreement takes the place of the individual employment contract. The agreement in writing would also not be valid and any conditions different to the collective agreement would not be enforceable. What then would be the use of giving an Employee an Agreement in writing to merely re state the same conditions set out in the Collective Agreement.

x. Secondly it will be shown that there are minimum conditions in place, required by the Government on all contracts of a similar nature, that are adhered to by the Objector.

xi. Thirdly, it is a mandatory requirement of the tender that employees be allowed by the Employer to join unions. The existence of a collective agreement is therefore meaningless. It adds nothing relevant to the way in which the services are provided. And, if anything the question should have been couched in a way to ensure that the Tenderer has in place either (i) an individual agreement with all the employees or (in) a Collective Agreement covering the relevant employees.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 7th April 2022 and its verbal submission during the virtual hearing held on 7th July 2022, in that:

a) Preliminary issue – In relation to the deposit paid, this is not the right forum to address such a grievance. Nonetheless, the capping of €50,000 is to be calculated on a per lot basis. This as per Regulation 273 of the Public Procurement Regulations ("PPR")

b) Merits –

    i. All that the Appellant is basically stating in the their letter of objection is that in their opinion it was not permissible to include question 28 – D1 (vi)

    ii. Regulation 262 of the PPR is amply clear that such type of grievances should have been brought forward prior to the closing date of tenders. Such an appeal should have been filed withing 'two thirds' timeframe as per Call for Remedies applications.

    iii. Since this mechanism has not been availed of, the Appellant's did not consider such a criterion as illegal and / or discriminatory when it submitted its offer. It was only when the offers were evaluated and they were not chosen as the preferred bidder that it thought that this criterion was illegal and / or discriminatory.

    iv. Moreover, the Contracting Authority contends that such a criterion is certainly not illegal and / or discriminatory. Initially it needs to be pointed out that this was an 'add-on' requirement and hence those economic operators which do not have a collective agreement in place, are not deemed as not compliant. Moreover, the regulations of public procurement do encourage the use of collective agreements as part of their requirements.

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 witnesses duly summoned, will now consider Appellant's grievances.

The points that merit attention are three-fold.

1. Preliminary issue – Deposit
2. Regulation 262
3. Question 28 – D1 (vi) – 'A valid Collective Agreement in place'

a) Preliminary issue – Deposit – The Board notes the written representations brought forward by both parties. It also notes that during the hearing this issue was not raised, and no verbal submissions were forthcoming. Reference is made to regulation 273 of the Public Procurement Regulations ("PPR") whereby it is stated: *"The objection shall only be valid if accompanied by a deposit equivalent to 0.50 per cent of the estimated value set by the contracting authority of the whole tender or if the tender*

is divided into lots according to the estimated value of the tender set by the contracting authority for ***each*** *lot submitted by the tenderer, provided that in no case shall the deposit be less than four hundred euro (€400) or more than fifty thousand euro (€50,000) which may be refunded as the Public Contracts Review Board may decide in its decision."* (bold emphasis added) It is this Board's opinion that when a tender is divided into lots, the minimum and maximum thresholds are to be taken for each specific lot individually.

b) Regulation 262 – Reference is made to regulation 262 of the PPR whereby: *"262. (1) Prospective candidates and tenderers* ***may****, within the first two-thirds of the time period allocated in the call for competition for the submission of offers, file a reasoned application before the Public Contracts Review Board: (a) to set aside or ensure the setting aside of decisions including clauses contained in the procurement document and clarification notes taken unlawfully at this stage or which are proven to be impossible to perform; or (b) to determine issues relating to the submission of an offer through the government's e-procurement platform; or (c)* ***to remove discriminatory technical****, economic or financial* ***specifications which are present in the call for competition****, in the contract documents, in clarifications notes or in any other document relating to the contract award procedure; or (d) to correct errors or to remove ambiguities of a particular term or clause included in a call for competition, in the contract documents, in clarifications notes or in any other document relating to the contract award procedure; or (e) to cancel the call for competition on the basis that the call for competition is in violation of any law or is likely to violate a particular law if it is continued."* (bold emphasis added).

   The Board is in agreement with the argumentation brought forward by the Appellant that the regulation uses the word "may", and therefore an economic operator is not obliged per se, to make use of this tool / regulation. However, in this Board's opinion, regulation 262 is the proper tool available, at the disposal of economic operators, when they feel aggrieved on 'potential' discriminatory technical specifications found in the tender dossier. They cannot accept, *ab initio*, all that is written in the tender dossier, present and formalise a bid, wait for the eventual award of tender, and then if not being awarded such tender, feel aggrieved about specifications which were known as from the start of the tendering procedure. The arguments brought forward, by the Appellant, about the 'high fees' to place a call for remedy application, are deemed immaterial since the amount to be paid as part of the deposit is commensurate to, and is based on the, estimated procurement value of the tender in question. Minimum and maximum thresholds also apply.

c) Question 28 – D1 (vi) – 'A valid Collective Agreement in place' – Even though, as per point above, this Board opines that the Appellant should have used regulation 262 in order to appeal against such grievances, this Board will still comment on the merits of the case. Reference is made to recital 18(2) of the European Directive 2014/24/EU whereby such use of collective agreement is in fact encouraged by EU institutions[as best practice]. Moreover, this Board is comforted by the testimony under oath of Mr Louis Cordina whereby he confirmed that such collective agreements presented as part of the bids, by other economic operators, had the 'blessing' / approval of the specialised entity within government for such work, i.e. the Department of Industrial and Employment Relations (DIER).

Therefore, this Board does not uphold the grievances of the Appellant.

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 on Lot 2, Lot 6, Lot 7 and Lot 8, not to be reimbursed.

Mr Kenneth Swain	**Mr Lawrence Ancilleri**	**Dr Vincent Micallef**
Chairman	**Member**	**Member**