

PUBLIC CONTRACTS REVIEW BOARD

Case 1777 – SPD3/2022/012 – Services - Framework Agreement for the Provision of Refrigerated Transport and Highup Services to be used for the Emergency on Farm Slaughtering Services for the Strategy and Support Division within the Ministry for Gozo

16th August 2022

The Board,

Having noted the letter of objection filed by Dr Ryan C Pace acting for and on behalf of Ms Maria Magro, (hereinafter referred to as the appellant) filed on the 13th June 2022;

Having also noted the letter of reply filed by Dr Tatiane Scicluna Cassar acting for Ministry for Gozo (hereinafter referred to as the Contracting Authority) filed on the 23rd June 2022;

Having heard and evaluated the testimony of the witness Ms Maria Magro (the Appellant) as summoned by Dr Ryan C Pace acting for Ms Maria Magro;

Having heard and evaluated the testimony of the witness Mr Eucharist Camilleri (Chairperson of the Evaluation Committee) as summoned by Dr Ryan C Pace acting for Ms Maria Magro;

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 11th August 2022 hereunder-reproduced.

Minutes

Case 1777– SPD3/2022/012 – Framework Agreement for the Provision of Refrigerated Transport and High Up Services to be used for the Emergency on Farm Slaughtering Services for the Strategy & Support Division within the Ministry for Gozo

The tender was issued on the 29th March 2022 and the closing date was the 27th April 2022. The estimated value of the tender, excluding VAT, was € 57,125.

On the 12th June 2022 Ms Maria Magro filed an appeal against the Ministry for Gozo as the Contracting Authority objecting to the award of the tender to a bidder whose offer was cheaper.

A deposit of € 400 was paid.

There were two (2) bids.

On the 11th August 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Dr Vincent Mercieca as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Ms Maria Magro

Dr Ryan Pace
Ms Maria Magro

Legal Representative
Representative

Contracting Authority – Ministry for Gozo

Dr Tatiane Scicluna Cassar
Mr Eucharist Camilleri
Mr Joseph Mifsud
Mr Daniel Camilleri
Mr Christian Buttigieg
Mr Marnol Sultana

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

Preferred Bidder – Mr Peter Paul Said

Dr Chris Said
Mr Peter Paul Said

Legal Representative
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 Ryan Pace Legal Representative for Ms Maria Magro said that the point of contention in this Appeal was the high-up service which was not an option but mandatory. The adjudication of the tender was not within the parameters of the tender document.

Dr Tatiane Scicluna Cassar Legal Representative for the Ministry for Gozo stated that according to the Contracting Authority the winning bidder provided the correct documents. The tender requested the provision of a high-up vehicle without insisting on proof of ownership. Regulation 235 of the PPR allowed reliance on the capacity of other entities and since both offers were fully compliant the tender was awarded to the cheapest offer.

Dr Chris Said Legal Representative for Mr Peter Paul Said agreed with the submissions of the Authority. The preferred bidder has carried out this work for two years prior to this tender and has the capacity to fulfil the tender requirements.

Ms Maria Magro (3881G) called to testify by the Appellant stated on oath that the tender required a high-up service in conjunction with a refrigerated van. A copy of the relevant log book was tabled confirming this together with a certificate of training indicating that Joseph Magro has the necessary skills to drive a truck mounted crane. Witness explained that a crane operated independently of the vehicle meant the operations were not combined.

Questioned by Dr Said witness said that she is aware that the preferred bidder has experienced crane usage employees but is not aware of any other facilities he may have to carry carcasses.

In reply to questions by Dr Scicluna Cassar witness mentioned that the tender specifically requested a high-up which was different to just a lifting service.

Mr Eucharist Camilleri (30595M) called as a witness by the Appellant testified on oath that the objective of the tender was a refrigerated transport with high-up service. The preferred bidder offered two types of crane one of which was more powerful than a high-up. He confirmed that no part of the bids included subcontracting.

In reply to questions from Dr Scicluna Cassar, witness said that all that a high-up means is that it can lift carcasses.

This concluded the evidence.

Dr Pace said that the Chairperson's explanation made it clear that what is offered and what was required are different things. Self-limitation has to follow the tender which asked for a high-up when what was offered was a building construction crane. The point that a crane can lift heavier loads is not valid nor relevant to the tender criteria and if one stuck to them only a high-up qualifies. The Chairperson confirmed that there was no subcontracting and it therefore follows that the two cranes are the preferred bidder's only offer. Past relations do not form part of the adjudication process and are irrelevant whilst equivalence has to be on the high-up not on any lifting equipment. High-up is the only equipment that qualifies and the preferred bidder's offer is not technically compliant.

Dr Said claimed that a high-up is another form of crane and there is no distinction between the two. All that the tender required was lifting services and this was acceptable on past tenders.

Dr Scicluna Cassar said that all that the Authority required was a truck mounted crane and both bids fulfil the lifting purpose. HIAB, a brand name, from which the word high-up is corrupted is not mentioned in the tender and there is no proof what the Appellant offered. The criteria was on price.

Dr Pace concluded by saying that the fact that the Authority has tried to make a distinction is clear on what the tender required.

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 11th August 2022.

Having noted the objection filed by Ms Maria Magro (hereinafter referred to as the Appellant) on 13th June 2022, refers to the claims made by the same Appellant with regard to the tender of reference SPD3/2022/012 listed as case No. 1777 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Ryan C Pace

Appearing for the Contracting Authority: Dr Tatiane Scicluna Cassar

Appearing for the Preferred Bidder: Dr Chris Said

Whereby, the Appellant contends that:

- a) The Department of Contracts' decision to award this tender to the preferred bidder - on the basis that he is "the cheapest compliant bidder" - attests to an incomplete and unfair evaluation process, one in which selected requirements, specifications and/or conditions specifically listed in the applicable tender document were arbitrarily discarded, this leading to an incorrect and erroneous decision. *"The subject of this tender is the provision of refrigerated transport and high up services to be used for emergency on farm slaughtering services for the Strategy and Support Division within the Ministry for Gozo."* The relative tender document further provides that *"bidders must submit together with this tender document the details of ownership, licenses and permits for the high-up being proposed under the term of this contract. The license registration number of the high-up will be submitted with the bidder's offer."* The principle of self-limitation imposes a duty on any adjudicating body to limit its evaluation to the terms and conditions specifically outlined in the applicable tender document. Under no circumstance shall such terms and conditions be varied and shall thus remain unfettered from start to finish. Offers by prospective bidders must therefore be fully aligned to what is clearly and explicitly stated and/or listed in the tender dossier.
- b) Appellant firmly submits that the tender document could not have been clearer in outlining the request for services, specifically services undertaken by means of a high up. In order to be eligible for the award of the contract, prospective bidders were expected to be in possession of a high up - not just any vehicle - prior to the award of the contract so much so that *"bidders must submit together with this tender document the details of ownership, licenses and permits for the high-up being proposed under the term of this contract. The license registration number of the high-up will be submitted with the bidder's offer."* As per the abovementioned tender dossier, therefore, bidders who, at the time of the submission of their offer, were not in possession of a high up, were not eligible for award and their respective offers should have consequentially been deemed unsuccessful on account of technical non-compliance. Shockingly, albeit possibly inadvertently, it transpires that the Evaluation Committee (as later endorsed/approved by the Department of Contracts) evaluated the preferred bidder's offer from a strictly monetary perspective, doing away with the mandatory selection criteria which are essential to the attainment of the objectives of this tender. This arbitrary and unjustified departure from the unequivocal text of the tender document does not only run counter to the core principles in public procurement (and breach the principle of self-limitation) but also cause significant prejudice to the appellant - more so considering that the administrative, technical and financial compliance of her offer, as opposed to that of the preferred bidder, is undoubted.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 23rd June 2022 and its verbal submission during the virtual hearing held on 11th August 2022, in that:

- a) The objector seeks to cast doubt on the decision of the Evaluation Committee in recommending the tenderer for award by stating that the same had not been technically compliant since he did not possession (sic) the high up machinery intended to carry out the services required by the Contracting Authority. The Evaluation Board declares that it has acted in terms of its remit always in ensuring compliance of bidders and examined the literature submitted by both competitors in line with the requirements of the relevant tender.
- b) The Contracting Authority submits that the tender offer had only been chosen after the relevant procedure had taken place, inter alia, in terms of Rule 16 of the General Rules Governing Tenders with the Evaluation Committee having carefully and diligently examined the tender offers together with any documentation in support thereof. As shall be proven during the eventual public hearing, the Evaluation Committee has in line with the tender document and in accordance with the principle of self limitation no option other than to recommend for award the administratively, technically and financially compliant offer with the cheapest price. The recommendation of the Evaluation Committee had thereafter been approved by the Departmental Contracts Committee.
- c) In the present case, in the terms of reference at page 11 section 6 of the tender document, it had been mandatory for the bidder: *“The service provider must also provide for the service of lifting of the carcass on farm during evisceration by means of a high up”* and at page 12 point 2.3 *“Bidders must submit together with this tender document the details of ownership, licenses and permits for the high-up being proposed under the term of this contract. The license registration number of the high up will be submitted with the bidder's offer.”*
- d) At page 12 section 2.6 *“Prior to the contract award, the Contracting Authority reserves the right to confirm any tenderer's claims and submissions regarding the provision of a high up and refrigerated vehicle contingency arrangement. The services of a high up and refrigerated vehicle can be carried out by the same vehicle if the vehicle is equipped to provide for both services.”*
- e) The latter part implies that it is possible for the tenderer to carry out the two functions of i) refrigeration and ii) lifting of carcasses by means of two different vehicles. Therefore, the tender does not exclude having a refrigerated van and having a high up to carry out the two different functions of refrigeration and lining of slaughtered animals. The said information was to be submitted through the requested literature list which the Evaluation Committee examined and found to be compliant with the technical specifications.
- f) By referring to the Technical Literature provided to the Evaluation Committee, it had been satisfied that the vehicles of the recommended tenderer performed the services required by the Contracting Authority in terms of Section 3 of the Tender Document. The Evaluation Board had been satisfied with the machinery provided by both bidders and found them to be compliant with what was required as per the technical specifications.
- g) Should the Evaluation Committee have had any issue in so far as the recommended tenderer not possessing the machinery required for the performance of the services sought to be procured by the Contracting Authority, it would have issued a clarification request in terms of Rule 16(3) of

the General Rules Governing Tenders and regulation 62(2) of the Public Procurement Regulations, 2016 to the recommended tenderer.

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.

- a) The Board opines that the only relevant matter to this appeal revolves around the term 'High Up Services'. Therefore, this Board will analyse what it deems to be most relevant points as emerging from the hearing, as compared to what was required by the tender dossier.
- b) Initially reference is made to the testimony under oath of Mr Eucharist Camilleri, chairperson of the evaluation committee, whereby it transpired that the preferred bidder within its submission, offered the use of two (2) cranes, namely a 'Canter Crane' and an 'FD161C Crane'. This was corroborated with the respective logbooks issued by the licensing authority, more specifically the section entitled 'Vehicle Commercial Description/Name'. On the other hand, the vehicle included within the submission of the Appellant, within its logbook, stated 'Elf: Truck with HIAB'.
- c) It is therefore evident to this Board, that even the licensing authority (Transport Malta), does in fact make a distinction between what is a 'Crane' and what is a 'Truck Mounted Crane' / 'Truck with HIAB'. HIAB is a brand name that is owned by a European private company, whereby in the lifting and haulage industry enjoys a reputation much like 'hoover' do in the vacuum industry. The 'HIAB' cranes are truck mounted cranes that allow a lorry or truck to self-load and unload. Therefore, the HIAB also refers to what is understood to be a 'High Up'.
- d) It is also very clear and unambiguous what the tender dossier required from the economic operators. The title of the tender document is self-explanatory whereby it states "*..... for the Provision of Refrigerated Transport and **High Up Services**.....*" (bold & underline emphasis added). Section 3 paragraph 2.3 of the tender dossier also states "*Bidders must submit together with this tender document the details of ownership, licenses and permits for the **high-up** being proposed under the term of this contract. The license registration number of the **high-up** will be submitted with the bidder's offer.*" (bold & underline emphasis added).
- e) This Board is also of the opinion that what was offered in previous calls for tender is irrelevant to these proceedings, even if the tender dossier was very much similar to the one under appeal. The fact that previous calls were carried out by the Appellant and Preferred Bidder, in different instances, is also deemed irrelevant. Each and every tendering procedure needs to be analysed, reviewed and evaluated under its own independent merits and procedures.
- f) This Board opines, even when noting that the licensing authority makes a distinction between a crane and a truck mounted crane, that the evaluation committee broke the principle of self-limitation when it deemed the 'preferred bidder' as technically compliant. The tender dossier specifically requested a 'high-up' and rightly or wrongly, that is what needs to be supplied in order

to be deemed technically compliant. Again, this Board highlights the importance to Contracting Authorities about the need to be very much clear in the drafting of tender documents. A Contracting Authority cannot request certain characteristics / specifications in a tender document and then evaluate the bids using a different ‘ruler’. This would also create distortion and not allow a same level playing field between economic operators. In this instance, any other rational economic operators who would have had within their fleet a number of cranes but having no specific truck mounted cranes, would not have submitted a bid. This due to the restrictive wording of the tender document, which is certainly not desirable.

Hence, this Board upholds the Appellant’s grievances.

The Board,

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) To uphold the Appellant’s concerns and grievances;
- b) To cancel the ‘Notice of Award’ letter dated 3rd June 2022;
- c) To cancel the Letters of Rejection dated 3rd June 2022 sent to Ms Maria Magro;
- d) To order the contracting authority to re-evaluate all the bids received in the tender through a newly constituted Evaluation Committee composed of members which were not involved in the original Evaluation Committee, whilst also taking into consideration this Board’s findings;
- e) After taking all due consideration of the circumstances and outcome of this Letter of Objection, directs that the deposit be refunded to the Appellant.

Mr Kenneth Swain
Chairman

Mr Lawrence Ancilleri
Member

Dr Vincent Micallef
Member