

PUBLIC CONTRACTS REVIEW BOARD

Case 1778 – SPD5/2022/017 – Services – Framework Agreement for the provision of preventive maintenance and support for the air conditioning systems for the Court Services Agency

16th August 2022

The Board,

Having noted the letter of objection filed by Dr Chris Said acting for and on behalf of Mr Ruslan Cilia, (hereinafter referred to as the appellant) filed on the 25th July 2022;

Having also noted the letter of reply filed by Dr Chris Mizzi acting for and on behalf of Court Services Agency (hereinafter referred to as the Contracting Authority) filed on the 4th August 2022;

Having heard and evaluated the testimony of the witness Mr Ernest Cilia (Representative of Mr Ruslan Cilia) as summoned by Dr Chris Said acting for Mr Ruslan Cilia;

Having heard and evaluated the testimony of the witness Ms Laura Desira (Chairperson of the Evaluation Committee) as summoned by Dr Chris Mizzi acting for Court Services Agency;

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 1778 – SPD5/2022/017 – Framework Agreement for the Provision of Preventive Maintenance and Support for the Air-Conditioning Systems for the Court Services Agency

The tender was issued on the 26th May 2022 and the closing date was the 16th June 2022. The estimated value of the tender, excluding VAT, was € 27,800.

On the 25th July 2022 Mr Ruslan Cilia filed an appeal against the Court Services Agency as the Contracting Authority objecting to his disqualification on the grounds that his bid was deemed to be not technically compliant

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 – Mr Russlan Cilia

Dr Chris Said
Mr Ernest Cilia

Legal Representative
Representative

Contracting Authority – Court Services Agency

Dr Christopher Mizzi
Ms Laura Desira
Mr Daniel Mifsud
Ms Maria Busuttil
Ms Doreen Vella
Mr George Magri

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

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

Dr Chris Said Legal Representative for Mr Russlan Cilia said that the only reason for the disqualification was the Gantt Chart submitted in the bid. Appellant claims that his bid meets the time frames set in the tender which the Contracting Authority could have possibly clarified. Appellant also submitted a declaration which followed the time frame but which the Evaluation Committee ignored.

Dr Christopher Mizzi Legal Representative for the Court Services Agency stated that the point at issue is basic. The Gantt Chart presented by the bidder does not respect the tender requirements regarding the time frames of the Quarters; moreover the bidder imposed conditions qualifying the bids. Clarification was not in order as changes to the Gantt Chart would amount to rectification.

Mr Ernest Cila (441661M) called as a witness by the Appellant testified on oath. He explained the reason behind his layout of the time frames in the Gantt Chart and that he had planned the maintenance such that each Quarter's maintenance would be completed earlier than the tender thus leaving room for any unforeseen events. He was anticipating that the work would be carried out earlier than the time specified in the tender.

Questioned by Dr Mizzi. witness agreed that there were eight weeks allowed over and above the maintenance work in the Gantt Chart. These could be used for call-outs and other contingencies. This should not be interpreted as a condition .

Ms Laura Desira (553388M) called to testify by the Contracting Authority stated on oath that she was the Chairperson of the Evaluation Committee and explained that when the Committee examined the Gantt Charts of the bidder they realised that in two of the Quarters there were issues. Quarter 3 starts on the 1st June but ends on the 21st August when it should have ended in September whilst Quarter 4 indicates that work starts in week 34 and ends in week 44 instead of the last day of December – this is not in line with the tender requirements. Service may also be required on weekends and public holidays and the Gantt Chart was not in line with the requirements of the tender in page 13 Article 2.3B in this regard.

In reply to questions from Dr Said witness stated that the start date to Quarters were not observed but completion was within end dates, but the Quarters stipulations were not observed. The inclusion of public holidays in leave and sickness submissions was taken to mean by the Committee as the bidder being unable to provide the service. Clarification could not be sought to correct the Gantt Chart.

This concluded the testimonies.

Dr Said stated that this appeal hinges on whether the Gantt Chart provided was compliant with the terms of the tender. The Authority maintains that the Chart is not as the time frames do not fit with the Quarters although they all end in the correct Quarter. It seems that the bidder has been penalised for taking measures to meet contingencies.

Dr Mizzi said that the Chart was not compliant as the Quarters were not observed but varied at the whim of the bidder. Certain Quarters overlap other Quarters which defeats the point of quarterly maintenance. The contingencies included in the Chart could not be ignored as they created conditions alien to the terms of the tender. The Evaluators had to practice non-discrimination and self-limitation and thus the appeal should be denied.

There being no further submissions the Chairman 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 Mr Ruslan Cilia (hereinafter referred to as the Appellant) on 25th July 2022, refers to the claims made by the same Appellant with regard to the tender of reference SPD5/2022/017 listed as case No. 1778 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Chris Said

Appearing for the Contracting Authority: Dr Chris Mizzi

Whereby, the Appellant contends that:

- a) The evaluation board makes reference to article 4.2 of section 3 in its rejection letter. However it is evident that this has been interpreted wrongly.
- b) What the evaluation committee is attesting is wrong. An analysis of the Gantt Chart shows that the first quarter ends by week 11, 2nd quarter by week 22 etc, hence prior to the end of each quarter.
- c) The weeks indicated at the end of the year are there as an 'allowance' and not as a 'qualification'.
- d) Finally, reference is also made to the signed declaration by the appellant confirming the periods when the maintenance is to take place. It appears this was not taken into consideration by the evaluation committee.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 4th August 2022 and its verbal submission during the virtual hearing held on 11th August 2022, in that:

a) **Quarterly Maintenance -**

Although the bidder noted that each quarterly maintenance shall be completed within 11 weeks, the bidder did not confirm through the Quarterly Preventive Maintenance Gantt Chart that each quarterly preventive maintenance shall be definitely completed by end of March, June, September and December of each year as was requested in the tender document. The tender document under Article 4.2 of the Terms of Reference in page 15 specifies that "Bidders are to submit a Gantt Chart showing the start and end date of each Quarterly Maintenance (the Quarterly Maintenance of all premises are to be completed by the last day of March, June, September and December of each year respectively) as part of the Technical Offer. This requirements was prescribed in the Tender Document and the Evaluation Committee could not waiver this obligation since such Gantt chart with the explicit information of the quarterly maintenance as required by the Tender Document which would have inevitably be part of the contract agreement. This is in line with the principle of self-limitation and non-discrimination as per Public Procurement Regulations. Should the evaluation committee derogated from such obligation as prescribed in the Tender document the evaluation committee would be in breach of the mentioned principles and therefore vitiating the whole evaluation process. For this reason alone, the bid is to be excluded from the ranking and hence disqualified as per reason given and this appeal dismissed.

b) **Extra weeks indicated at the end of the year**

In the presented Gantt Chart by the bidder for the Quarterly Preventive Maintenance, the Evaluation Committee noted that at the bottom a condition was included which states that "Allowance of 8 weeks in any one year to allow for Leave/Sick Leave/Public Holidays, Tool Breakdowns and Call Outs". This extra condition together with the contents of the Gantt Chart seemed to be altering the requirements of the tender document. Moreover, in subsistence to the previous point, this raised doubts as to whether the quarterly preventive maintenance would be actually completed by end of March, June, September and December of each year as requested in Article 4.2 (iii) of Section 3 - Terms of Reference. But, albeit this incomprehension, the Evaluation Committee was also faced with additional conditions laid down by the bidder which unequivocally such added conditions lead to disqualification of the bid.

The statement regarding the overall allowance of 8 weeks was listed at the end of the Quarterly Preventive Maintenance Gantt Chart in Weeks 45-52. The Evaluation Committee takes this as a condition being imposed on the Contracting Authority to allow the bidder flexibility in completing the overall quarterly preventive maintenance in any given year, and not only the actual quarterly preventive maintenance.

In line with the principle of level-playing field among bidders and self-limitation the bid is to be excluded from the ranking and hence disqualified as per reason given and this appeal dismissed. In

both instances mentioned above the evaluation committee could not opt for a rectification of the submission since did (sic) would involve a change in offer which is not possible under the Tender Document. The principle of self- limitation indicates that the evaluation committee is not able to do and act at free will but only according to what is indicated in the Tender Document.

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. In the Board's opinion there are two main grievances and instances to be analysed. These are in respect of the 'Quarterly Maintenance' and 'Extra weeks' indicated at the end of the year in the Gantt Chart.

- a) **Quarterly Maintenance** – in the Board's views, the tender dossier, in page 14 Section 3 – Terms of Reference, paragraph 4.2.iii is clear and unambiguous when it state "*Quarterly maintenance – this shall take place **and be completed by the last day of** March, June, September and December of each year respectively and for each building as listed in Section 3 Article 2.2.....*" (bold & underline emphasis added). Even though this Board agrees with the logical arguments as brought forward, during the testimony under oath of Ms Laura Desira, that they expected the quarterly maintenance to finish in March / June / September / December, this was not specifically required in the tender dossier. What the tender dossier required, is for the maintenance to be completed by the last day of each quarter. Therefore, as long as the maintenance is completed before 31st March, 30th June so on so forth, the Appellant's bid was within tender specifications. There were no restrictions on when the quarterly maintenance was to start.

Hence, this Board upholds the Appellant's first grievance.

- b) **Extra weeks indicated at the end of the year** – within the submitted Gantt Chart, the Appellant included the following for weeks 45 to 52 "*Allowance of 8 weeks in any one year to allow for leave / sick leave/ public holidays, tool breakdown and call outs*". It is the Board's opinion that such an inclusion, allowance or condition is a qualification on the Appellant's part. This qualification in the Appellant's submission is to the detriment of other economic operators who participated in such procurement procedure and therefore if accepted the contracting authority would not be keeping the same level playing field between all economic operators. It is also important to point out that if accepted, this Gantt chart, and hence this 'extra' condition / allowance, would be part of the contract signed by the economic operator and the contracting authority and would therefore be binding on the contracting authority. Acceptance of such condition would have gone against the principle of self-limitation imposed on evaluation boards.

Hence, this Board does not uphold the Appellant's second grievance.

The Board,

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

- a) To uphold the first grievance of the appellant;
- b) Not to uphold Appellant's second grievance and therefore reject demands of the Letter of Objection;
- c) Upholds the Contracting Authority's decisions in the recommendation for the award;
- d) Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Mr Lawrence Ancilleri
Member

Dr Vincent Micallef
Member