

PUBLIC CONTRACTS REVIEW BOARD

Case 1797 – CT2394/2021 – Lot 5 – Tender for the Provision of Temperature Controlled and Non-Temperature Controlled Transport Services for the Ministry for Health

10th October 2022

The Board,

Having noted the letter of objection filed by Dr Shazoo Ghaznavi on behalf of Legal Works Consortium acting for and on behalf of eCabs Company Limited, (hereinafter referred to as the appellant) filed on the 5th September 2022;

Having also noted the letter of reply filed by Dr Alexia J Farrugia Zrinzo and Dr Leon Camilleri acting for Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority) filed on the 12th September 2022;

Having also noted the letter of reply filed by Dr Mark Anthony Debono acting for the Department of Contracts (hereinafter referred to as DoC) filed on the 15th September 2022;

Having heard and evaluated the testimony of the witness Ms Josette Sciberras (Member of the Evaluation Committee) as summoned by Dr Leon Camilleri acting for Central Procurement and Supplies Unit;

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 6th October 2022 hereunder-reproduced.

Minutes

Case 1797 – CT 2394/2021 – Tender for the Provision of Temperature Controlled Transport Services for the Ministry for Health (LOT 5)

The tender was issued on the 15th January 2022 and the closing date was the 10th March 2022. The estimated value of the tender, for Lot 5, excluding VAT, was € 33,720.

On the 5th September 2022 eCABS Co Ltd filed an appeal against the Central Procurement and Supplies Unit (Ministry for Health) as the Contracting Authority objecting to the withdrawal of the award by the Department of Contracts.

A deposit of € 400 was paid.

There were four (4) bids.

On the 6th October 2022 the Public Contracts Review Board composed of Mr Kenneth Swain Chairman, Dr Charles Cassar and Ms Stephanie Scicluna Laiviera as members convened a virtual public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – eCABS Co Ltd

Dr Shaheryar Ghaznavi	Legal Representative
Dr Charlon Gouder	Legal Representative
Ms Greta Borg Bezzina	Representative
Mr Andrew Bezzina	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Leon Camilleri	Legal Representative
Dr Alexia Farrugia Zrinzo	Legal Representative
Mr Joseph Borg	Chairperson Evaluation Committee
Mr Stephen Cassar	Member Evaluation Committee
Ms Josette Sciberras	Member Evaluation Committee

Department of Contracts

Dr Mark Anthony Debono	Legal Representative
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Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Shaheryar Ghaznavi Legal Representative for eCABS Ltd said that Appellant’s letter of objection dealt fully with their case and he would be relying on this.

Dr Leon Camilleri Legal Representative for the Central Procurement and Supplies Unit said as an opening submission that the tender document was clear – either the cars were available or not.

Dr Mark Anthony Debono Legal Representative for the Department of Contracts said he too would rely on the written submissions and pointed out that the Department of Contracts (DoC) has every right to ask for further information at any stage of the process.

Dr Camilleri requested the production of a witness.

Ms Josette Sciberras (028196M) called as a witness by the Contracting Authority testified on oath that she was the technical evaluator in this evaluation. The vehicle log books submitted by Appellant in his bid were very faint and illegible so the Evaluation Committee (EC) as a rectification requested clearer copies. In reply they received a declaration that if Appellant was awarded the contract it will meet all the terms and conditions in the tender. Clearer copies of the log books were not submitted.

Questioned by Dr Ghaznavi witness stated that the rectification was issued under Note 2. The EC initially accepted the declaration and the evaluation report recommended the award on the basis of this declaration. Subsequently the Chairperson of the EC advised the members that the declaration did not meet the requirements of the tender. Witness confirmed that the declaration was accepted on the basis of the Note 2 rectification which was based on the illegibility of the log books and this was what was asked of the economic operator. The declaration did not correct this point as this was required only if the vehicles were not available at the time of the bid. Once the log books were presented it was obvious that the vehicles were available.

This concluded the testimony.

Dr Ghaznavi referred to a similar PCRB case that accepted and allowed a change of lawyer. Note 2 allows rectification or clarification and the declaration submitted was in lieu of legible log books so it was fully within the parameters of Note 2. The original decision was an informed one and decided correctly within the structure of the tender. Whilst it is correct that Regulation 15(1) of the PPR enables the cancellation of a tender there was no breach of regulations in this case. Note 2 allows either rectification or clarification and therefore the cancellation of the tender does not make sense once the award had been made. The EC was competent and made the correct decision.

Dr Debono said that there was a need in the tender to produce technical literature to supplement the offer and there is no evidence that the declaration as such conforms. The PPR allows the DoC to revoke a tender at any time.

Dr Camilleri said that there is no dispute that the DoC or the Contracting Authority have the right to cancel a tender or a lot in a tender and this is not the ground of objection – the only complaint is regarding the technical compliance. Note 2 does not give liberty for any follow-up action; it is limited purely to the offer. The tender gave alternatives to maintain competition options. The production of the log books by the Appellant indicated that at the time of the bid the vehicles were in hand; when the self declaration was submitted there was a change of offer. The rectification request was clear – this was not followed and the DoC and the EC applied the principle of self limitation which indicated only one outcome.

As there were 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 6th October 2022.

Having noted the objection filed by eCabs Company Limited (hereinafter referred to as the Appellant) on 5th September 2022, refers to the claims made by the same Appellant with regard to the tender of reference CT2394/2021 – Lot 5 listed as case No. 1797 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Shazoo Ghaznavi & Dr Charlon Gouder

Appearing for the Contracting Authority: Dr Leon Camilleri & Dr Alexia J Farrugia Zrinzo

Appearing for the Department of Contracts: Dr Mark Anthony Debono

Whereby, the Appellant contends that:

- a) the Appellant makes direct reference to the reason submitted by the Department of Contracts in justification of the cancellation, namely: *“Since the evaluation committee requested technical literature to corroborate bidder's technical offer and this was not forthcoming, the bid cannot be deemed compliant. A declaration is neither a substitute for literature corroborating technical offer, nor a satisfactory reply to a rectification specifically requesting compliant literature.”*
- b) the Tender document required Bidders to comply with the technical requirements of each lot, by: *“Literature as per Form marked 'Literature List' to be submitted with the Technical offer at tendering stage. The scope of the literature is to corroborate a fully compliant technical offer, (Note 2)”*
- c) from a closer examination of the 'Literature List', one finds that each bidder had two options, and one of these options was: *“In the case of vehicles that are not available or not have been purchased yet, the bidder is to submit a declaration that the vehicles that will be utilised for the provision of this service will be in conformity with the published Terms of Reference, Specifications and Conditions.”*
- d) in the present case the Appellants declared that they have yet to purchase the vehicles and will do so upon being successfully awarded the tender, and this in terms of the Literature List, that formed an integral part of the Tender document. It is incomprehensible how the Department of Contracts can contend that a justification for a cancellation of a Tender is due to the fact that the Appellants failed to submit the necessary literature as set out in the Tender Document under the requirements established for the Technical Offer.
- e) It is evident that the Appellants complied with the requirements set out within the Tender Document by the Contracting Authority and thus made a qualitatively and financially worthwhile bid, and this due to the fact that the bid was compliant with the Tender Document and the value of the bid respected the estimated contract value established within the Tender.
- f) the Department of Contracts cannot use Clause 18(3)(a) of the General Rules Governing Tenders as the requirements and/ or scenarios envisaged in that Clause did not subsist in the present procurement exercise.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 12th September 2022 and its verbal submission during the virtual hearing held on 6th October 2022, in that:

- a) In relation to the objector's submission that a bidder had the opportunity to submit a declaration, CPSU submits that this is correct, however the opportunity to submit a declaration was only an alternative where the vehicles are not yet acquired.
- b) The initial literature submitted consisted of what seems to be 6 vehicle registration certificates (logbooks) which were not easily legible. By means of a letter dated 14th June 2022 the evaluation committee stated and requested the below: *“The submitted Vehicle registration Certificates are not clearly legible and therefore the evaluation board cannot confirm that submitted literature corroborates the declarations made in the technical offer. You are hereby being given the opportunity to rectify your position by re-submitting clear and legible copies of the Vehicle Registration Certificates that corroborate your Technical Offer.”*

- c) Instead of the requested document, the objector submitted a self-declaration that the vehicles that will be used are compliant with the published Terms of Reference, Specifications and Conditions.
- d) Although the literature list provides for the possibility that such self-declaration is submitted, this could only be submitted 'in the case of vehicles that are not available or not have been purchased yet'.
- e) In the present case, the fact that with the initial submission log books (despite being illegible) were submitted with the literature list, clearly show that the alternative of submitting a self-declaration is inapplicable as the vehicles were in fact available, so much so that the bidder had the vehicle registration certificates in hand!
- f) Moreover, a rectification request does not mean that the bidder could submit anything else it desires. The request was for the resubmission of a legible version of the documents which were already presented, namely the vehicle registration certificates and the objector failed to do so. Therefore, the contracting authority and the Department of Contracts were well within their right to cancel the lot by invoking clause 18.3 of the instructions to tenderer since this states that: *“18.3 Cancellation may occur where: (a) the tender procedure has been unsuccessful, namely where no qualitatively or financially worthwhile tender has been received or there has been no response at all;”*
- g) For the avoidance of any frivolous arguments, CPSU submits that although a letter of award in favour of the objector was initially issued, it was subsequently cancelled before the signing of the contract and thus there was no contractual obligation in force between the parties.

This Board also noted the DoC's Reasoned Letter of Reply filed on 15th September 2022 and its verbal submission during the virtual hearing held on 6th October 2022, in that:

- a) Cancellation of Procurement Procedure and Revocation of Award -

The DoC refers to rule 18(3)(a) of the General Rules Governing Tenders whereby Cancellation may occur as a result of: *“the tender procedure has been unsuccessful, namely where no qualitatively or financially worthwhile tender has been received or there has been no response at all”*. This legal ground has been adhered to in accordance with the issued Evaluation Report and the Addendum thereto by the Tender Evaluation Committee and has been confirmed in the decision of the DoC.

The revocation of the award is an authority which, in terms of Regulation 15(1) of the Public Procurement Regulations, 2016, is vested in the DoC to: *“cancel the award of a contract at any time during a call for tenders or quotations even after the recommended bidder has been decreed and the time establish to file and appeal before the Public Contracts Review Board has lapsed...”*

- b) Technical Compliance -

The appellant should have adhered and complied with the request of the Tender Evaluation Committee since, as a reasonably well informed and normally diligent tenderer, it had the duty to

demonstrate to the Tender Evaluation Committee that the vehicles required to provide the services to the Contracting Authority complied with stringent criteria in terms of Section 3 of the Tender Document and such evidence could have only been made by providing the requested literature.

The objective and purpose of the Literature List, being subject to Note 2, is laid down in Section 5C Technical Offer whereby it is stated *“The scope of the literature is to corroborate a fully compliant technical offer of the Tender Document and is mirrored in terms of Literature List document itself whereby it is stated “List of documentation to be submitted with the tender offer to supplement the Technical Offer submitted.”*

According to Transport Conditions for Lots 1-5 as Applicable of the Tender Document, it is stated that: *“Fully descriptive literature and colour illustrations of all the vans to be utilised for the execution of this contract are to be submitted with the offer.”*

In its submissions of defence, the appellant refers to Literature List for *“Van 5 Type E: Non-temperature Moving/Transport Service”* whereby a declaration that had been required and which was the basis for its reply to the request. According to the Tender evaluation Committee, the declaration provided by the Appellant was not tantamount to the literature being sought and that therefore the appellant had not complied with its request, constraining the same to issue an addendum to its evaluation report.

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 now consider Appellant’s grievances.

a) Main grievance –

This Board will initially list out what it deems to be most relevant to this main grievance.

- i. It is a non-disputed fact that in the initial stages of the bidding process, the Appellant submitted a number of vehicle logbooks. One can easily identify that such documents are vehicle logbooks but as the Evaluation Committee correctly pointed out, it is impossible to ascertain the specific details within them. The submitted logbooks are mostly illegible, most probably due to the low quality scanning process.
- ii. The rectification request issued by the Evaluation Committee was very specific when it requested the re-submission of these logbooks in a legible format.
- iii. It is also a non-disputed fact that when the Appellant received the above-mentioned rectification request, rather than adhering to the letter of the request received, the Appellant changed ‘tactics’ and submitted a declaration that the vehicles that will be used are compliant with the published Terms of Reference, Specifications and Conditions.

Therefore, what needs to be ascertained is whether the Appellant could change ‘strategies’ and submit this declaration rather than re-submitting the vehicle logbooks as requested.

Whilst, it is true that the tender provided for both options, including the possibility of submitting a declaration, this option was only 'available' in the case that the vehicles are not yet available or have not been purchased as yet.

What this Board cannot logically understand is how the Appellant can prove that the vehicles were not available or as yet not purchased, when initially he submitted logbooks. It is the opinion of this Board that with the initial submission (of the logbooks), the Appellant is as if declaring that the vehicles are in an already 'available' state. Therefore, when also considering that the rectification request was very clear, it was the duty of the Appellant to abide by what was requested and not to change 'strategies' and move goal posts in the middle of the evaluation process. This is to be deemed as a change in the Appellant's bid, something which is certainly not in terms of the PPR. Therefore, this Board will not uphold the Appellant's grievance.

- b) **Revocation of award** - On the matter of revocation of award, this Board will from the outset makes reference to case law, being E.C. Municipals vs Dipartiment tal-Kuntratti et (420/2019) decided on 27th March 2020, whereby the Court of Appeal when pronouncing itself, very much re-enforced Regulation 15(1) of the Public Procurement Regulations when it stated *"Din il-Qorti tgħaraf li mhux necessarjament għaliex l-offerta tas-socjeta rikorrenti ma tnehhietx waqt il-process tal-evalwazzjoni allura dan ifisser li l-offerta tagħha kienet konformi ma' dak li kienet tgħid is-sejha. Nonostante li nħarget rakkomandazzjoni li l-kuntratt jingħata lis-socjeta' rikorrenti, li ma hijiex decizjoni finali, **jekk jigi skopert li, wara kollox, l-offerta kienet nieqsa minn document mandatorju, il-process tal-iffirmar tal-kuntratt kellu jieqaf.**"* (bold & underline emphasis added) Therefore, it is abundantly clear that revocation of award, before the signing of the contract between the awarded economic operator and the contracting authority, is to be considered lawful if there is a good enough reason. In the present circumstances, reference is being made to the main grievance. Since it has been already adjudged that the appellant did not respond to the rectification request in an acceptable manner, and therefore his bid was to be deemed as technically non-compliant, therefore the manner in which the Evaluation Committee and Contracting Authority proceeded to revoke the recommendation for award, is being deemed in full compliance and adherence of the law.

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 cancellation of the tender (Lot 5),
- c) Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Dr Charles Cassar
Member

Ms Stephanie Scicluna Laiviera
Member