

PUBLIC CONTRACTS REVIEW BOARD

Case 1807 – CT2050/2022 – Supplies – Lease of 48 Plug-in Hybrid Vehicles for the Members of Judiciary

8th November 2022

The Board,

Having noted the letter of objection filed by Dr Dustin Camilleri on behalf of EMA Advocates acting for and on behalf of Fremond Limited, (hereinafter referred to as the appellant) filed on the 27th September 2022;

Having also noted the letter of reply filed by Dr Chris Mizzi acting for Court Services Agency (hereinafter referred to as the Contracting Authority) filed on the 7th October 2022;

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 3rd November 2022 hereunder-reproduced.

Minutes

Case 1807 – CT 2050/2022 – Tender for the Lease of 48 Plug-in Hybrid Vehicles for the Members of the Judiciary

The tender was issued on the 1st May 2022 and the closing date was the 2nd June 2022. The estimated value of the tender excluding VAT, was € 3,155,328.

On the 27th September 2022 Fremond Ltd filed an appeal against the Courts Services Agency as the Contracting Authority objecting to their disqualification on the grounds that their offer was deemed to be not administratively compliant.

A deposit of € 15,776.64 was paid.

There were three (3) bids.

On the 3rd November 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Dr Vincent Micallef as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Fremond Ltd

Dr Dustin Camilleri
Mr Toni Meli

Legal Representative
Representative

Contracting Authority – Court Services Agency

Dr Christopher Mizzi	Legal Representative
Dr Carlos Bugeja	Legal Representative
Ms Laura Desira	Chairperson Evaluation Committee
Mr Daniel Mifsud	Secretary Evaluation Committee
Ms Bronia Farrugia	Member Evaluation Committee
Ms Maria-Louisa Busuttil	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 Dustin Camilleri Legal Representative for Fremond Ltd referred to the two points on which Appellant had been disqualified and said that the evaluation was not carried out correctly as the criteria in question had been superseded by the clarification and Appellant should have been awarded the points as it was offering valeting and washing on a daily basis.

As regard the delivery of vehicles Dr Camilleri said that through the clarification note the letter signed by the importer met the request of the tender as it indicated the delivery times. Although Appellant accepts that it did not submit a Gantt Chart the time frame terms were all met without reservations and if this did not meet requirements a clarification could have easily been sought. All the terms of the tender were met through the medium used and if a different medium was required a clarification should have been sought.

Dr Christopher Mizzi Legal Representative for the Court Services Agency requested the evidence of a witness.

Ms Laura Desira (153388M) called as a witness by the Contracting Authority testified on oath that she was the Chairperson of the Tender Evaluation Committee (TEC) and has been involved in procurement for eight years. She stated that there were problems in Appellant's submission. On Criteria 1.5 the description of the service required indicated a number of marks. Bidder merely stated 'open for 12 hours' without any mention of number or quantities and therefore could not be awarded any marks. Bidder did not state what was required and therefore could not be awarded any marks. A rectification was out of order as this would have altered the bid.

Further, said the witness, according to Criteria 3 a Gantt Chart was required and although mandatory this was not provided. Merely stating 'will be adhered to' was not equivalent to a Gantt Chart – neither were the submissions by Muscat Motors. Again no marks could be awarded.

Dr Christopher Mizzi stated that the specifications on car washing and valeting were meant to tie down the contractor, which bidder did not do and therefore could not be awarded marks. The frequency and quantity were not stated and could not be ratified. Also missing was the request for a Gantt Chart and the document from Muscat Motors should have been used to confirm the Chart not instead of. Again this could not be ratified and clearly this appeal should not be upheld.

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 3rd November 2022.

Having noted the objection filed by Fremond Limited (hereinafter referred to as the Appellant) on 27th September 2022, refers to the claims made by the same Appellant with regard to the tender of reference CT2050/2022 listed as case No. 1807 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Dustin Camilleri

Appearing for the Contracting Authority: Dr Chris Mizzi & Dr Carlos Bugeja

Whereby, the Appellant contends that:

a) **Carwash and Valeting service –**

The Contracting Authority provided the two criteria whereby Fremond was administratively non-compliant namely: *“The submission to this Criterion was deemed as inaccurate since the bidder stated that “Our car wash facilities are situated at Kirkop. We are open for 12 hours daily. An intensive car wash and valeting service is provided.” On the other hand, this Criterion specifically requested details from the bidder in relation to the frequency of the car wash and the frequency of the valeting service per month. Fremond Ltd did not submit any information pertaining to this requirement in the submission therefore, the Evaluation Committee has no option but to consider the submission as being technically non-compliant. Given that this information was specifically part of the Technical Offer (Note 3), and no rectifications are permissible for Note 3 items, the Tender Evaluation Committee has no option but to deem the submission as being technically noncompliance (sic) since the information requested (being frequency of the car wash and the frequency of the valeting service per month) was not submitted by the bidder.....”*

The relevant provision in the tender document is clause 9.9 (8) whereby it has been specified that *“8. The contractor shall provide a monthly internal valeting service (Internal vacuum cleaning and other internal cleaning including the luggage compartment) and car wash on days as specified by the Court Services Agency.”*

In fact, a clarification was submitted - Question 7, whereby the Contracting Authority made reference to the above clause in the tender document. Although the Evaluation Grid Criteria refers to the frequency of the Carwash and Valeting services in relation to the marks that might be awarded but not that such could render a bid non-compliant.

The bidder submitted that “Our car wash facilities are situated at Kirkop, We are open for 12 hours daily. An intensive car wash and valeting service is provided”. The latter falls exactly in the criteria stipulated by the Contracting Authority, both in clause 9.9 (8) and also in in the BPQR evaluation grid, thus it cannot be declared noncompliant, and had to be graded. Further, the Contracting Authority, for clarity's sake, should have requested the Bidder to clarify, if the information provided included the frequency listed in the Evaluation Grid, which clearly is, and beyond, since the bidder did not limit the frequency of the carwash or valeting, to the frequency requested by the Contracting Authority. That in view of the above the reasons for noncompliance of the bidder by Contracting Authority should be deemed not correct.

b) **Time frame for Vehicles**

The Contracting Authority provided the two criteria whereby Fremond was administratively non-compliant namely: “The submission to this Criterion is not deemed as being technically noncompliant to the requirements of the Tender Document and the requirements of BPQR Evaluation Grid - Criterion 3 for the following reasons: Fremond Ltd's submission in response to this Criterion should have been a Gantt Chart and this document was not submitted. Seeing as the Tender Evaluation Committee is bound to ensure that the requirements of the tender document and those listed in the respective BPQR Evaluation Grid - Criterion 3 are met, the Tender Evaluation Committee noted that such a requirement was not adhered to by the bidder since a Gantt Chart was not included in the bidder's submission. Given that the Gantt Chart was part of the Technical Offer (Note 3), and no rectifications are permissible for Note 3 items, the Tender Evaluation Committee has no option but to deem the submission as being technically non-compliance since this specific document (being the Gantt Chart) was not submitted by the bidder. Therefore, the response to this Criterion is incorrect and not in line with the requirements of BPQR Evaluation Grid - Criterion 3.....”

Gantt (sic) Chart - The request made by the Contracting Authority, in relation to the timing of the delivery of the vehicles on one principal requirement, that is, adherence to the timeframe of the delivery. The document provided by the Bidder, from Muscat Motors, it is clear that the timeframes will be adhered to, thus the principal information requested by the Contracting Authority was satisfied, that is the information requested was there.

The Contracting Authority requested that the said information be translated in for of a Gantt (sic) Chart. The Bidder is humbly submitting that, since the declaration in relation to the timeframe was supplied, the Gantt (sic) Chart is to be considered as a clarification and not a rectification, since the Gantt (sic) chart shall only display, in such form, the information initially requested by the Contracting Authority.

This Board also noted the Contracting Authority’s Reasoned Letter of Reply filed on 7th October 2022 and its verbal submission during the virtual hearing held on 3rd November 2022, in that:

a) **Carwashing and valeting - Criterion 1.5 -**

Criterion 1.5 - relating to Carwash and valeting Service includes a requirement for bidders to submit a description to clearly state how the bidder would be providing valeting service and carwash. The details of which are referred to at Section 3 - Specification 4.14 of the Tender Document as well as in the evaluation grid. A gradation of marks was included in the evaluation grid of this mandatory requirement, thereby the Evaluation Committee had clear parameters what marks to allocate for which values. This invariably implies that the bidder was also aware of the parameters which involve different marks allocation. In the opinion of the defendant, it is obvious for a bidder who has taken cognition of such a gradation to deliver the parameters as gradation in order to secure himself a targeted amount of marks from the gradation.

In this case, the bidder did not provide a parameter he is committing himself to deliver to attain a certain mark from the gradation. In turn the bidder was extremely generic by asserting that he owns carwash facilities which are open daily. However, details of frequencies of the car wash and frequencies of valeting service per month were not submitted. Thereby the evaluation committee could not allocate marks for such a generic submission. The evaluation committee could not assume any parameters for which the bidder could commit himself to be given a mark under this heading. Should the evaluation committee have assumed and given marks under any of the gradation in the marking scheme of the tender this would have been in breach of the principles of transparency and equal level playing field. The allocation of marks in this scenario would have induced an added information to the bid which was not submitted.

Therefore, it is only plausible and in line with the principle of self-limitation that the Evaluation Committee had to allocate nil marks under this section, which would invariably mean disqualification as this section was a mandatory requirement.

b) **Timetable of Activities -**

Under Criterion 3 - Timetable of Activities - Timing; the bidder was requested to commit himself to a timeframe of 10 months from the last date of signature on contract for the delivery of 48 vehicles. This information was required to be presented in the form of a Gantt (sic) Chart with the avenue to be supported by further documentation. This criterion was mandatory.

The bidder did not submit the requested Gantt (sic) Chart and therefore the absence of a Gantt (sic) Chart had to be deemed as missing information which as part of the Technical Offer (Note 3) could not be rectified. Hence, the Evaluation Committee was correct in its deduction to disqualify the bidder under this heading. 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 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. In these circumstances the Evaluation Committee had little leeway and its conclusions are only the logical reaction of the submission itself. Any derogation from this conduct would only result in a breach of the basic principles of public procurement.

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) **1st Grievance - Carwash and Valeting service –**

Reference is made to part 1.5 of the Evaluation Grid of the tender dossier, whereby what was required out of economic operators was clear and unambiguous. The write-up / description needed to include information on the **frequency** of car wash and valeting service. The submission of the Appellant did not include any information on the frequency of both car wash and / or valeting service. Whilst noting that such criteria fell under the remit of 'note 3', this Board opines that if the evaluation committee would have allowed for a rectification, this would have been tantamount to amending the original submission which is to be deemed as a change in the original bid of the economic operator, now appellant. The evaluation committee could also not assume any parameters in relation to frequency of service, and hence no marks could be allotted.

When considering all of the above, this Board opines that the evaluation committee correctly assessed the situation and acted in a proportionate manner. Henceforth, this Board does not uphold appellant's first grievance.

b) **2nd Grievance - Time frame for Vehicles –**

Part 3 of the Evaluation Grid as per the tender dossier states as follows: "*Timing – A description of the proposed timing plan – based on the timeframe of 10 months from the last signature on contract of delivery of the 48 vehicles **in the form of a Gantt (sic) Chart** which may be supported by further documentation to support the proposed timeline*". (bold & underline emphasis added). This criterion was also listed as 'Mandatory'.

The Board opines that what was required from economic operators was very clear. A Gantt chart was obligatory, whilst the supporting documentation was 'optional'. In fact, the tender dossier uses the word 'may' in regards to further / supporting documentation.

Whilst it may correctly be argued that the declaration submitted contains sufficient information, economic operators cannot of their own accord decide what information is to be submitted and what is not so relevant. The Gantt Chart was specifically requested, was listed as a mandatory criteria and was also marked as 'note 3'. This Board does not agree with argumentation brought forward by appellant that such an issue could have been corrected by way of a 'clarification' but in actual fact it required a 'rectification' which is not allowed as per 'Note 3'.

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) Does not uphold Appellant's Letter of Objection and contentions,
- b) Upholds the Contracting Authority's decision in recommending the cancellation of the tender
- c) Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Dr Charles Cassar
Member

Dr Vincent Micallef
Member