

PUBLIC CONTRACTS REVIEW BOARD

Case 1827 – SPD5/2022/038 – Services - Tender for the Provision of Cleaning Services with a Reduced Environmental impact for the Ministry for National Heritage, the Arts and Local Government

20th December 2022

The Board,

Having noted the letter of objection filed by Dr Amadeus Cachia acting for and on behalf of ACJ Cleaning & Hospitality Services, (hereinafter referred to as the appellant) filed on the 10th November 2022;

Having also noted the letter of reply filed by Dr Fiorella Fenech Vella acting for the Ministry for National Heritage, the Arts and Local Government (hereinafter referred to as the Contracting Authority) filed on the 18th November 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 18th November 2022;

Having also noted the letter of reply filed by Dr Gianella Farrugia acting for AGV Non-Ferrous Malta Ltd (hereinafter referred to as the Preferred Bidder) filed on the 18th November 2022;

Having heard and evaluated the testimony of the witness Mr Mikyle Francalanza (Member of the Evaluation Committee.) as summoned by Dr Amadeus Cachia acting for ACJ Cleaning & Hospitality Services;

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 15th December 2022 hereunder-reproduced.

Minutes

Case 1827 – SPD5/2022/038 – Tender for the Provision of Cleaning Services with a reduced Environmental Impact for the Ministry for National Heritage, the Arts and Local Government

The tender was issued on the 31st July 2022 and the closing date was the 2nd September 2022. The estimated value of the tender excluding VAT, was € 193,085.

On the 10th November 2022 ACJ Cleaning and Hospitality Services Ltd filed an appeal against the Ministry for National Heritage, the Arts and Local Government as the Contracting Authority objecting to their disqualification on the grounds that their offer was deemed to be not technically compliant.

A deposit of € 965 was paid.

There were twelve (12) bids.

On the 15th December 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Ms Stephanie Scicluna Laiviera as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – ACJ Cleaning & Hospitality Services Ltd

Dr Amadeus Cachia Legal Representative

Contracting Authority – Ministry for National Heritage, the Arts & Local Government

Dr Fiorella Fenech Vella Legal Representative
Ms Maria Grixti Secretary Evaluation Committee
Mr Mikyle Francalamza Evaluator
Ms Bernadette Felice Representative

Preferred Bidder – AGV Non Ferrous Metals Ltd

Dr Gianella Farrugia Legal Representative
Mr Frank Cachia Representative
Ms Gillian Seymour Representative

Director 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 Amadeus Cachia Legal Representative for ACJ Cleaning & Hospitality Services Ltd said that he wishes to be made aware of the comments made by the Tender Evaluation Committee (TEC) on the winning bid.

Dr Gianella Farrugia Legal Representative for AGV Non Ferrous Malta Ltd stated that the appeal had nothing to do with the winning bid but with the lack of meeting the requisite regarding employment of disabled persons which is a case for automatic disqualification.

Mr Mikyle Francalanza (86657M) called as a witness by the Appellant stated on oath that he was one of the evaluators of the tender. He explained that the tender had been evaluated collectively by three evaluators. Witness was aware that Appellants had not paid the fine to meet the quota obligations on employment of disabled persons. The quota set by the tender had not been reached and the TEC's decision was based on that fact. The preferred bidder had reached the quota requirement. Witness agreed that there was an error in the tender in the proposed methodology section but this had been overcome by awarding all bidders full marks on that section.

This concluded the testimony.

Dr Cachia said that the points made in the letter of objection were valid and would be followed in the appeal. Companies were at a disadvantage when it came to pay penalties as they cannot pay the fine

as no invoices have been issued and it therefore follows that it cannot participate in tenders. In these circumstances it is unfair to include a clause in tenders requiring the employment of disabled persons.

Dr Fiorella Fenech Vella Legal Representative for the Ministry said that the disability clause was there to ensure adherence to the law. The other grievances raised had to do with not reaching the required standards.

Dr Debono Legal Representative for the Department of Contracts said that the TEC had to abide by the principle of self-limitation and referred to PCRB Case 1649 where it was held that no proof has been brought that this was not followed.

Dr Farrugia said that the bidder cannot impose terms in tenders and it is up to the Contracting Authority to dictate the terms which bidders have to abide with. The appeal is based solely on shortcomings on the part of the Appellant.

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 15th December 2022.

Having noted the objection filed by Dr Amadeus Cachia (hereinafter referred to as the Appellant) on 10th November 2022, refers to the claims made by the same Appellant with regard to the tender of reference SPD5/2022/038 listed as case No. 1827 in the records of the Public Contracts Review Board.

Appearing for the Appellant:	Dr Amadeus Cachia
Appearing for the Contracting Authority:	Dr Fiorella Fenech Vella
Appearing for the Department of Contracts:	Dr Mark Anthony Debono
Appearing for the Preferred Bidder:	Dr Gianella Farrugia

Whereby, the Appellant contends that:

- a) Legal Requirements for the Employment of Disabled People -

The first reason given was with regards the fact that the company does not have in its possession a NCPE Certification. ACJ Cleaning & Hospitality Services is committed to offer equal opportunities to all and does not hinder the possibility that disabled people work within our

company. Every member of the team is treated with respect and dignity, and we also expect that to be reciprocated. In fact, a disabled individual already works within the ACJ Cleaning & Hospitality Services Company and another one is during his probationary period - however notwithstanding this - the company to be in line with the 2% quota the company needs to employ another employee. Moreover, the company has in the past few months tried to employ individuals and is still seeking to employ individuals [through the Lino Spiteri Foundation] but at the moment no ideal candidates have arisen. Moreover, the email from Ms. Moira Falzon [executive and schemes coordinator of the Compliance, Migration & Public Sector Employment Services] explaining that invoices for the years 2019 and 2020 have not yet been issued due to the COVID-19 situation. Thus, since the appellant's company was formed in 2020 they could not pay any fine that is due to be in line with the 2% quota since the invoices have not yet been issued as can be seen from the attached email from Ms. Moira Falzon. Thus, the conclusion reached by the review committee that our company did not pay the fine is not true - the company could not and cannot pay any fines since no fines have yet been issued or imposed - once these fines are issued or imposed they would be paid unless the company reaches its quota for the employment of disabled people. Thus, the appellant's company is not at fault in not being in line with the 2% quota and consequently no points should be deducted from the technical score with regards to this criterion.

b) Adequate Level of Service is provided -

The appellant humbly submits that all the measures put forward by him are relevant to this tender in question with all being measures relating to the adequacy of the level of service to be provided by our company. Furthermore, before listing adequate measures our Company in its submissions listed the cleaning activities to be covered by this tender - which cleaning activities were quoted from the tender document as submitted on the portal. In fact, all these measures which were considered to be irrelevant were quoted from the tender document namely pages 24 and 25. Consequently, if such measures were deemed to be irrelevant, they should not have been included in the tender document as part of the cleaning activities to be covered and performed by the company which won the tender.

c) Proposed Methodology -

Our Company in its submissions listed the cleaning activities to be covered by this tender - which cleaning activities were quoted from the tender document as submitted on the portal. In fact, all these measures which were considered to be irrelevant were quoted from the tender document namely pages 24 and 25. Consequently, if such measures were deemed to be irrelevant, they should not have been included in the tender document as part of the cleaning activities to be covered and performed by the company which won the tender.

d) A Valid Collective Agreement is in place -

Without prejudice to the above, another reason given by the Department of Contracts was that no collective agreement was provided by the Company. The appellant states that under Maltese law there is no legal obligation for the employer to have a collective agreement in place. Moreover, the Company declared through a submitted declaration that although there is no collective agreement in place and registered with the Department of Industrial and Employment Relations, there is no difficulty that the employees have a collective agreement in place.

e) Health and Safety Measures -

Without prejudice to the above, another reason given by the Department of Contracts was that no *Health and Safety policy (quality assurance systems employed by the Contractor to ascertain a safe working environment) was provided. This is not a proper health and safety policy.* The appellant, humbly submits that the Contracting Authority in its tender document asked for health and safety measures and not a policy which measures were provided by the Economic Operator. The Contracting Authority never asked for a health and safety policy and that is why the Economic operator did not provide a health and safety policy - the economic operator abided to the request made by the Contracting Authority. Various health and safety measures were provided by the Economic Operator through the submission of a write-up including pictures of cleaning products and equipment which will be used during such tender and even equipment to be worn by the employees to ensure their health and safety during working hours and thus the claims made by the contracting authority that the economic operator was at fault in this criterion is unfounded.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 18th November 2022 and its verbal submission during the hearing held on 15th December 2022, in that:

a) As regards the legal requirements for the employment of disabled people -

The appellant lacked the legal requirements for the employment of disabled people. The Jobsplus documentation filed by appellant himself clearly demonstrates that the company is not in line with that legal requirement. From page 12 of the tender document, it is evident that this was a mandatory requirement and as provided under section C1(i): *"For this criteria, a score of '0' shall be allotted if proof is not submitted whereas full marks will be given if appropriate documentation is provided accordingly";*

This deficiency has also been admitted and acknowledged by the appellant himself in his Letter of Objection. Given that, admittedly, the appellant was not in line with the 2% quota, no marks were allotted and bidder was disqualified on this basis in line with the following disposition (vide page 14 of tender document).

b) As regards measures related to Adequate Level of Service and Proposed Methodology -

Despite what has been held in paragraph 5 above, for correctness sake, the Respondent will still be addressing all the other points. As regards points 2 and 3 of the Letter of Objection, the Respondent acknowledges that there was a mistake in the tender document. However, even if the Respondent were to acknowledge the mistakes in the tender document and make up for them by increasing the marks from 3 to 5 and from 2.4 to 4 respectively, with the final result being increased to 91% from 87%, the appellant would still be disqualified on the basis of the deficiency mentioned above.

c) As regards the valid collective agreement in place

The appellant is also admitting that it has no valid collective agreement in place. As per the dispositions of pages 13 and 14 of the tender document, since this is an Add-on and not a Mandatory criterion, if the Declaration/Proof is not provided, automatically a score of 1% is allotted - which is what happened in this case. The Respondent deems irrelevant the argument posed by appellant company that under Maltese law there is no legal obligation for an employer to have a collective agreement. This argument does not hold water because the Respondent is issuing the tender with the terms and conditions appropriate for its specific requirements. In this case, it would appear that the appellant company is trying to dictate what the Respondent should have asked of the tenderers. This should not be accepted by this Board. It needs to be re-affirmed that the tenderers should abide by and comply with all instructions, forms, contract provisions and specifications contained in the tender document.

d) As regards the health and safety measures -

The company submitted mainly pictures of cleaning products and equipment the company will be making use of and allotted only a short description on health and safety measures. The Respondent asserts that what the appellant company provided was not deemed sufficient by the Committee and marks were deducted accordingly. The appellant company did not enter into particular details contrary to what was required by the Respondent. In fact, there was no mention of, amongst other things, fire safety policy and procedures, fire detection equipment, fire fighting equipment, equipment provided to work from heights, risk assessments of the relevant equipment to work from different heights and risk assessments of all work involving exposure to hazardous substances.

This Board also noted the DoC's Reasoned Letter of Reply filed on 18th November 2022 and its verbal submission during the hearing held on 15th December 2022, in that:

a) The DoC submits that the Public Contracts Review Board cannot review the arguments of the first and fourth grievance as to the legal requirement for employment conditions and to the necessity

of the collective agreement requirement since these are exclusively actionable in terms of regulation 262 of the Public Procurement Regulations, 2016, and in accordance with the principles provided in Truevo Payments Limited vs Direttur tal-Kuntratti et decided on the 30th June 2021.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 18th November 2022 and its verbal submission during the hearing held on 15th December 2022, in that:

a) The legal requirements for the employment of disabled people –

The Respondent submits that, whereas on his part this criteria has been satisfactorily satisfied, the appellant failed to satisfy the said legal requirement for the employment of disabled people. Therefore, in view of the said reasoning coupled with the fact that the tender document required, on a sine qua non basis, the said requirement, the Respondent submits that the decision reached by the Tender Evaluation Committee was indeed correct, just and in full adherence to the criteria required in the tender document.

In this regard, the Respondent makes reference to the objection filed by the appellant himself, in which the appellant clearly and evidently admits that the legal requirement for the employment of disabled persons is not satisfied from their end. Indeed, the appellant states:

“in fact a disabled individual already works within the ACJ Cleaning and Hospitality Services Company and another one is during his probationary period - however notwithstanding this - the company to be in line with the 2% quota the company needs to employ another employee.”

This assertion, or rather admission, on the part of the appellant clearly indicates that this sine qua non requirement in question is not satisfied on their part and consequently the appellant had to be disqualified as per tender document.

b) The valid Collective Agreement in place -

The Respondent deems the reasoning of the Appellant irrelevant in the sense that the possession of a Collective agreement Registered with the Department of Industrial and Employment Relations is not a Mandatory Criteria but merely an Add-on.

c) As regards the health and safety measures -

Without prejudice to the above arguments, the Respondent whilst noting and reaffirming that the health and safety measures put forward from his end represented concrete evidence of the commitment on the part of the Respondent to fully adhere to appropriate health and safety measures, the appellant failed to provide a comprehensive and adequate outlook as to the health and safety features and measures to be conducted from his end.

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 consider Appellant's grievances as follows:

a) Legal Requirements for the Employment of Disabled People –

- i. The Board notes that the tender dossier is very clear and unambiguous in page 14, paragraph 6.2 when it states: *"For Mandatory criteria, unless otherwise specified in the individual criterion, the Declaration/Proof/List/Picture/Template (or any other information as requested in each criterion) is not provided or else it is not in line with the specified requirements, automatically a score of '0' shall be allotted and the bidder shall be disqualified."*
- ii. Criterion C1 is listed as an 'Mandatory' and required *"Economic Operators are required to submit proof through appropriate documentation from Jobsplus (or equivalent) that the economic operator meets the Legal requirements."*
- iii. Documentation provided by Jobsplus states *"... The above workings show that although ACJ Cleaning & Hospitality Service has 2 RDPs employed (1 Full time and 1 Part time), you still need to employ 3 more RDPs to be inline with the 2% Quota obligation or you have to pay a contribution of €7,200 if and when invoices are issued."*
- iv. From point (iii) above, it is clear that the Appellant is not in line with the quota obligation.
- v. Documentation from Jobsplus continues to state *"However, the last invoices issued were for the year 2018, since invoices for 2019, 2020 and 2021 are still on hold and have not yet been issued due to Covid-19 situation."* This Board is flabbergasted as to why in this day and age, an invoice to settle a fine cannot be issued due to the Covid-19 situation!
- vi. None-the-less, it is clear that the quota obligation has not been reached by the appellant company. This Board notes that even though the appellant had this information in hand, that he could not regularise his position with Jobsplus, no clarification requests to the Contracting Authority were submitted. Moreover, if Appellant feels that they are being put at a disadvantage by Jobsplus, since invoices cannot be settled, the correct medium to be used was for a Call for Remedies application under regulation 262 of the Public Procurement Regulations whereby he can formulate arguments that the technical specifications as listed are jeopardising his position or limiting competition.
- vii. This Board notes that the Evaluation Committee assessed such document as per the requirements of the Tender Dossier whilst duly observing the principle of Self Limitation imposed on it.
- viii. Moreover, no proof was provided by Appellant to demonstrate that there was no level playing field in the evaluation of such criterion.

This Board, therefore, does not uphold Appellant's first grievance. Being a Mandatory criteria, this means that the Evaluation Committee was right in deeming the bid as technically non

compliant. None-the-less this Board will continue to provide its views on the other grievances as presented.

b) Adequate Level of Service is provided & Proposed Methodology –

- i. The Board notes submissions by both Appellant and Contracting Authority. Although grievances are *in parte* conceded by Contracting Authority, this Board notes and agrees with arguments brought about by same Contracting Authority that *“However, even if the Respondent were to acknowledge the mistakes in the tender document and make up for them by increasing the marks from 3 to 5 and from 2.4 to 4 respectively, with the final result being increased to 91% from 87%, the appellant would still be disqualified on the basis of the deficiency mentioned above.”* (reference to disable people quota requirements)

c) Collective Agreement – 2nd grievance –

- i. The Board notes that the tender dossier is very clear and unambiguous in page 12, paragraph 6.2 when it states: *“For Add-on requirements, if the Declaration/Proof/List/Picture/Template (or any other information as requested in each criterion) is not provided or else it is not in line with the specified requirements, automatically a score of '1%' shall be allotted.”*
- ii. Criterion C2(v) is also listed as an ‘Add-on’.
- iii. Thereby, it is this Board opinion that the evaluation committee fully understood and correctly interpreted this specification of the tender document when they provided the minimum points to the Appellant when he provided no collective agreement. A declaration stating that ‘it finds no difficulty for employers to have a collective agreement in place’ is not to be deemed the same as having a collective agreement in place. The tender dossier did not provide an allowance for such or for example to have a collective agreement finalised by a specific time period from award of such contract.

d) Health and Safety Measures

- i. This Board has on numerous occasions stated that in tenders evaluated under the Best Quality Price Ratio (BPQR), the Evaluation Committee is to be afforded ‘*leeway*’ in the way it goes on its business of evaluating the different bids received. This obviously needs to be done in a professional, detailed and meticulous manner and always within the remit of the Public Procurement Regulations and the specific Tender document in question.
- ii. The Board notes that no specific evidence has been brought to its attention that this was not the case. Hence the Board does not uphold this grievance 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 decision in the recommendation for the award of the tender,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Mr Lawrence Ancilleri
Member

Ms Stephanie Scicluna Laiviera
Member