

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1871 – CT2321/2022 – Tender for the Provision of Cleaning Services, with reduced environmental impact, to the Ministry for Finance and Employment and its line departments – Lot 5**

**15<sup>th</sup> May 2023**

The Board,

Having noted the letter of objection filed by Dr Christopher L. Vella on behalf of Mifsud Bonnici Legal & Advisory acting for and on behalf of Smart Cleaning Joint Venture, (hereinafter referred to as the appellant) filed on the 24<sup>th</sup> March 2023;

Having also noted the letter of reply filed by Dr Ivan Sammut and Dr Mark Anthony Debono acting for the Ministry for Finance and Employment and the Department of Contracts (hereinafter referred to as the Contracting Authority) filed on the 3<sup>rd</sup> April 2023;

Having heard and evaluated the testimony of the witness Mr Jonathan Bugeja (Member of the Evaluation Committee) as summoned by Dr Christopher L. Vella acting for Smart Cleaning Joint Venture;

Having heard and evaluated the testimony of the witness Mr Giulio La Scala (Representative of Smart Cleaning Joint Venture) as summoned by Dr Christopher L. Vella acting for Smart Cleaning Joint Venture;

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 11<sup>th</sup> May 2023 hereunder-reproduced;

#### **Minutes**

#### **Case 1871 – CT 2321/2022 – Tender for the Provision of Cleaning Services, with Reduced Environmental Impact, to the Ministry for Finance and Employment and its Line Departments**

##### **LOT 5**

The tender was issued on the 22<sup>nd</sup> September 2022 and the closing date was the 25<sup>th</sup> October 2022. The estimated value of the tender for Lot 5 excluding VAT, was € 53,019.20

On the 24<sup>th</sup> March 2023 Smart Cleaning Joint Venture filed an appeal against the Ministry for Finance and Employment as the Contracting Authority on the grounds that their bid on Lot 5 was rejected as it failed to satisfy the PBQR criteria

A deposit of € 400 was paid.

There were thirteen (13) bids.

On the 11th May 2023 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Ms Stephanie Scicluna Laiviera and Mr Richard Matrenza as members convened a virtual public hearing to consider the appeal.

The attendance for this public hearing was as follows:

**Appellant – Smart Cleaning Joint Venture**

Dr Christopher Vella	Legal Representative
Mr Giulio La Scala	Representative

**Contracting Authority – Ministry for Finance and Employment**

Dr Ivan Sammut	Legal Representative
Dr Mark Anthony Debono	Legal Representative
Mr Ivan Portelli	Chairperson Evaluation Committee
Mr Jonathan Bugeja	Evaluator
Ms Jacqueline Jacono	Evaluator
Ms Carmen Cassar	Evaluator
Mr Reuben Spiteri	Evaluator
Mr Mario Bugeja	Evaluator
Mr Kurt Balzan O’Dea	Representative

**Preferred Bidder – Floorpul Ltd**

Invited to attend but confirmed by e-mail that they would not be attending.

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and prior to inviting submissions proposed that the Appeals on Lot 1, 2, 3, 4 and 5 be heard together since the grounds for objections and submissions thereon applied to all five lots. This was agreed to by all parties.

Dr Christopher Vella Legal Representative for Smart Cleaning Joint Venture said that his submissions covered lots 1 to 5 of a tender for the provision of cleaning services – lot 6 had been awarded to his client as the financial bid form on that lot was different to that on the five lots. The tender was adjudicated on a BPQR basis. All five lots were technically and administratively compliant with the technical score on all five contested lots being 100%. The financial scoring on Appellant’s bids was better than that of the preferred bidder. The appeal was on a particular item in the financial offer where only one column was subject to inputting by the bidder on a ‘rate per hour’ basis; all other columns were fixed and could not be changed. The wording in the financial bid form was totally ambiguous as it was not the rate per hour that was to be provided.

Dr Ivan Sammut Legal Representative for the Ministry said that in fact both the Appellant and the preferred bidder’s inputs were correct although reached through a different route and did not affect the final result. If Appellant had any doubt about the wording in the tender he should have used Regulation 262 or alternately regulation 38, instead of complaining at this stage. Case law back this procedure.

Mr Jonathan Bugeja (464986M) called as a witness by the Appellant stated on oath that he was one of the Evaluators. He said that the function of a ‘rate’ was to determine the final cost in the grand total and that rate should not change the multiplier. The rate on cleaning materials in this instance did not affect the overall result. The cost of the cleaning materials was expressed as a lump sum. Bidder was

not informed that the wording on cleaning materials could have confused bidders but from the resulting bid it was obvious that Appellant understood the requirement correctly and the inconsistency did not affect the outcome. Asked if he was aware of Regulation 38 witness said that he was aware of it and of the difference between clarification and rectification but, in this case, there was nothing to clarify as bidder seemed to have understood what was required.

Bidders were requested to input a lump sum and although confused Appellant's submission was correct said the witness. Figures for all the years were correctly inputted and hence it is obvious that bidder was aware of what was required and was not misled. This possible confusion was discussed by the evaluators and possible solutions discussed and it was agreed that the bid forms had been correctly completed. The Appellant was attempting to create doubts through this appeal. The preferred bidder had used lump sums in his submissions and figures submitted in row six (6) were higher than row three (3). The difference in the multiplier between rows is twenty (20). The additional note submitted by Appellant with its financial bid was not taken into consideration and considered irrelevant as it could have led to it being disqualified on that point alone.

Mr Giulio La Scala (0284084A) called as a witness by the Appellant stated on oath that he had prepared the technical offer in the tender. When the terms of the tender were being reviewed it was noticed that in the financial section, which was the last one to be dealt with, the rate for cleaning materials was different to the other requirements. The financial bid indicated that a rate per hour was required not a lump sum figure. The word 'rate' was used in several places. There was a difficulty in deciding which option to apply and it put Appellant in an impossible situation in trying to ensure that its bid was compliant. The time to seek a clarification had by then elapsed. The dilemma facing Appellant was what rate to submit and it was decided to put in a clarification note with the bid.

Questioned by Dr Sammut, witness explained the difference in figures between lump sum and rate per hour submitted in the clarification note (referred to as Doc 'C') submitted with the financial bid. As the wording in the financial bid was not clear Appellant had to make a choice.

In reply to a question from Dr Debono witness said that the problem with the wording was realised just before the submission of the tender.

This concluded the testimonies.

Dr Vella said that witness Mr Bugeja had admitted that there was a mistake in the tender where it requested a rate per hour when a lump sum was required. On this ambiguity in the financial form witness accepts that doubts could have arisen and that the Authority was prepared to cancel the tender if it became clear that the wording had not been understood. The Authority could have used Regulation 38 to ensure clarity as they created a dilemma for the Appellant as to the figures to submit for cleaning materials. Ambiguity in tender goes totally against the principle of public procurement. The financial bid form is a sensitive document which cannot be changed yet the bidder had to act 'in the dark'. Regulation 38 binds the Authority to issue clarifications if an error becomes clear. The decision to award the tender should not have happened and the process should be nullified as it is not right for the Authority to assume that bidders would correctly interpret and understand this discrepancy. The Board should nullify the award or at least refund the considerable deposits paid on these appeals.

Dr Sammut said that the Authority accepts that the title of the column stated rate but both parties had put in a fixed sum so it is clear they understood what was required and there was no discrimination and the award is therefore fair. Appellant claims that it was confused but its submissions, including Doc 'C' confirms that it understood what was required. At this late stage they are now trying to sow

doubts. This was a simple mistake and Appellant should have cleared it before submitting its bid. There were no adverse effects in the award.

Dr Debono said the objector had the necessary time to seek clarification. No remedy had been sought and therefore the right to contest had been forfeited.

The Chairman thanked the parties for their submissions and declared the hearing closed.

End of Minutes

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**Hereby resolves:**

The Board refers to the minutes of the Board sitting of the 11<sup>th</sup> May 2023.

Having noted the objection filed by Smart Cleaning Joint Venture (hereinafter referred to as the Appellant) dated 24<sup>th</sup> March 2023, refers to the claims made by the same Appellant with regards to the tender of reference CT2321/2022 – Lot 5 listed as case No. 1871 in the records of the Public Contracts Review Board.

Appearing for the Appellant:	Dr Christopher L. Vella
Appearing for the Contracting Authority:	Dr Ivan Sammut
Appearing for the DoC:	Dr Mark Anthony Debono

Whereby, the Appellant contends that:

- a) The Financial Form provided with the Tender included a clear and evident glitch in relation to items 3, 6, 9 and 12 since although a rate per hour was being requested, such rate was not serving as a 'multiplier' and the same rate which was being indicated was being reflected in the 'Total Price'. Therefore in hypothetical terms, where a rate of €0.5 was indicated, the figure in the 'Total Price' column was also that of €0.5 and was not being multiplied by the number of hours to result in an aggregate amount. Being a cleaning services tender, whereby the cleaning materials used was crucial, it is disproportionate to assume that the cost of cleaning materials for a whole year would be of €0.5. In fact the Tender Document puts particular emphasis on the importance of the cleaning materials by providing a non-exhaustive list of cleaning materials that are required to be provided by the winning bidder (vide 6.4 of the Terms of Reference).
- b) In view of such clear and obvious glitch in the 'Financial Bid Form' and following considerable deliberation, Smart Cleaning JV opted to provide a 'Rate per Hour' which is reflective of the 'Total

Price' for the cleaning material for the whole year but not reflective of the actual rate per hour which the Appellant prices. In fact, in relation to Lot 1, item 3, Smart Cleaning JV inputted the amount of €1,027 as being the Rate per Hour since such was also the Total Price. However the rate which was effectively applicable, but which the form did not allow to provide was that of €0.5 since €1,027 is to be divided by 2054 being the number of hours indicated as hours of service for Year 1. It is undoubted that the Appellant did not intend to indicate a rate per hour of €1,027 for cleaning material but was only compelled to do so in view of such glitch. This was repeated for items 6, 9 and 12 which however varied due to a variance in the number of hours. Nevertheless the rate of €0.50 of cleaning material per hour remained constant throughout except for a slight increase of €0.01 to Year 3 and Year 4. Reference is being made to the Financial Form as submitted by the Appellant.

- c) In the face of such uncertainty in the Financial Form, Smart Cleaning JV was constrained to provide a rate per hour which in actual fact was not the rate per hour to be provided as part of the bid. The consequence of this being that should it have opted for the 'Rate per Hour' of €0.50 (and therefore effectively a 'Total Price' of €0.50) the Financial Score would have changed considerably to the extent that in view of a perfect Average 'Technical Score', Smart Cleaning JV would have qualified as the offer with the Best Price Quality Ratio (BPQR).
- d) The JV was not requested to provide any clarification on the submitted offer.<sup>[1]</sup>Such was the ambiguity in the Financial Bid Form that the Joint Venture proceeded to provide a clarification note to serve as an explanation of the 'Rate per hour'.
- e) Such offer was submitted based on assumptions which were not required to be made had a clear financial bid form been provided. This is in clear violation of a fundamental principle in public procurement, being that the procurement documents are to be void of any ambiguity but are to be in clear and unambiguous terms. Reference is made to Regulation 38 of the Public Procurement Regulations. S.L 601.03.
- f) No such clarification note was provided, notwithstanding such error in such a crucial document in the procurement documentation.
- g) It goes against the spirit of a public procurement process that bidders are bound to make assumptions and that such assumptions may lead to the successful or unsuccessful award of a tender. This goes against the principle of equal treatment of all bidders whereby bidders are not expected to make any assumptions due to lack of clarity in the procurement documents. In fact Smart Cleaning JV was awarded with Lot 6 which included a different Financial Form and which did not include the mistaken rate per hour included in the financial bid form for this lot.

This Board also noted the Contracting Authority's & DoC's Reasoned Letter of Reply filed on 3<sup>rd</sup> April 2023 and its verbal submission during the virtual hearing held on 11<sup>th</sup> May 2023, in that:

- a) The appellant submits that there has been an uncertainty in the financial form for items 3, 6, 9 and 12 (rate for cleaning materials) and that the appellant provided a rate per hour reflective of the total price reflective of the total price for the cleaning material for the whole year. The procedure for financial evaluation which is to be adhered by the tender evaluation committee is in accordance with rule 16.4 and 17 of the General Rules Governing Tenders.
- b) The manner in which the Financial Bid form has been drawn up is reflective of rule 7 of the General Rules Governing Tenders which seeks to ensure that all costs for the number of cleaners and the number of working hours per week are accounted for, with particular items being fixed as provided Section 2 - Terms of Reference and consequently not subject to amendment by the tenderer. The presentation of the arguments regarding the methodology consist in submissions that do not result from the tender document nor are these provided in the financial bid form.
- c) The appellant submits that the tender evaluation committee should have requested a clarification in terms of rule 16 of the General Rules Governing Tenders and regulation 62 of the Public Procurement Regulations, 2016. In accordance with Guidance Note 2 regarding rectifications and clarifications during evaluation, the following principle is to be observed: *“Nevertheless, it is important that the nature of any clarification does not materially change the substance of the requirement or, to that matter, the bidder's submission. If this happens, it would breach the Treaty on the Functioning of the European Union (TFEU) obligation to maintain equality of treatment. TFEU principles would be breached if Clarification Requests are sought in order to allow a... Change in the price quoted in the tender price (except for correction of any arithmetical errors discovered during the Financial Stage of the Evaluation Process)”*
- d) The MFIN and the DoC submit that the appellant did not avail of the right for clarification before the closing date of the submission for tenders in terms of regulation 38 of the Public Procurement Regulations, 2016 nor had it requested to file a pre contractual call for remedies in terms of regulation 262 of the Public Procurement Regulations, 2016.
- e) According to the requirements of regulation 270 of the Public Procurement Regulations, 2016, the MFIN and the DoC submit that the appellant does not adduce further reasons as how the same appellant should be recommended the contract agreement with reference to the methodology provided in rule 16.4 of the General Rules Governing Tenders (sic) and clause 62 of the tender document where it is stipulated that: *“The BPQR will be awarded to the offer that has obtained the highest score after adding the respective technical and financial scores”*

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 only bone of contention in this appeal revolves around rows 3, 6, 9 and 12 of the Financial Bid Form. Appellant is stating that even though the description of these specific rows was requiring a “*rate for cleaning materials*”, the way the Financial Bid Form was construed, it was essentially requiring a ‘lump sum’ amount to be inputted.
- b) This Board opines that there are a number of points that need to be delved into.
- c) Initially, one is to note that all the bidders in this specific lot provided a lump sum figure as was essentially required. Reference is hereby made to the testimony under oath of Mr Jonathan Bugeja whereby he stated “*Figures for all the years were correctly inputted and hence it is obvious that bidder was aware of what was required and was not misled*”.
- d) Another point to take into consideration is that no economic operator made a request for clarification to address any possible anomaly as is being alleged by appellant. As per testimony under oath of Mr Giulio La Scala, the Appellant did not make a request for clarification as they realised this just before making the submission of the tender at the very last stages. Therefore, this Board opines that the appellant did not act diligently and did not provide necessary diligence as expected of a *bonus paterfamilias*.
- e) The Board now refers to the document presented by Appellant during their bid submission and re-presented during appeal stage (“Doc C”) entitled “Pricing Clarification for Cleaning Material”. Here the appellant was explaining what would have been the rate per hour should the financial bid form actually have requested a rate instead of a lump sum. This Board notes that the same similar result would have been obtained as the “Grand Total” of the bid would have been exactly the same. Therefore, this Board opines that no prejudice has been suffered.
- f) Finally, it is the opinion of this Board that such a grievance should have been dealt with as per regulation 262 of the Public Procurement Regulations, within the timeframes duly stated within.

Because there was no prejudice suffered, this Board does not uphold Appellant’s grievances.

### **The Board,**

Having evaluated all the above and based on the above considerations, concludes and decides in relation to Lot 5:

- 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 to Floorpul Co. Ltd,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

**Mr Kenneth Swain**  
**Chairman**

**Mr Richard Matrenza**  
**Member**

**Ms Stephanie Scicluna Laiviera**  
**Member**