

PUBLIC CONTRACTS REVIEW BOARD

Case 1872 – SPD 5/2022/058 – Services – Tender for Freedom of Information System

22nd May 2023

The Board,

Having noted the letter of objection filed Mr Kyle Pullicino acting for and on behalf of Phalanx Software Limited, (hereinafter referred to as the appellant) filed on the 14th April 2023;

Having also noted the letter of reply filed by Dr Chris Mizzi acting for Data Protection and Information Coordination Directorate (hereinafter referred to as the Contracting Authority) filed on the 24th April 2023;

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 16th May 2023 hereunder-reproduced.

Minutes

Case 1872 – SPD5/2022/058 – Service – Tender for Freedom of Information System

The tender was issued on the 23rd December 2022 and the closing date was the 15th February 2023. The estimated value of the tender excluding VAT, was € 425,000.

On the 14th April 2023 Phalanx Software Limited filed an appeal against the Data Protection and Information Coordination Directorate as the Contracting Authority on the grounds that its bid was rejected as it failed to satisfy the PBQR criteria

A deposit of € 2,125 was paid.

There were ten (10) bids.

On the 16th May 2023 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a virtual public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Phalanx Software Ltd

Mr Kyle Pullicino

Representative

Contracting Authority – Data Protection and Information Coordination Directorate

Dr Christopher Mizzi

Legal Representative

Ms Davida Flores

Chairperson Evaluation Committee

Mr Joseph Ciprian Magro
Ms Samantha Muscat

Evaluator
Evaluator

Preferred Bidder – Deloitte Malta

Mr Ludwig Micallef
Ms Ilaria Deandra Micallef

Representative
Representative

Department of Contracts

Dr Mark Anthony Debono

Legal Representative

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

Mr Kyle Pullicino Representative for Phalanx Software Ltd said that the points of this appeal follow the letter of objection. Appellant accepts that the error made by the Contracting Authority in the wording of the evaluation grid had no effect on the outcome as it had received full marks on that criterion. It had, however, still created problems at tender submission stage. The second objection was regarding the Gantt Chart required under criterion 6.1 where Appellant had been awarded zero points which meant automatic disqualification. The Authority claim that the Evaluation Committee has discretion in awarding points but this seems to have been inconsistent. The fact that a Gantt Chart had been provided merited at least one point which would have kept the bid in the running.

Dr Chris Mizzi Legal Representative for the Data Protection and Information Directorate agreed that on the first grievance Appellant submission had not been affected and its bid was correct and hence the objection should be disregarded. With regard to the objection on the Gantt Chart the failure to be awarded any points was due to the fact that there was information missing not that the Gantt Chart itself was missing. The Evaluation Committee used its discretion correctly.

Mr Pullicino re-iterated the point that the Gantt Chart indicated all milestones as requested and the award on this criterion was inconsistent with other criteria.

Dr Mizzi referred the Board to the detailed reply to the objection submitted in writing.

There being no further submissions the Chairman thanked the parties and declared the hearing closed.

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 16th May 2023.

Having noted the objection filed by Phalanx Software Limited (hereinafter referred to as the Appellant) on 14th April 2023, refers to the claims made by the same Appellant with regard to the tender of reference SPD 5/2022/058 listed as case No. 1872 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Mr Kyle Pullicino
Appearing for the Contracting Authority: Dr Chris Mizzi
Appearing for the Preferred Bidder: Mr Ludwig Micallef

Whereby, the Appellant contends that:

a) Unclear Timeframe for Contract -

On Page 3 of the tender document, point 1.2 mentions that: “... *the time-limits for the execution of the contract shall be twelve (12) months for the creation, execution, and installation of the client's system and a further three (3) months post implementation enhancements and integrations.*”

However, on Page 11 of the tender document, the strategy evaluation section mentions that: “... *bidders are to submit in sufficient detail how the proposed works will be implemented within twenty-four (24) months.*”

Normally, we would ask for a clarification for the above mentioned inconsistency however such an error was only noted after the end of the clarifications period. The above-mentioned error is substantial in the context of the entire tender because a bidder may propose a strategy that does not fulfil the requirements of the contract's requirements. In the case that a bidder proposes a strategy which fits within the required 15 months on Page 3, then it would be unfair on other bidders who have proposed a strategy that covers a period of twenty-four months (and vice-versa). Furthermore, the period taken into consideration by each bidder for the proposed strategy will greatly affect the bid price for the entire project and thus affecting the final BQPR (sic) score for the bidder. If the Board of Evaluation scored strategies to target a period of 24 months, then the evaluation would not be useful for the purposes of determining the best bid to satisfy the requirement on Page 3 of the tender document. It is our belief that the tender should have been cancelled or that the contracting authority should have issued a clarification with regards to this before the end of the submission period of the tender. Failing this, the Board of Evaluation should have noticed this substantial inconsistency and cancel the award of the tender after the submitted tenders were opened.

b) Bid Disqualification -

Phalanx Software Limited's bid was disqualified because for the criterion entitled Timetable of Activities, Q1: “*Details of activities and sub-activities as underlined in Article 4.2 of the ToR are not indicated in the document provided by the bidder.*”

However this is only one part of the entire criterion requiring a Gantt Chart showing the major milestones and the timing/sequence of the proposed project. We have submitted a Gantt Chart clearly showing major milestones and also the timing and sequence of activities to be followed so the Board of Evaluation should have granted a nonzero amount of points due to fulfilling part of the criterion.

By awarding zero points out of the entire nine points for this criterion, our proposal was completely disqualified from consideration against other bids. We humbly ask that the Public Contracts Review Board instructs the Evaluation Board to re-evaluate our submission for this criterion.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 24th April 2023 and its verbal submission during the virtual hearing held on 16th May 2023, in that:

a) Unclear Timeframe for Contract -

The objector is referring to the evaluation grid criteria under the strategy section criteria wherein the document contains an endnote referring to a 24 month period for bidders to implement the proposed works. It is true that there existed some form of misalignment in the text where the text as mentioned should have made reference to a 12 month implementation period and 3 months post-implementation as per previous instances. Having said this, the defendant would like to point out that this concern did not translate into any implications on the bidder's proposition. It is to be noted that the objector's submission managed to score full points (100%) under this criterion and therefore no prejudice was posed on the objector.

It is also to be noted that the evaluation grid and criteria will not be part of the eventual contract to be signed between the parties, whereas the special conditions will be part of the contractual relationship between the contracting authority and the awarded bidder. In the order of precedence the Special Conditions rank before the other documents so it is only natural that the provisions of the special conditions are to prevail - in this case the 12 month implementation period being the correct statement.

Therefore, from the bidder's submission alone it is clear that although one could insist that a clarification by the contracting authority could have been suited ultimately the information was clear enough and the bidder managed to provide an acceptable submission for this part of the bid. Moreover, this concern should also not be a point of contention between the parties. The objector had no issue in interpreting the tender provision as his submission was in line with the tender requirement and this afforded him maximum mark. For this reason this ground cannot subsist as it is not material to the objector and for this objection in front of this Board as it has no bearing on the eventual disqualification of the objector.

b) Bid Disqualification -

As can be explained during the oral submissions for this objection the details required of the activities and sub-activities as per article 4.2 of the ToR were not indicated in the document hence since this requirement was mandatory the bidder was disqualified. The bidder's submission could not be rectified as this forms part of the Technical Offer (Note 3) which could not be rectified. Hence, the Evaluation Committee was correct in its deduction to disqualify the bidder under this heading. It was also in line with the principle of level-playing field among bidders and self-limitation for the bid is to be excluded from the ranking and hence disqualified since no rectification of the offer was possible.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties, will now consider Appellant's grievances.

- a) 1st grievance – This Board notes that the anomaly referred to by the Appellant did not in any way prejudice the situation of any economic operator and is in no way 'substantial' as it is being alleged. Moreover, *ex admis* by same appellant, they did not request a clarification on the matter as it was only after the end of the clarifications period that this was noted by them. Such a grievance should have been dealt with either: i) by a clarification request by the economic operator to the contracting authority or ii) an appeal filed in accordance with regulation 262 of the Public Procurement Regulations within the stipulated timeframes.

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

- b) 2nd grievance – This Board opines that the Evaluation Committee used its discretion correctly and managed to achieve a level playing field between all economic operators participating in this tender procedure. As per the evaluation grid, the mere fact that a 'Gantt Chart' was submitted, did not automatically need to result in points being obtained. The Evaluation Grid was clear and unambiguous when stating that points were to be allotted in accordance with pre-determined criteria. No proof has been provided to substantiate that the evaluation committee used its 'afforded leeway' in a negligent manner nor indeed was any proof provided that the requested criteria had been submitted.

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 the recommendation for the award of the tender to Deloitte Malta,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member