

PUBLIC CONTRACTS REVIEW BOARD

Case 1880 – SPD8/2022/155 – Framework Contract for the Certification Services of Various Types of Equipment at Wasteserv Sites around Malta and Gozo (Lot 2 Goods and Passenger Lifts)

8th June 2023

The Board,

Having noted the letter of objection filed Ing Nicholas Bellizzi acting for and on behalf of NBEngineering Services Limited, (hereinafter referred to as the appellant) filed on the 26th April 2023;

Having also noted the letter of reply filed by Dr John Axiak acting for Wasteserv Malta Limited (hereinafter referred to as the Contracting Authority) filed on the 4th May 2023;

Having heard and evaluated the testimony of the witness Mr Stefan Salomone (Chairperson of the Evaluation Committee) as summoned by Dr John Axiak acting for Wasteserv Malta Limited;

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 June 2023 hereunder-reproduced.

Minutes

Case 1880 – SPD8/2022/155 – Framework Contract for the Certification Services of Various Types of Equipment at Wasteserv Sites around Malta and Gozo (4 Lots)

LOT 2 – Goods and Passenger Lifts

The tender was issued on the 12th December 2022 and the closing date was the 26th January 2023. The estimated value of the tender, for Lot 2, excluding VAT, was € 6,480.

On the 26th April 2023 NB Engineering Services Ltd filed an appeal against Wasteserv Malta Ltd as the Contracting Authority on the grounds that their bid was rejected as it was deemed to be technically non-compliant.

A deposit of € 400 was paid on Lot 2.

There were two(2) bids on Lot 2.

On the 6th June 2023 the Public Contracts Review Board composed of Mr Kenneth Swain 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 – NB Engineering Services Ltd

Eng Nicholas Bellizzi Representative

Contracting Authority – Wasteserv Malta Ltd

Dr John Axiak	Legal Representative
Dr Pearl Agius	Legal Representative
Mr Stefan Salomone	Chairperson Evaluation Committee
Mr Morgan Bonnici	Evaluator
Ms Branica Xuereb	Representative

Preferred bidder – TVI Services Ltd

Invited to attend but confirmed by Eng Pierre Cassar that will not be attending.

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.

Eng Nicholas Bellizzi Representative for NB Engineering Services Ltd said that its bid was technically compliant and the cheapest. Their reply to the clarification to confirm the bid price once uploaded on the system was assumed to have been accepted. The request to confirm that the price submitted was not abnormally low was difficult to prove as the price reflected only labour costs and the request set a dangerous precedent as it meant that the Evaluation Committee could decide at which level to set their benchmark. This goes against the principle of the cheapest bid being awarded the tender.

Dr John Axiak Legal Representative for Wasteserv Malta Ltd requested witness to testify.

Mr Stefan Salomone (9982M) called to testify by the Contracting Authority stated on oath that he was the Chairperson of the Evaluation Committee which had requested clarification to justify if the bid was abnormally low, since the price submitted by Appellant (€ 2160) was very much lower than the tender estimate (€ 6,480) which was based on market research. This was normal practice in the case of low bids. The clarification was replied to, but the stated attachment was not traced. Full details of this correspondence were displayed in a screenshot which clearly indicated N/A against the reply to the clarification on the 27th March 2023 at 14.00hrs.

Questioned by Eng Bellizzi witness said that the software in use for the clarification was the same as that used for the tender and that there was no minimum price set at which an offer was regarded as abnormally low. Market research, according to the witness was not carried out by the Evaluation Committee.

This concluded the testimony.

Eng Bellizzi re-iterated the points made earlier and again stated that it was difficult to establish what is an abnormally low price. This is a dangerous precedent as the Evaluation Committee were at liberty to decide who qualifies at which price.

Dr Axiak said it was evident that Appellant's offer was too low when compared with the tender estimate. The Evaluation Committee were obliged to ask for a clarification but did not receive a reply. They had no alternative except to disqualify.

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 6th June 2023.

Having noted the objection filed by NBEngineering Services Limited (hereinafter referred to as the Appellant) on 26th April 2023, refers to the claims made by the same Appellant with regard to the tender of reference SPD 8/2022/155 listed as case No. 1880 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Ing Nicholas Bellizzi

Appearing for the Contracting Authority: Dr John Axiak

Whereby, the Appellant contends that:

- a) As stipulated by the eTender Document, Section 1/5 - Selection & Award Requirements - NBEngineering Services is fully technically compliant with the Contract Requirements, and is the cheapest offer.
- b) As stipulated by the eTender Document, Section 1/6 - Criteria for Award - NBEngineering Services offer fulfils the criteria in full and hence should be awarded the Contract.
- c) The Clarification document requested by the Authority was uploaded and an attachment was included. In fact the Tender system accepted our clarification. Therefore we believe that the attachment has been misplaced in the system, or else the eTender system would not have accepted our upload in the first place, as is usual with all etender documents. If attachments (such as "CV") are not attached, the system does not accept the upload.
- d) We firmly believe the request for clarification was useless and has no basis. The Contracting Authority wanted an explanation why the tendered price was low. The aim of a Tender is for the Authority to obtain the best price for a technically compliant offer. How can a Tenderer know the lowest price he can put in his offer which will satisfy the Contracting Authority? This is a true precedent in Public Procurement. Any offer below the 'market value price' the Authority mentions in the Tender Document can be too low. This is why we believe the request for clarification has no merits in the first place.

- e) The offer NBEngineering has put forward for this Contract is the same price that NBEngineering put forward 2 years ago, when we won the same job. There were no complaints or clarifications required last time around, so we do not see the relevance of the clarification. We used the same price basis as our last bid two years previous. The Contracting Authority did not need to seek a clarification on the pricing level two years ago, and it has already benefitted from this pricing level.
- f) Since the Contracting Authority already had a cost for this service in the past (that of NBEngineering during the previous Contract), we cannot identify where the 'current market research' has been derived from. It seems this 'marker' is more of a detriment to fair bidding implying higher costs to the Contracting Authority than beneficial. Bidders can neglect their true costs when preparing a bid and put an offer a few percentage points less than the 'market research value'. This will result in more profits for the bidder to the detriment of the Contracting Authority.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 4th May 2023 and its verbal submission during the virtual hearing held on 6th June 2023, in that:

- a) Non-compliance of procedure – The appellant asserts that the company uploaded the document attached to the appeal. The Contracting Authority did not find this document when it considered the tender. This is a matter of fact that can be proved by the Contracting Authority during the hearing of this appeal by the production of the relevant witnesses.
- b) Clarification is useless and has no basis – The appellant company objects that the request for clarification is useless and has no basis. According to the company's appeal the Contracting Authority's only role is to obtain the best price which is technically compliant, and the matter stops there. The Contracting Authority respectfully disagrees and would like to point out that its remit goes beyond merely issuing the tender and finding the lowest value. A contracting authority has every right to request further information as to why the service being offered is being offered at such a reduced price. On the same reasoning, the contracting authority would like to add that merely because a price was accepted two years ago does not mean that it should not query why the same price that is being offered today. The Contracting Authority has its own reasons for requesting this additional information and any reasonable person should query why a service at such a low price is being offered. For all good intents and purposes, it is being stated that as per section 1.14 of the Standard Operating Procedures (SoP) Guidelines for Tender Evaluation Committees (TEC), the Contracting Authority is bound to request for a justification when an abnormally low price is offered, which is clearly the case in this situation. In view that this information was not received by the contracting authority, the contracting authority couldn't consider the application any further.
- c) Questioning the price as per Current Market Research': The complainant questions where the 'current market research' has been derived from – Consequently, to questioning the figure established by the 'current market search' the complainant states' that this is a detriment to fair

bidding and to the contracting authority. In response to this assertion the contracting authority has every right to question why a bid is below the current market research in order to ensure that it gets a quality that it deserves. Moreover, one is to consider that a service that is not properly rendered may eventually cost more for the contracting authority. Moreover, the contracting authority would like to add that section 1.3 specified the Estimated Procurement Value for Lot 2 (being €6,480). Therefore the appellant had the opportunity to question such a figure through the process of clarification (deadline 5th January as per tender) as per regulation 262 of the Public Procurement Regulations.

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) The below are the main point that will be analysed by this Board:
 - i. Abnormally Low clarification
 - ii. Evidence (or lack thereof) relating to the attachment of the clarification request
 - iii. Past tender/s
 - iv. Current Market Research / Estimated Procurement Value
- b) Abnormally Low clarification – This Board notes that the Estimated Procurement Value for Lot 2 was set at €6,480 excluding VAT. The Appellant's offer was submitted at €2,160 excluding VAT, which is exactly 33.33% of the Estimated Procurement Value. Hence the Appellant's offer is 66.66% below the Estimated Procurement Value. Reference is now made to regulation 243 (1) of the Public Procurement Regulations ("PPR") whereby it is stated "*Contracting authorities **shall** require economic operators to explain the price or costs proposed in the tender where tenders **appear** to be abnormally low in relation to the works, supplies or services.*" (bold & underline emphasis added). It is this Board's view that the difference in values stated above certainly provides enough indication that the tender 'appears' to be abnormally low. Therefore, the evaluation committee, representing the contracting authority, was obliged to seek such a clarification.
- c) Evidence (or lack thereof) relating to the attachment of the clarification request – the Contracting Authority, during the testimony under oath of Mr Stefan Salomone shared extracts and reports from the ePPS system showing that no attachments were duly uploaded. On the other hand, the appellant did not provide any evidence of uploads made.
- d) Past tender/s – it is duly emphasized that it is not the remit of this Board to compare tenders under appeal to past and previous tenders. Conditions, specifications, objectives etc might be different and such arguments are not deemed relevant to proceedings.
- e) Current Market Research / Estimated Procurement Value – it has already been established that one of the tests to analyse the possibility of an abnormally low tender, is to compare the bid price

to the estimated procurement value of the tender. Any grievances in relation to the estimated procurement value should have been dealt with under regulation 262 of the PPRs as this was something known as from the beginning of the tender process.

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

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

Mr Kenneth Swain
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member