

PUBLIC CONTRACTS REVIEW BOARD

Case 1882 – Cft 009-3067/23 (CPSU 2005/22) – Services - Tender for the Provision of Preventive Maintenance and Repairs of HVAC System at CPSU at San Gwann including of Cleaning Chemicals or Solvents with a reduced environmental impact

12th June 2023

The Board,

Having noted the letter of objection filed Dr John L Gauci acting for and on behalf of Aeris Environmental Europe, (hereinafter referred to as the appellant) filed on the 27th March 2023;

Having also noted the letter of reply filed by Dr Alexia J Farrugia Zrinzo and Dr Leon Camilleri acting for Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority) filed on the 3rd 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 8th June 2023 hereunder-reproduced.

Minutes

Case 1882 – Cft 009-3067/23. Services - Tender for the Provision of Preventive Maintenance and Repairs of HVAC System at the Central Procurement and Supplies Unit at San Gwann including Cleaning Chemicals or Solvents with a Reduced Environmental Impact

The tender was issued on the 13th January 2023 and the closing date was the 3rd February 2023. The estimated value of the tender, excluding VAT, was € 100,000.

On the 27th March 2023 Aeris Environmental Europe filed an appeal against the Central Procurement and Supplies Unit as the Contracting Authority objecting to their bid being rejected as it was deemed to be technically non-compliant.

A deposit of € 500 was paid.

There were two (2) bids.

On the 8th June 2023 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 – Aeris Environmental Europe

Dr John L Gauci

Legal Representative

Mr Ivan Cassar

Representative

Mr Dalziel Bugeja Representative

Contracting Authority – Central procurement and Supplies Unit

Dr Leon Camilleri	Legal Representative
Dr Alexia Farrugia Zrinzo	Legal Representative
Mr Stephen Mercieca	Chairperson Evaluation Committee
Mr Albert Incorvaja	Secretary Evaluation Committee
Mr Paul Grima	Evaluator
Mr Malcolm Bartolo	Evaluator

Preferred Bidder – FM Core Ltd

Dr Stefan Camilleri Cassar	Legal Representative (Online)
Ms Mariella Vidal	Representative (Online)

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

Dr John Gauci Legal Representative for Aeris Environmental Europe said that the disqualification of Appellant was because it had failed to attend a mandatory site visit. Regulation 232 of the PPR covers a very exhaustive list of causes for which a bid can be held to be not complaint but it does not include exclusion for not attending a site visit. The publication period for a tender was also not honoured as only five days were allowed for the site visit from the publishing of the tender. This is restriction of competition and the publication period of the tender has to run from the site visit. A precontractual remedy has only a limited time to run and again the period was too short.

Dr Leon Camilleri Legal Representative for the Contracting Authority stated that the site visit was mandatory and has been used before in tenders. PP Regulation 52 supports site visits. Appellant claims that a period of five days was too short but there was time for a precontractual remedy available – as far as Regulation 262 is concerned this tender is no different to any other. The two-thirds rule applies in this case too.

Dr Stefan Camilleri Cassar Legal Representative for FM Core Ltd indicated that the preferred bidder agrees with the points made by Dr Leon Camilleri.

Dr Gauci said that the mandatory site visit clause is illegal and immaterial of whether a precontractual remedy was used or not – this claim of illegality has not been challenged and the fact that Regulation 262 has not been used does not make the tender legal.

Dr Leon Camilleri concluded by stating that it was not right to claim that Regulation 262 did not apply as the tender was illegal since that particular section even covers violations of the law and applies nonetheless. This remedy was not used and the appeal should not be met.

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 8th June 2023.

Having noted the objection filed by Aeris Environmental Europe (hereinafter referred to as the Appellant) on 27th March 2023, refers to the claims made by the same Appellant with regard to the tender of reference CfT009-3067/23 (CPSU 2005/22) listed as case No. 1882 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr John L Gauci

Appearing for the Contracting Authority: Dr Leon Camilleri & Dr Alexia Farrugia Zrinzo

Whereby, the Appellant contends that:

- a) 1st Grievance – Reason given for technical non-compliance is not one which is contemplated at law -

The reason given for the exclusion of Objector is the lack of technical compliance for failure to attend a site visit which was set five days after the publication of the tender document. Although styled as such, one would understand that the exclusion is attributed to lack of technical capacity rather than compliance since in no way the technical offer by bidder was found to be lacking in respect to the technical specifications (as defined in Regulation 53 of the Public Procurement Regulations). In any case, the imposition of a "mandatory" site visit, which had to take place only five days after the publication of the tender document goes against all rules governing assessment of technical compliance and technical capacity by bidders. The Public Procurement Regulations, stipulate an exhaustive list of what may be requested by Contracting Authorities to bidders as proof of their technical abilities.

Reference is made to Regulation 232 of the said Regulations

That therefore, the technical capacity of a bidder, can never be assessed by the attendance of a bidder to a site meeting.

Furthermore, the Instructions to Tenderers (Section 1) part does not stipulate that the site visit was mandatory. The "mandatory" nature of the site visit is only mentioned in Section 3 of the Tender Document (technical specifications) and in the tenderer's technical questionnaire, both of which are meant to assess the technical conformity of a bidder and not to include exclusion criteria.

Moreover, the exclusion criteria are clearly set at law and certainly the non-attendance of a site-visit is not one of them.

- b) 2nd grievance – The Stipulation of a “Mandatory Site Visit” 16 days prior to the actual closing date goes counter against the basic principles of transparency and open competition -

That indeed, by imposing a mandatory site visit five days after the publication of the tender, the Contracting Authority is in fact violating the publication notice period which is set by law since technically it would be restricting the competition only to those entities who would have read the tender document in those first five days. This is clearly an unjustified and irregular restriction of the notice period which should afford equal and unrestricted access to all bidders.

Furthermore reference is made to Article 52(2) of the Public Procurement Regulations which states as follows: Also, there is a proviso in S.L.601.03 - Article 52 (2) which states the following: *“Where tenders can be submitted only after a site visit or after on-the-spot inspection of the documents supporting the procurement documents, the time limits for the receipt of tenders shall be longer than the minimum time limits set out in regulations 116, 121, 122, 125, 142 and 132, and shall be fixed so that all economic operators concerned may be aware of all the information needed to produce tenders.”*

Therefore, as such, the exclusion of Objector due to failure to attend a site-visit is definitely unwarranted.

- c) 3rd grievance – that the imposition of a ‘Mandatory’ site visit is not justifiable in the circumstance

Without any prejudice to the above considerations, it is humbly submitted that there was no compelling reason to make this requirement a mandatory once especially since, the site visit minutes were made available to all bidders and since the site in question is a publicly accessible one and can be visited independently.

This Board also noted the Contracting Authority’s Reasoned Letter of Reply filed on 3rd April 2023 and its verbal submission during the hearing held on 8th June 2023, in that:

- a) On the First Grievance

In this first grievance the objector contends that the imposition of a mandatory site meeting is not permissible by the Public Procurement Regulations (PPR) and cites regulation 232 of the PPR. This is factually and legally incorrect as there is nothing in the PPR which excludes such a visit as a mandatory requirement.

Regulation 52(2) of the PPR provides that *“Where tenders can be submitted only after a site visit or after on-the-spot inspection of the documents supporting the procurement documents...”*

The above cited regulations, which deals with time limits, clearly demonstrates as well that a site visit before submission of an offer is permissible and the words 'only after' clearly shows that such a site visit can be mandatory as well. Without prejudice to the above, CPSU submits that if the objector had any difficulties with the specifications and requirements such as the imposition of a mandatory site visit, the remedy at law for such difficulties was that contemplated in regulation 262 of the Public Procurement Regulations which should have been Filed before closing time for offers. The bidder had up till the 27th of January 2023 to file for such a remedy in line with article 262 of the PPR.

Since the objector did not file for the remedy above referred to, the specifications and tender conditions were being accepted as published.

Section 3 - Terms of Reference clause 3.5 states: *“Site visit is mandatory for interested bidders as to ascertain works are carried out up to satisfactory of contractual authority and to familiarise with the plant involved.”*

Section 3 - Terms of Reference clause 3.6 states: *“Site visit is mandatory for interested bidders to obtain answers to any questions that may arise during bidding period.”*

The objector also states that the instruction to tenderers did not stipulate that the site meeting is mandatory, CPSU submits that the tender document should be read as a whole and if the Terms of Reference stipulated that the attendance is mandatory, then it is mandatory as stated. An interested bidder should read all the tender document and not just the first part. Nevertheless, if for the objector there was something which was unclear, it could have opted for a request for clarification or for the remedy before closing time in terms of regulation 262 of the PPR.

b) On the Second Grievance -

In reply to this grievance, CPSU submits that in this regards the action of the objector is *fuori termine* and in any case the action undertaken is not the correct action since if the objector had any queries relating to competition and transparency issued, it should have resorted to the action under regulation 262 of the PPR which specifically caters for such situations.

The clauses and conditions which the objector is complaining upon could have easily been dealt with by this Board during a procedure according to regulation 262, however such claims are inadmissible at this stage of the procurement process.

c) On the Third Grievance -

Specifically with regards to the third grievance without prejudice to the above stated, CPSU submits that the premises are not publicly accessible to anyone. However and without prejudice to this, the same legal argument highlighted throughout this reply that these grievances should have been tackled through an action in terms of regulation 262 of the PPR, holds.

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

- a) Reference is made to regulation 52(2) of the Public Procurement Regulations ("PPR") whereby it is stated "*Where tenders can be submitted only after a site visit or after on-the-spot inspection of the documents.....*" (bold & underline emphasis added). The words "only after" duly showcase that a site visit can be classified as a 'mandatory requirement' if need be. Section 3 – Terms of Reference of the tender dossier duly mentions this 'requirement' in spec numbers 3.5 and 3.6 respectively.
- b) Such grievances, also those in relation to the time-limits of the tender process should have been dealt with under the remit of regulation 262 (1) (e) of the PPR whereby "*Prospective candidates and tenderers may, within the first two-thirds of the time period allocated in the call for competition for the submission of offers, file a reasoned application before the Public Contracts Review Board to cancel the call for competition on the basis that the call for competition is in violation of any law or is likely to violate a particular law if it is continued.*"
- c) During the hearing it was duly ascertained that the appellant realised about this 'mandatory site visit requirement' only after the two thirds period timeframe, as required in regulation 262, had elapsed. Therefore, it cannot also be ascertained that the appellant exercised prudence, diligence and attention of a *bonus paterfamilias*.

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 FM Core Ltd,
- 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