



To: Public Contracts Review Board
Notre Dame Ditch, Floriana, FRN 1601

19th September 2023

Reasoned Letter of Reply Re: Objection dated 11th September 2023 regarding Tender Ref. No. CT3050/2022- Tender for the Provision, Packaging and Delivery of Food Items to Various Distribution Centre in Malta and Gozo for Collection by end recipients.

1. Introduction

I write upon the instructions of the Ministry for Social Policy and Children's rights (MSPC), herein after referred to as the Contracting Authority

Primarily, the Contracting Authority would like to state that the decision taken by the appointed Evaluation Committee is just and correct decision and the Evaluating Committee is of the humble opinion that it merits the full confirmation of the Public Contracts Review Board (PCRB) as the decision was taken in terms of the Public Procurement Regulations as set out in SL 601.03.

The Contracting Authority herein answers to the arguments raised in the appeal in the same order and insists that these arguments are unfounded in fact and at law;

2. Technical literature was indeed correctly provided

2.1 It should be noted that the specifications of the technical literature were listed in Section 3 wherein it is stated that *'This contract is for the provision, packaging and delivery of food packages containing various food items as per List in Appendix 1.'*

Appendix 1 then listed the various items which the food package should contain, stipulating that in every package the bidder should provide 1 packet of pasta of at least 1000grams with the following specifications:

- a. Dry
- b. White
- c. Pasta: Along the duration of the contract, **the contractor should provide at least three different kinds of pasta**, which has to be of the same kind in each delivery, from the following varieties: farfalle, fusilli, macaroni, penne and spaghetti.

With an expiry, or best before, or used by date of at least 20 months with any sort of packaging.

By virtue of a letter dated 06th June 2023, the Evaluation Committee informed Transporter Ltd of the following shortcomings with regards to his submissions:

Literature for Items listed herewith are missing:

1. Coffee
2. Tomatoes
3. Tuna
4. Fruit-mixed-in juice or in light syrup
5. Vegetables in Tin
6. Whole-Wheat Cereal
7. Pasta
8. Rice
9. Dried Pulses

2.2 The appellant rectify by submitting literature of these missing items corroborating your technical offer....**Tenders who fail to rectify the shortcomings identified in this communication shall be deemed to be non-compliant.**

2.3 Thus, it should first be noted that out of the 15 requested items in the specifications part, originally the appellant provided only 6, failing to provide the technical literature of the above 9 items. Upon given a rectification opportunity, the appellant regulated his position with the other items, but where it comes to pasta, the appellant provided a forefront picture of a packet of Poiatti spaghettoni n.4, a forefront picture of a packet of Poiatti Rigatoni n.54 and the back of a package of Poiatti pasta showing the ingredients.

2.4 The Contracting Authority deems it quite irregular that the appellant is claiming that the technical literature provided was correct when in actual fact he omitted to provide literature for the pasta delineated in the specifications' sections, that is, farfalle, fusilli, macaroni, penne or spaghetti. The data provided by the appellant was not what was requested of him since the Contracting Authority was requesting 3 kinds of Pasta of a particular kind, (The appellant provided two out of three kinds, which were not amongst those indicated on the Specifications' list) not only did the appellant provided two out of three but those provided were not even in the list.

3. Provision of three types of pasta

3.1 The appellant is claiming that when the Evaluating Committee requested the rectification, it introduced new rules. In this regard, the Contracting Authority reiterates that the tender document was crystal clear from the very first day of publication since Section 2.1 of the tender document clearly states '*The successful bidder will be required to supply the food packages to each distribution point of the partner organization (see specific Objectives).*' The specific Objectives are then

referred to in Section 2.2 of the tender document, in which point 1 of such Section delineates, *'This Contract is for the provision, packaging and delivery of food packages containing various food items as per list in Appendix 1.'* Thus, Appendix 1 was to be rigorously followed. The most reasonable question that one should ask is, 'How can the appellant expect to be compliant when he provided the Contracting Authority technical literature of products that were not listed in Appendix 1 and less than he was obliged to?' The Contracting Authority did not at any stage introduce new rules during the rectification stage. It abided by the principle that during the rectification stage there were no alterations from what was published in the tender document; it is the appellant that is expecting the Contracting Authority to accept a bid that is not technically compliant, particularly to accept literature for items that were not listed in Appendix 1 of the tender document. The bidder can in no way assume that whatever he provides, which according to his opinion, is similar to the specifications, should be accepted. Had this been the situation, the Evaluating Committee would be acting unfair vis-à-vis the other bidders leading to a havoc in the competitive market.

4. Appellant's offer was non-compliant due to the fact that *".....the two-pasta provided were different as specified in Appendix 1 of the Tender Document"*

4.1 The appellant's claim that *'..every attempt was made to ensure that the appellant's bid, that is cheaper by €82, 800, was disqualified'* is definitely unfounded. The tender document explicitly specified that *'The contract will be awarded to the tenderer submitting the cheapest priced offer satisfying the administrative and technical criteria.'* Thus, while it was true that the main criterion was the cheapest price, it is also true that this was subject that the bidder also satisfied the administrative and technical criteria. The appellant in fact only satisfied part of it, that of submitting the cheapest price, however, failed to satisfy the technical criteria.

4.2 The appellant's argument that it was in *'his discretion to provide a minimum of 3 different types of pasta during the execution of the contract'* is also unfounded. The only discretion the successful bidder has, is to see which kind of pasta from the list listed in the specifications, particularly *'farfalle, fusilli, macaroni, penne and spaghetti'* shall be distributed in every package and even with that, the successful bidder is bound to provide the same kind of pasta in all the packages. The natural question that a reasonable person would ask is 'If the appellant could not provide the technical literature of the 3 types out of the 5 indicated, as requested at the rectification stage, but instead provided a kind of pasta that he deemed generic, how can the Evaluation Committee have the peace of mind that the bidder is going to honor the contract rigidly?'

4.3 What the appellant is failing to consider is that this is an EU funded project during which specifications have to be followed rigorously. Failing that, the appellant will render the Contract Authority liable to the relative fines/penalties.

5. Appellant in total observance of the substance of the tender

5.1 The Contracting Authority reiterates that the appellant did not provide the requested information, that is, he did not provide a technical literature for 3 kinds of pasta out of the 5 that were specified in the tender document. What he provided for was information of 2 products that were not listed in Annex 1. Thus, the appellant can in no way claim or rather pretend that he was in total observance of the substance of the tender.

5.2 The measuring yardstick shall not be what the Evaluating Committee could have done but did not do but it should be what the appellant was obliged to do but failed twice to adhere to the technicalities and specifications as published in the tender document.

5.3 With all due respect, the appellant can in no way now expect the Public Contracts Review Board (PCRB) to shift obligations.

6. Appellant's bid is €82,800 cheaper than the successful bid

6.1 As previously stated, the award criteria in the tender document specified that '*The contract will be awarded to the tenderer submitting the cheapest priced offer satisfying the administrative and the technical criteria.*' Hence, the cheapest offer had to be substantiated by fully complying with the administrative and technical aspect. The appellant failed to satisfy his compliance with the technical aspects.

6.2 Had the Evaluation Committee accepted a non-compliant bid, it would render the risk to be sued for damages by a bidder that was fully compliant.

7. Conclusion

In view of the reasons above-captioned, the Ministry for Social Justice and Solidarity, the Family and Children's rights concludes that the appeal is to be refused *in toto* by the PCRB.

Therefore, MSPC awaits for your reply as to any date and time for the hearing of the said appeal, wherein it reserves the right to put forward further submissions if need be.

Sincerely



Avv. Anita Giordimaina
f/ the Contracting Authority