

PUBLIC CONTRACTS REVIEW BOARD

Case 1925 – CT3050/2022 - Supplies – Tender for the Provision, Packaging and Delivery of Food Items to Various Distributions Centres in Malta and Gozo for Collection by End Recipients

23rd October 2023

The Board,

Having noted the letter of objection filed Dr Massimo Vella acting for and on behalf of Transporter Limited, (hereinafter referred to as the appellant) filed on the 11th September 2023;

Having also noted the letter of reply filed by Dr Anita Giordimaina acting for Ministry for Social Policy and Children's Rights (hereinafter referred to as the Contracting Authority) filed on the 20th September 2023;

Having heard and evaluated the testimony of the witness Mr Jeremy Piscopo (Chairperson of the Evaluation Committee) as summoned by Dr Anita Giordimaina acting for Ministry for Social Policy and Children's Rights;

Having heard and evaluated the testimony of the witness Mr Roger Mamo (Member of the Evaluation Committee) as summoned by Dr Anita Giordimaina acting for Ministry for Social Policy and Children's Rights;

Having heard and evaluated the testimony of the witness Ms Idonia Cutajar (Secretary of the Evaluation Committee) as summoned by Dr Anita Giordimaina acting for Ministry for Social Policy and Children's Rights;

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 17th October 2023 hereunder-reproduced.

Minutes

Case 1925 – CT 3050/2022 – Supplies – Tender for the Provision, Packaging and Delivery of Food Items to various Distribution Centres in Malta and Gozo for Collection by End Recipients

The tender was issued on the 17th April 2023 and the closing date was the 23rd May 2023. The estimated value of this tender, excluding VAT, was € 1,657,540.

On the 11th September 2023 Transporter Ltd filed an appeal against the Ministry for Social Policy and Children's Rights as the Contracting Authority objecting to their disqualification on the grounds that their offer was not technically compliant.

A deposit of € 8,288 was paid.

There were four bids.

On the 17th October 2023 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Ms Stephanie Scicluna Laiviera and Dr Vincent Micallef as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Transporter Ltd

Dr Paul Farrugia	Legal Representative
Mr Derek Conti	Representative
Ms Andreina Fenech Farrugia	Representative

Contracting Authority – Ministry for Social Policy and Children’s Rights

Dr Anita Giordimaina	Legal Representative
Mr Jeremy Piscopo	Chairperson Evaluation Committee
Ms Idonia Cutajar	Secretary Evaluation Committee
Mr Roger Mamo	Evaluator

Preferred Bidder – DC Property Services.

Invited to attend but declined the offer.

Department of Contracts

Dr Mark Anthony Debono	Legal Representative
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Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Paul Farrugia Legal Representative for Transporter Ltd outlined the objects of the tender and specified one item which was the provision of three out of five types of pasta and the requirement to provide technical literature. The original tender specified only pasta but following a rectification request further details and illustrations of three types of pasta were provided. The Tender Evaluation Committee (TEC) also had the right to request a sample basket of goods, which it did not do. The Appellant was therefore totally compliant. Appellant’s bid was € 82,000 cheaper than the next best offer and there were remedial penalties included in the tender if the contract was not met. Appellant offered variations of the same requested products and one wonders if these shortcomings are worth the State spending € 82,000 more?

Dr Anita Giordimaina Legal Representative for the Ministry for Social Policy and Children’s Rights said that the Contracting Authority claims that after rectification the bidder offered only two pasta products which were not even any of the five requested in the tender. The TEC could not request further clarification and had no alternative except to disqualify.

Dr Mark Anthony Debono Legal Representative for the Department of Contracts said that the TEC is subject to self-limitation in their decisions and could go no further than to evaluate what the bidder had offered.

Dr Giordimaina requested that witnesses be heard.

At this stage Dr Farrugia objected to members of the TEC giving testimony since in his view they were prejudiced by virtue of the fact that they had evaluated the tender and made the decisions on which this appeal was based.

The Chairman explained that this is normal standing procedure followed in appeal hearings which followed regulations laid down.

Dr Farrugia requested that the following note is recorded verbatim:

“Dr Paul Farrugia in the name of Transporter Ltd objects that Evaluation Committee members who decided the tender testify and on which basis the decision of the 1st September 2023 advised Transporter Ltd that the bid was technically not compliant and this because it is legally and procedurally inconceivable that in an appeal situation the person who gave that decision testified to justify that decision. After all the Appellant had only the decision of the 1st September 2023 to submit this appeal. If it transpires that other facts emerge the Appellant is being restricted in his right of appeal.”

Dr Giordimaina stated that once the Appellant had shed doubts on the decision of the TEC then those members of the TEC, including the Chairperson, had every right to testify to remove any of those doubts inferred by the Appellant.

The Chairman pointed out for the record that there are instances where the Appellant itself explicitly ask for the TEC members to testify and went on to explain the procedures under the Public Procurement Regulations.

Mr Jermy Piscopo (437780M) called to testify by the Contracting Authority stated on oath that he was the Chairperson of the Evaluation Committee and that he had no voting rights. He outlined the procedure carried out in the evaluation, the outcome of that evaluation including the need for clarifications. Transporter Ltd replied in time to the clarification sent but the TEC realised that the points raised in the clarification had not been fully satisfied. Rectification can only be sought once. All other bidders fulfilled the requests for rectification. Witness referred to a past similar EU tender where penalties were imposed for failures to follow specifications exactly.

In reply to questions from Dr Farrugia witness said that Appellant had met the request the specifications that the pasta offered had to be dry and white in five different types. In his first submission Appellant had not offered any pasta.

Questioned by Dr Debono, witness stated that in Appellant’s reply to the clarification there were shortcomings in the types of pasta – only two types out of the three pasta required were offered and these were not even according to the specifications.

Mr Roger Mamo (238483M) called to testify by the Contracting Authority stated on oath that he was one of the Evaluators. He detailed how the evaluation had been carried out and the shortcomings in Appellant’s offer.

At this stage Dr Farrugia requested that the following note is recorded verbatim:

“Dr Paul Farrugia and Transporter Ltd object that:

1. The witness was present the testimony of the previous witness of a member of the Evaluation Committee
2. The witness is reading a full textual written reply from notes which indicated that the witness was instructed on what he would be testifying”

Dr Giordimaina pointed out that the Chairperson who has testified and the witness Mr Mamo had different roles in that the Chairperson had no voting rights which the present witness had.

The Chairman requested that the document referred to, be viewed by the Board and if witness was prepared to confirm that he had prepared these notes himself for his own use.

The witness confirmed whilst still under oath that he had prepared the notes on the basis of what had been evaluated merely to facilitate the process. He did not consult anyone in preparing these notes.

[The Chairman directed that a copy of the notes be distributed to all parties].

Resuming his testimony, Mr Mamo stated that after the shortcomings in the Appellant's bid had been noted the TEC sent a rectification on the 6th September 2023. Appellant's reply covered all nine points except the one on pasta on which out of three criteria only two were offered and even then not the right ones. In Appendix 1 the tender indicated five types of pasta out of which the bidder had to provide three.

Replying to questions from Dr Farrugia, witness said that the clarification sought was referring to the word 'pasta' relating to specifications in Appendix 1 – the TEC expected the three types of pastas to be specified. The Technical Offer states that for each item offered the bidder has to submit literature list.

In reply to a question from Dr Giordimaina witness said that the point of requesting literature is to ascertain that the specifications are met. The literature requested in the clarification letter was precisely to corroborate the technical offer.

Ms Idoia Cutajar (487391M) called as a witness by the Contracting Authority stated on oath that she was the Secretary of the Evaluation Committee and described her role and duties as such. She recalls sending the clarification letters.

This concluded the testimonies.

Dr Farrugia said that the witnesses confirmed the Appellant's claim that the literature requested only the specifications of the product which is the same for all types of pasta offered. The Board must understand that that in the original bid the pasta was offered and only the specifications that the pasta had to be dry and white were not provided. This was provided subsequently. With regard to the clarification witness stated that it was requested which three types of pastas were being provided, but the letter does not say so – it is simply requesting the specification of the product. Pasta is a common product familiar to everyone and this should not have worried the TEC as the Contracting Authority was protected by the terms of the contract. If the TEC had any doubts on the reply to the clarification it should have asked for the basket especially since this bid was the lowest.

Dr Giordimaina stated that to be compliant the bid had not only to be the cheapest but also technically compliant. Only two out of three types specified were offered and the two offered were not specified. There was a failure to provide what was requested and it was not a question of the TEC introducing new requests. The Authority had carried out its duties correctly and in line with Public Procurement Regulations. The clarification was not dealt with correctly and regulations tied TEC's hands in not requesting further clarifications. This was an EU tender and in a past case fines were imposed and it is essential that all technical points are followed. Appellant was still not conforming even after the rectification.

Dr Debono said that Appellant had to prove his allegations which it failed to do. The literature is there to corroborate the offer which if not done leaves the Authority with no alternative.

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

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 17th October 2023.

Having noted the objection filed by Transporter Limited (hereinafter referred to as the Appellant) on 11th September 2023, refers to the claims made by the same Appellant with regard to the tender of reference CT3050/2022 listed as case No. 1925 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Paul Farrugia

Appearing for the Contracting Authority: Dr Anita Giordimaina

Whereby, the Appellant contends that:

a) **Technical literature was indeed correctly provided -**

The request for rectification was complied with accurately by Appellant as the requested technical literature was indeed submitted. As the Evaluation Committee was aware, the appellant had committed itself to use pasta products produced by the brand "Poiatti" in the execution of the contract. All the Poiatti pasta that was to be utilized in execution of the tender has the same specifications, notwithstanding the different shapes and forms. Appellant submitted a photo showing the rear of a pasta Poiatti pasta packet, where all the pertinent and required technical data is listed (ex. proof of specifications, shelf life, capacity and packing details), and this in compliance with what is stipulated in section 3 - 'Technical Specifications - Appendix 1. Note that these specifications - and only these - were requested under the document titled "Literature List" in the tender document'. Appellant consequently totally adhered to the request made by the Evaluation Committee on the 6th of June 2023. The tenderer was requested to provide 3 different kinds of pasta – of the kind therein stated – having only two requirements, namely “DRY” and “WHITE”. The technical specifications provided by the appellant provided much more data than was actually required.

b) **Provision of three types of pasta -**

In its initial bid Appellant had indicated clearly that Appellant would comply in providing three different types of pasta as requested in the original tender document. As seen from the tender document, tender was only required - at the choice of the tenderer throughout the duration of the contract - to provide at least any of those 3 types of pasta - so tenderer could actually opt to provide all the kinds of pasta therein stated throughout the execution of the contract. Nothing further was required in the tender document, so one cannot now argue that Appellant was technically non-compliant. Whilst having the right to request clarifications, the Evaluating Committee was not empowered to introduce new rules on the basis of which the tender was to be adjudicated.

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

In the humble opinion of the Appellant this merely confirms that every effort was made to ensure that my Appellant's bid, that is cheaper by €82,800, was disqualified. Firstly, as already shown above, Appendix 1 - Food Package, left it at the bidder's discretion to provide a minimum of 3 different types of pasta during the execution of the contract. There was no requirement for the tenderer to state which kind of pasta would be provided, as long as it was one of the kinds therein stipulated and having the technical characteristics therein specified.

This notwithstanding, the Evaluation Committee chose to disqualify the appellant because of what it saw were divergences from the type of pasta that was listed. It is common knowledge that both spaghetti and macaroni are generic pasta names and that there exist multiple configurations of both.

Spaghetti is a generic description of long, thin, solid, cylindrical pasta. There is no determinate thickness of Spaghetti, and the name Spaghettoni merely indicates that the particular type of Spaghetti is merely on the thicker side. Again, if one were to search for what constitutes the strict thickness of spaghetti, one would be totally unsuccessful.

Macaroni is also a generic description of pasta shaped like tubes. As explained, Macaroni is available in different configurations, and there is no specific determined definition as to the thickness of the tubes. Rigatoni are merely Macaroni with a different name, as they have ridges on the outside of the pasta.

d) **Appellant in total observance of the substance of the tender. -**

The Public Contracts Review Board will definitely appreciate that the substance of the tender has been totally observed by the Appellant, and that at the end of the day that is what is required by the Government. The Evaluating Committee was too fiscal in its approach as the appellant was totally compliant with tender requirements. It is submitted that if the Evaluating Committee believed that much further detail was required, it could have availed itself of its right under the tender document to request that all bidders provide physical samples of the products that formed part of their bids, something that the Evaluating Committee failed to do.

e) **Appellant's bid is €82,800 cheaper than the successful bid. -**

The Public Contracts Review Board will appreciate that the appellant's bid is actually €82,800 cheaper than that of the successful bidder, and this represents a substantial saving to Government. Furthermore, article 6.1 of the tender document provides as follows: *The sole award criterion will be the price. The contract will be awarded to the tenderer submitting the cheapest priced offer satisfying the administrative and technical criteria.*

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 20th September 2023 and its verbal submission during the hearing held on 17th October 2023, in that:

a) **Technical literature was indeed correctly provided -**

By virtue of a letter dated 6th 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

The appellant rectify (sic) 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."*

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. 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.

b) **Provision of three types of pasta -**

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 I."* Thus, Appendix

I 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 I 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-a-vis the other bidders leading to a havoc in the competitive market.

c) **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” -**

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 (sic) only satisfied part of it, that of submitting the cheapest price, however, failed to satisfy the technical criteria.

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 (sic) the contract rigidly?'

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.

d) **Appellant in total observance of the substance of the tender -**

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 I. Thus, the appellant can in no way claim or rather pretend that he was in total

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

e) **Appellant's bid is €82,800 cheaper than the successful bid -**

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. 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.

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.

It is this Board's opinion that the facts of the case are clear and are not being challenged by either party. Therefore, what needs to be analysed are the following:

- 1) The Technical Literature submission following the rectification request issued by the Evaluation Committee and whether, or otherwise, it satisfies the requirements of the tender document. (therefore encapsulating the first four grievances of the appellant).
- 2) Appellant's bid is €82,800 cheaper than the recommended bidder. (being the fifth grievance of the appellant).

a) ***The Technical Literature submission –***

- i. Relevant to these proceedings is 'Appendix 1 – Food Package' of the tender documents which for the 'Pasta' food item listed the following 'Specifications':
 - I. Dry
 - II. White
 - III. 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.** (bold & underline emphasis added)

- ii. Also relevant is the following extract in the Technical Offer which states *“For each item offered, the respective supporting documents and printed manufacturer’s technical literature are to be submitted by the bidder as per form marked “Literature”.*”
- iii. From the above, which in the Board’s opinion is clear and unambiguous, economic bidders were to present technical literature of three (3) types of pasta out of the five (5) categories mentioned above (i.e. farfalle, fusilli, macaroni, penne and spaghetti).
- iv. Without going into the merits of whether ‘spagethoni’ should have been accepted as a ‘substitute’ of ‘spaghetti’, it is still clear and obvious that the appellant did not meet the requirements of the specifications imposed on it due to the fact that it submitted two (2) types of pasta (instead of the required three (3)). Moreover, the submitted ‘Rigatoni’ is certainly not one of the pasta types which was mentioned in the tender dossier.
- v. It goes without saying that the technical literature to be provided should be relevant and be able to **corroborate** the economic bidder’s submission in accordance with the requirements of the tender document.
- vi. The Board notes that a ‘Rectification request’ was duly issued to the appellant by the evaluation committee, in total observance of the regulations. It is this Board’s opinion that the rectification request was also clear and unambiguous and it did not need to necessarily specify that technical literature in reference to three (3) types of pasta was required to be submitted by the appellant, when it made reference to the tender dossier which already and unambiguously mentioned these.
- vii. Finally, with regards to the arguments in reference to the sample, it is to be noted that the General Rules Governing Tenders do not impose on the evaluation committee an obligation to request samples on a mandatory basis but states *“Wherever applicable, tenderers may be requested to submit samples so that the Evaluation Committee will corroborate the technical compliance of the offers received.”* Once the bid of the appellant was deemed to be technically non-compliant due to missing technical literature, the request for a sample would have been futile and could not be used as a tool to ‘save’ the bid of the appellant. It is also to be noted that a second rectification request on the same topic cannot be issued.

b) **Cheaper bid –**

- i. This Board makes reference to PCRB case 1926 [Note for the Chairman – do you want to quote as a precedent a case that was heard **after** this one ????] which states that *“As stated on numerous occasions, in order for a bid to make it to the financial evaluation part of the process, it must duly ‘pass’ and satisfy the tests of the administrative and technical requirements.”*
- ii. Reference is also made to paragraph 6 of section 1 of the tender dossier which states that *“The sole award criterion will be the price. The contract will be awarded to the tenderer submitting the cheapest priced offer **satisfying the administrative and technical criteria**.”* (bold & underline emphasis added)

- iii. Hence, even though, the offer of the appellant is indeed cheaper than the other bids submitted by other economic operators in this tendering process, in order for it to be considered for financial evaluation, it must first satisfy the administrative and technical requirements as duly stipulated in the tender dossier.
- iv. If this procedure would not have been followed by the Evaluation Committee, it would have resulted in clear breach of the principles of equal treatment and that of self-limitation.

Hence this Board does not uphold all the grievances of the appellant.

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

Mr Kenneth Swain
Chairman

Dr Vincent Micallef
Member

Ms Stephanie Scicluna Laiviera
Member