

BEFORE THE PUBLIC CONTRACTS REVIEW BOARD



CT3039/2022

15TH NOVEMBER 2023

Deloitte

vs.

Department of Justice, within the
Ministry for Justice; and the
Department of Contracts

This is the reply by the Department of Justice, within the Ministry for Justice (hereinafter referred to as the 'defendant') to the objection filed by Deloitte in respect of the tender bearing the reference CT3039/2022 - SERVICES - TENDER FOR THE MAPPING, RE-ENGINEERING AND DOCUMENTING THE BUSINESS PROCESSES OF THE JUSTICE ENTITIES WITHIN THE MINISTRY FOR JUSTICE

Respectfully submit:

1. The Department of Contracts on behalf of the Department of Justice issued a call for tenders for THE MAPPING, RE-ENGINEERING AND DOCUMENTING THE BUSINESS PROCESSES OF THE JUSTICE ENTITIES WITHIN THE MINISTRY FOR JUSTICE on the 23rd March 2023;
2. The closing date for this call for tenders following an extension was the 11th May 2023.
3. Following the opening of the bids ten (10) offers had been unlocked for this tender procedure;
4. The award criteria for this Tender is the Best Price Quality Ration (BPQR) in accordance with the weighting and evaluation grid as per Tender Document.

5. Following a decision of the Public Contracts Review Board of the 28th September 2023, a re-evaluation for this tender was carried out, and through a letter dated 27th October 2023 the objector was informed *inter alia* that his offer has been successful, however it did not rank first and the award was being recommended to Grant Thornton.
6. The objector felt aggrieved by this communication and proceeded with this objection before this Review Board lodged on the 6th November 2023.
7. The objector is founding his objection on two grounds being the following:
 - a. Application of the Best Price Quality Ratio the scoring of which allegedly dwindled the nature of the BPQR itself;
 - b. The alleged non-compliance of the recommended bidder – Grant Thornton.
8. The defendant is rejecting all allegations and arguments put forward by the objector for the following reasons:

Best Price Quality Ratio

9. The defendant makes reference to the evaluation grid as published in the tender document. This grid includes the scores which can be allotted for each item included in the grid. It also indicates which are the mandatory criteria that needs to be satisfied by each and every bidder.
10. The objector in his objection is trying to build his argument on the marks allotted which seemingly it is alleged that the way the marks have been allotted would have bypassed the award criteria of a BPQR.
11. The defendant humbly rejects this allegation and can prove all the way through testimony which will be given in front of this Board that the marks allotted by the evaluation committee as effectively a true and fair representation of the assessment being done for each bidder.
12. The defendants would like to point out further that the Evaluation Committee has an element of leeway when allotting marks under the BPQR method of award. This has been recognized in the judgment of the Court of Appeal (Superior), in the names **Cateressence Limited et vs. Id-Direttur tal-Kuntratti et**, dated 14th February 2017; where it is stated the following:

“... din il-Qorti tara li l-kumitat ta’ evalwazzjoni kien raġjonevoli fil-gudizzju tiegħu, u kellu raġunijiet validi biex ma jassenjax marki massimi lill-konsorzju appellant. Kumitat bhal dan irid jinghata certa flessibilita` biex ikun jista’ jwettaq dmiru, u l-fatt li offerent ma jaqbilx ma’ certi marki mogħtija, ma jfissirx li l-istess għandhom jigu skartati.

Kifosservat il-Qorti Ewropea tal-Ġustizzja fil-każ TNS Dimarso NV v. Vlaams Gewest, deċiż fl-14 ta’ Lulju, 2016 (każ numru C-6/15):

“The Court has held that an evaluation committee must be able to have same leeway in carrying out its task and, thus, it may, without amending the contract, award criteria set out in the tender specifications or the contract notice, structure its own work of examining and analysing the submitted tenders.

“The leeway is also justified by practical considerations. The constructing authority must be able to adapt the method of evaluation that it will apply in order to assess and rank the tenders in accordance with the circumstances of the case.”

13. Therefore, in the humble opinion of the defendant the tender has to be adjudicated according to the Award Criteria as set out in the published tender documents. This is fundamental for the proper observance of fundamental principles of public procurement such as level-playing field, equal treatment and non-discrimination among bidders. In this regard the bidder has been ranked upon the marks allotted and according to the mechanism laid out in the tender document hence the ranking is to be confirmed by this Honourable Board as is.
14. Having said all the above, it is the humble opinion of the defendant that as will be shown during the presentation of evidence for this objection no marks have been allotted in an automatic fashion and the evaluation committee can submit under oath the reasons for the allocation of the marks according to the marking scheme which has been submitted as part of the evaluation report.
15. For the above reasons this objection should be dismissed.

Non-compliance of the recommended bidder

16. The defendant humbly submits that bid evaluation is bid specific and comparisons are not acceptable between bids coming from different bidders. The marks allotted and technical evaluation is made solely by comparing

compliance between the bid information with the Technical Specifications/Terms of Reference contained in the Tender Document.

17. Any comparison between bids would clearly tantamount to a breach of basic principles of Public Procurement since the only benchmark with which bids are scrutinized is the text and requirements found in the published document.
18. By analogy, the appeal ground under this heading is trying to put scrutiny over the technical submission of the recommended bidder. In the opinion of the defendant this method of defence is not correct and an objection at this stage is intended to scrutinize the evaluation committee findings with respect to the bid of the objector.
19. It is therefore, out of line and contrary to the principles of public procurement that scrutiny is being placed on a third party to the cause between the objector and the contracting authority.
20. Having said this, the evaluation committee can confirm under oath that the recommended bidder is compliant and the marks allotted to the concerned bidder are justifiable to say the least.
21. In addition to the above, the objector makes reference to the rectification exercise which was carried out with respect to the recommended bidder. The objector argues that this could be symptomatic to a defective bid. For the defendant this argument does not hold and it is humbly submitted that a rectification exercise is a right established in the Tender Document. The fact that a bidder was eligible for a rectification exercise does not make his bid inferior or otherwise. It is the ultimate submission including any rectification/clarifications that is ranked and allotted marks. Such an exercise for rectification is equally applied to all bidders according to the specifics of the bid itself and it in line with fundamental principles of public procurement.
22. In view of all the above the defendant humbly submits that this objection is to be dismissed.

Conclusion

23. An evaluation process has to be reverent towards the rules and requirements as set in the Tender Document which may be unique for that particular tender and it is up to the Evaluation Committee to come up with justifications and reasons and its endorsement of the outcome and recommendation for award.

24. Finally in view of all the above, the defendant humbly requests the Review Board to dismiss all arguments submitted by the objector thereby dismissing the objection *in toto* and to confirm the disqualification of the objector's bid for the reasons given.

25. The defendant reserves the right to make further submissions and produce such evidence as may be appropriate during the hearing of this appeal.

Christopher Mizzi

Avv. Chris Mizzi

Notification: Deloitte