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Public Contracts Review Board
Notre Dame Ditch
Floriana, FRN 1601

20th December 2023

Joint Reply of the Department of Contract and of the People & Standards Division within the Office of the Prime Minister to the appeal of EMCS Advisory Ltd re. CT3011/2023 Tender for the Provision of Mystery Shopping Services in the Public Administration Lots 1 and 3

Preliminary

1. By means of its appeal, EMCS Advisory Ltd (the Appellant) requests this Honourable Board to cancel the call for tenders in question and, in the alternative, to change the award decisions for Lots 1 and 3.
2. The appeal application raises two issues:
 - (a) By its first grievance, the Appellant claims that Clause 3.1 of the Instructions to Tenderers (page 4 of the Tender Dossier) is ambiguous and non-transparent such as to warrant the cancellation of the procurement procedure;
 - (b) By its second grievance, the Appellant effectively re-iterates the first and claims that the allegedly unhappy drafting of the tender led to an unequal treatment between the Appellant and another bidder, Powered Knowledge; and
 - (c) By its third grievance, the Appellant claims that a fair and proportional application of Clause 3.1 of the Instructions to Tenderers should have led to the award of the Lot 1 contract to the Appellant and the award of the Lot 3 contract to Pricewaterhouse Coopers (PWC).
3. The Respondents are of the view that none of the Appellant's claims merits to be upheld. Before replying to the Appellant's three grievance, this Reply shall firstly deal with the heart of the matter at issue. That is, the application of the application of Clause 3.1 of the Instruction to Tenderers in the case at issue by the Evaluation Committee.

The application of Clause 3.1 of the Instruction to Tenderers by the Evaluation Committee

4. All three grievances of the Appellant are grounded on claims relating to Clause 3.1 of the Instructions to Tenderers which is being reproduced here for ease of reference:

This tender is divided into lots. Tenderers may submit a tender for several lots (one or more lots), however only one (1) Lot can be awarded to any particular tenderer. The Contracting Authority reserves the right to award more than one lot to the same bidder in case no more than one compliant bid is ranked in the final ranking for any particular lot.

In case the same bidder ranks highest (final ranking) in more than one lot, s/he shall be awarded the lot with the highest value.

The lots are as follows:

- *Lot 1: areas of Work and Employment Services; Tax and Finance; Economy, Business and Trade and; Education, Science and Technology.*
- *Lot 2: areas of Culture and Leisure; Justice; Citizenship, Immigration and Identity; Gozo; Transport and Communication.*
- *Lot 3: areas of Environment, Energy, Agriculture/Fisheries; Health and Community Care and; Social Welfare, Equality and Social Inclusion.*

Each lot represents a number of (mostly related) areas within the Public Administration where the Contracting Authority can direct the contractor to conduct mystery shopping exercises.

The Contracting Authority reserves the right to request the contractor to conduct mystery shopping exercises in any subject area within that lot.

(emphasis added).

5. The results of the evaluation for Lot 1, 2 and 3 are as follows:

LOT 1			
Ranking	Tenderer	Financial Offer	Overall Score
1	PWC	EUR 261,912.00	99.30
2	IDEA	EUR 296,000.16	96.55
3	EMCS	EUR 294,144.00	88.31
4	Powered Knowledge	EUR 300,000.00	84.29

LOT 2			
Ranking	Tenderer	Financial Offer	Overall Score
1	PWC	EUR 261,912.00	99.30
2	IDEA	EUR 298,000.08	96.37
3	EMCS	EUR 295,872.00	88.86
4	Powered Knowledge	EUR 300,000.00	87.09

LOT 3			
Ranking	Tenderer	Financial Offer	Overall Score
1	PWC	EUR 261,912.00	99.30
2	IDEA	EUR 294,000.00	96.73
3	Powered Knowledge	EUR 300,000.00	94.09
4	EMCS	EUR 294,144.00	84.81

6. PWC ranked first in all three Lots. The rule contained in Clause 3.1 of the Instructions to Tenderers, that a bidder ranking first in more than one Lot shall be awarded only the highest valued contract, could not be applied *ad litteram*. PWC ranked first in all three Lots with the same price of Eur261,912.00.
7. The rule, also contained in Clause 3.1 of the Instructions to Tenderers, that a bidder can only be awarded one Lot nevertheless bound the Evaluation Committee.
8. According to Clause 3.3. of the Instructions to Tenderers:

Contracts will be awarded lot by lot, in accordance with the award criteria at Article 6.
(emphasis added).

9. The Evaluation Committee proceeded to award the contracts Lot by Lot, that is in numerical order as follows:
 - first, awarding Lot 1 to PWC;
 - then, awarding Lot 2 to the second ranked IDEA Advisory Services Ltd given that PWC (first ranked) had already been awarded a Lot; and,
 - finally, awarding Lot 3 to the third ranked Powered Knowledge since PWC (first ranked) and IDEA Advisory (ranked second) had already been awarded Lots 1 and 2 respectively.

First Plea: the first and second grievances of the Appellant, and the consequential request for the cancellation of the procurement procedure, are inadmissible at this stage.

10. By its first and second grievances the Appellant claims that the tender document lacked clear awarding criteria, since in this case PWC has submitted the first ranked bid in all three Lots at the same value, and that due to this ambiguity the tenders could not be evaluated in an equal and fair manner.
11. Specifically, the appeal application claims that:

However, it is patently missing information and adjudication criteria on how the Evaluation Committee should award Lots should there be bidders having the same score and/or same bidders placing first and second in all three lots ... However, it says nothing about which bids would be awarded the contract for the relative lot if there are bidders having the same price throughout the three lots. In other words, the lot award criteria were imprecise... (para. 2.1.4 in the first grievance); and

Hence, it becomes amply clear that the Tender Dossier had to stipulate what would happen if one bidder had to rank in the same position throughout lots and having the same value throughout the same lots because only then the procedure in such instances would become transparent, objective and respect the equal in treatment of the relative tenders (para. 2.2.4 in the second grievance).

12. It is manifestly clear, then, that these grievances are not permissible under an appeal brought in terms of Reg. 272 of the Public Procurement Regulations (PPRs) but could only have been raised in an application under Reg. 262 of the PPRs before the closing date of the call for tenders. The Appellant did not do so but decided voluntarily to participate in the call for tenders as issued and published. The Appellant has thus acquiesced to the terms and conditions of the tender document and cannot now, at award stage, rely on any ambiguity in the tender documentation

to request the cancellation of the call for tenders. After all, the Appellant had every opportunity, just like any other prospective bidder, to attend clarification meetings and to request clarifications on the tender documentation.

13. The Court of Appeal has held in this respect, in its judgment of 30 June 2021 in Case 95/2021 *Truevo Payments Limited v. Direttur tal-Kuntratti et*, that:

...it-tlett aggravji li abbazi tagħhom il-kumpanija appellata Credorax Ltd pprezentat l-appell tagħha jirrigwardjaw materji illi kienu jeżistu sa mill-bidu nett tal-proċedura in kwistjoni, u għal dawn l-ilmenti kienu jeżistu rimedji taħt ir-Regolament 262. Dawn l-ilmenti kellhom jitressqu qabel iddata tal-għeluq ta' sejha għall-kompetizzjoni u mhux, bħal fil-kaz tallum, wara dik id-data. (para. 7 of the judgment).

14. For these reasons, the first and second grievance as well as the consequential request for the cancellation of the procurement procedure are inadmissible and should be outrightly dismissed.

Second Plea, being raised without prejudice to the first plea: the first and second grievances of the Appellant are unfounded,

15. Despite that Clause 3.1 of the Instructions to Tenderers could not be applied *ad litteram*, since PWC ranked first in all three Lots with the same price of Eur261,912.00, the tender documentation still adopted a clear procedure for how the Lots were to be awarded.
16. In particular, Clause 3.3 of the Instructions to Tenderers clearly states that the Lots are to be awarded *lot by lot*.
17. The judgment of the European Court of Justice (ECJ) in the Case C-19/00 *SIAC Construction v. Mayo County Council* (18 October 2001, EU:C:2001:553) established the rule of the 'reasonably well-informed and diligent tenderer'. That is:

More specifically, this means that the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way. (para. 42); and

This obligation of transparency also means that the adjudicating authority must interpret the award criteria in the same way throughout the entire procedure... (para. 43).

18. It is manifestly clear to the reasonably well-informed and diligent tenderer that Clauses 3.1 and 3.3 of the Instructions to Tenderers adopt the following procedure to be followed in the award of the different Lots:

- first, in the case where a bidder ranks first in more than one lot, the Evaluation Committee must award that bidder the Lot with the highest value pursuant to Clause 3.1 of the Instructions to Tenderers;

- second, in the case where different bidders ranked first in the different lots or where the Lots have equal values (such as in this case), the Evaluation Committee must award the contracts Lot by Lot pursuant to Clause 3.3 of the Instructions to Tenderers.

19. After all, this is the most logical and objective reading of the respective clauses. A reasonably well-informed tenderer would not expect the Lots to be awarded in the inverse order, from Lot 3 to Lot 1. To depart from the lot by lot procedure, as the Appellant is suggesting, would have departed from the tender documentation and would have resulted in the unequal treatment of bidders.
20. In para. 2.2.3 of its appeal application, the Appellant suggest that the equal treatment of bidders should have at least meant a tie between the Appellant's and Powered Knowledge's bid. It follows that what the Appellant is arguing for is to share the contract for Lot 3 with Powered Knowledge. This is only permissible, and indeed only makes sense, where two bids obtain the same ranking which is not the case here.
21. Moreover, equal treatment in public procurement does not mean ensuring that competitors "share the pie". Equal treatment means that the rules of the call for tenders are strictly adhered to. In this case the Evaluation Committee, rightly so, did stray from Clauses 3.1 and 3.3 of the Instruction to Tenderers and to the lot by lot procedure which is imposed.
22. It follows that the Appellant's first and second grievances are unfounded and ought to be rejected.

Third Plea: the third grievance of the Appellant is unfounded

23. By its third grievance the Appellant claims that the principle of proportionality would dictate a different outcome to the procurement process. The Appellant suggests more proportional ways in which the Lots should have been awarded.
24. One suggestion (see para. 2.3.2 and 2.3.3 of the appeal application) is to award the Lots 1 and 3 according to which bidder, between itself and Powered Knowledge, was the highest ranked across all three lots. According to the Appellant, since it ranked better than Powered Knowledge in two out of the three Lots this must mean that it is better ranked overall and should have been awarded a Lot instead of Powered Knowledge.
25. Another suggestion (see para. 2.3.4 of the appeal application) is that Lots 1 and 3 should have been awarded to the bidder, between itself and Powered Knowledge, who has the overall highest financial score across all three lots.
26. Neither suggestion can be taken seriously, namely for two reasons.
27. First, neither suggestion is envisaged in the tender documentation which establishes, by means of Clause 3.3 of the Instructions to Tenderers, a lot by lot procedure for the award of the three Lots in numerical order.
28. Secondly, the suggested parameters by the Appellant – (i) that the Appellant ranks higher in more Lots than Powered Knowledge; and (ii) that the Appellant has an overall higher financial score than Powered Knowledge – contradict the fact that the award criterion for this procedure is the Best Price Quality Ratio (BPQR). Even if one had to ignore the fact that the relative clauses of the Instructions to Tenderers bound the Evaluation Committee to award the Lots lot by lot, a proportional method to award the Lots in keeping with the purposes of the BPQR criterion would have been to compare the overall BPQR scores not just the financial scores or the respective ranking in each Lot. The average overall BPQR score of Powered Knowledge across three Lots is higher than the Appellant's:

Average Overall BQPR Score across the three Lots				
Tenderer	Overall Score for Lot 1	Overall Score for Lot 2	Overall Score for Lot 3	Average Score across Lots 1-3
EMCS	88.31	88.86	84.81	87.34
Powered Knowledge	84.29	87.09	94.09	88.49

29. For these reasons the Appellant's third grievance is also unfounded and ought to be rejected.

Therefore, the Department of Contracts and the People & Standards Division humbly submits that this Honourable Board ought to:

- (i) dismiss all of the grievances raised by the Appellant;
- (ii) confirm the award decision of the 1st December 2023; and
- (iii) order that the deposit paid by the Appellant not be refunded.



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For the Department of Contracts and
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