

Public Contracts Review Board
Department of Contracts
Notre Dame Ravelin
Floriana, VLT 2000



14 March 2024

Re: SPD8/2023/149 – Services – Tender for the provision of Consultancy Services to undertake a Study to assess the feasibility of expanding Extended Producer Responsibility (EPR) obligations to additional waste streams for the Environment and Resources Authority. Tender ID: 202337

Dear Chairman,

Reference is being made to the Letter of Objection filed by PKF Malta Limited (hereinafter “the objector”) on 4th March 2024.

The Environment and Resources Authority (hereinafter referred to as “ERA” or “Contracting Authority”) humbly submits the following:

- i. On the 15th November 2023 a call for tenders for the provision of consultancy services to undertake a study to assess the feasibility of expanding Extended Producer Responsibility (EPR) obligations to additional waste streams for ERA was issued. The deadline pertaining to this tender was the 6th December 2023.
- ii. A number of bids were submitted and a recommendation was made in favour of Pricewaterhousecoopers, their offer being the cheapest technically compliant offer.
- iii. The Objector was informed by means of two letters (dated 21st February 2024 and 27th February 2024 respectively) that his offer was rejected for being financially non-compliant due to the following reason:

“The bidder was issued a clarification letter to verify the revised Grand total value of Schedule A + Schedule B which should read €28,595.00. The bidder’s response reiterated that the Grand Total value on the Financial Bid Form and XML should still read €28,500.00. This is not in line with the tender instructions 5(D)(i) which indicate that Schedule A and Schedule B financial proposals are to be summed up together for evaluation purposes. To this effect, the bid submitted is deemed financially non-compliant and should not be considered for financial adjudication.”

- iv. Whilst the administration of the notification to bidders is not undertaken by the Contracting Authority, the Authority clarifies that the letters dated 21st February 2024 and 27th February 2024 contained the same decision (i.e. that the offer was deemed as financially non-compliant), and the only divergence was the applicable respective 10 day period for the filing of objections by bidders.
- v. The Objector felt aggrieved with the decision of the evaluation committee and filed its objection.
- vi. ERA respectfully disagrees with the objection and is filing the below submissions.

Submissions

ERA respectfully submits that the objector's grievance is unfounded in fact and at law for multiple reasons:

1. The Financial Bid Form attached to the Tender Document contained three separate schedules:
 - a. 'Schedule A' which required tenderers to submit the total price for the 'feasibility assessment on the introduction of extended EPR obligations for three waste streams';
 - b. 'Schedule B' which required tenderers to submit the provisional hourly rate; and
 - c. 'Schedule A + Schedule B' which required tenderers to submit the amount in euro for both Schedule A and Schedule B, separately and with a Grand Total computing both items listed in Schedule A and Schedule B.

The above ensured that the Contracting Authority secured the applicable hourly rate should, at its own discretion, require the provision of additional information/feedback following the presentation of the study listed in Schedule A or if potentially a similar study on another additional waste stream is required. By summing Schedule A with Schedule B, the Contracting Authority secured the hourly rate through an open competitive procedure.

2. The objector submitted a Grand Total of €28,500 in 'Schedule A', the cost per additional hour at €95.00 in 'Schedule B', and **left the Grand Total in 'Schedule A + Schedule B' as blank**. The Evaluation Committee gave the opportunity to the bidder (now Objector) to

clarify his position whereby by virtue of a clarification letter issued, the bidder was informed that:

“The Grand Total submitted in the XML tender response format and the Grand total value in the Financial Bid Schedule A + Schedule B do not corroborate. The Evaluation Committee requires confirmation that:

- 1. The Grand Total for Financial Bid Form Schedule A + Schedule B should read €28,595.00**
- 2. The Grand Total in the XML response format should read €28,595.00**

In terms of Notes to Clause 5 (2) of the Instructions to Tenderers, you are hereby being given the opportunity to clarify these shortcomings within five (5) working days of notification. You may confirm deadline day and date through your EPPs interface.”

By virtue of the reply dated 2nd February 2024 the bidder maintained that computing Schedule A and B is not appropriate and that the grand total should read €28,500 (and not €28,595.00):

*“Our price for the feasibility assessment (Schedule A) is €28,500, whilst any additional hours which shall be charged separately through the modification clause within the special conditions of the tender document, shall be charged at €95 per hour. **Computing the two items (Schedule A and B) is not appropriate for the reason that the two requirements are completely separate and distinct from each other.** The hours for which will be charged as per Schedule B will be determined following the closure of the assignment, at the Contracting Authority’s discretion, and subject to a separate addendum to the main contract.*

The grand total in the XML should still read at €28,500.”

Therefore notwithstanding the fact that the bidder (now Objector) was provided, through a clarification made by the Authority, with an explanation and also the value of the Grand Total after summing Schedule A and Schedule B (as defined in the same tender documents), he still failed to accept the Grand Total indicated and thus failed to adhere to the mandatory instructions provided in the tender and thus a discrepancy between the Financial Bid Form and the XML Tender Response Format remained. The Evaluation Committee’s decision that such discrepancy rendered the bidder as financially non-

compliant is logical and correct. Both the Financial Bid Form and the XML Tender Response Format require the objector to insert the Grand Total value for calculation purposes by adding together the values listed in Schedule A and Schedule B. It is important to note in this regard that the use of separate Schedules and method of evaluation of same are an available tool to be used at the discretion of the Contracting Authority.

3. The Objector claims that the tender as issued created an illogical situation, in breach of the *absurda sunt vitanda* principle. The Contracting Authority submits that (i) the Financial Bid Form as published was very clear, (ii) it left no room for interpretation and (iii) other bidders understood what was being requested and as a matter of fact submitted compliant bids. The forms, which were applicable uniformly to all bidders, were created with a specific structure and a set of requirements to provide clarity and fairness to all bidders. If bidders were allowed to deviate from the provided forms based on their interpretation of what seems reasonable, it would create inconsistencies and an unfair playing field amongst bidders.
4. It seems that the Objector failed to understand the Tender Document and tries to shift the blame on the Contracting Authority that the tender as issued was illogical. The Objector claims that *"From the decision received, it seems that the Contracting Authority expected the bidders to add together the 'final contract price' in Schedule A, together with the hourly rate for modification in Schedule B to provide a grand total."* The Authority holds that this was clear *ab initio* and not at the decision stage. This emanated not only from the Financial Bid Form itself which states 'Schedule A + Schedule B', but was also provided to the bidder through the clarification request, which he did not confirm.
5. The Authority maintains that the arguments put forward by the Objector as to why the tender was illogical should not be entered into by the Board at this stage. The Objector took part in the tender process, which applied consistently and uniformly for all bidders in a transparent manner, and he could have availed himself of the remedies available in line with regulation 262 of the Public Procurement Regulations (S.L. 601.03), which remedies he did not avail himself of.
6. The Contracting Authority also points out that any doubts with regards to the contents of the tender dossier could have been clarified during the Clarification Meeting held on 22nd November 2023 whereby the Authority was available to answer any questions which arose,

or through a clarification until the 23rd November 2023. As a matter of fact no economic operator submitted any clarifications with respect to the Financial Bid Form. This, together with the fact that other bidders submitted the correct information requested, serves to emphasise that the requirements of the tender were very clear.

7. The Objector claims that the Contracting Authority's decision is illogical and incongruous with the wording of the Tender Document. The Authority maintains that the decision was correct and that it was obliged to act in this manner, in accordance with the Tender Document itself.

The ERA is hereby reserving its right to present further evidence both written and orally to further its submissions in relation to this objection.

For the above reasons, ERA humbly requests the Board to dismiss the claims raised by the objector in its Letter of Objection and confirm the recommendation for the tender to be awarded to Pricewaterhousecoopers on 27th February 2024.



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