

PUBLIC CONTRACTS REVIEW BOARD

Case 1987 – Cft019-4210/23 (CPSU1426/23) – Services Tender for the Provision of Services of a Project Officer to work on an EU-Funded Project entitled ‘REACH-OUT’ for the Genito-Urinary Clinic within Mater Dei Hospital

15th April 2024

The Board,

Having noted the letter of objection filed by Dr Daniel Calleja on behalf of Carmelo Galea & Associates acting for and on behalf of Yama Yami Limited, (hereinafter referred to as the appellant) filed on the 18th March 2024;

Having also noted the letter of reply filed by Dr Alexia Farrugia Zrinzo and Dr Leon Camilleri acting for the Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority) filed on the 27th March 2024;

Having heard and evaluated the testimony of the witness Dr Valeska Padovese (Representative of the Medical Health Department) as summoned by Dr Daniel Calleja acting for Yama Yami Limited;

Having heard and evaluated the testimony of the witness Engineer Patrick Borg Cardona (Chairperson of the Evaluation Committee) as summoned by Dr Daniel Calleja acting for Yama Yami Limited;

Having heard and evaluated the testimony of the witness Mr Ryan Mercieca Cefai (Representative of Yama Yami Limited) as summoned by Dr Daniel Calleja acting for Yama Yami Limited;

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 11th April 2024 hereunder-reproduced.

Minutes

Case 1987 – Cft 019-4210/23 (CPSU 1426/23) – Services Tender for the Provision of a Project Officer to work on an EU-Funded project entitled ‘Reach-Out’ for the Genito-Urinary Clinic within Mater Dei Hospital

The tender was issued on the 29th September 2023 and the closing date was the 20th October 2023.

The estimated value of this tender excluding VAT, was € 20,000.

On the 18th March 2024 Yama Yami Ltd filed an appeal against the Central Procurement and Supplies Unit objecting to their disqualification on the grounds that their bid was deemed to be abnormally low.

A deposit of € 400 was paid.

There were two bids.

On the 11th April 2024 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Ms Stephanie Scicluna Laiviera as members convened a virtual public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Yama Yami Ltd

Dr Daniel Calleja	Legal Representative
Mr Ryan Mercieca	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Alexia Farrugia Zrinzo	Legal Representative
Dr Leon Camilleri	Legal Representative
Eng Patrick Borg Cardona	Chairperson Evaluation Committee
Mr John Pace	Secretary Evaluation Committee
Ms Maria Axisa	Evaluator
Mr Johann Caruana	Representative
Mr Brian Camilleri	Representative
Mr John Buttigieg	Representative

Preferred Bidder – Ms Isotta Rossoni

Ms Isotta Rossoni	Representative
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Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Daniel Calleja Legal Representative for Yama Yami Ltd said that Appellant’s offer which was lower than the other bid was deemed to be abnormally low – this was not so as will be proven during this hearing.

Dr Leon Camilleri Legal Representative for the CPSU said that the Authority’s reply was very clear – it had requested a clarification as the bid appeared to be abnormally low. The reply was ambiguous as it did not address the request and disqualification was the only way forward.

Dr Calleja requested that witnesses be heard.

Dr Valeska Padovese (135087A) called to testify by the Appellant stated on oath that she was a Consultant at the Medical Health Department and had drafted the tender. This was an EU-Funded project and to a certain extent the estimate was based on the funds allocated and calculated at a rate of € 23 per hour which was the rate of a normal manager’s salary.

In reply to a question from Dr Camilleri witness said that the tender was based on a total project of 720 hours over a period of 36 months at 20 hours per month.

Engineer Patrick Borg Cardona (323669M) called to testify by the Appellant stated on oath that he was the Chairperson of the Evaluation Committee. A clarification was requested when the Appellant’s offer was evaluated as it appeared abnormally low. The reply received did not provide any details relating to the calculation of costs and rates leading the Committee to conclusion that, at the rate offered, it would not be the key expert who would be engaged on the project. Referred to page 3 , Clause 1.2 of

the tender which indicated that the tender could be concluded by 31st December 2025, and hence would run for only 1 year 9 months, witness said that the tender was based on a three year run and the rates were calculated on the basis of employing a contractor not an employee.

Questioned by Dr Camilleri, witness said that in its reply the Appellant had not given any figures to justify the price and that the bid was by a company not by an individual.

[Dr Calleja requested leave to table a document showing the Pay Scales of Grades of Government employees]

Mr Ryan Mercieca Cefai (535988M) called to testify by the Appellant stated on oath that the rate used was based on the specifications in the tender and he had offered a lower rate to be competitive and based on the methodology used by his company. This is not something that can be described mathematically. Just because someone has a PH.D. qualification does not mean that a certain rate has to apply. 'Low' is an opinion not a fact. The rate to be charged had been discussed with the key expert.

Questioned by Dr Camilleri, witness confirmed that the offer was submitted by a company and that it was based on a profit plus payment of salaries basis. Two key experts had been submitted when the tender asked only for one. Witness agreed that no explanation had been offered on how the financial figures were arrived at to justify the offer.

This concluded the testimonies.

Dr Calleja said that the Chairperson of the Evaluation Committee had confirmed that it had not considered the shorter possible time (1 year 9 months) that the tender had to run and therefore the offer must be considered in this light. Only two bids were submitted and this affected the decision. All the Authority had to do was to ensure that the Appellant understood what was required of him and decided thereon. Yama's offer was competitive with the rates of Government employees and it is clear that it is reasonable and competitive, otherwise one must conclude that Government salaries are abnormally low.

Ms Isotta Rossoni said that her bid was realistic and based on projects worked on in the past.

Dr Camilleri said that this was a post evaluation objection and the questions posed to Dr Padovese were more suited to seeking a remedy prior to bidding. References to Government salaries were misleading as this was a contractor, not employee situation and the tender was based on market rates. Objector is a limited liability company and needs to pay its technical experts – it offered two when only one was requested. The reply to the rectification merely described how the company works with no figures provided. Regulation 243 provided that the Contracting Authority should reject the tender if the evidence does not hold up. There are several Court of Appeal judgements on how to identify abnormally low tenders and this is a clear case that the evaluation procedure was carried out correctly. The contract is for three years with a time clause but the contract would still have to be concluded so the overall hours remain the same.

There being no further submissions the Chairman thanked the parties and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 11th April 2024.

Having noted the objection filed by Yama Yami Limited (hereinafter referred to as the Appellant) on 18th March 2024, refers to the claims made by the same Appellant with regard to the tender of reference CFT019-4210/23 (CPSU 1426/23) listed as case No. 1987 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Daniel Calleja

Appearing for the Contracting Authority: Dr Leon Camilleri & Dr Alexia Farrugia Zrinzo

Whereby, the Appellant contends that:

- a) The offer made by the appellant was wrongly deemed as abnormally low. The Contracting Authority requested a clarification from the appellant in view of the fact that the tender estimate was that of €20,000 and his offer was that of €10,800. The appellant duly obliged with the request and clearly indicated the reason why his bid was not abnormally low.
- b) In this case there will not be any breach of social and labour laws. What has happened is that the appellant is being penalised for having an efficient system whereby it can fullfill (sic) its obligations whilst minimising the costs. Such bidders should be rewarded not penalised. The Contracting Authority itself is going to benefit from this since it will be saving up (sic) money.
- c) Abnormally low offers can be identified by any one of the following methods:
 - i. An analysis of the price (costs) proposed by an economic operator in comparison with the objective of the procurement;
 - ii. A comparison made between the Tender price and the average price proposed by the other compliant Bidders.
- d) In this case there has only been two (2) bids. In this case it was the Contracting Authority itself which provided a high estimated procurement value. One would question how did the Contracting Authority itself come up with the tender estimate. The appellant's financial offer is not abnormally low (sic), but simply one which was more competitive than the other tenderer. The Appellant can attest that the financial offer can be explained in further detail and complies and will continue to comply with all relevant labour, social and environmental laws in terms of Regulations 13(m) and 16(k) of the PPR.
- e) In this particular instance, it is not the Evaluation Committee's jurisdiction to delve into whether, through their offer, the Appellant will make a profit or sustain a loss on this particular project.
- f) The Evaluation Committee had the obligation to summon the bidder with the lowest price and request explanations as to the breakdown of their offer. The explanation provided by Yama Yami

Limited promoted assurances that, the bidder had understood what is being required and that it can, through the quoted price, execute the stipulated services to the full satisfaction of the Contracting Authority. The explanations given by the bidder were sound and financially logical. Thus there was no reason to conclude that the offer was abnormally low.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 27th March 2024 and its verbal submission during the hearing held on 11th April 2024, in that:

- a) The objector's offer was rejected since following a request for clarification in terms of regulation 243(1) of the Public Procurement Regulations (PPR), and after analysing the reply of the objector, the objector's office [offer] was deemed to be abnormally low. The objector claims that its offer was deemed abnormally low wrongly and that it is not the competence of the evaluation committee to delve into whether, through their offer the appellant will make a profit or sustain a loss on this particular project.
- b) The evaluation committee strongly disagreed and submits that it is indeed its duty in line its obligations stipulated in regulation 243 of the PPR to analyse the financial offer and to reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed, in line with sub regulation (4) of this same regulation.
- c) This Honourable Board had identified a number of methods how an evaluation committee can flag a potentially abnormally low offer. In case number 1140 delivered on the 15th of March 2018, the Board stated that: In practice, methods are often used for the identification of tenders that appear to be abnormally low, such as:
 - i. An analysis of the price (Costs) proposed by an economic operator, is made in comparison with the objective of the particular procurement;
 - ii. A comparison is carried out between the tendered price and the estimated value of the tender so that an assessment of the proportion of deviation from the estimated price is established;
 - iii. A comparison is made of the offer with the average of the other quoted rates for the same procurement. (emphasis added)
- d) The value of the objector's offer was only 54% of the estimated contract value. Thus it was fair and reasonable for the contracting authority to request a clarification due to potentially abnormally low offer.
- e) It is therefore evident that it is indeed the evaluation committee's competence to delve into whether the contractor will be making a profit. The evaluation committee sent a request for clarification to the objector to explain its offer and was informed that "you are hereby being requested to provide a justification and explain the price or costs proposed in your submission".
- f) The objector replied with generic statements which did not concretely explain how the price offered was possible. For example regarding the economics behind the services, the objector replies

as below: "Our proposal offers a competitive price due to several key factors. Firstly, our company has optimized operational efficiencies through advanced technology and streamlined processes, allowing us to reduce costs without compromising on quality. Additionally, we have established strong relationships within our team. This, combined with our lean management practices, enables us to offer cost-effective solutions to our clients."

- g) The objectors justification of the price did not include a single number to justify the price offered. CPSU submits that the objector, which is a company (and the natural objective of all companies is to make a profit) had to prove how it was going to cover its costs and make profits whilst satisfying all tender conditions and obligations. The evaluation committee holds firm to its decision, as from the replies to the clarification request it is clear and evident that the objector failed to justify its price.

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 grievance.

- a) Important numerical facts to establish before moving on to further analysis, are the following:
- Estimated Procurement Value – Eur20,000
 - Financial Bid of Recommended Bidder – Eur19,980
 - Financial Bid of Appellant – Eur10,800
- b) Other important factors to ascertain are:
- i. The Estimated Procurement Value was known to all economic operators at the outset of this procedure. Therefore, it was known when a 'Remedies before closing date of a call for competition' in terms of Regulation 262 of the PPR was readily available to all economic operators participating in this tender procedure.
 - ii. No economic operator resorted to the aforementioned Regulation, therefore, all economic operators invariably 'accepted' or 'acquiesced' to the Estimated Procurement Value as published.
- c) It is this Board's opinion that a challenge to the Estimated Procurement Value, if any, could only and exclusively have been challenged and/or raised on the basis of Regulation 262(1)(a) of the Public Procurement Regulations.
- d) At the outset it must be stated that there is a material difference between the two (2) bids received by the economic operators participating in this procedure. The bid submitted by the preferred bidder resonates more with the published estimated procurement value whilst that of the appellant is *prima facie* substantially lower.
- e) Relevant to this appeal and grievance is Regulation 243(1) of the PPR which states the following:

*“Contracting authorities **shall require** economic operators to explain the price or costs proposed in the tender **where tenders appear** to be abnormally low in relation to the works, supplies or services.” (bold & underline emphasis added)*

- f) Therefore, this Board opines that the ‘obligation’ to investigate, whilst it is there and the law uses the word ‘shall’, such obligation is only to be imposed where tenders **appear** to be abnormally low. Therefore, since there are no mathematical hard and fast rules on what constitutes an abnormally low offer, this Board must first analyse how and why the offer as submitted by the appellant appeared to be abnormally low to the Evaluation Committee.
- g) Reference is made to paragraph (a) which shows that the bid of the recommended bidder is extremely close to the Estimated Procurement Value. It is only the bid of the appellant which deviates **considerably**. It is to be noted that the financial bid of the appellant is 46% lower than the Estimated Procurement Value and 45.9% lower than the bid of the recommended bidder. Therefore, when considering these two indicators it is more than evident that the evaluation committee correctly interpreted the bid of the appellant as appearing to be abnormally low.
- h) Arguments made in relation to Pay Scales of Grades of Government employees are deemed irrelevant once the appellant is a private limited liability company. It is the same appellant who in their Key Experts Form confirmed that the two proposed Key Experts are no public employees.
- i) Once the bid of the appellant appeared to be abnormally low, the evaluation committee adopted the correct procedure whereby they requested a clarification from the appellant to explain the price proposed in their tender.
- j) Even though the appellant company did reply within the stipulated timeframe, in the opinion of this Board, it failed to properly explain how they arrived at such a lower price. It is to be noted that this is not an issue of registering a ‘profit’ or not, as economic operators are well within their rights to offer a low bid with the intention of, for example, entering a new market. However, they must be able to properly substantiate how they will be able to perform the required tender objectives. In this specific case, the reply of the appellant, to the clarification request, was extremely generic and did not explain in detail the financial reasons how they arrived at such a low offer. It is difficult to comprehend how an economic operator can substantiate / explain a financial bid without any reference to a numerical figure.

Therefore, this Board cannot but reject the appellant’s grievance.

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

Mr Lawrence Ancilleri
Member

Ms Stephanie Scicluna Laiviera
Member