PUBLIC CONTRACTS REVIEW BOARD

Case 1990 – 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

19th April 2024

The Board,

Having noted the letter of objection filed Dr Carlos Bugeja on behalf of ProLegal Advocates acting for and on behalf of PKF Malta Ltd, (hereinafter referred to as the appellant) filed on the 4th March 2024;

Having also noted the letter of reply filed by Dr Paula Axiak acting for the Environment and Resources Authority (hereinafter referred to as the Contracting Authority) filed on the 14th March 2024;

Having noted the letter of objection filed Dr Steve Decesare on behalf of Camilleri Preziosi Advocates acting for and on behalf of PriceWaterhouseCoopers, (hereinafter referred to as the Preferred Bidder) filed on the 11th March 2024;

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 15th April 2024 hereunder-reproduced.

Minutes

Case 1990 – 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

The tender was issued on the 15th November 2023 and the closing date was the 6th December 2023

The estimated value of this tender excluding VAT, was € 50,000.

On the 4th March 2024 PKF Malta Ltd filed an appeal against the Environment and Resources Authority objecting to their disqualification on the grounds that their bid was deemed to be financially non-compliant.

A deposit of € 400 was paid.

There were seven bids.

On the 15th April 2024 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 – PKF Malta Ltd

Dr Robert Spiteri	Legal Representative
Dr Carlos Bugeja	Legal Representative

Contracting Authority – Environment and Resources Authority

Dr Paula Axiak	Legal Representative
Dr Lenka Portelli	Legal Representative
Mr Daniel Cilia	Chairperson Evaluation Committee
Ms Nicole Chan	Secretary Evaluation Committee
Dr Christopher Chan	Evaluator
Dr Cecilia Pereira	Evaluator
Ms Marie Claire Cappello	Evaluator
Ms Denise Grima	Representative
Mr Mark Spiteri	Representative

Preferred Bidder – Pricewaterhouse Coopers

Dr Steve Decesare	Legal Representative
Ms Claudine Attard	Representative

Department of Contracts

Dr Audrey Marlene Buttigieg	Legal Representative
Dr Mark Anthony Debono	Legal Representative

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

Dr Carlos Bugeja Legal Representative for PKF Malta Ltd said that this appeal is based on the letter of objection and referred to Clause 5D(i) in the tender which requested the adding together of two incongruous items, namely a lump sum and an hourly rate. This was clearly not a precontractual remedy matter as the request was one which obviously could not be considered as anything but illogical. The hourly rate did not form part of the contract price and the items had to be considered separately according to the tender and not lumped together.

Dr Paula Axiak Legal Representing for the Contracting Authority said that from the requested schedules it was clear what was required of the bidders. For evaluation purposes the hourly rate had to be added on. The Appellant was given the opportunity to remedy matters through a clarification note but insisted on not changing its submission.

Dr Mark Anthony Debono Legal Representative for the Department of Contracts said it was important that a tender had to be followed and the tenderer cannot decide for itself what to accept.

Dr Decesare on behalf of the preferred bidder said that its submissions were laid out in details in the letter of reply. Appellant had been granted the chance of a rectification but even then the outcome was still not according to the tender requirements.

As there were 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 15th April 2024.

Having noted the objection filed by PKF Malta Ltd (hereinafter referred to as the Appellant) on 4th March 2024, refers to the claims made by the same Appellant with regard to the tender of reference SPD8/2023/149 listed as case No. 1990 in the records of the Public Contracts Review Board.

Appearing for the Appellant:	Dr Carlos Bugeja
Appearing for the Contracting Authority:	Dr Paula Axiak
Appearing for the Department of Contracts:	Dr Mark Anthony Debono
Appearing for the Preferred Bidder:	Dr Steve Decesare

Whereby, the Appellant contends that:

a) The Appellant is in fact financially compliant, and that the Contracting Authority's reasoning in deeming it so is incorrect, gravely illogical, and contrary to what was required in the tender document. Firstly, it must be stated that at the very foundation of law is a legal maxim which has been stated to make up the "golden rule of legal interpretation" - *absurda sunt vitanda*. It is the rule that calls against a literal interpretation of a legal document where it is (sic) leads to illogical or repugnant conclusions; in the broader sense, the *absurda sunt vitanda* rule is based on the fact that the adjudicated shall avoid a situation of repugnance, some conflict or another unacceptable solution. In this case, the "golden rule" not only allows a choice to be made between different sensible literal meanings of a legal text but becomes an independent directive prejudging the content of the finally formulated provision in the law of a legal document. The rationale behind this is that the law is presumed to be logical, and thus any illogical interpretation thereof is seriously undesired. This introduction to this objection is important, because here, the Contracting Authority persisted in an illogical interpretation of the tender document to deem PKF as being financially non-compliant. With due respect to the Contracting Authority, the decision is very evidently

incorrect. According to the tender, bidders had to submit to separate financial offers in the Financial Bid Form – the first 'cell' (in Schedule A) was the lump sum amount to carry out the feasibility assessment on the introduction of extended EPR obligations. The second 'cell' (Schedule B) in the Financial Bid Form requested an hourly rate, for the reasons provided in clause 20.6 of the Tender Document: *"The Contracting Authority may make use of this modification for additional information/ feedback that may be required following the presentation of this study and/or if a similar study on another additional waste stream is required. The rates applicable for addition of services shall be the hourly rate specified in the Financial Bid Form Schedule B."* 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. This makes absolutely no sense. It is obvious to Appellant that the two Schedules are distant (sic) from each other, as counting the two schedules as a total can lead to an illogical conclusion, especially since in Schedule B, no indication of the number of hours required was given. With the Contracting Authority's interpretation, this could be that a bidder who quotes €1 in Schedule A and €29,000 an hour in Schedule B would, through this illogical math, (sic) deemed cheaper than the winning bidder. It just holds no logic to add a lump sum to one hour of a quoted hourly rate. This flawed logic in the Contracting Authority's decision is not only illogical, but incongruous with the wording of the Tender Document.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 14th March 2024 and its verbal submission during the hearing held on 15th April 2024, in that:

a) 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.
b) 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. 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).

c) 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.

d) 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.

e) 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.

f) 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.

g) 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.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 11th March 2024 and its verbal submission during the hearing held on 15th April 2024, in that:

a) Absurda sunt vitanda: absurdities should be avoided -
The Complainant claims that, in terms of the Tender Document, the tenderers had to submit two separate financial offers in the Financial Bid Form - the first 'cell' (in Schedule A) was the lump sum amount to carry out the feasibility assessment on the introduction of extended EPR obligations; and the second 'cell' (Schedule B) in the Financial Bid Form requested an hourly rate. It is submitted, with respect, that this is not entirely correct. The Financial Bid Form published with the Tender Document contained three (3) schedules, and Schedule A required four (4) amounts, not simply a lump sum. The Complainant then states as follows: *"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. This makes absolutely no sense."* The purpose of the third (3d) schedule forming part of the Financial Bid Form was exactly that - that is, Schedule A + Schedule B, required the tenderers to insert the Grand Total for Schedule A, the Grand Total for Schedule B, and the Grand Total for both together. The spreadsheet Schedule A + Schedule B left no room for interpretation. Tenderers are not, at submission stage, entitled to decide what makes sense or does not. If tenderers have an issue with the manner in which a Tender Document is drafted, this must necessarily be raised either at clarification stage or through a remedy before closing.
b) Clarification Meeting - In terms of the Tender Document, a clarification meeting was held on 22nd November 2023. If the Complainant had any concerns with the manner in which the Tender Document was drafted, it should have raised these at this stage. It failed to do so as can be seen from the minutes of meeting (Clarification Note No. 1 - Meeting Minutes).
c) Clarifications - In addition to the Clarification Meeting, tenderers were afforded the right to submit requests for clarifications up until 23 rd November 2023. If the Complainant had any concerns with the manner in which the Tender Document was drafted, it should have raised these at this stage. It failed to do so, as can be seen from the clarifications published (Clarification Note No. 2).
d) Remedy before Closing - In terms of Regulation 262 of the PPR, tenderers had the right to file a reasoned application before the Board, within the first two thirds (2/3) of the time period allocated for submission of offer, challenging (amongst other things) the content of the Tender Document. Indeed, Regulation 262(1)(b) allows for requests to be made: *"to determine issues relating to the submission of an offer through the government's e-procurement platform"* and *"to correct errors or to remove ambiguities of a*

particular term or clause included in a call for competition, in the contract documents, in clarifications notes or in any other document relating to the contract award procedure". If the Complainant had any concerns with the content of the Tender Document, this was the time when it had to exercise its final remedy in relation to the Tender Document. The Complainant, for the third (3) time as explained above, failed to exercise the remedies available to it. The Complainant, upon submission of its tender, accepted in full and in its entirety the content of the Tender Document and it cannot, at this stage, raise discrepancies or issues with the manner in which the Tender Document was drafted.

e) Grievance: Misinterpretation of Tender Document by Evaluation Committee - The Complainant claims that the Evaluation Committee has misinterpreted the Tender Document. The main reason for this argument appears to be the Complainant's view that it is illogical to add the Grand Total of Schedule A with the Grand Total of Schedule B. As explained above, it is irrelevant (at this stage) whether it makes sense, mathematically or logically, to add the two together for evaluation purposes. If this is what the Tender Document provided (which it did in a clear and unequivocal manner), then tenderers had two options: i) Firstly, to clarify or challenge the manner in which it was drafted through questions in the Clarification Meeting, clarification requests and, or a remedy before closing. ii) Secondly, to submit Schedule A + Schedule B as requested in the Tender Document and to include in said schedule and the XML response the total price for Schedules A and B.

The Complainant failed to do any of the above. Instead, it chose to submit Schedule A + Schedule B, without the Grand Total, and to include only the Grand Total of Schedule A in the XML response. The Contracting Authority gave the Complainant an opportunity to rectify this error, notwithstanding that it was marked as Note 3 - that is, that no rectifications are permitted - on the basis that there was an error in the Grand Total which qualified as an arithmetical error. The Complainant however refused to accept the rectification and continued to argue that it made no sense to add the two together. If the Contracting Authority did not want the two to be added together, it would have not published the third schedule - Schedule A + Schedule B - as this third schedule served no other purpose than to obtain the total financial offer for evaluation purposes. Indeed, the Contracting Authority could not simply leave Schedule A and Schedule B separate without adding this third schedule since, if it did so, it would not have been in a position to compare the offers (unless, for example, the Tender Document provided for a different manner in which to do so, such as by giving a weighting to each of the values in Schedule A and Schedule B to arrive at the total score for each financial offer). In any event, it is submitted with respect that at this stage the Board is not required to establish whether or not it makes sense to add the two together - that was the Contracting Authority's prerogative, since it is the Contracting Authority which had to establish the manner in which the total contract price for evaluation purposes would be arrived at and any tenderer who was not satisfied with this had to challenge it prior to submission of offers - but to establish whether or not the disqualification is justified due to the Complainant's failure to

accept the rectification. In terms of the Tender Document (and the relevant rules incorporated by reference therein), if a tenderer does not accept the adjustment within five (5) working days, its tender will be rejected. The Contracting Authority has no discretion - it must disqualify. In addition, in terms of the Notes to Clause 5 (the last paragraph of Note 3), no clarifications and/or rectifications can be made in relation to the same shortcoming. The Contracting Authority could not therefore request an additional rectification and had an obligation to proceeding with rejecting the tender in accordance with principle of self-limitation. In this respect, reference is made to the Court of Justice of European Union decision in Nexans France v. European Joint Undertaking for ITER and Development of Fusion Energy wherein the Court held: *"It must be borne in mind at the outset that where, in the context of a call for tenders, the contracting authority defines the conditions which it intends to impose on tenderers, it places a limit on the exercise of its discretion and, moreover, cannot depart from the conditions which being in breach of the principle of equal treatment of candidates. It is therefore by reference to the principles of self-limitation and respect for equal treatment of candidates that the Court must interpret the tender specifications."*

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties, will now consider Appellant's grievances.

a) Reference is made to Section 1 – Paragraph 5(D)(i) of the tender dossier which clearly states that: *"Schedule A shall be the Final Contract Price in the event of an award. Price quoted in Schedule B shall NOT be part of the final contract……. Schedule B are provisional items and are* ***for evaluation purposes only****"* (bold & underline emphasis added)
b) Therefore, this Board opines that it was clear and unambiguous that the price listed in Schedule B, whilst it was not to be considered as part of the final contract price, it would **still** be relevant for evaluation purposes, i.e. to determine which economic operator is to be awarded the tender.
c) Once the economic operator has been granted the full rights available to it, i.e.
    i. Invited to a clarification meeting;
    ii. Had the possibility to request a clarification;
    iii. Had the opportunity to file a 'Remedies before closing date of a call for competition';
    iv. Has been provided with an opportunity to rectify his position

    and the issue at hand has been known to him *ab initio*, but did not avail himself of any of the above mentioned, then it is incomprehensible as to why such a grievance is being raised at this particular point in time.
d) It is important to point out that all the other economic operators participating in this tender procedure correctly interpreted this specific clause and had no issues with being compliant with the financial evaluation criteria.

Hence, this Board does not uphold 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	**Dr Vincent Micallef**	**Ms Stephanie Scicluna Laiviera**
Chairman	**Member**	**Member**