

PUBLIC CONTRACTS REVIEW BOARD

Case 2012 – SPD2/2023/052 – Services - Tender for Cleaning Services using Environmentally Friendly Cleaning Products at Identita’

24th May 2024

The Board,

Having noted the letter of objection filed by Mr Melchior Dimech acting for and on behalf of Simply Clean Limited, (hereinafter referred to as the appellant) filed on the 18th April 2024;

Having also noted the letter of reply filed by Dr Neil Harrison acting for the Identita (hereinafter referred to as the Contracting Authority) filed on the 26th April 2024;

Having also noted the letter of reply filed by Dr Matthew Paris acting for the AGV Non Ferrous Malta Ltd (hereinafter referred to as the Preferred Bidder) filed on the 29th April 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 20th May 2024 hereunder-reproduced;

Minutes

Case 2012 – SPD2/2023/052 – Services - Tender for Cleaning Services using Environmentally Friendly Cleaning Products at Identita’

The tender was issued on the 27th September 2023 and the closing date was the 2nd November 2023.

The estimated value of this tender, excluding VAT, was € 400,000.

On the 18th April 2024 Simply Clean Limited filed an appeal against Identita’ objecting to the decision to reject their tender as it was deemed to be technically non-compliant.

A deposit of € 2,000 was paid.

There were twelve bids.

On the 20th May 2024 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Vincent Micallef and Mr Lawrence Ancilleri as members convened a virtual public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Simply Clean Ltd

Dr Franco Galea	Legal Representative
Mr Melchior Dimech	Representative
Mr Dalziel Bugeja	Representative
Mr Ray Bartolo	Representative

Contracting Authority – Identita’

Dr Neil Harrison	Legal Representative
Mr Pablo Cachia Belli	Chairperson Evaluation Committee
Ms Claudine Miceli	Secretary Evaluation Committee
Ms Geraldine Abdilla Busuttil Inguanez	Evaluator
Mr Wilfred Saliba	Evaluator

Preferred Bidder – AGV Non Ferrous Malta Ltd

Dr Matthew Paris	Legal Representative
Mr Frank Cachia	Representative

Director of Contracts

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

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

Dr Franco Galea Legal Representative for Simply Clean Ltd said that this appeal is based on submissions in the letter of objection. The Evaluation Committee were incorrect in their decision and if there were any shortcomings in the offer it should have requested a clarification.

Dr Neil Harrison Legal Representative for Identita’ said that similarly the Authority relied on the letter of reply for their submissions. This was not a matter of a clarification but of a rectification as the shortcoming was in the technical submissions. The tender requested that bidder submits a contract of employment – instead a template was offered.

Dr Galea said once the document was there a simple clarification would have been in order. Copy of a written contract was provided; there was no request for details of employee and in any case the rates of pay were dictated by legislation.

Dr Paris Legal Representative for the preferred bidder said that the grievance was unrelated to the reason for rejection. Regulation 270 request a clear reason to be given which is not the case here. The tender is clear on what was required and there is a mismatch between the appeal and what the appellant is claiming. Offer has to be complete *ab initio* and rectification is not possible.

Dr Galea in reply stated that appellant accepts the points made but the appeal is clear and the contract of employment was presented with details lacking due to confidentiality and data protection requirements.

Dr Harrison said that the document provided was totally different to what was requested. The situation here was quite similar to the PCRB Case 1886 in respect of the clarification issue. In any case the document request was mandatory.

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 20th May 2024.

Having noted the objection filed by Simply Clean Limited (hereinafter referred to as the Appellant) on 18th April 2024, refers to the claims made by the same Appellant with regards to the tender of reference SPD2/2023/052 listed as case No. 2012 in the records of the Public Contracts Review Board.

Appearing for the Appellant:	Dr Franco Galea
Appearing for the Contracting Authority:	Dr Neil Harrison
Appearing for the Preferred Bidder:	Dr Matthew Paris

Whereby, the Appellant contends that:

- a) Bid has been declared as non-compliant for the following reason: *In the social aspect criteria clause iii - In the written contract of employment submitted, the hourly rate has been greyed out. The redaction renders the bid to be technically non-compliant.* The reason for the alleged noncompliance is unfounded in fact and at law.
- b) All the criteria were met as well as the fact that all employees are employed with a written contract. Therefore the mandatory criterion was satisfied. If any part of the contract was not clear to the evaluators, the evaluation committee had all the powers at law to request a clarification on the documents provided. Furthermore the hourly rates in this field of employment as set at law and are reflected in the pay slips given to each and every employee.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 26th April 2024 and its verbal submission during the hearing held on 20th May 2024, in that:

- a) The offer submitted by the objector was not technically complaint (sic) given that offer failed to provide a mandatory document, essentially that the objector failed to provide a copy of a written contract of employment between the bidder and an employee.
- b) That in lieu of the requested contract of employment as clearly specified in the tender document, the objector submitted a template of a contract of employment.
- c) That the objector is not contesting this fact however is claiming that if any part of the contract was not clear to the evaluators, the evaluation committee had all the powers at law to request a clarification on the document provided.

- d) That the Contracting Authority totally differs with this argument.
- e) That this was not a matter of clarification but a matter of rectification of a technical document. The Evaluation Committee cannot request the bidder for the provision of an additional document, as this is tantamount to a rectification which is not permitted with regards to the Technical Offer - Vide Note 3 in the Notes to Clause 5 on page 5 of Tender Document.
- f) That without prejudice to the above and for the sake of the argument made by the objector, if the objector at the bidding stage had any clarifications to be made, it was his responsibility to do so.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 29th April 2024 and its verbal submission during the hearing held on 20th May 2024, in that:

- a) **Valid bid ab initio** - On a strictly without prejudice basis, AGV makes reference to regulation 62 (1) of PPR, which specifically states that: "*Without prejudice to Part VI and regulation 235(2), the .[Words Valid bid are the marginal title for the Regulation] authority responsible for the tendering process must ensure that an economic operator must ab initio be eligible to qualify for a tender and must consequently be in possession of all the requirements stipulated in the procurement documents by the closing date for the submission of the same.*" This has also been confirmed by the Court of Appeal in the decision in the names of NQUAYMT konsorzju kompost minn (i) Bonnici Bros. Services Limited (C57464) u (ii) Korfezdeniz ins Taah. San. Ve Tic. Ltd. Sti, socjeta estera v. (i) Agenzija ghal Infrastruttura Malta, wherein it held that: "*Din il-Qorti mhux l-enwel darba li tirribadixxi li kull oblatur irid, sa mill-bidu nett mal-offerta tiegħu, isegwi rigorozimament dak li trid issejba għall-offerti u m'għandux jippretendi li jigi mitlub "jirrange" l-offerta biex ikun kompatibbli ma' dak mitlub.*" Indeed it is permissible to clarify certain aspects of a submitted tender, and this in accordance with regulation 62 (2) of PPR, however such clarification shall be done "*Provided that such requests are made in full compliance with the principles of equal treatment and transparency*" - the expectation of the appellant in the case under review cannot and should not be clarified since it would prejudice the rights of inter alia AGV.
- b) **Principle of self-limitation** - The principle of self-limitation is a fundamental principle which has been decided upon on various instances by this Honourable Board. The expectation of the appellant seems to suggest [once again unclear] that the Evaluation committee should have not applied the tender specifications - this is tantamount to a breach of the self-limitation principle, since it would have applied different rules to different economic operators - thus breaching the self-limitation principle, as well as the obligation of equal treatment. AGV submits that the evaluation committee did not have any discretion whatsoever to opt out from applying the tender specifications uniformly, and on the contrary it had to observe the technical specifications *ad unguem*.
- c) **No changes to tender specifications** - Whatever reason it had to defect from the tender specifications, such reasons cannot be discussed at this mature stage within the procurement

process. Regulation 262 of PPR specifically creates a remedy within the early stages of the procurement cycle for any party to submit a procedure to address anything within the tender document, through modification, cancellation or the setting aside of any clause within the tender document - a procedure which the appellant opted not to avail of, thus and thereby it has to be adjudged in accordance with the regulations [technical specifications in this case], it explicitly consented to through participation.

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) Initially it is to be stated that the reason for exclusion was based on criterion C2(iii) (page 9 of the tender dossier) and not on that quoted in the letter of appeal i.e. criterion C2(viii) (pages 15 and 16 of the tender dossier). Therefore, one can argue that the letter of objection, as filed on 18th April 2024, *ab initio*, fails to meet the minimum requirements as set out in Regulation 270 of the Public Procurement Regulations S.L. 601.03 which requires appeals to “.... *contain in a very clear manner the reasons for their complaints*”.
- b) None-the-less, this Board opines that the requirements of criterion C2(iii) were very clear and unambiguous when they stated that “*Employees have a written contract of employment. (Mandatory). **A copy of the agreement between the bidder and an employee is to be provided.***” (bold & underline emphasis added).
 - i. It is therefore very evident that the template of employment contract as submitted by the appellant was not what the contracting authority was after. It very specifically required a “**copy of the agreement between the bidder and an employee**”.
 - ii. Being a ‘Mandatory’ requirement, this Board opines that the evaluation committee correctly interpreted that a rectification could not be sought. This, since the criterion fell under the remit of Note 3. Once a clarification could not solve this predicament, technical non-compliance was the correct way forward.
 - iii. Reference is finally made to PCRB Case 1886 - Signal 8 Security Services Malta Limited v. Project Green decided on 26th June 2023 whereby it was held that “*Whilst this Board acknowledges that the contract submitted is ‘less’ redacted than the payslips mentioned above, it is stated that what the tender document required was clear and unambiguous. Criterion C2(iii) states that “a copy of a contract agreement between the bidder and employee is to be provided”. This Board opines that if the Appellant had any confidentiality / GDPR concerns, it was up to it to submit a clarification request within the timeframes stipulated in the General Rules Governing Tenders and if the reply provided was not to its satisfaction, it could contemplate further remedial mechanisms as provided in the Public Procurement Regulations S.L. 601.03. Therefore, arguments brought forward by Appellant that in this*

case it was the responsibility of the Evaluation Committee to seek a clarification from the appellant are not upheld.”

Therefore, this Board does not uphold the grievance of the appellant.

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

Dr Vincent Micallef
Member