

PUBLIC CONTRACTS REVIEW BOARD

Case 2017 – VLC/01/2023 – Service Tender for Street Sweeping Services in Victoria, Gozo using Environmentally Friendly Practices

10th June 2024

The Board,

Having noted the letter of objection filed by Dr Daniel Calleja on behalf of Carmelo Galea & Associates Advocates acting for and on behalf of Innovative Business Solutions, (hereinafter referred to as the appellant) filed on the 18th April 2024;

Having also noted the letter of reply filed by Dr Larry Formosa and Dr Jonathan Mintoff acting for the Victoria Local Council (hereinafter referred to as the Contracting Authority) filed on the 24th April 2024;

Having heard and evaluated the testimony of the witness Mr William Sultana (Chairperson of the Evaluation Committee) as summoned by Dr Daniel Calleja acting for Innovative Business Solutions;

Having heard and evaluated the testimony of the witness Dr Mark Anthony Debono (Representative of the Department of Contracts) as summoned by Dr Daniel Calleja acting for Innovative Business Solutions;

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 4th June 2024 hereunder-reproduced;

Minutes

Case 2017 – VLC/01/2023 – Service Tender for Street Sweeping Services in Victoria, Gozo using Environmentally Friendly Practices.

The tender was issued on the 29th December 2023 and the closing date was the 31st January 2024

The estimated value of this tender, excluding VAT, was € 52,405.

On the 18th April 2024 Innovative Business Solutions filed an appeal against the Victoria Local Council objecting to the decision to reject their bid as it was deemed to be technically not compliant and to the subsequent cancellation of the tender.

A deposit of € 400 was paid.

There were two bids.

On the 4th June 2024 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Ms Stephanie Scicluna Laiviera 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 – Innovative Business Solutions

Dr Daniel Calleja	Legal Representative
Mr Lukas Cefai	Representative

Contracting Authority – Victoria Local Council

Dr Jonathan Mintoff	Legal Representative
Dr Larry Formosa	Legal Representative
Mr William Sultana	Chairperson Evaluation Committee
Ms Miriam Attard	Secretary Evaluation Committee
Mr Daniel Galea	Evaluator
Mr Mario Cauchi	Evaluator
Mr Josef Schembri	Representative

Department of Contracts

Dr Audrey Marlene Buttigieg Vella	Legal 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 Innovative Business Solutions stated that appellant’s bid was declared technically non-compliant as it is alleged that certain documents were not submitted but the Authority did not realise that the bidder had no employees and hence he had provided declarations as an alternative. The tender was subsequently cancelled.

Dr Jonathan Mintoff Legal Representative for the Victoria Local Council said that the technical offer gave two options as to what had to be provided. In his submissions appellant had veered between declaring that he had no employees whilst in others that he had employees. This created a conflict as to which category the bidder fitted into. The tender made it very clear that zero (0) marks would be awarded unless the requested declarations were provided.

Dr Calleja asked that a document from Jobsplus dated 16th May 2024 and confirming that appellant has no employees be tabled at this stage. He then requested that further witnesses be heard.

Dr Mark Anthony Debono (124390M) called to testify by the appellant stated on oath that he was a Junior Legal Officer at the Department of Contracts. He pointed out that the tender was issued by the Victoria Local Council which is recognised as a contracting authority in its own right and that therefore there was no involvement by the Department in this tender.

Mr William Sultana (229699M) called to testify by the appellant stated on oath that he was the Chairperson of the Tender Evaluation Committee (TEC). He recited the reasons for appellant’s disqualification and mentioned that overall the impression the Committee had from these submissions was that he did have employees. Several references in certain sections of the submissions referred to ‘all employees’. On the two contested points regarding the payment of wages by credit transfer and the detailed payslip appellant had not submitted self-declarations that currently he has

no employees. The TEC decided that the documents submitted did not meet the tender requirements. The self-declaration did not indicate that the tender requirements would be followed if employees were eventually engaged. No rectification could be sought as this came under Note 3 restriction.

In reply to a question from Dr Formosa, witness agreed that if appellant declared that he had no employees then the confirmation from Jobsplus was not necessary.

This concluded the testimonies.

Dr Calleja stated that Jobsplus had indicated that appellant had no employees yet he was disqualified because the TEC had assumed that he has employees and that, therefore, he was not compliant on two points. The necessary documents had been submitted and appellant's bid was compliant. The Authority cannot now raise fresh points beyond the grievances raised in the appeal. Witness Mr Sultana had confirmed that since declarations were made that appellant had no employees then the bid was compliant and it is not in order to raise fresh points. The cancellation of the tender should be withdrawn and the tender awarded to the appellant.

Dr Mintoff said that the tender must be considered as a whole. Reasons had been given why the bid was not compliant. There was no need to submit official documents to substantiate the case but it was important to rely on the declarations requested. Note 3 restricted changes to the offer. The documents submitted indicated that bidder had employees and had misguided the TEC in his declarations. Bidder has to conform to the tender as evidenced in PCRB Case 1675 where even a document deemed to be too long infringed the tender requirements. This was not a pick and choose exercise.

Dr Formosa pointed out that the letter from Jobsplus, albeit not needed, still stated that the appellant complies with disablement requirement which gives one to understand that appellant did have employees.

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 4th June 2024.

Having noted the objection filed by Innovative Business Solutions (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 VLC/01/2023 listed as case No. 2017 in the records of the Public Contracts Review Board.

Appearing for the Appellant:

Dr Daniel Calleja

Appearing for the Contracting Authority:

Dr Larry Formosa & Dr Jonathan Mintoff

Whereby, the Appellant contends that:

a) ***No proof of an agreement with the bank was provided re wages being Paid by Credit Transfer -***

Reference is made to the tender document page 15: Proof of Good Working conditions measures taken in favour of the employee.

That the appellant is currently an economic operator with no employees. That as per tender document it had to submit a self-declaration committing itself to have any wages paid through credit transfer, costs of which are borne by the contractor should employees be engaged during the contract duration. That this was duly done and thus this criterion was duly satisfied. That proof of an agreement with the bank re wages being Paid by Credit Transfer was applicable for Economic Operators currently with employees and thus this was not applicable to the appellant. An economic operator which currently has no employees had to submit a self declaration which in this case was duly provided. Thus this reason for deeming the appellant technically non-compliant is manifestly wrong.

b) ***No copy of detailed payslip was provided -***

Similarly reference is made to the tender document page 16.

That the appellant is currently an economic operator with no employees. That as per tender document it had to submit a self-declaration of compliance. That this was duly done and thus this criterion was duly satisfied. That providing a copy of a payslip was applicable for Economic Operators currently with employees and therefore this was not applicable to the appellant. An economic operator which currently has no employees had to submit a self declaration which in this case was duly provided. Thus this reason for deeming the appellant technically non-compliant is manifestly wrong.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 24th April 2024 and its verbal submission during the hearing held on 4th June 2024, in that:

- a) It must be noted that the Objector's grievances are associated with his submissions for the Technical Offer. In this tender, the Technical Offer (as in all other instances) is classified under Note 3. Consequently, the Contracting Authority and/or the Evaluation Board could not consider any requests for rectification from the Objector. This point is emphasised due to the nature and type of grievances raised by the same Objector. Thus, the Contracting Authority does not have any discretion to save seemingly non-compliant tenders for parts of the submissions falling under 'Note - 3'. The principle of equal treatment and the corollary transparency requirements establish clear constraints on what a contracting authority can accept by way of tender correction, supplementation or clarification. Although a contracting authority is allowed to request clarification, this remains a discretionary power and not duty on the contracting authority. The

Technical Offer for this tender, comprising the 'Technical' Part of the Award Criteria of the BPQR, enables new market entrants to participate in the tendering process aiming to be selected as the preferred bidder by the Contracting Authority. Notably, for several criteria within the Technical Offer, prospective bidders without employees may opt for a self-declaration of compliance without facing any penalties for such a choice.

- b) However, it is paramount for the Contracting Authority to outline and highlight to the PCRB the lack of consistency and coherence in the Objector's submissions and documentation regarding his employee status. Which fallings(sic) could not be rectified, this as outlined above. For instance:
- i) The Objector did not submit a specific declaration stating that currently he has no employees. While in some instances the Objector did submit declarations, these were insufficient. They failed to adequately emphasise that should employees be engaged during the contract duration, he would comply with the legal requirements. Instead, his declarations were vague, merely asserting his commitment at a high level without the detailed assurances required by the tender specifications;
 - ii) The documentation submitted by the Objector connotes the fact that the Objector actually has employees (at the time of the tender submission). In Document C2 viii Health and Safety Resources the Objector states that: *"Our health and safety strategy is underpinned by regular training sessions for all employees, designed to keep them informed of the latest safety protocols and best practices. This training ensures that every team member is not only equipped with the physical tools they need to work safely but also the knowledge to identify risks and take appropriate preventive measures."* The statement suggests that the company already has employees and conducts regular training sessions to keep them informed of safety protocols and best practices. It doesn't imply that the employees are currently trained, but rather that training sessions are a part of their existing operational strategy for its workforce. The phrase "for all employees" indicates that there are already existing employees who are receiving these training sessions.
 - iii) For Clause C1 (i), bidders were required to provide proof that they meet the legal requirements for the employment of disabled people. Bidders with employees needed to submit an undertaking or declaration issued by JobsPlus, while bidders without employees were required to submit a self-declaration of compliance. In this instance, the Objector submitted a declaration from JobsPlus instead of a self-declaration. This document should have affirmed his commitment to meeting the legal requirements should he employ staff during the contract term. Furthermore, the Objector failed to provide a specific declaration stating that he currently has no employees. The document issued by JobsPlus muddled the Objector's bid. On one hand, he attempts to present himself as a self-employed contractor with no staff, yet on the other, he submitted documentation that suggests the contrary. This inconsistency has led to confusion throughout the bidding process and even into(sic) his appeal. By not providing a self-declaration, the Objector did not adhere to the tender

requirements, which explicitly required such a declaration to ensure full compliance with this specific clause. Therefore, the Contracting authority in this very case had no option but to deem the objector's offer as non-compliant.

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 grievances.

- a) As from the outset it is imperative to note that section 'C – Social Aspects' of the Evaluation Grid, within the tender document, makes reference to "*For Economic Operators currently **with Employees***" and "*For Economic Operators currently **with No Employees***". (bold & underline emphasis added).
- b) It was uncontested that for criteria C1(i), the appellant submitted a 'Jobsplus' declaration which would satisfy the requirement of the "*For Economic Operators currently **with Employees***" category. The requirement for 'no employees' was unambiguously listed as being a 'Self Declaration', something which was not submitted. Therefore, the Evaluation Committee reached a conclusion that the appellant is in fact an organisation 'with employees'. This also as corroborated through submissions of criteria C2(viii) Health and Safety Resources.
- c) For criteria C2(i) and C2(ii), the appellant submitted the requirements falling under the 'no employees' category, which was found as technically non-compliant by the Evaluation Committee. This due to the fact that other criteria were 'met' and satisfied under the 'with employees' category.
- d) Arguments brought forward by the appellant that clarifications could have been sought and that submissions were in fact compliant, are deemed irrelevant and surreal by this Board.
- e) An economic operator can either have or not have employees. Submissions will then follow suit, either by satisfying all the criteria under the 'with employees' or under the 'with no employees' categories.
- f) What is for sure not acceptable is that for certain criteria, an economic operator satisfies the 'with employees' category and for other they declare that they have no employees and try to satisfy the 'with no employees' category.
- g) Once the Evaluation Grid falls under the remit of Note 3, no rectifications could be sought. Once clarifications would also not aid the submission of the appellant, it is hereby being confirmed that the *modus operandi* of the Evaluation Committee was correct in its final decision.

Hence this Board does not uphold the grievances 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 of cancellation 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