

PUBLIC CONTRACTS REVIEW BOARD

Case 2049 – CT2249/2023 – Tender for the Provision of Cleaning Services (Excluding Products and Materials) for Premises Pertaining to the Foundation for Social Welfare Services - Lot 5

27th December 2024

The Board,

Having noted the letter of objection filed by Mr Melchior Dimech on behalf of Simply Clean Ltd (hereinafter referred to as the "Appellant"), filed on the 22nd of July 2024;

Having also noted the letter of reply filed by Dr Dianne Galea acting on behalf of the Foundation for Social Welfare Services and Dr Audrey Marlene Buttigieg Vella acting on behalf of the Department of Contracts (hereinafter referred to as the "Contracting Authority"), filed on the 1st of August 2024;

Having also noted the letter of reply filed by Dr Matthew Paris and Dr Zachariah Esmail, on behalf of DALLIPARIS Advocates, acting for and on behalf of AGV Non-Ferrous Malta Limited (hereinafter referred to as the "Recommended Bidder"), filed on the 1st of August 2024;

Having heard and evaluated the testimony of the witness Mr Matthew Attard (Member of the Evaluation Committee) as summoned by Dr Franco Galea acting for Mr Melchior Dimech;

Having heard and evaluated the testimony of the witness Mr Stephen Vella (Chairperson of the Evaluation Committee) as summoned by Dr Dianne Galea acting for the Foundation for Social Welfare Services;

Having taken cognisance of and evaluated all the acts and documentation filed, as well as the submissions made by the legal representatives of the parties;

Having noted and evaluated the minutes of the Board sitting of the 6th of December 2024, hereunder reproduced:

Minutes

Case 2049 – CT 2249/2023 – Tender for the Provision of Cleaning Services (Excluding Products and Materials) for Premises Pertaining to the Foundation for Social Welfare Services - LOT 5

The tender was issued on the 12th October 2023, and the closing date was the 21st November 2023.

The estimated value of this tender, excluding VAT, was €159,967.28.

On the 22nd July 2024, Simply Clean Ltd filed an appeal against the Foundation for Social Welfare Services, objecting to their disqualification on the grounds of being technically non-compliant. A deposit of €800 was paid.

There were twelve bids.

When questioned by Dr. Franco Galea, the witness stated that the TEC had sought the Department of Contracts' (DoC) views regarding clarification and were advised that, as this was a Note 3 item, clarification could not be sought.

This concluded the testimonies.

Dr Franco Galea said that in regard to the criterion on the employment contract there is enough information supplied to confirm that employment laws are observed as the template provided satisfies this. The Department of Industrial and Employment Relations (DIER) regularly checks employment contracts with employers to ensure obligations are met. On the point of the extension of the evaluation period this appears to have been admitted as it has not been argued and a fresh tender should be issued.

Dr. Zack Esmail, Legal Representative for the preferred bidder, stated that the tender required a signed contract, not a template. Appellant's claims regarding GDPR infringements are irrelevant, as the tender specified a contract with blacked out details. If the appellant had any doubts or perceived ambiguities with the tender document, Regulation 262 provided a remedy. This was not a case where the authority could seek clarification. In case 2012, the PCRB already decided on an identical appeal. The TEC had no option but to declare the offer non-compliant. On the second grievance, Dr. Esmail argued that the appellant could not object at this stage, having continued participating in the tender. Court of Appeal Case 632/2023/1 was cited in support of this. The Contracting Authority had the right to cancel but did not and was not obliged to cancel.

Dr Dianne Galea stated that, on the first grievance, the contract submitted was not valid, and therefore tender requisites were not met. No clarification was permitted, as the requirement was regulated by Note 3. Further, there were other shortcomings in the appellant's bid. The appellant had the opportunity to check this point if there were any doubts prior to the submission of the bid. On the second grievance, one must point out that this was an extensive evaluation with a vast number of documents to be checked. A change of one of the evaluators was also necessary. The TEC's interest was in saving a large tender with an extensive evaluation process.

Dr Audrey Marlene Buttigieg Vella, on behalf of the Department of Contracts, said that, on the point raised regarding the request for cancellation of the tender, the General Rules Governing Tenders give discretion not to cancel if there are valid reasons. PCRB Case 1022, CJEU Case of 2/12/2015, and Court of Appeal Case 430/23/1 backed this point.

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 6th December 2024.

Having noted the objection filed by Simply Clean Ltd (hereinafter referred to as the Appellant) on 22nd July 2024, refers to the claims made by the same Appellant with regards to the tender of reference CT2249/2023 listed as case No. 2049 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Franco Galea

Appearing for the Contracting Authority: Dr Dianne Galea

Appearing for the Preferred Bidder: Dr Matthew Paris & Dr Esmail Zackariah

Whereby, the Appellant contends with respect to:

a) ***1st grievance***

The appellant provided the standard contract he provides all his employees with and was therefore in line with the requirement as per tender. Signed copies of employment contracts are not the remit of the evaluation committee but that of the DIER officials in the course of an investigation. When so requested by the competent authorities, the appellant has provided the actual signed copy of contracts with his employees. However, he is so authorised within the scope of an investigation. He is prohibited under GDPR regulations from providing signed copies of employment contracts and employee details unless these are in the public domain to the evaluation committee.

In any case once the appellant submitted his standard employment contract the evaluation committee could have requested a clarification on the documentation submitted and not proceed to automatically disqualify the tenderer.

It has come to the tenderer's knowledge that all other bidders in this tender procedure save for the recommended bidder were disqualified for this very same reason. This is indicative of the understanding and application of such a criterion by participants in the market bound by the same GDPR rules and regulations.

b) ***2nd grievance***

From a prima facie analysis of the date of submission of bids to this tender and the date of evaluation and decision, it will clearly result that none of the bids submitted can be considered as valid and binding.

Public Procurement Regulations and the tender itself are clear on the period of validity of the bids submitted. It does not result from the acts available to appellant that the contracting authority requested any one of the bidders to extend the validity of its bid beyond the original term. The contracting authority took all the time it wanted to evaluate this bid. However, this has its own consequences and therefore given the expiry of the term of validity the tender itself cannot be awarded and has to be cancelled in terms of law.

The Board also noted Contracting Authority's and DOC's Reasoned Letter of Reply filed on 1st August 2024 and its verbal submission during the hearing held on 6th December 2024, in that :

a) ***Grievance 1: One of the mandatory requirements of the tender was missing***

The Appellant lacked one of the mandatory technical requirements of the tender and the document provided was not correct. The specific requested document was a copy of a contract agreement between the bidder and employee to be presented with the application of the tender.

The applicant failed to present a copy of a contract blackened or greyed as per GDPR requirements as specified in the evaluation grid in the tender document and the bidder merely presented an empty template. This constituted a breach of the requirements of the application of the tender as was clearly stated in the tender itself.

The document, submitted by the appellant, clearly carries no date, no signatures and no blackened-out information whatsoever making it a template and not an actual contract which had already taken place or is currently active. In a template anything could have been factored to comply with what is being requested in the tender.

The Contracting Authority's reason to request an agreement between both parties is to substantiate and delineate that such measures are already in practice.

The Evaluation Committee individually noticed that this is not an actual contract but a template. The Contracting Authority reiterates that no additional request for documentation is allowed in such instance (Note 3).

Regarding: *'The Appellant states that he knows for a fact that the other bidders were all also disqualified because of this criterion and how he interpreted it.'*

How does this equate to his case having not been able to interpret correctly what was needed of him with the fact that all the other bidders allegedly made the same mistake? And had this been the truth, how would the Appellant have this information?

- b) ***Grievance 2: A prima facie analysis of the date of submission of bids to this tender and the date of evaluation and decision, it will clearly result that none of the bids submitted can be considered as valid and binding***

The appeal and this grievance are simply another way to hinder the award by requesting cancellation and stalling the whole procurement process. The appellant is doing this by using procedural points in the General Rules and deviating from the merits of the case. The fact remains that the Appellant did not provide a basic mandatory required document, hence his bid was not compliant.

However, if one is to address this grievance than one must state that the Evaluation Committee had constantly been in contact with the Department of Contracts addressing queries and guidance through the process. At no point in time was the Evaluation Committee directed to halt the evaluation process due to time frame issues.

One must argue the fact that it is not mandatory for the Evaluation Committee to request an extension. The law does not state anything on timelines and if the law does not state anything why should such a lengthy and detailed process such as this be thrown away.

On the other hand, the power vested in this Board as per PPR 90(3) to cancel the tendering process, as is being requested by the Appellant, needs to be exercised only if it is in the best overall interest of the situation. Should this be a bone of contention than it is the Contracting Authority's belief that other courses of action would be more justifiable and proportional as has always been the practice of the PCRB and of Honorable Courts to save an action or tender in this case whenever it is possible.

The Board also noted the Preferred Bidder's Reasoned Letter or Reply filed on the 1st of August 2024 and its verbal submission during the hearing held on 6th December 2024, in that:

- a) ***No changes to tender specifications***

In its objection, the appellant alleges GDPR issues that hindered him in submitting signed copies of employee's employment contracts. 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 the PPR specifically affords a remedy within the early stages of the procurement cycle for any party to submit a review procedure to address inter alia ambiguities within the tender document, through modification, cancellation or the setting aside of any clause within the tender document - a procedure which the appellant opted to not avail of, and explicitly consented to through participation in the tendering process.

b) ***Self-Limitation Principle***

The appellant seems to suggest that the Evaluation Committee should have not applied the tender specifications — the suggestion by the recommended bidder is in breach of the self-limitation principle, since it would have applied different rules to different economic operators — thus creating discrimination between economic operators and as a consequence infringe the principle of self-limitation.

c) ***PCRB has already determined the requirement in an identical case with the same parties on the same merits***

This Honourable Board has already decided upon an identical case with the same parties, in a decision of Case 2012 — SPD2/2023/052 — Services - Tender for Cleaning Services using Environmentally Friendly Cleaning Products at Identita' wherein the Board stated that:

'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.'

d) ***Validity of Bid***

Likewise, the claim that the validity period should lead to the actual cancellation of the tender has been previously determined both by the PCRB and the Honourable Court of Appeal [Superior Jurisdiction] whereby it was confirmed that the lapse of the validity period should not lead to the cancellation, since this is neither proportionate nor in accordance with the General Rules Governing Tenders.

The General Rules Governing Tenders grant the possibility to the Contracting Authority to cancel, which cancellation is definitely not mandatory, since the terminology used is "may" as opposed to "shall" cancel.

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) **Grievance 1: Alleged Non-Compliance Decision on Employment Contract**

- The Board notes that the requirements of criterion C2(c) were very clear and unambiguous when they stated: "*Employees have a written contract of employment. (Mandatory). A copy of the agreement between the bidder and an employee is to be provided.*"

- It is therefore very evident that the template of the employment contract as submitted by the appellant was not what the Contracting Authority was seeking. The tender explicitly required a “*copy of the agreement between the bidder and an employee*”, not a generic, unsigned template devoid of specific details.
- Being a ‘Mandatory’ requirement, this Board opines that the Evaluation Committee correctly interpreted that a rectification could not be sought. This is because the criterion fell under the remit of Note 3, which prohibits the Evaluation Committee from seeking rectifications or additional documentation at that stage. Since the appellant’s submission did not comply with this explicit requirement, it rightfully led to a finding of technical non-compliance.
- The Appellant's concern that he is prohibited under GDPR regulations from providing signed copies of employment contracts and employee details unless such information is in the public domain accessible to the evaluation committee is explicitly addressed within the tender document, which states that “*Any information regarding third parties is to be blacked out in line with the GDPR. 3rd Party information relates to any information/documentation that specifically includes the Economic Operator’s employees/personnel name (or any other identifier) shall be greyed out in line with GDPR.*”
- Reference is made to PCRB Case 2012 – SPD2/2023/052 – *Services - Tender for Cleaning Services using Environmentally Friendly Cleaning Products* at Identita’, Simply Clean Limited against Identita’, decided on 24th May 2024, in which the Board reached the same conclusion in a similar case involving the same appellant.
- Additionally, reference is 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, the Board does not uphold the Appellant's grievance on this point.

b) **Grievance 2: Validity of Bids**

- The General Rules Governing Tender (version 4.9) and Regulation 15(2)(a) of the PPR state: “*The Director may decide to cancel any procurement procedure even if an evaluation process has not been concluded by the end of the validity period of the submitted bids.*”

- The use of “*may*” instead of “*shall*” indicates that cancellation is at the discretion of the Director, not an obligation. Thus, the lapse of the bid validity period does not automatically mandate cancellation.
- Furthermore, PPR 90(3) provides that “*In its decision the Review Board shall have the power to cancel the tendering process if it appears to it that this is the best solution in the circumstances of the case.*”
- This power vested in the Board is therefore only to be exercised if cancellation serves the best overall interest of the situation.
- The Evaluation Committee provided relevant justifications for the delay, including the need for a change of evaluator and the complex/time-consuming process of evaluating several bids against numerous criteria.
- In the present case, the Board concurs with the assessment of the Contracting Authority that cancellation of the tender would not serve the best overall interests and such decision would go against the principle of proportionality.
- Therefore, the Board does not uphold the Appellant's grievance on this point.

The Board,

Having evaluated all the above and based on the above considerations, concludes and decides in relation to Lot 5:

- 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

Dr Ing. Damien Gatt
Member

Mr Lawrence Ancilleri
Member