

PUBLIC CONTRACTS REVIEW BOARD

Case 2071 – SPD6/2024/023 – Services - Tender for the Provision of Cost Optimal Studies for New and Existing Buildings – Lot 2

3rd February 2025

The Board,

Having noted the letter of objection filed by Ing Nicholas Brincat acting for and on behalf of NB Services, (hereinafter referred to as the appellant) filed on the 4th October 2024;

Having also noted the letter of reply filed by Perit Roderick Bonnici acting on behalf of Building and Construction Authority (hereinafter referred to as the "Contracting Authority"), filed on the 10th October 2024;

Having heard and evaluated the testimony of the witness Mr Matthew Degiorgio (Representative of the Contracting Authority) as summoned by Dr Joe Gerada acting for Building and Construction Authority;

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 28th January 2025 hereunder-reproduced.

Minutes

Case 2071 – SPD6/2024/023 – Services – Tender for the Provision of Cost Optimal Studies for New and Existing Buildings - LOT 2

The estimated value of this tender, on Lot 2, excluding VAT, was € 50,000.

On the 4th October 2024 NB Services filed an appeal against the Building and Construction Authority objecting to their disqualification on the grounds that they failed to clarify an abnormally low offer.

A deposit of € 400 was paid.

There were four bids on Lot 2.

On the 28th January 2025 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Vincent Micallef (online) and Mr Richard Matrenza as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – NB Services

Ing Nicholas Brincat Representative

Contracting Authority – Building and Construction Authority

Dr Joe Gerada	Legal Representative
Ms Janet Debrincat	Chairperson of the Evaluation Committee
Mr Anthony Buhagiar	Evaluator
Mr Ian Dalli	Evaluator
Mr Johan Caruana	Evaluator
Mr Karsten Cilia Zarb	Representative
Ms Matthew Degiorgio	Representative

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and prior to inviting submissions noted that this appeal was very similar to the one tabled under Lot 3 of the same tender by the same appellant and proposed that both cases should be heard simultaneously. This was agreed to by both parties.

Ing Nicholas Brincat on behalf of NB Services indicated that his submissions were along the lines of his appeal letter.

Dr Gerada Legal Representative for the Building and Construction Authority said that the different lots on this tender had been evaluated separately. On three of the lots the offer had been considered abnormally low and the Contracting Authority had sought clarifications. Lot 1 had been withdrawn by the bidder whilst no satisfactory replies were submitted on Lots 2 and 3.

Mr Brincat said that comparative figures on the bids submitted indicate that there is no vast difference between the prices offered by the other bidders. The members of NB Services were self-employed and did not have the overheads that other consultancy firms had, so they could submit economical prices.

Dr Gerada requested the examination of witnesses.

Mr Matthew Degiorgio (179983M) called to testify by the Contracting Authority stated on oath that he had drafted the technical terms of the tender document. Asked to explain what NCT files were, witness said that these were models of structures on which simulations were carried out leading to the build-up of certain parameters such a natural light, heating etc. There was no indication given that the files will ever be available to bidders. This was made clear at the clarification meeting which the appellant did not attend, nor were the files mentioned in the tender dossier.

This concluded the testimony.

Mr Brincat said that his lack of presence at the clarification meeting was not significant as he was otherwise engaged. He could not understand why the Authority should query the build-up of prices so long as appellant is prepared to do the job at that price. Appellant was benefitting from economies of scale by undertaking more than one job.

Dr Gerada stated that the appellant assumed that the NCT files would be provided although this was never mentioned by the Authority which clearly indicated that they would not be available. The Evaluation Committee was restricted by self-limitation and if it had any suspicion of low prices, it required an explanation. This was clearly stated in PCRB Cases 1953 and 1927 and there was always the risk that a low bidder would be unable to fulfill a contract or of requesting variations later. The

Authority gave the bidder the opportunity to explain matters but the reply referred only to the NCT files. If bidder had any doubts about the availability of the NCT files he had a remedy available under Regulation 262 as held in Court of Appeal Case 340/22 (10.1.23). In CJEU case C101/22 *European Commission vs State of Belgium* the factors that one had to consider in deciding if a bid was abnormally low were clearly laid out. The objections of the Contracting Authority apply to both Lots 2 and 3.

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 28th January 2025.

Having noted the objection filed by NB Services (hereinafter referred to as the Appellant) on 4th October 2024, refers to the claims made by the same Appellant with regard to the tender of reference SPD6/2024/023 – Lot 2 listed as case No. 2071 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Ing Nicholas Brincat

Appearing for the Contracting Authority: Dr Joe Gerada

Whereby, the Appellant contends that:

- a) This objection letter is being submitted on the basis that unless the NCT files are provided, then ab-initio, this tender was predisposed to favour the contractors that have already been commissioned to carry out the same work in previous years. The unfair advantage stands that these individuals would have already carried out all of the work, hence have access to, the base building simulation models (NCT files).
- b) Government Gazette of 30th July 2021 refers to 3 direct orders totalling €26,025 are indicative that the study has been recently conducted. The basis of the rejection letter is on the provision (or lack of) of the NCT files, which is the raw model/file on which the simulation is conducted. To this effect, Direct Order number 2 shows that these NCT files are available and the task of the direct order was to verify these base model files. Therefore, these files are available to the Contracting Authority. Furthermore, when compiling the bid for this tender (Lot 2 of Tender 000211317), the direct order shown has served as a basis for pricing. Considering that our team is rather fast in vetting these files, the fee considered in pricing the tender was based on 50% of what the direct

order was given for. The starting target of the hourly allocations which Lot 2 of Tender 000211317 was calculated on was: €9,986 (No. 1) + 50% of €6,090 (No. 2) + €9,949 (No. 3) amounts to €22,980. Based upon further refining of the hours required, the final bid amount was of €23,900.

- c) Furthermore, the Clarification letter submitted (Appendix 3) goes into the detail of why reusing the same NCT files is important for such a study, not just financial. Therefore, the rationale goes beyond what the refusal letter stipulates, as it being just a monetary based decision. It is also to be pointed out that the clarification letter never mentioned that without the NCT files we would not be able to provide the service with the rates submitted. To this effect, the rejection letter states that financial non-feasibility was "assumed", as per image provided.
- d) With respect to the refusal letter, attention is being drawn to the clarification letter submitted by the Contracting Authority following the clarification meeting held on the 13th May 2024. Reference is being made in particular to Question 6, whereby the Contracting Authority was asked whether the building reference selection (buildings to be studied) could be based on the studies carried out in 2018-2021. The Reply was that the previous studies were carried relatively recently and energy cost changes have remained the same by and large. The paragraph goes on explaining how the main changes since 2018 - 2021 studies were the technological advancements which need to be reassessed. Our team has allocated 90 hours to perform such iterations/assessments/permutations. However, said permutations are conducted on the same base model, which will by and large remain the same from the 2018-2021 analysis. From a research standpoint, it is important that the same base/reference model vis-à-vis 2018-2021 is kept, as otherwise the true cost-optimal impact of the technological advancements and updates in installation costs and maintenance cannot be properly analysed. Keeping the same starting/reference point is the basic methodological research approach in any scientific field (medial, engineering etc).

This Board also noted the Contracting Authority's Letter of Reply filed on 10th October 2024 and its verbal submission during the hearing held on 28th January 2025, in that:

- a) Non-Provision of NCT Files -
NB Services is raising its concern on the absence of NCT files, asserting that without such files, the tender was predisposed to favour contractors previously commissioned. It is imperative to clarify that the NCT files were not provided for this tender because the buildings upon which these files are based can be outdated. As a result, the suitability, accuracy, and relevance of these files could not be guaranteed by the Contracting Authority. It would have been imprudent to provide data that may not reflect current conditions.
- b) Tender award to Camilleri and Cuschieri Consulting Engineers -
In October 2020, a tender with reference no MTIP/BRO/028/2018 was awarded to Camilleri and Cuschieri Consulting Engineers to conduct a Cost-Optimality Study for Existing Offices,

amounting to €19,800 (exclusive of VAT). It is crucial to highlight that if Camilleri and Cuschieri had indeed held an undue advantage over other bidders, as NB services is alleging, one would reasonably expect their bid for the current tender to align closely with the previous tender amount. Instead, their submitted bid was €32,450 (exclusive of VAT), which exceeds their previous offer by €12,650 and is also €8,500 higher than the bid submitted by NB Services. Additionally, their bid for Lot 2 was higher than their submission for Lot 3, despite both lots having comparable budget estimates and work packages. Camilleri and Cuschieri were never not awarded similar work to what is required for lot 3 in the past by this Contracting Authority. These facts clearly indicate that the suitability of NCT files from previous years is questionable and their utility was neither assumed nor relied upon by other bidders, including Camilleri and Cuschieri Consulting Engineers.

c) Assumptions Made Regarding Tender Documentation -

The tender documentation explicitly did not indicate that NCT files would be provided, for reasons elaborated above. It is apparent from NB Services submission that the economic operator proceeded on the assumption that such files would be made available. It must be noted that during the publication stage, the objector had the opportunity to request clarification on this matter but chose not to do so. Additionally, it should be pointed out that the objector did not attend the scheduled clarification meeting, thereby foregoing another opportunity to seek necessary details.

d) Ownership of Previous NCT Files -

In accordance with Article 14.1 of the contractual terms and conditions of MTIP/BRO/028/2018, it is explicitly stated that all reports and data, including but not limited to maps, diagrams, drawings, specifications, plans, statistics, calculations, databases, software, and any supporting records or materials acquired, compiled, or prepared by the contractor in the performance of the contract, are the exclusive property of the Contracting Authority. This means that any such documentation produced by contractors during the execution of their obligations becomes the absolute property of the Building and Construction Authority. Specifically, regarding the NCT files, as these were produced under previous contractual arrangements, they remain under the proprietary rights of the Contracting Authority and are considered confidential information. Contractors who originally prepared these files did so under terms that require these documents to be returned and retained by the Contracting Authority upon the completion of their contracts. Therefore, the dissemination or use of these files beyond their original intent requires the explicit, written consent of the Contracting Authority. As outlined above, the Contracting Authority chose not to provide the NCT files within the tender documentation, as these files may contain outdated or inaccurate information that could potentially mislead bidders and impact their pricing strategies. Instead, in alignment with Article 18.2 of the Special Conditions, the tender specifically required bidders to independently establish reference buildings and develop new NCT files as an initial milestone. This approach ensures that the analysis is based on current, accurate data, promoting fairness and consistency across all bids.

e) New Information Provided Post-Adjudication Stage -

It is noted that NB Services has provided new information regarding the basis for the valuation of their offer, which was not furnished when initially requested by the adjudication board during the evaluation stage. The analysis of the newly submitted rationale clearly reveals that the offer was premised on the assumption that NCT files would be made available. Furthermore, the objector's justification is based on references to Direct Orders issued to Malta University Consulting Ltd., contracts to which the objector is not privy of the scope, terms of references and respective conditions of these work packages, thereby rendering such references unreliable for pricing validation. The objector has also cited the efficiency of their team in processing files and has asserted that the pricing was calculated on the assumption of expeditious file handling. Such claims, describing their team as "rather fast," are subjective and unquantifiable, making it impossible for anyone to accept them as substantiated evidence.

f) Clarification Regarding Question 6 in the Tender Clarification Meeting -

NB Services also asserts that the Contracting Authority has misinterpreted their bid's feasibility without NCT files. However, in response to the clarification request concerning their abnormally low offer, NB Services explicitly indicated that their pricing was based on assessments assuming 12 properties with an average assessment duration of 10 hours each, conditional upon the provision of NCT files. This statement directly contributed to the adjudication board's decision, as it became evident that the pricing structure was founded on an unverified assumption. During the clarification meeting, Question 6 addressed whether reference buildings and energy package selections could be based on past studies conducted between 2018-2021. The Contracting Authority clarified that while energy costs had remained relatively stable, other parameters, including technological developments, initial building costs, and maintenance expenses, had evolved and needed to be considered in the current analysis. The response explicitly indicated that the required analysis should account for these changes and not assume the stability of parameters, including those related to NCT files. The interpretation provided by NB Services in this regard is therefore inaccurate.

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 witness duly summoned, will now consider Appellant's grievances as follows in their entirety.

a) Initially, it should be mentioned that the "NCT" files were:

- i. not mentioned in the tender dossier;
- ii. not discussed in the clarification meeting organised by the Contracting Authority;
- iii. not the subject of any clarification request submitted by any of the economic operators participating in the tender process, including the appellant;

- iv. not the subject of a 'Remedies before closing date of a call for competition' as per Regulation 262 of the Public Procurement Regulations ("PPR").
- b) Clarification request issued by the Contracting Authority –
- i. The Board is of the opinion that the Evaluation Committee complied with the requirements of Regulation 243(1) of the PPR when they issued a clarification request to the appellant. Regulation 243(1) mandates that contracting authorities require economic operators to justify their proposed prices when these appear to be abnormally low. Comparing the estimated procurement value of Eur50,000 with the appellant's bid of Eur23,900, it is reasonable to conclude that the appellant's bid could be considered as 'appearing' to be abnormally low.
 - ii. The evaluation committee acted proportionally in issuing the request for clarifications.
 - iii. The appellant explained that the price quoted could be met due to the provision of the "NCT", although this was never confirmed by the Contracting Authority.
 - iv. Therefore, the Board believes that the decision made by the Tender Evaluation Committee was proportional, correct and fully aligned to the principle of Self-Limitation.

For these reasons, the Board does not uphold the appellant's grievances.

The Board,

Having evaluated all the above and based on the above considerations, concludes and decides in relation to Lot 2:

- 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 Vincent Micallef
Member

Mr Richard Matrenza
Member