

PUBLIC CONTRACTS REVIEW BOARD

Case No. 310

WBG 26/10/1

Tender for the Cleaning of Marsalforn Valley

This call for tenders was published in the Government Gazette on the 24th September 2010. The closing date for this call with an estimated budget of € 80,000 was the 8th October 2010.

Six (6) tenderers submitted their offers.

Mr Lawrence Attard filed an objection on 17th March 2011 against the decision taken by the Evaluation Committee's to recommend the award of the tender in caption to Mr Peter Paul Said.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr. Edwin Muscat and Mr Joseph Croker as members convened a public hearing on Friday, 6th July 2011 to discuss this objection.

Present for the hearing were:

Appellant

Mr Lawrence Attard	Representative
Dr Joseph Attard	Legal Representative

Preferred Bidder

Mr Peter Paul Said	Representative
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Ministry for Gozo

Mr Joseph Portelli	Representative
Mr Reno Grech	Representative

Evaluation Board

Ms Mary Ann Pace	Chairperson
Mr Mario Saliba	Secretary
Mr Anthony Cefai	Evaluator
Mr Saviour Bonello	Evaluator

After the Chairman's brief introduction, Dr Joseph Attard, legal advisor of Mr Lawrence Attard, the appellant, started by requesting the Public Contracts Review Board to postpone the hearing as Dr Alfred Grech, the appellant's lawyer who was knowledgeable of this case, could not be present for this public hearing to defend his client's interests because he had to attend a sitting at the Gozo Law Courts presided over by Magistrate Joseph Demicoli. Dr Attard declared that Dr Grech's request for the deferment of the case was declined by the Courts.

Dr Attard said that he was not in a position to defend the appellant's interests because he knew nothing about this case.

The Chairman Public Contracts Review Board acknowledged that the complainant had a right to be accompanied by a professional person who was considered suitable to defend his interests but it was the prerogative of the Public Contracts Review Board to decide whether to postpone a hearing or not. However, it was also made amply clear that the appellant's interests/ rights would not be compromised. The Chairman, Public Contracts Review Board drew the appellant's attention that if the need arose during the proceedings it would be the Board itself that would adjourn the hearing. On the other hand, if the evidence heard would be sufficient for the Public Contracts Review Board to arrive to a decision the Board would proceed accordingly.

At this stage, Mr Attard, the appellant, was invited to explain the motive/s of his objection. He said that he felt that his bid was unjustly rejected because the reason given was that he did not include the earth mover. The appellant said that an earth mover could refer to many different types of equipment.

At this point the Chairman, Public Contracts Review Board, read out the contents of the letter of objection dated 17 March 2011 which was written by Mr Attard's lawyer but was signed by the appellant. Mr Attard was asked to confirm whether the verbal rendition of the objection letter was fully faithful to Mr Attard's original letter. The appellant replied in the affirmative.

Mr Reno Grech, Assistant Director, Major Projects, Projects & Development Directorate, said that the appellant was contesting the Evaluation Board's decision for two reasons, namely, on the substance and shortcomings in the tender and that the decision taken was against the spirit of the pertinent regulations of LN 296 of 2010.

Mr Grech confirmed that the earth mover was required under *Clause 6.1 (b)* of the *Selection Criteria* and also under *(A) Construction Plant in Form 4.1 – Plant and Equipment to be Employed on Contract*. Mr Grech said that the Evaluation Board had to abide by what was specifically required in the tender document.

On cross examination by the Public Contracts Review Board, the appellant said that he did not fill in the requested information related to the earth mover because it was not clear which specific type of equipment was required, that is, whether it was a Hymack and/or bulldozer and/or excavator etc. Mr Grech agreed with the definition of the earth mover given by the appellant.

Mr Attard confirmed that his offer did include an excavator. When asked to state whether, in his opinion, an excavator was an earth mover, the reply given by Mr Grech was in the affirmative.

At this point the Public Contracts Review Board requested that each of the other members who formed part of the Evaluation Board would stand up, introduce themselves one by one and reply to the same question, namely whether, in their opinion, an excavator could be considered the same as an earth mover. Mr Saviour Bonello confirmed that an excavator could be considered as an earth mover. Mr Mario Saliba said that it could qualify as an earth mover. The reply given by Mr Anthony Cefai was in the affirmative and Ms Mary Ann Pace agreed with the replies given by the other members of the Board.

The Chairman Public Contracts Review Board verbalised that the Evaluation Board had just confirmed that an excavator was, in their opinion, an earth mover.

Mr Grech contended that Mr Attard's offer was disqualified because he did not provide the information where it was specifically requested, that is, against Item 2 Earth mover in Form 4.1. The Ministry for Gozo's representative pointed out that all the other five tenderers had filled in the information requested for the earth mover as specifically required in the tender dossier. The Chairman of the Public Contracts Review Board intervened to draw Mr Grech's attention to the fact that the information of the excavator was provided under other equipment on the same page and referred him to the principle of 'Substance over Form'.

Mr Grech emphasised that, by what was written in the letter of objection, the information against Item 2, 'Earth Mover' was left out deliberately because the appellant was assuming that his offer would have still been discarded if he had provided the requested information. Mr Grech remarked that he failed to understand why, in this particular instance, the appellant did not seek any clarification as he did on other tenders in the past.

Mr Grech's attention was drawn by the Public Contracts Review Board that Mr Attard did provide appropriate details relating to equipment required for the execution of the works requested by the tender. As a matter of fact there was more than one earth mover listed but since there was only one line where to insert such movers the appellant included them just below the text provided. Mr Grech agreed but added that the scope of transparency was to reduce, as far as possible, the discretion of the Evaluation Boards in the decision making process. Mr Grech explained that the appellant could have made an asterisk and referred to the relative items indicated under other equipment. He insisted that it was specifically written that relative information had to be provided against the earth mover.

Mr Saviour Bonello said that as a member of the Evaluation Board he had attended various courses and they were always told that (i) tenders having mandatory information missing would be automatically disqualified and (ii) Evaluation Boards had to abide strictly with the conditions of the tender document.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 17th March 2011 and also through their verbal submissions presented during the hearing held on 6th July 2011, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant’s claims and observations, particularly, the references made to the fact that (a) he felt that his bid was unjustly rejected because the reason given was that he did not include the earth mover claiming that an earth mover could refer to many different types of equipment, (b) he did not fill in the requested information related to the earth mover because it was not clear which specific type of equipment was required, that is, whether it was a Hymack and/or bulldozer and/or excavator etc. and (c) in his opinion, an excavator was equivalent to an earth mover;
- having considered the contracting authority’s representatives’ reference to the fact that (a) the appellant was contesting the Evaluation Board’s decision for two reasons, namely, on the substance and shortcomings in the tender and that the decision taken was against the spirit of the pertinent regulations of LN 296 of 2010, (b) the Evaluation Board had to abide by what was specifically required in the tender document, (c) Mr Attard’s offer was disqualified because he did not provide the information where it was specifically requested, that is, against Item 2 Earth mover in Form 4.1, (d) all the other five tenderers had filled in the information requested for the earth mover as specifically required in the tender dossier, (e) by what was written in the letter of objection, the information against Item 2, ‘Earth Mover’ was left out deliberately because the appellant was assuming that his offer would have still been discarded if he had provided the requested information, (f) whilst agreeing that Mr Attard did provide appropriate details relating to equipment required for the execution of the works requested by the tender, yet one had to take note of the fact that such details were not listed where it was indicated in the tender dossier and (g) the scope of transparency was to reduce, as far as possible, the discretion of the Evaluation Boards in the decision making process and it was specifically written that relative information had to be provided against the earth mover,

reached the following conclusions, namely:

1. The Public Contracts Review Board opines that Mr Attard did provide appropriate details relating to equipment required for the execution of the works requested by the tender as duly confirmed during the hearing by each and every member of the Evaluation Board. The fact that there was more than one earth mover listed but, since there was only one line where to insert such movers the appellant included them just below the text provided, does not mean that the appellant omitted the details as requested in the tender document.
2. The Public Contracts Review Board agrees that Evaluation Boards have to carry out their analysis of facts submitted within a fully transparent and equitable evaluation process. Nevertheless, such Boards should be more pragmatic and accountable as, after all, similar instances are causing a considerable amount of delays in the public tendering processes apart from overall waste of financial and human resources.

3. The Public Contracts Review Board also concludes that, in this particular instance, one cannot even refer to mandatory information being missing as erroneously concluded by, at least, one of the Evaluation Board members.
4. The Public Contracts Review Board maintains that Evaluation Boards should focus more on quality of equipment being provided, time frames of provision of service, adherence to safety standards and work practices, financial issues and so forth rather than being, unnecessarily, finicky on whether information is provided in the same line as indicated when it is evident that, occasionally, more space may be required. Undoubtedly, in this particular scenario one could have placed more emphasis on substance with this taking prevalence over form.

In view of the above this Board finds in favour of the appellant and recommends that the said tenderer be reinstated in the evaluation process as well as recommending that the deposit paid by the latter should be reimbursed.

Alfred R Triganza
Chairman

Edwin Muscat
Member

Joseph Croker
Member

18 July 2011