

PUBLIC CONTRACTS REVIEW BOARD

Case No. 509

KMS/TEN/035/2012

Tender for the Provision, Delivery, Installation and Dismantling of Professional Regatta Race Rigging at the Grand Harbour for Five National Regattas

This call for tenders was published in the Government Gazette on the 12th October 2012. The closing date for this call with an estimated budget of € 42,372.88 was the 26th October 2012.

Two (2) tenderers submitted their offers.

Mr Kevin Agius filed an objection on the 16th November 2012 against the decision of the Kunsill Malta għall-Ispport to recommend the award of the tender to Mr Franco Scicluna.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Joseph Croker and Mr Carmel Esposito as members convened a public hearing on Wednesday, 16th January 2013 to discuss this objection.

Present for the hearing were:

Mr Kevin Agius

Dr Antonio Depasquale	Legal Representative
Mr Kevin Agius	Appellant

Mr Franco Scicluna

Mr Franco Scicluna	Recommended Tenderer
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Kunsill Malti għall-Ispport

Dr Peter Fenech	Legal Representative
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Evaluation Board

Mr Joseph Ludwig Cassar	Secretary
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After the Chairman's brief introduction, the appellant was invited to explain the motives of his objection.

Dr Antonio Depasquale, legal representative of Mr Kevin Agius, the appellant, made the following submissions:

- i. by email dated 9th November 2012 the appellant was informed that his offer was not successful since it was not the cheapest compliant tender;
 - ii. albeit the appellant had requested details about the technical evaluation of the recommended tender yet this request was not entertained;
- and
- iii. the appellant was contending that it was not commercially viable for the bidder to carry out this contract for the amount quoted and, as a consequence, it was questionable whether the preferred bidder could provide the level of service requested in this tender.

Dr Peter Fenech, a legal representative of the Kunsill Malti għall-Isport, the contracting authority, on his part submitted that as per letter of objection dated 15th November 2012 two points were raised, namely:-

Technical competence of recommended bidder

- a. the appellant doubted the technical capacity of the preferred bidder to satisfy the technical specifications set out in the tender document;
 - b. that assertion was not, *per se*, sufficient for the appellant to lodge an objection because the evaluation of the technical aspects of the tender was the responsibility of the contracting authority, which, in this case had carried out the said evaluation and was satisfied that the recommended bidder did meet the requirements of the tender, including the experience required to carry out this service;
 - c. it was not allowed to provide the appellant with technical information of his competitor's (recommended) bid;
- and
- d. the contracting authority considered the recommended price of €39,895 reasonable when compared to the estimated value of €42,372 and, for that matter, it was up to the bidder to set his margin of profit.

Conflict of Interest on the part of the Recommended Bidder

- a. it was not correct to claim that the recommended tenderer was an employee of the Kunsill Malti għall-Isport;

- b. whilst Mr Franco Scicluna was not an employee of the contracting authority for the duration of this tendering process, yet, in the past Mr Scicluna was engaged on a part-time basis by the Kunsill Malti għall-Isport, along with hundreds of other coaches, with regard to the implementation of the programme 'Kids on the Move' which involved a number of sports disciplines;

and

- c. the appellant has failed to demonstrate that the evaluation process carried out by the contracting authority was defective or deficient in some way and, as a result, the reason for objection brought forward by the appellant did not constitute sufficient grounds for an appeal.

Dr Depasquale remarked that whereas the appellant was satisfied with the explanation given that Mr Scicluna was not in the employment of the contracting authority, he still maintained that the recommended price was not realistic and that the recommended tenderer lacked the necessary experience.

The Chairman Public Contracts Review Board noted that, according to the evaluation report, the appellant did not submit the 'Financial Bid', which shortcoming should have led to his disqualification from the outset and which shortcoming should have been communicated to the appellant.

Dr Fenech acknowledged the mistake on the part of the contracting authority in not notifying the appellant that he had failed to submit the 'financial bid'.

The Public Contracts Review Board examined the original tender submission of the appellant and it resulted that, whereas he had indicated the price in the *tender form*, the appellant had failed to submit the 'Financial Bid' as per Volume 4 which was a mandatory requirement as per clause 16.1 '*Content of Tender*' (f) (ii).

Mr Kevin Agius remarked that if he had been notified that the reason for non-award was the non-submission of the 'financial bid' he would not have lodged his appeal in the first place.

At this point the hearing came to a close.

This Board,

- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated 16th November 2012 and also through its representatives verbal submissions presented during the hearing held on the 16th January 2013, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by email dated 9th November 2012 the appellant was informed that his offer was not successful since it was not the cheapest compliant tender, (b) albeit the appellant had

requested details about the technical evaluation of the recommended tender yet this request was not entertained, (c) the appellant was contending that it was not commercially viable for the bidder to carry out this contract for the amount quoted and, as a consequence, it was questionable whether the preferred bidder could provide the level of service requested in this tender, (d) whereas the appellant was satisfied with the explanation given that Mr Scicluna was not in the employment of the contracting authority, he still maintained that the recommended price was not realistic and that the recommended tenderer lacked the necessary experience, (e) acknowledged the mistake on the part of the contracting authority in not notifying the appellant that he had failed to submit the 'financial bid' and (f) if he had been notified that the reason for non-award was the non-submission of the 'financial bid' he would not have lodged his appeal in the first place;

- having considered the contracting authority's reference to the fact that (a) with regard to Technical competence of recommended bidder, (1) the appellant doubted the technical capacity of the preferred bidder to satisfy the technical specifications set out in the tender document, (2) that assertion was not, *per se*, sufficient for the appellant to lodge an objection because the evaluation of the technical aspects of the tender was the responsibility of the contracting authority, which, in this case had carried out the said evaluation and was satisfied that the recommended bidder did meet the requirements of the tender, including the experience required to carry out this service, (3) it was not allowed to provide the appellant with technical information of his competitor's (recommended) bid, (4) the contracting authority considered the recommended price of €39,895 reasonable when compared to the estimated value of €42,372 and, for that matter, it was up to the bidder to set his margin of profit and (b) with regard to Conflict of Interest on the part of the Recommended Bidder, (1) it was not correct to claim that the recommended tenderer was an employee of the Kunsill Malti għall-Ispport, (2) whilst Mr Franco Scicluna was not an employee of the contracting authority for the duration of this tendering process, yet, in the past, Mr Scicluna was engaged on a part-time basis by the Kunsill Malti għall-Ispport, along with hundreds of other coaches, with regard to the implementation of the programme 'Kids on the Move' which involved a number of sports disciplines and (3) the appellant has failed to demonstrate that the evaluation process carried out by the contracting authority was defective or deficient in some way and, as a result, the reason for objection brought forward by the appellant did not constitute sufficient grounds for an appeal,

reached the following conclusions, namely:

1. The Public Contracts Review Board recognizes the fact that despite the appellant's claim wherein he questioned whether the preferred bidder could provide the level of service requested in this tender the said appellant failed to demonstrate such lack of capability.
2. The Public Contracts Review Board concurs with the position taken by the evaluation board in so far as the resistance to forward to the appellant technical information relating to the recommended bidder's submission. This Board has always maintained that, apart from certain commercial sensitivity, in this instance it was more a question as to whether the

appellant was basing an argument on a hunch or on concrete evidence. Whilst the former line of reasoning is not permissible at all, the latter issue concerns the fact that one seems to be more embarking on a fact finding mission which, *per se*, does equally not provide enough reason for anyone to file an objection.

3. The Public Contracts Review Board noted that, according to the evaluation report, the appellant did not submit the 'Financial Bid', which shortcoming should have led to his disqualification from the outset and which shortcoming should have been communicated to the appellant. As a matter of fact this Board, following a thorough examination of the appellant's tender submission, establishes that the said appellant has erroneously failed to submit the 'Financial Bid' as per Volume 4 which was a mandatory requirement in line with clause 16.1 '*Content of Tender*' (f) (ii).

In view of the above this Board finds against the appellant company but, in taking cognisance of the fact that the contracting authority had not notified the appellant that he had failed to submit the 'financial bid', thus recommends that the deposit paid by the same company for the appeal to be lodged should be reimbursed.

Alfred R Triganza
Chairman

Joseph Croker
Member

Carmel Esposito
Member

24 January 2013