

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case No. 573**

**06/12**

### **Tender for the Supply & Installation of Playing Field Equipment, Soft Flooring and Fencing in Gnien il-Kunsill Lokali, Gnien Profs. A. Tabone and Gnien Mons. Guzeppi Minuti**

The tender was published on the 11<sup>th</sup> September 2012. The closing date was the 12<sup>th</sup> October 2012.

The estimated value of the Tender was: €60,000. (Exclusive of VAT).

Seven (7) bids were received for this tender.

On the 9<sup>th</sup> April 2013 FGL Commercial Sales Ltd. filed an objection against its exclusion from the tender and the award of the tender to JGC Ltd.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Thursday 30<sup>th</sup> July 2013 to discuss the appeal.

#### **Present for the hearing were:**

##### **FGL Commercial Sales Limited - Appellants**

Mr Tony Bonello	Representative
Mr Gordon dimech	Representative
Dr John Gauci	Legal representative
Dr David Zahra	Legal representative

##### **JGC Limited. - Recommended Bidder**

Mr Pierre Cuschieri	Representative
---------------------	----------------

##### **Kunsill Lokali Birzebugia – Contracting Authority**

Mr Joseph Farrugia	Mayor
Mr Joseph Baldacchino	Councilor
Mr Carol Muscat	Councilor
Ms Maria Galea	Executive Secretary
Dr Victor Bugeja	Legal representative

After a brief introduction, the Chairman invited the appellants to explain the reasons for the objection.

Dr John Gauci on behalf of appellants explained that the hearing was the third time that this case has been before the Public Contracts Review Board.

At this point the contracting authority was asked by the Chairman to give the reasons why this case is before the board for the third time.

Dr Victor Bugeja, legal representative of the contracting authority explained that when the tender was issued, the appellant had failed to produce all the requested documents. Nevertheless, as the contracting authority was keen in the project, continued with the evaluation of appellant's bid. When all the bids were evaluated it was found that, apart from the fact that appellant's bid was not the best one, the equipment offered by another bidder would in the long term be the most advantageous offer. Thus it was decided to offer this bidder rather than appellant the tender in question. This notwithstanding the fact that appellant had not supplied all the necessary documentation, including the insurance. In its first decision the Public Contracts Review Board decided that this was not the right decision because if the contracting authority had a preference for certain material to be used for the equipment, it should have made the specifications clearer. The Public Contracts Review Board decision was to have a re-evaluation made. This meant that the evaluation process had to start anew. When this was done and the bids were evaluated again, it was discovered that appellant had not produce all the necessary documents. It was therefore decided to exclude his bid.

Dr John Gauci explained that when the appellant was excluded in the first award, an appeal had been filed. The Public Contracts Review Board went through every decision taken by the contracting authority to justify not choosing the cheapest bid, and discarded them. The Public Contracts Review Board decision then ordered the re-integration of appellant's bid into the evaluation process. This should have meant that appellant's offer, being the cheapest, to be accepted and the tender awarded to the appellant. Instead of doing this, however, the contracting authority decided to cancel the tender because they claimed that no funds were available since the government estimates had not been carried out. Appellant saw this decision to cancel as a strategy to dispense with the Board's decision. So a fresh appeal from the decision to cancel was entered, and once again the Contracting Authority's decision was overturned by the Public Contracts Review Board. Now at this stage the matter of non-submission of documents has been raised to discard appellant's bid once again. It is contended that this decision serves to attack the first decision taken by the Board which declared appellant's bid compliant. No details about the lack of documents were given, enabling the appellant to oppose these claims. It is only during the present hearing that the insurance policy was mentioned. This goes against the normal procedure.

Dr Victor Bugeja for the contracting authority said that:

- i) The list of employees, that should have been given with the tender was not submitted;
- ii) The insurance policy not submitted;
- iii) The list of main projects carried out in the last two years, and their value, was

- not submitted;
- iv) The list of machinery and equipment was not submitted, and v) certificates were not submitted. All these documents were required and were not submitted by appellant. Notwithstanding this defective submission, the contracting authority, still considered appellant's bid, because it was interested in obtaining the best offer for the tender. However, the same authority, being a public entity, considered also the long term outlook regarding maintenance cost for the equipment, and it was found that in this aspect, appellant's bid would no longer be the cheapest. The Public Contracts Review Board decided against this and stated that such considerations should have been made when the specifications were being drafted. On being asked by the Public Contracts Review Board Chairman, Dr Victor Bugeja stated that when the first award was made, the documents were missing. However, the Board in its first decision stated that new matters could not be raised at appeal stage. Since the matter of non production of documents was not stated as a reason for discarding appellant's bid, it could not be raised then during the first appeal. The first Board decision put everything *status quo ante* thus opening the evaluation process anew. The second time the Public Contracts Review Board decided that cancellation because of lack of funds was not justified and once again opened the evaluation process anew.
  - v) The reasons for today's appeal are not the same, and have not been already decided upon by the Public Contracts Review Board. The tender document gives the power to the contracting authority to reject even the cheapest tender. The evaluation process started again and when it was found that appellant's bid was not compliant because of non-submission of documents, it was discarded. The non production of documents is considered as leading to disqualification.

The Public Contracts Review Board expressed concern that the letter is taking over the spirit of the law in many cases brought before it. This must be generating a great waste of time and resources of public funds.

Dr John Gauci stated that in the first appeal the Board had gone through all the points on which appellant's bid was discarded by the contracting authority, and had rejected all those points. In the appeal appellant had asked for the decision to reject his bid to be revoked and also that the tender be awarded to the appellant. The Public Contracts Review Board's decision in the first appeal found for appellant. This means that the award should have been made to appellant firm. In the first decision the Public Contracts Review Board had also raised the issue of waste of resources, just as it was raised today. He insisted that he was found compliant by the Board and cannot be at this stage be declared as not compliant. The issue of non production of documents should have been raised when the first award was made enabling his client to argue against it then. Architect William Lewis's report during the first appeal only mentioned his preference to plastic equipment over wooden equipment and did not mention any missing documents. Furthermore Dr Gauci contends that clarifications should have been sought from his clients regarding any missing documents. The law has changed and administrative compliancy can now be rectified according to law. Missing documents fall under administrative compliance and so should have been rectified through clarification.

Chairman stated that the matter of non submission of documents was not raised in the first appeal and neither in the second appeal. Why was this matter being raised now during the

third appeal?

Dr Victor Bugeja stated that using the letter/spirit of law principle, the contracting authority had to decide within the law and as a *bonus pater familiae*. It decided to go for the plastic equipment because this would be more advantageous in the long term. This reasoning was rejected by the PCRB, but the decision did not go on to award the tender to appellant.

Dr John Gauci for appellant referred to the second appeal where appellant had asked that the Board orders the contracting authority to award the tender to appellant. The Board had found in favour of the appellant and ordered the adjudication process to continue. Any decision against this decision is against the law and goes against the principle of *res judicata*. The contracting authority had every chance to contest the PCRB decisions before the Court of Appeal but did not do so. It could not therefore take any other decision that goes against the two previous judgements.

At this point the hearing was brought to an end.

**This Board,**

**Having noted the Appellant's objection , in terms of ' Reasoned Letter of Objection' dated 9<sup>th</sup> April 2013 and also through the Appellant's verbal submissions presented by same during the hearing held on 30<sup>th</sup> July 2013, had objected to the decision taken by the pertinent Authority, in that:**

- a) This case is being brought before The Public Contracts Review Board for the third time. The previous two hearings and decisions thereof were that the Appellant be reintegrated in the evaluation process.**
- b) After the second decision taken by the Public Contracts Review Board , i.e. to integrate the Appellant in the evaluation process, the Contracting Authority decided to cancel the tender due to lack of funds.**
- c) When the Contracting Authority's decision was again overturned by the Public Contracts Review Board, the Contracting Authority adjudicated the Appellant's bid as being administratively non compliant, due to lack of documents that should have been submitted with the tender , by the Appellant.**
- d) It is only during this hearing that missing documentation is mentioned by the Contracting Authority with regards to the Appellant's bid.**
- e) Clarifications should have been sought by the Evaluation Board of the Contracting Authority.**
- f) In the second appeal made by the Appellant wherein the Public Contracts Review Board found in favour of the Appellant and the latter was recommended to be integrated in the evaluation process, the Contracting Authority had the opportunity to contest the PCRB's decision within the stipulated period.**

Having considered the Contracting Authority's verbal submissions presented by same during the hearing held on 30<sup>th</sup> July 2013, in that:

- a) The Public Contracts Review Board's decisions were that the Appellant's bid be integrated in the evaluation process.
- b) The Contracting Authority commenced with the evaluation process anew.
- c) During the evaluation process the Board of the Contracting Authority noted that the Appellant did not submit mandatory documentation as specified in the Tender Document.
- d) The information not submitted by the Appellant was the following:
  - i) List of Employees of the Appellant
  - ii) Insurance Policy as requested in the tender.
  - iii) List of main projects carried out by the Appellant during the last two years with values.
  - iv) List of machinery and equipment.
  - v) Other certificates.
- e) During the evaluation process, the Evaluation Board took also into account the 'Long Term Outlook' in terms of Maintenance Costs.
- f) The tender document conditions give the power to the Contracting Authority to discard even the cheapest bid.
- g) The Appellant's bid was not administratively compliant due to failure of submissions of mandatory documentation.

Reached the following conclusions:

1. This Board is somewhat disappointed as to why, during the evaluation stage, the Evaluation Board did not communicate with the Appellant regarding the missing documentation and as to why.
2. This Board is also not aware of the reasons why the Appellant did not submit the requested information as specified in the tender document.
3. The tender document lays down the required documentation that should accompany the tender. In this regard, the Appellant was in duty bound to abide by these requirements. In actual fact, he did not for some unknown reason. On the other hand, the Contracting Authority had the power to discard the Appellant's bid as it was not abiding by the requirements of the tender document.
4. The 'Long Term Aspect' with regards to maintenance costs, as considered by the Evaluation Board of the Contracting Authority, is to be commended as it may happen that the lowest bid is not the cheapest, in the long run.
5. This Board is purely taking into account the above mentioned four considerations in arriving at its decision.

**In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed.**

Dr. Anthony Cassar  
Chairman

Dr. Charles Cassar  
Member

Mr. Richard A. Matrenza  
Member

*18 September 2013*