

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case No. 594**

**MLC/001/2013**

### **Tender for the Services of a Perit.**

The tender was published on the 11<sup>th</sup> January 2013. The closing date was the 18<sup>th</sup> February 2013.

The estimated value of the Tender was under €120,000 (Exclusive of VAT).

Eleven (11) bidders submitted their offers.

On the 18<sup>th</sup> June 2013, Architect Anthony Bezzina filed an objection against a decision taken by the contracting authority, Msida Local Council to award the tender to Architects William Lewis and Architect Daniel Micallef.

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 Tuesday 24<sup>th</sup> September 2013 to discuss the appeal.

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

#### **Architect Anthony Bezzina - Appellant**

Architect Anthony Bezzina	Representative
Mr Clayton D'Amato	Representative
Dr Beppe Fenech Adami	Legal representative

#### **Architects William Lewis and Daniel Micallef - Preferred Bidder**

Architect William Lewis	Representative
Architect Daniel Micallef	Representative
Dr Benjamin Valenzia	Legal representative
Dr Stefan Zrinzo Aazzopardi	Legal representative

#### **Msida Local Council - Contracting Authority**

Dr Alex Sciberras	Vice Mayor Msida Local Council
Ms Marita Portelli	Executive Secretary

Following a brief introduction by the Chairman, Public Contracts Review Board, the appellant's representative was asked to make his submissions on the objection to the award.

Dr Beppe Fenech Adami, on behalf of the appellant stated that his client's offer was compliant with the tender conditions, as was the preferred bidders' offer. Therefore the adjudication committee had to base its assessment on the bidders' qualifications, the set up and finally the pricing. There is no doubt that appellant was in fact an architect; that appellant was competent; that appellant had years of experience with several other local councils; and that appellant provided the same service to the Msida Local Council for a number of years. During these years there never arose difficulties about his capacities and capabilities and the service provided. Appellant provided this service under several Mayors in the locality. The price factor thus remains. Dr Fenech Adami contended that in the tender's seven categories, his client's offer was the cheapest in all but one. It can be seen that there was no motivation behind the evaluation committee's decision to award the tender to the preferred bidder. There are no minutes or documents that show the motivation, on how the decision was taken.

Dr Alex Sciberras, Vice Mayor, Msida Local Council on behalf of the contracting authority, replying to questions by the Chairman Public Contracts Review Board stated that the appellant was totally compliant. Appellant's bid was the cheaper in five out of seven categories, but if all categories are taken globally, his offer was the cheapest. There was another bidder, tenderer number eight who had the lowest hourly rates. The offers were for rates for services, and when these are examined, the appellant's rates were cheapest. The appellant's hourly rates however were not the cheapest.

Dr Sciberras continued that it is apparent from the letter of objection that the appellant did not agree with the decision taken by the evaluation committee. However, Dr Sciberras stated, that the Public contracts Review Board could not question the discretion of the evaluation committee. The PCRB had to see that the committee had observed the principles of transparency and procedures. The discretion of the evaluation committee could not be substituted by that of the PCRB. He cited jurisprudence and referred to the case 'Cassar et vs Minister for the Development of Infrastructure' decided on the 27<sup>th</sup> November 1992 wherein the court made it clear that discretion given to the evaluation board could not be overruled. The award criteria of the tender were not the lowest price, but the tender was MEAT. It was the most favourable tender that had to be chosen. All compliant bidders were then examined under three criteria: Experience; Price and Organization Capability. Fifty percent (50%) marking was assigned to experience, thirty per cent (30%) to price, and twenty percent (20%) for Organization Capability. The Executive Secretary had prepared summaries of all the tenders received, and these summaries were examined by the evaluators during adjudication. Members of the evaluation board then individually assigned marks to the bidders, and the bidder who obtained most marks was recommended for the award. The cheapest bidder thus obtained 30% of the pricing marks. The preferred bidder had vast experience with several local councils and had submitted several references for works performed. Overall marks of the preferred bidder were the highest. The preferred bidder was bidder number 11 and it can be seen from the mark sheets that this bidder obtained higher marks from all the members of the evaluation board. The evaluation committee treated each bidder the same.

The Chairman asked where appellant lost most points, because the mark sheet is not clear enough.

Dr Alex Sciberras stated that it was not a question of losing points but rather of the preferred bidder gaining more points. Clearly what carried most weight in points was the experience.

Preferred bidder had more points had vast experience with local councils, he showed that he had more experience in that type of work. The preferred bidder produced seven letters of reference.

Ms Marita Portelli said that evaluation board members assigned markings individually and then each of them worked out the average. This average was then incorporated into the document that was later accepted by the Council. The individual markings were kept by the evaluation board members themselves and were not filed. The evaluating committee prepared the minutes of the meeting for the adjudication and the minutes are then brought before the Council which either approves them or not. In this case the minutes were approved.

The Chairman remarked that the schedule that was shown was not clear. The Board would like to know how the total percentage was arrived at for each bidder was arrived at. While the column headed Price 30% was filled in for each bidder, the other two columns headed respectively Organizational Structure 20% and Experience 50% are blank. It is not clear how many marks percentagewise, were given to each bidder for organization and experience.

On being asked by the Board if there were any parameters that were used to assess the experience and the organizational structure of the bidders, Dr Alex Sciberras referred to a decision by the European Courts of Justice which states that *“while the requirement to state the relative weighting for each of the award criteria at the stage of publication of the tender as now profiled under article 53.2 of the directive meets the requirement of principle of compliance of equal treatment and transparency, it cannot be argued that the scope of that principle stands in the absence of a specific provision to that effect in the directive to require that the relative weighting of criteria used by the contracting authority to be notified in advance to bidders prior to their submitting their bids.”* He insists that the fact that these criteria are not shown in the tender does not mean that there is a breach of article 53. He continued to explain that what garnered more marks was bidder’s experience as an architect, especially experience in works for the Local Council. These Councils have to submit applications for funding and an architect with such experience would be favoured. After analysing the offers it was felt that the preferred bidder had more experience. Both appellant and the preferred bidder had experience, but the latter had more.

The Chairman wanted to know the points obtained for experience by the appellant and the preferred bidder. It was not necessary to give the individual markings given by each member of the evaluation committee, but the total percentage given for the appellant and preferred bidder for experience.

Dr Alex Sciberras said that this information was not available but promised that he would submit it later on. The work sheet of each adjudicator remained in his possession and is not available. At the end of the adjudication meeting the average markings were published. This information exists and the Council has it. He promised to submit the information later on.

The Chairman insisted that the Board must have the information regarding the percentages given for organization and for experience, at least to the appellant and to the preferred bidder. Remarked that the Council ought to have these workings, and the Board wanted to see them.

Dr Fenech Adami stated that his client has vast experience as architect with the Msida Local Council of nine years. He also has had experience with several other Councils, Sliema, Balzan, Safi, Zurrieq, Qrendi, Mqabba, Kirkop, St Venera and Pieta`. He said that when this

experience is compared to that acquired by the preferred bidder, it is evident that appellant's experience with Local Councils is greater. As regarding the set-up, Dr Fenech Adami, continued, his client the appellant had a more organizational set-up than that of the preferred bidder.

Dr Alex Sciberras insisted that the discretion on evaluation the merits of the bidders, lies not with the Public Contracts Review Board, but with the evaluation board. Review should be limited to ensure compliance, transparency and that there were no errors. The evaluation committee created a basis for adjudication of the tender and followed it. Each evaluator then chose the preferred bidder, which in itself is indicative that the preferred bidder was the best choice.

Dr Zrinzo on behalf of the preferred bidder said that his client's offer shows that Architect William Lewis, who also has a master's degree, has thirteen years experience. In this offer he is joined by the team headed by Architect Daniel Micallef, who also provide service to several Local Councils, and the set-up is therefore wider and more organized, with full time employees. On examining the curriculum vitae of the two architects one can see that they have vast experience.

At this point the hearing was closed.

By an email sent on the 12<sup>th</sup> October 2013, the Msida Local Council provided the following data regarding the preferred bidder, shown as tenderer 11, and appellant, shown as tenderer 7. This information was requested by the Board during the hearing.

**Tenderer Price Experience/Structural organization.**

		Member 1	member 2	member 3	member 4	member 5
Tenderer7	29%	44%	25%	30%	52%	12%
Tenderer 11	26%	54%	45%	52%	55%	67%

**This Board,**

**Having noted the Appellant's objection , in terms of the 'Reasoned Letter of Objection' dated 18<sup>th</sup> June 2013 and also through the Appellant's verbal submissions presented by same during the hearing held on 24<sup>th</sup> September 2013, had objected to the decision taken by the pertinent Authority, in that:**

- a) The Appellant's bid was fully compliant, so that the determining factors for the award of the tender were the qualifications, the set up of the organisation and obviously the price.**
- b) The Appellant had the required experience in the field, and in fact the same experience exceeded that of the Preferred bidder.**

- c) **The Appellant claimed to have a better organisation set up than that of the Preferred bidder.**
- d) **There was no logical motivation behind the Evaluation Board's decision to award the tender to the Preferred bidder.**

**Having considered the Contracting Authority's verbal submissions presented by same during the hearing held on 24<sup>th</sup> September 2013, in that:**

- a) **The Contracting Authority admitted that the Appellant's bid was fully compliant.**
- b) **Although the Appellant's bid was the cheapest in five out of seven categories, same was not the cheapest overall.**
- c) **The Contracting Authority stated that the PCRB could not question the discretions taken by the Evaluation Board of the Contracting Authority.**
- d) **The Evaluation Board evaluated the tenders on a scientific basis. The same Board awarded points relating to experience, qualification and price to each Bidder in a methodical system.**
- e) **The preferred Bidder achieved the highest score in so far as experience was concerned.**

**Reached the following conclusions:**

1. **This Board does not agree with the comments made by the Contracting Authority wherein it was stated that the PCRB has no discretion on the evaluation merits of the Bidders. This Board has all the authority to evaluate the procedure adopted by the Evaluation Board in the selection of the Preferred Bidder.**
2. **From submissions presented by both the Appellant and the Contracting Authority, this Board opines that it is evidently clear that:**
  - i) **The Appellant's bid was not the overall cheapest offer.**
  - ii) **The Preferred Bidder's offer was fully compliant and same scored the highest percentage during the evaluation stage of the tender.**

**In view of the above, the Board finds against the Appellant 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

*7 November 2013*