

PUBLIC CONTRACTS REVIEW BOARD

Case No. 648

CT 2167/2011

Provision of Skips and Collection of Waste at St Vincent de Paule Residence and Homes for the Elderly.

The tender was published on the 21st December 2012 and the closing date was on the 12th February 2013.

The estimated value of the tender was €177,000 (Inclusive of VAT)

Eight (8) bidders had submitted an offer for this tender.

On the 4th November 2013 Greenlines Environmental Services filed an objection against the decision to award the tender to Saviour Mifsud for the price of €163,155 including VAT.

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 9th January 2014 to discuss this objection.

Present when the hearing started were:

Greenlines Environmental Services Limited - Appellant

Mr Sandro Micallef	Representative
Ms Suzanne Zammit	Representative
Dr Franco Vassallo	Legal Representative

Mr Saviour Mifsud - Preferred Bidder

Mr Saviour Mifsud	Representative
Dr Luciano Busuttill	Legal Representative

Elderly and Community Care - Contracting Authority

Mr Albert Briffa	Chairman Evaluation Board
Mr John Privitelli	Secretary Evaluation Board
Mr James Carabott	Member Evaluation Board
Mr Saviour Pace	Member Evaluation Board
Mr Ray Mamo	Representative

Department of Contracts

Mr Nicholas Aquilina	Representative
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The Chairman made a brief introduction and invited appellant's representative to make his submissions.

Dr Franco Vassallo on behalf of appellant said that there were two grievances raised by appellant regarding the award of this tender: a) the tender was awarded in October 2013 when the validity period of the bids had expired; and b) the tender document raises concerns on the validity of the tender.

- a) Dr Vassallo explained that the tender had a validity period of 150 days. When examining the closing date which was the 12th February 2013 and the award date, which is the 25th October 2013 it can be clearly seen that the tender had expired. Therefore no award could have been made unless the period was extended.
- b) His client has been contesting years the award of Waste contracts. The present system used by the local councils where these do not pay landfill charges. The contractor thus is able to dispose of the rubbish without paying charges. However appellant noticed that it stopped being awarded tenders because it became over-priced. Appellant came to know that private tenders for the removal of waste, where charges for disposing of the waste were payable. However bidders could submit lower prices for private tenders if they had the contracts with local councils. They achieved this by mixing the waste they collected from private tenders to the waste collected from local councils. In this way they would not pay the necessary landfill charges on waste collected from the private sector. Appellant has taken up the matter with all the entities involved including WasteServe and the police. WasteServe were only interested in collecting the charges whoever paid them. Appellant pointed out that this was a criminal offence where public funds were being stolen. Appellant finally resorted to the Ombudsman.

In the present tender, continued Dr Vassallo, the contracting authority declared that it would be paying the landfill charges itself, indicating that some form of control was being exercised. However when comparing our bid with that of the recommended tender, these do not make sense. He stressed that he is not alleging that the preferred bidder was doing anything wrong, but the matter raised suspicions. However it can be seen from Clause 4.4.2 that the receipt for landfill charges is issued on the contractor and not on the contracting authority and when appellant asked about this it was found that the contracting authority has no contingency for checking. Finally Dr Vassallo explained that he is asking the Board to cancel this tender so that it may be reissued in a way allowing for proper monitoring of the charges. The contractor should be issued with a receipt stating how much waste was collected from the contracting authority. Appellant is thus requesting more monitoring and an amendment to Section 4.2 .1.2 which enables monitoring of the quantity of waste collected. This would ensure better value for money for the tax-payer.

Mr Albert Briffa, the Chairman of the evaluation Board, on behalf of the contracting authority said that what the appellant stated about the first grievance was correct and admitted by the contracting authority, the 150 day validity period had lapsed. But the evaluation board had consulted the Department of Contracts on the matter and was informed that it was acceptable to continue the evaluation process. The awarded tenderer would however have the option to insist for a change of his price or to accept it as it was. In the case the preferred bidder opted to change his bid, as the tender validity had lapsed, then the tender would be offered to the second rated bidder and then the third rated and so on. Regarding the appellant's second grievance, Mr Briffa said that the contracting authority asked bidders, in their financial bid, to give the all inclusive rates including VAT, Echo contribution, and any other charges or rates

applicable. Bidders could not then add the landfill charges in their rates. The rate submitted had to be per skip per day all charges included.

Dr Luciano Busuttill on behalf of the preferred bidder said that the fact that the validity period had lapsed is not contested since it is evident. This objection however, before the Public Contracts Review Board was filed after the conclusion of the evaluation process and the award of the tender. Therefore if there was anything in the process that caused the tender to be null, it had to be raised elsewhere and should have been the subject of a case at the Courts of Justice. One should not wait to raise the matter after being informed that he was not awarded the tender. It was not for the Public Contracts Review Board to decide on the matter at this stage, it would be ultra vires if the Board decided to do so. The objection was raised because appellant felt aggrieved by the award decision not because of the nullity of the tender. Regarding appellant's second grievance Dr Busuttill said that that was about administrative matters and he would not go into it.

Mr Albert Briffa for the contracting authority said that the evaluation board did not consult anyone. The evaluation board had given its decision within the 150 day period. The first evaluation report was remitted to Department of Contracts on the 16th July 2013. The Department of Contracts had asked a number of clarifications, and asked the evaluation board to amend the report. He reiterated that the evaluation board was informed that the expiry of the validity period did not halt the adjudication process as explained before.

Dr Franco Vassallo for the appellant said that terms were binding on both bidders and the contracting authority. If clause 34.1, Notification of Award was examined, it could be seen that it was mandatory on the contracting authority that notification of the award had to be done prior to the expiry of the validity period of the tender. He reiterated that the Board should ensure that if the tender was re-issued there would be specific safeguards that SVPS is paying for its waste.

Dr Luciano Busuttill for the preferred bidder said that the Board will have to decide if it was competent to decide on the matter because although the 150 day validity period had expired, no bidder, not even appellant had raised the matter with the contracting authority. The validity of the tender cannot be attacked before this Board. The Board should only decide on the nullity or otherwise of the adjudication and not on the nullity of the tender itself.

Dr Franco Vassallo said that Regulation 85.1 (c) of the Public Contracts Regulations is clear that the Board is empowered to address complaints relating to contracts, award decisions or cancellations of a tender.

The hearing was at this point brought to a close.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 1st November 2013 and also through the Appellant's verbal submissions during the hearing held on 9th January 2014, had objected to the decision taken by the pertinent Authority, in that:

- a) **The award of the tender was in fact affected after the tender had expired, ie 'Lapse of 150 days'.**

- b) Appellant contends that much lower bids were submitted due to the fact that the waste collecting process was being composed of a mixture of waste collected from private sources and waste collected from Local Councils.**
- c) This procedure allowed the tolerance of avoiding the tenderer of paying landfill charges , as waste collected from Local Councils were exempt from paying landfill charges.**

Having considered the Contracting Authority's verbal submissions during the hearing held on 9th January 2014, in that:

- a) The Evaluation Board did in fact consult the Department of Contracts and were advised to carry on with the award of the tender, even though the '150 day validity period' had elapsed.**
- b) The Tender document clearly stated that 'Bidders had to quote an all inclusive rate, which would obviously include all charges connected with the required assignment'.**

Reached the following conclusions:

- 1. This Board seriously suggests that unless more internal controls are carried out by the Contracting Authority regarding such types of tenders, abuse will be encouraged. Taxpayers' funds are to be strictly safeguarded and this same Board strongly recommends that such internal control measures be instituted immediately.**
- 2. Regarding the '150 day validity period', this Board opines that since not one single Bidder objected to this issue prior to the award of the tender, it transpires that the 'lapse of time of the tender' was not contested and the fact that it has been raised during the Appeal's hearing does not hold waters.**
- 3. The Preferred Bidder's Offer was fully compliant and the cheapest.**

In view of the above, this 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

18th February 2014