

PUBLIC CONTRACTS REVIEW BOARD

Case No. 649

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 J. Micallef & Son Express Skip Services Limited 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:

J. Micallef & Son Express Skip Services Limited - Appellant

Mr Joseph Micallef	Representative
Dr Paul Micallef Grimaud	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	Procurement Manager
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The Chairman made a brief introduction and invited appellant's representative to make his submissions.

Dr Paul Micallef Grimaud on behalf of the appellant said that the tender entailed the carrying of clinical waste that was considered as hazardous waste. He contended that to process hazardous waste, the contractor has to have special permits and licences and the preferred bidder was not in possession of these necessary permits. The preferred bidder did not have the necessary MEPA permit neither did he have a Licence issued by Transport Malta specific for the transport of hazardous waste. Hence appellant contends that the preferred bidder was technically not compliant. His client the appellant is in possession of the required licences, and to obtain these licences entails certain additional expenses that had to be reflected in the bid price of appellant's offer.

Mr Albert Briffa, the chairperson of the evaluation board, on behalf of the contracting authority stated that the tender did not require the submission of these licences by the bidders. However, during the evaluation process, the board decided that they should examine the licences but were informed by the Department of Contract that they could not ask for them at the evaluation stage. The tender had a mobilization period of 4 weeks, within which, a bidder who was awarded the tender could obtain these licences. The law required contractors to be in possession of these licences. The tender document stated that bidders must possess all the licences and to be in line with the requirements of legislation. However no request to submit these licences was contained within the tender dossier.

Dr Paul Micallef Grimaud stated that the tender required bidders to be in possession of the necessary licences and he could not see why these licences were not included in the documents bidders had to submit. According to the tender, bidders had to be aware of all that was necessary for them to provide the service.

Mr Albert Briffa for the contracting authority continued that all bidders had signed a declaration which stated that they accepted all the tender conditions and that they were compliant with all the relevant laws.

The Chairman contended that the evaluation board had to check that all bidders had the necessary permits and licences to be able to provide the service they offered.

Mr Albert Briffa for the contracting authority repeated that the evaluation board recognized this and had asked for permission to demand their production but was told to decide and adjudicate on the tender dossier submitted by the bidders, and the board's decision was accordingly based on what was available.

Dr Luciano Busuttil on behalf of the preferred bidder stated that the preferred bidder had submitted all the documents that were requested. He could not see why the evaluation board could not ask the bidders to provide the licences that had been omitted from the tender requisites. This omission of the requisites had prejudiced his client's offer since he could not produce the documents at this stage although had the requirement been listed in the tender requirements, his client could have obtained the licences prior to submitting his tender. Bidders were expected to abide by the requested requirements. And his client did so.

The Chairman remarked that in his opinion, it was up to the contracting authority to demand the production of the licences and it should have included this in the tender document. The

contracting authority was obliged to ascertain that whichever tenderer was awarded the tender was in fact in possession of the requirements to provide the service.

Replying to a question by the Chairman, Dr Paul Micallef Grimaud said that appellant's bid was set at €200.57 per day, that is, the second cheapest one.

The Chairman asked Dr Busuttill if the preferred bidder his client was in possession of a MEPA permit.

Mr Saviour Mifsud the preferred bidder under oath stated that he was in possession of a MEPA permit. He did not have any ADR issued by the Transport Authority. He stated that his engineer had acted under MEPA's directions and applied for the relevant permit. MEPA had then issued a licence. MEPA had instructed him what to do to be able to carry hazardous waste and then he had appointed an engineer to obtain the necessary permit.

Mr Nicholas Aquilina on behalf of the Department of Contracts said that what was admissible to ask for during adjudication was pre-determined by the tender conditions. If the tender did not state that the evaluation board could ask for certificates then it was not admissible to ask for the production of additional certificates during the process. The tender had to be adjudicated on the items that had been requested and submitted.

Mr Albert Briffa the chairman evaluation board, under oath, replying to questions by the Chairman whether in his opinion since the permits were required and therefore should have been requested in the tender, he said that yes he agreed. He contended that bidders were bound to state the truth when filling in their bids and there were grave repercussions if it appeared that this was not done. There were circumstances however where bidders could have meant to obtain the necessary permits in the interim period after filing their offers. This was acceptable. Replying to a question by Dr Luciano Busuttill, witness replied that the preferred bidder was fully compliant with the tender requirements. Replying to a question by Dr Paul Micallef Grimaud, witness replied that the evaluation board did not verify direct with the other authorities whether bidders possessed the necessary permits or not.

Dr Luciano Busuttill finally made a legal point in that since appellant's bid was less than €120,000 therefore the letter of objection had to have been filed within 5 days. This objection was filed later than 5 days and is therefore not valid.

Dr Paul Micallef Grimaud said that the objection was filed within the period specified by the Department of Contracts. He stressed that bidders had to be technically compliant at the time the tender closed. The fact that the tender failed to request the submission of the permits does not mean that the preferred bidder, who did not have the permit was compliant.

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 4th 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 Preferred Bidder was not in possession of the mandatory permits to transport hazardous material.**
- b) **Appellant contends that the mandatory permits should have been included as submissions with the tender document.**

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

- a) **The Tender document did state that 'bidders must be in possession of the necessary licences'.**
- b) **Bidders signed a declaration confirming that they were in line with all the local regulations.**
- c) **The preferred Bidder was fully compliant with all the requirements as laid out in the tender document.**

Reached the following conclusions:

- 1. This Board opines the tender document should have included mandatory submission of the relative permits.**
- 2. The fact that the Preferred Bidder signed the declaration that he is in possession of the necessary licences did suffice the requirement of the tender document. However, on the award of tender, the Evaluation Board is in duty bound to ensure that such required licences are in fact in possession of the Preferred Bidder.**
- 3. The Evaluation Board assessed the Preferred Bidder's offer on the basis of what was 'required and duly submitted' by same.**
- 4. The Preferred Bidder's offer was fully compliant and the cheapest.**

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

18th February 2014

