

PUBLIC CONTRACTS REVIEW BOARD

Case No. 688

KLBO 04/2013

Tender for the Collection of Mixed Household Waste in an Environmentally Friendly Manner.

The tender was published on the 22nd November 2013. The closing date was the 13th January 2014.

The estimated value of the tender was €320,000 (Excluding VAT).

Four (4) bidders had submitted their offer.

On the 27th February 2014 V&A Services filed an objection against the decision to award the tender to Mr Saviour Mifsud.

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 the 22nd April 2014 to discuss this objection.

Present for the hearing were:

V&A Services - Appellant

Mr Brian Vella	Representative
Mr Ronald Attard	Representative
Dr Michael Grech	Legal representative
Dr Kevin Camilleri Xuereb	Legal Representative

Mr Saviour Mifsud - Preferred Bidder

Mr Saviour Mifsud	Representative
Dr Franco Galea	Legal Representative
Dr Christopher Chircop	Legal Representative

Kunsill Lokali Bormla - Contracting Authority

Mr Brian Loffreda	Representative
Mr Joseph Caruana	Executive Secretary
Dr Luciano Busuttil	Legal Representative

When the hearing commenced, Dr Luciano Busuttill on behalf of the contracting authority filed a detailed letter of reply to the letter of objection and a copy of the evaluation report.

The Chairman made a brief introduction and invited appellant's representative to make his submissions on the objection.

Mr Brian Vella on behalf of the appellant raised the following points:

- i. He could not understand how the evaluation committee worked out the points on financial offer of the bidders taking into consideration also the offers of those 2 bidders who had already been disqualified.
- ii. Regarding the human resources to be used to provide the service he said that while the appellant had submitted this requirement and obtained full points, the preferred bidder did not and should not have obtained any points yet he was awarded 13 points.
- iii. He desired to know how the points on the year of manufacture of the vehicles were awarded.
- iv. He claimed that appellant had asked to be shown the other bidders' tender to examine the reference letters submitted but was denied this right. He asked if the preferred bidder had submitted any completed contracts.
- v. Re default notices. Appellant's offer had two marks deducted for a default notice on which an appeal is still pending.

He claimed that the marks assigned to appellant and the preferred bidder were 42.9 and 55.8 respectively however this was when the financial marks were worked including the offers of the two bids that had been disqualified, according to the evaluation report. He claimed that had the financial points been worked only on those bids that were compliant then the points awarded to appellant would have been 49.2 and those of the preferred bidder 47.

Dr Michael Grech on behalf of the appellant explained that if the financial offer points were worked only on the amounts submitted by compliant bidders then the position of the final ranking would have been different.

Mr Brian Vella for the appellant continued that according to page 5 of the evaluation report the preferred bidder failed to submit a signed declaration re employees to be assigned on this contract, yet the same preferred bidder was assigned points 13. He asked on what basis this was done.

Dr Michael Grech on behalf of the appellant said that only two bidders remained for the evaluation process. He explained that this objection was based on 4 grievances that are:

- a) That the preferred bidder failed to comply with the tender specifications and his offer was thus incomplete. The failed bidder did not submit a signed declaration showing the number of employees assigned to the contract according to Article 21. This failure was noted twice by the evaluation committee but the Local Council said that this Article referred to the ETC certificates and not to the declaration. He explained that the appellant did not agree with this interpretation. Article 21 was mandatory and it said that *tenderers are also required to submit a signed declaration*. It was only later that reference is made to certificate/certificates. The declaration is clearly important and a requisite since the bidders here showed what manpower they would

- be using.
- b) That the workings out of points of the financial offer were also based on the financial offers of discarded bidders. Contended that this should not have been done and the discarded bidders should not have been assigned points. The cheapest offer obtains maximum points for financial bid.
 - c) According to page 6 of the evaluation report the preferred bidder should have received no points since he did not submit the declaration showing the number of employees assigned to the contract.
 - d) The assigning of points to both year of manufacture of the vehicles as well to Euro mark does not make any sense. What counts is the Euro grade ranking of the vehicles.
 - e) References. Here it is important to consider only completed contracts for reference purposes. He insisted that the information should have been given to his client. However he claimed that the tender required a minimum of one reference letters yet appellant was assigned 12 marks for three references while the preferred bidder was assigned 20 marks for five references.
 - f) The last grievance was that the notice sent to appellant informing him of the award decision was null since no appeal period was indicated. The notice also gave the wrong information because it indicated that objections should be filed at the Council while in fact under Regulation 84 requires that objections be filed with the PCRB. He also contended that the letter of reply by the preferred bidder confirms appellant's stand regarding the failure to submit the signed declaration.

Dr Luciano Busuttill on behalf of the Bormla Local Council, the contracting authority said he would not be going into the matter of the submitting of the declaration because Article 21 was clear enough. He claimed that according to the appellant's signed declaration, appellant would be using all his employees to work the Bormla contract. However appellant was assigned maximum points. In adjudicating the tender, the Council assumed the functions of an evaluation board. He personally was present as an advisor but did not have any voting rights. After the disqualification of two bidders the evaluation committee assigned points only to compliant bidders and had drawn up a report a copy of which he was presenting, and it can be seen that points were only awarded to appellant and to the preferred bidder.

Dr Luciano Busuttill continued that the evaluation board, to be hundred percent certain that the rejected bids were really non-compliant, on the day after the report made an exercise to show how the points would have been assigned had the two bids not been rejected. Another report was therefore drawn up. Page 3 of the evaluation report shows how reference letters were assigned points. The preferred bidder had more references than the appellant and was assigned more points. Satisfying the minimum requirements did not entitle you to maximum points. Regarding Vehicles, page 6 of the report, he said that points were allocated to the year of manufacture of the collection vehicles. Appellant's was 1997/1995 and appellant was assigned 2 marks; the preferred bidder's was 2012/2007 and was assigned 10 marks. When it came to the engine model, appellant had two Euro IV vehicles while the preferred bidder had one Euro V and one Euro IV and thus was assigned more points. This was according to the tender document itself. Regarding the appellant's last grievance Dr Busuttill contended that the issuing of a wrong notice does not render the tender award null. Insisted that appellant asked to be shown the whole tender submitted by the preferred bidder. This is definitely not possible; bidders cannot be granted leave to examine each others' tenders

Dr Michael Grech for the appellant said that the ETC certificate of appellant's employee's lists twelve, of these 7 were going to be assigned to this tender. There has been no plausible

explanation given how the points were assigned. The assignment of points according to the year of manufacture is being contested.

Dr Franco Galea on behalf of the preferred bidder referred to the letter of reply his client had submitted. The fact that his client did not submit a signed declaration of employees to be assigned to contract was admitted. The tender document referred to production of certificates and to the declaration. Exclusion was definitely tied to the certificates only. For human resources the evaluation board assigned full marks to the appellant and he agreed with this. The preferred bidder was penalized by being assigned less marks. Page 3 of the tender, Article 2.4 explained the criteria of the assigning of points. These were assigned independently from those of the other bidders. He contended that the year of manufacture of the vehicles mattered and made a difference. The fact that appellant did not sign for the default notice did not mean that the default notice had not been issued. Finally he claimed that the appellant cannot be allowed to see the preferred bidder's tender. In fact according to the regulations that states that if a bidder has acquired any information on the bid of another bidder's tender, he would be automatically disqualified.

Dr Luciano Busuttill for the contracting authority stated that the appellant's default notice had been appealed from but it had been confirmed.

Dr Michael Grech for the appellant said Article 21 of the tender was important and was relevant for evaluation purposes. The number of employees to be assigned is important. Regarding the request for information he claimed that the law itself in Article 44 allows for the request for information.

The Chairman remarked that local councils in general are failing to give the reasons with the letter informing bidders of the tender awards.

At this point the hearing was closed.

This Board,

Having noted the Appellant's objection, in terms of the ' Reasoned Letter of Objection ' dated 27th February 2014 and also through Appellant's verbal submissions during the hearing held on 22nd April 2014, had objected to the decision taken by the pertinent Authority, in that:

- a) **The Preferred Bidder failed to submit the declaration from the ETC, denoting the number and details of the employees to be assigned to the tender works in question. In this regard, this failure should have rendered the Preferred Bidder's offer as invalid.**
- b) **Appellant contends that the allocation of points to compliant bidders was not justly apportioned. If the apportionment of points or marks were based on the financial element, the Appellant's offer, which had the cheapest bid, should have been allocated the maximum points.**

- c) **The criterion employed by the Evaluation Board was incorrect.**
- d) **The Contracting Authority failed to specify the ‘Time frame’ for the Appeal, in the notice of refusal of the Appellant’s bid.**
- e) **Appellant also contends that upon request, he was denied of the required information pertaining to other contesting bidders.**

Having considered the Contracting Authority’s verbal submissions, during the hearing held on 22nd April 2014, in that:

- a) **The Evaluation Board assigned points / marks only to compliant Bidders.**
- b) **Points were awarded in respect of, human resources, equipment to be used in the tender works, EU certification of equipment and any previous default notices. In this respect, the evaluation Board, acted in the fairest manner.**
- c) **The Contracting Authority was not, in a pertinent position, to give any information about other Bidder’s offer to the Appellant.**

Reached the following conclusions:

1. **First of all, this Board, on numerous occasions, have pointed out that, Local Councils are legally bound to state specifically the reasons for refusal of a tender, when sending a ‘Notice of Refusal of Award’ to unsuccessful Tenderers.**
2. **This Board also opines that, the fact that the Preferred Bidder did not sign the declaration, wherein same had to declare the number of employees to be assigned for the tender works, but submitted the requested information, does not in any way, breach the conditions as laid out in the tender document.**
3. **This Board, opines that the evaluation procedure adopted by the Evaluation Board of the Contracting Authority acted in the following manner:**
 - i) **The Evaluation Board acted in a transparent and diligent way.**
 - ii) **The system of allocation of points/ marks by the Evaluation Board was fair and just.**
 - iii) **The selection criteria applied by the Evaluation Board was just and competent.**
4. **This Board also upholds the fact that the Contracting Authority could not divulge any information to the Appellant regarding competing tenderers.**

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

20 June 2014