

PUBLIC CONTRACTS REVIEW BOARD

Case No. 718

NLC 249/00: Tender for Environmentally Friendly Collection of Bulky Refuse

The tender was published on the 31st January 2014. The closing date was the 4th March 2014. The estimated value of the Tender was €24,406 (Excluding VAT)

Seven (7) offers had been received for this tender.

On 6th June 2014 Messrs Dimbros Limited filed an objection against the award of the tender to the second cheapest bidder.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Friday the 11th July 2014 to discuss the objection.

Present for the hearing were:

Dimbros Limited - Appellant

Mr Malcolm Dimech	Representative
Dr Franco Galea	Legal Representative

Mr Jonathan Mangion - Preferred Bidder

Mr Jonathan Mangion	Representative
Dr Yanika Caruana	Legal Representative

Naxxar Local Council - Contracting Authority

Mr Paul Gatt	Executive Secretary
Dr Adrian Mallia	Legal Representative

Following a brief introduction by the Chairman wherein it was explained to the parties that a recording of the hearing was being made for the sole purpose of compiling the minutes, the appellants' representative was invited to make his submissions.

Dr Franco Galea on behalf of the appellant Dimbros Limited submitted that the criterion for the award of this tender was the best rate offered. Appellant had submitted the cheapest offer but another bidder, whose offer was not the cheapest, was chosen as the preferred bidder. The only reason given to appellant for this decision was that since the preferred bidder had been providing the service and the Local Council preferred to have him carrying on providing the service as this choice gave more guarantees. Although the difference in bids was not great, this tender was not for a once only delivery but for around 100 deliveries per week for a period of three years. The rates offered by bidders were per delivery. Furthermore, it was not correct for the contracting authority to state that the preferred bidder had been providing the service. Appellant is informed that in fact the previous contract was not with the preferred bidder but with the preferred bidder's employer, Euroclean Limited. He reiterated that the tender specifications did nowhere mention past experience with the contracting authority as being an award criterion.

Dr Adrian Mallia on behalf of the contracting authority stated that there was no contestation of the facts as submitted by appellant. He added that since this service was for the removal of bulky refuse, where citizens called the local council to have bulky items removed, having someone whom the contracting authority knew providing the service had some value. It would be satisfied that the contractor was familiar with the locality's areas. He further contended that the Public Procurement Regulations do not apply for this tender. The value of the tender is less than €120,000. Local Councils are listed in the Regulations as Schedule III entities. Regulation 20 of the regulations, that regulates tenders below €120,000 mentions only Schedule II entities. Thus it is clear that the law does not apply to local councils for tenders valued below €120,000. These tenders are regulated by the local councils act. While the award criteria for tenders that are regulated by the Public Procurement Regulations are either MEAT or lowest price, the criteria governing the local councils procurement are neither MEAT nor lowest but the 'best value for money'. The councils have to choose the most favourable tender. The local councils are not obliged to choose the cheapest offer but can take into consideration several other factors. In the present case the contracting authority preferred to choose a bidder who had provided the service before, being the previous contractor's employee. The preferred bidder's offer was considered as the best value for money offer. At this point Dr Mallia filed a copy of the legal notice governing the procurement of local councils for values less than €120,000.

The Chairman here remarked that the money spent by local councils comes from public funds and therefore the Board preferred to be guided by the Public Procurement Regulations. He wanted to know the approximate number of deliveries because although the difference between bids was minimal, the value depended on the number of deliveries.

Mr Paul Gatt, the Executive Secretary of the Naxxar Local Council said that the average number of collections per year, based on the years 2012 and 2013, was 3,100 collections.

Dr Franco Galea for the appellant claimed that the tender in question was after all a public call for tenders where anyone could have bid. Nowadays there are certain aids for moving about that make the need for knowledge of the locality not relevant. The call was for items of not more than 3 cubic meters which is not such a large volume and the frequency of collections would be greater. The spending of public funds has to be accountable even for small amounts and the preferred bidder should not be advantaged just because he had

delivered the service before.

Dr Yanika Caruana on behalf of the preferred bidder said that the tender document mentioned the most favourable offer and not the cheapest offer. Her client the preferred bidder resulted to be the most favourable and was thus awarded the tender.

Dr Franco Galea for the appellant said that the tender document itself referred to the Public Procurement Regulations where it mentioned the right for appeal.

Dr Adrian Mallia for the contracting authority contended that the fact that the tender dossier referred to the Public Contracts Review Board in cases where an objection was to be made does not mean that the Public Procurement Regulations apply. This Board has the jurisdiction to hear objections but this arises from the articles of the Local Councils legal notice. Local Councils have to abide by those regulations and cannot just follow the Public Procurement Regulations.

At this point the hearing was closed.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 6th June 2014 and also through Appellant's verbal submissions during the hearing held on 11th July 2014, had objected to the decision taken by the pertinent Authority, in that:

- a) Appellant claims that the only reason why his offer was discarded, was due to the fact that the Preferred Bidder, who had been giving the same service to the same Local Council, was more familiar with the respective Council's area, thus giving a better and more efficient service to the Contracting Authority, (namely the Naxxar Local Council). In this regard, Appellant contends that, although "Naxxar is a vast Area," Appellant contends that he has the necessary expertise to carry out such assignment as requested in the tender document.**
- b) Appellant also contends that his offer was cheaper than that of the Preferred Bidder.**

Having considered the Contracting Authority's verbal submissions during the hearing held on 11th July 2014, in that:

- a) The Contracting Authority maintains that the 'Public Procurement Regulations , do not apply to this particular appeal, since the estimated value of this tender is less than € 120,000 and also since the Local Councils are regulated by the 'Local Councils Act';**
- b) The Local Council is not obliged to select the tender that renders the cheapest price, but rather great importance is given to previous knowledge of the specific area, to be serviced by the potential bidder.**

Reached the following conclusions:

- 1. This Board would like to point out that in accordance with the ‘Local Councils Regulations’ , with particular reference to clause 17, wherein it states that; “ in all cases, where the Contract value exceeds € 12,000, the procedure for an Appeal shall be in accordance with the ‘Public Procurement Regulations’. The Appeal Board mentioned in clause 10.3 of the Local Councils Act, shall not have jurisdiction in such cases. This means that this Board (PCRB) does have the jurisdiction to decide on the outcome of this Appeal.**

- 2. After having considered all the facts and submissions by both the Appellant Company and the Contracting Authority, this Board opines that:**
 - i) The fact that the Preferred Bidder had previous experience, (as an employee of the previous Preferred Bidder) of the same area, should not have been considered by the Evaluation Board, as a disadvantage to the Appellant’s offer. In this regard, this Board does not find the reason of ‘previous experience of the area’ to be the deciding factor in awarding the tender to the Preferred Bidder;**

 - ii) If the principle of ‘previous experience of the area’ is applied and given great weighting in assessing a tender, then ‘fair competition’ is being limited. It has been established from credible submissions that the Appellant is well experienced in the field of the tendered activity, he is also administratively and technically compliant and his offer is cheaper than that of the Preferred Bidder.**

In view of the above, this Board finds in favour of the Appellant Company and recommends that:

- a) The Appellant’s offer should be reintegrated in the Evaluation Process;**

- b) The deposit paid by Appellant Company should be reimbursed.**

Dr. Anthony Cassar
Chairman

Dr. Charles Cassar
Member

Mr. Lawrence Ancillieri
Member

26 August 2014