

PUBLIC CONTRACTS REVIEW BOARD

Case No. 728

GCCL T 03/2014

Tender for the Provision of Advertising Services.

The tender was published on the 4th April 2014. The closing date was the 2nd May 2014.

The estimated value of the Tender was €214,600 (Exclusive of VAT)

Three (3) bidders had tendered for this tender.

On the 5th August 2014 Aiken Services Limited filed a letter of objection objecting against the cancellation of the tender by the contracting authority and asking to be awarded the tender.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Wednesday the 20th August 2014 to discuss the objection.

Present for the hearing were:

Aiken Services Limited - Appellant

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| Mr Kenneth Abela | Representative |
| Ms Sylvana Calleja | Representative |
| Dr Mark Simiana | Legal Representative |

Gozo Channel Company Limited - Contracting Authority

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| Ms Jacqueline Mizzi | Chairperson Evaluation Board |
| Mr John Muscat | Secretary Evaluation Board |
| Mr Mark Formosa | Member Evaluation Board |
| Mr Anthony Mizzi | Member Evaluation Board |
| Mr Philip Vella | Member Evaluation Board |
| Dr Georgine Schembri | Legal Representative |

Others

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

Dr Mark Simiana on behalf of Aiken Services Limited, the appellant company explained that the non motivation for the cancellation of the tender in the notice sent by the contracting authority to appellant was the main reason for the objection. He claimed that since no reason had been given for the cancellation, his client could not contest the decision properly since the motivation behind the decision remained withheld.

The Chairman remarked that it was not correct for a contracting authority to cancel a tender without explaining the reasons for such cancellation. The tender document requires such explanations to be given. He asked the contracting authority to give the reasons for the cancellation.

Dr Georgine Schembri on behalf of the contracting authority explained that the reasons for the cancellation were not given because the contracting authority was given the wrong advice, but she stated that she had explained verbally to Dr Robert Abela, appellant's legal representative the reason for the cancellation.

Mr John Muscat on behalf of the contracting authority said that he bids had been opened in his presence. Three persons had opened the tenders. They had opened 3 envelopes belonging to 3 bidders and prepared the Schedule. Another envelope was thought to be a copy of one of the bids and inadvertently was not opened. Tenders had to be submitted in two copies, an original and a sealed copy. A bidder's representative had pointed out that there should have been another tender by appellant. Mr Muscat said that he had asked her to re-check the schedule since she probably had missed it. This was on a Friday. On Monday, appellant's representative had gone to the contracting authority's office and asked why appellant's second tender had not been opened. On Tuesday, the evaluation board met and checked everything again and discovered that another tender had remained unopened, probably appellant's second bid. This was opened since it was not deemed to be the bidder's fault that his bid was not opened. The offer was included in the Schedule of Tenders with an explanatory note on the notice boards, both at Victoria and Mgarr. After some days however, the chairman informed the evaluation board that some complaints had been received regarding the procedure and that Department of Contracts should be consulted on the proper procedure to be followed.

Mr John Muscat continued that Ms Phyllis Mercieca from the Department of Contracts had informed them that only the offers opened during the first opening sessions were valid and had to be considered. Later on they were given a ruling from the Department of Contracts that since this tender was for a concession, it did not fall under the Public Procurement Regulations and thus the Department could not give any ruling on the matter. The contracting authority's legal advisor then advised the evaluation board that the tender should be cancelled in terms of clause 33e. Thus the board then recommended the cancellation of the tender and this recommendation was accepted by the Board of Directors. The notice of cancellation was subsequently issued.

Mr Kenneth Abela, Director at appellant company said that the appellant had submitted two bids following the instructions given in the tender documents. Appellant had submitted offer 1 containing 4 lots and offer 2 containing 4 lots. Each tender envelope contained an original offer plus a copy. However it transpired that only one offer was opened, this consisted of two

envelopes, one with the original and the other a copy. The opened tender contained the appellant's lowest one. The offer with the higher bid remained unopened. This fact was noticed by appellant's representative who immediately informed Mr John Muscat that another tender had been submitted by appellant remained unopened.

Ms Sylvana Calleja ID No. 210274M employed with appellant under oath stated that on Friday the 2nd June 2014 she had personally deposited two tenders on behalf of appellant at the Offices of Gozo Channel. Later on she attended at the opening of the tenders. She saw the Schedule being placed on the notice board and discovered that only one of the tenders she deposited was shown. I asked Mr Muscat about the other tender and he replied that all tenders had been opened. She assumed then that the other tender would be shown later in the notice board. Replying to a question by Dr Georgine Schembri, she reiterated that she deposited two envelopes, each containing an original and a copy.

Dr Georgine Schembri for the contracting authority said that it was admitted that erroneously, appellant's other tender had not been opened.

Mr John Muscat explained that three envelopes had been opened and it had been assumed that the remaining three envelopes were the copies. It was only later that it was discovered that one of the other bidders had failed to include a copy. As copies are not opened it was not discovered at the time that one of the remaining envelope contained an original tender. The copies of tenders are not opened at the tender opening stage but are kept by the Department of Contracts.

Dr Georgine Schembri said the problem arose because the unopened tender, that was subsequently opened on Tuesday contained appellant's best offer. But since this was not shown immediately doubts were being raised about lack of transparency. The only way out was to cancel the tender.

Dr Mark Simiana for the appellant said that he was still insisting the nullity of the decision to cancel because of the failure of the contracting authority to motivate the decision. It is apparent that two decisions had been taken the first was to open the tender and include it in the Schedule. The second was to cancel after third parties raised concerns about transparency. The fact is that the appellant had submitted two tenders at the proper time and it was not at fault that one of these had been left unopened. The net result of the decision to cancel is that now the appellant's best offer has been publicized and known to all parties and it was this that would prevent fair competition. To cancel the tender is a wrong and illogical decision.

Dr Georgine Schembri said that the tender had to be cancelled because a procedural irregularity had taken place, not by the bidders but inadvertently by the contracting authority.

At this point the hearing was closed.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 31st July 2014 and also through Appellant's verbal submissions during the hearing held on 20th August 2014, had objected to the decision taken by the pertinent Authority,

in that:

- a) The Contracting Authority, in its letter dated 6th June 2014 and subsequent correspondence dated 31st July, failed to give the reasons for the cancellation of the tender.**
- b) The Appellant's offer was fully compliant and was also the most favourable to the Contracting Authority.**
- c) Appellant contends that if a mistake in the procedure of the opening of tenders occurred, this should not reflect negatively on the part of the Bidders.**

Having considered the Contracting Authority's verbal submissions during the hearing held on 20th August 2014, in that:

- a) The reason why the tender was cancelled was due to the fact that during the opening of the envelopes containing the tender documents, inadvertently, Appellant's offer was not opened, later noted that one of the Bidders had failed to submit a copy whilst Appellant's offer was still unopened.**
- b) Due to this occurrence the Contracting Authority were advised to cancel the tender in accordance with clause 33e of the tender document.**

Reached the following conclusions:

- 1. This Board opines that the Contracting Authority had the obligation to state the 'specific reasons' why such a public tender was cancelled. In this regard, although during the submissions of the hearing, this Board was informed that the Appellant's legal Adviser was informed verbally, this same Board does not accept the fact that the Contracting Authority, officially informed the Appellant of the reasons, for the cancellation of the tender. In this regard, this Board upholds the Appellant's contention that the notice sent by the Contracting Authority, informing the Appellant Company of the cancellation of the tender did not state the specific reasons for such action.**
- 2. This Board, also notes that the Contracting Authority failed to ensure that the documentation (Tenders) sent by all Bidders are properly examined and properly documented at the stage of the opening of the tender documents. In this regard, this Board does not credibly accept the contention that the 'Unopened' envelopes were to be 'assumed' as copies. Assumptions are not to be tolerated at such a delicate state of the tendering procedure.**
- 3. This Board opines that the tendering procedure was fully complied with by the Appellant Company and same should not be penalised due to a trivial error by**

the Contracting Authority at the expense of an advantageous concessional offer by the Appellant's Bid.

- 4. This Board opines, that to cancel the tendering procedure at this stage would prevent fair competition as the best offer for the Contracting Authority has already been publicised.**

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

- a) The remaining 'unopened' documentation be opened in the presence of all Bidders.**
- b) The tendering process should be continued in the normal procedure.**
- c) The Appellant's offer should also be reintegrated in the tendering process.**
- d) The deposit paid by the Appellant Company should be reimbursed.**

Dr. Anthony Cassar
Chairman

Dr. Charles Cassar
Member

Mr. Lawrence Ancilleri
Member

11th September 2014