

PUBLIC CONTRACTS REVIEW BOARD

Case No. 763

KLC T 02/2014

Tender for the Collection of Mixed Household Waste for the Kalkara Local Council.

The tender was published on the 17th June 2014. The closing date was the 25th July 2014.

The estimated value of the Tender was €35,596 (Exclusive of VAT)

Five (5) bidders had submitted an offer for this tender.

On the 9th October 2014 WM Environmental Limited filed an objection against the award of 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 25th November 2014 to discuss the objection.

Present for the hearing were:

WM Environmental Limited - Appellant

Mr Wilson Mifsud	Director
Dr John Bonello	Legal Representative

Mr Saviour Mifsud - Preferred Bidder

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

Kalkara Local Council - Contracting Authority

Ms Speranza Chircop	Chairperson Evaluation Board
Ms Elaine Caruana	Secretary Evaluation Board
Mr Christopher Pullicino	Representative
Dr Luciano Busuttill	Legal Representative

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

Board member Mr Richard A. Matrenza remarked upon the slipshod way tender forms and documents brought before the board were filled in, citing for example the way the preferred bidder was referred to in the documents. It is evident that the preferred bidder is a sole bidder yet his offer is listed in the schedule of tenderers and in the Notification of Award Tender as "Cleaning Services Saviour Mifsud". All parties involved should be more accurate when filling-in official documents.

Dr John Bonello on behalf of appellant submitted that:-

1. His client was not given any reasons or motivation for the rejection of his bid; he was just informed that his offer was not the cheapest compliant tender. He contended that thus the objection could not be prepared in detail but blindly. Appellant had to object in order to be given the detailed reasons;
2. From examination of the schedule of tenders received, his client suspects that the prepared bidder would not be abiding with the employment legislation and guidelines regarding precarious employment since the tender bids had to include the fees paid by bidder for the disposal of the refuse as charged by WasteServ. From the workings made by appellant the bid is not enough to cater for all these costs.

Dr Luciano Busuttill on behalf of the contracting authority remarked that the disposal fees should not have been included since a clarification number 3 had been issued on the 15th July 2014 were this requirement had been removed and bidders were informed not to include the disposal fees.

Dr John Bonello claimed that his client the appellant did not receive this clarification.

Ms Elaine Caruana, ID No 97389 M under oath testified that the clarification explaining to bidders not to include the disposal fees in their bids was issued and served to all bidders who had already submitted a tender on the 15th July 2013 via emails. Appellant, who collected the tender form after this, was handed a copy of the clarification together with the tender form. It was personally handed to her by the person who came to collect the tender form on behalf of the appellant, and was in the same printed format. The tender closing date had been extended and this was published in the local papers. Appellant had submitted his tender on the 22nd July 2014.

Dr John Bonello said that he failed to understand the need for the clarification since the removal of the disposal fees was equal to all bidders across the board, at €1 per ton. He disputed the fact that a copy of the email sent to all bidders was given to appellant with tender form.

Dr Luciano Busuttill on behalf of the contracting authority raised the matter of the Public Contracts Review Board's competence to hear this objection. He cited Chap 363 article 10.2 which stated that the appeal board (appointed in terms of Art 10.2 of Chap 363) has the remit to decide appeals in cases where the tender is for a *per diem* rate and not for a sum. Furthermore he withdrew the plea where late submission of objection had been raised. He

insisted that the non submission of the motivation for the rejection of bids, while not to be condoned, did not cause the award procedure null. He contended that payment of employees is regulated by law and therefore low rates bid by tenderers should not be considered as leading to precarious employment and this point has been decided by the court of appeal.

Mr Christopher Pullicino ID No 205168M, for the contracting authority, under oath said that he was an auditor and had been appointed by the contracting authority to prepare the present tender and to eventually help to evaluate the offers. The tenders were assigned a number of points that were divided as 50% for the technical capabilities, which were divided into several criteria, and 50% for the financial offer. All bidders had been technically and administratively compliant so he had worked out the most advantageous offer. The evaluation grid was then submitted for the approval of the Local Council. Replying to questions by the Board he explained that it was at first intended to include the disposal fees into the rates but following a call for clarification by one of the bidders, it was decided to omit these disposal fees from the rates to be quoted. The clarification had been regularly issued according to the regulations. Appellant had called to pick his tender forms after the clarification had been issued. Appellant stated in his bid that his offer included the disposal fees but bidders had no right to change the bills of quantity and the value of the disposal fees could not be assessed from his offer.

Dr Franco Galea for the preferred bidder Saviour Mifsud contended that the appellant was cognizant of the reason why his bid had not been chosen. He said that appellant's contention that the preferred bidder's rates could lead to precarious employment has been proved to be wrong because in his calculations, the appellant had included the disposal fees and these had been removed from the bidding rate. Furthermore there could be precarious employment only if the employees were specifically hired for the tender and not as in the present case where the preferred bidder's employees were full time employees with the preferred bidder. The rates submitted by bidders contained a certain amount of commercial risk taken by each bidder.

At this point the hearing was closed.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 9th October 2014 and also through Appellant's verbal submissions during the hearing held on 25th November 2014, had objected to the decision taken by the pertinent Authority, in that:

- a) Appellant was not notified of the reasons for the rejection of his offer. This deficiency, on the part of the Contracting Authority, limited the extent of Appellant's objection;**
- b) From calculations, compiled by the Appellant, latter claims that through the quoted rate by the Preferred Bidder, same rate could lead to precarious working conditions, as this rate also included 'disposal fees' for the refuse collected.**

Having considered the Contracting Authority's verbal submissions during the hearing held on 25th November 2014, in that:

- a) **The Contracting Authority raised a ‘Preliminary Plea’ with regards to the fact that, in accordance with chapter 363 article 10.2, the Public Contracts Review Board has not got the remit to decide appeals in cases where the tender is for a rate ‘per diem’ and not for a sum. The Contracting Authority also stated that the objection made by Appellant was ‘Fuori Termine’. In this latter plea, the Contracting Authority withdrew this claim, as it was credibly determined that the ‘Letter of rejection of Offer’ was sent by normal post so that it could not be determined as to when the Appellant was notified of such notice;**
- b) **The Contracting Authority contends that the Preferred Bidder’s rate included the ‘disposal fee’ of the waste to be collected, whilst at the same instance, the Contracting Authority, through clarification number 3, issued on 15th July 2014, had informed all bidders that the ‘Disposal Fees’ will be borne by the Contracting Authority;**
- c) **Although the Contracting Authority confirms that no reasons were given for Appellant’s offer rejection, same Authority maintains that this deficiency on its part should not annul the award of the tender.**

This Board accepts the fact that in accordance with Chapter 363, Article 10.2 of the ‘Local Councils Regulations’, this Board treats the ‘Preliminary Pleas’ raised by the Contracting Authority as follows:

- i) **Although the Contracting Authority, in its submissions, questioned the validity of Appellant’s objection, due to, as claimed by the same Authority, that objection was not filed within the stipulated period, this preliminary plea was later withdrawn as the Appellant was informed of the rejection of his tender by normal mail. In this regard, this Board accepts the Appellant’s objection as valid;**
- ii) **With regards to the Contracting Authority’s second preliminary plea. This Board (PCRB) opines that, since this tender was a ‘Rate per Diem’, the Appeals Board appointed under chapter 363, article 10.2 of the ‘Local Councils Regulations’; has the jurisdiction to hear this appeal. However, due to the fact that this notification should have been clearly indicated in the tender document, the PCRB Board decided to hear this appeal.**

Reached the following conclusions:

1. **This Board is somewhat perturbed by the fact that, some Contracting Authorities are not abiding by their mandatory obligation to state, in their ‘Letter of Rejection’ to unsuccessful Bidders, the reasons why such a bid was rejected. This Board regrettably notes that the majority of such instances involve Local Councils. As decided on numerous occasions by this Board, the Contracting Authorities, mainly Local Councils should abide by the decisions**

taken and not ignore same. In this regard, this Board upholds Appellant's first grievance;

- 2. With regards to Appellant's second contention, in that 'From calculations compiled by Appellant, the rate quoted by the Preferred Bidder might lead to precarious working conditions'; from credible submissions during the hearing, this Board established the fact that the tendered services do not entail a workforce specifically employed for this tender. The Preferred Bidder, justifiably, would utilise his present workforce to carry out the requested ancillary service. In this regard, this Board does not find any indication of precarious working conditions in the rate as quoted by the Preferred Bidder. This Board does not uphold Appellant's second contention.**

In view of the above, this Board finds against the Appellant Company, however, due to the fact that Appellant was not given reasons for the rejection of his offer, this same Board recommends that the deposit paid by Appellant should be reimbursed.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Richard A Matrenza
Member

18 December 2014