

PUBLIC CONTRACTS REVIEW BOARD

Case No. 777

MCH 98/2014

Call for Quotes for the Supply of Cleaning Services to the Mental Health Services.

The tender was published on the 25th June 2014. The closing date was the 2nd July 2014. The estimated value of the Tender was €450,000 (Exclusive of VAT)

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

On the 22nd December 2014 Omnicare Cooperative filed an objection against the decision to award the tender to WM Environmental Ltd.

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 20th January 2015 to discuss the objection.

Present for the hearing were:

Omnicare Cooperative - Appellant

Ms Esmeralda Borg Azzopardi	Executive
Mr Jonathan Gerada	Secretary
Mr Mario J Gerada	CEO
Dr Maria Azzopardi	Legal Representative

WM Environmental Limited - Preferred Bidder

Mr Joachim Calleja	Representative
Mr Adolfo Camilleri	Representative
Dr John Bonello	Legal Representative

Mental Health Services - Contracting Authority

Mr Gilbert Bonnici	Chairperson Evaluation Board
Dr Yana Micallef Stafrace	Legal Representative

The Chairman made a brief introduction and invited appellant's representative to make her submissions.

The appellant's legal representative, Dr Maria Azzopardi referred to the letter of objection and submitted that:

1. The adjudication process of the offers had been incorrectly carried out since there was a great difference between the amount offered by the preferred bidder as shown in the schedule of tenders and the amount shown on the award letter. There was a difference of €22,000. This change had not been the result of a clarification according to regulations, but must have reflected a change in the tender offer itself. This was not allowed since the tender offer could never be changed. The fact it has been changed was prejudicial to the interests of the appellant;
2. According to the present Green Procurement Policies being followed by the government, the use of bleach in offered products was not allowed. Yet the contracting authority had asked for bleach. This was against the policy and should not be allowed;
3. The tender document had allowed for the possibility of a negotiated procedure to be used. However, a request by the appellant to meet with the contracting authority to explain what was being offered, including a power point presentation, by appellant was refused;
4. Appellant had been misinformed and given the wrong information when the tender was awarded the first time. This misinformation had led to appellant's letter of objection being rejected by the Public Contracts Review Board. For this reason appellant feels that the award process was not professionally conducted. This was unacceptable and the award should be revoked.

Dr Maria Azzopardi at the end pointed out that the amount offered by the preferred bidder would lead to a loss being incurred. She contended that should the tender not be awarded to her client, the appellant, then it should be cancelled and a penalty be awarded to appellant in terms of law. This because the length of time for the award and because the award was not just.

Dr Yana Micallef Stafrace on behalf of the contracting authority rebutting appellant's first grievance explained that the tender general conditions clause 15.2 where arithmetical errors had to be corrected and the difference emerged from an arithmetical correction.

Mr Gilbert Bonnici for the contracting authority explained that the tender required bidders to provide the monthly costs for a total of three months. That is they had to multiply their offers by three and insert this amount in the last column. The appellant in the tender omitted to multiply the amount per month by three. The evaluation board worked out this and adjusted the offer accordingly. Other bidders also made the same mistake and the evaluation board corrected all bids. Some other bidders including the preferred bidder also failed to work out the second line of the financial bid, where they had to include other expenses, maybe because the number of hours had not been printed. Again the evaluation board had arithmetically corrected all the bids. Thus evaluation could be performed like with like.

Dr Yana Micallef Stafrace continued on behalf of the contracting authority and on the matter of bleach being requested, explained that the technical specifications were issued and were the same for all bidders. The parameters were the same. Regarding the request made by appellant for a presentation, she said that presentations were not demanded from any of the bidders and therefore the contracting authority could not accede to appellant's request to make such presentation. She stated that what happened after the first award is common knowledge but now what matters is the present objection. She explained that when negotiated procedures are resorted to, only the lowest bidder is contacted for negotiations. In this case appellant's bid was the fifth lowest bid. She then referred to a court of appeal judgement delivered on the 30th July 2014, case 162/2014. This case had identical merits of the present objection and the decision was that the contracting authorities should not go into the merits whether the bidders would make any profit or not. Bidders sign and agree with the statement of conditions of employment for the tender to be valid. Bidders can opt to work specific tenders at a loss.

The Chairman explained that the situation had changed with effect from the 1st January this year.

Dr Yana Micallef Stafrace continued that the contracting authority had the comfort of the previous court decisions that bidders could choose to make a loss on a tender. Appellant's offer was the fifth lowest bid.

Mr Gilbert Bonnici for the contracting authority replying to a question by the Chairman whether the question of precarious employment by bidders was taken into consideration stated that all bidders had declared to abide by all laws including those against precarious employment, and that they would pay employees according to law.

Dr John Bonello on behalf of the preferred bidder said that in part of the tender document, apart from the schedule of works, included a form where bidders had to give the breakdown of costs that led to the hourly rates they offered. Examination of this declaration would easily show if precarious employment of the bidder's employees was being risked.

Mr Gilbert Bonnici for the contracting authority confirmed this and added that the rates had to be according to a previous circular at least €5.78 per hour. This was in fact the rate submitted by the preferred bidder.

Dr John Bonello for the preferred bidder continued that this tender was based on the best offer. Appellant was not however only stating that the tender should not be awarded to WM Environmental but also that the tender should be awarded to appellant. Since appellant's offer was placed 5th, appellant cannot prove that if the preferred bidder's tender is discarded then automatically appellant's offer would be chosen. He insisted that the preferred bidder's offer was above the minimum requirement and the totals resulted from the hourly rates. He reiterated that his client's offer was the most advantageous.

Mr Mario J Gerada on behalf of the appellant remarked that the contracting authority was not competent to make the tender award. This was appellant's main grievance. There were mistakes and some of these were malicious. Appellant had been misguided by the first award notification and in the letter dated the 11th December 2014 the contracting authority itself admitted to certain inaccuracies in the notification letter of August 2014. He insisted that the contracting authority's workings should be scrutinized since it was favouring certain bidders.

He reiterated that the award amount is different from the amount shown at the tender opening. Appellant's offer was the fifth cheaper because appellant abided with the law regarding payment to employees overtime leave etc. However he was not alleging that there was a risk of precarious employment in this case. He alleged that the evaluation board had manipulated the figures. In the schedule, WM Environmental is shown to have offered €141,360. However the evaluation board had shown the amount as €446,748. When the preferred bidder's offer is multiplied by 3 the result should be €424,080. He continued that according to the Green Procurement Regulations bidders could be disqualified if they submitted products not according to regulations. Yet the tender asked for products that were not listed in green procurement.

Mr Gilbert Bonnici, replying to questions by the Chairman reiterated that all bidders had been treated the same. Bidders were asked for 2 rates in the financial bid – one was the hourly workers' cost and the other was the rate of all other expenses. Some bidders understood this while others did not. The preferred bidder was one of the latter. The evaluation board could not evaluate like with like so the bids were arithmetically corrected and adjusted according to the rates put down by bidders, and as allowed by the clause concerning arithmetic correction. Rates of bids were multiplied by 18,000 and by three for the first line and 2,000 by three for the second line. Bleach was included because it was asked for from the infection control section however the evaluation board had to follow the specifications. There were some bids were rejected because of technical non-compliance.

Dr Maria Azzopardi for the appellant asked whether the preferred bidder had left the second line blank.

Mr Bonnici replied that the preferred bidder had put down the rates for the second line but failed to multiply these. The Evaluation Board worked out the results and did not consult the bidders about the results.

The hearing was brought to a close.

This Board

Having noted the appellant's Objection in terms of the "Reasoned Letter of Objection" dated 22nd December 2014 and also through the appellant's verbal submissions during the hearing held on the 20th January 2015, had objected to the decision taken by the pertinent authority, in that:

- a) The appellant contends that there existed a great variation between the price offered by the preferred bidder and the price quoted in the award letter. In this regard, appellant claims that the adjudication process was incorrectly carried out;**
- b) In the Tender Document, the Contracting Authority asked for the provision of "Bleach" which goes against the "Green Procurement Policies";**
- c) Since the Tender Document allowed for the possibility of a negotiated procedure, the appellant requested a meeting with the Contracting Authority to clarify points regarding the product/services being offered by the same. This request**

was not granted.

- d) The Appellant was misled when filing his first objection regarding this tender;
- e) The preferred bidder's offer would lead to a loss.

Having considered the Contracting Authority's verbal submissions during the Hearing held on 20th January 2015, in that:

- a) The difference referred to in the Appellant's first grievance emerged from the fact that some of the bidders failed to multiply their offers by three, as the total amount had to represent a total cost for three months in accordance with Clause 15.2 of the Tender Document. The same clause also states that Arithmetical Errors can be corrected by the Evaluation Committee. All bids were corrected to ensure a "Level Playing Field" for all bidders;
- b) Regarding the appellant's second contention, "Bleach" was included in the Technical Specifications of the Tender Document which was known to all bidders;
- c) The Contracting Authority was not obliged to accede to the appellant's request for negotiation or demonstration of appellant's products or services;
- d) The Contracting Authority acknowledges the fact that the appellant was inadvertently misled when filing his first appeal for this award;
- e) The Contracting Authority contends that the Evaluation Committee should not enter into the merits whether bidders would make a profit or not.

Reached the following conclusions:

1. With regards to the appellant's first contention, this Board opines that, through credible submissions made by the Contracting Authority, the arithmetical correction which was carried out by the Evaluation committee was justifiably necessary to ensure "a level playing field" for all bidders when a comparison of the various bids are carried out. Clause 15.2 of the Tender Document specifically empowers the Evaluation Committee to carry out such corrections. This Board opines that the reason for such corrections is totally justified and hence why there was a difference between the preferred bidder's published offer and that of the award of the Tender. In this regard, this Board does not uphold the appellant's first contention;
2. With regards to the appellant's second contention, this Board opines that since "Bleach" was included in the Tender Document and from credible submissions it emerged that this "agent" was recommended by the "Infection Control Section", this contention should not be regarded as a valid objection to the award of this Tender. In this respect, this Board does not uphold the Appellant's second contention;
3. In respect of the appellant's third contention, this Board, after having heard

credible submissions, opines that although the document allowed for negotiated procedures, such action is only adopted by the Evaluation Committee, if need be, with the lowest bidder. In this regard, this Board does not uphold appellant's third contention;

4. This Board acknowledges the appellant's fourth contention and in this regard, this same Board is perturbed when such instances do occur. Although this Board accepts that such directives are not intentional, at the same time, contracting authorities are obliged to inform any unsuccessful bidder of his right of appeal under the relevant legal notice. This Board upholds the appellant's fourth grievance;
5. This Board opines that it is not its competence to decide on whether the preferred bidder's offer will sustain a loss through his tendered price;
6. On a general note, this Board notes that the breakdown of costs submitted by the preferred bidder indicated compliance of the minimum rate of hourly labour cost as directed by circular OPM 124/2013 issued on 1 July 2013.

In view of the above, this Board finds against the Appellant Co-operative. However, due to the fact that the Appellant was misled by the Contracting Authority when filing the first appeal, this same Board recommends that the deposit paid by the appellant Co-operative be fully reimbursed.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Richard A. Matrenza
Member

5 February 2015