

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case 778**

**T 05/2013**

### **Tender for Environmentally Friendly Collection of Mixed Household Waste.**

The tender was published on the 8<sup>th</sup> October 2013 and the closing date was on the 11<sup>th</sup> November 2013. The estimated value of the tender was €118,000 (Exclusive of VAT)

Six (6) bidders had submitted an offer for this tender.

On the 25<sup>th</sup> September 2014 Waste Collection Limited filed an objection against the decision to reject their tender which was the cheapest offer.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on the Tuesday the 27<sup>th</sup> January 2015 to discuss the objection.

Present for the hearing were:

#### **Waste Collection Limited - Appellant**

Mr Adrian Muscat	Representative
Mr Mario Tufigno	General Manager
Dr Robert Tufigno	Legal Representative

#### **SRF Veladrians Joint Venture - Preferred Bidder**

Mr Steve Farrugia	Representative
Mr Adrian Vella	Representative
Dr John Gauci	Legal Representative

#### **Kunsill Lokali Naxxar - Contracting Authority**

Mr Paul Gatt	Executive Secretary
Ms. Marthese Camilleri	Executive Officer
Dr Adrian Mallia	Legal Representative

The Chairman made a brief introduction during which he explained that the deposit demanded by the contracting authority from the appellant was incorrect and not according to the Public Procurement Regulations. The deposit should have been set at 0.5% of the estimated value of the tender and not 5%. He then asked appellant's representative to make his submissions.

Dr Robert Tufigno on behalf of Waste Collection Limited said that his client was notified of the award of the tender to the preferred bidder through an e-mail that contained no other details. No motivation was provided for the decision. Since appellant's offer was the cheapest, his clients had asked the contracting authority for full details according to Article 40 of Chap 363 which was mandatory. It was difficult to prepare a letter of objection without having any details at all. On behalf of his clients, he could not really contest the award without having recourse to the necessary documents. After the filing of the letter of objection the contracting authority had replied to appellant's query and supplied a list with the points that the evaluation board had awarded to the appellant only. The appellant's offer was the cheapest. The award decision was defective because it was not motivated; and it was only after the filing of the letter of objection that the contracting authority supplied appellant with the number of marks his tender was assigned.

Dr Adrian Mallia on behalf of the contracting authority agreed that Art. 40 of Chap 363 said that all documents could be demanded, but the Public Procurement Regulations say the opposite. Regulation 4.4 of the regulations binds contracting authorities to respect the confidentiality of bidders' submissions. Thus the contracting authority cannot supply to a bidder another bidder's tender details without infringing regulations. He pointed out that the Public Procurement Regulations were issued at a later date than the law regulating Local Councils. Regulation 21 of the Public Procurement Regulations explained what information the contracting authority has to give to bidders when announcing an award. In this case the appellant had been given an extract of the evaluation report showing appellant's marks award.

The Chairman at this point remarked that the contracting authority has to give reasons for the award in the letter of rejection. Most Local Councils are failing to do so.

Dr Robert Tufigno for the appellant submitted that subsidiary legislation cannot override law. Public Procurement Regulations were subsidiary legislation while Chap 363 was law, and a law cannot be changed by means of subsidiary legislation. Furthermore he insisted that there was really no conflict since points awarded to bidders are not a trade secret that cannot be divulged. In order to enable a bidder to use the right of objecting, these marks have to be made known to him. All other items in the tender offers are usually public knowledge, like experience, human resources, ownership and date of manufacture of vehicles etc, are not trade secrets. The contracting authority was only bound not to divulge trade secrets.

Dr Adrian Mallia on behalf of the contracting authority insisted that while the Public Procurement Regulations implemented an EU Directive, any parliamentary act that goes against an EU Directive is null. Appellant had asked to be given copies of all the documents in the preferred bidder's tender offer, and this could not be accepted because of Regulation 4.4 of the Public Procurement Regulations. The evaluation of the tender had been made according to law and published and all the bidders had been informed.

The Chairman remarked that the letter of rejection should contain the reasons for the non-acceptance of the offer.

Mr Paul Gatt for the contracting authority confirmed that the appellant had went to the Council on the 25<sup>th</sup> September 2014 and been handed an extract of the evaluation report. Appellant had asked to be provided with the documents in a letter of the 23<sup>rd</sup> September 2014. The period of appeal lapsed on the 26<sup>th</sup> September 2014.

Dr Robert Tufigno informed the Board that appellants had already requested the information verbally before doing so through the letter of the 23<sup>rd</sup> September 2014. He insisted that European Law regulations come into force immediately and have an immediate effect while European Directives had to be first implemented by the member states before having effect.

Dr Adrian Mallia acknowledged this but reiterated that a directive can have immediate implementation. Tribunals have an obligation to set aside a law that is in conflict with a European Directive provision.

Dr John Gauci on behalf of the preferred bidder said that appellant had asked for copies of the preferred bidder's tender and the contracting authority had justly refused to comply. He referred to another case decided on the similar subject by this Board on the 10<sup>th</sup> October 2013 that considered confidential information in tenders. The case had been also confirmed by the court of appeal. The Public Contracts Review Board itself can and has the right of access to all information contained in tenders, even to those tenders issued by the Local Councils. There was no nullity in the present tender award.

Dr Robert Tufigno submitted that the main grievance in the appellant's objection was that the award by the contracting authority had not been motivated according to law and not because appellant was not given the information.

At this point the hearing was closed.

**This Board,**

**Having noted the appellant's objection in terms of the "Reasoned Letter of Objection" dated 25<sup>th</sup> September 2014 and also through the appellant's verbal submissions during the Public Hearing held on the 27<sup>th</sup> January 2015, had objected to the decision taken by the pertinent authority, in that:**

- a) The appellant's main contention was that in the letter of rejection of the award, the Contracting Authority did not state the reasons for such a refusal. In this regard, the appellant could not be aware of the issues on which he could object;**
- b) The appellant had requested information so as to determine the factors on which he could object. Since the Contracting Authority did not furnish this information, the appellant contends that the award decision was defective as it was not motivated. The appellant also maintains that the only information submitted by the Contracting Authority consisted of "Points awarded to the appellant" and this submission was made after the filing of the letter of objection.**

**Having considered the Contracting Authority's verbal submissions during the Public Hearing held on the 27<sup>th</sup> January 2015, in that:**

- a) **The Contracting Authority acknowledges the fact that he was not given reasons in the letter of rejection. However, the same Authority confirmed that the appellant was handed an extract of the Evaluation Report showing the latter's marks allocated by the Evaluation Board;**
- b) **The Contracting Authority maintains that the information requested by the appellant went against Regulation 21 of the Public Procurement Regulations wherein it is clearly stated what information can be submitted to the appellant. In this regard, the Contracting Authority contends that although no reasons were given in the letter of rejection, the same Authority insists that the award decision was not defective.**

**Reached the following conclusions:**

1. **With regards to the appellant's first contention, this Board has on many occasions noted and pointed out that the Contracting Authority has the obligation to submit detailed reasons for rejection of offers, to unsuccessful tenders. Unsuccessful tenderers cannot be denied the knowledge and reasons as to why their offer was unsuccessful. On the other hand, the appellant has the right to object to the decision taken by the pertinent Authority, however in the absence of knowing the reasons why his offer had been rejected; the appellant is unable to motivate his objection. In this regard, this Board upholds the appellant's first contention;**
2. **This Board refers to the appellant's letter of objection dated 25 September 2014 with particular reference to paragraph 2, wherein the appellant requested copies of all offers with accompanying documentation of the same. This Board would respectfully refer to Clause 4.4 of the Public Procurement Regulations which state:**

**“Contracting Authorities shall respect fully the confidential nature of any information furnished by economic operators. Such information includes in particular technical or trade secrets and the confidential aspects of tenders.”**

**In this regard, this Board opines that the information requested by the appellant exceeded the nature of information which could be submitted by the Contracting Authority. In this respect, the Board does not uphold appellant's second contention;**

3. **This Board also opines that although the Contracting Authority did not submit the reasons for the rejection of the appellant's offer, this same Board does not find a valid reason to declare the decision for award taken by the Contracting Authority to be defective.**

**In view of the above, this Board finds against the Appellant Company. However due to the facts that:**

- i) **The Appellant was not given the reasons for rejection of his offer;**

**ii) The excessive amount of deposit the Appellant was advised to pay on this Appeal**

**This same Board recommends that the full deposit paid by the Appellant should be reimbursed**

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Lawrence Ancilleri  
Member

*6 February 2015*