

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case No. 807**

**MLC 2/2014**

**Tender for the Collection of Bulky Refuse from Msida in an Environmentally Friendly Manner.**

The tender was published on the 14<sup>th</sup> December 2014. The closing date was the 19<sup>th</sup> December 2014. The estimated value of tender is €36,000(Exclusive of VAT).

Two (2) offers had been received for this tender.

On the 5<sup>th</sup> February 2015 Dimbros Limited filed an objection against the decision of the contracting authority to discard its 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 Thursday 7<sup>th</sup> May 2015 to discuss the objection.

Present for the hearing were:

**Dimbros Limited:**

Mr Malcolm Dimech	Representative
Dr Franco Galea	Legal Representative

**Mr Alfred Galea:**

Mr Alfred Galea	Representative
Dr John L Gauci	Legal Representative

**Msida Local Council:**

Mr Emanuel Brincat	Representative
Dr Alex Sciberras	Legal Representative

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

Dr Franco Galea on behalf of the appellant firm Dimbros Limited said that although his client's offer was the cheapest, it had been rejected by the contracting authority because the evaluators had decided that it was "too low". The tender award criterion was to 'the most favourable compliant tender'. He submitted that the point has been decided several times before that a bidder could choose to take commercial risks. He claimed that the price of the preferred bidder is higher than that being paid by other local councils around Malta, and this goes against the principle of good governance even though the preferred bidder was the incumbent provider. The contracting authority cannot just discard the lowest offer.

Dr Alex Sciberras for the contracting authority submitted that the juridical framework is in the process of being changed. In April 2014 another Procurement Directive came into force and this discarded the criterion of the lowest price. Tenders should now be MEAT based. Contracting authorities should discard bids that are deemed too low. The wages of employees should be guaranteed. There are approximately 2000 instances when the bulky refuse service is needed in the locality. At the €2.18 per instance as being offered by appellant this amounts to €4336. It is also a fact that each instance takes about 20 minutes which means an annual 600 hours. These hours at the minimum wage amount to €2700. To this the overheads should be added. The contracting authority did not care if the bidder made any profit but it wanted to see if the service could be provided at that price. The Evaluation Board, not wanting to prejudice the service, thought that this price could not guarantee the service. There was no other reason for the decision.

The Chairman remarked that the question of profit would not be considered. He added that he assumed that this would not be a full time job but a rate per collection. He said that presumably the employees already working with the appellant would provide the service and there would be no need to employ other employees. Thus no additional costs would be entailed. This led appellant to quote a certain rate.

Dr Alex Sciberras said that the contracting authority assumed that appellant had his resources but also that additional resources would be needed, he would have to increase the work complement, to provide the service for eight hours per week.

Dr Franco Galea for the appellant submitted that this tender was issued on a rate per collection bases and bidders did not have to list their employees. The appellant has several other contracts and therefore did not need to employ additional staff. At this point Dr Galea filed three documents to show that his client has other contracts with other local councils – with Rabat Local Council where he is being paid €1.43 per collection, and with Naxxar Local Council where the fee is €1.67 per collection. The other document he showed the Board is an extract which shows what the preferred bidder, who is the incumbent with the contracting authority was receiving for the same service.

Dr Alex Sciberras for the contracting authority, replying to the Chairman stated that the question of default notices was not the deciding factor when rejecting appellant's tender. The deciding factor was that the cheapest could no longer be used.

Dr Franco Galea on behalf of the appellant insisted that the tender was not for the cheapest but for the most advantageous offer.

Dr John L Gauci for the preferred bidder said the contracting authority had adjudicated for valid reasons and according to law. To check whether a bid was abnormally low the evaluators needed to take into consideration the employees' wages. He insisted that the discretion given to the evaluators should not be overruled, since the evaluation was carried out according to regulations and the contracting authority had used its discretion when making the decision

At this point the hearing was closed.

**This Board,**

**Having noted the appellant's objection, in terms of the "Reasoned letter of Objection" dated 5<sup>th</sup> February 2015 and also through the appellant's verbal submissions during the Public Hearing held on 7<sup>th</sup> May 2015, had objected to the decision taken by the pertinent authority, in that:**

- a) **The appellant company maintains that although its offer was the cheapest, it had been discarded as the contracting authority considered the same to be too low;**
- b) **The appellant maintains that the tender asked for a rate per collection of bulky refuse. Since the appellant has other contracts and the tender does not entail additional workforce, the appellant could quote a competitive rate;**

**Having considered the contracting authority's verbal submissions during the Public Hearing held on 7<sup>th</sup> May 2015, in that:**

- a) **The contracting authority contends that under the new EU directive, it is not necessary for the contracting authority to choose the cheapest tendered price but rather the most economical and advantageous bid. The evaluation committee, in this regard considered the appellant's bid too low to carry out efficiently the tendered works;**
- b) **The contracting authority maintains that in order to provide the tendered service which approximately amounts to eight hours per week, the appellant had to increase the work force, so that there will be additional costs to the appellant, hence the reason why the evaluation committee considered the appellant's rate as "too low".**

**Reached the following conclusions:**

1. **With regards to the appellant's first contention, this Board justifiably established that the only reason why the appellant's bid was discarded was due to the fact that the evaluation committee regarded the appellant's quoted rate as being too low.**

**This Board would refer to the Court of Appeal decision and subsequent decisions taken in similar cases by this same Board, wherein it was clearly stated that it is not the competence of the Evaluation Committee of the Contracting Authority**

**nor is it the jurisdiction of the Public Contracts Review Board to delve into the issue whether the appellant's quoted rate will result in a loss or profit to the appellant. This Board opines that it is the duty of the Contracting Authority to ensure that the service is provided to the satisfaction of the Authority once the tender is awarded. In this regard, this Board upholds the Appellants' first grievance;**

- 2. With regards to the appellant's second contention, this Board having heard credible submissions by the Appellant, is justifiably convinced that the limited number of hours which have to be allotted for the tendered service does not entail additional work force and this Board also justifiably contends that since the appellant company has other contracts, the limited number of hours to be allocated can surely be absorbed through the appellant's present work force. In this regard, this Board upholds the Appellant's second contention;**
- 3. This Board would like to point out that it is true that under the new EU Directive, the Contracting Authority is not obliged to select the cheapest offer, however, one has to take into consideration the type and frequency of service being tendered for. In this regard, this Board does not uphold the Contracting Authority's first contention;**
- 4. With regards to the Contracting Authority's second contention, this Board opines that no credible evidence was submitted which indicates that the Appellant Company will have to increase its workforce to enable the latter to carry out the service efficiently. In this regard, this Board does not uphold the Contracting Authority's second contention.**

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

- i) The appellant offer is to be reintegrated in the evaluation process;**
- ii) The deposit paid by the appellant is to be reimbursed**

**Dr. Anthony Cassar  
Chairman**

**Dr. Charles Cassar  
Member**

**Mr. Lawrence Ancillieri  
Member**

*15 May 2015*