

PUBLIC CONTRACTS REVIEW BOARD

Case No. 818

SGLC/T/03/15

Tender for Street Sweeping and Cleaning in the Locality of San Gwann Zone A.

The tender was published on the 20th January 2015. The closing date was the 23rd February 2015.

The estimated value of tender is €50,000 (Exclusive of VAT).

Seven (7) offers had been received for this tender.

On the 30th March 2015 Euro Clean filed an objection against the decision of the contracting authority to reject appellant's 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 Tuesday 16th June 2015 to discuss the objection.

Present for the hearing were:

Euro Clean:

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| Mr Alexander Fenech | Director |
| Dr Matthew Brincat | Legal Representative |

Mr Owen Borg:

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| Mr Owen Borg | Director |
| Ms Svetlana Dimech | Representative |
| Dr Giangranco Gauci | Legal Representative |

Kunsill Lokali San Ġwann:

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| Mr Domenic Cassar | Councillor |
| Ms Joan Farrugia | Councillor |
| Mr Kurt Guillaumier | Executive Secretary |
| Dr Claudine Pace Zarb | Legal Representative |

The Chairman remarked that while the tenderer is Euro Clean, both the letter of rejection and the opening schedule list Mr Alexander Fenech as the bidder. He said that it has been a regular occurrence that Local Councils fail to give any reason for the rejection of tenders. He insisted that Local Councils should abide with the Regulations and give reasons, also informing bidders that they had a right to make an objection. The appellant's representative was then invited to make his submissions.

Dr Matthew Brincat on behalf of the appellant Euro Clean said that the contracting authority failed to inform appellant of the reason or reasons for which his tender had been rejected. He said that it was from the published minutes later that appellant had found out that in fact his bid had been the cheapest. Furthermore, the contracting authority had contacted several other bidders and held meetings with them while his client the appellant had not been asked to attend any such meeting. He explained that the tender specifications did not make it a condition of the selection criteria of the tender that bidders had to have a certain number of employees to qualify. Replying to a question by the Chairman, Dr Brincat explained that his client has other ongoing contracts and has a work force of seven employees. These can be increased as necessary if the need arises. The tender did not specify a number of hours it just listed a number of streets that had to be serviced and it was up to the contractor to manage his employees and ensure that the service is provided.

Dr Claudine Pace Zarb on behalf of the contracting authority admitted that the tender did not specify a number of hours but explained in detail the amount of work required to provide the service. It listed a long list of streets and the frequency of the required cleansing. She contended that the contracting authority calculates that at least two full time employees are needed to provide the service. This was however not in the tender but was based on experience. If one takes appellant's bid and deducts the management fee and VAT etc, one can calculate the number of hours appellant intended investing for the service. She insisted that the contracting authority knew from past experience the length of time required to provide the service. From calculations the contracting authority reached the conclusion that appellant would not probably give the required number of hours.

Mr Kurt Guillaumier on behalf of the contracting authority, replying to a question by the Chairman said that when the Councillors met with the short-listed bidders they discussed the Council's requirements. Appellant was not invited to discuss because through appellant's work plan it could be seen when deducting overheads and considering the Government Circular that the bid would not be compliant.

Dr Matthew Brincat on behalf of the appellant said that appellant had submitted a detailed work plan with his tender that showed the number of hours, rates, overtime rates and many other details. Dr Brincat filed a copy of this document, containing two pages.

Mr Kurt Guillaumier for the contracting authority contended that appellant had only submitted page one of the said document; page 2 of the document was not submitted with the tender. In fact the first page submitted with the tender was different from the first page filed today. The original submitted with the tender had included a hand written addendum that said that two sweepers two bins would be engaged, and no dates or rates were included. He explained that the work plan was not the reason for rejecting appellant's tender from short listing, the reason was that when deducting the overheads and other expenses, the contracting authority assumed that no profit would be made.

The Chairman remarked that rather than assuming the contracting authority should have clarified with the appellant. The matter of making a profit should not be the factor for deciding. This has been decided by the Court of Appeal and by this Board before.

Dr Claudine Pace Zarb for the contracting authority cited Regulation 29 of LN 296/2010 which stated that contracting authorities could reject abnormally low bids. Taking the number of hours needed and the acceptable rates, one could calculate this.

Dr Matthew Brincat for the appellant reiterated that the contracting authority had assumed that 2 workers were necessary. Appellant could easily have moved other workers to the locality to ensure the proper service.

Mr Kurt Guillaumier for the contracting authority stressed that evaluators take into consideration not only the price but also the probability that the bidder would provide the service. When removing the 5% management fee and the VAT the evaluators had to consider what balance remained.

The Chairman reiterated that this point had been decided by the Court of Appeal and the Board; the evaluation could not be based on whether bidders made any profit or not.

Dr Matthew Brincat for the appellant said that the reason for rejection of appellant's bid according to the published minutes was because the appellant's offer does not cover the wages of two full-time employees.

Dr Gianfranco Gauci on behalf of the preferred bidder Owen Borg wished to make some questions to the appellant and the Chairman refused to allow this. Dr Gauci referred to the appellant's work plan.

At this point the Chairman said that the contracting authority cannot give particulars from a bidder's tender to another bidder. The offers are public but the individual details submitted are not. The preferred bidder should not be in possession of the appellant's work plan. The Board would not admit discussion on this document.

Dr Gianfranco Gauci for the preferred bidder said that the tender did not require two full time employees because bidders could use four part timers. The contracting authority requested two sweepers because it calculated that the amount of work required these. He stated that he agreed with the assessment of the contracting authority that two full-time sweepers were needed. The number of hours required for providing the service meant that 2 full-timers were required.

At this point the hearing was closed.

This Board,

Having noted the Appellant's objection, I terms of the 'Reasoned Letter of Objection' dated 30th March 2015 and also through Appellant's verbal submissions during the hearing held on 16th June 2015, had objected to the decision taken by the pertinent Authority, in that:

a) Appellant contends that although his offer was the cheapest, it was not

shortlisted. Appellant maintains that if the Contracting Authority had any doubts about his offer, the Evaluation Committee should have asked for clarifications.

- b) Appellant also maintains that the Tender Document did not dictate the number of employees to be deployed on the tender works. The tender document simply asked for a 'work plan', which was submitted by Appellant.
- c) Appellant contends that no reasons were given by the Contracting Authority for the rejection of his offer.

Having considered the contracting Authority's verbal submissions during the hearing held on the 16th June 2015, in that:

- a) The Contracting Authority contends that the reason for not short listing Appellant's offer was due to the fact that the Evaluation Committee considered Appellant's bid too low to cover all expenses which would be incurred by appellant to carry out the tender works.
- b) The Contracting Authority maintains that although the Tender Document did not dictate the number of employees to be deployed on the tender works, from experience, the Evaluation Committee considered Appellant's bid as being "Not Feasible".

Reached the following conclusions:

1. With regards to Appellant's first grievance, this Board after hearing credible submissions opines that, since there was a short listing procedure and Appellant's bid was the cheapest, the Evaluation Committee had the obligation to seek 'in dept clarifications' prior to resort to assumptions, which in the opinion of this Board were not justified. The Evaluation Committee jurisdiction was to ensure that Appellant's offer was fully compliant and Not whether the Appellant's bid would incur same in a loss. This Board would like to emphasize this Board's previous decision on this issue which was also affirmed by the Court of Appeal. Quote *"It is not the jurisdiction of the Evaluation Committee of the Public Contracts Review Board to enter into the merit of whether, through his bid, the Appellant will make a profit or sustain a loss"*.

This Board opines that it would be the responsibility of the Contracting Authority to ensure that the most advantageous offer is awarded and thereafter make the necessary supervision to guarantee the quality of works being carried out by the preferred bidder. This Board opines that the Evaluation committee should have asked for clarifications prior to short listing Tenders. In this regard, this Board upholds Appellant's first grievance.

2. With regards to Appellant's second grievance, this Board confirms that the Tender Document did not dictate the number of Employees to be deployed on the Tendering Works; the Tender Document simply requested a work plan which the Appellant should have submitted. This Board opines that the Evaluation Committee should have clarified any doubts prior to assuming that the work

plan submitted by Appellant was not feasible. This Board opines that the decision for not short listing Appellant's offer was purely based on assumptions and not verifications. In this regard, this Board upholds Appellant's second contention.

- 3. This Board has, on many occasions, emphasized the fact that all Contracting Authorities should state the specific reasons for a rejection of an offer. In this regard this Board justifiably confirms that no specific reasons were given to Appellant in the letter of rejection. This Board upholds Appellant's third grievance.**

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

- i. Appellant's offer is to be reintegrated in the Evaluation process.**
- ii. The deposit paid by Appellant is to be reimbursed.**

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

24 June 2015