

PUBLIC CONTRACTS REVIEW BOARD

Case No. 824

eCT 3180/2014

Tender for the Supply, Delivery, Installation, Commissioning and Maintenance of an Adaptive Traffic Light Solution.

The tender was published on the 14th October 2014. The closing date was the 2nd December 2014. The estimated value of tender is €686,686.00 (Exclusive of VAT).

Five (5) offers had been received for this tender.

On the 1st June 2015 Firetech Cross TLS JV filed an objection against the decision of the Contracting Authority to award the tender to Alberta Fire & Security Equipment Limited.

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 2nd July 2015 to discuss the objection.

Present for the hearing were:

Firetech Cross TLS JV:

Mr Mark Anthony Sammut	Representative
Mr Simon Camilleri	Representative
Mr Brian Vassallo	Representative
Mr Libor Susil-Cross	Representative
Mr Lukas Duffek-Cross	Representative
Ms Daniela Bianchi	Representative
Dr Matthew Paris	Legal Representative
Dr Adrian Delia	Legal Representative

Alberta Fire & Security Equipment Limited:

Mr Duncan Barbaro Sant	Representative
Mr Kevin Cassar	Representative
Dr Robert Abela	Legal Representative

Transport Malta:

Perit Audrey Testaferrata de Noto	Chairperson Evaluation Board
Mr Luke Genuis	Secretary Evaluation Board
Mr Joseph Ciappara	Member Evaluation Board
Mr Stephen Muscat	Legal Representative
Mr Ray Stafrace	Representative
Mr Glenn Ellul	Representative
Ms Ethel Demicoli	Representative

Department of Contracts:

Mr Antoine Galea
Mr Joseph Saliba
Dr Christopher Mizzi

Representative
Representative
Legal Representative

The Chairman made a brief introduction and asked the Contracting Authority's representative to explain what was stated in its letter of reply that the preferred bidder was a Joint Venture.

Mr Ray Stafrace for the Contracting Authority explained that it resulted from the documents submitted with the preferred bidders' tender that this tender was being submitted by a Joint Venture.

The Chairman then asked the Appellant's representative to make his submissions.

Dr Adrian Delia on behalf of the Appellants contended that according to page 2 of the tender document, any Joint Venture or Consortium wishing to bid for this tender had to open an account in the e-tendering system so that this account would be used to submit the tender. No bidder could open an account in his own name and use it to submit a tender in the name of a Joint Venture. Each account opened is assigned a unique number code to use for submitting tender. It is not acceptable to declare that one is in a Joint Venture only through the tender documents. The tender opening schedule clearly shows that the account numbered 24619 was assigned to Alberta Fire and Security Equipment and not to a Joint Venture. This point was accepted and referred to in the Department of Contract's letter of reply in paragraphs 12 and 13. It is evident that the bidder was not the Joint Venture but Alberta.

Perit Audrey Testaferrata de Noto ID No 239473M, the Chairperson of the Evaluation Board, under oath confirmed that the preferred bidders' documents included data on the Joint Venture and formed part of the tender. She also confirmed that the tender documents also contained an agreement through which the Joint Venture was formed. Replying to Dr Delia, who showed her the open tender schedule, witness confirmed that the schedule listed bidders and the code 24619 was the identity code issued to Alberta Fire & Security Limited. She could not state whether a Joint Venture was registered or how the identity number was assigned because the e-tendering system was managed by the Department of Contracts, however from the schedule the code 24619 seems to be assigned to Alberta. When the tenders were opened it was seen that all the relative documents contained therein referred to the Joint Venture. She was a Transport Malta employee and not a Department of Contracts employee and could not state anything concerning the department. According to the schedule the bidder was Alberta and the Evaluation Board had recommended that the tender be awarded to Alberta Fire & Security Limited. Replying to Dr Mizzi, who referred the witness to the Joint Venture agreement paragraph D, the witness stated that the Evaluation Board took into consideration this paragraph. This paragraph stated that Alberta is bidding as a Joint Venture not yet legally constituted. The Evaluation Board interpreted this that once the tender was awarded the Joint Venture would be constituted. Replying to Dr Robert Abela for the preferred bidder, witness said that the evaluation process was done in respect to the Joint Venture and not to Alberta. The tender documents all referred to the Joint Venture.

Mr Antoine Galea ID No. 377187M, a procurement manager at the Department of Contracts, under oath explained that bidders in an e tender open an account and are given an identity

number. The bidder's name cannot be changed after the submission of the tender. A Joint Venture needed to open an account as a Joint Venture according to page 2 of the tender document. On being shown the schedule of tenders received he said that this showed that the first bidder on the list was Alberta Fire & Security Equipment Limited and that it was assigned identity code number 24619. A Joint Venture could not use the account of one of the bidders. After the Evaluation Board made its recommendation this was sent to the Department of Contracts for award. The letter of rejection sent to Appellant shows that the preferred bidder was Alberta Fire & Security Equipment Limited.

Dr Adrian Delia on behalf of the Appellants said that the moot point here is who in fact is the bidder and eventual contractor. It has resulted that the bidder who was recommended for award is Alberta Fire & Security Equipment Ltd. Appellants' objection is not about whether a Joint Venture would be set up or not but about the identity of the preferred bidder, who has been assigned the identity code 24619. He reiterated that any Joint Venture had to create an account in order to be eligible to make a bid, and this was mandatory. It is evident that erroneously the Joint Venture formed between Alberta and the other company did not make the tender offer; the Joint Venture did not make the tender offer. The legal obligation of the tender offer rested with the bidder and the Contracting Authority cannot sign the contract with the Joint Venture since the bidder was Alberta.

Dr Christopher Mizzi on behalf of the Department of Contracts explained that the letter of reply was filed by the Department of Contracts and not by the Contracting Authority. He explained that the documents are self explanatory and that it is true that the clause referred to by Appellants existed. He however would raise the principle of proportionality. If the matter of whether the preferred bidder was a Joint Venture or not did not impinge on contents of the bid or the execution of the contract then the principle of proportionality should prevail.

Mr Stephen Muscat on behalf of the Contracting Authority explained that this first preliminary grievance on which the objection was based was a result of form. The tender was in fact submitted by the Joint Venture, since this result from the documentation. It also results that the preferred bid was just under €300,000 cheaper and it is clear that the Italian partner of the Joint Venture would who would satisfy the financial economic standing. He referred to a Court of Appeal decision regarding Ballut Blocks who had failed to put down the financial offer in the tender form. The Court had referred to the principle of proportionality and said that the Contracting Authority's aim had to be the choosing of the cheapest bid. He contended that in the present case the identity of the bidder was clear from the documents included in the tender and no advantage was gained by the preferred bidder or any disadvantage to any other bidder resulted from the inaccuracy. He filed a copy of the Court judgement.

Dr Robert Abela on behalf of the preferred bidder contended that the clause requiring Joint Ventures to register by opening an account was not mandatory. He said that mandatory clauses for the tender that would lead to disqualification were listed in clause 7 at page 7 of the tender documents and the non-registering of a Joint Venture could not lead to disqualification. The Department of contracts reserved the right to disqualify, and so it was not mandatory. The preferred bidder had submitted all the data on the Joint Venture including the agreement. The Contracting Authority was aware of the identity of the preferred bidder. The form where Joint Ventures had to be declared was submitted and indicated as AlbSem JV. He contended that it could be seen from the letter of reply by the Department of Contracts that the Contracting Authority knew who the preferred bidder was. He contended that

substance should not be the victim of excess formalism. He declared that the Public Contracts Review Board was one of the few remaining of an administrative nature and should be governed by the principle of good governance. He said that the Board should distance itself from any pressures made by anyone before delivering its judgement.

Dr Adrian Delia for the Appellants said that Dr Abela had just made a serious accusation that the Public Contracts Review Board could succumb to pressure by the Appellants. He said that he would be taking further action against this allegation at the proper venue.

Dr Robert Abela said that he was speaking generically that should pressure be made on the PCRFB, this should not succumb. He claimed that he had no doubts regarding the three board members.

Dr Adrian Delia referred to several decisions including the Tiki Taka case and that it was not a matter of substance over form. Here the question is who in fact the bidder was, and both the Department of Contracts and the Contracting Authority had said that the bidder was Alberta.

Dr Robert Abela for the preferred bidder said that there was a genuine error about the identification of the bidder but that no prejudice had been created to the other bidders as a result.

Dr Christopher Mizzi for the Department of Contracts reiterated the principle of proportionality and that the bidder was the Joint Venture.

At this point the hearing was closed.

This Board,

Having noted the Appellant's objection, in terms of the "Reasoned Letter of Objection" dated 1st June 2015 and also through the Appellant's verbal submissions during the Public Hearing held on 2nd July 2015, had objected to the decision taken by the Pertinent Authority, in that:

- a) The Appellant Company contends that the Preferred Bidder submitted his offer as a "Joint Venture" with a third party. In this regard, the Appellant maintains that through the system of E-Tendering, a Joint Venture is assigned an identity number. The account number assigned to the Preferred Bidder does not refer to**

a Joint Venture” but to a specific tenderer, in his own name i.e Alberta Fire & Security Ltd and not in the name of the Joint Venture;

- b) The Appellant maintains that the Joint Venture formed between the Preferred Bidder and the other company, did not submit the tender offer in its own name so that the Contracting Authority would not be able to sign the contract within the Joint Venture since the successful bidder is not the same legal entity.**

Having considered the Contracting Authority’s verbal submissions during the Public Hearing held on the 2nd July 2015 in that:

- a) The Contracting Authority maintains that from the documentation submitted by the Preferred Bidder it was clearly inferred that the latter’s offer was based on a Joint Venture, if it was accepted;**
- b) The Contracting Authority also contends that from the documentation submitted by the Preferred Bidder, it was clearly indicated that the Preferred Bidder would be executing the Tenderer’s word on a “Joint Venture” basis;**
- c) Although the “Joint Venture” was not legally constituted, the indication from the documentation submitted by the Preferred Bidder clearly indicated that such a constitution was legally formed.**

Reached the following conclusions:

- 1. This Board, after hearing all submissions, opines that, the fact that the preferred bidder did not abide by the bureaucratic system of filing the correct name of legal entity of the E-Tender, does not infringe the principle of “Substance over Form”. This Board also credibly note, that the Preferred Bidder did give a clear indication that he will perform the tendered works via a “Joint Venture”. At the same time, this Board notes that the documentation submitted by the Preferred Bidder, wherein he mentions the “Joint Venture” with full identification and also the agreement clearly illustrates that the Preferred Bidder entered into a joint agreement with “La Sema Forica SrL, Via Ponticello 17, Padova, Italy”.**

The identification of this third party company was well documented and its financial standing was also well adjudicated. Although, it is a fact, that the E-Tendering Process dictates that, if an E-Tenderer submits his offer on the basis of a Joint Venture, the Contracting Authority must allocate an identification number in the name of the Joint Venture and the fact that it was not done, does not, in any way camouflage the identity of the bidder.

The documentation submitted with the Tender Document should prevail. In this case, although the Tender Document was submitted in the name of “Alberta Fire & Security Company”, the latter had clearly informed the Contracting Authority through credible documentation that, should the tender be awarded to the Appellant, the bidder would carry out the tendered work as a Joint Venture whose agreement has been agreed, signed and submitted to the Contracting Authority.

In this regard, this Board, justifiably opines that “substance should prevail over form” and is credibly convinced that the information submitted by the Preferred Bidder explicitly indicated that the Tendered Works would be executed through a Joint Venture. This issue was vividly shown through the “Joint Venture” agreement dated 20 November 2014 duly signed by both parties. It must also be pointed out that the Preferred Bidder also submitted data on the Joint Venture Consortium, as stipulated in the Tender Document. In this regard, this Board justifiably opines that although the Tender submitted was in the name of “Alberta Fire & Security Ltd”, the latter had informed the Contracting Authority of such a Joint Venture. In this regard, this Board does not uphold the Appellant’s first grievance.

- 2. With regards to the Appellant’s second grievance, this Board after having heard credible submissions by the Contracting Authority and after having reviewed the documentation submitted by the Preferred Bidder, is justifiably convinced that the latter did give a clear indication that he had already entered into a “Joint Agreement” with “La Sema Forica SrL” and that he had also indicated such a partnership in the “Data on Joint Venture/Consortium, (Where Applicable) Form” which formed part of the Tender Document. So that, the Evaluation Committee, quite correctly, considered the existence of the partnership between “Alberta Fire & Security Ltd” and “La Sema Forica SrL”. In this regard, this Board justifiably opines that although the submitted tender was in the name of “Alberta Fire & Security Ltd”, enough documentation was submitted by the latter to indicate a Joint Venture should the award of the Tender be in his favour. This Board justifiably notes that the “Joint Venture” has already been identified**

to the Contracting Authority and should not present a problem if the award contract is signed by both parties to the Joint Venture. In this regard, this Board does not uphold the Appellant's Second Grievance.

3. This Board would respectfully address the issue of "Principle of Proportionality" with specific reference to this Appeal, in that, the fact that the Preferred Bidder submitted the offer in his name ie. "Alberta Fire & Security Ltd", yet at the same time, the same bidder did declare and prove through documentation that he had entered into an agreement with a third party company to form a "Joint Venture", does not in any logical way, alter the conditions of the Tender Document. In this regard, this Board justifiably opines that the discrepancy in the name of the Tenderer should not be an issue. The Recommended Bidder did provide all the relevant information at first hand, with regards to the "Joint Venture".

At the same time, this Board credibly notes that, the fact whether the Recommended Bidder was a Joint Venture or not, did not impose any disadvantage to the other bidders. The identity of the composition of the bidder was clear from the very start. This Board also notes that the Preferred Bidder was approximately € 300,000 cheaper and fully compliant. In this regard, this Board upholds the Evaluation Committee's decision to apply the "Principle of Proportionality". This Board also credibly notes that the E-Tendering System necessitates that a "Joint Venture" is given an identity number and not the Tender Document itself.

4. For the sake of clarity and transparency, this Board deplores the comments made by the Legal Representative of the Preferred Bidder, in that, this Board is under no pressure from any source to deliver its adjudication to this appeal. This Board does not deserve such unwarranted and unfounded comments. This same Board, whilst deploring such illicit comments, has decided to disregard them and dedicate its precious time in conducting its “autonomous activities” rather than waste precious time in litigation.

In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancillieri
Member

28 July 2015