

PUBLIC CONTRACTS REVIEW BOARD

Case No. 829

DLC 08/2014

Tender for Cleaning and Maintenance of Soft Areas and Cleaning of Urban Roads in an Environmentally Friendly Manner.

The tender was published on the 5th December 2014. The closing date was the 14th January 2015.

The estimated value of tender is €28,000 (Exclusive of VAT).

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

On the 20th March 2015 Mr Charles Gauci filed an objection against the decision of the contracting authority to award the tender to WM Environmental Limited for the amount of €20,377 exclusive of VAT.

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 14th July 2015 to discuss the objection.

Present for the hearing were:

Mr Charles Gauci:

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| Ms Annalise Gauci | Representative |
| Mr Charles Gauci | Representative |
| Mr Kurt Gauci | Representative |
| Dr Charlene Grima | Legal Representative |

WM Environmental Limited:

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| Mr Wilson Mifsud | Director |
| Dr John Bonello | Legal Representative |

Kunsill Lokali Dingli:

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| Mr Sandro Azzopardi | Mayor |
| Ms Rachel Powell | Councillor |
| Mr Maurice Hili | Representative |
| Mr Saman Bugeja | Representative |
| Dr Sharon Hili | Legal Representative |
| Dr John Gauci | Legal Representative |

The Chairman made a brief introduction during which he explained that the Board's policy is that objections for tenders involving European Union Funding, Health and Education are given priority when cases for hearings are set. He said that there was an ever increasing work load and that reporting the Board to any anti-bureaucracy authority was totally unwarranted. Had the contracting authority in this case had a very urgent reason to have the case heard before, it just had to ask the Board and the request would have been considered. He then invited the appellants' representative to make her submissions.

Dr Charlene Grima on behalf of her client the appellant contended that the preferred bidder's was too low to permit him to provide the necessary service. His offer was €20,377 and when VAT, overheads, management fees and necessary expenses are taken into consideration, the amount remaining to the preferred bidder to pay the employees was €10,730. This was clearly not enough as other further expenses like watering gardens and vehicle expenses still have to be paid. It is clear that the remaining amount is not enough to cover all and this must perforce mean that the preferred bidder's employees were at risk of being in precarious employment. He client had provided the same service for six years and knew what the expenses and wages amounted to.

Mr Charles Gauci, the appellant said that to provide the service required at least one full time employee to clean all of Dingli plus another 4 hours on Saturdays. He had lowered his previous bid by €5000 and his employees are regularly registered with the ETC. He had made minimum profit.

Dr Charlene Grima for the appellant continued that the contracting authority should have not just evaluated the price factor when awarding the tender but should have examined the level of service to be provided and that a minimum number of employees required would be available. She reiterated that for the preferred bidder to make any profit he must resort to precarious employment conditions.

Dr John Gauci on behalf of the contracting authority explained that appellant's tender had not been rejected on a technical matter but because it was not cheapest. In fact there were three other bidders who had made lower offers. The contracting authority had assessed all the tender offers also through the services of an expert. The expert reported that the preferred bidder could provide the service at the price offered. The contracting authority had examined and considered that the preferred bidder had complied with all the minimum legal requirements and was compliant and the tender had therefore been awarded the tender since he was also the cheapest bidder.

The Chairman remarked that the contracting authority was obliged to see that the contractor delivered all the services and it had other remedies if not. The Board cannot question whether a bidder made a profit or not.

At this point the hearing closed.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned letter of objection' dated 20th March 2015 and also through Appellant's verbal submission during the hearing held on the 14th July 2015, had objected to the decision taken by the pertinent Authority, in that:

- a) Appellant contends that the quoted price by the Preferred Bidder does not allow for the proper execution of the tendering works.**
- b) Appellant maintains that the Contracting Authority should have taken into consideration the level of service to be provided, during the evaluation process.**

Having considered the Contracting Authority's verbal submissions during the hearing held on 14th July 2015, in that:

- a) The Contracting Authority maintains that Appellant's offer was fully compliant but it was not the cheapest. The award criteria in this tender was the price.**
- b) The Contracting Authority was justifiably satisfied that the Preferred Bidder could provide the service to the quality as stipulated in the tender document.**

Reached the following conclusions:

- 1. With regards, to Appellant's first grievance, this Board justifiably contends, that through previous judgments and the Honourable Court of Appeals Judgment, it has been clearly stated that it is not the jurisdiction of the Evaluation Committee, nor it is this Board's Authority, to delve into whether the Preferred Bidder's offer will sustain a profit or incur a loss. This same Board, has on various occasions quoted this 'maxim', and opines that the objection filed by Appellant was 'Frivolous'. Appellant knew for a fact, that he was administratively and technically compliant, but his offer was not the cheapest. In fact, this Board notes that Appellant's bid was the fifth cheapest. This Board also respectfully notes that the Appellant's offer was not the cheapest and in all respects, this Board is somewhat perplexed why Appellant filed this objection. In this regard, this Board does not uphold Appellant's first grievance.**
- 2. With regards to Appellant's second grievance, this Board would like to point out that the 'Evaluation Committee' of the Contracting Authority must ensure that the Preferred Bidder can execute efficiently, the duties dictated in the tender document. In this regard, it was credibly proved that the Preferred Bidder can carry out the dictated duties as specified in the tender document. At the same time, this Board insists that a 'Monitoring Procedure' be applied by the Contracting Authority to ensure that the tendered services are carried out to the satisfaction of the Contracting Authority.**
- 3. This Board would also refer to previous decisions taken by same. In similar cases, and would also refer to the Decision by the Honourable Court of Appeal, where it was vividly stated that neither the 'Evaluation Committee of the Contracting Authority' nor the Public Contracts Review Board, had the**

jurisdiction to decide whether with the preferred Bidder's offer, would result in a profit or a loss to same.

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

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

16 July 2015