

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case No. 844**

**KLBO 04/2013**

### **Tender for the Collection of Mixed Household Waste in an Environmentally Friendly Manner.**

The tender was published on the 22<sup>nd</sup> November 2013. The closing date was the 13<sup>th</sup> January 2014. The estimated value of tender is €320,000.00 (Exclusive of VAT).

Four (4) offers had been received for this tender.

On the 7<sup>th</sup> April 2015 V & A Services filed an Objection against the decision of the Contracting Authority to award the tender to Saviour Mifsud and demanding the cancellation of the tender because of irregularities.

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 27<sup>th</sup> August 2015 to discuss the Objection.

Present for the hearing were:

#### **V&A Services:**

Mr Brian Vella	Representative
Mr Ronald Attard	Representative
Dr Michael Grech	Legal Representative
Dr Kevin Camilleri Xuereb	Legal Representative

#### **Mr Saviour Mifsud:**

Mr Saviour Mifsud	Representative
Dr Franco Galea	Legal Representative

#### **Bormla Local Council:**

Mr Joseph Caruana	Executive Secretary
Dr Mark Simiana	Legal Representative

Following a brief introduction by the Chairman, the Appellant's representative was invited to make his submissions.

Dr Michael Grech on behalf of the Appellant was shown the Recommended Bidder's extended bid bond by Dr Franco Galea who was acting on behalf of the latter who was Mr Saviour Mifsud. Dr Grech at this point declared that the matter of the validity of the bid bond was thus settled. He then listed his client's grievances:

1. That the Contracting Authority failed to give detailed reasons for the rejection of Appellant's tender according to clause 15(c) of the special conditions of tender;
2. That the adjudication had not been made according to the way demanded by the Department of Contracts;
3. That the date of manufacture of the vehicles should not have been used as a criterion for adjudication and the Recommended Bidder should not have been awarded full marks for this since his vehicles were manufactured in 2007 and 2012 while the adjudication was made in 2015. Furthermore it did not make sense to assign marks according to the age of the vehicles since what mattered environmentally was the quality of the engine emissions, the engine model of the vehicle; thus article 1.3 was superfluous since article 1.4 tested the vehicles for environmental constraints;
4. The criterion demanding bidders to list experience should not have been used since the Department of Contracts had issued a Circular 19/2013 that stated that this criterion should not be used anymore and that the order limiting the experience criteria had to be implemented at all times. The circular was also applicable to Local Councils. Yet for this criterion has been applied in this tender and Appellant had been assigned 12 marks while the Recommended Bidder had been allocated 20 marks. The tender should have been cancelled;
5. These two criteria, as applied by the evaluators, prejudiced Appellant's tender since if his bid had not been so penalized the Appellant's offer would have been better than the Recommended Bidder's;
6. The Evaluation Board failed to follow MEAT during evaluation. On the 18<sup>th</sup> August 2014 the Department of Contracts issued a policy note showing how MEAT tenders had to be evaluated, general rules, and this policy had to be used immediately from that date. According to this policy 100 points had to be assigned to the best technical offer while those offers who did not reach the threshold points had to be eliminated. The Evaluation Board had not used this since they allotted maximum points to the Recommended Bidder because he had more recent built vehicles. He contends that the procedure was not followed since the points allotted to the Recommended Bidder should have been the technical points obtained by Appellant divided by the points obtained by the Recommended Bidder times 100. MEAT was not followed. The same could be said for the financial score;
7. On the basis of the Court of Appeal's decision, where a conflict of interest had been shown to exist, the Contracting Authority should have decided to have the

tender cancelled. Reference was made to another tender where the Bormla Local Council had decided to cancel the tender in spite of a Court of Appeal decision confirming the PCRБ decision. The present tender should have been cancelled.

Dr Mark Simiana for the Contracting Authority said that:

- i) All the reasons sufficient to enable the filing of an Objection had been given to the Appellant. A break-down of points assigned to all bidders had been supplied. In fact the Objection was based on matters so explained;
- ii) A bidder cannot reject award criteria at the stage after submitting a tender. Every bidder was aware of these before submitting the tender and accepted them. The Appellant was now objecting to the year of manufacture of the vehicles and the engine quality and the experience clauses of the tender after the tender had been adjudicated; the year of manufacture of a vehicle and its type of engine were different;
- iii) The relative circulars relating to experience had been issued after the issue of the call for tenders and also the procurement policy note had been so issued after the call. The adjudication took a long time because of Objections and appeals. At any rate Local Councils were excluded from the constraints of the circulars since they do not fall under Schedule 2;
- iv) The matter of the validity of the bid bond has been settled;
- v) That any conflict of interest that there may have been does not vitiate the tender process. The Court of Appeal had in fact agreed with the advice given by Dr Luciano Busuttill and the Court decision had been to order the reinstatement of WM and to re-adjudicate the tender.

Dr Michael Grech for the Appellant insisted that the information given to Appellant in the Letter of Rejection did not contain any details as required by law. It just gave the bare facts and only after requests was detailed information given. He said that regarding the criteria to which Appellant objected, recourse through a warrant of inhibition could not be had since there were several court decisions. Finally he claimed that it was not true that the Court of Appeal had agreed with the advice given to the Local Council by its then advisor.

The Chairman remarked that action could have been taken by raising pre-contractual concerns before the tender closing date. Once the bidder submitted his offer he accepted the tender conditions.

Dr Franco Galea on behalf of the Recommended Bidder contended that the year of manufacture of vehicles was important since vehicles did not consist only of the engine and suitable vehicles were necessary for waste collection. He also contended that Appellant should have filed pre-contractual concerns if he thought that certain award criteria were irrelevant. He said that he had suspicions that some bidders had been given information about other bidders' tenders. This must have been so because of the grievance raised by the Appellant regarding the Recommended Bidder's bid bond. He said that a bidder who tried to obtain information about another bidder's offer should have been disqualified. He said that the Appellant was the incumbent providing the service and that could be the real reason for

the present Objection, to waste time.

Dr Michael Grech on behalf of the Appellant pointed out that the Recommended Bidder's previous legal adviser had also been the Contracting Authority's advisor. He reiterated that the year of manufacture of the vehicles does not make sense for adjudication. The vehicles should have been inspected instead. It was the engine quality that should matter environmentally.

At this point the hearing was closed.

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**This Board,**

**Having noted the Appellant's Objection, in terms of the "Reasoned Letter of Objection" dated 7th April 2015 and also through the Appellant's verbal submissions during the Public Hearing held on the 27th August 2015, had objected to the decision taken by the Contracting Authority, in that:**

- a) The Appellant contends that the Contracting Authority failed to give the specific reasons for the rejection of his offer;**
- b) The Appellant maintains that the Adjudication process was not carried out in accordance with the instructions issued by the Department of Contracts;**
- c) The Appellant claims that the method of allocation of marks assigned to his bid with regards to the age of vehicles was not correct as the allocated system placed too emphasis on the latter to be utilised in the tendered service;**
- d) The Appellant contends that the "Experience Criterion" should not have been adopted since Circular 19/2013 issued by the Department of Contracts**

**specifically exempted this requirement for tenders below the € 500,000 through the application of the “Experience Clause”, the Appellant’s bid was unfairly penalised;**

- e) The Appellant claims that the Evaluation Board did not follow the MEAT Evaluation Process;**
- f) The Appellant also contends that there existed a conflict of interest to the effect that the Tender should have been cancelled.**

**Having considered the Contracting Authority’s verbal submissions during the Public Hearing held on the 27<sup>th</sup> August 2015 and also the Letter of Reply dated 9<sup>th</sup> April 2015, in that:**

- a) The Contracting Authority maintains that sufficient reasons were given in its “Letter of Rejection” to enable the Appellant to submit an objection to the decision taken by the Authority;**
- b) The Appellant raised the question of the Award Criteria after submitting his offer so that he was fully aware of the conditions prior to submission of his bid;**
- c) With regards to the procedure of allocating marks, the Contracting Authority maintains that it has followed the correct and transparent procedure to ensure a level playing field to all bidders;**

- d) **The Contracting Authority contends that all the circulars mentioned by the Appellant in his objection were all issued after the publication of the Tender.**

**Reached the following conclusions:**

1. **With regards to the Appellant's First Grievance, this Board, after having heard credible submissions by the Contracting Authority and after having examined the "Letter of Rejection" sent to the Appellant, opines that the information sent to the Appellant with the "Letter of Rejection", did in fact contain ample information with regards to "Reasons" for the rejection of the Appellant's bid.**

**This Board also notes that attached to the "Letter of Rejection" was the breakdown of marks as allotted by the Evaluation Committee. This Board justifiably opines that, the Contracting Authority gave enough reasons for them to reject the Appellant's bid to enable the latter to object.**

**At the same time this Board credibly points out that, in fact, the Appellant's objection was based on the same details and reasons as submitted by the Contracting Authority. In this regard, this Board does not uphold the Appellant's First Grievance.**

2. **With regards to the Appellant's second grievance, this Board does not find any solid evidence that the Evaluation Committee did not follow the procedures as laid out by the Department of Contracts. This Board, on the other hand credibly notes that the Evaluation Committee acted in a transparent and fair manner.**

**This same Board was not given proof or circumstances as to note otherwise. In this regard, this Board does not uphold the Appellant's second contention.**

- 3. With regards to the Appellant's Third Grievance, this Board after reviewing the "Allocation of Marks" schedule, as processed by the Evaluation Committee and from credible submissions made by the same, opines that the mode of allocation of the marks has been an established useful tool in assessing the compliance of a Tender. The final marks are not given by one single person but by more so that, although the method may seem "Subjective", it does reflect the general average overview of the allotment of a fair mark.**

**The Appellant's main contention in this regard, is the allocation of the marks given to his bid with regards to his vehicles. This Board credibly notes that the Preferred Bidder's vehicles were more recent so that some advantage should be given on older ones being offered by the Appellant.**

**In this regard, this Board opines that the Allocation of Marks made by the Evaluation Committee represented a fair and transparent view of the Evaluation. To this effect, this Board does not uphold the Appellant's Third Contention.**

- 4. With regards to the Appellant's Fourth Grievance, this Board would justifiably point out that all the circulars mentioned by the Appellant in his objection were issued after the publication of the Tender Document.**

**In fact, Circular 19/2013 states clearly that “The Exemption of the Experience Criteria” shall not apply for Tenders below the € 500,000 for all tenders published after 1<sup>st</sup> January 2014. The Publication of the Tender Document was in fact 22 November 2013. In this regard, this Board does not uphold the Appellant’s Fourth Contention.**

- 5. With regards to the Appellant’s Fifth Contention, this Board, after having examined all the facts relating to this objection, credibly notes that the Evaluation Committee did in fact exercise the principle of the “Most Economic Advantageous Tender”.**

**The “MEAT” issue is debatable, in that, the scope of adopting this policy, is to ensure the most economical and advantageous Tender. This Board, justifiably opines, that although the formula for the “MEAT” Evaluation was not adopted, the Evaluation Committee, in its recommendations, did in fact choose the most favourable bid to its benefit. In this regard, this Board does not uphold the Appellant’s Fifth Grievance.**

- 6. On a general note, this Board justifiably points out that the Appellant raised grievances in front of this same Board, which could have been avoided by filing a “Pre-Contractual Concern”. At the same time, this same Board takes note of the allegations made by the Preferred Bidder that sensitive information relating to contesting bidders, was passed on to the Appellant. In this regard, this Board opines that the Contracting Authority should investigate such a contention and take the necessary legal action required.**

**7. With regards to the Appellant's claim that the Recommended Bidder's previous Legal Advisor was also the Contracting Authority's Legal Advisor, this Board opines that although the Hon. Court of Appeal decided that there existed a conflict of interest, the latter did decide that this issue did not in any way, effect the decision taken by the Evaluation Committee, so that there was no proven grounds why the Tender should be cancelled. In this regard, this Board does not uphold the Appellant's contention.**

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

Dr. Anthony Cassar  
Chairman

Dr. Charles Cassar  
Member

Mr. Lawrence Ancillieri  
Member

*22 September 2015*