

PUBLIC CONTRACTS REVIEW BOARD

Case No. 845

KLBO 04/2013

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

The tender was published on the 22nd November September 2013. The closing date was the 13th 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 8th April 2015 WM Environmental Limited filed an objection against the decision of the Contracting Authority to award the tender to Saviour Mifsud.

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 27th August 2015 to discuss the objection.

Present for the hearing were:

WM Environmental Limited:

Mr Wilson Mifsud	Representative
Dr John Bonello	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 John Bonello on behalf of the Appellant remarked on the length of time taken by the Contracting Authority to adjudicate the tender after the Court of Appeal decision. He also remarked that no detailed information was given to his client regarding the adjudication of the tender rendering the compilation of the Letter of Objection difficult. The relevant information was only produced after repeated requests. He said that the grievances of the Appellant regarding this tender were:

1. The Adjudication to the Recommended Bidder was based on the most economically advantageous offer despite the Tender Document stating that it would be to the most favourable tender. If the Contracting Authority wanted to give it according to the MEAT procedure it should have said so in the Tender Document;
2. The financial offers, which were assessed taking into consideration also the bid from a bidder whose tenders had already been rejected. This should not have been done;
3. The subjective way the marks were assigned to Appellant, citing for example the marks for human resources where the latter who employed 16 persons was assigned the same number of marks as the Recommended Bidder who employed 11 persons. The same could be said of other criteria such as whether bidder owned the vehicles or not and the date of manufacture of the same.

The deciding factor of the Adjudication was however decided by the date of manufacture of the vehicles since the Appellant and the Recommended Bidder had the same number of points up to that point. While the Recommended Bidder was allocated 10 marks for vehicles made in 2007 and 2012, the Appellant, who had vehicles made in 2005, 2006 and 2009, was assigned 7.5 marks. This was a purely subjective criterion and he contended that the Appellant should at least have been allocated 8.5 marks. Mathematically this 1 point difference resulted in the Recommended Bidder obtaining more points in the total weighted marking. He insisted that the Appellant should not have been penalized 2.5 marks for the year of production of the vehicles.

Mr Joseph Caruana, Executive Secretary, Kunsill Lokali Bormla, replying to questions by the Chairman explained that the adjudication was made by 5 persons on the Evaluation Board who had discussed the offers between them and then issued a collective mark. He stated that the Evaluation Board decided to allot the Appellant with 7.5 marks for the year of production of the vehicles since each year that passes, vehicles are becoming more environmentally friendly.

Dr Mark Simiana for the Contracting Authority explained that the first adjudication had included the lowest offer, made by a rejected bidder, as a basis to assess the financial offer. The present evaluators decided to use the same criterion since there had been no criticism by the Court of Appeal on the method used. He agreed that the wording in the Tender Document could have indicated that the tender would be assessed using MEAT, but it was clear enough although it stated the most favourable. Replying to a question by Dr John Bonello regarding the fact that no points were given to Appellant under clause 1.1, when Appellant had 16

employees against the 11 employees of the Recommended Bidder, he said that neither the Recommended Bidder nor the Appellant had included a signed declaration showing the number of persons to be assigned to the project, and therefore no points were assigned to either of them.

Dr John Bonello insisted that Appellant's offer was cheaper and that the year of manufacture of the vehicles was not a good objective criterion.

Dr Franco Galea on behalf of the Recommended Bidder stated that Appellant could and should have resorted to a pre-contractual concern if he did not agree with the criteria. He said that "most favourable" does not necessarily mean the cheapest. The discretion of the evaluators should prevail, and this was accepted by the Court of Appeal in several decisions.

Dr Mark Simiana for the Contracting Authority reiterated that the Evaluation Board had used the same criteria when assessing the financial offers in order to ensure consistency.

At this point the hearing was closed.

This Board,

Having noted the Appellant's Objection, in terms of the "Reasoned Letter of Objection" dated 8th 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 pertinent Authority, in that:

- a) The Appellant maintains that although the Tender Document dictated that the Adjudication would be based on the most favourable Tender, in fact, the assessment was made on the "Meat" basis, which was not mentioned in the Tender;**
- b) The Appellant contends that the Evaluation Committee took also into account a rejected bid when assessing the financial aspect of the Tender;**

- c) **The Appellant also claims that the method of allocating marks were highly subjective and unfair.**

Having considered the Contracting Authority's "Letter of Reply" dated 10th April 2015 and also the verbal submissions of the same, during the Public Hearing held on the 27th August 2015, in that:

- a) **The Contracting Authority contends that in accordance with Clause 12 of the "Instructions to Tenderers" the term "Most Favourable" tender is stated without any reference to particular criteria for the award of the Tender. In this regard, the Authority maintains that it has followed the correct procedure in the Evaluation Process;**
- b) **The Contracting Authority confirmed the fact that, in the Evaluation process, the same had taken into account a rejected offer's price, but this action did not in any way prejudiced or disadvantaged the Appellant's bid;**
- c) **The Contracting Authority maintains that the allocation of points was agreed by all members of the Evaluation Committee and was carried out in a consistent, transparent and fair manner.**

Reached the following conclusions:

1. **With regards to the Appellant's first contention, this Board, after having examined closely, the work of the "Award Criteria" as stipulated in the**

“Instructions to Tenderers”, in the Tender Document is justifiably convinced that the term “Most Favourable” does in fact meant the most advantageous bid to the Contracting Authority.

This Board acknowledges the fact that, perhaps, through more precise wording such as “Meat” could have been expressed, but this Board justifiably contends that the interpretation of the expression “Meat” does in fact denote the “Most Favourable bid”, in that the latter satisfies the Administrative and Technical compliance together with the price, to the eventual benefit of the Contracting Authority.

This Board also credibly notes, that this grievance should have been remedied through a Pre-Contractual Concern and not presented in front of this Board. In this regard, this Board does not uphold the Appellant’s First Grievance.

- 2. With regards to the Appellant’s Second Contention, this Board justifiably contends that, the fact that the Evaluation Committee took into account a “rejected bid’s price” in assessing the Financial Standing of the other bids, did not in any credible way, effect the transparency and level playing field of the “Financial Evaluation Process” of the offers.**

This Board is credibly convinced that the approach adopted by the Evaluation Committee was simply to establish a basis of price. This Board notes that it was not credibly proven that such an approach taken by the Evaluation Board did in fact jeopardise or handicapped the Appellant’s offer, in the Evaluation Process.

This Board would also like to refer to the Hon. Court of Appeal’s decision dated 11 November 2014, in the names of “Brian Vella vs Director of Contracts” whereby, it was upheld that such an action taken by the Evaluation Committee does not in fact effect the latter’s decision in the award of the Tender. In this regard, this Board does not uphold the Appellant’s Second Grievance.

- 3. With regard to the Appellant’s Third Grievance, this Board, after having examined the procedure adopted by the Evaluation Committee, is thoroughly and credibly convinced that although there may exist an element of “subjectivity” in allotting marks to a bid during the evaluation process, the same procedure provides for an “objective” result, due to the fact that more than one person is adjudicating.**

In fact, this Board note, that the Evaluation Committee consisted of five independent persons and prior to allocation of points; these were discussed and approved by the same. In this context, this Board contends that the “subjectivity” of the issue was substantially minimised to form an “objective” decision.

In respect of the fact that the Appellant claims, that his bid was discarded for only 1 mark, this Board, as on previous occasions, maintains the fact that the Appellant’s bid suffered from being denied the Tender Award for only one mark. This does in fact represent the “Resultant Total marks” and in the opinion of this Board, this should not be a focal point of the Appellant’s objection.

This Board justifiably notes the Appellant’s contention that he was disqualified due to the fact of the “Years of Motor Vehicles”. In this regard, this Board upholds the Contracting Authority’s contention that the most recent of the vehicles and equipment does in fact merit the highest marks as the most recent equipment would be awarded the highest score. The preferred bidder’s vehicles were more recent and the Evaluation Committee were prudent, transparent and correct in allotting the marks. In this regard, this Board does not uphold the Appellant’s Third Grievance.

- 4. This Board would finally and credibly note that sufficient reasons were given to the Appellant in the Letter of Rejection. Although there are no regulations with regards to the deposit, this same Board opines that sufficient reasons were given by the Contracting Authority to enable the Appellant to object.**

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

23 September 2015