

PUBLIC CONTRACTS REVIEW BOARD

Case No. 860

GCCL T 08/2015

Tender for the Provision of Cafeteria Attendant Services on Board GCCL Vessels.

The Tender was published on the 10th July 2015. The closing date was the 7th August 2015. The estimated value of Tender is €120,000.00 (Exclusive of VAT).

Three (3) offers had been received for this Tender.

On the 17th September 2015 Koperativa Indafa Pubblika filed an objection against the decision of the Contracting Authority to award the Tender to Trust Business Solutions JV.

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 15th October 2015 to discuss the objection.

Present for the hearing were:

Koperativa Indafa Pubblika:

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| Mr Marcel Bonnici | Representative |
| Mr Laurie Zammit | Representative |
| Dr Carmelo Galea | Legal Representative |

Trust Business Solutions JV:

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| Mr Matthew Formosa | Representative |
| Mr Joseph John Grech | Representative |

Gozo Channel Company Limited:

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| Ms Jacqueline Mizzi | Chairperson Evaluation Board |
| Mr Mark Formosa | Member Evaluation Board |
| Ms Carmen Ogilvie Galea | Representative |
| Ms Francine Muscat | Legal Representative |
| Dr Georgine Schembri | Legal Representative |

The Chairman made a brief introduction and asked the Appellant's representative to make his submissions.

Dr Carmelo Galea on behalf of the Appellant Cooperative explained that the objection was based on Public Policy. The Contracting Authority had, in accordance with Contracts Circular 13 of 2015, asked bidders to split their offers in two – the manpower costs and the overheads including administrative costs. Two of the bidders failed to give these overheads while one bidder had made a 1 cent provision for overheads. The Appellant contends that this was a rule in order to circumvent the administration's intention to eradicate precarious employment. Contracts Circular 27 of 2013 had stipulated that similar contracts had to be revised yearly according to the cost of living increase. In the present Tender it was not conceivable that the awarded company would provide the service at 1 cent per hour as overheads and still pay its employees the minimum wages. It is contended that this amounts to an illegal action where the contractor declares paying certain wages but in reality would use a certain amount to cover overheads. The Court of Appeal decision was delivered before the change in public policy where precarious employment was safeguarded.

The Chairman explained that the Court of Appeal had overruled this Board's decision and now the Court of Appeal's decision had to be followed. Neither the Evaluation Board nor the Public Contracts Review Board could investigate whether a bidder would be making a profit or a loss. What mattered is that bidders declared that they would pay their employees according to law and that they would provide the necessary service. It was up to the Contracting Authority to see that the service was provided as declared.

Dr Carmelo Galea for the Appellant contended that since the administration had published its policy and since it is impossible for the Recommended Bidder to operate at the offered price, this meant that the policy would be circumvented. Bidders were in fact declaring that they would pay the legal wages to their employees but then they were not declaring their overheads, making a loss. This was not feasible.

Dr Georgine Schembri on behalf of the Contracting Authority said that the Evaluation Board had to see that offers were administratively compliant and then to evaluate them on the financial aspect. Once it was ascertained that the minimum wages would be paid to bidders' employees, the bidders were administratively compliant and only the financial aspect would have to be considered. It may be that certain bidders would end up making a loss since no overheads were considered, but this would not be of any interest to the Evaluation Board. The award would have to be made to compliant bidders making the lowest financial offer.

Dr Carmelo Galea for the Appellant explained that what Dr Schembri stated went against the requisites of the Tender which had requested three columns where the financial offers had to be made. Offering a Tender without overheads meant that the bidder was stultifying the aims of the Contracting Authority in safeguarding employees.

Dr Georgine Schembri for the Contracting Authority said that the Tender Document said nothing precluding bidders to offer free services without overheads. What mattered was the financial offer.

The parties present at the hearing agreed that since the merit of the three cases 06/2015, 07/2015 and 08/2015 were identical and the same and involved the same parties, the submissions that had been made in the case, Tender 06/2015 should apply for the other two

cases set down for hearing today.

At this point the hearing was closed.

This Board,

Having noted the Appellant's objection, in terms of the "Reasoned Letter of Objection" dated 3 September 2015 and also through the Appellant's verbal submissions during the Public Hearing held on 15 October 2015, had objected to the decision taken by the pertinent Authority, in that:

- a) **The Appellant contends that in accordance with the Circular 13/2015 issued by the Department of Contracts, prospective bidders had to split their offer into labour costs and overheads. The main purpose of this Circular was to eradicate precarious employment rates. The Recommended Bidder's quoted rate on overheads was 1 cent per hour and in this regard the Appellant maintains that it is not possible for the latter to pay the established minimum rate to employees, without incurring a loss.**

Having considered the Contracting Authority's verbal submissions during the Public Hearing held on 15 October 2015, in that:

- a) **The Contracting Authority maintains that the Evaluation Board awarded the Tender to the cheapest administratively and technically compliant bid but also took into consideration the declaration made by the Recommended Bidder whereby the latter undertook to pay the Employees the stipulated minimum**

wage.

Reached the following conclusions:

- 1. With regards to the Appellant's main contention, this Board justifiably, would like to assert the decision taken by the Court of Appeal and also subsequent decisions taken by this Board on this particular issue.**

The fact that the Recommended Bidder provided, in his bid, only 1c per hour does not constitute evidence that they would incur a loss. At the same instance, the Recommended Bidder's rate does not indicate that he will pay fewer wages to his employees than the stipulated minimum wage.

This Board opines that a prospective Tenderer may have more than one motive for bidding at a cheap bid, other than making a profit. This can be done as long as the Recommended Bidder declares that he will pay his employees not less than the stipulated hourly rate.

This Board notes that the labour rate quoted by the Recommended Bidder was more than the statutory minimum wage. In this regard, this Board opines that no credible evidence was proved that the precarious employment was present in the Recommended Bidder's quoted rate.

This Board would also contend that although Circular 13/2015 issued by the Department of Contracts asked bidders to quote their bid broken down into

labour costs and overheads, this does not preclude a potential bidder from quoting a very low or zero rate per hour for overhead costs.

- 2. This Board would also like to re-affirm its previous decisions taken on this issue where it has been credibly established that it is not the jurisdiction of this Board or the Evaluation Committee to delve into the “Commercial Viability” aspect of a Tender.**

This Board is only concerned with the adopted procedure in the Evaluation Process. It is then up to the Contracting Authority to ensure that the Recommended Bidder executes the Tendered Works under the conditions and rates quoted by the same.

In view of the above, this Board does not uphold the Appellant’s grievances 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**

20 October 2015