

PUBLIC CONTRACTS REVIEW BOARD

Case No. 868

LCC/T 03/2014

Tender for Street Sweeping in an Environmentally Friendly Manner for Luqa Local Council.

The Tender was published on the 28th November 2014. The closing date was on the 9th January 2015. The estimated value of the Tender was €19,000.00 (Exclusive of VAT)

Five (5) bidders had submitted an offer for this Tender.

On the 23rd April 2015 WM Environmental Limited filed an objection against the decision taken by the Contracting Authority to award the Tender to Northern Cleaning Group Limited.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Thursday 5th November 2015 to discuss the objection.

Present for the hearing were:

WM Environmental Limited:

Mr Wilson Mifsud
Dr John Bonello

Representative
Legal Representative

Northern Cleaning Group Limited:

No representatives present.

Luqa Local Council:

Mr John Schembri
Mr Michael Portelli
Dr Alessandro Lia

Mayor
Executive Secretary
Legal Representative

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

Dr John Bonello on behalf of the Appellant referred to the Letter of Objection and confirmed that his client's offer had been in fact the highest bid. He contended that the various recent decisions by this Board, following the judgement by the Court of Appeal about precarious employment should not be taken into consideration in this case. In the present Tender, the Contracting Authority had specified that bidders had to provide two full time employees to satisfy the Tender conditions. He contended that in this case it cannot be argued that the same employees were used elsewhere as well. When one takes into consideration the wages of these two employees and the amount at which the Tender was awarded the conclusion must be that these two employees must perforce be paid at less than the minimum wage. He also remarked that in the letter of reply the Contracting Authority was raising the matter of its past bad experience with the service provided by the Appellant. This was tantamount to black listing and was not permissible.

Dr Alessandro Lia on behalf of the Luqa Local Council explained that clause 12 of the Tender Document set down the award criteria of the Tender to be "most favourable Tender" and insisted that the award had been made following this criterion. He produced and presented a copy of the minutes of the sitting where the award was decided and a number of emails. He explained that the Appellant was the incumbent contractor for three years during which the Executive Secretary was receiving several complaints against Appellant. The emails had been sent to Appellant by the Secretary to remedy the situation. He also said that an ex-employee of the Appellant had complained to the Council that he was continually receiving complaints from the public. He had explained that he was made to work alone for a long time. These had to be considered when choosing the most favourable Tender. The matter of precarious employment, he contended, was only being raised as a sort of fishing expedition by the Appellant. He insisted that all Tenderers had to sign a declaration affirming that they would abide by all laws and that the Recommended Bidder was fully compliant.

Dr John Bonello for the Appellant insisted that the Contracting Authority should not have relied on hearsay. He explained that the former employee cited by the Contracting Authority had started work with the Appellant on the 13th April, ended his employment on the 18th April, and made the allegations to the Local Council on the 24th April. He reiterated that this Tender had mandatorily insisted that two full time employees be assigned to this work and that thus it was not possible for the Recommended Bidder to pay these employees the legal wages at the offered price.

Dr Alessandro Lia, replying to questions by the Chairman, said that the Recommended Bidder had signed the necessary declaration. Apart from the wages to employees they had to take into consideration all the other costs. When making the award the Council took into consideration the price, the service provided and any complaints that had been received.

The hearing was brought to a close.

This Board,

Having noted the Appellant's objection in terms of the "Reasoned Letter of Objection", dated 23 April 2015 and also through the Appellant's verbal submissions during the Public Hearing held on 5 November 2015, had objected to the decision taken by the Pertinent Authority, in that:

- a) The Appellant contends that although there were various decisions regarding this type of appeal both by the Hon. Court of Appeal and by the Public Contracts Review Board, this particular tender dictated that bidders had to provide two (2) full time employees. In this regard, the Appellant maintains that the rate quoted by the Recommended Bidder could not, in any way, cover the cost of the minimum hourly Labour rate and overheads;**

- b) The Appellant also contends that the Contracting Authority took into account their past bad experience in arriving at the Award decision. In this regard, the Appellant maintains that this attitude represent "*Black Listing*", which is not permissible.**

Having considered the Contracting Authority's "Letter of Reply" dated 2 September 2015 and also the verbal submissions during the Public Hearing

held on 5 November 2015, in that:

- a) The Contracting Authority maintains that it had carried out its Evaluation process on the Award Criteria of “*most favourable tender*”. At the same time, consideration was also given to the Appellant’s past performance;**

- b) The Contracting Authority also contends that the Recommended Bidder signed the necessary declarations for the latter to abide by all regulations.**

Reached the following conclusions:

- 1. With regards to the Appellant’s First Grievance, this Board justifiably opines that the fact that the Contracting Authority dictated that bidders had to provide two Full Time employees, does not in any credible way, alter the decisions taken by the Hon. Court of Appeal and this Board’s numerous decision;**
 - In this regard, this Board would re-affirm its past decisions on similar appeals, in that, it is not this Board’s jurisdiction to delve into the issue of whether the quoted rate by the**

Recommended Bidder would result in a loss or profit to the latter. This jurisdiction also applies to the Evaluation Board;

- This Board would, once again, confirm that as long as, the Recommended Bidder signed the necessary declarations in that he is bound to pay the Full Time Employees not less than the stipulated minimum labour rate, the Evaluation Committee carried out the Evaluation Process in a fair and transparent manner. In this regard, this Board does not uphold the Appellant's First Grievance.**

2. With regards to the Appellant's Second Grievance this Board credibly opines that the award criteria of the "*Most Favourable Tender*" implies that the Contracting Authority has all the liberty and obligation to select the most advantageous tender, with regards to price and performance.

This Board asserts that it was the duty of the Evaluation Committee to conduct the necessary "*Due Diligence*" and take this issue into consideration when evaluating a Tender. This Board justifiably opines that there was no "*Black Listing*" element in this regard but rather a "*Review of Past Performance of Appellant*". In this regard,

this Board does not uphold the Appellant's Second Grievance.

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

Dr. Anthony Cassar
Chairman

Dr. Charles Cassar
Member

Mr. Richard A. Matrenza
Member

12 November 2015