

PUBLIC CONTRACTS REVIEW BOARD

Case No. 910

MLC 08/2015

Tender for the Environmentally Cleaning and Maintenance of Public Conveniences.

The Tender was published on the 25th September 2015. The closing date was on the 29th October 2015. The estimated value of the Tender was €198,305.00 (Exclusive of VAT)

Seven (7) bidders had submitted an offer for this Tender.

On the 20th January 2016 Absolute Cleaners Limited filed an Objection against the decision taken by the Contracting Authority to award the Tender to Mr Antoine Fenech for the sum of €190,650.00.

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 the 3rd March 2016 to discuss the Objection.

Present for the hearing were:

Absolute Cleaners Limited:

Mr Luke Bajona	Representative
Dr David Farrugia Sacco	Legal Representative

Mr Antoine Fenech:

Mr Antoine Fenech	Director
Dr Josette Sultana	Legal Representative

Kunsill Lokali Mellicha:

Mr Clayton Bartolo	Deputy Mayor
Me Carmel Debono	Executive Secretary
Mr Joseph Attard	Contracts Manager
Dr Alfred Abela	Legal Representative

The Chairman made a brief introduction and then invited the Appellants' representative to make his submissions.

Dr David Farrugia Sacco on behalf of the Appellant explained that there were six points to which he wanted to refer. The Contracting Authority's Letter of Reply contained items that Appellant did not agree with. He contended that:

- i) In spite of the explanation given by the Contracting Authority, the amount indicated in the bid-bond was not sufficient to cover the Tender;
- ii) The number of hours was so small that in a contract amounting to scores of thousands of Euros amounts only to around €700;
- iii) With regards to the GPP Compliance Details that was not submitted by the Recommended Bidder, the Contracting Authority is admitting this fact but stated that the evaluation of the Tender could still be carried out. The Appellant contends that bidders should submit all the required documents;
- iv) With regards the not proper presentation of Annex 6 by the Recommended Bidder, the Contracting Authority also admits this fact but had deemed it as a genuine mistake. The Appellant contends that Mr Antoine Fenech's Annex 6 was not properly filled since the figures do not tally;
- v) With regards the 5% management fee and VAT deduction from the Recommended Bidder's offer, there would be only €1377 remains to cover all the other expenses including transport, materials and equipment. This is economically not possible;
- vi) The Contracting Authority in the Letter of Reply raised the matter of default notices against the Appellant but the latter contends that this is irrelevant in the present case which is about the failure of the Recommended Bidder to submit a proper Tender.

Dr Alfred Abela for the Contracting Authority referred to the Letter of Reply and stated:

- a) With regards to the bid bond, the Recommended Bidder had two active performance bonds and these satisfied clauses 8b of the instructions to Tenderers covers the need for submitting a bid-bond;
- b) The Contracting Authority had taken into consideration the possibility of precarious employment;
- c) It was true that the GPP was not submitted by some bidders one of which being the Recommended Bidder. The Contracting Authority during evaluation asked these bidders to submit these documents and continued evaluating after it was submitted;
- d) Annex 6 from the Recommended Bidder contained a genuine mistake where certain numbers were interchanged. However this did not affect the totals;

- e) The Contracting Authority had checked with several other Local Councils and it resulted that the Appellant firm had received a number of default notices. This included those from the Contracting Authority itself.

The Chairman explained that the Contracting Authority had to ask bidders for clarification where their submissions were not clear, but it could not ask them to rectify their Tenders but submitting documents that had been omitted.

Dr Alfred Abela had asked for rectification by other bidders as well and not only from the Recommended Bidder. The Local Council had considered that it was expedient to ask the bidders to submit the missing documents.

At this point the hearing was closed.

This Board,

Having noted the Appellant’s Objection, in terms of the “*Reasoned Letter of Objection*”, dated 20 January 2016 and also through their verbal submissions during the Public Hearing held on 3 March 2016 and had objected to the decision taken by the pertinent Authority, in that:

- a) **The Appellant contends that the amount of Bid-Bond offered by the Recommended Bidder was not sufficient to cover the value of the Tender;**

- b) **The Appellant Company also maintains that the Recommended Bidder did not submit the GPP Compliance details, as requested in the Tender Document;**

- c) **The Appellant insists that the Recommended Bidder did not submit “Annex 6” properly;**
- d) **The rates offered by the Recommended Bidder were not realistic;**
- e) **Absolute Cleaners Limited contests that the default notices against them are irrelevant to this Appeal.**

Having considered the Contracting Authority’s “Letter of Reply” dated 26 January 2016 and also their verbal submissions during the Public Hearing held on 3 March 2016, in that:

- a) **The Contracting Authority maintains that due to the fact that the Recommended Bidder was already in possession of a single performance bond in favour of the Council;**
- b) **Although the Recommended Bidder did not initially submit the GPP compliance details, these were made immediately available upon request by the Contracting Authority;**
- c) **Regarding the Annex 6 submitted by the Recommended Bidder, the Contracting Authority maintains that although an amount was**

incorrectly positioned against the wrong location, the total was correct and this did not affect the ranking of the Tender;

- d) The Contracting Authority confirms that it had examined all the relative costing submitted by the Recommended Bidder and the eventual event of precarious employment does not arise;**
- e) The Contracting Authority had from past experience and through information obtained from other councils, noted the default notice which Absolute Cleaners Ltd was served upon.**

Reached the following conclusions:

- 1. With regards to the Appellant's First Contention, this Board, after having examined the relative documentation, justifiably confirms that the Recommended Bidder did in fact had other bonds in favour of the Contracting Authority satisfying the amount so requested. In this regard, this Board rejects the First Contention by Absolute Cleaners Ltd;**
- 2. With regards to the Appellant's Second Contention, this Board, after having heard the submissions made by the Contracting Authority,**

credibly confirms that it was not the proper procedure for the Evaluation Committee to ask for the GPP documentation during the Evaluation stage. This amounted to a “*Rectification*”, which is not allowed. In this regard, this Board upholds the Appellant’s Second Contention;

3. With regards to Absolute Cleaners Limited’s Third Contention, this Board opines that the misplacement of a figure in Annex A did not in any way affect the ranking or assessment of the Recommended Bidder’s offer. The principle of “*Substance over Form*” should prevail. In this regard, this Board does not uphold the Appellant’s Third Contention;

4. With regards to the Appellant’s Fourth Contention, this Board justifiably points out, as it had done on many occasions, that it is not the jurisdiction of this Board to delve into whether the rates quoted by the Recommended Bidder will incur the latter in a profit or loss.

This Board opines that it is the obligation of the Contracting Authority to ensure that Mr Antoine Fenech, with his quoted rates, will carry out the tendered works/services in accordance with all the conditions stipulated in the Tender Document. In this regard, this

Board rejects the Appellant's Fourth Contention.

5. With regards to the Appellant's Fifth Contention, this Board credibly contends that the Contracting Authority had every right to investigate and check any default notices served upon a prospective bidder, so much so, that it was also evident that the Appellant Company failed to deliver a particular Tender for the same Contracting Authority. In this regard, this Board does not uphold the Appellant's Fifth Contention.

In view of the above, this Board opines that the Evaluation Process adopted by the Contracting Authority was not transparent and proper.

This Board recommends that:

- i) The Tender should be re-issued under the proper procedures;**
- ii) The deposit paid by the Appellant Company should be refunded**

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Richard A Matrenza
Member

15 March 2016