

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case No. 930**

**BLC 002/2015**

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

The Tender was published on the 8<sup>th</sup> October 2015. The closing date was on the 9<sup>th</sup> November 2015. The estimated value of the Tender is €762,711.00 (Exclusive of VAT).

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

On the 9<sup>th</sup> March 2016 Executive Tenders Joint Venture filed an objection against the decision of the Contracting Authority to award the Tender to WM Environmental Limited.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Tuesday the 19<sup>th</sup> April 2016 to discuss the objection.

Present for the hearing were:

#### **Executive Tenders Joint Venture:**

Mr Adrian Vella	Representative
Mr Steve R Farrugia	Representative
Dr John L Gauci	Legal Representative

#### **WM Environmental Limited:**

Mr Wilson Mifsud	Representative
Dr John Bonello	Legal Representative

#### **Birkirkara Local Council:**

Mr Neil Spiteri	Secretary
Mr Ray Pellicano	Representative
Dr Larry Formosa	Legal Representative

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

Dr John L Gauci on behalf of the Appellant submitted that:

- a) The Contracting Authority did not give any reasons why the Appellant's offer was rejected. It was only later that Appellant had been provided with an Adjudication Report;
- b) The Contracting Authority had ignored the MEAT provisions set out in the Tender Document and used a completely different method that had not been previously published, to adjudicate the Tender. This can be seen from the Evaluation Report. Page 37 of the Tender Document showed that the Tender had to be adjudicated as to 60/40% basis that is weighting of 60% for performance and 40 % of the marks for the financial aspect. Yet the evaluators had set a 70% threshold mark and then adjudicated according to price.

There was no justification for this and this put Appellant at a disadvantage position since Appellant had obtained 100% of the technical/administrative marks which meant that if the MEAT method was used would have been awarded the Tender;

- c) The Contracting Authority had allowed the Recommended Bidder to change his Tender. Where the Evaluation Board was not satisfied with the Recommended Bidder's human resources, they had sent for him and allowed him to include another firm's (Specialist Group) employees as his own. This was without obtaining any clearance from the Specialist Group to do so. Furthermore another bidder tried to do the same but was disqualified. This was a serious point as the number of employees should have been put down in the Tender submission;
- d) The Technical Evaluation grid contained provisions for any default notices issued to the bidders to have been penalized. Although it resulted that the Recommended Bidder had a number of default notices, this was ignored and he was given full marks. The reason the Contracting Authority gave for this was that the San Gwann Local Council had not replied to the Contracting Authority. It later resulted that the San Gwann Local Council had terminated the Recommended Bidder's contract and removed the twenty three default notices.

For these reasons, Dr John L Gauci contended that the Tender should be awarded to the Appellant.

Dr Larry Formosa on behalf of the Contracting Authority contended that using MEAT could create problems for the Contracting Authority. The procedure used to adjudicate the Tender Document was correct as in fact the Recommended Bidder had submitted the cheapest offer.

The Chairman remarked that the MEAT system of adjudication was the most objective one and the latter system should have been used as specified in the Tender Document.

Dr Larry Formosa insisted that the Contracting Authority had used the system and had arrived at choosing the best offer. He cited this Board's decision in the case 844 where the Board

decided that if the MEAT was not followed to the letter the Evaluation Board could still arrive in obtaining the most favourable offer. He denied that the Recommended Bidder was allowed to change his offer. The Evaluation Board just asked him to clarify the employees' position for ease of mind. The number of employees to be used was as per Tender conditions.

Regarding the default notices he explained that San Gwann Local Council had failed to reply to request regarding these. However an anonymous phone call had led the evaluators to investigate whether the Recommended Bidder had any default notices. It resulted that the Recommended Bidder had 23 default notices with the San Gwann Council but that these were not related to waste collection and had been withdrawn and the charges dropped when the contract was terminated. He insisted that the Recommended Bidder had offered the best offer – it was around €130,000 less per year for four years.

Dr John L Gauci for the Appellant invited the Board to examine the Evaluation Report to see that in fact the Recommended Bidder was allowed to change his offer. It can also be seen that the question of default notices had been ignored for the only reason that San Gwann Local Council did not reply.

Dr John Bonello on behalf of the Recommended Bidder said that page 8 of the Tender Document had stated that the intention of the Contracting Authority was to award the Tender to the “*most favourable*”. Thus in principle the method to be used was MEAT and the evaluators did not just rely on price as the only deciding factor but took into consideration both the price as well as the other factors. This results from the Evaluation Report.

He denied that the Recommended Bidder was allowed in any way to change the Tender offer. The evaluators had just asked him for clarification and assurance that employees would be available. It was also not true that the Recommended Bidder did not have enough employees. In such Tenders, where the awarded Tenderer takes over from another contractor, there is normally a transfer of business where certain employees are taken over by the new contractor. He said that he was apprehensive that action was taken following an anonymous telephone call. This should not have been done.

The default notices that his client had from the San Gwann Local Council were unilateral and amounted to 23 in just three months. There was no way to contest these except through the Courts, which the Recommended Bidder did. As soon as the San Gwann Local Council had received a judicial letter, the default notices were withdrawn.

At this point Dr John Bonello presented a letter from the San Gwann Local Council to the Recommended Bidder stating that the default notices had been annulled. This meant that there were no default notices to take into consideration when making the evaluation. The Evaluation Board had acted correctly when recommending his client.

Dr John L Gauci for the Appellant insisted that page 37 of the Tender Document stated that the Tender would have been adjudicated on the 60/40% basis MEAT but the Evaluation Board had completely ignored this using a different *modus operandi*. The Specialist Group should have signed a declaration of undertaking and included it in the submission before the use of its employees was sanctioned by the evaluating committee. The law had to be followed. He finally pointed out that no court decision has been produced regarding the default notices issued to the Recommended Bidder.

Dr Bonello insisted that the Tender could not be awarded to the Recommended Bidder but should instead be awarded to his client, a regularly formed Joint Venture.

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 Objecton*" dated 9 March 2016 and also through their verbal submissions during the Public Hearing held on 19 April 2016, and had objected to the decision taken by the Pertinent Authority, in that:**

- a) The Appellant contends that the Contracting Authority failed to provide reasons why their offer was rejected;**
- b) Executive Tenders Joint Venture contended that Birkirkara Local Council did not follow the Adjudication method as specified in the Tender Document, ie, MEAT System, but chose a different path which was disadvantageous to the Appellant's offer;**
- c) The Appellant maintains that the Contracting Authority allowed the Recommended Bidder to rectify his offer without informing other bidders;**
- d) The Evaluation Committee did not take into account the substantial number of "*Default Notices*" issued to the Recommended Bidder with the result that, the latter was allotted full marks for this issue.**

**Having considered the Contracting Authority's "*Letter of Reply*" dated 14 March 2016 and also their verbal submissions during the Public Hearing held on 19 April 2016, in that:**

- a) Birkirkara Local Council was maintaining that the Evaluation method adopted by the Evaluation Board did in fact lead to the most advantageous offer;**
- b) With regards to the Appellant's Third Grievance, the Contracting Authority is negating the fact that it allowed any bidder to rectify his offer. The purpose of the meeting held with WM Environmental Ltd was simply to confirm that the bid was correct;**
- c) The Contracting Authority maintains that since the default notices**

sent to the Recommended Bidder by another Local Council were annulled, these were not to be taken into account.

Reached the following conclusions;

1. With regards to the Appellant's First Grievance, this Board after referring to the "*Letter of Rejection*" sent to the Appellant justifiably opines that no specific reason was given to the unsuccessful bidder on which the later could apply his Right of Recourse.

In this regard, this Board had on many occasions pointed out that the Contracting Authority is obliged to give specific reasons to unsuccessful bidders for discarding their offer.

This Board, especially in appeals where the Contracting Authority concerned is a "*Local Council*" had instructed the latter that if no specific reasons are stated in the "*Letter of Rejection*", the Local Council should at least send a copy of the minutes where such a Tender is referred to unsuccessful bidders.

2. With regards to the Appellant's Second Grievance, this Board, after having examined the Evaluation Report for the award of this Tender, and after having heard submissions during the Public Hearing, justifiably opines that the "*Adjudicating System*" adopted by the Evaluation committee did in fact result in the Contracting Authority choosing the most advantageous offer.

In this regard, this Board justifiably opines that although the formula for "*MEAT*" Evaluation was not adopted, the Evaluation Committee, in its award, did choose the most favourable offer to its advantage. In this regard, this Board does not uphold the Appellant's Second Grievance.

3. With regards to the Appellant's Third Grievance, this Board, after having examined the Evaluation Report and credible submissions made by the Contracting Authority justifiably opines that there was no trace of any evidence that the Contracting Authority did allow the Recommended Bidder to rectify his offer.

This Board is credibly convinced that as "*duly obliged*", the Evaluation Board obtained information from the Recommended Bidder that his offer at the quoted price and manpower supply was

**correct in all respects.**

**In this regard, no evidence or proof was submitted to this Board to substantiate the Appellant's Claim that Birkirkara Local Council allowed a rectification on the Recommended Bidder's offer. In this regard, this Board does not uphold the Appellant's Third Grievance.**

- 4. With regards to the Appellant's Fourth Grievance, this Board, after having examined the relative documentation, credibly confirms that the "Default Notices" served on WM Environmental Ltd by San Gwann Local Council were in fact annulled to the effect that the Evaluation Board were correct in not taking these notices into the merits of the Evaluation Process. In this regard, this Board does not uphold the Appellant's Fourth Grievance.**

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

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Lawrence Ancilleri  
Member

*25 April 2016*