

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case No. 934 – SGLC/T/6/15: Tender for the Domestic Waste Collection Door to Door.**

The Tender was published on the 30<sup>th</sup> January 2015. The closing date is on the 6<sup>th</sup> March 2015. The estimated value of Tender is €100,000.00 (Exclusive of VAT).

Five (5) offers had been received for this Tender.

On the 30<sup>th</sup> October 2015 Mario Borg and Alexander Fenech filed a Letter of Objection against the decision of the Contracting Authority to reject their Tender.

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 the 28<sup>th</sup> April 2016 to discuss the Objection.

Present for the hearing were:

#### **Messrs. Mario Borg and Alexander Fenech:**

Mr Mario Borg	Representative
Mr Alexander Fenech	Representative
Dr Carlos Bugeja	Legal Representative

#### **Galea Cleaning Solutions:**

Mr Christian Galea	Representative
Dr Adrian Delia	Legal Representative

#### **Kunsill Lokali San Gwann:**

Mr Kurt Guillaumier	Executive Secretary
Dr John L Gauci	Legal Representative

The Chairman remarked that the Contracting Authority had made a second award of the Tender while an Objection had been pending. This should never have been done since the filing of a Letter of Objection should halt all action being taken in the Tender appraisal and award. He said that there was no need to hear the merits of the case.

Mr Kurt Guillaumier confirmed that when the second award was decided there was a pending appeal before the Board.

The Chairman then made a brief introduction and asked the Appellant's representative to make his submissions on the Letter of Objection.

Dr Carlos Bugeja on behalf of the Appellants made the following submissions:

- i) The Letter of Rejection sent to his clients failed to give any reasons for the rejection or why the Recommended Bidder was chosen;
- ii) The Appellants had submitted the Tender as two persons acting together. There was nothing in the Tender Document that prevented this. Yet their Tender had been disqualified for this reason;
- iii) This fact (two persons submitting one Tender) should not have been a reason for the disqualification;
- iv) Although the bid-bond was issued on only one of the Appellants, Mario Borg, it still provided sufficient cover and safeguards to the Contracting Authority;
- v) The Appellants had given the weights of the vehicles instead of the capacity, it was true but the previous Recommended Bidder (Waste Collection Ltd) had done the same – giving the weight instead of capacity – and not only was not disqualified, but awarded the Tender.

Dr John L Gauci on behalf of the Contracting Authority said that the Appellants had been provided with a copy of the Evaluation Report with the Letter of Rejection. He explained that Appellants' Tender had been rejected because it was submitted by two persons who had no connection with each other and this was not acceptable. On the other hand the Recommended Bidder followed the law and created a joint venture. There was no link between the two Appellants. Even the bid-bond was in one of their names only and there was no juridical representation of the two persons. The Appellants' offer had also left the number of employees that were to be used in the service blank.

Mr Robert Grech, ID No. 26876G, an architect, under oath testified that he helped the Contracting Authority to prepare the Tender specifications and to help in the evaluation of the Tenders – both administratively and technically. When examining the Appellants' Tender he discovered that it was from two individual persons and that there was no documentation or declaration enclosed with the Tender about these two persons.

The bid-bond was also issued in the name of one of the two persons only. I considered this Tender, for these reasons to be administratively non-compliant. However, the Tender was considered for technical compliance as well, and Appellants had failed to indicate the human resources to be assigned and could not be assigned any points. Some vehicles listed in the

Appellants' Tender were registered with one of the two persons while some were registered with the other. But since the Tender was administratively non-compliant, it could not be evaluated. The Recommended Bidder had formed a joint venture and the bid-bond was issued on behalf of the joint venture.

Replying to questions by Dr Adrian Mallia on behalf of the Recommended Bidder, the witness said that he could not state whether the Appellants had the least points because the assigned marks to the Appellants were just to form an idea of the points had the Tender been administratively compliant, but since their Tender had been found administratively non-compliant, there was thus no need to assign marks.

Dr Carlos Bugeja for the Appellants insisted that even the Recommended Bidder's offer was made by two bidders just the same as his clients'. The fact that they submitted one Tender created such connection between them. They just made a verbal agreement between them.

The Chairman pointed out that such bidders, to be jointly and severally liable, had to present with their Tender, signed agreements in the sense that they were submitting an offer for that particular Tender.

Dr John L Gauci on behalf of the Contracting Authority contended that there was nothing wrong in the evaluation of the Appellants' Tender. Appellants should have provided documentation of their agreement.

Dr Adrian Mallia for the Recommended Bidder pointed out that Appellants' Tender points came fifth out of five bidders.

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 Objection*" dated 30 October 2015 and also through their verbal submissions during the Public Hearing held on 28 April 2016 had objected to the decision taken by the Pertinent Authority, in that:**

- a) The Appellant contends that the "*Letter of Rejection*" sent by the Contracting Authority failed to specify the reasons why the**

**Recommended Bidder's offer was awarded the Tender;**

- b) The Appellant maintains that it was unfair that his bid was discarded due to the fact that the Appellant's offer was made by two separate individuals. In this regard, the Appellant Company also maintains that the Contracting Authority should have accepted the Bid Bond supplied by one of the individual involved in the submission of the Tender.**

**Having considered the Contracting Authority's scanty "*Letter of Reply*" dated 14 April 2016 and also through their verbal submissions during the Public Hearing held on 28 April 2016, in that:**

- a) The Contracting Authority maintains that the reasons for the Appellant's offer rejection was based on the Evaluation Report submitted;**
- b) The Contracting Authority contends that it could not accept the submission of a Tender in the name of two individuals without any proof or indication with regards to their commercial relationship to this Tender.**

**Reached the following conclusions:**

- 1. With regards to the Appellant's First Contention, this Board credibly insists as it had done on many occasions, that "*specific*" reasons are to be given to unsuccessful bidders why their bid was discarded.**

**In this particular instance, this Board notes that the reason given by the Contracting Authority is totally out of context and does not in any credible way; satisfy the "*Maxim*" that specific reasons were given by the Contracting Authority, as to why the Recommended Bidder's offer was chosen. In this regard, this Board upholds the Appellant's First Contention;**

- 2. With regards to the Appellant's Second Contention, this Board outrightly opines that when more than one individual submit the Tender Document in both names, the Bidder should provide evidence that there is a "*Joint Venture*" or a "*Partnership*" between these individuals.**

**The Contracting Authority has to know the identity of the venture bidding and their commercial relationship which has been undertaken by the individuals to assume responsibility for carrying**

out the Tendered Works.

The “*Joint and Several*” maxim will only apply to what is written in the venture or partnership agreement. In this particular case, it is evident that such a basic procedure was not followed by the Appellant Company and in this regard, this Board does not uphold the Appellant’s Second Contention;

3. This Board, after having treated the Appellant’s Contention would like to justifiably note that the procedure adopted by the Evaluation Committee was not in accordance with the Public Procurement Regulations in that, the same Evaluation Board continued with the Evaluation Process and the eventual award of the Tender, whilst an Appeal on the same Tender was still pending. This procedure is totally unacceptable and the Evaluation Board was in fact aware of this issue, yet it continued with the process.

In view of this irregular procedure adopted by the Evaluation Board, this Board, justifiably opines that:

- a) The Tender is to be re-issued and that the proper procedures are to be followed by the Contracting Authority;

**b) The deposit paid by the Appellant should be refunded.**

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Lawrence Ancilleri  
Member

*17 May 2016*