

PUBLIC CONTRACTS REVIEW BOARD

Case No. 939 – HLC/TD/05/2015: Tender for the Collection of Mixed Household Waste in an Environmentally Friendly Manner.

The tender was published on the 6th October 2015. The closing date was on the 6th November 2015. The estimated value of the tender is €75,000.00 yearly (Exclusive of VAT).

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

On the 27th January 2016 Waste Collection Limited filed an objection against the decision of the contracting authority to award the tender to Saviour Mifsud.

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 24th May 2016 to discuss the objection.

Present for the hearing were:

Waste Collection Limited:

Mr Adrian Muscat	Representative
Mr Mario Tufigno	Representative
Dr Robert Tufigno	Legal Representative

Saviour Mifsud and Sons:

Mr Saviour Mifsud	Representative
Dr Franco Galea	Legal Representative

Kunsill Lokali Hamrun:

Mr Christian Sammut	Mayor
Mr Efrem Buttigieg	Councillor
Mr Antonello Cuschieri	Councillor
Ms Karen Camilleri	Executive Secretary

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

Dr Robert Tufigno on behalf of the appellant said that he would like to start by hearing the testimony of Mr Ray Pellicano who had assisted in the adjudication.

Mr Ray Pellicano, ID No. 312862M, called to testify by appellant, under oath said that he had assisted the contracting authority in the present tender, having prepared the tender according to the requirements of the contracting authority. He had later submitted a draft report for adjudication.

Replying to Dr Tufigno he confirmed that the award as made was not in line with his report; - his recommendations were not all adhered to. Clause 7.1.8 of the tender had listed a number of requisites that were mandatory, these were; the number of collection vehicles, human resources, ownership of equipment and other resources. He explained that the preferred bidder had made a condition that the bin washer would be purchased if the tender was awarded to him. This meant that the preferred bidder lacked certain items of machinery that were mandatory. Apparently this resources factor had been ignored by the evaluation board that made the adjudication.

Replying to questions by Dr Franco Galea the witness said that he was called to testify by appellant. His draft report was passed to the contracting authority confidentially and he had not been present when the evaluation board had met with the individual bidders. Neither was he present when the evaluation report was prepared by the local council. The preferred bidder's tender included documents that stated that the mounted bin washer was not yet available. Shown page 122 of appellant's bid, and asked to state whether he had seen that document about the bin washer, witness stated that he had. The document stated that "*I Saviour Mifsud ID No 470554M declare that if I will be awarded the contract, an automatic mounted bin washer for the cleaning of bins on wheels (sample literature attached). The vehicle used to carry this automatic vehicle have engine euro V (log book attached).*" Witness stated that this was not clear enough and according to him needed clarification. He had not been present for the meeting between the Council and the bidders. There was no photograph of the bin washer included in appellants bid, but incomplete literature, and the log book submitted was for a hook loader and not for the bin washer, which had to be towed by a vehicle.

Dr Franco Galea on behalf of the preferred bidder objected to the fact that Dr Robert Tufigno was going through the tender submitted by the preferred bidder. The secretary had already pointed this out and stopped this from going on explaining that it was against the regulations for this to be done.

Mr Saviour Mifsud, ID No 470554M, the preferred bidder, called to testify by the appellant, under oath explained that he did not have the bin loader's serial number but had a receipt for the bin washer and submitted to the Board a commercial invoice dated 1st November 2015. He stated that:

- i) The imported bin washer was received around three weeks later;
- ii) It was imported on his behalf by a car importer from England;
- iii) He had no other documents to show about the bin washer;
- iv) He did not agree that the delivery of the bin washer was made after the 19th

- January 2016;
- v) He had paid cash for the bin washer to a certain Salvu and had paid around €13,000 in cash.

The Chairman remarked that the Board needed to see some sort of proof of the purchase of the bin washer and also that it was not possible to take out over €10,000 out of Malta.

Dr Robert Tufigno for the appellant contended that the bin washer in question was received after the tender was awarded to the preferred bidder.

Mr Christian Sammut, the Mayor, explained that the Council had appointed Mr Ray Pellicano to assist it in the preparation and award of the tender that had to assign bidders percentage marks for administrative compliance and marks for the financial offer. The evaluation was then made by the Council members as an adjudication board.

Ms Karen Camilleri, the Executive Secretary of the contracting authority explained that Mr Ray Pellicano had been appointed by the Council to assist it in the evaluation of the offers submitted in this tender. Mr Pellicano had submitted a report to the Council about the adjudication. However, Ms Camilleri explained that two Council members had noted that the preferred bidder had been assigned 0 points for the bin washer while the Council had found that there were documents about this bin washer in the preferred bidder's tender. The Council had therefore asked Mr Ray Pellicano to prepare a revised report giving fair technical points to all bidders in the tender. Mr Pellicano's report had not been made public and the adjudication report only became public on the 14th January 2016. The contracting authority was satisfied with the documents as submitted by the preferred bidder Mr Saviour Mifsud. While evaluating the offers the Council had met with all the four bidders and the preferred bidder had given assurance that he had the necessary bin washer.

The Chairman reiterated that the Board needed to see some proof of the importation date of the bin washer.

At this point the hearing was adjourned to a later date in order to hear the evidence of the person who had imported the bin washer on behalf of the preferred bidder.

Second Hearing:

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Carmel Esposito as members re-convened a hearing on Thursday the 28th July 2016 to continue discussing the objection.

Present for the second hearing were:

Waste Collection Limited:

Mr Mario Tufigno	Representative
Dr Robert Tufigno	Legal Representative

Saviour Mifsud and Sons:

Mr Saviour Mifsud	Representative
Dr Franco Galea	
Dr Christopher Chircop	Legal Representative

Kunsill Lokali Hamrun:

Mr Christian Sammut	Mayor
Mr Vincent Bonello	Vice Mayor
Mr Efrem Buttigieg	Councillor
Ms Karen Camilleri	Executive Secretary
Dr David Farrugia Sacco	Legal Representative

The Chairman explained that this hearing was convened just to hear the testimony of the person that had imported the bin washer in question.

Mr Stephen Attard, ID No 226688M, an employee of LMS Transport Co Limited, under oath testified that the preferred bidder had passed him the papers relating to the bin washer, that he had purchased from England, in order that he would have it brought to Malta by LMS Transport employees. The washer was delivered to Malta in a matter of weeks. The washer was delivered on the 7th April 2016.

The Chairman remarked that the washer arrived in Malta after the closing date of the tender.

Mr Christian Sammut the Mayor for the contracting authority explained that the tender requisites stated that bidders had to possess the vehicles and equipment when filing their offers. The preferred bidder had confirmed that the washer was available. The contracting authority had later met all the bidders and the preferred bidder had confirmed that the washer was in his possession and submitted the documents. The Council had checked the documents and met the bidders after the closing date of the tender.

Mr Stephen Attard, the witness continued that the preferred bidder had phoned and informed him that he would be purchasing equipment from England and he had told the preferred bidder to inform him as soon as the washer was purchased. It was months before. The instructions by the preferred bidder for the collection of the washer were given to witness around three weeks prior to the delivery of the machine to Malta. Probably the original documents were sent to the preferred bidder from England and copies of this were given to my company for collecting purposes. Other employees had in fact done the collecting. Copies of the documents were not kept by LMS but the driver who collected the washer had checked the serial number. LMS had not made any payment to the England supplier for the washer because the preferred bidder had paid for it himself. LMS had not kept any copies of the documents. He reaffirmed that LMS had not paid for the washer when collecting it.

The Chairman pointed out that in the previous hearing it was alleged that the money was given to the LMS for onward payment to the England supplier.

Dr Franco Galea filed a document issued from the vehicle supplier that showed that the purchase was paid for on the second November 2015.

Mr Ray Pellicano re-called for cross examination by the preferred bidder, under oath stated in the draft evaluation report he had prepared, at page 7 showed remarks on all the bidders. He said that the draft report contained certain questions that had to be made by the evaluators to the diverse bidders. In that draft report only one bidder had resulted fully compliant and that was Waste Collection Limited. He had vetted the appellant's documents submitted with the tender. He had found that everything was in order. He confirmed that the photo shown to him has the number plate blacked-out. He could not find the vehicle in question's log book relating to the appellant's bin washer. When the document was found it resulted that the vehicle in question was registered in the UK.

Dr Franco Galea on behalf of the preferred bidder asked witness to explain how he had applied Clause 52. (3) of the Public Procurement Regulations which deals with technical compliance.

Mr Ray Pellicano replied that he had abided with Section 7 of the tender document – minimum requirements; and another condition that states that all equipment had to be possessed by the contractor.

Mr Saviour Mifsud, the appellant, under oath, requested to testify by the Board denied having stated in the last hearing that the money for the purchase was handed to the agent for onward payment to the British supplier. He had purchased the bin washer at the time of tender submission. He confirmed that the fiscal invoice was not produced and that the bin washer was not mounted on a vehicle.

The Chairman remarked that the document filed by the preferred bidder today was not acceptable as a VAT invoice.

Dr Franco Galea on behalf of the preferred bidder said that the Board had to decide whether the objection filed by appellant was null because of the deposit made. He contended that the grievances raised in the objection were not proven. The tender did not specifically state that the bin washer had to be in Malta at time of submission but that it had to be owned. The preferred bidder had shown that he had purchased the bin washer even if the documents were not fiscal. On the other hand it had resulted that appellant had offered a vehicle with a blacked-out number plate and therefore there was no certainty that it was the same vehicle. Also no log book had been submitted by the appellant. The same arguments raised by the appellant against the preferred bidder are also valid to the appellant himself.

Dr Robert Tufigno for the appellant said that the preferred bidder's tender should have been annulled because Clause 7.18 of the tender document required at least one vehicle mounted bin washer as otherwise the tender would be invalidated. The tender requested one automatic vehicle mounted bin washer and 'automated' does not have the same meaning as 'automatic'

Dr David Farrugia Sacco on behalf of the contracting authority said that the whole question was whether the award was incorrect in anything regarding the appellant; whether the appellant was disadvantaged in any way by the tender award or not. The evidence brought forward does not make it clear that appellant was disadvantaged by any procedure used in the award.

The hearing was brought to an end at this point.

This Board,

Having noted the Appellant's Objection, in terms of the "*Reasoned Letter of Objection*" dated 27th January 2016, and also through their verbal submission during the Public Hearing held on the 24th May 2016, had objected to the decision taken by the Pertinent Authority, in that:

a) Appellant Company contends that the Preferred Bidder did not possess, at the time of tendering stage, certain machinery which was compulsory, namely the Bin Washer. In this regard, Appellant maintains that the Contracting Authority did not abide by the consultant's report wherein such a deficiency on the Preferred Bidder's Offer was in fact highlighted.

b) Appellant also maintains that the Preferred Bidder did not produce documented proof that the Bin Washer was paid for by the latter nor that the Bin Washer was registered in his name, prior to the closing date of the tender.

Having considered the Contracting Authority's 'Letter of Reply' dated 30th January 2016, and also the Authority's verbal submissions during the hearings held on 24th May 2016 and 28th July 2016, in that:

a) The Contracting Authority contends that, after having two evaluation committee members casting doubts as to the compliancy of the Preferred Bidder's Offer, same authority engaged the services of an expert namely Mr Raymond Pellicano, who also advised the Authority in preparation of the tender document; to prepare a report so that the evaluation process can continue. After the submission of

such a report the Contracting Authority was also given assurances by the Preferred Bidder that the latter had the necessary Bin Washer.

Reached the following conclusions:

- 1. With regards to Appellant's grievances, this Board, after having examined the relative documentation and heard submissions made by interested parties during the sittings held on 24th May and 28th July 2016, that the main issues regarding this appeal rest on two major factors and these are 'Ownership of Bin Washer' and special reference to the 'Expert Report' which are being treated as follows:**

- i) Ownership of Bin Washer**

From documentation made available and from the Expert's testimony it was clearly established that the Preferred Bidder was willing to procure the Bin Washer, provided he is awarded the tender. So that the Preferred Bidder is clearly stating that at the time of tendering, the Bin Washer was not owned by same. At the instance, this Board cannot but justifiably note that no reliable and credible documentary evidence was produced by Appellant to prove that the Bin Washes was in his possession prior to the 6th November 2015, the closing date of the tender. This Board would also mention that during the

second sitting, it was presented with a commercial invoice dated 1st November 2015, which apart from the fact that it was not a fiscal invoice, same did not prove that the Bin Washer was delivered to Malta to the Preferred Bidder prior to the closing date of the tender, that is 6th November 2015. In this regard, this Board does not credibly accept that the Preferred Bidder owned and possessed the Bin Washer as at 6th November 2015.

On the same issue of this Appeal, this Board noted that during the sitting held on 24th May 2016, the Preferred Bidder stated, under oath, that he had given Euros 13000 to the deliverer, namely a certain Mr Salvu to pay the supplier in England and deliver the Bin Washer to Malta. Mr Stephen Attard (Salvu) was called to the witness stand and during the sitting held on 28th July 2016, under oath, Mr Attard confirmed that he did not receive Euros 13000 to pay the supplier from the Appellant's Company and his assignment was that of freight forwarded only. At the same time, Mr Stephen Attard could not confirm the date of delivery in Malta. In this regard this Board finds the Appellant's testimony, given under oath, to be highly unreliable and not credible.

ii) Consultant's Report

With regards to the issue of adherence to the Expert's report, this Board would prudently point out that, after having heard

the submissions made by the Contracting Authority and the Expert, namely Mr Raymond Pellicano, the latter of whom assisted in the preparation of the tender document, although the Contracting Authority is not bound by Law to adhere to the Expert's advice certain deficiencies pointed out in the report should have been given due importance. This Board notes that from the Expert's testimony, under oath, the Evaluation Committee did not heed the former's advice in that, the Preferred Bidder was deficient in owning certain machinery, so that the evaluation committee were aware of such shortcomings and yet, this Board was informed that the evaluators relied on the documentation and assurances given by the Preferred Bidder without checking in depth the real ownership of the Bin Washer, in the absence of other mandatory documentation such as registration and Log Books. In this regard, this Board strongly feels that the evaluation process was not carried out in the proper manner, by not checking in depth ownership and other shortcomings as listed in the Expert's report.

2. With regards to the preferred Bidder's contention,

- That the deposit paid by Appellant is incorrect, this Board**

credibly notes that the deposit should have been €2250 and not €587 which represents the estimate value of €75000 per annum for four years at .75% as per regulation 84 clause 1of Legal Notice 296 of 2010 in this regard, this Board upholds the preferred bidder’s grievance.

- This Board would also refer to this preferred bidder’s allegation in that Appellant’s offer included a vehicle with a blacked – out number plate, which this Board finds very unusual. Also in this regard, this Board justifiably opines that the evaluation process was not carried out in the proper manner.**

In view of the above, this Board finds in favour of the Appellant Company and recommends that:

- a) The tender be cancelled and re-issued.**
- b) The deposit paid by Appellant should be reimbursed.**

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member

17 August 2016