

PUBLIC CONTRACTS REVIEW BOARD

Case No. 953 – MLC 02/2014: Tender for the Collection of Bulky Refuse from Msida in an Environmentally Friendly Manner.

The Tender was published on the 14th December 2014. The closing date was on the 19th December 2014. The estimated value of the Tender was €36,000 (Exclusive of VAT)

Two (2) offers had been submitted for this Tender.

On the 20th April 2016 Dimbros Limited filed an Objection against the decision taken by the Contracting Authority to award the Tender to Mr Alfred Galea.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Mr Richard A. Matrenza and Mr Carmel Esposito as members convened a hearing on Thursday the 7th July 2016 to discuss the Objection.

Present for the hearing were:

Dimbros Limited:

Mr Melchior Dimech	Representative
Dr Franco Galea	Legal Representative

Mr Alfred Galea:

Dr John Gauci	Legal Representative
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Kunsill Lokali Msida:

Ms Margaret Baldacchino Cefai	Mayor
Ms Karen Camilleri	Acting Executive Secretary
Mr Emanuel Brincat	Councillor
Dr Stephanie Abela	Legal Representative

The Chairman pointed out that the Board regarded the present Appeal as a challenge against both its previous decision and the Court of Appeals' decision. He then invited the Appellant's representative to make his submissions.

Dr Franco Galea on behalf of Dimbros Limited, the Appellant said that the Objection this time was from the decision taken by the Contracting Authority, communicated to his client on the 14th April 2016, which gave no explanation whatever about why his client's offer was rejected but just stated that the Tender was awarded to the "most valid and advantageous" Tender.

Dr Galea contended that there were no gradations in "valid"; an offer could either be valid or not. The letter should have contained clear reasons why his clients offer that was the cheapest was not considered as the most advantageous.

Dr Franco Galea continued that the Contracting Authority had also ignored the Court of Appeal's decision, about the procedure to use when an offer was considered too low. His client was not consulted as directed by the Court decision to clarify matters. The Contracting Authority insisted on awarding the contract, and by doing so they ignored completely the decisions taken by this Board and the Court of Appeal.

The Chairman said that this Board had ordered the re-integration of Appellant's Tender and it was not clear whether this had been followed. He asked the Contracting Authority for the reasons why Dimbros Ltd's offer was rejected.

Dr Stephanie Abela on behalf of the Contracting Authority contended that she considered that "*the most valid advantageous offer*" was sufficient enough reason to be given to the Appellant by the Contracting Authority. She pointed out that the Court of Appeal had also referred to any default notices and directed the Contracting Authority to investigate if there was sufficient reason to reject Appellant's offer. The Contracting Authority focussed on this aspect when making the adjudication.

The Chairman remarked that therefore this should have been stated as the reason for not choosing Appellant's offer in the Letter of Rejection. This Board had many times declared that bidders should be given specific reasons for rejection. This point is being raised now when it should have been brought to the notice of Appellant before.

If informed of this Appellant could have chosen not to appeal. She also referred to Clause 14 (b) of the "Instructions to Tenderers" that stated that "*the Tenderer will be required to establish to the satisfaction of the Local Council the reliability and responsibility of the persons or entities proposed to furnish and perform the works or the services described in the Tender Documents.*" The Contracting Authority thus contends that it is not a question of the cheapest. The Appellant had fiscal problems when issuing VAT receipts.

The Chairman once again remarked that none of this was given in the Letter of Rejection, and it should have been.

Dr Franco Galea said that these reasons were not even mentioned in the first adjudication from which Appellant had appealed – therefore the reason why his client's bid was rejected was that his offer was abnormally low.

The decisions by this Board and the Court of Appeal dealt with this. The fact remains that his client was not contacted to clarify his low offer while the Contracting Authority insisted in giving the same award without justification. This was an affront to the Court of Appeal.

Dr John Gauci on behalf of the Recommended Bidder submitted that he agreed with this Board that Local Councils do not give sufficient reasons. Dr Gauci added that he always instructs his clients to demand these reasons in terms of law. This is a right given by the regulations, and in certain cases the complete Evaluation Report is then made available. The Court of Appeal had just re-integrated the Appellant into the Evaluation process. Dimbros Ltd should have asked the Contracting Authority for the reasons.

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 April 2016 and also through their verbal submissions during the Public Hearing held on 7 July 2016 had objected to the decision taken by the Pertinent Authority, in that:

- a) Dimbros Ltd's main contention is that there were given no specific reasons by the Contracting Authority as to why their bid was rejected;**

- b) The Appellants are also contending that in the "*Letter of Rejection*", the reason given was that their offer was not the most "*Valid and Advantageous*", without giving the valid reasons why this is so.**

Having considered the Contracting Authority's "*Letter of Reply*" dated 17 May 2016 and also their verbal submissions during the Public Hearing held on 7 July 2016, in that:

- a) Kunsill Lokali Msida contends that it had followed the default notices against Dimbros Ltd and this was a pivotal issue in the Award of the Tender. The Appellants had also fiscal problems upon issuing VAT Receipts.

Reached the following conclusions:

1. With regards to the Appellant's First Grievance, this Board justifiably opines that no specific reasons were given to Dimbros Ltd in the "*Letter of Objection*" dated 14 April 2014.

The vague consideration given by Kunsill Lokali Msida, namely that "*The Offer is not considered as the most valid and advantageous*", does not, in this Board's opinion form specific reasons why the Appellant's offer was discarded.

This Board regrets to note that despite the numerous adjudications issued regarding the obligations of the Contracting Authorities to

give specific reasons why bidders were not successful, these are being totally ignored and this deficiency arises through Appeals where Local Councils are involved as the Contracting Authority.

This Board also notes that the specific reasons why the Appellant's Bid was discarded were explained and determined during the Hearing of this Appeal. This Board justifiably contends that such instances create unnecessary ambiguities and waste of time and resources. In this regard, this Board upholds the Appellant's First Contention.

- 2. With regards to the Appellant's Second Grievance, this Board opines that the "*Outline Description*" of the reasons given by Kunsill Lokali Msida in their "*Letter of Rejection*" do not constitute or serve the purpose of "*specific reasons*" in no credible way.**

This Board notes that through the "*Letter of Rejection*" received by Dimbros Ltd, the latter was not in a position to base his appeal on "*Real Reasoned Grounds*" for the refusal of his Appeal.

This Board is also concerned regarding the wording of "*Valid*" in the Evaluation Report. First of all, this Board opines that if Dimbros

Ltd's offer was not valid; it should have been rejected from the very start. In this regard, this Board credibly opines that the consideration given by the Contracting Authority as the most "*valid and advantageous*" is not perhaps the most precise and correct phrase to describe the reasons for rejecting a particular bid.

In this particular case, the fact that the Appellant's offer was in the stage of Evaluation, provides ample evidence that their offer was valid in the first instance.

- 3. This Board would like to comment on the submissions made by the Contracting Authority in that, there was no evidence produced to prove that the latter did in fact approach the Appellant to weigh the pros and cons as to whether the quoted price and the default notices would justify the discarding of the Appellant's Offer. In this regard, this Board notes that the Contracting Authority went against the Adjudication of the sentences of the Hon Court of Appeal.**

In view of the above, this Board finds in favour of Dimbros Ltd and recommends that:

i) The Appellant's offer is to be re-integrated to take into consideration all the merits treated by the Hon Court of Appeal

ii) The deposit paid by Dimbros Ltd is to be refunded.

Dr Anthony Cassar
Chairman

Mr Richard A Matrenza
Member

Mr Carmel Esposito
Member

13 July 2016