

PUBLIC CONTRACTS REVIEW BOARD

Case No. 956 – WSM 004/2016: Tender for the Hire of Mobile Plant, with Operators, to Transport and Set Boulders to form Retaining Walls at the Magtab Environment Complex.

The Tender was published on the 2nd February 2016. The closing date was on the 23rd February 2016. The estimated value of the Tender is €107,950 (Exclusive of VAT).

Seven (7) bidders had made offers for this Tender.

On the 9th May 2016 Pullicin Developers Limited filed an Objection against the decision of the Contracting Authority that found its Tender non-compliant.

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 12th July 2016 to discuss the Objection.

Present for the hearing were:

Pullicin Developers Limited:

Mr Dylan Pullicino
Dr Franco Galea

Representative
Legal Representative

Rock Cut Limited:

No representatives were present

WasteServ Malta:

Ms Daniela Psaila
Mr Robert Micallef
Dr Victor Scerri

Chairperson Evaluation Board
Member Evaluation Board
Legal Representative

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

Dr Franco Galea on behalf of Pullicin Developers Ltd referred to the submissions made in the Letter of Objection and explained that when the Tender was submitted the Appellant was still in the process of purchasing a tipper truck and had informed the Contracting Authority accordingly, enclosing the necessary Technical Literature for the Iveco vehicle that was being purchased. Therefore, the Appellants did not submit the truck's log book or the MEPA certification for the same as these were as yet not available.

The Contracting Authority had asked Pullicin Developers to rectify this through a clarification, against a payment of €50. The Appellant had complied. However, in the interim period, the latter had purchased a different truck, a Renault one which had the specifications as requested in the Tender Document.

Dr Galea insisted that the Contracting Authority had asked Appellants to rectify the non-submission of the log book and certification on payment of a fine; and that his client had complied submitting these for a different vehicle having the correct specifications satisfying the Tender requisites.

Dr Victor Scerri on behalf of the Contracting Authority explained that Appellants, with the Tender had submitted Technical Literature for an Iveco truck and no log book or MEPA certification. This was rectifiable however and the Appellants were asked to rectify. The log book and certificate submitted by the latter as rectification, however, referred to a different truck, a Renault one, and not to the original truck offered.

Although the Technical Specifications of both vehicles were compliant with the specifications requested, the Evaluation Board had then considered that the Appellants had changed their original offer and this was inadmissible. For this reason the Tender submitted by Pullicin Developers was deemed to be non-compliant.

Dr Franco Galea for the Appellants contended that his clients' Tender submission had explained that the truck "will be purchased" and that the Contracting Authority itself had declared that the omission to send the log book and certificate was rectifiable.

Ms Daniela Psaila, the Chairperson of the Evaluation Board stated that when the clarification reply was received, this contained new information and not the rectification of the missing information. The Evaluation Board considered Article 16.1 (e)(iv) of the Tender Document which was qualified by Note 3 that meant that no rectification was allowed and since the Appellants had submitted information about a new vehicle, this could be interpreted as altering the original Technical Offer.

Therefore the Evaluation Board disqualified the Appellants' Tender. Ms Psaila explained that the Appellants had submitted a new Technical Specifications form that was different from the original submitted with the Tender. Although both the Technical Specifications sheets were compliant with the requisites, some items were different. She contended that the Technical Specifications form was not rectifiable.

At this point the hearing was closed.

This Board,

Having noted the Appellant's Objection, in terms of the "*Reasoned Letter of Objection*" dated 9 May 2016 and also through their verbal submissions during the Public Hearing held on 12 July 2016 had objected to the decision taken by the Pertinent Authority, in that:

- a) Pullicin Developers Ltd are stating that WasteServ Malta were well aware that the truck which was going to be purchased was being replaced despite having the same Technical Specifications. In this regard, upon a request by WasteServ Malta to rectify, the Appellants complied as per request. At the same instance, it was confirmed that the omission of the Log Book & MEPA Certificate was rectifiable; so that all mandatory conditions have been met.**

Having considered the Contracting Authority's "*Letter of Reply*" dated 19 May 2016 and also their submissions during the Public Hearing held on 12 July 2016, in that:

- a) The Contracting Authority maintains that although the rectification as requested were complied with by Pullicin Developers, the latter submitted what was requested but referring to a different truck, and**

for this reason, WasteServ Malta considered that there was a change to the Appellant's Original Offer. At the same instance, the latter submitted Technical Specifications of the Truck having different specifications than those quoted in the original bid.

Reached the following conclusions:

1. With regards to the Appellant's Grievance, this Board, after having examined the relative documents and heard credible submissions by both interested parties, would like to treat this Appeal under two main issues, namely, Rectification Requested and Technical Compliance.

Rectification Requested

The requested information with regards to the log book of the vehicle deployed together with the MEPA Certificate, the latter confirming that the necessary permits were in hand, was correct and appropriate.

From the documentation presented, it transpires that the changes which the new truck had, consisted of certain dimensions and the

brand, which as confirmed by both the Appellants and the Contracting Authority, does not affect the functionality of the vehicle itself.

At the same instance, this Board justifiably notes that the sole reason why Pullicin Developer's offer was discarded was due to the fact that the Evaluation Board considered the mentioned different Technical Specifications of the new truck as being "*New Specifications*".

In this regard, this Board would like to credibly confirm that the Contracting Authority did in fact request a rectification with regards to the Log Book and MEPA Permit. On the other hand, it was justifiably established that Pullicin Developers complied with the Contracting Authority's request giving the details and Technical Specifications of the new vehicle to be deployed.

Technical Compliance

With regards to the issue of Technical Compliance, this Board, after having heard the credible submissions from WasteServ Malta, in that, the new vehicle offered by Pullicin Developers in the Rectification Reply, did in fact comply with the Technical

Specifications as stipulated in the Tender Document.

This Board opines that the principle of “*Substance Over Form*” should prevail in this case, as apart from the fact that the Appellant’s offer was cheaper in price, this same Board justifiably considers the latter to be Technically Compliant.

In view of the above, this Board finds in favour of Pullicin Developers and recommends that:

- i) The Appellant’s Offer is to be re-integrated in the Evaluation Process;**

- ii) The deposit paid by the Appellant is to be refunded.**

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

14 July 2016