

PUBLIC CONTRACTS REVIEW BOARD

Case 985 – MGOZ T 12/2016 – Transport Service of a 20 Foot Reefer Container Between Gozo and Malta

The Publication Date of the Call for Tenders was 18 March 2016 whilst the Closing Date for Call of Tenders was 15 April 2016. The Estimated Value of the Tender was € 55,000. (Exclusive of Vat).

Two (2) Bidders have submitted offers for this Tender.

On 6 July 2016, Zombor Enterprises Ltd filed an Objection against the decision of Ministry for Gozo to award the Tender to Road Construction Company Ltd for the price of € 436 per round trip against a deposit of € 400.

On 4 October 2016, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Richard A Matrenza as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

Appellant – Zombor Enterprises Ltd

Mr Teddy Farrugia	Representative
Dr Mario Scerri	Legal Representative

Recommended Bidder – Road Construction Company Ltd

Mr Joseph Michael Patrick Grima	Representative
Dr Daniel Calleja	Legal Representative

Contracting Authority – Ministry for Gozo

Ing Jeffrey Muscat	Chairperson, Evaluation Board
Ms Dorianne Borg	Member, Evaluation Board
Ing Mario Cauchi	Member, Evaluation Board
Dr Tatiane Scicluna Cassar	Legal Representative

Dr Anthony Cassar, Chairman Public Contracts' Review Board, opened this Public Hearing by stating that this Board will not accept anymore late submissions of the Reasoned Letters of Reply by any party. It is totally unfair on everyone that a Reasoned Letter of Reply is being submitted at 17:00 on the eve of the Public Hearing.

Dr Daniel Calleja, on behalf of Road Construction Company Ltd who are the Recommended Bidders for this Tender, said that the latter had every right to file a Reasoned Letter of Reply.

Dr Anthony Cassar, Chairman Public Contracts' Review Board, replied that these are things which are not acceptable at the Hon Court of Appeal and so they are not acceptable for this Board too.

Dr Daniel Calleja, for Road Construction Company Ltd replied that there were no deadlines for submissions.

Dr Anthony Cassar, Chairman Public Contracts' Review Board replied that this is irrelevant and that he was giving the Appellants time to study the letter should the need arises.

Dr Mario Scerri, on behalf of Žombor Enterprises pointed out that all submissions should have been made by 30 September 2016, two working days prior to the Public Hearing

Mr Richard A Matrenza, a Board member for this case, pointed out that the Reasoned Letter of Reply was addressed to the Director and not to the Chairman as it should have been.

Following this preamble, the Chairman of the Public Contracts Review Board has invited the Appellants to make their submissions.

Dr Mario Scerri, on behalf of Žombor Enterprises, said that in his Objection, he clearly indicated that on submission of Tenders, the Recommended Bidders were not Technically Compliant. The Tender was issued for Transportation of Carcasses from the Xewkija Abattoir to the Marsa Abattoir but it was useless to award the Tender to a particular company if the latter does not have the necessary permits to enter and exit both Abattoirs in Malta and Gozo.

The Tender's aim, continued Dr Scerri, was that at arrival in the Abattoir, the material delivered had to be unloaded and burned in the incinerator. At the time of Submission of Tenders, Road Construction Co Ltd couldn't make this transportation. What happened was that during transportation between the Abattoirs by the actual Recommended Bidders, the latter was stopped halfway through, with the consequence that the blood from the chillers was spilling, hence having also a sanitation issue, and the request of the other Bidders, namely his clients so that the carcasses could enter the Marsa Abattoir.

The Second Grievance, continued Dr Scerri, was that the Recommended Bidders did not have the required machinery to transport these carcasses at destination. Whoever issued this Tender was not familiar with the way of how these carcasses are transported.

Dr Scerri then quoted Clause 16.3 from the Tender Document which stated, "*Further to the Provisions of the General Conditions, the Contractor shall give evidence that s/he has at least two trucks at his/her disposal which could be used for this Transport Service*".

The word “*trucks*” technically does not make sense for this Tender according to Dr Scerri as whoever won the Tender had to transport 2 Ministry Chillers, a Mechanical Hoarse, a Trailer and a Side Loader so that the Container can be loaded at Xewkija and eventually unloaded at Marsa.

Ministry for Gozo were requesting 2 trucks. From the evidence submitted by the Appellants, they were offering 3 Mechanical Hoarses with the trailer and a side loader. If the Board, continued Dr Mario Scerri, had to examine the number of vehicles which the Recommended Bidder had submitted, it will result that the latter had not given any evidence that he has any machinery for loading and unloading.

Dr Scerri continued by quoting Section 4 Clause 3.2 of the Tender Document, which *inter alia* stated that “*The service provider shall also provide for the loading and unloading of the container on both sites*”.

It does not result that the Recommended Bidders submitted any evidence that he will have any machinery for loading and unloading which is essential for this type of work, continued the Appellants.

On the other hand, the latter not only had presented a list of the machinery which will be used for the work requested but they had also presented copies of the log books and the vehicle Technical Specifications.

Dr Mario Scerri, closed his opening submission by stating that finally you need to have a supplementary truck to be used as a backup should one of the main trucks have some type of mechanical problems during the trips.

Dr Tatiane Scicluna Cassar, for Ministry of Gozo, said that the Tender was not as complicated as the Appellants were trying to say since nowhere in the Tender Document there was stated that whoever was bidding for the Tender had to have the necessary permits, which if needed can be issued within two weeks. The Recommended Bidder could have got the permits needed for Transportation once he was awarded the Tender. Without the necessary permits, it was obvious that the Recommended Bidder could not offer the requested service.

The main criteria, continued the Ministry’s Legal Representative, was the price since both bidders who submitted offers for this Tender were Technically and Administratively Compliant. Žombor Enterprises were discarded since their offer was more expensive.

With regards the equipment submitted, Road Construction Co Ltd had enough machinery to make the necessary works and the Evaluation Board saw that they can work with the material submitted, continued Dr Scicluna Cassar.

Mr Richard A Matrenza, Member, Public Contracts Review Board, asked why the permit condition was not included in the Tender Document.

Dr Tatiane Scicluna Cassar, for the Ministry for Gozo, replied that since the permits were easy to get, the Contracting Authority did not have any problems regarding the matter.

At this point, the first Witness, Ing Jeffrey Muscat, ID 512594 M, Chairperson of the Evaluation Board, was called to testify under oath.

Dr Anthony Cassar, Chairman Public Contracts Review Board, asked whether the Evaluation Board saw that the Recommended Bidders had adequate material to make the works, for which Ing Muscat confirmed so.

Dr Mario Scerri, for Žombor Enterprises Ltd, asked then the witness whether the Evaluation Board took into consideration whether Road Construction Co Ltd had all the permits to enter the Abattoir for which the reply was no since this was not a requirement in the Tender Document.

Mr Richard A Matrenza, Member Public Contracts Review Board, then asked whether this condition was in the Tender. Dr Mario Scerri, for Žombor Enterprises Ltd asked also whom did the Contracting Authority contact during the fifteen days period until the Recommended Bidders got the permit. Ing Mifsud said that he couldn't answer the question as he was only the Chairman of the Evaluation Board.

Dr Mario Scerri, for Žombor Enterpriss Ltd, then asked the witness whehter consideration was taken that without any permits, the service could not be made for which Ing Muscat replied that he couldn't ask for more information than that required in the Tender Document.

Dr Mario Scerri continued then by asking the witness what type of trucks did Road Construction Company Ltd submitted. Dr Tatiane Scicluna Cassar, for the Ministry of Gozo objected to this question. Dr Anthony Cassar, Chairman Public Contracts Review Board, then remarked that no information can be given but that an indication of what has been submitted could. Ing Jeffrey Muscat, Chairperson Evaluation Board replied that the Recommended Bidders had enough material for loading and unloading and that they were going to hire a side lifter.

Dr Anthony Cassar, Chairman Public Contracts Review Board, then asked whether the Evaluation Board was fine with this for which the witness replied in the affirmative.

Dr Mario Scerri, for Žombor Enterprises Ltd, then asked whether the witness can say what type are the two trucks submitted. Dr Anthony Cassar, Chairman Public Contracts Review Board added that the witness must reply whether these trucks can side load or tow. Ing Muscat replied that from the documentation submitted, the Recommended Bidders had more than two trucks with which he can tow.

Dr Anthony Cassar, Chairman Public Contracts Review Board, queried whether the machinery was adaptable for this work, the witness confirmed so.

Dr Mario Scerri, for Žombor Enterprises Ltd, then asked whether the Recommended Bidders gave any evidence on the two trucks and whether these can transport the material in question from one place to another, which again, the witness confirmed.

Mr Richard A Matrenza, Public Contracts Review Board Member, asked whether the machinery which Road Construction Co Ltd had was owned or hired. Ing Muscat said that the machinery was going to be both owned and hired.

Dr Mario Scerri, for Žombor Enterprises Ltd, then asked whether the Recommended Bidder gave any details of the vehicles. The witness replied that they didn't.

Dr Daniel Calleja for Road Construction Company Ltd, stated that with regards to the First Grievance issued by the Appellants, the Tender Document did not required the bidders to show that they have the necessary permits to do the job but that they have the machinery required to load these containers. Dr Calleja said also that his clients had more machinery than requested to make these deliveries.

Mr Carmelo Buttigieg, ID 330666 M, Tariff Fee Collector, WasteServ Malta, was then called to testify under oath.

Dr Mario Scerri, Legal Representative Žombor Enterprises Ltd, asked the witness when Road Construction Co Ltd applied for the permit to load and unload the carcasses at the Abattoir. Mr Buttigieg replied that his job was to ensure that clients and vehicles are registered with WasteServ Malta. If they do not have a MEPA Permit, they cannot enter at the Abattoirs.

Dr Mario Scerri, Legal Representative Žombor Enterprises Ltd then asked whether the Recommended Bidders had the necessary permits to enter the Abattoir, which the witness confirmed but did not know exactly when the permit for Road Construction Co Ltd was issued.

Dr Anthony Cassar, Chairman Public Contracts Review Board, asked the witness how one can check whether a particular vehicle had any permits. Mr Carmelo Buttigieg replied that both client and vehicle would be automatically registered with WasteServ Malta as they collect the data and memorise it on a computer.

Here Dr Daniel Calleja, for Road Construction Company Ltd passed some permit documents to Mr Buttigieg who confirmed that these permits were issued by WasteServ Malta.

Dr Mario Scerri, for Žombor Enterprises Ltd, remarked that these permits are undated and asked the witness whether these were issued after April. Mr Buttigieg confirmed this but did not know the exact date of issue.

The last witness, Mr Anthony Zarb, Co-Ordinator Gozo Abattoir, 237674 M was then called to testify under oath.

Dr Mario Scerri, for Žombor Enterprises Ltd started by asking Mr Zarb which company was contacted for the first Transportation back in April 2016. The witness replied that they called Road Construction Co Ltd.

Dr Mario Scerri then asked how many trips did the latter do. Mr Zarb replied that the Recommended Bidders had made one trip but were stopped at Sa Maison because they did not have the necessary permits. In order for a vehicle to enter the incinerator, it must have a permit so that the Civil Abattoir would have trace of whoever entered the place.

Dr Mario Scerri remarked that technically, in order for one to transport the carcasses from Xewkija to Marsa, one had to have a permit to do so otherwise this would not be possible. He then asked Mr Zarb whether Road Construction did eventually enter at the Marsa

Abattoir, when they were contacted to make this first transport. The witness replied negatively.

Dr Mario Scerri then asked what did the Gozo Abattoir do at this stage. Mr Anthony Zarb replied that they had contacted Žombor Enterprises Ltd to go and collect the containers at Sa Maison since they had the permits.

Dr Mario Scerri, Legal Representative for Žombor Enterprises Ltd, then asked whether from April onwards Road Construction Ltd made any transport to the Gozo Abattoir for which the witness replied in the negative.

Dr Tatiane Scicluna Cassar, for the Ministry of Gozo, then asked the witness how this trip by Road Construction Co Ltd was requested. Mr Anthony Zarb replied that the request was made by direct order.

Dr Tatiane Scicluna Cassar then asked what happened before. Mr Zarb replied that at Award Stage, the Director had sent a letter to Žombor Enterprises Ltd where he informed them about the ten days Appeals' period and the latter thought that he could still provide the service until the end of this period.

Dr Mario Scerri, Legal Representative for Žombor Enterprises Ltd, asked whether he understood well that until now, direct orders are still being given to his clients. Mr Zarb confirmed so and added that it is still happening because the Tender is still at Appeals' stage.

Dr Daniel Calleja, Legal Representative for Road Construction Ltd, asked Mr Zarb whether his clients had the necessary permits for transportation on the basis of the documents exhibited in this Public Hearing. The witness replied that he doesn't need to know this.

At this stage, the Public Hearing was closed.

This Board,

Having noted the Appellant's Objection, in terms of the “*Reasoned Letter of Objection*” dated 6 July 2016 and also through their verbal submissions during the Public Hearing held on 4 October 2016 had objected to the decision taken by the Pertinent Authority, in that:

a) Žombor Enterprises Ltd contend that the Recommended Bidder did not possess the necessary permits for the transportation of carcasses from Xewkija, Gozo to the Abattoir in Malta at the time of Tender Submission;

b) Žombor Enterprises Ltd also maintain that the Recommended Bidder did not have the necessary transportation equipment to deliver these carcasses in conformity with all the sanitary regulations. In this regard, the Appellant contains that the Evaluation Board was not aware of this deficiency.

Having considered the Contracting Authority's "*Letter of Reply*" dated 22 September 2016 and also their verbal submissions during the Public Hearing held on 4 October 2016, in that:

a) Ministry for Gozo maintain that there was nowhere in the Tender Document which stated that the Bidders had to have the necessary permits. In this regard, the Contracting Authority informed the Public Contracts Review Board that any such permits can be obtained within 15 days;

b) Ministry for Gozo insist that the Evaluation Board were assured that Road Construction Co Ltd had the necessary equipment and vehicles to carry out the tendered works.

Reached the following conclusions:

1. With regards to Žombor Enterprises Ltd's First Grievance, this Board after having examined the conditions laid out in the Tender Document justifiably acknowledges the fact that the latter did not request the Bidders to present the necessary permits for the Transport of carcasses from Gozo to Malta.

In this regard, the Evaluation Board followed the laid-out conditions of the Tender Document. In Tenders of this kind, it is the responsibility of the Bidders to ensure that he has all the necessary permits to operate the Tender works.

In this instance, the onus of having the necessary permits should not be shifted to the Evaluation Board. The latter is constituted to assess what has been submitted and whether such submissions are in accordance with the conditions dictated in the Tender Document.

In this regard, this Board credibly opines that to carry out the Tendered works, certain permits are necessary and that Road Construction Co Ltd is in duty bound to obtain these permits prior to the commencement of the Tendered works.

From submissions made, this Board notes that this permit is a usual normal requirement for operators in this field of work, so that in the absence of the permit, the Contractor cannot operate.

At the same instance, this permit can be easily issued by the relative Authority within a short period of 2 weeks, so that the non-possession of a permit, at the time of submission of the Tender Document does not handicap, the prospective Bidder from making his submissions.

In this regard, this Board does not uphold Žombor Enterprises Ltd's First Grievance.

2. With regards to the Appellant's Second Grievance, this Board opines that Road Construction Co Ltd had made his submissions and assurances about the equipment and vehicles that were to be deployed for this Tender and in this case, the Evaluation Board was satisfied with the equipment being offered, whether owned or hired,

and that these were in accordance with the requirements of the Tender, hence the Evaluation Board assessed on what has been submitted.

This Board opines that it is the obligation of the Recommended Bidder to abide by the conditions and regulations as stipulated in the Tender Document.

On the other hand, it is up to the Ministry for Gozo to monitor and ensure that the Recommended Bidder carries out the Tendered works in accordance with the requisites of the Tender; otherwise, remedial action is available. In this regard, this Board does not uphold the Appellant's Second Grievance.

In view of the above, this Board finds against Žombor Enterprises Ltd and recommends that the deposit paid by the Appellant should not be refunded.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Richard A Matrenza
Member

11 October 2016