

PUBLIC CONTRACTS REVIEW BOARD

Case 1107 – LLC T 01/2017 – Service for the Collection of Mixed Household Waste for the Hal Lija Local Council in an Environmentally Friendly Manner

The Publication Date of the Call for Tenders was 25 July 2017 whilst the Closing Date for Call of Tenders was 25 August 2017. The Estimated Value of the Tender, (Exclusive of VAT) was € 86,100.

Eight (8) Bidders have submitted Nine (9) offers for this Tender.

On 1 October 2017, Galea Cleaning Solutions JV filed an Objection against the decision which was taken by Kunsill Lokali Lija to award the Tender to Ms Maria Carmen Gatt for the price of € 79,560 (Exclusive of VAT) against a deposit of € 400.

On 30 November 2017, 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 – Galea Cleaning Solutions JV

Dr Mark Gatt	Legal Representative
Dr Adrian Mallia	Legal Representative

Recommended Bidder – Ms Maria Carmen Gatt

Ms Maria Gatt	Representative
Ms Maria Carmen Gatt	Representative
Dr John Gauci	Legal Representative

Contracting Authority – Kunsill Lokali Lija

Mrs Magda Magri Naudi	Chairperson, Evaluation Board
Mrs Georgette Borg	Secretary, Evaluation Board
Dr Michele Tufigno	Legal Representative

Following an introduction made by the Chairman of The Public Contracts' Review Board, Dr Anthony Cassar, the Appellants were invited to make their submissions.

Dr Adrian Mallia, the Legal Representative of Galea Cleaning Solutions JV opened by saying that if one had to see the Tender Document, Clause 7c (ii) it referred to a form which was described as the Literature List, which *inter alia* stated that:

“Literature as per Form marked “Literature List” may be requested during the Adjudication Stage to supplement the Technical Offer Submitted. If requested, the Literature must be submitted within 14 working days of being notified to do so, (Note 3). If Literature is not submitted within the specified timeframe, offer will not be considered further.

Tenderers are NOT requested to supply Literature and Samples at Publication Stage.”

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board remarked that these statements were completely contradicting one another.

Dr Adrian Mallia, the Legal Representative of Galea Cleaning Solutions JV, continued by saying that his clients understood that it had to be submitted on request. If one had to see the Literature List provided with the Tender, one would notice that:

“List of Literature to be submitted within 14 days from when notified to do so”.

In their Reasoned Letter of Reply dated 5 October 2017, Kunsill Lokali Lija wrote that there were many Bidders who did not submit their Log Books. This point had to be clarified since the Tender Document did not require the Bidders to submit their Log Book. On the other hand Annex 7 requested the vehicle description, registration number and estimated tonnage.

Dr Mallia continued by saying that the Tender requested, the successful Bidder to work with two vehicles, a large one and a small one. Galea Cleaning Solutions JV said that they had filled all the mandatory requirements and that from the information which they had available, Mrs Maria Carmen Gatt who had been recommended for award, did not have the necessary vehicles for the contract at the time when Offers were submitted.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether there was somebody from the Local Council available for questioning for which Dr Michele Tufigno, the Legal Representative for Kunsill Lokali Lija replied that there was the Mayor present.

At this point, Mrs Magda Magri Naudi, the Mayor of Kunsill Lokali Lija who was also the Chairperson of the Evaluation Committee, holding ID Card Number 583348 M, was summoned by the Public Contracts Review Board to testify under oath before the same.

Following Ms Magri Naudi's testimony, Ms Georgette Borg, the Executive Secretary of Kunsill Lokali Lija, and the Secretary of the Evaluation Board, holding ID Card Number 91057 M was summoned by the Public Contracts Review Board to testify under oath before the same.

At this stage, the Public Hearing was adjourned to Thursday 7 December 2017 at 09:00 wherein the Public Contracts Review Board will transmit the decision taken for this Objection verbally and then distribute a hard copy of the same to all parties concerned.

This Board,

Having noted this Objection filed by Galea Cleaning Solutions JV (herein after referred to as the Appellant) on 1 October 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference LLC T 01/2017 listed as Case No 1107 in the records of the Public Contracts Review Board, awarded by Kunsill Lokali Lija (herein after referred to as the Contracting Authority).

Appearing for the Appellant: Dr Mark Gatt

Dr Adrian Mallia

Appearing for the Contracting Authority: Dr Michele Tufigno

Whereby, the Appellant contends that:

- a) At the time of submission of his offer, the Preferred Bidder did not possess the requested vehicles with the correct specifications as duly dictated in the Tender Dossier. In this respect, the Appellant**

maintains that the Evaluation Process should have been carried out in conformity with such requirements.

This Board also noted the Contracting Authority's "*Letter of Reply*" dated 5 October 2017 and its verbal submissions during the Public Hearing held on 30 November 2017, in that:

- a) Kunsill Lokali Lija maintains that since most of the Bidders failed to submit their vehicles' log books with their original offers, the Contracting Authority decided to request this submission during the Evaluation Stage, after which the Recommended Bidder's offer was found to be the best offer.**

This same Board also noted the Testimonies of the witness, which were both summoned by the same namely:

- 1. Ms Magda Magri Naudi;**

- 2. Ms Georgette Borg**

This Board, after having examined the relative documentation and heard submissions made by the parties concerned, including the testimonies of the

Witnesses duly summoned, opines that two emerging factors in this appeal are (i) “*Requisites in the Tender Document*” and (ii) “*Adopted Evaluation Procedure*”, which are being considered as follows:

(i) “*Requisites in the Tender Document*”

It is an established fact that the Tender Document included annexes which formed part of the same document and this Board would like to respectfully refer to Annex 7, under “*Schedule of Vehicles to be Used*”, whereby vehicle registration number, vehicle description and tonnage capacity were requested to be submitted as part of the Tender Documentation.

In this respect, this Board acknowledges the justifiable fact that the reason why such information was dictated, was, so that Kunsill Lokali Lija will ensure that the equipment being deployed by the Contractor on the tendered services will be capable of carrying out the tasks involved and yet conform with the necessary legislation for the operation of such vehicles and in this regard, this Board opines that such information played an important role in the smooth execution of the Tendered Works.

This Board, at this particular stage of consideration of this Appeal, would like to refer to the EU directive relating to the “*European Single Procurement Document*” whereby such documentation, (on which the Tender document should be formulated) is intended to simplify the process of qualification for Tendering by permitting business to self-declare that they meet the necessary regulatory criteria or commercial requirements of the Public Authority concerned, without needing to submit proof unless subsequently selected as the appointed Contractor. In this respect, the supplier must state they he is able, upon request and without delay, to provide the supporting documentation to prove compliance. In this regard, this Board justifiably opines that the information submitted by Ms Maria Carmen Gatt in annex 7, regarding the vehicles to be deployed on the project, did in fact, represent a declaration that such declared particular vehicles will be deployed for carrying out the Tendered Service.

At the same instance, this Board credibly notes that the Authority should have ensured that what the Recommended Bidder declared was factual, upon receipt of the documentation to validate his competency and compliance, however this Board also points out that the Local Council, instead, accepted documentation which does not

agree with that declared in the offer submitted by Ms Maria Carmen Gatt and this action on the part of the Contracting Authority, goes against the spirit of the submission of the ESPD, as what was declared is different from the real circumstance.

This Board would also refer to Clause (6) under vehicle type in the Tender Document, wherein it was stated that:

“The collectors are required to have a minimum a medium to large tonnage vehicles for general use and an appropriate low tonnage waste carrier which should render an adequate service in the narrow roads of Lija. This will be further discussed in detail between both parties once the Tender is awarded”

And justifiably opines that the above mentioned clause refers to the type of vehicle to be operated and under what circumstances such vehicles are to be deployed. It does not override the fact that the declaration made by the Bidder with regards to the details and registration number of the vehicles can be otherwise, after the award of the Tender. At the same instance, the Bidder was well aware that the declared details of vehicles so submitted refer to the same vehicles which are to be deployed. If such a condition is tolerated

then, there was no justifiable purpose for Kunsill Lokali Lija to request details and identification of the vehicles to be used for the Tendered Service.

(ii) Evaluation Procedure Adopted

In considering this issue, this Board would like to refer to the importance of the Tender Dossier and its contents. Apart from the basic fact that the Tender Document is a contract, the Bidder should also appreciate and accept that each clause and condition contained in the document must be strictly adhered to throughout the Tender Period, yet at the same instance, the Local Council must ensure that, throughout the Evaluation Process, same clauses and conditions are respected so that the Evaluation Committee is obliged to safeguard all the conditions dictated in the Tender Document during their deliberations.

In this particular case, this Board would like to point out that under clause (6) Vehicle Type, it was dictated that:

“The waste carrier is obliged to submit a copy of the registration document issued by MEPA together with a copy of the Vehicle Log Book with his offer, failing which the submission is to be disqualified.”

In this regard, this Board notes that such an important clause was not considered by the Evaluation Board during its deliberations. As otherwise all those offers which did not include such documentation should have been rejected.

This Board opines that it is highly unacceptable for the Contracting Authority to change conditions laid out in a Tender Document during evaluation stage and accept same at award stage. In this regard, this Board notes that all offers which did not abide by clause (6) of the Tender Document should have been disqualified as they were not administratively compliant.

It is to be pointed out that the Evaluation Board is the pillar in the award of a particular Tender, as is in this case, and its main objectives should be to award the Tender to the most advantageous Bidder but who is also compliant with all the conditions laid out in the Tender Document and in this regard, this Board was not presented with any credible evidence as to why the parameters of

the conditions as stipulated in the Tender were changed and accepted by the Contracting Authority.

On a final consideration, this Board does not opine that clause (6) under “*Vehicle Type*” presents a plausible solution and credible justification to prove that different vehicles from those declared could be accepted.

3. On a general note this Board, after having considered the merits of this Appeal, opine that:

- i) the Tender Document contained conflicting clauses and somewhat unclear in its requirements;**
- ii) the Evaluation Process was not carried out according to transparent procedures**

In view of the above, this Board does not uphold Kunsill Lokali Lija’s decision to award the Tender to Ms Maria Carmen Gatt and therefore finds in favour of Galea Cleaning Solutions Joint Venture. Besides, this Board recommends that:

- a) The Tender is to be cancelled and if a new one is to be issued, the Local Council is to ensure that all conditions and clauses in the Tender Document are clearly and objectively construed whilst at the same instance, the Evaluation Board must ensure that all offers are screened to confirm that the latter abide by all the conditions dictated in the Tender Document;**
- b) Recommends that the deposit paid by the Appellant is to be fully refunded.**

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Richard A Matrenza
Member

7 December 2017