

PUBLIC CONTRACTS REVIEW BOARD

Case 1263 – MESDC/AGR 169/2017 – Tender for the Manufacture, Supply, Installation and Commissioning of a Complete Functional Liquid Petroleum Gas Power Heating System

The publication date of the call for tenders was the 19th October 2018 whilst the closing date of the call for tenders was 9th November 2018. The estimated value of the tender (exclusive of VAT) was € 134,500.

On the 20th December 2018 Mr Anthony Falzon filed an appeal against the Ministry for the Environment, Sustainable Development and Climate Change as the Contracting Authority objecting to being disqualified on the grounds that his bid was not compliant. A deposit of € 672 was paid.

There were two (2) bidders.

On 7th February 2019 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Carmel Esposito as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – Mr Anthony Falzon

Dr Marco Woods	Legal Representative
Mr Anthony Falzon	Representative

Recommended Bidder – Mr Michael Camilleri

Dr Adrian Mallia	Legal Representative
Mr Michael Camilleri	Representative

Contracting Authority – Ministry for the Environment, Sustainable Development and Climate Change (MESDC)

Mr Pierre Farrugia	Chairperson Evaluation Committee
Ms Olivia Bugeja	Member Evaluation Board
Mr Emanuel Schembri	Representative
Mr Roberta Sultana	Representative

Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties and invited them to make their submissions.

Dr Marco Woods Legal Representative for Mr Anthony Falzon said that his client's appeal against disqualification was based on two grounds. The first point was that up to the time of the closing date of the tender the ESPD showed that only his client's tender had been submitted, and his screenshot showed that there was only his one bid.

Mr Pierre Farrugia Representative of the MESDC, and Chairperson of the Evaluation Committee said that when opening the ESPD two bidders were shown with times and dates bids submitted. When a bidder opened his own account only that applicant's offer was shown.

Moving to the next objection Dr Woods said that the price element of his client's bid was based on international market prices for each type of this equipment and it was difficult to accept that there should be such a lower price submitted by the preferred bidder for identical items.

Mr Anthony Falzon (235663M) appearing as a witness on his own behalf, testified on oath that he was a Director of his business and had 25 years experience in this sector. The prices he had quoted for the products required in the tender had been normal market prices and it was impossible to see how there could be a difference of € 90,000 between the bids unless one was unaccountably low - the difference in pricing was too vast.

Mr Pierre Farrugia (358069M) called as a witness by the Board testified on oath that he was the Chairperson of the evaluation committee. He said that before issuing a tender estimates were prepared by a qualified engineer. The tender on that estimate had a departmental limit of €150,000. Apart from meeting the specifications bidders had to offer guarantees and register the equipment with the Malta Resources Authority or else the bid would fail. He confirmed that it was mandatory to provide a five year maintenance agreement and the preferred bidder had certified that all tender terms were met.

Mr Emanuel Schembri Representative of the Contracting Authority pointed out that this was a departmental tender and Appellant's bid was over the threshold and therefore was automatically excluded.

Dr Adrian Mallia Legal Representative for Mr Michael Camilleri mentioned that the Court of Appeal had in past cases upheld that it is the prerogative of the bidder to base offers at his discretion.

The Chairman thanked the parties for their submissions and declared the hearing closed.

This Board,

having noted this Objection filed by Mr Anthony Falzon, (hereinafter also referred to as the Appellant) on 20 December 2018, refers to the contentions made by the latter with regard to the Tender of Reference MESDC/AGR 169/2017 listed as Case No 1263 in the records of the Public Contracts Review Board, awarded by the Ministry for the Environment, Sustainable Development and Climate Change, (herein after referred to as the Contracting Authority).

Appearing for the Appellant: Dr Marco Woods

Appearing for the Contracting Authority: Mr Pierre Farrugia

Whereby, the Appellant submits that:

- a) his first contention refers to the fact that at the time of the closing date of the submissions, the Electronic Public Procurement System showed only his offer as the only offer;**

- b) his main concern is that the global price quoted by the Preferred Bidder does not reflect the market price so that the products offered by same, may not meet the technical specifications stipulated in the Tender Document.**

This Board has also noted the Contracting Authority’s “*Letter of Reply*” dated 28 December 2018 and its verbal submissions during the Public Hearing held on 7 February 2019, in that:

- a) The Ministry for the Environment, Sustainable Development and Climate Change insists that by the end of the closing date of submission of offers, two offers were received and duly recorded in the Electronic Public Procurement System;**

- b) The Authority also maintains that both offers were fully compliant and to this effect, the cheapest offer was selected for the award of the Tender.**

This same Board has also noted the testimony of the witness, namely Mr Anthony Falzon who testified on his own behalf.

This Board, having examined the relevant documentation to this Appeal and heard submissions made by the parties concerned, including the testimony of the same witness opines that the issues that deserve consideration are twofold namely:

- 1. The fact that only one bidder is shown on the Electronic Public Procurement System;**

2. Mr Michael Camilleri’s quoted price

1. The fact that only one bidder shown on the Electronic Public Procurement System

With regards to Mr Anthony Falzon’s first contention, this Board notes that the “*screen shot*” showing the latter’s offer only, simply refer to the Appellant’s account as duly recorded in the system and not the summary of the offers received. After examining the documentation, this Board can confirm that two offers were submitted as follows:

000103621	Mr Anthony Falzon	9 November 2018	Time 09:28
000103246	Mr Michael Camilleri	5 November 2018	Time 07:15

In this regard, this Board does not uphold Mr Anthony Falzon’s first contention.

2. Mr Michael Camilleri's quoted price

With regards to the Appellant's second contention, this Board would respectfully point out that the Preferred Bidder's offer was technically compliant and adhered to the dictated specifications and conditions of the Tender Dossier. Apart from such an issue, Mr Michael Camilleri quoted a global price which is within the budgeted parameter, so that the successful bid was recommended for award due to the simple fact that it was a cheaper bid.

This Board will not enter into the merits as to whether the quoted price is not reflecting the market price and is not concerned as to whether the Preferred Bidder will realise a profit or sustain a loss. This Board is however comfortably assured that through the guarantees and registration of equipment with the Malta Resources Authority, the Ministry for the Environment, Sustainable Development and Climate Change will have a safety valve that the Preferred Bidder will deliver to the satisfaction of the Contracting Authority. In the event that the successful Bidder will not honour his obligations, the Contracting Authority has other remedies to control such a situation. At the same

instance, this Board would also emphasize that it is the responsibility of the Contracting Authority to take all necessary measures to ensure that the successful Bidder will deliver in a timely and efficient manner, as duly dictated in the Tender Dossier. In this regard, this Board is comfortably convinced that the Evaluation process was carried out in a just and transparent manner and therefore this Board does not uphold the Appellant's Second Contention.

In view of the above, this Board,

- i) upholds the Ministry for the Environment, Sustainable Development and Climate Change's decision in the award of the contract;**

- ii) does not uphold Mr Anthony Falzon's contention;**

- iii) directs that the deposit paid by the Appellants should not be refunded.**

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Carmel Esposito
Member

13th February 2019