

## **PUBLIC CONTRACTS REVIEW BOARD**

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### **Case 1302 – MTFLC-T-01-2019 – Street Sweeping Services in the Locality of Mtarfa using Environmentally Friendly Practices**

The publication date of the call for tenders was the 8<sup>th</sup> January 2019 whilst the closing date of the call for tenders was 29<sup>th</sup> January 2019. The estimated value of the tender (exclusive of VAT) was € 66,200.

On the 25<sup>th</sup> March 2019, Mr Chris Gatt filed an appeal against the Mtarfa Local Council as Contracting Authority objecting that his bid was rejected as it was not the best price quality ratio offer. A deposit of € 400 was paid.

There were seven (7) bidders.

On 23<sup>rd</sup> April 2019 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

#### **Appellant – Mr Chris Gatt**

Dr Adrian Mallia	Legal Representative
Ms Maria Gatt	Representative
Mr Chris Gatt	Representative

#### **Contracting Authority – Mtarfa Local Council**

Dr Malcolm Mifsud	Legal Representative
Mr Daniel Attard	Chairperson Evaluation Board
Ms Josette Micallef	Secretary Evaluation Board
Ms Romina Perici Ferrante	Member Evaluation Committee

Dr Anthony Cassar, Chairman of the Public Contracts Review Board, welcomed the parties and invited submissions.

Dr Adrian Mallia Legal Representative of Mr Chris Gatt stated that two points need to be considered in regard to this appeal – namely the price of the bid and certain ancillary issues. Dealing with the latter point first he said that there are several previous Board decisions with regard to criteria like working conditions, collective agreements etc and these should not be considered as in the view of the Board they are not proportionate. Where the issue of price is concerned the

Mtarfa Local Council used the rates mentioned in various Government Circulars and multiplied those rates by 40 hours per week to arrive at a figure. The decision of the Contracting Authority is that this Board does not enter into the merits of whether a profit is made or not by the tenderer. The intention of the Government Circulars is to protect workers against precarious working conditions, primarily to ensure that they are paid the minimum rate for the job; therefore the submitted tender price must reach that figure as a minimum. In this Case the tenderer is a self-employed person, and will not be employing anyone. Therefore the Government formula of one person multiplied by 40 hours multiplied by the rate does not apply as there are no employees to protect.

Dr Malcolm Mifsud Legal Representative of the Mtarfa Local Council pointed out that the tender referred to 'employee plus driver' as a requirement and it was therefore clear that the criteria was for more than one employee. Worker and supervisor is not to be taken as the same person.

Ms Josette Micallef (143272M) called as a witness by the Appellant testified on oath that she was the Secretary of the Evaluation Committee and that the tender was evaluated on a best price quality ratio (BPQR) basis, with all bids treated similarly. Five bids were rejected because of the price submitted - any bid that did not cater for a employee plus supervisor was eliminated.

Dr Mallia said that the issue was not to establish a minimum price – his client was self employed and did not require protection. The Council maintains that you need two persons but the fact that they awarded two points (against the possible maximum of four) for employing one person indicates they were prepared to consider this possibility.

At this stage the Chairman pointed out to the Contracting Authority that the letter of rejection should give the reasons for rejection as well as details of the points awarded when it is a BPQR tender.

Dr Mifsud said that the Council had scrupulously followed the tender document. They were bound to ensure that an offer was sustainable as otherwise it would lead to difficulties at a later stage. Appellant has other contracts ongoing with the Mtarfa Council and cannot possibly fulfil this contract himself apart from the doubt as to whether he intended to employ a supervisor. It is now common practice for Local Councils to insist on a supervisor in their tenders for similar types of contracts. Nowhere did the Appellant state that he was self-employed.

Dr Mallia said that the electronic tendering system was rigid and does not allow notification of variations. The Council had not used their prerogative to discuss with Appellant his bid and to seek reasons for his offer. Moreover no proof had been provided that he had other contracts with the Council, and the Board should disregard this statement.

Finally, Dr Mifsud stated that the Council's decision was not based on price. They had followed the EPP system throughout and they were not legally obliged to discuss his offer with bidder. Conversely it was the bidders' responsibility to eliminate any doubts in their bid. He had been faithfully awarded the correct marks in line with his bid, and the Council's decision should be upheld.

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

**This Board,**

**Having noted this Objection filed by Mr Chris Gatt (herein after referred to as the Appellant) on 25 March 2019, refers to the claims made by the same Appellant with regard to the Tender of reference MTFLC-T-01/2019 listed as Case No 1302 in the records of the Public Contracts Review Board, and awarded by Mtarfa Local Council (herein after referred to as the Contracting Authority).**

**Appearing for the Appellant: Dr Adrian Mallia**

**Appearing for the Contracting Authority: Dr Malcolm Mifsud**

**Whereby, Appellant contends that:**

- a) His main concern refers to the fact that, in his offer, he took into consideration that he will not be employing anyone and that, the tendered works will be carried out by himself, a self-employed person and in this regard, the rates as stipulated in the Government circulars, do not apply.**

**In this respect the Authority should have asked for an explanation from Appellant, as to how the quoted price would cover the required services.**

**This Board also noted the Contracting Authority's 'Letter of Reply' dated 2 April 2019 and its verbal submissions during the hearing held on 23 April 2019, in that:**

- a) The Authority maintains that the tender document requested more than one employee, that is, an employee and a supervisor, so that, the Government circulars with regards to the minimum rates of employees, apply in this instance. The Authority insists that it was the responsibility of the Appellant to indicate that all the requested works will be carried by himself alone.**

**This same Board has also noted the testimony of the witness namely Ms Josette Micallef duly summoned by Mr. Chris Gatt.**

**This Board, after having examined the relevant documentation to this appeal and heard submissions made by the parties concerned, including the testimony of the witness duly summoned, opines that the issue that merits consideration is the stipulated labour complement.**

**1. This Board would respectfully refer to clause 4.25 ‘Number of Employees’ of the tender document, as follows:**

*Number of Employees*

*The Contractor must provide services for one (1) full time employee. Without prejudice to the level of cleanliness required, lack of employees engaged is not an excuse for substandard work. The Council reserves the right to increase/decrease the service hours at the rate quoted in the financial bid to cover for any changes in working schedules.’*

**The above-mentioned clause clearly stipulates that the economic operator must provide one full time employee to execute the tendered services. At the same instance this Board notes that the Authority also requested the services of a supervisor and in this respect, such a person would ensure that the tendered services are carried out in accordance with the stipulated conditions as duly dictated in clause 6.1.1 of the tender document, as follows:**

*‘6.1 Personnel*

*6.1.1 Personnel engaged on the Contract*

*Street Sweeper:*

*The Service shall be delivered by the number of personnel as stipulated in Article 4.2.5 of the Terms of Reference.*

*Personnel shall have the ability to communicate in Maltese and /or English.  
Personnel are to be given basic training in Cleanliness and Hygiene.*

*Prior to the signing of the contract, contractor shall give the name/s of the worker/s who are to be engaged in the delivery of this service and notify any subsequent changes in this respect during its validity.*

*Supervisor*

*The Supervisor shall ensure that the work being done by the personnel is to the required standard. The supervisor shall have the duty to report any matters related to the efficiency of the service to the Council representative. The Supervisor shall have the duty to ensure timekeeping and level for service to reach the service grade "A".*

**Although this Board cannot understand how the contractor must engage a supervisor to report on the progress of works being executed by the same contractor, the above-mentioned clause makes a clear distinction in that, the person who executes the service cannot act as a supervisor on his own performance.**

- 2. This Board, would point out that the evaluation committee are bound to abide by the principle of self-limitation in that, during the evaluation process, each evaluator must keep in mind that, offers should contain what was requested in the tender dossier and not otherwise. In this particular case, Appellant should have, first of all**

**indicated that he, as a self-employed person, will carry out the works, and, in this regard, this Board opines that such an explanation could have been submitted through the Epps system and secondly, he also had to provide for a supervisor. It is the responsibility of the economic operator to provide the correct information to the authority to enable the latter to evaluate the respective offer and not for the authority to chase or request missing submissions on the part of the tenderer.**

- 3. This Board noted that all the offers, five in number, were also rejected for the same reason, that is, for not providing a supervisor, so that, the Evaluation Committee treated all offers on the same level playing field, in a transparent manner.**
  
- 4. With regards to Appellant's contention in that the Authority should have requested an explanation to establish how Appellant, through his offer, can execute the works, this Board, would respectfully point out that, such an alleged request can only be appropriate and equitable in a instance where Appellant's offer would have been fully compliant, to avoid any possibility of an**

**abnormally-low offer . In this particular case, this Board confirms that the Appellant's offer, like five other competing bids, was technically non-compliant, so that no further requests for explanations were obliged to be affected by the Evaluation Committee.**

**In conclusion, this Board opines that:**

- a) The Evaluation Committee was not obliged or in duty bound, under these circumstances, to seek further explanation as to, and in what manner, Appellant will carry out the tendering services through his offer.**
  
- b) Appellant's offer was not technically compliant as he failed to provide for the services of a supervisor.**
  
- c) The Evaluation Committee, in its deliberation of the submitted offers, followed the basic principles of self-limitation, equal treatment and transparency.**

**In view of the above, this Board,**

**a) Does not uphold Appellant's contentions,**

**b) Upholds the decision of the Contracting Authority in the award of the  
Tender,**

**c) Directs that the deposit paid by Appellant should not be refunded.**

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Lawrence Ancilleri  
Member

*7 May 2019*