

PUBLIC CONTRACTS REVIEW BOARD

Case 1394 – ALC 4/2019 – Tender for the Street Sweeping Services in the Locality of Attard, using Low Emission Service Vehicle

The publication date of the tender was the 13th July 2019 whilst the closing date was the 21st August 2019. The estimated value of the tender (exclusive of VAT) was € 300,000.

On the 21st October 2019 Galea Cleaning Solutions JV filed an appeal against Attard Local Council as the Contracting Authority on the grounds that the tender is being cancelled. A deposit of € 1,500 was paid.

There were eleven (11) bidders.

On 28th November 2019 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Richard Matrenza as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – Galea Cleaning Solutions JV

Dr Adrian Mallia	Legal Representative
Dr Paul Felice	Legal Representative

Contracting Authority – Attard Local Council

Dr Gabriel Farrugia	Legal Representative
Mr Stefan Cordina	Chairperson Evaluation Committee
Mr Chris Falzon	Member Evaluation Committee
Ms Marika Mifsud	Representative

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

Dr Adrian Mallia Legal Representative for Galea Cleaning Solutions JV said that Appellants based their offer on five cleaners and after the opening of the bids their offer was the lowest, but were subsequently informed that due to certain discrepancies in the tender document it was cancelled. It was totally unacceptable that in their letter of rejection no reason was given by the Council for their decision nor was there any mention of the right of appeal. Appellants were later verbally informed that the reason for the cancellation was that there was reference in part of the documents to three instead of five operators.

Mr Chris Falzon (37983M) called as a witness by the Public Contracts Review Board testified on oath that he was a member of the evaluation committee. He stated that in the tender documents on page 11 it indicated that three operators must be provided whilst on page 40 it stated that the number must be five operators. Since this was likely to mislead bidders the committee decided that it would make evaluation difficult and the decision was taken to cancel the tender.

Witness was referred to the Financial Offer Form (tabled as Doc 1) where it was indicated by the Council that the approximate number of hours per year required to carry out the tasks were 10,400 and it was pointed out to him that this was equivalent to five operators working all year round on a 40 hour week basis.

Dr Mallia said that the Financial Offer Form did not allow any changes, therefore any offer submitted must have been based on employing five operators – it was clear that this was what the Council had in mind and none of the bidders had been misled. All that the Appellants were asking for was that the evaluation of the bids be proceeded with.

The Chairman said the Council had to follow the principle of proportionality – all offers had to be based on a fixed number of hours and therefore a level playing field existed. He then thanked the parties for their submissions and declared the hearing closed.

End of Minutes

Decision

This Board,

having noted this objection filed by Galea Cleaning Solutions JV (herein after referred to as the Appellants) on 21 October 2019, refers to the claims made by the same Appellants with regard to the cancellation of tender reference ALC 4/2019 listed as case No. 1394 in the records of the Public Contracts Review Board.

Appearing for the Appellants:

Dr Adrian Mallia

Dr Paul Felice

Appearing for the Contracting Authority: Dr Gabriel Farrugia

Whereby, the Appellants contend that:

- a) They were informed that the tender is to be cancelled without giving any reasons; this is unacceptable. Subsequently, upon enquiring with the Authority, Appellants were informed that due to discrepancies contained in some of the clauses in the tender document, cancellation was inevitable.**

- b) The reason for the alleged discrepancies did not mislead the bidders and did not affect the selection process and in this regard, the evaluation process should be resumed.**

This Board also noted the Contracting Authority's 'Letter of Reply' dated 29 October 2019 and its verbal submissions during the hearing held on 28 November 2019, in that:

- a) The Authority maintains that during the evaluation process the Committee noted conflicting contents on pages 11 and 40, of the tender document and since such an eventuality might mislead the bidders, the Authority decided to cancel the tender.**

This same Board also noted the testimony of the witness namely:

Mr Chris Falzon duly summoned by the Public Contracts Review Board.

This Board has also taken note of the documents submitted by Galea Cleaning Solutions JV which consisted of:

Document No. 1 – Financial Offer Form.

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, whether the reason for cancellation of the tender is justified or not.

- 1. First and foremost, this Board, as it has on several occasions, would reaffirm the duty and obligation of the Contracting Authority to give specific and detailed reasons in their ‘Letter of Rejection’ or ‘Letter of Cancellation’ of a tender. In this particular case, the letter acknowledging cancellation of the tender dated 15 October 2019, leaves much to be desired and is in breach of the Public Procurement Regulations.**

2. With regards to Appellants’ second contention, this Board would respectfully refer to page 11, clause 9.3 and page 40, clause 6.1.1 of the tender document as follows:

“9.3 Evaluation Grid

The Contractor must provide the services of three (3) full time employees. 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.

6.1 – Personnel

6.1.1 Personnel engaged on the Contract

Street sweepers:

The Contractor must provide services of five (5) full-time employees. 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 two clauses do create an ambiguity to the reader if, the financial offer to be quoted by bidders was related to the number of employees the bidder had to provide.

- 3. This Board would however refer to the financial offer from, wherein the number of hours that must be quoted for, is fixed at 10,400 hours, so that, the financial offer had to be calculated on this fixed amount (number) of hours, the latter of which could not be altered. In this regard, this Board opines that, the constant factor on which the financial offers had to be calculated, was the dictated number of hours and not the number of employees.**

- 4. From the submissions made by the bidders, this Board can comfortably establish that all the bidders formulated their financial offer on the stipulated number of hours of 10,400 so that, there was no misleading effect in their offer due to the ambiguity created through the mentioned clauses denoting different number of employees.**

- 5. This Board opines that, every effort should be made by the Contracting Authority to save the tender and in this respect, the Board takes into**

consideration the fact that all the financial offers are now public. At the same instance, from the offers submitted, this Board notes that the level of financial bids does not expose any misleading effect caused through the ambiguities contained in the two clauses, as the quoted prices were computed on the number of hours of 10,400 as stipulated in the tender dossier.

In conclusion, this Board opines that:

- a) The letter, sent by the Authority, informing Appellants of the cancellation of the tender, is in breach of the Public Procurement Regulations, as it does not state the specific reasons why such a cancellation is justified.**

- b) Although clauses 9.3 and 6.1.1 of pages 11 and 40 of the tender document create an ambiguity in form, however same do not affect in substance, any financial implications in the submission of offers.**

- c) The constant factor upon which bidders submitted their offer, was the number of hours dictated in the financial bid form and in this respect, this Board is comfortably convinced that all bidders based their financial calculations on this fixed factor.**
- d) The tender should be saved, as no indication was found to deem that such ambiguity in the number of employees stated in both clauses, misled in any manner, the bidders' financial offer, so that the tender can be justifiably cancelled.**

In view of the above, this Board,

- i. does not uphold the Contracting Authority's decision to cancel the tender,**
- ii. directs the Authority to resume the Evaluation process of all the offers submitted,**

iii. directs that the deposit paid by Appellants should be fully refunded.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Richard A Matrenza
Member

17 December 2019