

PUBLIC CONTRACTS REVIEW BOARD

Case 1376 – MGOZ/MPU/32/2019 – Framework Agreement for the Provision, Maintenance and Regular Collection of Open Skips at various Sites in Gozo

The publication date of the tender was the 26th May 2019 whilst the closing date was the 10th June (extended to 17th June) 2019. The estimated value of the tender (exclusive of VAT) was € 200,200

On the 9th August 2019 Sultech & Co filed an appeal against the Ministry for Gozo (ECO Directorate) as the Contracting Authority on the grounds that their bid was rejected even though it was the cheapest offer. A deposit of € 1,001 was paid.

There were for (4) bidders.

On 28th October 2019 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – Sultech & Co

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| Dr Jonathan Mintoff | Legal Representative |
| Mr Noel Sultana | Representative |
| Ms Marion Buttigieg | Representative |

Recommended Bidder – Mr Anthony Mercieca

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| Dr Mario Scerri | Legal Representative |
| Mr Anthony Mercieca | Representative |
| Mr Mario Mercieca | Representative |
| Ms Manuela Mercieca | Representative |

Contracting Authority – Ministry for Gozo (ECO Directorate)

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| Dr Abigail Caruana Vella | Legal Representative |
| Mr Joseph Cutajar | Chairperson Evaluation Board |
| Mr Joseph Piscopo | Secretary Evaluation Board |
| Mr Angelo Camilleri | Member Evaluation Board |
| Mr Marnol Sultana | Representative |

Dr Anthony Cassar, Chairman of the Public Contracts Review Board, welcomed the parties and prior to inviting submissions pointed out that sending correspondence dealing with the appeal at the last minute was not acceptable. The objection raised will be treated in line with Public Procurement Regulations. Participating bidders were not part of the appeal and the objections will only be heard on the decision of the Contracting Authority.

Dr Jonathan Mintoff Legal Representative of Sultech & Co sought permission to produce a witness.

Ms Vicky Xuereb (27478G) called as a witness by Appellants testified on oath that she was the Director General of Strategy and Support at ECO Gozo. She stated that currently Sultech & Co were operating the service required for skips collection. She was not aware of how many vehicles the contractor was using to carry out the service.

Dr Mintoff said that the cheapest bidder was found to be non compliant. Appellant was also aggrieved by the late reply by the Contracting Authority. The winning bidder, Mr Mercieca was proposing using his son's vehicle to operate the service. This required a permit from Transport Malta (according to SL 499 regulation 3) which permit was not submitted. Bidder had to be compliant with all laws of Malta to comply with the tender requirements. He referred to Public Contracts Review Board case number 789 which ran on similar lines and wherein it was decided that bidder had to be compliant at the time of submission of bid. He also referred to EJC 314/01 and 176/98 both of which dealt with the requirement of bidder having to be committed at source of bid.

Mr Joseph Cutajar (1379G) called as a witness by the PCRFB testified on oath that he was the Director of ECO Gozo. He stated that he drafted the tender specifications which covered the carriage of manure to farmers from the Water Services Corporation site. He confirmed that the tender required the bidder to have one vehicle with alternative arrangements in case of contingencies Technical specification 4.2.4 et seq. dealt with skip requirements and licences.

Questioned by Dr Mintoff witness re-iterated that one vehicle was sufficient to undertake the work involved.

Mr Noel Sultana (11679G) called as a witness by Appellants testified on oath that he managed the transport requirement of Sultech & Co. He gave details of how the service was being carried out currently and said that the use of two vehicles was essential to cope with the work load.

Recalled to give further testimony, Mr Joseph Cutajar confirmed that the tender asked for one vehicle to be used and there were no restrictions on sub-contracting in the tender. Regarding the Tool of Trade Insurance he confirmed that this was in the name of Mr Mario Mercieca who worked for Mr Anthony Mercieca. Witness said that the evaluation committee did not seek rectification, although they should have, on whether the insurance covered the vehicle and also they failed to check with Transport Malta if the necessary permits had been issued for the use of the vehicle in question.

Dr Mintoff referred again to case 789 heard by the PCRB in which instance the bidder did not have the necessary documents and the Board ruled that the bidder must be compliant at the time of submission of bid. He referred to EJC Case 314/01 (para 44) which states that the onus is on the service provider to prove eligibility to be admitted to bidding, and to EJC Case 176/98 (para 29) where it was held that the bidder had to have the resources available to perform the contract. In this instance the vehicle did not belong to the bidder, Transport Malta authorisation was not available and there was some doubt if this could be obtained. The evaluation committee should have clarified this point before reaching a decision on the award of the tender. The Tool of Trade policy was not in the name of the preferred bidder and therefore there was no insurable interest and hence bidder was not compliant. In any case it was impossible to perform the service with only one vehicle and under no circumstance should he have been awarded the tender.

Dr Abigail Caruana Vella Legal Representative for ECO Gozo stated that the tender asked for one vehicle (para 4.2.5) and requested details of ownership without necessarily insisting that the vehicle is in the bidders' ownership. Mr Mario Mercieca has all the necessary documents and is employed by his father, therefore both insurances are covered. Mr Mario Mercieca is providing a service to Mr Anthony Mercieca and hence there is no need for Transport Malta permits as claimed. The tender asks for one vehicle and that is being provided. Under clause 4.2.9 the contracting authority may demand assurances prior to the signing of the contract which was an additional safeguard.

Dr Mario Scerri Legal Representative for Mr Anthony Mercieca referred to the tender documents which state that a minimum of one vehicle is required. The preferred bidder has a skip loader available and ownership is irrelevant – it has all the necessary insurance and permits. A Court of Appeal Case in 2016 held that although the vehicles did not belong to the contractor he was still entitled to put in an offer. Bidder has all necessary permits in hand and no clause in the tender restricts his operations

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

End of Minutes

Decision

This Board,

having noted this objection filed by Sultech & Co (herein after referred to as the Appellants) on 9 August 2019, refers to the claims made by the same Appellants with regard to the tender of reference MGOZ/MPU/32/2019 listed

as case No. 1376 in the records of the Public Contracts Review Board, awarded by Ministry for Gozo (Eco Directorate) (herein after referred to as the Contracting Authority).

Appearing for the Appellants: Dr Jonathan Mintoff

Appearing for the Contracting Authority: Dr Abigail Caruana Vella

Whereby, the Appellants contend that:

- a) The preferred bidder is not compliant as he does not own the necessary equipment to carry out the tender works. In this regard, the equipment which will be utilised to execute the works, is all owned by Mr Mario Mercieca and not the tenderer namely, Mr Anthony Mercieca.**
- b) The Evaluation Committee should have carried out the necessary investigation to establish whether the preferred bidder had the necessary ‘Tool of Trade’ policy and other necessary permits to be eligible to carry out such type of works.**

This Board also noted the Contracting Authority’s ‘Letter of Reply’ dated 19 August 2019 and its verbal submissions during the hearing held on 28 October 2019, in that:

a) The Authority maintains that this is a service tender whereby the Authority is requesting the services of the provision, maintenance and regular collection of open skips. In this regard, as long as the service provider has the necessary equipment and permits, same can be eligible to carry out the tendered works and in this case the preferred bidder will be utilising the services of Mr Mario Mercieca, an employee who owns the equipment and necessary permits.

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

Ms Vicky Xuereb, duly summoned by Sultech & Co

Mr Joseph Cutajar, duly summoned by the Public Contracts Review Board

Mr Noel Sulana, duly summoned by Sultech & Co

This Board, after having examined the necessary documentation to this appeal and heard submissions made by parties concerned, including the testimony of the witnesses duly summoned opines that, the issues that merit consideration are two-fold namely:

a) The objective of the tender and

b) Whether the preferred bidder was compliant or not for the execution of the Authority's objectives.

1. With regards to Appellants' first contention, this Board would, first and foremost, refer to the Authority's objectives for issuing such a tender and in this particular case, the Authority is requesting the provision of open skips, for the particular purpose of collecting and transporting material to designated areas in Gozo, so that, the tender is a service tender for the provision of equipment to achieve the desired collection and transportation of materials to particular sites.

2. In this case, the bidder namely Mr Anthony Mercieca submitted an offer for the provision of equipment to carry out the tendered service. The tender document itself did not stipulate that the bidder cannot subcontract or that the bidder himself must be the owner of such equipment. In this regard, this Board would respectfully refer to clause 4.2.4 (Technical Specifications) which states that:

"4.2.4 The transport and disposal vehicle for the open skip shall be duly covered with all relevant licenses and permits, including, but not restricted

to, those of Environment and Resources Authority (ERA) and the Transport Authority.”

From the Documentation made available to this Board, same can confirm that the vehicle which the bidder declared to utilise for the tendered works is suitable and has the necessary licences and permits to execute the tendered service.

3. This Board notes that, the equipment to be utilised belongs to Mr Mario Mercieca, the son and employee of Mr Anthony Mercieca. The offer submitted by the preferred bidder declared that his son owns the vehicle to be used and also included the necessary licences and permits, in the name of Mr Mario Mercieca, who will carry out the tendered services, as a subcontractor of the preferred bidder. In this regard, this Board does not find any irregularity as the tender document did not preclude subcontracting whilst, at the same instance, the service will be provided by equipment having the necessary licences and permits to execute the service being requested by the Authority.

4. With regards to Appellants’ claim that the preferred bidder will not be able to execute the service with one truck only, this Board would

respectfully refer to clause 4.2.9 (Technical Specifications) which stipulates that:

“4.2.9 Prior to any contract award, the Contracting Authority reserves the right to confirm any tenderer’s claims and submissions regarding the provision of Open skips Loader, contingency arrangements, and the availability of enough open skips resources for a continual, and an effective and efficient Contract Works and Services.”

The above-mentioned clause provides the necessary provision to ensure that the bidder must prove that he has enough resources for the ongoing service during the term of the contract.

- 5. With regard to Appellants’ second contention, this Board after having examined the documentation submitted by the preferred bidder, established that a ‘Tool of Trade’ policy was included in the name of Mr Mario Mercieca, the person sub-contracted by the bidder to carry out the tendered services under Mr Anthony Mercieca’s responsibility.**

In conclusion, this Board opines that:

- a) The tender was for the provision of equipment, so that such equipment which will be utilised for tendered services had to possess the necessary**

permits and licences to enable the bidder to execute the service being requested by the Authority. In this particular case, this Board finds that the equipment to be utilised possesses the necessary licences and permits.

- b) The tender document does not preclude sub-contracting and the preferred bidder will be sub-contracting the utilisation of the tendered service to his son Mr Mario Mercieca, who owns the appropriate equipment to carry out the tendered service.**

In view of the above, this Board,

- i. does not uphold Appellants' contentions,**
- ii. upholds the contracting decision in the award of the tender,**
- iii. directs that the deposit paid by Appellants should not be refunded.**

Dr Anthony Cassar
Chairman
7 November 2019

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member