

PUBLIC CONTRACTS REVIEW BOARD

Case 1437 – IM001/2020 – Tender for a Shuttle Service for Residents between Rahal Gdid and Santa Lucija in an Environmentally Friendly Manner

The tender was published on the 13th January 2020 and the closing date of the call for tenders was the 4th February 2020. The estimated value of the tender (exclusive of VAT) was € 27,000.

On the 24th February 2020 Garden of Eden Ltd filed an appeal against Infrastructure Malta as the Contracting Authority objecting to their disqualification on the grounds that their bid was deemed to be not the cheapest. A deposit of € 400 was paid.

There were three (3) bidders.

On 9th April 2020 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 – Garden of Eden Ltd

Dr Johnatan Abela	Legal Representative
Mr Julian Spiteri	Representative

Recommended Bidder – Faith Garage

Dr Carlos Bugeja	Legal Representative
Mr Emmanuel Calleja	Representative

Contracting Authority – Infrastructure Malta

Dr Franco Galea	Legal Representative
Arch. Raphael Abdilla	Chairperson Evaluation Committee
Ms Melanie Buttigieg	Member Evaluation Committee
Dr Anthea Galea	Representative
Ms Christine Friggieri	Representative

Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties and invited submissions. He noted that since this was a virtual meeting all the parties had agreed to treat this as a normal meeting of the Board.

Dr Johnatan Abela Legal Representative for Garden of Eden Ltd stated that the reason for the appeal was that Faith Garage does not qualify to be awarded the tender as the price they quoted was too low to enable them to fulfil the contract. Furthermore under Article 192 and 193 of the Public Procurement Regulations they should have been excluded from participating on the grounds of a past conviction.

Dr Franco Galea Legal Representative for Infrastructure Malta said that any objections raised must be tied to the terms of the letter of appeal. The point regarding possible exclusion was not part of the appeal which was based purely on the price offered. It has been established by the Board over a long history of past cases that the matter of the bid price was a risk on the bidder. The Authority confirmed that bidder had met all the points in the submitted tender and he was bound by the declarations made. The price tendered binds the bidder.

The Chairman pointed out that the Board was not involved in whether a profit was made on a tender or not. There is a Court of Appeal decision confirming this ruling.

Dr Abela re-iterated that the successful bidder will be unable to fulfill the contract at the rate quoted, more so since there is a record of past infringements.

The Chairman again pointed out to Appellants that the Board's only concern is whether the tender was evaluated correctly and not with claims regarding other fringe items.

Dr Carlos Bugeja Legal Representative for Faith Garage said that the Articles referred to by Appellants dealt with exclusions and blacklisting. The convictions mentioned are a past record and did not mean that they are going to be repeated or that the preferred bidder was black listed; the current bidder was not the same individual as the one who had been responsible for the earlier breach.

The Chairman stated that the Board maintains that if the bidder is not actually black listed then the bid is eligible immaterial of the past.

Dr Galea said that the Contracting Authority was not involved with the past history of the tenderer. It would be a fundamental breach of the rights of a bidder to exclude him in 2020 on something that happened three years previously.

In reply to a comment by Dr Abela that the Public Procurement Regulations allows exclusion if the Board so wishes, Dr Bugeja said that Article 193 cannot be interpreted to mean that in 2020 the bidder is still in breach.

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 Garden of Eden Ltd (hereinafter referred to as the Appellants) on 24 February 2020, refers to the claims made by the same Appellants with regard to the tender of reference IM 001/2020 listed as case No. 1437 in the records of the Public Contracts Review Board awarded by Infrastructure Malta (hereinafter referred to as the Contracting Authority).

Appearing for the Appellants: Dr Johnatan Abela

Appearing for the Contracting Authority: Dr Franco Galea

Whereby, the Appellants contend that:

- a) The preferred bidder's offer does not qualify to be awarded the tender as their quoted price is too low so that, they will be unable to fulfil their obligations.**

This Board also noted the Contracting Authority's 'Letter of reply' dated 3 March 2020 and its verbal submissions during the online hearing held on 9 April 2020, in that:

- a) The Authority insist that the award of the tender was based on proper and transparent Evaluation process which concluded that the preferred**

bidder's offer was the cheapest and the most advantageous one, so that, the Authority regard Appellants' claims to be unfounded allegations.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the parties concerned opines that, the issue that merits consideration is Appellants' claim that the preferred bidder's offer is not technically compliant.

- 1. This Board notes that Appellants' main alleged reason as to why the successful bid is not compliant, is based on the rate quoted by the preferred bidder. Furthermore, Appellants are claiming that the preferred bidder will not be able to satisfy the obligations as duly stipulated in the tender document.**
- 2. With regard to Appellants' claim that the rate quoted by the preferred bidder is too low, this Board notes that the rate of €14.87 per hour, by far exceeds the minimum stipulated labour hourly rate so that, there is no indication whatsoever of the prospective bidder being guilty of any precarious working conditions.**
- 3. With regard to Appellants' claim that, the preferred bidder will not be able to comply with the stipulated conditions due to the low-rate quoted**

by same, this Board would respectfully point out that, it is not the remit of this Board to establish whether the preferred bidder will make a profit or incur a loss. The remit of this Board is to review the procedure of the evaluation process carried out by the Authority and in this regard, this Board opines that the evaluation process was carried out in a just and transparent manner having abided by the principles of self-limitation and equal treatment.

4. It must also be stated that, it is the obligation of the Authority to monitor the successful bidder's progress in the execution of the stipulated duties and to ensure that, what has been offered is being delivered. Needless to point out that, the Authority has the necessary remedies in case of default by the successful economic operator, so that this Board does not find any relevance between the rate quoted by the preferred bidder and the economic operator's capabilities to carry out the tendering works.

5. With regard to the claim raised by Appellants during the online hearing in that, the successful bidder should have been disqualified due to past conviction, this Board although noting that such a contention was not included in Appellants' 'Letter of Objection', would however point out that, if at the time of submission of the offers, the preferred bidder was

not 'Blacklisted', then their offer is eligible and should not be connected to any past litigations. At the same instance, this Board notes that, the preferred bidder was fully compliant with all the stipulated conditions of the tender document and was the cheapest.

- 6. With regard to Appellants' request to award the tender to the objector, this Board would respectfully point out that, the award of tenders is not within the jurisdiction of this Board, but it is the Authority that can award tenders.**

In conclusion, this Board opines that:

- a) After having examined closely the relevant documentation and the evaluation report, the preferred bidder's offer is fully compliant and the cheapest.**
- b) At the time of submission of offers and the evaluation process, the preferred bidders were not 'Blacklisted' so that their offer was truly legitimate and proper.**

- c) The rate per hour quoted by the successful economic operator does not indicate any possible precarious working conditions and by far, exceeds the stipulated minimum hourly labour rate.**

- d) The evaluation process was carried out in a fair, just and transparent manner.**

In view of the above, this Board,

- i) does not uphold Appellants' contentions,**

- ii) upholds the Contracting Authority's decision,**

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

Dr Anthony Cassar
Chairman
14 April 2020

Dr Charles Cassar
Member

Mr Carmel Esposito
Member