

PUBLIC CONTRACTS REVIEW BOARD

Case 1457 – SGN-SSCS 01/20 – Tender for the Street Sweeping and Cleaning Services in the Locality of San Gwann Using Environmentally Friendly Practices.

The tender was published on the 6th February 2020 and the closing date of the tender was the 4th March 2020. The estimated value of the tender (exclusive of VAT) was € 400,000.

On the 4th June 2020 Mr Sandro Caruana filed an appeal against the San Gwann Local Council as the Contracting Authority objecting to their disqualification on the grounds that their bid was not the best price offer. A deposit of € 2,000 was paid.

There were twelve (12) bidders.

On 9th July 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 virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellant – Mr Sandro Caruana

Dr Jonathan Mintoff	Legal Representative
Dr Larry Formosa	Legal Representative
Mr Sandro Caruana	Representative

Preferred Bidder – Galea Cleaning Solutions JV

Dr Adrian Mallia	Legal Representative
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Contracting Authority – San Gwann Local Council

Dr Ramona Attard	Legal Representative
Mr Chris Falzon	Chairperson Evaluation Committee
Dr Matthew Paris	Member Evaluation Board
Ms Nikita Zammit Alamango	Member Evaluation Board
Mr Kurt Guillaumier	Representative

Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties. He noted that since this was a virtual meeting all the parties had agreed to treat it as a normal hearing of the Board. He noted that it was vitally important that Contracting Authorities correctly state the amount of deposit necessary to lodge an appeal – there is a simple formula which had to be adhered to. He then invited submissions.

Dr Jonathan Mintoff Legal Representative for Mr Sandro Caruana requested that the Board first hears the evidence of the Chairperson of the evaluation committee.

Mr Chris Falzon (37883M) called as a witness by the Appellants testified on oath that he was the Chairperson of the evaluation committee. Questioned by Dr Mintoff he stated that the vehicle proposed to be used in carrying out this contract carried the registration number GGV 527 and was an electrically propelled vehicle owned by Mr Saviour Galea. The ERA permit on this vehicle was for Classes A2 and A4 work. The assessment on the Best Price Quality Ratio (BPQR) evaluation was as laid down by the Director of Contracts in past tenders.

The Chairman intervened to point out that the Board will not accept challenges on technical specifications which could have been contested at an earlier stage.

Witness, questioned by Dr Mintoff, said that under the procurement policy note referred to it was not essential for the terms of every tender to be dictated by the Director of Contracts – this was a matter of policy not law. The evaluation committee had clarified the point regarding the Insurance being only in the name of one of the participants in the joint venture (the preferred bidder) and it was specifically confirmed that different members of the joint venture would be dealing with different aspects of the contract. The Employers Liability Insurance covered all workers on all sites against all risks. The Financial bid based on an annual basis was valid for all four years specified in the tender and the rate of 7.08cents was the minimum rate and could not be less.

The Chairman noted that the offer by Appellants was qualified and was therefore not compliant. He also strongly regretted the fact that a copy of the evaluation report had ended up in the hands of the economic operators.

Ms Charisse Chetcuti (384980M) called as a witness by the Public Contracts Review Board testified on oath that she was an Assistant Director at the Department of Contracts. She stated that the Department vetted contracts prior to publication in line with existing policy. Although she had not vetted this particular tender it might very well have been seen by a colleague. The BPQR procedure followed in this tender was the correct one and the right template had been used by the Local Council. The template does not differentiate between electric and other vehicles as this is a matter of gradation. In reply to a question witness stated that in general all the BPQR criteria had been met in this tender.

Ms Lorraine Mangion Duca (641081M) called as a witness by the PCRb testified under oath that she was the Director of Procurement Policy in the Department of Contracts and confirmed that all tenders had to be vetted by the Director of Contracts. This tender fulfils the BPQR criteria and does not vary any of the policy guidelines. It is up to the Contracting Authority how vehicles are graded once the minimum Euro IV grade is met.

Questioned by Dr Adrian Mallia Legal Representative for Galea Cleaning Solutions JV, witness stated that Public Procurement Note 25 (referred to earlier) applies to Schedule 1 and 2 of the Public Procurement Regulations but that local councils are listed under Schedule 3.

Mr Kristian Sultana (470494M) called as a witness by the PCRB testified on oath that he is an Environment Officer at the Ministry for the Environment and Climate Change. He stated that the minimum required for waste collection vehicles is a Euro IV grade classification. The Ministry requests and welcomes any improvements on that grade.

At this stage Dr Mintoff regretted the fact that the witness he had requested from Jobsplus had not turned up as he wished to find out the named employees of the preferred bidder who were covered by the Employers Liability Insurance. It was pointed out to him that all employees are covered by a said policy and workers were not named individually. If witness had turned up he still would not have been able to provide the details that Dr Mintoff expected.

Dr Mintoff said that according to Public Procurement Note 25 the BPQR tender had to be approved by the Department of Contracts prior to publication. By insisting on only Euro VI or electric powered vehicles the Local Council was limiting competition and discriminating against certain economic operators. The Insurance document appeared to cover only the employees of Mr Christian Galea and no declaration had been submitted to the effect that all employees of the joint venture were covered. The Financial Bid is a final price contract but does not conform to Government Regulations regarding annual increments in wages – this is tantamount to breaking the law.

Dr Ramona Attard Legal Representative for the San Gwann Local Council said throughout this hearing there was not one single reference made to the points raised in the letter of appeal by the Appellants. She went through the appeal letter point by point and showed how the Appellants had not even touched upon them – the points dealt at today’s hearing could have been dealt with through a precontractual appeal if Appellants were so aggrieved. The Department of Contracts regulations had been followed; the grievance about the vehicle was a red herring; the insurance policy covers all employees of the joint venture and the rate of pay applies only to 2020.

Dr Adrian Mallia said that under Public Procurement Regulation 235 requirements it was sufficient for one member to cover insurance for the whole joint venture. The PP Note 25 is a policy document, not law and the role of the PCRB is not to decide policy. The tendering of the price was clearly laid out in page 6 of the tender (financial offer). Government Circular 17/2019 clearly outlines how changes in wages are to be taken into account and there was no need for economic operators to try and foresee the future.

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 Mr Sandro Caruana (hereinafter referred to as the Appellant) on 4th June 2020, refers to the claims made by the same Appellant with regard to the tender of reference SGN-SSCS 01/2020 listed as case No. 1457 in the records of the Public Contracts Review Board awarded by San Gwann Local Council (hereinafter referred to as the Contracting Authority).

Appearing for the Appellant: Dr Jonathan Mintoff

Dr Larry Formosa

Appearing for the Contracting Authority: Dr Ramona Attard

Appearing for the preferred bidder: Dr Adrian Mallia.

Whereby, the Appellant contends that:

- a) The modus operandi of the Contracting Authority post evaluation is irregular.**
- b) The evaluation process was not carried out in accordance with the Public Procurement Regulations.**
- c) Although the preferred bidder was chosen for the award, same offer was not compliant.**
- d) The preferred bidder was not in line with the award criteria as he was fully non-compliant.**

- e) **The allocation of points was not awarded objectively.**
- f) **The preferred bidder's offer is not in line with other provisions of domestic and EU Legislation.**

This Board also noted the Contracting Authority's 'Letter of reply' dated 11th June 2020 and its verbal submissions during the virtual hearing held on 9th July 2020, in that:

- a) **With regard to Appellant's first contention, the Authority insists that, the *modus operandi* post evaluation was carried out in accordance with the Public Procurement Regulations.**
- b) **With regard to Appellant's second grievance, the Authority contends that the evaluation process was carried out in a just and fair manner, adhering to the principles of Public Procurement.**
- c) **With regard to Appellant's third and fourth contentions, the Authority maintains that, such claims are unfounded as the selection process was carried out in a just and objective manner.**
- d) **With regard to Appellant's fifth and sixth contentions, the Authority maintains that the preferred offer was selected after carefully examining the bidder's compliance with the administrative, technical and financial aspects and following the BPQR system, the result obtained reflected a just and objective selection.**

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

Mr Chris Falzon, Chairperson Evaluation Committee duly summoned by

Mr Sandro Caruana

Ms Charisse Chetcuti, Assistant Director Department of Contracts duly summoned by the Public Contracts Review Board

Ms Lorraine Mangion Duca, Director Department of Contracts duly summoned by the Public Contracts Review Board

Mr Kristian Sultana, Environmental Officer duly summoned by the Public Contracts Review Board

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties, including the testimony of the witnesses duly summoned, will treat the merits of the grievances presented by Mr Sandro Caruana as follows:

- 1. With regard to Appellant's first grievance whereby it is being claimed that the post evaluation procedure was carried out irregularly by the Authority, this Board noted that, the unsuccessful bidder (Appellant) was duly informed about his rights to seek a remedy and although the incorrect amount of deposit for filing an appeal was indicated to the Appellant, the procedure adopted by the Authority after the evaluation process was in accordance with**

the Public Procurement Regulations and in this regard, this Board does not uphold Appellant's contention.

2. With regard to Appellant's second contention, wherein Appellant claims that, the evaluation process was not carried out according to law, this Board notes that, such a claim refers to the configuration of the financial bids submitted by the various bidders.

2.1. Due to the fact that, bidders made their financial offers either globally for 4 years, and even 5 years or on an annual basis the Evaluation Committee had to abide by the principle of a level playing field, and for comparison purposes, the Evaluation Committee, quite appropriately, established an annual offer extrapolated for the 48 months, the latter period of which represents the stipulated duration of the tendered works, so that each offer was assessed on the same level playing field. At the same instance, this Board notes that, through clarification requests sent to bidders, it was confirmed that, the annual fee being considered truly reflected the bidders' original submitted financial offers. In this regard, this Board opines that the method adopted by the Evaluation Committee in their adjudication process was fair, just, transparent and in no way whatsoever, the established annual rate of each offer changed the respective original financial bids, so that, this Board does not uphold Appellant's second grievance.

Kurt Guillaumier
Executive Secretary

Request Attachment *N/A*

Response *Dear Mr Guillaumier*

As this is a joint venture, different joint venturers will be taking care of different aspects, e.g. one member will be providing the equipment, one the vehicles, one the employees and so forth. The Insurance sent to you is of the joint venturer who will be providing the employees.

Response Attachment *N/A”*

In this respect, this Board also examined the insurance policy certificate submitted and can confirm that, the policy belongs to a party to the joint venture who will supply the workforce for the tender services and is therefore compliant.

3.1. This Board would also refer to Regulation 235 of the Public Procurement Regulations which specifically allows a bidder to rely on the capacity of other entities, in this particular case, a partner in the joint venture, as follows:

“235. (1) With regard to criteria relating to economic and financial standing as set out pursuant to regulations 218 to 221, and to criteria relating to technical and professional ability as set out pursuant to regulations 222 and 223, an economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of links which it has with them. With regard to criteria relating to the educational and professional qualifications as set out in regulation 232(f), or to the relevant professional experience, economic operators may however only rely on the capacities of other entities where the latter will perform the works or services for which these capacities are required. Where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing a commitment by those entities to that effect.”

In this regard, this Board opines that, the submission of the Insurance Policy by the preferred bidder, through one of the parties to the joint venture, is compliant with the requisite of the tender dossier. At the same instance, this Board notes that, the policy holder is the employer of the workforce to be deployed on the tender works.

3.2. With regard to Appellant’s concern relating the financial bid, this Board, after having examined the preferred bidder’s offer established

that, the financial bid is based on an annual basis valid for the duration of the tender and is in conformity with the conditions as stipulated in the ‘Award Criteria’ of the tender dossier, so that, the same Board does not find any justifiable cause to deem otherwise.

4. With regard to Appellant’s fifth and sixth contention, this Board would respectfully point out that the BPQR system applied in assessing bids has proved to represent a fair and just method of evaluating tenders. Although, there is leeway allowed for the opinion of the members of the committee, the system suppresses the subjectivity element of the procedure itself.

4.1. Special reference was made by Appellant in respect of allocation of points under the BPQR method. In this regard, this Board established that the tender document clearly denoted on what basis points will be allotted. At the same instance, this Board, after having examined closely the evaluation report, can confirm that, the guidelines as stipulated in the tender dossier were appropriately adhered to by the Evaluation Committee in their adjudication process. In this respect, this Board confirms that, the points allotted to Appellant’s offer were just and proportional to Appellant’s submission.

5. This Board cannot but notice that, the majority of the issues raised by Appellant related to the technical specifications and conditions as laid out in the tender dossier and in this regard, this Board opines that, such issues could

have been dealt with prior to the submission of Appellant’s offer, or through a ‘Call for Remedy Prior to the Closing Date’. In this respect, this Board notes that, Appellant, if felt aggrieved by any of the technical clauses or conditions in the tender document, could have filed such a ‘Call for Remedy’; however, such a remedial action was not availed of by Appellant.

6. This Board would also refer to a clarification note sent to Appellant regarding the financial bid, as follows:

<i>“Clarification ID</i>	<i>7</i>	<i>Date</i>	<i>2020/04/01 12.23.57</i>
		<i>Date Answered</i>	<i>2020/04/02 09.46.58</i>
<i>EO Name</i>	<i>Sandro Caruana</i>		
<i>Request Title</i>	<i>Financial Bid Form</i>		
<i>Request description</i>	<p><i>Dear Sirs,</i></p> <p><i>The amount indicated in your financial offer is abnormally low. Can you kindly clarify?</i></p> <p><i>Clarification shall be sent in five (5) working days from the date of this clarification.</i></p> <p><i>Thanks and regards,</i></p> <p><i>Kurt Guillaumier</i></p> <p><i>Executive Secretary</i></p>		
<i>Request Attachment</i>	<i>N/A</i>		
<i>Response</i>	<i>Executive Secretary</i>		

San Gwann Local Council

The annual price, as submitted in the financial bid is of 119475.20EUR. Such bid did not provide for the pricing of further years, which as in other cases would have carried the minimum rate per hour for the further three years. Hence it is abnormally low.

However if the Evaluation committee is assuming that the award shall on this assumption, that the submission on year 0 is to be multiplied by 4 years, our bid for the total of the contract value is 477,900Eur plus any additional cost of living as directed by Government every year.

Considering the above, it is pertinent to emphasize that our financial bid was not abnormally low.

Regards

Sandro Caruana

Response Attachment

N/A”

It is evidently clear that, from the Appellant’s reply to this request, same Appellant qualified his final price, by not including the expected COLA increases as may be directed by Government for every year. In this regard, this Board opines that, such a qualification should have rendered Appellant’s financial offer by the Evaluation Committee, as financially non-compliant.

In conclusion, this Board opines that,

- a) The modus operandi, post evaluation, was in accordance with the Public Procurement Regulations and apart from the fact that, the incorrect amount of deposit for appeal was denoted, the procedure adopted by the Authority, did not in any way whatsoever, preclude or hinder Appellant from availing himself of the remedy to appeal the Authority's decision.**
- b) The Evaluation process was carried out in a just and fair manner, the basic principles of self-limitation and level playing field were applied. This Board also affirm that, the evaluation procedure adopted, was fully compliant with the Public Procurement Regulations.**
- c) Appellant's offer was in line with the conditions laid out in the award criteria and the Evaluation Committee followed strictly the principle of self-limitation and equal treatment.**
- d) The allocation of points under the BPQR system was in accordance with the guidelines stipulated in the tender dossier and the basis for the allocation of points was clearly denoted therein.**
- e) Appellant's bid price qualification merited disqualification at the financial evaluation stage.**
- f) Deplores the fact that, the Contracting Authority decided to submit the full version of the evaluation report to Appellant. In this regard, this Board expects that, the Authority should ensure that its officials are fully aware of**

the Public Procurement Regulations so that, such an occurrence will not be repeated.

- g) The Authority's decision in the award of the tender was not in breach of any law but abided strictly by the guidelines of the Public Procurement Regulations.**
- h) This Board noted that, Appellant's claims as duly stated in their 'Letter of Objection' dated 5th June 2020, referred to issues which could have been treated through a 'Call for Remedy' and Appellant did not avail himself of such remedial opportunity.**
- i) Appellant did not present any proof to justify any of the claims mentioned in his 'Letter of Objection'.**

In view of the above, this Board,

- i. does not uphold Appellant's contention in *toto*,**
- ii. upholds the decision of the Contracting Authority in the award of the tender,**
- iii. directs that the deposit paid by Appellant should not be refunded**

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Carmel Esposito
Member

20th July 2020