

PUBLIC CONTRACTS REVIEW BOARD

Case 1458 – 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 Owen Borg 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 10th 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:

Appellants – Mr Owen Borg

Dr Franco Galea	Legal Representative
Mr Owen Borg	Representative
Ms Svetlana Borg	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
Mr Paul Bugeja	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 again expressed his regret that a copy of the evaluation report had been handed to the appellant in this tender. He then invited submissions.

Dr Franco Galea Legal Representative for Mr Owen Borg stated that his client's appeal was based on three grievances. In respect of the insurance cover the preferred bidder had submitted a policy that covers only one aspect of the joint venture whilst the tender in article 13.3 required cover for risks wider than workers. With regard to the price tendered by the successful bidder (€591,552.45) this should not have been allowed to be changed following a rectification since the tender requested a global price. Thirdly the Contracting Authority had ignored the fact that the Appellant had reasons outside his control which prevented him from obtaining the Equality Mark in time.

He requested permission to produce Ms Svetlana Borg as a witness to confirm the latter point.

Dr Ramona Attard Legal Representative for the San Gwann Local Council objected to this on the grounds that the witness was present throughout the proceedings and the Board ruled in favour of Dr Attard's objection.

In dealing with the grievances raised Dr Attard stated that the insurance certificate submitted provided cover for all the parties of the joint venture, and this had been confirmed by the bidder. The annual price in the bid had not changed – it was exactly as it had been submitted and again this was confirmed in a clarification note. Regarding the Equality Mark no attempt had been made by Appellant to explain why this was not available and which would have enabled the Contracting Authority to consider and thus they had no alternative but to act accordingly.

Dr Galea re-iterated that the insurance cover provided did not meet the specifications in article 13.3 of the tender since it only relates to workers and not to plant and machinery and other risks. This is even confirmed in the clarification which the Contracting Authority sought. As to the price submitted the tender refers to global amount and this should prevail even if the preferred bidder had made a mistake.

Mr Chris Falzon (37883M) called as a witness by the Public Contract Review Board testified on oath that he was the Chairperson of the evaluation committee. He stated that the relevant point regarding the insurance cover was in article C2.5 of the Employment Conditions which stated that the contractor had to provide proof of insurance cover to its employees in case of injury. The preferred bidder had submitted a combined liability policy which covered the risks and satisfied the tender requirement. Vehicles were normally covered under their own insurance and the issue of the ERA permits on those vehicles was further proof that they were adequately insured.

Dr Adrian Mallia Legal Representative of Galea Cleaning Solutions JV pointed out that the requirements of the tender were specific and should not be interchanged. What the bidder had to satisfy at the tendering stage was the fulfilment of article C2.5 namely to provide cover for the workers. Coverage of all other risks as specified in article 13.3 of the Special Conditions, to which Appellant was referring, was only triggered on the signing of the contract and not at the tendering stage. According to Regulation 235 of the Public Procurement Regulations it was allowed to share responsibilities in a joint venture.

Dr Attard said that proof was requested that employees are protected and this had been supplied. It was also crystal clear from the form submitted that the price tendered was per annum amount.

Mr Chris Falzon, resuming his testimony, stated that the financial breakdown requested details of the work involved. Because of divergent submissions (over the period of years of the tender) bidders were requested to confirm their submitted figure for one year – this was done to ensure that there was a level playing field. With regard to the Equality Mark the tender made it very clear (in C1.1) that if this was not submitted only one mark would be awarded. The Appellant gave no indication to the evaluation committee that he was encountering problems obtaining the Mark.

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 Owen Borg (hereinafter referred to as the Appellant) on 5th 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. 1458 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 Franco Galea

Appearing for the Contracting Authority: Dr Ramona Attard

Appearing for the preferred bidder: Dr Adrian Mallia

Whereby, the Appellant contends that:

- a) The Insurance Policy provided by the preferred bidder is not compliant with article 13.3 which clearly states that, the policy must cover damages to third parties, injury to personnel and Insurance on Plant and machinery. In this**

regard, Appellant maintains that, the policy presented by the preferred bidder covered insurance only on injury to employees by one of the parties to the joint venture.

- b) The tender document requested a global price and the Authority allowed the preferred bidder to alter the price after a clarification was sent to them. In this respect, Appellant insists that, their offer should have been disqualified.**
- c) With regard to equality mark his offer was unfairly penalised for not submitting the relative certificate however, due to circumstances beyond his control, the Authority concerned did not process his application in time for submission of the requested certificate.**

This Board also noted the Contracting Authority's 'Letter of reply' dated 5th June 2020 and its verbal submissions during the virtual hearing held on 9th July 2020, in that:

- a) The Authority contends that, the Insurance Policy submitted by the preferred bidder did satisfy the requirements as per article C 2.5 which stated that, the bidder had to provide proof of insurance cover of its employees in case of injury and such a policy cover has been submitted to the satisfaction of the Evaluation Committee.**
- b) The Authority maintains that, it was clearly evident from the bid form submitted by the preferred bidder that the price tendered was per annum. In**

this regard, since there were divergent submissions, bidders were requested to confirm their annual price for the period of the tender, so as to assess all bids on a level playing field and, in this regard, after having examined the relative correspondence, this Board confirms that there were no changes in the price of the bids.

- c) The tender dossier requested the submission of the ‘Equal Opportunities Certification’ and Appellants failed to submit such documentation. At the same instance, the Authority was not made aware of any difficulties which Appellant encountered in obtaining such certification so that the principle of self-limitation was appropriately applied by the Evaluation Committee.**

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

Mr Chris Falzon, Chairman Evaluation Committee 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 witness duly summoned establishes that, the issues that merit consideration are threefold namely:

- Insurance Policy submitted by the preferred bidder**
- Alleged alteration of the global price of the preferred bidder**
- Non-submission of ‘Equal Opportunities Certification’ by Appellant**

1. Insurance Policy

1.1. First and foremost, this Board notes that, the Insurance Policy submitted by the preferred bidder related to one of the partners of the joint venture namely, Mr Christian Galea who is also responsible for the provision of the working force for the tendered works.

1.2. Appellant contends that, the Insurance Policy should have been issued in the name of the joint venture itself and not on one member of the joint venture. In this regard, this Board would respectfully refer to Regulation 235 of the Public Procurement Regulations which clearly states that:

“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 the 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 service 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.”

So, the fact that, the Insurance Policy is in the name of Mr Christian Galea who will be responsible for recruiting the labour force and forms part of the joint venture does satisfy the requested insurance for the employees of the consortium.

1.3. Appellants also contend that article 13.3 of the Special Conditions of the tender dossier stipulated that:

“13.3 Insurance shall cover at least the following:

- *Damages to third parties;*
- *Cover for personnel in case of injury during their working hours;*
- *Insurance on Plant and Machinery.”*

It is a fact that the above-mentioned article stipulated what the Insurance Policy should cover but at the time of signing of the contract and not at submission of offers stage.

1.4. In this respect, this Board would refer to article C 2.5 of the evaluation grid (Page 13 of the tender dossier) wherein what is being requested mandatorily, at submission stage is:

“5) Contractor to provide proof of insurance cover to its employees in case of injury during work. (add-on) (2 points).”

It is amply evident that what the Authority requested at submission stage was a Policy covering the employees in case of injury during work and in this respect, this Board can confirm that the Policy submitted by the preferred bidders included a public liability coverage and an employer's liability covering manual workers, so that, there is no justifiable reason to deem preferred bidders' submitted policy as non-compliant with the requirement of article C 2.5 of the tender dossier, the latter of which specifies what is mandatory on the submission of offers.

2. Alteration of Preferred Bidder's global price

2.1. Appellant maintains that, through a reply to a clarification request, the preferred bidder confirmed a price different from their original submission and since the tender requested a global price, such a change in the bid price should have rendered the preferred bidders' offer as non-compliant.

2.2. This Board, after having examined the offers in detail, noted that the preferred bidders' financial bid was denoted as €118310.49 for a period of one year. Since other bidders quoted different configurations, the Evaluation Committee, quite appropriately, had to evaluate all the bids on a level playing field and it is at this particular stage and instance that, requests for clarifications were sent to the various bidders to confirm

that, in the case of those who quoted per annum, same rate applies for the duration of the tender and for those who quoted a global price, to confirm the rate per annum.

2.3. This Board opines that, it was imperative for the Evaluation Committee to establish an annual rate so that, the global price for 4 years (the duration of the tender) can be compared on a level playing field.

2.4. The preferred bidders also submitted their financial bid breakdown through the EPPS system, showing the annual fee for all the 4 years, which amounted to a global fee of €473241.96 for the whole tender period, so that, through clarification requests sent to the various bidders, there was no change effected in bid prices. At the same instance, this Board confirms that, the action taken by the Evaluation Committee safeguarded the application of the principle of transparency and level playing field on all the offers.

3. Equal Opportunities Certification

3.1. With regard to Appellant's third contention, this Board would refer to article C 1.1 which was mandatory and which states that:

“C1 – Equal Opportunities

1) Evidence that economic operator is an Equal Opportunities employer in line with the Equality Mark or equivalent (Add-on). A copy of the certificate / label of this Equality Mark is to be provided. (2 Points).”

3.2. Appellant did not submit such a certification but only a declaration that he commits himself to obtain the necessary certificate. This Board also noted Appellant's submissions in this regard, however, it points out that, he failed to inform the Authority that an application process has started and is awaiting the necessary visits for inspection by the relevant Authority, to continue their application process.

3.3 One has to appreciate and acknowledge that, the Evaluation Committee are limited to assess offers on the submissions made by the respective bidders. At the same instance, the issue of equal opportunities falls under note 3, so that no clarification or rectification can be made.

In conclusion, this Board opines that,

- a) With regard to the Insurance Policy submitted by Galea Cleaning Solutions JV, this Board confirms that such a policy is compliant with article C 2.5, which is the mandatory requirement upon submission of offers.**
- b) There was no change in the bid prices and the Evaluation Committee, appropriately requested clarifications to abide by the principle of transparency, equal treatment and level playing field.**
- c) With regard to 'Equal Opportunities Certification', this Board affirms that, the documentation submitted by Appellant, in this regard, did not represent the mandatory certification requested in the tender dossier. At the same**

instance, this Board would point out that, had the Appellant submitted proof or explanations that he had commenced the application process, his contention would have been favourable, however, the documentation submitted on this issue was simply a ‘Declaration of Compliance’, which is not what the tender document requested.

d) Deplores the irregular action taken by the Authority in submitting copies of the full evaluation report to certain of the bidders. Such an action will not be tolerated again and the Authority is hereby being directed that, fines will be imposed in future for such an irresponsible and unnecessary submission by the Authority.

In view of the above, this Board,

- i. does not uphold Appellant’s contentions,**
- ii. upholds the Contracting Authority’s decision in the award of the contract,**
- 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

