

PUBLIC CONTRACTS REVIEW BOARD

Case 1500 – EWA/DT/92/2020 – Tender for the Provision of Services for Research and Innovation Support Scheme Management – Energy & Water Agency

The tender was published on the 21st May 2020 and the closing date of the tender was the 22nd June 2020. The estimated value of the tender (exclusive of VAT) was € 50,000.

On the 13th September 2020 EMCS Tax Advisory Ltd filed an appeal against the Energy and Water Agency as the Contracting Authority objecting to their disqualification on the grounds that their bid was not the cheapest compliant offer.

A deposit of € 400 was paid.

There were five (5) bidders.

On 14th October 2020 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Richard Matrenza as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – EMCS Tax Advisory Ltd

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| Dr Lorna Mifsud Cachia | Legal Representative |
| Mr Stefano Mallia | Representative |
| Ms Alison Mizzi | Representative |

Contracting Authority – Energy & Water Agency

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| Dr Ondine Gaerty | Legal Representative |
| Eng Mark Perez | Chairperson Evaluation Committee |
| Ms Elizabeth Cremona | Secretary Evaluation Board |
| Mr Sandro Lauri | Evaluator |
| Mr Carl Cassar | Evaluator |
| Ms Anne Marie Grech | Evaluator |

Recommended Bidder – Tuning Fork Advisory Ltd

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| Eng Joseph Caruana | Representative |
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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 agreed to treat it as a normal hearing of the Board. He then invited submissions.

Dr Lorna Mifsud Cachia Legal Representative for EMCS Tax Advisory Ltd said that Appellants' main submission was that the preferred bidders' offer was abnormally low. Both the European Court of Justice and the Public Contracts Review Board have always been clear on this point – competition offered reasonable prices and the lack of it prejudices other parties from submitting offers. A low price gives no assurance that the bidder will offer the level of service required or the standard of service the tender requested. The Contracting Authority is obliged to ascertain if the requirements of a tender are likely to be met and if the price is just. The cardinal point is that the playing field is level so that other parties are interested to compete; this is at the heart of the Public Procurement Regulations.

Ms Alison Mizzi (143179M) called as a witness by EMCS Tax Advisory Ltd testified on oath that she was a Director of the Company with twenty years experience in all spheres of the tendering process and had experience of evaluating tenders as a former head of the European Social Fund. She was involved in the submission of this tender and explained the process followed in deciding the rate to be charged. The average price of the tenders submitted indicates that the price submitted by the preferred bidder is totally out of line with the rest of the bids – in fact some 62% lower than the price set by the tender itself. The subcontracting facet alone accounts for some € 5,400 leaving a mere € 13,000 odd to fulfil the rest of an onerous and extensive contract requiring an input of some 875 hours. The preferred bid works out to around € 13 per hour whilst other bidders are quoting rates very near to each other at around € 36 per hour.

Engineer Mark Perez (78760M) called as a witness by the Public Contracts Review Board testified on oath that he is the Head of Procurement at EWA and was the Chairperson of the Evaluation Committee in this tender. He stated that prices submitted in service tenders tended to vary considerably, and the range of prices in this tender was not considered abnormal. The tender required a methodology system which in the preferred bidder's case was very detailed and indicated that he fully understood what was required, therefore it did not need any further discussion with him.

In reply to a question from Dr Mifsud Cachia witness confirmed that the preferred bidder was not asked to explain his price as his offer indicated that he had full understanding of the tender requirements.

The Chairman said that on the point of abnormally low offers the Board had often issued directives. In this case the price offered diverges from the normal and hence the Contracting Authority should have interviewed the bidder to explain his price; by not doing so they have removed the principles of a level playing field and of transparency.

Dr Mifsud Cachia stated that the PCRB principle is that a very low price demands examination of the submission regarding the price offered. From the Public Procurement point of view it is clear that the Authority did not concern itself with the divergence in the price spectrum – a difference of 50% should have triggered the demand for an explanation. Reference was made to PCRB cases 1350 and 1327 which similarly dealt with submissions where there were divergent differences in the prices bid. The Board has always insisted that an evaluation committee is obliged to query any suspicion of a low price and must seek justification there for.

Dr Ondine Gaerty Legal Representative for the Energy and Water Agency said that one must accept that prices vary, and the preferred bidder had not been led by the estimated value stated in the tender. The breakdown of prices was based on guidance documents and a value judgement was made on the price – however seeking a mathematical calculation was not a solution. The evaluation committee felt that the bid was compliant and laws or regulations were observed so the cheapest offer was accepted.

Dr Mifsud Cachia stated that if the evaluation committee were not aware of the market rates there was more reason to further investigate the prices quoted. An average bid of around € 30,000 put a higher obligation on them to look into the preferred bid.

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 EMCS Tax Advisory Ltd (hereinafter referred to as the Appellants) on 13th September 2020, refers to the claims made by the same Appellants with regard to the tender of reference EWA/DT/92/2020 listed as case No. 1500 in the records of the Public Contracts Review Board recommended for award by Energy & Water Agency (hereinafter referred to as the Contracting Authority).

Appearing for the Appellants: Dr Lorna Mifsud Cachia

Appearing for the Contracting Authority: Dr Ondine Gearty

Appearing for the Preferred Bidder: Ing Joseph Caruana

Whereby, the Appellants contend that:

- a) **Their main concern refers to the fact that, the preferred bidders' offer was abnormally - low and the Evaluation Committee failed to investigate this issue but awarded the tender on the basis of an unrealistically cheap offer.**

This Board also noted the Contracting Authority's 'Letter of reply' dated 22nd September 2020 and its verbal submissions during the virtual hearing held on 14th October 2020, in that:

- a) **The Authority contends that, it was aware that, prices in service tenders do vary considerably which is quite normal. In the case of the preferred bidders, their submissions were very detailed, indicating that, they fully understood what was being requested by the Authority, so that, the Evaluation Committee felt that no further action was needed to be taken from its end.**

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

Engineer Mark Perez Chairman of the Evaluation Committee summoned by the Public Contracts Review Board

Ms Alison Mizzi summoned by EMCS Tax Advisory Ltd

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 preferred bidders' offer is abnormally low.

1. In the current economic climate, there is often keen competition between economic operators, that submit competitive, low-price bids in order to secure a tender. However, it may also be the case that low-priced tenders are “too good to be true” and will be very poor value for money or will not be delivered at all. It is in this context that the concept of “Abnormally Low-Tenders” arises.

2. The EU Directive and the Local Public Procurement Regulations contain provisions for dealing with tenders that are suspected of being abnormally low. These rules enable Contracting Authorities to avoid negative consequences of accepting a tender that appears extremely advantageous but in practice, is not viable. These rules are also aimed at supporting genuine competition between economic operators and reducing unfair advantages.

3. The first ‘Red Light’ which shows an extremely low offer is obviously the price variance from the rest of the competing offers. In this respect, the Evaluation Committee should first carry out a small exercise to establish that, the particular offer does indeed represent an unreasonable low offer and in practice the following steps should be considered through the following action:

- An analysis of the price proposed by the bidder made in comparison with the objective of the particular procurement.**
- A comparison of the tender price with the estimated value of the tender.**

- **A comparison of the tendered price with the average price of the other competing offers.**
- 4. Once the difference is identified, the Evaluation Committee is obliged to discuss such variance with the economic operator and investigate the cause of such a variance in price.**
 - 5. In this particular case, the preferred bidder's price was €18,822 as compared with competing prices ranging from €33,400 to €41,500 representing an average price of the competing bids of €37,200. From the very outset, the preferred bidder's price seems abnormally low, representing 50% of the average competing price.**
 - 6. The Evaluation Committee had the obligation to summon the bidder with the lowest price and request explanations as to the breakdown of their offer. The explanation should promote assurances that, the bidders had understood what is being required and that they can, through the quoted price, execute the stipulated services to the full satisfaction of the Contracting Authority. The explanations given by the bidders must be sound and financially logical. In this regard, this Board notes that, the Evaluation Committee did not carry out this mandatory exercise but relied completely on the information submitted by the bidder. The Evaluation Committee should take into consideration, in adjudication the preferred bidder's justification of his price, factors such as, misunderstanding or**

misinterpretation of the tendered service, underestimation of risks and non-compliance with social obligations. Such considerations will ensure that the successful offer will not lead to unfortunate circumstances which are detrimental to the tendered service and the Authority.

In conclusion, this Board opines that:

- a) The preferred bidders' offer is abnormally low.**
- b) The Evaluation Committee failed to investigate and obtain valid reasons for the level of the quoted price of the preferred bidder.**

In view of the above, this Board,

- i. Does not uphold the Contracting Authority's decision in the recommendation of award**
- ii. Directs that the Evaluation Committee investigate the offer of the preferred bidder and obtain the necessary explanations, as duly described above**
- iii. Directs that, after having obtained the necessary explanations from the preferred bidder, a re-evaluation process be carried out on all the offers**
- iv. Directs that the deposit paid by appellants should be fully refunded.**

Dr Anthony Cassar
Chairman
15th October 2020

Dr Charles Cassar
Member

Mr Richard A Matrenza
Member