

PUBLIC CONTRACTS REVIEW BOARD

Case 1561 – DLC03-2020 – Tender for Street Sweeping and Community Cleansing in an Environmentally Friendly Manner – Had-Dingli Local Council.

24th May 2021

The Board,

Having noted the letter of objection filed by Dr Adrian Mallia on behalf of Michael Kyprianou Advocates acting for and on behalf of Ms Maria Carmen Gatt, (hereinafter referred to as the appellant) on the 22nd February 2021;

Having also noted the letter of reply filed by Dr Anita Giordimaina on behalf of Dingli Local Council on the 3rd March 2021;

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by the legal representatives of the parties;

Having heard and evaluated the testimony of the witness Mr Shawn Tanti who is a Representative of the Contracting Authority on this tender;

Having noted and evaluated the minutes of the Board sittings of the 8th April 2021 and 18th May 2021 hereunder-reproduced;

Minutes

Case 1561 – DLC 03 – 2020. Tender for Street Sweeping and Community Cleansing in an Environmentally Friendly Manner – Had-Dingli Local Council

The tender was published on the 24th June 2020 and the closing date was the 24th July 2020. The value of the tender was € 140,000 (excluding VAT).

On the 19th February 2021 Ms Maria Carmen Gatt filed an appeal against Dingli Local Council as the Contracting Authority objecting to her disqualification on the grounds that her bid was not the cheapest compliant offer.

A deposit of € 700 was paid.

There were eight (8) bidders.

On 8th April 2021 the Public Contracts Review Board (PCRB) composed of Dr Ian Spiteri Bailey as Chairman, Mr Lawrence Ancilleri 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 – Ms Maria Carmen Gatt

Dr Adrian Mallia

Legal Representative

Ms Maria Gatt	Representative
Ms Sarah Farrugia	Representative

Contracting Authority – Dingli Local Council

Dr Anita Giordimaina	Legal Representative
Mr Raymond Schembri	Representative
Mr Shawn Tanti	Representative

Preferred Bidder – WM Environmental Ltd

Dr Marycien Vassallo	Legal Representative
Mr Wilson Mifsud	Representative

Interested Party – Mr Sandro Caruana

Dr Jonathan Mintoff	Legal Representative
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Dr Ian Spiteri Bailey 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 in line with Article 89 of the Public Procurement Regulations (LN 174.04). He then invited submissions.

Dr Adrian Mallia Legal Representative for Ms Maria Carmen Gatt stated that the tender should have been adjudged on Best Price Quality Ratio (BPQR) basis but Appellant offer had not been accepted as it was not the lowest priced. There are three arguments which this appeal hinges on – the first issue is that the rejection letter failed to provide the necessary information regarding the amount of deposit payable and the latest date when an appeal could be filed as required in Articles 271 and 273 of the Public Procurement Regulations (PPR). In fact, it is stated there, that if the correct deposit is not remitted the appeal can be refused.

The second issue concerns Appellant’s entitlement for an extract of the evaluation report. This request was not met as the Authority claims that the request should have been directed via the ePPS although this does not seem to be a mandatory requirement. Appellant would appreciate direction from the Board on the validity of the Authority’s claim on this point.

The third point at issue is that according to Section 6.1 of the tender the contract was to be awarded on BPQR basis with the technical and financial criteria being considered according to the appropriate weighting. The qualitative side of the offer must be considered as well as the price. In this instance the offers were based solely on price, and it has been admitted by the Authority that it has not evaluated the technical offer. Since the correct methodology was not followed the tender a fresh evaluation must be carried out or cancellation of the tender.

Dr Anita Giordimaina Legal Representative for the Dingli Local Council accepted that the rejection letter did not indicate any information on deposit or appeal requirements but PPR stipulate clearly what is required and once this was followed the Appellant was not prejudiced. As regard the request for an extract of the evaluation report, it is clearly stated in the tender that this had to be routed through the ePPS and not through an e-mail with which method the Authority could not communicate.

In the BPQR assessments the technical criteria were not ignored but since the tender weighted the financial side at 60% it therefore followed that a favourable financial offer had a better chance of success. Bidders were fully aware of this.

Dr Jonathan Mintoff Legal Representative for Mr Sandro Caruana agreed with the submissions made by Dr Mallia regarding the deposit and the date for an appeal which points were backed by a Director of Contracts circular. The BPQR system is automatic and it is not up to the Dingli Council to decide how it works. The Authority must be advised that it is obliged to provide details of the evaluation outcome. Re-evaluation is a correct suggestion but not cancellation when all bidders have now shown their hand.

Dr Mintoff referred to the Bezzina vs St Vincent De Paul's Home (25.2.21) Case where the Court of Appeal held that a bidder could submit a price that did not cover the cost of wages as it was up to the bidder to account for his costs.

Dr Mallia stated that in Section 2 article 2.4 the tender indicated that the use of e-mail in communicating with the Council was in order and Appellant was justified in its use.

Dr Giordimaina pointed out that the Court's decision in the Bezzina case was totally opposite to what is being claimed by Dr Mintoff.

Mr Shawn Tanti Representative of the Authority stated that since both Appellant and objector had obtained a 100% assessment on the technical side it stood to reason that the outcome had to be resolved on price criteria. The BPQR rating is given by the ePPS and the Council is not involved in this decision.

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

End of Minutes

SECOND HEARING

On the 18th May 2021 the Public Contracts Review Board (PCRB) composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a public virtual hearing to discuss this case further.

The attendance for this public hearing was as follows:

Appellant – Ms Maria Carmen Gatt

Dr Adrian Mallia
Ms Maria Gatt

Legal Representative
Representative

Contracting Authority – Dingli Local Council

Dr Anita Giordimaina
Mr Shawn Tanti

Legal Representative
Representative

Preferred Bidder – WM Environmental Ltd

Dr Marycien Vassallo
Mr Wilson Mifsud

Legal Representative
Representative

Interested Party – Mr Sandro Caruana

Dr Jonathan Mintoff

Legal Representative

Mr Kenneth Swain 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 in line with Article 89 of the Public Procurement Regulations. He introduced himself and went on to explain that this second hearing was necessary due to a change of Chairman since the first hearing.

He requested the parties to confirm the submissions made at the first hearing to enable the Board to come to a decision in this Case.

All the parties signified their agreement to this procedure and confirmed the submissions made at the first hearing.

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

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sittings of the 8th April 2021 and 18th May 2021.

Having noted the objection filed by Ms Maria Carmen Gatt (hereinafter referred to as the Appellant) on 22nd February 2021, refers to the claims made by the same Appellant with regard to the tender of reference DLC03-2020 listed as case No. 1561 in the records of the Public Contracts Review Board.

Appearing for the Appellant:

Dr Adrian Mallia

Appearing for the Contracting Authority:

Dr Anita Giordimaina

Appearing for the Preferred Bidder:

Dr Marycien Vassallo

Appearing for Interested Party:

Dr Jonathan Mintoff

Whereby, the Appellant contends that:

- a) The Rejection Letter does not specify the deposit to be paid by an Appellant and during Virtual hearing made submissions about the term, i.e. the latest date when an appeal could be filed as required in Articles 271 and 273 of the Public Procurement Regulations (PPR).
- b) The failure of the Contracting Authority to provide the Appellant with an extract of the evaluation report.
- c) The tender should have been awarded on the “Best Price Quality Ratio (BPQR)” but that the Contracting Authority has in very unambiguous terms awarded this tender to the ‘cheapest compliant offer’.

This Board also noted the Contracting Authority’s Reasoned Letter of Reply filed on 3rd March 2021 and its verbal submission during the virtual hearings held on 8th April 2021 and 18th May 2021, in that:

- a) The period within which one can file the notice of objection and the deposit are stipulated in Articles 271 and 273 of S.L 601.03, hence the appellant’s position was not prejudiced because such information was obtainable from the said Subsidiary Legislation.
- b) As per Tender Documentation Clause 2.4, “All communication must be in the English language. For tendering purposes, all Communication is to be done through EPPS.”
- c) As per Clause 6.2 ‘the Evaluation Process’ there is stipulated “The offer with the lowest price will be awarded 100% of the financial weight. The other offers will be awarded scores in proportion to the offer with the lowest price...”

This Board also noted the testimony of the witness namely:

Mr Shawn Tanti, duly summoned by the Contracting Authority.

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, will consider Appellant’s grievances, as follows:

1. With regard to Appellant’s first grievance, after having reviewed the ‘Letter of Rejection’ dated 11th February 2021, sent by the Contracting Authority, this Board noted that Appellant was informed

of the reasons for the rejection of his offer but was not informed of the deposit to be lodged on appeal. Finally, the Contracting Authority stated *“The Had-Dingli Local Council shall be precluded from concluding the contract during the period allowed for the submission of appeals in accordance with [Part IX of the Public Procurement Regulations].”* The Board makes reference to PCRB Case 1557 whereby the Board opined *“The Board deems appropriate to take this opportunity to solicit any contracting authority to refrain from indicating any dates by when a letter of objection is to be sent, but to solely indicate and/or reproduce the relative provision of the law which entitles a party to appeal.”* This Board does not uphold Appellant’s first grievance.

2. With regard to the Appellant’s second grievance, the Board is of the opinion that the Contracting Authority should have presented the Appellant with the documentation requested. Therefore, the Board upholds Appellant’s second grievance.
3. With regard to the Appellant’s third grievance, the Board makes reference to the Evaluation Report issued by the Contracting Authority. The Board takes also note of the testimony of Mr Shawn Tanti under oath, that all bidders ranked equally in the ‘Technical Score’, hence the ‘lowest’ Financial Bid which is totally compliant in all other aspects should be awarded the tender. According to the witness this final mathematical result in a tender to be based on a Best Price Quality Ratio (BPQR) basis is worked out by the EPPS system. After duly noting all the above, the Board does not uphold the Appellant’s third grievance.

In conclusion this Board opines that;

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) Does not uphold Appellant’s Letter of Objection and contentions,
- b) Upholds the Contracting Authority’s decision in the recommendation for the award of the tender,.
- c) Upholds Appellant’s claim that the Authority should have supplied extracts of the evaluation report
- d) Directs that half the deposit paid by Appellant should be reimbursed.

Mr Kenneth Swain
Chairman

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member