

PUBLIC CONTRACTS REVIEW BOARD

Case 1669 – KLH/TDR/05/2021 – Tender for the Collection of Household Waste from the Locality of il-Hamrun in an Environmentally Friendly Manner

10th January 2022

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 Galea Cleaning Solutions JV, (hereinafter referred to as the appellant) filed on the 29th November 2021;

Having also noted the letter of reply filed by Dr David Farrugia Sacco acting for the Hamrun Local Council (hereinafter referred to as the Contracting Authority) filed on the 10th December 2021;

Having heard and evaluated the testimony of the witness Mr Adrian Mifsud (Member of the Evaluation Committee) as summoned by Dr Adrian Mallia acting for Galea Cleaning Solutions JV;

Having heard and evaluated the testimony of the witness Mr Daniel Bugeja (Executive Secretary Hamrun Local Council) as summoned by Dr Adrian Mallia acting for Galea Cleaning Solutions JV;

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

Having noted and evaluated the minutes of the Board sitting of the 6th January 2022 hereunder-reproduced;

Minutes

Case 1669 – KLH/TDR/05/2021 – Tender for the Collection of Household Waste from the Locality of Hamrun, in an Environmentally Friendly Manner.

The tender was issued on the 15th October 2021 and the closing date was the 15th November 2021. The value of the tender, excluding VAT, was € 107,399.24.

On the 29th November 2021 Galea Cleaning Solutions JV filed an appeal against the Hamrun Local Council as the Contracting Authority objecting to their disqualification on the grounds that their bid was not accepted as it exceeded the estimated cost and the tender was being cancelled.

A deposit of € 537 was paid.

There were three (3) bidders.

On the 6th January 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Ms Stephanie Scicluna Laiviera as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Galea Cleaning Solutions JV

Dr Adrian Mallia Legal Representative

Contracting Authority – Hamrun Local Council

Dr David Farrugia Sacco	Legal Representative
Mr Daniel Bugeja	Secretary Evaluation Committee
Mr Adrian Mifsud	Member Evaluation Committee

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 then invited submissions.

Dr Adrian Mallia Legal Representative for Galea Cleaning Solutions JV suggested that witnesses be heard first.

Mr Adrian Mifsud (4170M) called as a witness by Appellant testified on oath that he was a member of the Evaluation Committee along with another two evaluators and the Chairman and Secretary. He stated that the decision of the evaluators was that the cheapest bid was not compliant whilst the other two bids were very much higher than the budget allocation. The rejection letter was sent by the Executive Secretary of the Council in line with the set procedure. The evaluation was based on figures for two years but the tender was for one year with an one year's extension.

Mr Daniel Bugeja (535082M) called as a witness by the Appellant testified on oath that the budget figure was based on the cost of the service the previous year with the tender seeking figures for one year plus another year's extension in the BOQ. The Financial Bid Form requested figures for two years. Witness stated that the Council received a subsidy from Wasteserv on collection of organic waste. He agreed that the service was essential and a fresh tender would have to be issued.

Dr Mallia stated that there was a certain confusion on the length of the contract – tender clauses 1.2 and 1.3 state that the service was for one year with an extension while the financial bid requests figures for two years when the Council had a budget for only one year. The Evaluation Committee was wrong in its conclusion as it looked at the wrong figures which appeared to them to be excessive over two years.

The service requested is not optional and therefore the tender will have to be re-issued with offers being on the same basis and not likely to vary by much. Cancellation will serve no useful purpose except that of disclosing Appellant's hand on price and depriving him of an opportunity. The cancellation is not proportional.

Dr David Farrugia Sacco Legal Representative for the Hamrun Local Council said that the error is in the offer submitted by Appellant. The evaluators do not interpret tenders but work on the facts presented and if the presentation is wrong it is not the fault of the Authority which acted within the law.

Dr Mallia said that the whole point why the law allowed appeals against cancellation of tenders was precisely so that no liberties are taken – the tender is going to be re-issued therefore there is no point in cancellation.

Dr Farrugia Sacco re-iterated that the decision taken was within the law.

There being no further submissions the Chairman thanked the parties and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 6th January 2022.

Having noted the objection filed by Galea Cleaning Solutions JV (hereinafter referred to as the Appellant) on 29th November 2021, refers to the claims made by the same Appellant with regards to the tender of reference KLH/TDR/05/2021 as case No. 1669 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Adrian Mallia

Appearing for the Contracting Authority: Dr David Farrugia Sacco

Whereby, the Appellant contends that:

- a) The service to be procured by the Contracting Authority is an essential service which must be procured by the Contracting Authority. In other words, even if the Contracting Authority cancels the current Tender process, it has no option other than to issue another Tender which will be substantially identical to the current Tender - waste in the locality of Hamrun must be collected. In effect, therefore, the cancellation of this Tender process will serve only to prejudice bidders that have submitted an offer in this Tender process without accruing any real benefit to the Contracting Authority.

- b) The Appellant submitted an offer for a total of €505,440. However, it should be beyond any doubt that the said offer is for the provision of services for a period of two years, and not one year as was required by the Tender Document. It should be clarified that the Financial Bid Form is a document which is provided to prospective bidders by the Contracting Authority and, therefore, bidders have no option other than to fill in and submit the document provided by the Contracting Authority, regardless of whether or not it reflects what is requested in the Tender Document. Any other course of action would open a bidder to the risk of disqualification for incomplete submission of financial information. It should be clear therefore that in so far as the Contracting Authority assessed the Appellant's bid to be for €505,440, and in so far as the Contracting Authority reached its decision on this basis, the Contracting Authority's decision was incorrect

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 10th December 2021 and its verbal submission during the virtual hearing held on 6th January 2022, in that:

- a) Whereas the appellant claimed that the cancellation of the tender is prejudicial to bidders, the awarding of the Tender, solely due to a limited choice of contractors who can provide the requested service would result in a highly prejudicial situation to the Contracting Authority whereby it would be forced to accept bids above its budget.
- b) That in regard to the Evaluation of the Financial Offer, the Hamrun Local Council asserts that the budget for the tender was of €107,399.24 per annum. The bid of €252,720.00 per annum submitted by the appellant was well above the afore mentioned budget, namely 2.35 times higher.
- c) That in conjunction with such a high bid, the justified cancellation in terms of article 18.3(a) of the Public Procurement regulations is further strengthened.
- d) That the request to null and void the Local Council's decision and to have the evaluation of tenders resumed in the Tender Process would be of prejudice to such Contracting authority, in that it will be forced to accept unreasonable bids, causing it financial distress.

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 consider Appellant's grievances, as follows:

- a) The Board notes that:
- i. As per Tender Dossier – Section 1 – paragraph 1.3, the Estimated Procurement Value stands at €107,399.24 excluding VAT. This is for a period of one (1) year.
 - ii. Tender Dossier – Section 1 – paragraph 1.2 states that the tender shall be for a period of one (1) year with a possible extension up to a further year.

- iii. Appellant's bid was for a total value of €505,440 covering the maximum possible period of the tender, i.e. 2 year. Therefore, bid for one year of service to stand at €252,720.
- b) The offer of €252,720 is in fact 2.35 times higher the Estimated Procurement Value as stated by the Contracting Authority.
- c) The General Rules Governing Tenders Article 18.3(a) states "*Cancellation may occur where the tender procedure has been unsuccessful, namely where no qualitatively or **financially worthwhile** tender has been received or there has been no response at all*" (emphasis added)
- d) This Board opines that such a significant variance between the Estimated Procurement Value €107,399.24 and the financial value of the bid of the Appellant company €252,720 would fall under the parameters of the General Rules Governing Tenders Article 18.3(a)
- e) The argument as brought forward by the Appellant company that this tender should not be cancelled as this is an 'essential' service is not being upheld since as per testimony under oath of Mr Daniel Bugeja, this service, with same parameters, is already being provided in the locality of Hamrun and the estimated value of the tender has been based on the current service being provided. Hence this Board is of the opinion that the decision as taken by the Evaluation Committee is compliant with the Public Procurement Regulations and General Rules Governing Tenders

The Board does not uphold Appellant's grievances.

The Board,

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 cancellation of the tender as per clause 18.3(a) of the General Rules Governing Tenders,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Dr Charles Cassar
Member

Ms Stephanie Scicluna Laiviera
Member