

PUBLIC CONTRACTS REVIEW BOARD

Case No. 377

FO/6604/4/11

Framework Contract for the Hiring of Closed Skips on Wheels

The closing date for this tender which was published on the 21st June 2011 was the 26th July 2011.

The estimated value of this tender was € 90,000.

Two (2) tenderers submitted their offers.

Messrs Greenlines Environmental Services Ltd filed an objection dated 6th October 2011 against the decisions of the Armed Forces of Malta to disqualify its offer as administratively non-compliant and to recommend the cancellation of the tendering process.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman and Mr Carmel Esposito and Mr Joseph Croker as members convened a meeting on Tuesday, 7th February 2012 to discuss this objection.

Present for the hearing:

Greenlines Environmental Services Ltd

Dr Jimmy Vella	Legal Representative
Mr Sandro Micallef	Representative
Ms Suzanne Zammit	Representative

Armed Forces of Malta

Dr Mario Spiteri Bianchi	Legal Representative
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Evaluation Board

Lt. Colonel Alfred Attard	Chairman
Maj. Ivan. Consiglio	Member
Capt. John Borg	Member
Mr John Debattista	Member



After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of his company's objection.

Dr Jimmy Vella, legal representative of Greenlines Environmental Services Ltd, the appellant company, made the following submissions:

- i. by email dated 3rd October 2011 the Armed Forces of Malta had informed his client that the company's offer was disqualified as it was considered to be administratively non-compliant for not having submitted the 'Tender Form' and that the tender was being recommended for cancellation;
 - ii. the appellant company maintained that it had, in fact, submitted the 'Tender Form' as required;
- and
- iii. he contended that even if the appellant company had not submitted the 'Tender Form', the contracting authority could have requested the said company to 'either clarify/rectify any incorrect and/or incomplete documentation, and/or submit any missing documents within two working days from notification' – as per note 2 of clause 16.1;

Lt. Col Alfred Attard, chairman of the evaluation board, submitted the following:-

- a. on opening the appellant company's tender submission, the contracting authority noted that one page, namely page 16, of the 'Tender Form', consisting of pages 16 to 18, had not been submitted;
- b. clause 1.1 of the tender document provided, among other things, that:-

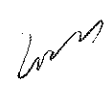
"No rectification shall be allowed in respect of the documentation as outlined in sub-clause 16.1 (c), 16.1 (d) and 16.1 (e) of these instructions to tenderers. Only clarifications on the submitted information in respect of the latter may be eventually requested."

- c. the 'Tender Form' requirement fell under sub-clause 16.1 (e) and, as a result, the contracting authority was not allowed to request any rectification to the 'Tender Form' submitted by the appellant company;
- d. as per clause 16.1, with regard to the 'Tender Form' sub-clause 16.1 (e) (i) note 3 and not note 2 – as quoted by the appellant company – was applicable and note 3 read as follows:-

"No rectification shall be allowed. Only clarifications on the submitted information may be requested."

and

- e. in this case, the appellant company did not submit page 6 of the 'Tender Form' and to ask for its submission after the closing date of the tender would have amounted to a rectification.



Dr Vella claimed that, given that this was a single package system tender and not a three package system tender, the contracting authority could have requested a rectification with regard to the 'Tender Form'. He insisted that his client had, in fact, submitted the 'Tender Form' in full and, hence, requested the opening of the additional envelope submitted on closing date to double check content.

Lt. Col Attard remarked that the appellant company had submitted the original, which he claimed was not marked 'Original', and a copy of the company's tender submission and that the contracting authority had opened them both and page 6 of the 'Tender Form' was found missing in both submissions.

Dr Mario Spiteri Bianchi, legal representative of the Armed Forces of Malta, stated that the evaluation board had requested guidance from the Departmental Contracts Committee in this regard and the advice given was that no rectification should be requested with regard to the 'Tender Form'. Dr Spiteri Bianchi remarked that the first page (page 16) of the 'Tender Form' dealt with sub-contracting and, in that regard, he referred the Public Contracts Review Board to Reg. 31 of the Public Procurement Regulations – Sub-contracting and conditions for performance.

The Chairman of the Public Contracts Review Board remarked that it was the responsibility of the contracting authority to draw up a comprehensive tender document but, on the other hand, it was the responsibility of the bidder to present, in the first place, a complete and correct tender submission, especially with regard to mandatory requirements in respect of which no rectification was allowed.

At this point the Chairman drew the attention of those present that the additional envelope submitted on closing date should not have been opened by the contracting authority because that was meant to be opened by the Public Contracts Review Board should the need arise.

Lt. Col Attard explained that:-

- a. during the first evaluation exercise - which was reported upon on the 5th August 2011 and wherein the bid submitted by another bidder, Fair Trading Ltd, was recommended for acceptance - was not carried out thoroughly;

and

- b. during the second evaluation exercise, which was reported upon on the 12th September 2011, on closer examination it emerged that the two participating bidders were not compliant, namely the appellant company had submitted an incomplete 'Tender Form' whereas the other bidder had declared that it would be sub-contracting more than the limit allowed as per note 3 at page 16 of the 'Tender Form', which was set at 50%, and, as a result, the tender was recommended for cancellation.

Dr Vella remarked that the Public Contracts Review Board should note that the contracting authority had opened both the original and the copy of his client's tender submission and, as a consequence, there was no way for the Board to verify his client's

claim that it had, in fact, submitted the 'Tender Form' in full. He concluded that his client's bid ought to be reinstated in the tendering process.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellant company, in terms of the reasoned letter of objection dated 6th October 2011 and through the verbal submissions made during the hearing held on 7th February 2012, had objected against the decisions of the Armed Forces of Malta to disqualify its offer as administratively non-compliant and to recommend the cancellation of the tendering process;
- having noted the appellant firm's representatives' claims and observations regarding the fact that (a) by email dated 3rd October 2011 the Armed Forces of Malta had informed the appellant company that its offer was disqualified as it was considered to be administratively non-compliant for not having submitted the 'Tender Form' and that the tender was being recommended for cancellation, (b) the appellant company maintained that it had, in fact, submitted the 'Tender Form' as required, (c) even if the appellant company had not submitted the 'Tender Form', the contracting authority could have requested the said company to 'either clarify/rectify any incorrect and/or incomplete documentation, and/or submit any missing documents within two working days from notification' – as per note 2 of clause 16.1, (d) given that this was a single package system tender and not a three package system tender, the contracting authority could have requested a rectification with regard to the 'Tender Form', (e) the Public Contracts Review Board should note that the contracting authority had opened both the original and the copy of the appellant company's tender submission and, as a consequence, there was no way for the Board to verify Greenlines Environmental Services Ltd's claim that it had, in fact, submitted the 'Tender Form' in full and (f) the appellant client's bid ought to be reinstated in the tendering process;
- having considered the contracting authority's representative's submissions, namely that (a) on opening the appellant company's tender submission, the contracting authority noted that one page, namely page 16, of the 'Tender Form', consisting of pages 16 to 18, had not been submitted, (b) clause 1.1 of the tender document provided, among other things, that "*No rectification shall be allowed in respect of the documentation as outlined in sub-clause 16.1 (c), 16.1 (d) and 16.1 (e) of these instructions to tenderers. Only clarifications on the submitted information in respect of the latter may be eventually requested*", (c) the 'Tender Form' requirement fell under sub-clause 16.1 (e) and, as a result, the contracting authority was not allowed to request any rectification to the 'Tender Form' submitted by the appellant company, (d) as per clause 16.1, with regard to the 'Tender Form' sub-clause 16.1 (e) (i) note 3 and not note 2 – as quoted by the appellant company – was applicable and note 3 read "*No rectification shall be allowed. Only clarifications on the submitted information may be requested.*", (e) in this case, the appellant company did not submit page 6 of the 'Tender Form' and to ask for its submission after the closing date of the tender would have amounted to a rectification, (f) the appellant company had submitted the original, which the contracting authority's representative claimed that it was not marked 'Original', and a copy of the company's tender submission and that the contracting authority had opened them both and page 6 of the 'Tender

Form' was found missing in both submissions, (g) the evaluation board had requested guidance from the Departmental Contracts Committee in this regard and the advice given was that no rectification should be requested with regard to the 'Tender Form', (h) during the first evaluation exercise - which was reported upon on the 5th August 2011 and wherein the bid submitted by another bidder, Fair Trading Ltd, was recommended for acceptance - was not carried out thoroughly and (i) during the second evaluation exercise, which was reported upon on the 12th September 2011, on closer examination it emerged that the two participating bidders were not compliant, namely the appellant company had submitted an incomplete 'Tender Form' whereas the other bidder had declared that it would be sub-contracting more than the limit allowed as per note 3 at page 16 of the 'Tender Form', which was set at 50%, and, as a result, the tender was recommended for cancellation,

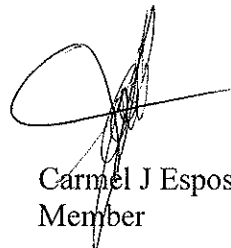
reached the following conclusions,

1. The Public Contracts Review Board opines that, whilst it is the responsibility of the contracting authority to draw up a comprehensive tender document, yet, on the other hand, it is also the responsibility of the bidder to present, in the first place, a complete and correct tender submission, especially with regard to mandatory requirements in respect of which no rectification is allowed. This Board, thus, disagrees with claim made by the appellant company regarding the fact that, given that this was a single package system tender and not a three package system tender, the contracting authority could have requested a rectification with regard to the 'Tender Form'.
2. The Public Contracts Review Board cannot remain oblivious of the fact that the unmarked envelope which was presented by the appellant company in its original submission should not have been opened by the contracting authority as this erroneous move by the said authority has denied this Board from having the possibility to acquire first hand information thus enabling it to personally verify the righteousness of a couple of claims made by respective parties.
3. Nevertheless, the Public Contracts Review Board argues that, all things being equal, this Board (a) cannot say that the arguments brought about by the appellant company to convince this Board that it had submitted all mandatory documentation were convincing enough to suggest a reversal of decisions taken prior to the filing of this appeal, but, also, this Board (b) is not in a position to exculpate the contracting authority for opening the sealed envelope albeit this was not marked 'COPY'.

In view of the above this Board finds against the appellant company, but given the issues raised during the hearing session, it recommends that the deposit paid by the latter should be reimbursed and that the tender be re-issued.



Alfred R Triganza
Chairman



Carmel J Esposito
Member



Joseph Croker
Member

13 February 2012