

PUBLIC CONTRACTS REVIEW BOARD

Case No. 500

CT/3099/2011

Tender for the Provision of Eleven (11) Low-Emission Saloon Vehicles to be used for Border Patrol by the Malta Police Force

This call for tenders was published in the Government Gazette on the 20th January 2012. The closing date for this call with an estimated budget of € 215,776 (inclusive of VAT) was the 1st March 2012.

Four (4) tenderers submitted their offers.

Gasam Enterprises Ltd filed an objection on the 22nd October 2012 against the decisions of the Contracts Department to disqualify its offer as non-compliant and to recommend the award to Meridien Enterprises Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Carmel Esposito and Mr Paul Mifsud as members convened a public hearing on Monday, 3rd December 2012 to discuss this objection.

Present:

Gasam Enterprises Ltd

Dr Steve Decesare	Legal Representative
Ms Stefan Deguara	Chief Executive Officer
Mr Neil Falzon	Representative

Meridien Enterprises Ltd

Dr Josette Grech	Legal Representative
Prof. John Mamo	Representative

Malta Police Force

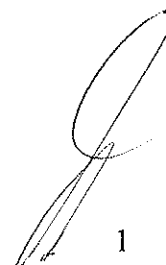
Mr Publius Agius	Director Finance & Administration
Mr Sandro Camilleri LP	Legal Representative

Evaluation Board

Insp. Geoffrey Azzopardi	Chairman
Insp. Anthony Agius	Member
Constable Raymond Conti	Member
Mr Martin Debono	Member
Mr Carmel Preca	Secretary

Department of Contracts

Mr Jonathan Barbara	Representative
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1

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

Dr Steve Decesare, legal representative of Gasan Enterprises Ltd, the appellant company, made the following submissions:

- i. on the 15th May 2012 the appellant company was informed by the Contracts Department that the tender was being recommended for award in its favour, which decision was made public on the 16th May 2012;
 - ii. albeit, on the 21st May 2012 the appellant company became aware that Meridien Enterprises Ltd had lodged an appeal with regard to this recommended award, yet the said appellant company's efforts to obtain further information about this appeal proved fruitless;
 - iii. on the 19th July 2012 the appellant company's representative was verbally informed that the tender was being recommended for award to Meridien Enterprises Ltd and this information was later communicated in writing on the 12th October 2012 while stating that the reason for rejecting the appellant company's offer was because the latter had failed to submit an original bid bond as requested in clause 16.1 (a) of the tender document;
 - iv. it was somehow odd how the appellant company was informed that it did not submit the original bid bond on the 12th October 2012 when it had submitted its tender in March 2012 when such a shortcoming was usually detected at tender opening stage and which shortcoming would have led to the outright disqualification of the appellant company's offer;
- and
- v. the appellant company maintained that it had in fact submitted the original bid bond and was even submitting two affidavits to this effect.

Insp. Geoffrey Azzopardi, chairman of the evaluation board, explained that:-

- a. the norm was that the evaluation board was handed a copy of the tender submissions and that also applied to the bid bond because the original bid bond was kept by the Contracts Department;
- b. therefore, the evaluation board was not in a position to establish whether the bid bond submitted was the original or a copy;
- c. as a result of the evaluation process it emerged that the cheapest compliant tender was that of Gasan Enterprises Ltd and the award recommendation was made accordingly, which recommendation was endorsed by the Contracts Department which, in turn, issued the relative letter of award on the 15th May 2012;

- d. Meridien Enterprises Ltd lodged an appeal with the Contracts Department, apparently stating that the recommended bidder had not submitted the original bid bond as had been indicated in the 'Summary of Tenders Received';
 - e. the Contracts Department then asked the adjudicating board to re-evaluate the tenders pointing out that Gasan Enterprises Ltd submitted a copy instead of the original bid bond;
- and
- f. on receiving these instructions from the Contracts Department, the evaluation board then disqualified the offer made by Gasan Enterprises Ltd and recommended for acceptance the offer made by Meridien Enterprises Ltd as the cheapest compliant tender.

The Chairman Public Contracts Review Board remarked that this Board had been made aware of the appeal lodged by Meridien Enterprises Ltd

Mr Jonathan Barbara, representing the Contracts Department, explained that:-

- i. the original bid bonds were always retained by the Contracts Department and kept separately from the tender submissions in an 'ad hoc' file and only a copy was handed over to the evaluation board;
- ii. the evaluation board was invariably handed, along with a copy of the tender submissions, the 'Summary of Tenders Received' drawn up at tender opening stage, in this case carried out by the General Contracts Committee, and this schedule clearly indicated against tenderer no. 3 'Gasan Enterprises Ltd' that the bid bond was 'not original';
- iii. albeit it was up to the evaluation board to disqualify a bidder who did not submit the original bid bond, yet it was conceded that this issue was also overlooked by the Contracts Department when it approved the award recommendation to Gasan Enterprises Ltd made by the evaluation board;
- iv. Meridien Enterprises Ltd objected to the recommended award and, on verifying that the reason for objection, namely the non submission of the original bid bond, was correct, action was taken, even through the evaluation board, to withdraw the letter of award in favour of Gasan Enterprises Ltd and to recommend the award to the cheapest compliant tenderer, this time Meridien Enterprises Ltd;
- v. the appellant company, Gasan Enterprises Ltd, had the opportunity to be present at tender opening stage and if it had viewed the 'schedule of tenders received' drawn up at tender opening stage and which was public information, it would have noticed that it had failed to submit the original bid bond;
- vi. at no time did Gasan Enterprises Ltd contest the information displayed against its bid that the bid bond submitted was not the original even though that was a serious shortcoming that led to the rejection of its tender;

and

- vii. the Contracts Department instructed the evaluation board to re-examine the offers because its first evaluation was defective since it recommended the award to a bidder who should have been disqualified in the first place.

Dr Josette Grech, legal representative of Meridien Enterprises Ltd, submitted that:-

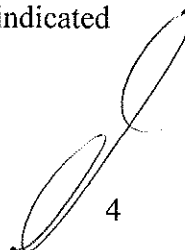
- a. the schedule of tenders received was drawn up way back in March 2012 and had been publicly displayed on the website of the Contracts Department which schedule clearly indicated that Gasan Enterprises Ltd had not submitted the original bid bond and, as a consequence, it was not correct for the appellant company to state that it was only on the 12th October 2012 that it was made aware that it had not submitted the original bid bond;
- b. the recommended tenderer filed an objection because it knew from the very beginning of the process, namely, at tender opening stage, and on the drawing up of the schedule of tenders received, that Gasan Enterprises Ltd had not submitted the original bid bond;
- c. the Public Contracts Review Board had informed the recommended tenderer on the 10th July 2012 that (i) once the General Contracts Committee was withdrawing its letter of award to Gasan Enterprises Ltd, (ii) once the evaluation board was going to re-examine the offers and make a fresh award recommendation and (iii) once the letter of objection dated 21 May 2012 was being withdrawn, then no further action was called for and the deposit was being refunded to the recommended tenderer;

and

- d. whilst, on a procedural note, the appellant company was given up to the 22nd October 2012 to lodge its objection, yet on that date it had only submitted the notice of objection but not the reasoned letter of objection, which was, in fact, presented on the 1st November 2012 and, therefore, the appeal itself was inadmissible.

The Chairman Public Contracts Review Board noted that, apparently, there was a series of oversights in this case, in the sense that the adjudicating board did not notice that the 'schedule of tenderers receive' indicated the non submission of the original bid bond which should have led to the outright disqualification of the appellant company's offer and the Contracts Department approved the award recommendation to a bidder who had not submitted the original bid bond. He added that, once Meridien Enterprises Ltd had withdrawn its appeal, there was no point in taking any further action, including informing Gasan Enterprises Ltd of the details of that appeal.

Insp. Azzopardi pointed out that in the 'schedule of tenders received' it was indicated that all the bidders had submitted the bid bond.



4

The Chairman Public Contracts Review Board argued that the column 'bid bond' of the 'schedule of tenders received' should have read 'no' and not 'yes' against tenderer no. 3 - Gasan Enterprises Ltd - because the copy of the bid bond submitted, effectively, amounted to a non-submission of a valid bid bond. On the other hand, Mr Barbara argued that the appellant company did, in fact, submit a bid bond but not in its original form as requested.

Dr Josette Grech pointed out that at tender opening stage the General Contracts Committee did not find the original bid bond and that was recorded and published in the 'schedule of tenders received' and no one seemed to have contested it except at this hearing.

Dr Decesare remarked that with regard to the procedural issue raised by Dr Grech, whilst the Public Procurement Regulations in force prior to June 2012 did provide the time within which to submit the reasoned letter of objection, yet the regulations presently in force only laid down the time limit within which to submit the 'notice', namely:

“84. (1) Any tenderer or candidate concerned, or any person, having or having had an interest or who has been harmed or risks being harmed by an alleged infringement or by any decision taken including a proposed award in obtaining a contract or a cancellation of a call for tender, may file a notice of objection with the Review Board.

The notice shall be filed within ten calendar days following the date on which the contracting authority has by fax or other electronic means sent its proposed award decision.”

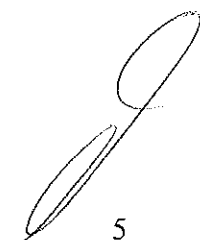
Dr Decesare added that the appellant company had submitted the reasoned letter of reply on the 1st November 2012, namely over a month before the date of the hearing;

Mr Stefan Deguara, CEO Gasan Enterprises, intervened to insist that Gasan Enterprises had submitted the original bid bond with its tender submission.

Dr Grech concluded that on two separate occasions the Contracts Department had verified that the appellant company had not submitted an original bid bond, namely first, at tender opening stage, and secondly, following the appeal lodged by Meridien Enterprises Ltd in May 2012. She insisted that the appellant company's objection was presented after the stipulated time indicated by the Contracts Department in a letter dated 12th October 2012, namely after the 22nd October 2012.

The Chairman Public Contracts Review Board remarked that it would be useful if the department on whose behalf the Contracts Department was issuing the tender were to be obliged to be present at tender opening stage.

At this point the hearing came to a close.



5

This Board,

- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated the 1st November 2012 and also through its representatives verbal submissions presented during the hearing held on the 3rd December 2012, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) on the 15th May 2012 the appellant company was informed by the Contracts Department that the tender was being recommended for award in its favour, which decision was made public on the 16th May 2012, (b) albeit, on the 21st May 2012 the appellant company became aware that Meridien Enterprises Ltd had lodged an appeal with regard to this recommended award, yet the said appellant company's efforts to obtain further information about this appeal proved fruitless, (c) on the 19th July 2012 the appellant company's representative was verbally informed that the tender was being recommended for award to Meridien Enterprises Ltd and this information was later communicated in writing on the 12th October 2012 while stating that the reason for rejecting the appellant company's offer was because the latter had failed to submit an original bid bond as requested in clause 16.1 (a) of the tender document, (d) it was somehow odd how the appellant company was informed that it did not submit the original bid bond on the 12th October 2012 when it had submitted its tender in March 2012 when such a shortcoming was usually detected at tender opening stage and which shortcoming would have led to the outright disqualification of the appellant company's offer, (e) the appellant company maintained that it had in fact submitted the original bid bond and was even submitting two affidavits to this effect, (f) with regard to the procedural issue raised by Dr Grech, whilst the Public Procurement Regulations in force prior to June 2012 did provide the time within which to submit the reasoned letter of objection, yet the regulations presently in force only laid down the time limit within which to submit the 'notice', (g) the appellant company had submitted the reasoned letter of reply on the 1st November 2012, namely over a month before the date of the hearing and (h) that Gasan Enterprises had submitted the original bid bond with its tender submission;
- having considered the contracting authority's representative's reference to the fact that (a) the norm was that the evaluation board was handed a copy of the tender submissions and that also applied to the bid bond because the original bid bond was kept by the Contracts Department, (b) the evaluation board was not in a position to establish whether the bid bond submitted was the original or a copy, (c) as a result of the evaluation process it emerged that the cheapest compliant tender was that of Gasan Enterprises Ltd and the award recommendation was made accordingly, which recommendation was endorsed by the Contracts Department which, in turn, issued the relative letter of award on the 15th May 2012, (d) Meridien Enterprises Ltd lodged an appeal with the Contracts Department, apparently stating that the recommended bidder had not submitted the original bid bond as had been indicated in the 'Summary of Tenders Received', (e) the Contracts Department instructed the adjudicating board to re-evaluate the tenders pointing out that Gasan Enterprises Ltd submitted a copy instead of the original bid bond and (f) on receiving these instructions from the

6

Contracts Department, the evaluation board then disqualified the offer made by Gasan Enterprises Ltd and recommended for acceptance the offer made by Meridien Enterprises Ltd as the cheapest compliant tender;

- having considered Mr Barbara's reference to the fact that (a) the original bid bonds were always retained by the Contracts Department and kept separately from the tender submissions in an 'ad hoc' file and only a copy was handed over to the evaluation board, (b) the evaluation board was invariably handed, along with a copy of the tender submissions, the 'Summary of Tenders Received' drawn up at tender opening stage, in this case carried out by the General Contracts Committee, and this schedule clearly indicated against tenderer no. 3 'Gasan Enterprises Ltd' that the bid bond was 'not original', (c) albeit it was up to the evaluation board to disqualify a bidder who did not submit the original bid bond, yet it was conceded that this issue was also overlooked by the Contracts Department when it approved the award recommendation to Gasan Enterprises Ltd made by the evaluation board, (d) Meridien Enterprises Ltd objected to the recommended award and, on verifying that the reason for objection, namely the non submission of the original bid bond, was correct, action was taken, even through the evaluation board, to withdraw the letter of award in favour of Gasan Enterprises Ltd and to recommend the award to the cheapest compliant tenderer, this time Meridien Enterprises Ltd, (e) the appellant company, Gasan Enterprises Ltd, had the opportunity to be present at tender opening stage and if it had viewed the 'schedule of tenders received' drawn up at tender opening stage and which was public information, it would have noticed that it had failed to submit the original bid bond, (f) at no time did Gasan Enterprises Ltd contest the information displayed against its bid that the bid bond submitted was not the original even though that was a serious shortcoming that led to the rejection of its tender and (g) the Contracts Department instructed the evaluation board to re-examine the offers because its first evaluation was defective since it recommended the award to a bidder who should have been disqualified in the first place
- having considered the recommended tenderer's reference to the fact that (a) the schedule of tenders received was drawn up way back in March 2012 and had been publicly displayed on the website of the Contracts Department which schedule clearly indicated that Gasan Enterprises Ltd had not submitted the original bid bond and, as a consequence, it was not correct for the appellant company to state that it was only on the 12th October 2012 that it was made aware that it had not submitted the original bid bond, (b) the recommended tenderer filed an objection because it knew from the very beginning of the process, namely, at tender opening stage, and on the drawing up of the schedule of tenders received, that Gasan Enterprises Ltd had not submitted the original bid bond, (c) the Public Contracts Review Board had informed the recommended tenderer on the 10th July 2012 that (1) once the General Contracts Committee was withdrawing its letter of award to Gasan Enterprises Ltd, (2) once the evaluation board was going to re-examine the offers and make a fresh award recommendation and (3) once the letter of objection dated 21 May 2012 was being withdrawn, then no further action was called for and the deposit was being refunded to the recommended tenderer, (d) whilst, on a procedural note, the appellant company was given up to the 22nd October 2012 to lodge its objection, yet on that date it had only submitted the notice of objection but not the reasoned letter of objection, which was, in fact, presented on the 1st

November 2012 and, therefore, the appeal itself was inadmissible, (e) at tender opening stage the General Contracts Committee did not find the original bid bond and that was recorded and published in the 'schedule of tenders received' and no one seemed to have contested it except at this hearing and (f) concluded that on two separate occasions the Contracts Department had verified that the appellant company had not submitted an original bid bond, namely first, at tender opening stage, and secondly, following the appeal lodged by Meridien Enterprises Ltd in May 2012,

reached the following conclusions, namely:

1. The Public Contracts Review Board notes that there was a series of oversights in this case, in the sense that, for example, (a) the adjudicating board did not notice that the 'schedule of tenderers received' indicated the non submission of the original bid bond which should have led to the outright disqualification of the appellant company's offer and (b) albeit it was up to the evaluation board to disqualify a bidder who did not submit the original bid bond, yet it was conceded that this issue was also overlooked by the Contracts Department when it approved the award recommendation to Gasan Enterprises Ltd made by the evaluation board.
2. The Public Contracts Review Board argues that the column 'bid bond' of the 'schedule of tenders received' should have read 'no' and not 'yes' against tenderer no. 3 - Gasan Enterprises Ltd - because the copy of the bid bond submitted, effectively, amounted to a non-submission of a valid bid bond. On the other hand, Mr Barbara argued that the appellant company did, in fact, submit a bid bond but not in its original form as requested.
3. The Public Contracts Review Board remarks that it would be useful if the department on whose behalf the Contracts Department would be issuing a tender were to be obliged to be present at tender opening stage.
4. This Board whilst claiming that it is, somehow, odd how the appellant company was informed that it did not submit the original bid bond on the 12th October 2012 when it had submitted its tender in March 2012 considering that such a shortcoming was usually detected at tender opening stage and which shortcoming would have led to the outright disqualification of the appellant company's offer.
5. The Public Contracts Review Board acknowledges the fact that it has two divergent views, namely whilst (a) the appellant company's representatives maintained that the company had, in fact, submitted the original bid bond and was even submitting two 'affidavits' to this effect, yet (b) the evaluation board was not in a position to establish whether the appellant company had actually submitted an original or a copy of the bid bond in view of the fact that the original bid bonds were always retained by the Contracts Department and kept separately from the tender submissions in an 'ad hoc' file and only a copy was handed over to the evaluation board.
6. This Board acknowledges the fact that, had the appellant company, Gasan Enterprises Ltd, been present at the tender opening stage it's representative/s



would have taken advantage of the opportunity to be able to view the 'schedule of tenders received' drawn up by the evaluation board there and then. Needless to say that this would have enabled the appellant company's representative/s to become aware of the fact that the company had failed to submit the original bid bond. Nevertheless, this Board also acknowledges that the physical presence of the parties in question is not mandatory so it remains a hypothetical scenario for this Board to contemplate on what would or could have happened.

Indeed, this Board, whilst also acknowledging that, for most of the time, Gasan Enterprises Ltd did not contest the information displayed against its bid, namely that the bid bond submitted was not the original, even though that was a serious shortcoming that led to the rejection of its tender, yet, it remains a fact that the conduct of a proper evaluation remains the responsibility of the evaluation board and not of the participating tenderers.

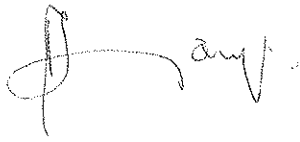
7. The Public Contracts Review Board recognises the fact that the Contracts Department instructed the evaluation board to re-examine the offers because its first evaluation was defective since it recommended the award to a bidder who should have been disqualified in the first place. Notwithstanding, however, from the evidence presented, this Board has not been provided with a clear scenario which, unequivocally, confirms that the appellant company had, in fact, not submitted an original bid bond. It is indeed unfortunate and, somewhat incomprehensible, for this Board to note that the presence of a member or members of the evaluation board at tender opening stage is not made compulsory.

This Board opines that, the fact that at tender opening stage the General Contracts Committee did not find the original bid bond and that was recorded and published in the 'schedule of tenders received' and that no one seemed to have contested it, does not mean that this Board has, meantime, been provided with enough corroborative and substantive evidence that the inclusion of the said 'bid bond' in its original format had, in fact, not been the subject of an oversight or a misplacement of the said document. It is also a fact that all this is being stated within a context where the appellant company, not only did not recognise such a mistake but went as far as to produce two 'affidavits' confirming that the company had, definitely, submitted the bid bond in its original format as required by the tender specifications, terms and conditions.

In the circumstances, this scenario obliges this Board to ensure that an equitable solution is reached. This Board cannot disregard the fact that it has been provided with two sworn 'affidavits' by the appellant company's representatives. Yet, this Board has been given no reason for it to doubt the 'bona fide' of the General Contracts Committee members as well as the members of the evaluation board who both claim that they have not sited the appellant company's pertinent bid bond in its original format. Neither can this Board rule out the possibility that the appellant company's representatives, despite all the best possible intentions and overall perceptions, may have physically omitted the inclusion in the appellant company's tender submission of the actual original bid bond through a mere oversight.

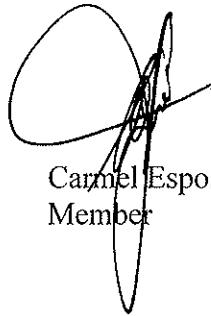


In view of the above this Board recommends that (a) this tender be cancelled and reissued and (b) the deposit paid by the same company for the appeal to be lodged should be reimbursed.

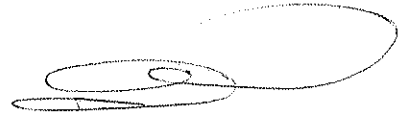


Alfred R Triganza
Chairman

17 December 2012



Carmel Esposito
Member



Paul Mifsud
Member