

PUBLIC CONTRACTS REVIEW BOARD

Case No. 650

CT 2015/2013

Framework Contract for the Supply and Delivery of Sodium Bicarbonate to Delimara Power Station.

The tender was published on the 12th April 2013. The closing date was the 30th July 2013.

The estimated value of the Tender was €3,162,500.00 (Exclusive of VAT).

Two (2) bids had been received for this tender.

On the 12th December 2013 United Equipment Co. (UNEC) Limited filed an objection against the proposed award of the tender to F & R Ventures for the amount of €2,887,500.00 including VAT.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Tuesday the 14th January 2014 to discuss the objection.

Present for the hearing were:

United Equipment Co. (UNEC) Limited - Appellant

Mr Marcus Bonnici	Representative
Dr John Gauci	Legal Representative

F&R Ventures - Preferred Bidder

Mr Hermann Mallia	Representative
Mr Roberto Ragonesi	Representative
Dr Matthew Brincat	Legal Representative
Dr Joseph Camilleri	Legal Representative

Enemalta Corporation - Contracting Authority

Ing. Ivan Bonello	Chairman Evaluation Board
Ing. Albert Farrugia	Member Evaluation Board
Ing Silvan Mugliett	Member Evaluation Board
Ing. Samuel Sammut	Member Evaluation Board
Dr Antoine Cremona	Legal Representative

Department of Contracts

Mr Nicholas Aquilina	Procurement Manager
Dr Franco Agius	Assistant Director

Witnesses:

Mr Anthony Cachia
Dr Claudette Fenech

Director General, Dept. Of Contracts
Legal Officer MFSA (not called to testify)

After a brief introduction by the Chairman, the appellant's representative was invited to make his submissions regarding the objection.

Dr John Gauci on behalf of the appellant said that there were reasons for the preferred bidder to be disqualified and he would be giving these later. First however he wanted the preliminary plea raised by the preferred bidder in the letter of reply. This stated that since this was a three envelope tender, the appellant should have raised the objection at an earlier stage and not when the financial offers were opened. He contended that appellant could not object after the bid bond stage and neither could the appellant have objected after the second package was opened because there had been another case decided by this Board, Case 81 CT 2525/05 Construction of Manwel Dimech Bridge. This Board had decided that in a three package tender a bidder could only object if his offer was discarded, the bidder could not object with the aim of disqualifying another bidder. To do this he had to await the adjudication to be completed.

Dr John Gauci said that as soon as appellant received the notification of the award of the tender, the appellant had sent a judicial letter to the Department of Contracts asking that the parties forming part of the Joint Venture be identified. This request has however been denied and no reply was received. He contended that to date this information was still not published. In the preferred bidder's letter of reply it is being asserted that the Joint Venture was in fact registered prior to the submission of the tender. He had therefore called the Registrar of Companies, Dr Claudette Fenech to testify about this registration.

Dr Matthew Brincat on behalf of the preferred bidder stated that the Joint Venture was registered with the contracting authority. The Joint Venture was set up through an agreement.

Dr Claudette Fenech was at this stage informed that there was no need for her to give evidence and was thanked and excused.

Dr John Gauci continued that the position therefore was that it was confirmed that the preferred bidder was not registered as a Joint Venture and thus had no juridical representation and it was for the Director General of Contracts to reveal the members of the Joint Venture.

Mr Anthony Cachia, the Director General of Contracts, under oath stated that the department abides by the laws and regulations. According to the regulations and according to law, his department had no obligation to divulge the members of the Joint Venture chosen as the preferred bidder. The law requires that the bidder be identified. In this case the bidder was identified as F&R Ventures. The advice received from the attorney general was always to act according to the available documentation alone. The law states the name of the tenderer is F&R Ventures. Answering questions made by Dr Gauci, witness stated that the definition of tenderer was "an economic operator who has submitted a tender"; economic operator is defined as "shall cover equally the concepts of contractor, supplier and service provider;" the definition of contractor is "means a natural or legal person or public entity or group of such

persons and, or bodies which offers on the market the execution of works and, or a work". In the present case F&R Ventures is a group of entities. He could not state why an email was sent by the clerk at the Public Contracts Review Board to a certain "Elaine @ Fahrenheit" since he only received a copy of the email himself.

At this point the Chairman intervened and stated that the person to whom the email was addressed was in fact the contact person of the preferred bidder F&R Ventures.

Mr Anthony Cachia continued replying to questions by Dr Gauci stated that before submitting the Department of Contracts letter of reply to the objection the department's legal representative had been consulted. On being asked what action would he have taken had he known that a bidder had executive action pending against him, Mr Cachia replied that in all European Countries it is the practice to have bidders make self declarations that they are up to date with tax and social contributions. This applied to all parties of a joint venture. When the tender is awarded, before the contract is signed, the preferred bidder would be required to produce certification that shows that he is up to date. This ensures that whoever gets the tender is up to date with tax payments at the time of signing of the contract. If it results that the preferred bidder signed a false declaration there would be grave consequences against the preferred bidder.

Dr Gauci at this point filed a document and asked the witness to state how he was going to react to it. The Chairman remarked that the document was dated 17th February 2012 and the position could have changed in the two years since. The witness should not reply to this question.

Dr Antoine Cremona on behalf of the contracting authority said that bidders signed a declaration according to regulation 50 that they are compliant are not bankrupt and have no action pending against them. Later on when the contract is awarded before signing the contracting authority is empowered to ask for the production of certificates. The law is clear if someone signs the declaration and is subsequently found that he was in default there are dire consequences and may be fined up to 10% of the value of the contract. The method being used by the department of contracts works better, lessens paperwork and ensures that at the moment of signing of the contract bidders are up to date and not months before on the closing date of the tender. At the time of signing the contract, the bidder had to be compliant.

Dr John Gauci for appellant agreed that the process was correct. However he insisted that the judicial letter he exhibited was a public document and could be easily obtained. Moreover according to Cap.372 the judicial letter will constitute an executive title unless contested through an action within two days from receipt. He contended that bidders had to be compliant at the time when they signed the tender declaration and if it resulted that there had been false declarations then the contracting authority was obliged to reject the relative bid. The defaulted bidder could not bring the tax position up to date just before signing the contract. Otherwise bidders who abided with the law regarding tax would be discriminated against.

The Chairman remarked that the system being used is practically fool-proof and provides safeguards.

Dr Antoine Cremona said that at the very least the appellant had to produce proof that the amount stated in the judicial letter was in fact still due as two years had lapsed since it was issued.

Dr Franco Agius, Assistant Director at the Department of Contracts said that the European Court judgement quoted by appellant does not state what was stated by the appellant in the objection. Article 50 has two parts, one that is mandatory and the other not mandatory. The judgement states that it is up to the individual country to implement processes in the non mandatory part. The law is clear and states that once the request for certificates had been made by the Department of Contracts is bound by law to abide by them and cannot contest them.

Dr John Gauci insisted that the European Court judgement states in Clause 32 that compliancy had to be declared in the tender document before submitting. Clause 35 required that bidders be compliant at the time the declaration was in fact signed.

Dr Antoine Cremona on behalf of the contracting authority said that since the decision on Case 81 was delivered the law has been changed. The contracting authority said that he had an idea for the reason of this objection because presently the product was being obtained from the appellant by direct order. He contended that the contracting authority in this case had followed the usual process.

Dr Matthew Brincat on behalf of the preferred bidder stated that the document submitted by appellant has nothing to do with the preferred bidder. He said that in the letter of reply, when he mentioned registration he meant the registration on the e tendering process.

The Chairman reiterated that the system used was transparent and correct. The method using self declaration is fool-proof. If this results to be not true there are remedies.

At this point the hearing was brought to a close.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 12th December 2013 and also through the Appellant's verbal submissions during the hearing held on 14th January 2014, had objected to the decision taken by the pertinent Authority, in that:

- a) After having received notification from the Contracting Authority, that the Appellant's bid had been discarded, same could not object to the decision, since the tender was a three package tender and in this regard the Appellant had to wait for the final adjudication.**
- b) Although the Appellant requested the Contracting Authority to submit details of the legal constitution of the Preferred Bidder, none was forthcoming from the Contracting Authority.**
- c) In any case, it was confirmed that the Preferred Bidder was not a registered legal entity with MFSA.**

Having considered the Contracting Authority's verbal submissions during the hearing held on 14th January 2014, in that:

- a) **The Contracting Authority was not in duty bound to divulge any information regarding the ownership of the Preferred Bidder.**
- b) **Nevertheless, the Contracting Authority did confirm to the Appellant that the Preferred Bidder's legal constitution was the result of a Joint group of commercial entities.**
- c) **At the same time, the Contracting Authority was legally empowered to verify the Appellant's self declaration statements.**

Reached the following conclusions:

- 1. **This Board opines that the present system relating to the Public Procurement Regulations is not a perfect one and certain regulations need to be amended to avoid unnecessary bureaucracy, litigation and be friendly formulated.**
- 2. **However, this Board also emphasise the golden rule that was a mandatory in a tender document must be respected and submitted. The Adjudicating Board of the Contracting Authority must assess the particular tender on the submissions made by the particular tenderer. This is a cardinal principle.**
- 3. **Unfortunately, this Board also notes, according to the present regulations of the Public Procurements Regulations restricts the Authority and Discretion of the Evaluation Board appointed by the same Authority and this is not on. This deficiency undermines the administrative and technical capabilities of the same appointed Board.**

In view of the above, this Board finds against the Appellant and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar
Chairman

Dr. Charles Cassar
Member

Mr. Lawrence Ancillieri
Member

4 February 2014