

PUBLIC CONTRACTS REVIEW BOARD

Case No. 830

CT 2003/2013/5104

Tender for Road Resurfacing Works at Fomm ir-Rih Limiti tal-Mgarr.

The tender was published on the 7th April 2015. The closing date was the 14th April 2015. The estimated value of tender is €18,537.64 (Exclusive of VAT).

Four (4) offers had been received for this tender.

On the 19th May 2015 Mr Raymond Calleja filed an objection against the decision of the contracting authority to award the tender to C & S Services Limited.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Thursday 23rd July 2015 to discuss the objection.

Present for the hearing were:

Mr Raymond Calleja:

Mr Raymond Calleja	Representative
Mr Raymond Azzopardi	Representative
Dr Gavin Gulia	Legal Representative

C & S Services:

Mr Stephen Bezzina	Representative
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Transport Malta:

Mr Keith Tanti	Chairperson Evaluation Board
Perit Noel Gauci	Member Evaluation Board
Mr Michael Baldacchino	Member Evaluation Board
Mr Jeffrey Formosa	Member Evaluation Board
Ms Ethel Demicoli	Representative
Mr Ray Stafrace	Representative
Dr Franco Vassallo	Legal Representative

All the parties present agreed that since the case was identical with the case next due for

hearing, CT 2003/2013/5093, and the parties involved are the same and the cases have the same merits, then the proceedings for this case would apply also to the other case.

The Chairman made a brief introduction and asked the appellants' representative to make his submissions.

Dr Franco Vassallo for the contracting authority stated that it was not contested that three of the bidders, including the preferred bidder, had failed to submit copies of their tenders. While the appellant contends that this was a defect that merited disqualification while the contracting authority thinks otherwise.

Dr Gavin Gulia on behalf of the appellant explained that according to the tender instructions all the bidders had to submit all the required documents. The condition was mandatory so much so that the wording said "shall" submit the documents; and the condition was clearly shown to be mandatory. He contended that the preferred bidder's tender had missing documents, since copies of bids are documents in themselves, and thus should have been disqualified.

Dr Franco Vassallo on behalf of the contracting authority Transport Malta explained that when the evaluation board received the tender they discovered that the recommended bidder had not submitted another copy of the tender as requested. The evaluators had to decide whether to discard the tender or try to salvage it. They considered a ruling that had been given by the DCC in a similar case which said that such tenders should be salvaged. The evaluation board then considered decisions taken by the European Court of Justice. According to the principle of proportionality the defect did not disadvantage any other bidders and that it was not reasonable to exclude a bidder because of this defect since it was not an exclusion criterion. The tender is for the patching of roads and the value is around twenty thousand euro. In fact all four bids are very close to each other. He referred to the Court of Appeal decision given on the 31st May 2013 in the Ballut Blocks case where the bidder had omitted to put down the price. The court had made reference to the Tideland case by the European Court of Justice and declared that the ultimate aim is to ensure free competition in order that no bidder is given an advantage, and in this case no advantage had been given. In the present case the non-submission of the copy works against the bidder's interests. The court had decided that since no competitive advantage was given it found for the appellant. The evaluation board in the present case referred to these two guidelines – the DCC ruling and the Court of Appeal decision and took the reasonable decision in not disqualifying the tender.

Dr Gavin Gulia for the appellant contended that the case referred to by the contracting authority was about the non-listing of the price, in the present case we are dealing with essential documents that were missing. Thus he contends that the Court of Appeal decision do not apply for the present case. The decision prejudiced the appellant. After the court of appeal decision the contracting authority could have amended the wording of the present tender; yet the word "shall" was retained and this shows that the submission of the copies was mandatory.

Dr Franco Vassallo explained that reference to the Court of Appeal was because of the principle of proportionality. He claimed that there were no missing documents in the tender itself and the evaluation board could evaluate. The only missing document was the extra copy of the tender document.

At this point the hearing was closed.

This Board,

Having noted the Appellant’s objection in terms of the “Reasoned Letter of Objection” dated 18th May 2015 and also through the Appellant’s verbal submissions during the hearing held on the 23rd July 2015, had objected to the decision taken by the pertinent Authority in that:

- a) The Appellant contends that the other bidders, including the Recommended Bidder should have been disqualified as they did not submit a copy of the original Tender Document as dictated in the latter.**

Having considered the Contracting Authority’s verbal submissions during the hearing held on the 23rd July 2015, in that:

- a) The Contracting Authority maintains that in arriving at its decision, the Evaluation Committee took into account the decisions taken by the European Court of Justice with regards to the “Principle of Proportionality” hence the most advantageous offer was awarded, to the benefit of the Contracting Authority.**

Reached the following conclusions:

- 1. With regards to the Appellant’s grievance, this Board acknowledges the fact that the Tender Document did request a copy of the original Tender to be**

accompanied. However, this omission of copies is more of a “Form” than “Substance”. This Board notes that the Original Tender form was submitted so that the same could be adjudicated without any need for clarifications.

At the same time, the Recommended Bidder’s offer was compliant and also the cheapest offer and in this regard, this Board upholds the Evaluation Committee’s decision to apply the “Principle of Proportionality”. This Board is justifiably convinced that through its decision and adjudication, the Evaluation Committee did not inflict any disadvantages to the other Tenders nor created any advantage to the Recommended Bidder.

The Evaluation Board took the responsibility not to disqualify the cheapest compliant offer due to a missing copy of the original tender document, and the decision taken by the Evaluation Committee was to the financial benefit of the Contracting Authority.

In view of the above this Board upholds the Evaluation Committee’s award of the Tender, however, due to the circumstances, this Board opines that the deposit paid by the Appellant should be reimbursed.

**Dr. Anthony Cassar
Chairman**

**Dr. Charles Cassar
Member**

**Mr. Lawrence Ancillieri
Member**

28 July 2015