

PUBLIC CONTRACTS REVIEW BOARD

Case No. 832

CT 2003/2013/5106

Tender for Road Resurfacing Works at Sqaq ta' B'Xejn Limits of Birzebbugia.

The tender was published on the 9th April 2015. The closing date was the 16th April 2015. The estimated value of tender is €48,104.51 (Exclusive of VAT).

Five (5) offers had been received for this tender.

On the 12th June 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 Tuesday 28th July 2015 to discuss the objection.

Present for the hearing were:

Mr Raymond Calleja:

Mr Raymond Calleja
Dr Gavin Gulia

Representative
Legal Representative

C & S Services:

No Representative

Transport Malta:

Mr Keith Tanti
Ms Stephania Hannaford
Mr Jeffrey Formosa
Ms Ethel Demicoli
Mr Ray Stafrace
Dr Franco Vassallo

Chairperson Evaluation Board
Secretary Evaluation Board
Member Evaluation Board
Representative
Representative
Legal Representative

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

Dr Gavin Gulia on behalf of the Appellant referred to the submissions he had made in the other two cases with the same merits, heard on the 23rd July 2015 before this Board, cases 830 and 831. He submitted that:

1. That the cases cited by the Contracting Authority about the decision by the Court of Appeal dealt with the omission of putting down the price but the present case was different;
2. The omission in this case by the preferred bidder was the non submission of documents. He cited from the 'Notes of Guidance to Bidders' of the tender which stated that "All contract allocations must be submitted in one original, clearly marked 'original' and one identical copy clearly marked 'copy'. Further down in the same document it was clearly stated that "ANY FAILURE TO COMPLY WITH THE ABOVE INSTRUCTIONS WILL RESULT IN AN AUTOMATIC DISQUALIFICATION OF THE SUBMITTED BID." In making the award the contracting authority was discarding its own instructions;
3. The present tender had been issued after the decision of the Court of Appeal in question and yet the contracting authority had left the mandatory requirement in place and did not remove it from the tender. The reason for this was that the contracting authority was aware that the principle of proportionality did not cover non-submission of documents.

Dr Franco Vassallo on behalf of the Contracting Authority explained that the Evaluation Board had decided to evaluate the tender in order to achieve the aim of awarding to the cheapest bidder. The case had been referred to the Director General, Architect Ray Farrugia who recommended that the award be made to the cheapest offer. He said that he had cited the Court of Appeal decision in order to show that this had decided on principles of proportionality in that the Preferred Bidder was not advantaged by the decision and neither had the appellant been disadvantaged. He cited from the decision where the Court had stated "That in the Court's opinion therefore, not only was disqualification not necessary to achieve the aims of the tender, amongst which the safeguarding of just competition, but on the contrary lead to the loss of the aim of the tender to be awarded to the lowest bidder. For this reason the court was of the opinion that the disqualification of the Ballut tender was not a proportional measure." He acknowledged the fact that the tender could have been worded better.

Dr Gavin Gulia submitted that in that case the appellant should not be penalized.

At this point the hearing was closed.

This Board

Having noted the Appellant’s objection, in terms of the “Reasoned Letter of Objection” dated 11th June 2015 and also through the Appellant’s verbal submissions during the Public Hearing held on the 28th July 2015, had objected to the decision taken by the pertinent Authority, in that:

- a) The Appellant contends that in accordance with the “Notes of guidance to bidders” of the Tender Document, the bidders had to submit a copy of the Tender Document with the original. In this regard, the Appellant maintains that the Contracting Authority went against its own dictated conditions as stipulated in the said “Guidelines to bidders”.**

- b) The Appellant maintains that since the Tender was issued after the Court of Appeal’s decision regarding the issue of “Proportionality” in the case of Ballut Blocks Services Limited vs Department of Contracts et, dated 31st May 2013. The Contracting Authority was well aware that the “Principle of Proportionality” did not cover the non-submission of documentation and the same should have worded the Tender Document to avoid ambiguity.**

Having considered the Contracting Authority’s verbal submissions during the Public Hearing held on 28th July 2015 in that:

- a) The Contracting Authority maintains that in this particular case by applying the “Principle of Proportionality”, no advantage was given to the Preferred Bidder**

nor hampering a fair and just competition among all the other bidders.

Reached the following conclusions:

- 1. With regards to the Appellant's first grievance, this Board acknowledges the fact that the "Guidelines to Tenderers" did state that "Any failure to comply with the above instructions will result in an automatic disqualification of the submitted bid." This Board would respectfully address the issue of missing documentation in that; "Missing Documentations from the original Tender Document does constitute "Information not Submitted" as per Tender Requirement".**

However, this Board justifiably points out that, in this case, a copy of the original tender was not submitted. The original Tender Documentation was complete and the Evaluation Committee could proceed with the Evaluation Process. In this Board's opinion, this is also a case of "Substance over Form" apart from the element of Proportionality.

This Board also notes that by applying the "Principle of Proportionality" in the Evaluation of this Tender, the Evaluation Committee succeeded in obtaining the most advantageous offer whilst, at the same time, safeguarding a just and fair competition among all bidders.

In this regard, this Board upholds the Evaluation Board's decision to award the Tender to the Preferred Bidder, namely C & S Services.

- 2. With regards to the Appellant’s second grievance, this Board acknowledges the fact that the wording of the Tender Document left much to be desired, in so far as clarification and definition of “Missing Documentation”. In this respect, this Board upholds the Appellant’s second contention.**

In view of the above, this Board finds against the Appellant. However, due to the circumstances mentioned in Paragraph 2 above, this same Board recommends that the deposit paid by the Appellant be reimbursed.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

31 July 2015