

PUBLIC CONTRACTS REVIEW BOARD

Case 1092 – MIP/TQF/GEN/D05/2017 – Call For Tenders for the Waste Collection Services in an Environmentally Friendly Manner and Environmentally Friendly Manner and Environmentally Friendly Cleaning Services at Various Industrial Estates (Category B)

The Publication Date of the Call for Tenders was 27 March 2017 whilst the Closing Date for Call of Tenders was 20 April 2017. The Estimated Value of the Tender, (Exclusive of VAT) was € 130,000.

Six (6) Bidders have submitted offers for this Tender.

On 18 September 2017, GB JV filed an Objection against the decision of Malta Industrial Parks Limited to award the Southern Lot to Euro Clean Limited for the price of € 4,865 (Exclusive of VAT) against a deposit of € 400.

On 10 October 2017, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

Appellant – GB JV

Mr Alistair Bezzina	Representative
Mr Ramon Fenech	Representative
Dr Clayton Fenech	Legal Representative

Recommended Bidder – Euro Clean Limited

Dr Timothy Spiteri	Legal Representative
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Contracting Authority – Malta Industrial Parks Limited

Mr Anthony Caruana	Chairperson, Evaluation Board
Mr Keith Buttigieg	Representative
Dr John Bonello	Legal Representative

Following an introduction made by the Chairman of the Public Contracts' Review Board, Dr Anthony Cassar, the Appellants were invited to make their submissions.

Dr Clayton Fenech, the Legal Representative for GB JV opened by quoting Clause 40 (1) and (2) of the Public Procurement Regulations which said:

“40. (1) *Subject to the obligations established under these Regulations and, or any other law obliging the Director, the Contracting Authority and the Ministerial Procurement Unit to disclose information, a Contracting Authority, the Director or the Ministerial Procurement Unit shall not disclose information forwarded to it by economic operators which they have designated as confidential, including, but not limited to, technical of trade secrets and the confidential aspects of Tenders.*

40. (2) *Without prejudice to the other provisions of these regulations, the following information shall not be considered as confidential:*

(a) The name of the Bidders and the individual names of the members of a group of economic operators who submitted a particular Tender;

(b) The name of sub-contractors;

(c) Documentation submitted by economic operators attesting that they comply with selection criteria; and

(d) Technical information which is already made available in public”.

Dr Clayton Fenech continued by saying that, although the Award Criteria was the cheapest technical offer compliant, the Appellants, were not contesting the offer submitted by the Recommended Bidders. They wanted to verify, whether, they were technically compliant, by means of a request, from the Contracting Authority, for the Recommended Bidder's Technical Offer, which was intended for further scrutiny.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board noted that GB JV were not objecting on the basis of their exclusion, consequently, he requested the Appellants, to bring forward their reasons.

Dr Clayton Fenech, the Legal Representative for the Appellants said that, they were contesting to the rejection of his client's offer. In the letter dated 7 September 2017, sent by the Contracting Authority which stated that:

“Your offer was not deemed to be the offer with the lowest price”.

Dr Fenech, continued by saying that although this was a fact, the Tender was to be awarded to the Bidder who had the cheapest compliant Tender.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board explained, that the Offers submitted, were first evaluated administratively, then, the Evaluation Board proceeded to the Technical Offers. If a Bidder was deemed to be technically non compliant, then, his Bid would not qualify for the final stage.

Dr Clayton Fenech, the Legal Representative for GB JV insisted that the Technical Offer submitted by Euro Clean Limited, should have been made public for further scrutiny, as per Regulations in Tender Document.

Dr John Bonello, the Legal Representative for Malta Industrial Parks, explained that, the Public Procurement Regulations ensured a level playing field in the whole process, but it did not allow the Contracting Authority or anyone, to reveal information, deemed to be commercially sensitive. There were guidelines, issued by the Department of Contracts, on what is made public.

The Malta Industrial Parks had to abide by the rules in their Tender Document; in particular, not to divulge the score sheet of each Bidder. Furthermore, the Public Contracts Review Board had to analyse, the Public Procurement Regulations, together with the rules in the Tender Document, that they had been observed by the Contracting Authority. Should, this information will not satisfy the Appellants; the latter should have sought a Remedy before the Closing Date of Call for Competitions. Bidders, who submitted their offer for this Tender, should have been aware of the rules and conditions.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, pointed out that any allegations presented before this Board, had to be substantiated with some form of evidence.

Dr Clayton Fenech, the Legal Representative for GB JV countered that he was enabled, to sustain evidence, to any allegation. He enquired why; the Recommended Bidder's offer was not made public, when this was imposed by the Public Procurement Regulations as per Clause 40 of same.

Dr John Bonello, the Legal Representative for Malta Industrial Parks Limited said, that the Public Contracts Review Board, could not give documents to interested parties. Moreover, the Tender's main decisive factor was the cheapest financial offer.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, asked what the criterion for the recommendation for award was for this tender. Dr John Bonello, Legal Representative for Malta Industrial Parks replied that, the Cheapest Technical compliant offer was recommended for award.

Dr Clayton Fenech, the Legal Representative for GB JV doubted the Evaluation Board, in view of the fact, that they could not see evidence of the Evaluation procedure.

Dr Timothy Spiteri, the Legal Representative for Euro Clean Limited, argued that this Objection was made in an abusive way, and without any basis, in respect of the Public Procurement Regulations. The objection, was made in order to lengthen the interim period, due to the fact that the Appellant was the incumbent, and had an interest to extend this period.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked who the incumbent was at the moment. Mr Keith Buttigieg, on behalf of the Malta Industrial Parks replied that, it was GB JV who was offering an interim service temporary.

Dr Timothy Spiteri, the Legal Representative for Euro Clean Limited, added that the information given by the Contracting Authority was sufficient for this Tender and that there was also confidential information with respect to bids.

At this stage, the Public Hearing was adjourned to Tuesday 31 October 2017 at 09:00 wherein the Public Contracts Review Board will transmit the decision taken for this Objection verbally and then distribute a hard copy of the same to all parties concerned.

This Board,

Having noted this Objection filed by GB JV (herein after referred to as the Appellant) on 18 September 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference MIP/TQF/GEN/D05/2017 listed as Case No 1091 in the records of the Public Contracts Review Board, awarded by Malta Industrial Parks Limited (herein after referred to as the Contracting Authority).

Appearing for the Appellant: Dr Clayton Fenech

Appearing for the Contracting Authority: Dr John Bonello

Whereby, the Appellant contends that:

- a) The Contracting Authority failed to provide a reasonable explanation for the rejection of his offer. In this regard, GB JV insist that Malta Industrial Parks was in duty bound, to submit the**

grounds on which the Recommended Bidder was deemed to be technically compliant;

- b) In the interest of transparency, GB JV contends that Malta Industrial Parks should publish the documentation of the Preferred Bidder so that unsuccessful Bidders can assert that the latter's offer was indeed technically compliant.**

This Board also noted the Contracting Authority's "*Letter of Reply*" dated 27 September 2017 and its verbal submissions during the Public Hearing held on 10 October 2017, in that:

- a) Malta Industrial Parks insist that the Evaluation Board had abided by the Public Procurement Regulations which ensured a Level Playing Field in the Evaluation Process. The Contracting Authority contends that it had rendered sufficient information in its "*Letter of Rejection*" to enable the Appellant to be aware of the reasons of his offer's rejection.**

This Board, after having considered the merits of this case, arrived at the following conclusions:

1. This Board would like to respectfully point out that the objective of this Appeal does not concern GB JV's offer failure of obtaining the Tender Award but rather to investigate whether the Recommended Bidder's offer was technically compliant. In this regard, the Appellant raised the issue of publication of the full Evaluation Report which contains sensitive commercial information and which is not to be published in accordance with the Public Procurement Regulations.

2. With regards to the GB JV's First Grievance, this Board would like to refer to the "*Letter of Rejection*" dated 7 September 2017, whereby the Appellant was informed that his offer was not the cheapest technically compliant. At this particular stage of consideration, it is pertinent to point out that, as all Bidders should be aware of, the Evaluation Procedure entails three phases of assessments, that is, Administrative, Technical and Financial.

In this particular case, it was confirmed that the Appellant's offer was, in fact, administrative and technically compliant but not the cheapest; hence there was another fully compliant offer which was cheaper than that of GB JV. At the same instance, this Board credibly asserts that the reasons given in the "*Letter of Rejection*"

reflected indeed the appropriate end result of the Evaluation Process and in this regard, this Board does not uphold the GB JV's First Grievance.

3. With regards to the Appellant's Second Contention, this Board would like to respectfully refer to the "*General Rules Governing Tenders*", which incidentally form part of the Tender Document, with particular reference to article 19.2 which specifies the following:

"Unsuccessful Bidders shall be notified with the outcome of the Evaluation Process and will be provided with the following information:

(i) The Criteria for Award

(ii) The name of the unsuccessful Tenderer

(iii) The Recommended price of the successful Bidder

(iv) The reasons why the Tenderer did not meet the Technical Specifications/Notification that the offer was not the cheapest;

(v) In case where the award criteria is linked to the “Price Quality Ratio”, the Contracting Authority must inform the economic operator who has submitted an admissible Tender of the characteristics and relative advantages of the selected offer;

(vi) The deadline for filing a notice of Objection;

(vii) The deposit required if lodging an appeal.”

The above dictated information is what Malta Industrial Parks is obliged to submit to all unsuccessful Bidders and such mandatory submissions do not include sensitive commercial information such as the full version of the Evaluation Report which contains data of all the Bidders together with sensitive comments and analysis made by the members of the Evaluation Board.

In this regard, this Board opines that GB JV should have been aware of such rules and conditions, apart from the fact that, as a normal Bidder, he had declared that he will abide by all the conditions laid out in the Tender Document.

At the same instance, this Board justifiably notes that the reason why the Appellant requested such publication was simply to find out if the Recommended Bidder's offer was technically compliant. This Board would like to emphasize the fact that the role of this Board is to review the Evaluation process carried in the award of this Tender and not to dispute the Technical Compliance of the Recommended Bidder's offer.

In this regard, this Board justifiably point out that GB JV did not provide justifiable proof or evidence that the Preferred Bidder's offer was not technically compliant. If such doubt or suspicion was substantiated, this Board would have taken the responsibility to investigate further into the technical assessment of this Tender, however, this Board is comfortably convinced that the Evaluation Board has carried out its duties in a fair, just and transparent manner and in this regard, this Board does not uphold the Appellant's Second Grievance.

- 4. On a general note, this Board must express its disappointment in that, it is being addressed with Appeals which include allegations and suspicions regarding the Evaluation process without justifiable evidence or proof which substantiates the same.**

This Board is also being addressed with frivolous cases wherein the contents therein could have been solved prior to the closing date of the Tender, whilst the Public Procurement Regulations provide remedies for such cases which are not being availed of by the Bidders.

In view of the above, this Board finds against GB JV, confirms the decision taken by the Evaluation Board and recommends that the deposit paid by the Appellants should not be refunded.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

31 October 2017