

PUBLIC CONTRACTS REVIEW BOARD

Case 1979 – SPD6/2023/070 – Services - Framework Contract for the Provision of Waste Collection Services using Environmentally Friendly Transportation Services

2nd April 2024

The Board,

Having noted the letter of objection filed by Dr Adrian Mallia on behalf of Michael Kyprianou Advocates acting for and on behalf of Galea Cleaning Solutions JV, (hereinafter referred to as the appellant) filed on the 22nd February 2024;

Having also noted the letter of reply filed by Dr Veronique Dalli and Dr Andrew Saliba on behalf of Dalli Advocates acting for and on behalf of Transport Malta (hereinafter referred to as the Contracting Authority) filed on the 4th March 2024;

Having also noted the letter of reply filed by Dr Elizabeth Gaerty on behalf of EG Legal acting for and on behalf of Green Skips Limited (hereinafter referred to as the Preferred Bidder) filed on the 1st March 2024;

Having heard and evaluated the testimony of the witness Mr Kevin Brincat (Chairperson of the Evaluation Committee) as summoned by Dr Andrew Saliba acting for Transport Malta;

Having heard and evaluated the testimony of the witness Mrs Mary Gaerty (Representative of Green Skips Limited) as summoned by Dr Elizabeth Gaerty acting for Green Skips Limited;

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by representatives of the parties;

Having noted and evaluated the minutes of the Board sitting of the 25th March 2024 hereunder-reproduced.

Minutes

Case 1979 – SPD 6/2023/070 – Services – Framework Contract for the Provision of Waste Collection Services using Environmentally Friendly Transportation Services

The tender was issued in on the 10th November 2023 and the closing date was the 11th December 2023.

The estimated value of this tender, excluding VAT, was € 193,320.

On the 22nd February 2024 Galea Cleaning Solutions JV filed an appeal against Transport Malta objecting to their disqualification on the grounds that their bid was not the cheapest offer satisfying the administrative and technical criteria.

A deposit of € 967 was paid.

There were five bids.

On the 25th March 2024 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Ms Stephanie Scicluna Laiviera as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Galea Cleaning Solutions JV

Dr Adrian Mallia	Legal Representative
Ms Diane Dimech	Representative

Contracting Authority – Transport Malta

Dr Andrew Saliba	Legal Representative
Mr Kevin Brincat	Chairperson Evaluation Committee
Mr Ivan Schembri	Secretary Evaluation Committee
Mr Chris Bonaci	Evaluator
Mr Johan Camilleri	Evaluator
Mr Domenic Vella	Evaluator (Online)
Mr Larson Pisani	Representative
Mr Ian Minuti	Representative

Preferred Bidder – Green Skips Ltd

Dr Elizabeth Gaerty	Legal Representative
Mrs Mary Gaerty	Legal Representative

Department of Contracts

Dr Mark Anthony Debono	Legal Representative
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Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Andrew Saliba Legal Representative for Transport Malta said that the Contracting Authority concedes that there was shortcomings in the evaluation and that the declaration of the vehicle does not meet the parameters of the tender

Dr Elizabeth Gaerty Legal Representative for the Green Skips Ltd, the preferred bidder, said that the tonnage of the vehicle offered does meet the tender requirements, to which Dr Saliba replied that one of the vehicles offered showed a tonnage over the 10% allowed in the tender.

Dr Mallia Legal Representative for the Appellant said that in the circumstances the Board should meet Appellant’s request to have the tender re-evaluated.

Dr Gaerty said that the preferred bidder does not have to prove its case and in seeking a re-evaluation it is the Authority that has to prove its case.

Dr Saliba said that a vehicle of 26 tons weight had been offered when a 16 ton was requested as will be shown by a witness.

Mr Kevin Brincat (194972M) Chairperson of the Evaluation Committee called to testify by the Contracting Authority stated on oath that vehicle GRN 025 showed a gross weight of 26,000 kgs in lieu of the 16,000 kgs requested. Both vehicles offered were in fact not compliant.

In reply to a question from Dr Gaerty witness said that the gross weight tonnage is the maximum permissible laden weight.

Dr Mallia asked that it be recorded that the Appellant was entitled to copies of any documents exhibited by the Authority.

Mrs Mary Gaerty (655752M) called to testify by the preferred bidder stated on oath that the vehicles submitted in the tender were offered according to the work required with small vehicles limited to areas where there are restrictions and vehicle with the highest weight offered otherwise so as to limit the amount of journeys giving economic and environmental benefits. Vehicle offered is the maximum that can be used as 10 tons is the maximum that can be loaded. The vehicles offered are within the tender requirements. The areas to be serviced have been checked and the vehicles fit these requirements. It is the service that is relevant in this tender not the size of the vehicle.

The Chairman pointed out that the specifications are what they are and the Authority has the right to opt for what they require and if these were not acceptable they was always a remedy. The tender terms are not in contest. He then asked witness what section of the tender was GRN 025 meant to fulfill to which she replied that this vehicle will be used only to collect bins.

This concluded the testimonies.

Dr Mallia said that Appellant was satisfied that the first point of his objection letter had been dealt with. The Authority themselves had indicated on two occasions that they have doubts about the declaration and therefore for peace of mind there should be a re-evaluation by a different committee.

Dr Saliba said that the Authority accepts that the bigger vehicle might not make a difference but the tender lays down certain specifications and these cannot be ignored or not followed.

Dr Gaerty said that the tender was not clear but if the Board feels that clarity is required the preferred bidder does not object to a re-evaluation. Since the tender is faulty cancellation might be considered.

Dr Mallia pointed out that the Board cannot order the cancellation of a tender – if the preferred bidder felt that the tender was not clear they had the option of challenging it at the time.

There being no further submissions the Chairman thanked the parties and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 25th March 2024.

Having noted the objection filed by Galea Cleaning Solutions JV (hereinafter referred to as the Appellant) on 22nd February 2024, refers to the claims made by the same Appellant with regard to the tender of reference SPD6/2023/070 listed as case No. 1979 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Adrian Mallia
Appearing for the Contracting Authority: Dr Andrew Saliba
Appearing for the Preferred Bidder: Dr Elizabeth Gaerty

Whereby, the Appellant contends that:

a) ***First Grievance Transparency and Right to an Effective Remedy not ensured -***

It should be beyond contention that contracting authorities must administer procurement processes transparently. Participants in a bidding process can only fully exercise their right to an effective remedy if contracting authorities act transparently. Acting transparently means providing sufficient information to an unsuccessful bidder to allow such a bidder to assess whether the decision taken by the Contracting Authority is unlawful and, therefore, subject to challenge. The Appellant's contention is that the Contracting Authority has failed to act transparently and has therefore fatally undermined the Appellant's ability to exercise an effective remedy. The Appellant's request for information from the Contracting Authority has a solid statutory basis, as well as foundations firmly rooted in recent jurisprudence of the European Courts.

The Contracting Authority has failed to comply with its obligations at law. It should be amply clear that the vehicles submitted by the winning bidder do not constitute confidential information or a trade secret. Indeed, in the event that a contract is eventually concluded with the winning bidder, and service provision is commenced, the vehicles used for the provision of the services will be public knowledge, in so far as they will be utilised by the winning bidder on public roads to provide the service. On this basis alone, it is clear that the Contracting Authority has infringed the law by refusing to provide the information requested.

b) ***Second Grievance: The Successful Bidder's submission was incorrectly evaluated -***

The Tender Document required bidders, inter alia, to provide: "*For the collection of bins on wheels, two (2) refuse collection vehicles are being required, one (1) with a gross weight tonnage of 6 tons (10% +/-) and another one (1) with a gross weight tonnage of 16 tons (10% +/-) respectively, Euro 6 certified, capable of uplifting the applicable bins on wheels a maximum of 2 meters and have a twin pack compartments. Certified vehicle documents are to be presented to the Contracting Authority upon request.*" As is stated above, the Appellant has requested information from the Contracting Authority in order to be able to objectively confirm what was offered by the successful bidder, however this request was refused. This notwithstanding,

the Appellant believes that the successful bidder does not own service vehicles with the specifications set forth in the Tender Document as specified above. The Appellant has been unable to confirm this objectively as a result of the Contracting Authority's unjustified refusal to disclose information requested by the Appellant. On this basis, it would appear that the Contracting Authority has incorrectly evaluated the successful bidder's submission, since a failure to offer a service vehicle with the specifications requested ought to have resulted in the disqualification of the successful bidder.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 4th March 2024 and its verbal submission during the hearing held on 25th March 2024, in that:

- a) The Contracting Authority acknowledges the points raised by the appellant concerning the transparency of the procurement process and the evaluation of the bids. It further recognises the significance of ensuring a fair and transparent tendering process, which is fundamental to maintaining the integrity and trust in public procurement systems. However, it contests the appellant's assertion that the Contracting Authority has acted in a non-transparent manner.
- b) On the matter of the evaluation of the preferred bidder's submission, the Contracting Authority submits that while the Tender Evaluation Committee acting entirely in good faith in its initial determination, upon a thorough internal review, it has concluded that the best way forward in the circumstances is for it to carry out a re-evaluation of all the bids received from all economic operators in the tender.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 1st March 2024 and its verbal submission during the hearing held on 25th March 2024, in that:

- a) The statement that the Objector has erroneously evaluated the bid on the grounds that the preferred bidder does not own vehicles capable to provide service as indicated in the tender specifications has provided no basis or proof of this statement.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties including the testimony of the witnesses duly summoned, will now consider Appellant's grievances.

- a) ***First Grievance Transparency and Right to an Effective Remedy not ensured -***
Reference is made to the minutes whereby the legal representative of the appellant confirmed that it was satisfied that the first point of its objection had been dealt with. Therefore, with reference to this specific grievance, no further decision is required to be made by this Board.

- b) ***Second Grievance: The Successful Bidder's submission was incorrectly evaluated –***
- i. Of specific relevance to this grievance is page 5 of the tender dossier where it is stated that *“For collection of bins on wheels, two (2) refuse collection vehicles are being required, one (1) with a gross weight tonnage of 6 tons (10% +/-) and another one (1) with a gross weight tonnage of 16 tons (10% +/-) respectively. Euro 6 certified, capable of uplifting the applicable bins on wheels a maximum of 2 metres and have a twin pack compartments.”*
 - ii. It is therefore unambiguous that in relation to the ‘16 tons’ vehicle the respective gross weight tonnage should be in the range of 16 tons (10% +/-), i.e. 14.4 tonnes to 17.6 tonnes.
 - iii. In view of the serious doubts raised by the Contracting Authority, this Board cannot but order the re-evaluation of bids received.
 - iv. This Board points out that a cardinal principle to be observed in evaluating bids of public procurement is the principle of self-limitation, which imposes on evaluators the obligation to assess bids only against the specifications as listed in the tender dossier.

The Board,

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) To uphold the Appellant’s second grievance;
- b) To cancel the ‘Notice of Award’ letter dated 13th February 2024;
- c) To cancel the Letter of Rejection dated 13th February 2024 sent to Galea Cleaning Solutions JV;
- d) To order the contracting authority to re-evaluate the bids submitted in this tender procedure;
- e) After taking all due consideration of the circumstances and outcome of this Letter of Objection, directs that the deposit be refunded to the Appellant.

Mr Kenneth Swain
Chairman

Mr Lawrence Ancilleri
Member

Ms Stephanie Scicluna Laiviera
Member