

PUBLIC CONTRACTS APPEALS BOARD

Case No. 227

P.L.C. OWC/07/10

Tender for the Collection of Organic Waste

This call for tenders was published in the Government Gazette on 23rd March 2010. The closing date for this call for offers was 14th May 2010.

The estimated value of this tender was Euro 212,000 (exclusive of VAT).

Five (5) tenderers submitted their offers.

Mr Clifford Agius filed an objection on the 14th June 2010 following the decision taken by the Pietá Local Council to (i) reject his offer because he failed to submit a true copy of the original offer as stipulated in clause 2.2 of the tender document and (ii) award the tender to SRF Cleaning Services.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Carmel J Esposito as members convened a public hearing on Monday, 4 October 2010 to discuss this objection.

Present for the hearing were:

Mr Clifford Agius

Dr Martin Fenech
Mr Clifford Agius

Legal Representative
Representative

SRF Cleaning Services

Dr John Gauci
Dr Stefano Filletti
Mr Steve Farrigia
Mr Joseph Attard

Legal Representative
Legal Representative
Representative
Representative

Pietá Local Council

Dr Francesco Depasquale
Mr Joseph Saliba

Legal Representative
Executive Secretary

Adjudicating Board

Mr M Seychell
Mr C. Mallia

Chairman
Technical Adviser

Department of Contracts

Mr Francis Attard

Director General (Contracts)

After the Chairman's brief introduction as to how the hearing was going to be conducted, the appellant's representative was invited to explain the motives of the objection.

Dr Martin Fenech, legal representative of Mr Clifford Agius, the appellant, explained that, by way of letter dated 8th June 2010, his client was informed that the Pietá Local Council, acting on the recommendation of the adjudicating board, had disqualified his offer because he failed to enclose a true copy of the original tender document as stipulated in clause 2.2 of the tender document.

Dr Fenech claimed that his client had been awarded this tender for the previous 12 years and that he had submitted the cheapest tender and within the required time limit. The appellant's legal representative admitted that the only shortcoming on the part of this client was that, through an oversight, he did not enclose a copy of the original tender submission adding that that was a new requirement in the tendering procedure. Albeit conceding that the submission of a true copy of the tender submission was requested in the tender dossier, yet, Dr Fenech contended that this omission did neither put the other tenderers at any disadvantage nor did it influence the tendering process or the price offered and, as a result, the contracting authority should not disqualify his client on such trivial grounds and, at the same, limiting competition especially since he was the cheapest bidder.

Dr Francesco Depasquale, legal representative of the Pietá Local Council, noted that the appellant had conceded that he did not submit the copy of this tender submission and pointed out that the tender conditions were quite clear so much so that Clause 2.2 of the tender document stated, among other things, that:

“Each offer must contain one original, clearly marked as ‘original’, and one copy, marked ‘Copy’. Failure to respect these requirements will result in the rejection of the tender.”

Dr Depasquale remarked that this requirement was meant for a very precise purpose, namely, that the original submission would be kept intact, whereas, the copy would be handed over to the adjudicating board to carry out its evaluation. Dr Depasquale stressed that the tenderer had to furnish the copy of his submission because he would be responsible for its contents. He argued that it was not up to the contracting authority to produce a copy otherwise the contracting authority would be held responsible if any omissions or additions were discovered between the original and the copy.

The contracting authority's legal representative stated that since the appellant's tender was found to be administratively non-compliant, the adjudicating board did not and could not go into the technical and financial aspects of that tender.

Dr Depasquale refused the claim that it was the first time that the appellant was dealing with such a tender document because this tender was being issued for the second time because the first tender had been cancelled since all tenderers, including the appellant, were found to be non-compliant.

Dr John Gauci, legal representative of SRF Cleaning Services – the recommended tenderer – endorsed the arguments put forward by Dr Depasquale. Dr Gauci pointed out that, whenever an appellant admitted before the PCAB that he had contravened the tender conditions, he was disqualified outright. At this point he made reference to PCAB Case No. 82.

Dr Gauci remarked that, as far as he was aware, this was the first time that the appellant was submitting a tender for this service or, better still, the second time since this tender had to be re-issued once none of the bidders had been found administratively compliant. He proceeded by stating that the recommended tenderer's legal representative pointed out that the appellant did in fact submit a copy of his submission in the original call for tenders and, as a consequence, he could not claim ignorance.

SRF Cleaning Services's legal representative then referred to the last paragraph of clause 2.3 'Administrative Criteria' which provided that:

“Only those tenders that fulfil all the above administrative criteria will proceed for the evaluation criteria.”

Dr Gauci stressed that the submission by the tenderer of a copy of his original offer was mandatory and the purpose of that requirement was that in case the tenderer would challenge the adjudicating board that he had in fact furnished all the documentation then that controversy could be sorted out by the opening of the original submission.

Dr Fenech reiterated that, whilst his client admitted his mistake, yet he contended that that genuine oversight did not, in any way, prejudice the tendering process or affect the substance of the tender submission or the outcome of the evaluation. He concluded that his client ought to be asked to furnish a copy of the submission and be reinstated in the tendering process.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated 14 June 2010 and also through their verbal submissions presented during the public hearing held on 4 October 2010 had objected to the decision taken by the General Contracts Committee;
- having taken particular note of the appellant's (a) reference to the fact that he was informed that the Pietá Local Council, acting on the recommendation of the adjudicating board, had disqualified his offer because he failed to enclose a true copy of the original tender document as stipulated in clause 2.2 of the tender document, (b) admission that albeit, through an oversight, he did not enclose a copy of the original tender submission which was mandatory, yet no one could argue against the fact that such omission did neither put the other tenderers at any disadvantage nor did it influence the tendering process or the

price offered and (c) plea to be allowed to furnish a copy of the submission and be reinstated in the tendering process;

- having also taken note of the contracting authority's (a) remark relating to the fact that the tender conditions were quite clear so much so that Clause 2.2 of the tender document stated, among other things, that each "offer must contain one original, clearly marked as 'original', and one copy, marked 'Copy'" and that failure by anyone "to respect these requirements will result in the rejection of the tender.", (b) reference to the fact that this requirement was meant for a very precise purpose, namely, that the original submission would be kept intact, whereas, the copy would be handed over to the adjudicating board to carry out its evaluation, (c) observation relating to the fact that it was not up to the contracting authority to produce a copy of the submission as, otherwise, the contracting authority would be held responsible if any omissions or additions were discovered between the original and the copy and (d) refusal of the claim made by the appellant that it was the first time that the appellant was dealing with such a tender document because this tender was being issued for the second time in view of the fact that the first tender had been cancelled since all tenderers, including the appellant, were found to be non-compliant;
- having taken cognizance of Dr Gauci's (a) reference to the fact that, whenever an appellant admitted before the PCAB that he had contravened the tender conditions, he was disqualified outright making reference to PCAB Case No. 82, (b) remark that, as far as he was aware, this was the first time that the appellant was submitting a tender for this service or, better still, the second time since this tender had to be re-issued once none of the bidders had been found administratively compliant, (c) reference to the fact that the appellant did in fact submit a copy of his submission in the original call for tenders and, as a consequence, he could not claim ignorance and (d) reference to the fact that the submission by the tenderer of a copy of his original offer was mandatory

reached the following conclusions, namely:

1. The PCAB opines that the appellant may have acted in good faith but the fact of the matter remains that he did not submit a document – a true copy of the original - which was mandatory.
2. The PCAB feels that the specifications, terms and conditions of the tender document were clear enough and that the penalty for the said conditions not being observed was stated in an unequivocal manner, namely failure by anyone "to respect these requirements will result in the rejection of the tender".
3. The PCAB considers the request made by appellant to be allowed to submit a true copy of the original tender document at this point as unacceptable

As a consequence of (1) to (3) above this Board finds against the appellant Company.

In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the said appellants should not be reimbursed.

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmel J Esposito
Member

25 October 2010