

PUBLIC CONTRACTS APPEALS BOARD

Case No. 288

KLM 02/2010

Tender for the Collection of Mixed Household Waste – Mosta Local Council

This call for tenders was published in the Government Gazette on 17th May 2011. The closing date for this call was 14th July 2011.

Three (3) tenderers submitted their offers.

Northern Cleaning Group Ltd filed an objection on 8 November 2010 against the decision by the Mosta Local Council to recommend tender award to Mr Wilson Mifsud as the cheapest compliant tenderer.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman, Mr. Edwin Muscat and Mr Carmel Esposito as members convened a public hearing on Wednesday, 11th May 2011 to discuss this objection.

Present for the hearing were:

Northern Cleaning Group Ltd

| | |
|---------------------|---------------------------|
| Dr Arthur Azzopardi | Legal Representative |
| Mr Victor Mizzi | Representative |
| Mr Kevin Farrugia | Representative |
| Mr Brian Borg | Representative-Accountant |

Mr Wilson Mifsud

| | |
|-------------------|----------------------|
| Dr John Bonello | Legal Representative |
| Mr Wilson Mifsud | Representative |
| Mr Joseph Cremona | Representative |

Mosta Local Council

| | |
|--------------------|------------------------------|
| Dr Joe Mifsud | Legal Representative |
| Perit Alfred Grech | Adviser to the Local Council |

Evaluation Board:

| | |
|--------------------------|----------|
| Dr Paul Chetcuti Caruana | Chairman |
| Mr Noel Cini | Member |
| Mr Mario Sammut | Member |

After the Chairman’s brief introduction, the appellant company was invited to explain the motives of its objection.

Dr Arthur Azzopardi, legal representative of Northern Ltd, the appellant company, explained his client’s objection as follows:

- i. the evaluation board had based its assessment of the bids on the report drawn up by Architect Alfred Grech, adviser to the Mosta Local Council;
- ii. all the members of the evaluation board were council members except for one, Mr Joe Cristina, and he questioned this exception;
- iii. it was crucial to examine the way points were awarded because the difference in the points awarded to the recommended tenderer and to his client was a mere 0.16 of a point (52.40 against 52.24);

iv. *Experience*

Article 2.3 under ‘Administrative Criteria’, (page 32) the tender document, indicated that, ‘preferably’, the bidder was expected to have 5 years relevant experience but the awarded tenderer had only 3 years experience having been awarded the first contract in 2007 whereas his client had executed such contracts for the previous 20 years;

v. *Sub-contracting*

Article 16 of the tender document (page 37), among other things, stated that:

“The selected tenderer must intend to carry out the major part of the services itself. The total value of the sub-contracted part of the services must not exceed 40% of the contract value and the sub-contractor must not sub-contract further”

The recommended tenderer had registered in his company’s name with Transport Malta 3 refuse disposal trucks but the company submitted 7 log books for 7 refuse disposal trucks which meant that 4 out of 7 trucks did not belong to his company which, in turn, meant that 57% of the contract was going to be sub-contracted in breach of the subcontracting provision which should have led to his company’s disqualification;

vi. *Prices*

| | <u>per week prices i.r.o Northern Cleaning</u> | | |
|--|--|------------------------------------|-------------|
| | <u>Mr Grech’s Table 4*</u> | <u>Northern Cleaning quote</u> | |
| | € | 1 & 2yr € | 3& 4yr € |
| Rate for kerb-side collection (Ghallis landfill) | 14,068 | 2,975** | 3,040 |
| Rate for kerb-side collection (Sant Antnin) | 14,468 | 3,060 | 3089 |

*Mr Alred Grech's report dated 18th October 2010 last page table 4 'Financial Criteria'.
** €525 x3 + €700 x2 = €2975 and so forth (page 52 of appellant's tender submission)

Mr Grech's workings in this regard were questionable in view of the wide variation and given that, according to the award criteria, 40% of the points concerned the price whereas 60% concerned technical compliance;

vii. *Human Resources*

Table 3 in the last page of Mr Grech's Report of 18th October 2010

| | <u>Out of 15 points</u> |
|--|-------------------------|
| Northern Cleaning for 15 full-time employees (pg 2) awarded | 15 points |
| Mr Wilson Mifsud for 4 employees (pg 4) awarded | 12 points |

For 15 employees Northern Cleaning was awarded 15 points and, if one were to apply the same proportion, then, for 4 employees, Mr Wilson Mifsud ought to have been awarded 4 points and not 12 points.

One had also to note that the collection of waste at Mosta, a rather extensive area, had to commence at 6pm; the Sant Antnin Centre operated up to 9:30 pm; it was possible to service this locality with 3 trucks but it was not possible to operate 3 trucks with 4 employees when each truck had to be operated with at least 2 employees, the driver and the collector, albeit 3 persons would be far better.

viii. *Vehicles*

According to the award criteria, the points with regard to Euro compliance of vehicles were to be allocated as follows: Euro 1 - 1 point; Euro 2 - 5 points; Euro 3 - 10 points; and Euro 4 - 20 points.

Dr Azzopardi client had 3 vehicles Euro 1; 3 vehicles Euro 2; 2 vehicles Euro 3 and according to the table was allocated 38 actual points which translated themselves into the award of 17 points for tender evaluation purposes.

The appellant company's legal advisor contended that Mr Mifsud was allocated points for the 3 vehicles registered in his name and also for the other 4 vehicles which were not in his company's name, i.e. 41 actual points which translated themselves into the award of the maximum 20 points for tender evaluation purposes. He contended that points should have been awarded only for the 3 vehicles registered in his company's name, however, even if one were to include them all, if one were to use the same calculation, if 41 actual points = 20 awarded points, then, 37 actual points = 18.5 awarded points and the difference of 1.5 points would have sufficed for his client to

win the tender.

ix. *Service Free of Charge*

No mention was made in the evaluation process and, as a consequence, no points were allocated to the fact that his client had offered the first 10 bins free of charge.

x. *Conclusion*

In view of the above, during the evaluation process, Northern Cleaning should have been awarded more points that would have neutralized by far the 0.16 point difference that resulted from the workings of the evaluation board.

Architect Alfred Grech, adviser to the Mosta Local Council, under oath, gave the following evidence:-

i. *Report*

He had compiled the report together with all the workings therein, following which he made a presentation on his report to the local council but, at the end of it all, it was the evaluation board, of which he was not a member, that, effectively, awarded the points.

ii. *Prices*

The figures of €14,068 and €14,468 quoted by the appellant company from the first 2 lines of Table 4 'Financial Criteria', in fact, covered 4 weeks, namely one week for each of the 4-year contract period and, as a result, in order to extract the average per week one had to divide those figures by 4.

At that stage the Chairman Public Contracts Appeals Board worked out the recommended value of the contract over the four year period as follows:

| |
|------------------|
| € |
| 290,940 |
| 295,880 |
| 301,600 |
| <u>306,800</u> |
| <u>1,195,220</u> |

iii. *Human resources*

On being awarded the contract the tenderer was free to employ more refuse collection workers, but, when Mr Grech was pressed to comment on the points awarded to human resources, he insisted that he was not the one who decided on the allocation of points;

and

iv. *Vehicles*

The recommended tenderer had submitted with his tender the log books of 7 refuse disposal vehicles as indicated in a report dated 30th November 2010, i.e.

| <i>Reg. No</i> | <i>Make</i> | <i>Type</i> | |
|----------------|------------------------|--|-------------------------------|
| <i>EBN983</i> | <i>Mitsubishi</i> | <i>Canter Refuse Disposal</i> | <i>]</i> |
| <i>EBP505</i> | <i>Seddon Atkinson</i> | <i>260 Refuse Disposal</i> | <i>]</i> |
| <i>CBT284</i> | <i>Dennis</i> | <i>Elite Refuse Disposal</i> | <i>]</i> |
| <i>DBR824</i> | <i>DAF</i> | <i>Refuse Disposal</i> | <i>]</i> <i>Wilson Mifsud</i> |
| <i>DEN173</i> | <i>Dennis</i> | <i>Elite Refuse Disposal</i> | <i>]</i> |
| <i>FAI147</i> | <i>Seddon Atkinson</i> | <i>Refuse Disposal</i> | <i>]</i> |
| <i>HED501</i> | <i>Isuzu</i> | <i>Refuse Disposal – Rocco Mifsud but same address</i> | |

When his attention was drawn to the fact that, according to information furnished by Transport Malta, the vehicles registered in the name of Mr Wilson Mifsud, as on 14 July 2010, consisted of 3 refuse disposal vehicles; 2 trucks; 1 road sweeper; 1 van Pajero; and 1 street cleaner, Mr Grech declared that he did not carry out his exercise on the data shown on letter by Transport Malta but on the documentation presented in the tender submission.

Dr Paul Chetcuti Caruana, Mayor and Chairman of the Evaluation Board, under oath, gave the following evidence:-

- a) Architect Alfred Grech was engaged by the Mosta Local Council to assist in the evaluation of this tender in the sense that he drew up his report which he then presented to the Council and, eventually, the evaluation board adjudicated the tender on the findings of Mr Grech and according to the award criteria set out in the tender document;
- b) the Mosta Local Council was empowered to appoint experts/consultants through the established procedure to assist the Council in carrying out its responsibilities, as was the case of Mr Joe Cristina, an ex-banker, who sat on the evaluation board;
- c) he had skimmed through the tender document but he did not examine it thoroughly because he was not an expert in the sector, he did not have the time and that task was assigned to experts, in this case Architect Alfred Grech, who was engaged for the purpose;
- d) with regards to *human resources*, the Council's Mayor stated that the incumbent refuse collection contractor at Mosta was the appellant and, from what he noted on the ground, he reckoned that 4 persons, and in certain instances even less, were detailed by the contractor on this waste collection contract and that, in a way, explained the award of 15 points to Northern Cleaning for having 15 full-time employees and the award of 13

points to Mr Wilson Mifsud for having 4 employees. He argued that, in this aspect of the tender, the points did not have to be awarded in the method indicated by the appellant. He also assumed that the recommended tenderer could rely on other workers that he had working on other contracts;

- e) referring to *default notices*, Dr Chetcuti Caruana argued that he often received complaints about shortcomings in the service delivered by the current contractor, the appellant, but since, individually, these amounted to minor shortcomings he preferred to give the contractor a second chance to rectify matters – often acting through Mr Paul Agius, councilor in charge of waste collection services. That explained why, the Mosta Local Council continued, in spite of the shortcomings, no default notices were issued to Northern Cleaning and hence no points were deducted but full marks were given to all three participating tenderers;
- f) the council had voted 8 in favour and 2 against the award of the tender to Mr Wilson Mifsud.

The Chairman Public Contracts Appeals Board remarked that benchmarks were set in the tender document so as to evaluate the submissions on objective and uniform criteria. He added that the evaluation exercise had to be carried out on documentation and objective criteria and not on hunches and emotions.

In reply to questions put forward by Dr John Bonello, legal representative of the recommended tenderer, Dr Chetcuti Caruana stated that:

- i. as far as he was aware, Northern Cleaning Group Ltd had two current cleaning contracts and his impression was that the 15 employees included in its tender submission referred to the employees working on current contracts and not that 15 employees were going to be detailed specifically on the Mosta contract;
- ii. Northern Cleaning Group Ltd had been carrying out waste collection at Mosta at least for the four 4 years that he had been serving as mayor but, probably, even before that too; and
- iii. he could not recall the exact number of trucks that Northern Cleaning Group Ltd deployed on its current Mosta contract but he reckoned that, most probably, there were two trucks.

At this point Dr Bonello made the following remarks:

i. Experience

Although this was not a mandatory issue - it was a 'preference' - it was one of the key points raised in the appellant company's objection. Contrary to what had been submitted, Northern Cleaning Group Ltd was a relatively new company which had been set up for one and half years and, as a consequence, with a limited track record.

Although its four shareholders had previous experience in this sector, in this case that experience was irrelevant for adjudication since the tender document did not request the submission of the CVs of the key persons for evaluation purposes.

Mr Wilson Mifsud, his client, was not a limited liability company but a sole trader and his experience in this line of work covered a number of years – as a matter of fact the Rabat Local Council certified that it had contracted his services for 7 years.

ii. Vehicles

When Transport Malta was asked to provide details of the vehicles registered with his client one would have expected Transport Malta to submit the same vehicle details with regard to the appellant. He added that the number of vehicles presented by a tenderer had to be considered also in the light of the number of contracts that were being executed by the contractor.

iii. Subcontracting

His client did not mention subcontracting in his tender submission but that issue was unjustly raised by the appellant company. Dr Bonello stated that, on being awarded the contract, the successful tenderer could acquire more trucks in the same way that he could engage additional workers on refuse collection.

The Chairman Public Contracts Appeals Board explained that, since the Transport Malta representatives could not attend the hearing as they had to attend various court hearings, the Public Contracts Appeals Board requested information in writing from the Chief Officer of the Land Transport Directorate as to the vehicles registered in the name of Mr Wilson Mifsud as on the 14th July 2010, the closing date of the tender. The Chairman Public Contracts Appeals Board remarked that the evaluating board should adjudicate the tenderer on the resources that one could allocate to the tender under adjudication whereas the other assets should serve to demonstrate one's track record and experience.

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 8 November 2010 and also through their verbal submissions presented during the hearing held on 11th May 2011, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant company's representatives' claims and observations, particularly, the references made to the fact that (a) the evaluation board had based its assessment of the bids on the report drawn up by Architect Alfred Grech, adviser to the Mosta Local Council, (b) all the members of the evaluation board were council members except for one, Mr Joe Cristina, and he questioned this exception, (c) it was crucial to

examine the way points were awarded because the difference in the points awarded to the recommended tenderer and to his client was a mere 0.16 of a point (52.40 against 52.24), (d) whilst Article 2.3 under 'Administrative Criteria', (page 32) the tender document, indicated that, 'preferably', the bidder was expected to have 5 years relevant experience but the awarded tenderer had only 3 years experience having been awarded the first contract in 2007 whereas the appellant company had executed such contracts for the previous 20 years, (e) the recommended tenderer had registered in his company's name with Transport Malta 3 refuse disposal trucks but the company submitted 7 log books for 7 refuse disposal trucks which meant that 4 out of 7 trucks did not belong to his company which, in turn, meant that 57% of the contract was going to be sub-contracted in breach of the subcontracting provision which should have led to his company's disqualification as Article 16 of the tender document (page 37), among other things, stated that the "*total value of the sub-contracted part of the services must not exceed 40% of the contract value and the sub-contractor must not sub-contract further*", (f) Architect's workings with regard to prices were questionable in view of the wide variation, (g) for 15 employees Northern Cleaning was awarded 15 points and, if one were to apply the same proportion, then, for 4 employees, Mr Wilson Mifsud ought to have been awarded 4 points and not 12 points, (h) whilst the appellant company had 3 vehicles Euro 1; 3 vehicles Euro 2; 2 vehicles Euro 3 and according to the table was allocated 38 actual points which translated themselves into the award of 17 points for tender evaluation purposes, the recommended tenderer was allocated points for the 3 vehicles registered in his name and also for the other 4 vehicles which were not in his company's name, i.e. 41 actual points which translated themselves into the award of the maximum 20 points for tender evaluation purposes and, as a consequence, the recommended tenderer should have only been awarded points for the 3 vehicles registered in his company's name, (i) with regard to vehicles, if one were to use the same calculation, if 41 actual points equivalent to a maximum of 20 awarded points, then, 37 actual points would be proportionately equivalent to 18.5 awarded points with the difference of 1.5 points sufficing for the appellant company to win the tender, (j) no mention was made in the evaluation process with regard to service free of charge and, as a consequence, no points were allocated to the fact that the appellant company had offered the first 10 bins free of charge and (k) during the evaluation process, Northern Cleaning should have been awarded more points that would have neutralized by far the 0.16 point difference that resulted from the workings of the evaluation board;

- having considered the contracting authority's representative's reference to the fact that (a) the Mosta Local Council's main consultant, Architect Alfred Grech had compiled the report together with all the workings therein, following which he made a presentation on his report to the local council but, at the end of it all, it was the evaluation board, of which he was not a member, that, effectively, awarded the points, (b) the figures of €14,068 and €14,468 quoted by the appellant company from the first 2 lines of Table 4 'Financial Criteria', in fact, covered 4 weeks, namely one week for each of the 4-year contract period and, as a result, in order to extract the average per week one had to divide those figures by 4, (c) on being awarded the contract the tenderer was free to employ more refuse collection workers, (d) with regard to vehicles the recommended tenderer had submitted with his tender the log books of 7 refuse disposal vehicles as indicated in a report dated 30th November 2010, (e) he had skimmed through the tender document but he did not examine it thoroughly because he was not an expert in the sector, he did not have the time and that

task was assigned to experts, in this case Architect Alfred Grech, who was engaged for the purpose, (f) with regards to *human resources*, the Council's Mayor stated that the incumbent refuse collection contractor at Mosta was the appellant and, from what he noted on the ground, he reckoned that 4 persons, and in certain instances even less, were detailed by the contractor on this waste collection contract and that, in a way, explained the award of 15 points to Northern Cleaning for having 15 full-time employees and the award of 13 points to Mr Wilson Mifsud for having 4 employees, (g) Dr Chetcuti Caruana had assumed that the recommended tenderer could rely on other workers that he had working on other contracts, (h) in view of the fact that shortcomings were considered to be minor, no default notices were issued to Northern Cleaning and hence no points were deducted but full marks were given to all three participating tenderers; the council had voted 8 in favour and 2 against the award of the tender to Mr Wilson Mifsud, (i) as far as Dr Chetcuti Caruana was aware, Northern Cleaning Group Ltd had two current cleaning contracts and his impression was that the 15 employees included in its tender submission referred to the employees working on current contracts and not that 15 employees were going to be detailed specifically on the Mosta contract, (j) Northern Cleaning Group Ltd had been carrying out waste collection at Mosta at least for the four 4 years or more and (k) Dr Chetcuti Caruana could not recall the exact number of trucks that Northern Cleaning Group Ltd deployed on its current Mosta contract but reckoned that, most probably, there were two trucks;

- having taken note of the recommended tenderer's representatives' arguments, particularly, the fact that (a) although experience was not a mandatory issue - it was a 'preference' - it was one of the key points raised in the appellant company's objection and albeit the appellant company's four shareholders had previous experience in this sector, in this case that experience was irrelevant for adjudication since the tender document did not request the submission of the CVs of the key persons for evaluation purposes, (b) the number of vehicles presented by a tenderer had to be considered also in the light of the number of contacts that were being executed by the contractor and (c) on being awarded the contract, the successful tenderer could acquire more trucks in the same way that he could engage additional workers on refuse collection,

reached the following conclusions, namely:

1. The Public Contracts Appeals Board contends that benchmarks were clearly set in the tender document in order to avoid highly subjective conclusions and thus render the entire process of evaluation more transparent and objective based on generally acceptable uniform criteria. This Board observed that the evaluation process under Appeals should have been carried out on document analysis and specific criteria and not based on hunches and emotions.
2. The Public Contracts Appeals Board argues that, during the evaluation process, Northern Cleaning Group Ltd should have been awarded more points and this would have neutralized by far the 0.16 point difference that resulted from the workings of the evaluation board.

In view of the above, this Board finds in favour of the appellant company and, whilst recommending that the said appellant company be reintegrated in the evaluation process, it also recommends that the deposit paid by the latter should be reimbursed.

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmel Esposito
Member

24 May 2011