

PUBLIC CONTRACTS REVIEW BOARD

Case No. 314

Ref: 08/2010

Kercem Local Council – Tender for Mixed Household Waste Collection

This call for tenders was published in the Government Gazette on the 7th December 2010. The closing date for this call with an estimated budget of €71,136 was the 4th January 2011.

Two (2) tenderers submitted their offers.

Mr Nicholas Zammit filed an objection on 28th January 2011 against the decision taken by the Kercem Local Council to disqualify his offer for being administratively non-compliant for the purposes of clause 2.2 of the Specific Conditions of the tender.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr. Carmel Esposito and Mr Joseph Croker as members convened a public hearing on Friday, 20th July 2011 to discuss this objection.

Present for the hearing were:

Mr Nicholas Zammit

Dr Joseph Ellis	Legal Representative
Mr Nicholas Zammit	Representative

Mr Jason George Debrincat

Dr Joshua Grech	Legal Representative
Ms Elizabeth Debrincat	Representative

Kercem Local Council (Kercem LC)

Dr Sara Grima	Legal Adviser
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Evaluation Board:

Ing. Joseph Portelli	Chairperson
Mr Joseph Grima	Member
Mr Saverio Grech	Member
Mr Mario Azzopardi	Member
Ms Marianne Sagona	Secretary

After the Chairman's brief introduction, the appellant was invited to explain the motives of his objection.

Dr Joseph Ellis, legal advisor of Mr Nicholas Zammit, in the first instance complained that his client had to lodge this appeal when he was kept in the dark as to the reason behind his disqualification and he claimed that that was in breach of Reg. 21 (2) of the Public Procurement Regulations. He added that his client had submitted the cheaper tender.

Ing. Joseph Portelli, chairman of the evaluation board, reacted in the following manner, namely by stating that:

- i. the evaluation report was considered an internal document and could not be passed on to third parties;
- ii. the award was to be made to the bidder who submitted the cheapest compliant tender;
- iii. clause 2.2 'Administrative Criteria' stated that "*Prospective bidders are expected to have at least 5 years relevant experience. Every bidder is obliged to provide sufficient documentation to sustain the experience claimed and must provide a minimum of one reference letter*";
- iv. from the appellant's tender submission it resulted that he had not provided proof of relevant experience and, as a result, the evaluation board had no option but to reject his offer; and
- v. on the 25th January 2011 the appellant had been informed that his offer had not been accepted and, later on, on the 18th February 2011, he was furnished with the reason for the rejection.

The Public Contracts Review Board pointed out that the reason for disqualification should have been furnished to the appellant in the letter of rejection and not 24 days later when the bidder had only 5 days within which to lodge his appeal.

Ms Marianne Sagona, executive secretary of the local council and secretary to the evaluation board, remarked that since the local council had not met for the purpose she could not communicate the reason for rejection prior to the Council's instructions to do so.

The Chairman Public Contracts Review Board stated that the contracting authority had to abide by regulations and immediately and formally inform the bidder of the reason for disqualification and, if necessary, the council should have met with the urgency required.

Dr Sara Grima, legal representative of the contracting authority, submitted that:-

- a. the appellant had in fact been verbally informed of the reason for his disqualification so much so that the letter of objection dated 28th January 2011

acknowledged this fact and the contents of the letter itself referred to the reason for rejection; and

- b. the appellant was obliged to present a document of proof of 5 years relevant experience however he submitted experience in street cleaning works which activity was quite different from refuse collection.

Ms Sagona, under oath, gave the following evidence:-

- i. she had been employed as executive secretary of the Kercem Local Council since May 2010;
- ii. acknowledged that on the 23rd November 2010 she had issued a letter of reference to the recommended tenderer, Mr Jason Debrincat at the request of the latter since he was going to submit a tender for refuse collection at the locality of Fontana but, evidently, he also made use of that reference with regard to the 'Kercem' call for tenders. Ms Sagona commented that a reference could be used for various purposes;
- iii. as far as she was aware, during the time that she had been employed with the council there were no major problems with the service rendered by the recommended tenderer and that, whenever his attention was drawn to a complaint, the contractor always took the necessary steps to rectify matters. That was why she attested to the loyal and reliable service of Mr Debrincat;
- iv. she did not require the approval of the council to issue such a factual reference;
- v. in her opinion, the complaints referred to in the Council minutes dated 10th September 2007, 12th May 2008 and 9th September 2008, presented by Dr Ellis, were not of a serious nature but still she preferred that the mayor would answer as, in the days mentioned, she was not employed with the Kercem Local Council; and
- vi. the council did not issue any default notices against the recommended tenderer who had been rendering refuse collection services in Kercem for the previous 5 years or so.

Mr Joseph Grima, mayor and member on the evaluation board, under oath, gave the following evidence:-

- a. he had been serving as mayor of Kercem for 11 years during which period two contractors had been engaged on refuse collection services;
- b. the note entered in the minutes dated 10th September 2007 referred to that instance when he expressed the wish to meet all those connected with public cleansing in Kercem, which, besides Mr Debrincat, included Wasteserv Ltd and three other persons because the council wished to tackle the issue in a holistic manner;

- c. his appeal to the refuse collecting contractor to stick to the agreed times was prompted by the fact that the contractor had informed him that he would like to anticipate the scheduled times by 30 minutes because the dumping site at Qortin closed its doors at 6pm and there were instances when he had to leave his truck loaded overnight. He added that the refuse collection times were, eventually, changed from afternoon to morning following a public consultation exercise;
- d. there was a period of time during which the Local Government Department precluded local councils from entering into new refuse collection contracts until such time that it would have concluded its work on a new standard tender document for use by all local councils;
- e. the note calling on the contractor and his employees to be polite and more tolerant with residents was made at a time when the refuse collection system across the entire Maltese islands was going through major changes due to such issues as waste separation and, as a consequence, contractors had to be a bit more tolerant with residents until they got accustomed to the system;
- f. the council did not have any particular problems with Mr Debrincat and, whenever his attention was drawn to any shortcoming, he had, invariably, taken measures to rectify matters; and
- g. if he were in the shoes of the executive secretary he would have issued a reference letter to Mr Debrincat on the same lines as she did in her letter dated 23rd November 2010.

Dr Ellis remarked that:

- i. in his tender submission his client had mentioned that he was going to make use of the services of a subcontractor but that his client had failed to submit the reference of this subcontractor;
- ii. the reference presented by the recommended tenderer did not specify that the experience covered a 5 year period; and
- iii. lamented that the experience clause was precluding new participants in such tendering procedures and it was thus stifling competition by maintaining the *status quo*

Dr Grima pointed out that (a) the recommended tenderer had been rendering these services since 2006 while clause 2.2 included the term 'preferably' with regard to the 5 year period, (b) in the case of the appellant it was not a question of whether it was more or less than 5 years but the issue was that there was no submission whatsoever with regard to experience because the reference presented was not relevant, (c) the 'experience clause' was a standard condition included in all tender documents for the provision of refuse collection services and (d) according to Art. 16 (page 9) of the tender document, the tenderer could not subcontract more than 40% of the works.

The Chairman Public Contracts Review Board made the following comments:-

- a. the regulations provided the tenderer with a pre-tendering remedy if he felt that the tender conditions were, somehow, unfair or discriminatory but once the tenderer accepted the conditions and participated in the process, he could not later on cry foul;
- b. the call for tenders was open to Gozo, Malta and, nowadays, even the EU and that in Gozo alone there were 14 local councils and the recommended tenderer only serviced 2 of them which was indicative that in Gozo there were other operators in this sector but they opted not to take part, and
- c. in his opinion, clause 2.2 at page 2 ought to be reviewed.

Dr Ellis questioned the validity of a reference issued by a local council which reference was then used in his tender submission in connection with a tender issued by the same local council.

Dr Joshua Grech, legal representative of the recommended tenderer, remarked that his client had requested a reference from the Fontana Local Council but the period for the submission of the tender was rather short within which the Fontana Local Council did not meet to give its go ahead to the issue of the reference since that was the procedure followed by this local council. He added that the Fontana Local Council had issued a tender about two months before that issued by the Kercem Local Council and his client had asked Kercem Local Council to provide him with a letter of reference to submit it with his offer in response to the Fontana Local Council call for tenders which reference, admittedly, was also used for the tender under review.

Dr Grima remarked that it clearly emerged that the appellant made no submission with regard to experience as requested in the tender document and hence the evaluating board acted correctly and had no option but to disqualify his offer.

Dr Ellis claimed that the tender procedure should be cancelled because (i) in issuing the reference in favour of the recommended tenderer the executive secretary had overlooked past complaints as shown in the various council minutes presented and (ii) the extract of the evaluation report was not made available to his client within the prescribed time.

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 28th January 2011 and also through their verbal submissions presented during the hearing held on 21st July 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 appellant had to lodge this appeal when he was kept in the dark as to the reason behind his disqualification which was in breach of Reg. 21 (2) of the Public Procurement

Regulations, (b) the appellant had submitted the cheaper tender, (c) in his tender submission his client had mentioned that he was going to make use of the services of a subcontractor but that his client had failed to submit the reference of this subcontractor, (d) the reference presented by the recommended tenderer did not specify that the experience covered a 5 year period, (e) the experience clause was precluding new participants in such tendering procedures and it was thus stifling competition by maintaining the *status quo* and (f) the validity of a reference issued by a local council which reference was then used in his tender submission in connection with a tender issued by the same local council was highly questionable;

- having considered the contracting authority's representative's reference to the fact that (a) the evaluation report was considered an internal document and could not be passed on to third parties, (b) the award was to be made to the bidder who submitted the cheapest compliant tender, (c) from the appellant's tender submission it resulted that he had not provided proof of relevant experience – "*at least 5 years relevant experience*" (clause 2.2 'Administrative Criteria') - and, as a result, the evaluation board had no option but to reject his offer, (d) the appellant was obliged to present a document of proof of 5 years relevant experience however he submitted experience in street cleaning works which activity was quite different from refuse collection, (e) on the 25th January 2011 the appellant had been informed that his offer had not been accepted and, later on, on the 18th February 2011, he was furnished with the reason for the rejection, (f) since the local council had not met for the purpose the executive secretary could not communicate the reason for rejection prior to the Council's instructions to do so but the appellant had, in fact, been verbally informed of the reason for his disqualification so much so that the letter of objection dated 28th January 2011 acknowledged this fact and the contents of the letter itself referred to the reason for rejection, (g) Ms Sagona had, on the 23rd November 2010, issued a letter of reference to the recommended tenderer - she did not require the approval of the council to issue such a factual reference - Mr Jason Debrincat at the request of the latter since he was going to submit a tender for refuse collection at the locality of Fontana but, evidently, he also made use of that reference with regard to the 'Kercem' call for tenders, (h) the council did not issue any default notices against the recommended tenderer who had been rendering refuse collection services in Kercem for the previous 5 years or so, (i) the note entered in the minutes dated 10th September 2007 referred to that instance when the mayor had expressed the wish to meet all those connected with public cleansing in Kercem, which, besides Mr Debrincat, included Wasteserv Ltd and three other persons because the council wished to tackle the issue in a holistic manner, (j) there was a period of time during which the Local Government Department precluded local councils from entering into new refuse collection contracts until such time that it would have concluded its work on a new standard tender document for use by all local councils, (k) the note calling on the contractor and his employees to be polite and more tolerant with residents was made at a time when the refuse collection system across the entire Maltese islands was going through major changes due to such issues as waste separation and, as a consequence, contractors had to be a bit more tolerant with residents until they got accustomed to the system, (l) the council did not have any particular problems with Mr Debrincat and, whenever his attention was drawn to any shortcoming, he had, invariably, taken measures to rectify

matters, (m) the recommended tenderer had been rendering these services since 2006 while clause 2.2 included the term 'preferably' with regard to the 5 year period, (n) in the case of the appellant it was not a question of whether it was more or less than 5 years but the issue was that there was no submission whatsoever with regard to experience because the reference presented was not relevant and (o) according to Art. 16 (page 9) of the tender document, the tenderer could not subcontract more than 40% of the works;

- having considered the recommended tenderer's representative's reference to the fact that (a) the said tenderer had requested a reference from the Fontana Local Council but the period for the submission of the tender was rather short within which the Fontana Local Council did not meet to give its go ahead to the issue of the reference since that was the procedure followed by this local council and (b) the Fontana Local Council had issued a tender about two months before that issued by the Kercem Local Council and the same recommended tenderer had asked Kercem Local Council to provide him with a letter of reference to submit it with his offer in response to the Fontana Local Council call for tenders which reference, admittedly, was also used for the tender under review,

reached the following conclusions, namely:

1. The Public Contracts Review Board opines that an evaluation report is considered an internal document and cannot be passed on in its entirety to third parties. However, this Board acknowledges that an appellant is entitled to receive an extract of salient parts forming part of the final evaluation report albeit limited to comments made by the evaluation board in connection with the submission made by the said appellant's bid.
2. The Public Contracts Review Board feels that the reason for disqualification should have been furnished by the contracting authority to the appellant in the letter of rejection and not 24 days later when the bidder had only 5 days within which to lodge his appeal. Furthermore, this Board also feels that the contracting authority had to abide by regulations and, immediately and formally, inform the bidder of the reason for disqualification and, if necessary, the local council should have met with the urgency required to ensure adherence to legislative timeframes.
3. The Public Contracts Review Board argues that no particular reason has transpired during the hearing to suggest that there was any wrong-doing when, as reflected in one of the minutes of the Council's meetings, the mayor had expressed the wish to meet all those connected with public cleansing in the locality of Kercem, Gozo, which, besides Mr Debrincat, included Wasteserv Ltd and three other persons due to the fact that the council wished to tackle the issue in a holistic manner.
4. The Public Contracts Review Board acknowledges that the fact that a reference given by the contracting authority was used as a supporting document in this tender cannot be considered as one of the best of practices. Nevertheless, this Board establishes that there was nothing in the tender specifications which precluded such reference from being given. Indeed though, this Board

recommends that, in future, changes be made to the effect that references issued by the contracting authority which would have issued the call would be unacceptable for the purposes of the same call.

5. The Public Contracts Review Board feels that there was no particular evidence to corroborate the appellant's position which placed emphasis on the fact that the local council had encountered a few issues with the current service provider, namely Mr Debrincat, the recommended tender in this tender. This Board argues that it is more than acceptable for opposing parties to a contract to, at one stage or another, experience the need to clarify and rectify minor points posing some concern to either party.
6. The Public Contracts Review Board has duly considered the fact that the appellant's own representative has admitted that in his tender submission the appellant had mentioned that he was going to make use of the services of a subcontractor but that the same appellant had failed to submit the reference of this subcontractor.
7. The Public Contracts Review Board contends that, apart from the point that one cannot be oblivious of the fact that the same regulations provided the tenderer with a pre-tendering remedy if such tenderer felt that the tender conditions were, somehow, unfair or discriminatory, yet, it is also true that once a tenderer accepts the conditions and participates in the process, then it is unacceptable for the said tenderer to later on cry foul.
8. The Public Contracts Review Board argues that (a) the call for tenders was open to participants from Gozo and Malta and (b) in Gozo alone there were fourteen local councils and the recommended tenderer only serviced two of them. This Board claims that this is indicative enough that in Gozo there were other operators in this sector who could participate albeit they opted not to take part. This Board concludes that the argument raised by the appellant that the experience clause referred to in the tender document was precluding new participants in the said tendering procedure and it was thus stifling competition by maintaining the *status quo*, is considered by this Board as, substantially unfounded.

In view of the above, this Board finds against the appellant. However, due to the fact that the contracting authority, as required by law, did not give the reason for the appellant's disqualification within the time frame envisaged in the law, prompting the appellant to file an appeal without formally knowing the reason for being disqualified, suggests that the appellant may, possibly, have been misled. As a result, this Board recommends that the deposit paid by the appellant should be reimbursed.

Alfred R Triganza
Chairman

Carmel Esposito
Member

Joe Croker
Member

25th July 2011