

PUBLIC CONTRACTS REVIEW BOARD

Case No. 327

WSM/12/2011; WSM/03/2011

Period Contract for the Provision of Land Surveying Services - WasteServ Malta Ltd Malta Ltd

This call for tenders was published in the Government Gazette on the 14th January 2011. The closing date for this call with an estimated value of € 120,000 (excluding VAT) was the 4th February 2011.

Three (3) tenderers submitted their offers.

Randolph Camilleri Surveys Ltd filed an objection on the 26th April 2011 against the decision of WasteServ Malta Ltd Malta Ltd to discard its offer as non-compliant and to recommend award to GeoMatrix Surveying.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Edwin Muscat and Mr Joseph Croker as members convened a public hearing on Monday, 12th September 2011 to discuss this objection.

Randolph Camilleri Surveys Ltd

Dr Antonio Tufigno	Legal Representative
Ms Michelle Camilleri	Representative

GeoMatrix Surveying

Dr Karl Sammut	Legal Representative
Mr Mark Bugeja	Representative

WaterServ Malta Ltd

Dr Victor Scerri	Legal Representative
Ing. Aurelio Attard	Contracting Executive

Evaluation Board

Perit Ivan Bartolo	Chairman
Perit Robert Grech	Member
Mr Joseph Mifsud	Member

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

Dr Antonio Tufigno, legal representative of Randolph Camilleri Surveys Ltd, the appellant company, stated that his client's objection centred on three issues, namely (a) that no quote had been given in respect of Item 4; (b) submission of professional qualifications and (c) conflict of interest.

A) No Quote Given For Item 4

Dr Tufigno made the following submission:-

- i. WasteServ Malta Ltd had informed his client that the offer it submitted was considered as non-compliant due to *'the fact that for item 4 of the Schedule of Rates you inserted the text 'TBD', namely 'to be discussed or determined'*;
- ii. the contracting authority considered that that was not in line with the instructions given in the tender and in the schedule of rates itself where the tenderer was requested to give specific rates only on the basis requested with no ambiguous information, thus rendering the term 'TBD' as unacceptable as, in the first place, this was not a rate; and
- iii. his client claimed that the company had been assigned this contract for the years 2007 to 2010 and that it had invariably indicated in all its previous tender submissions the term 'TBD' against item 4 which dealt with the surveying and plotting of buildings, claiming that this item could not be priced.

The Chairman Public Contracts Review Board declared that the hearing was concerned with what took place during the tendering process under review and not with what had taken place in similar previous tendering processes. He added that if the tenderer found it difficult to work out and/or to fill in the rate against item 4, the company should have asked for a formal clarification from the contracting authority because one had to appreciate that the evaluation board could not compare the bids like with like if tenderer/s did not submit all the rates requested.

Dr Victor Scerri, legal advisor of WasteServ Malta Ltd, pointed out that the schedule of rates submitted by the appellant was not faithful to the schedule of rates included in the tender document and to clause 2.8.3 of the tender document so much so that, at the end, a new paragraph had been entered which read as follows:

"Rates and prices must be entered against each item in the bill of quantities, or otherwise specifically declared as 'Nil' or 'Included' in writing. The price of any item in the bill of quantities against which no interpretable entry in writing has been made (i.e. either left blank or marked with a dash or other such uninterpretable signs), wilfully or otherwise, shall be deemed to be 'Nil' or 'Included' in other items of the bill of quantities. Requests for correction of such entries during the execution of the contract shall not be entertained."

The Chairman Public Contracts Review Board observed that if the appellant company had left blank the space reserved for the rate in respect of item 4 in the schedule of prices then it would have been interpreted as 'Nil' or included in other items of the bill of quantities but, contrary to what the appellant company's representative was contending, the term 'TBD' was not uninterpretable because it meant 'to be discussed/determined'.

B) Submission of Professional Qualifications

Dr Tufigno remarked that Clause 8.3.1 provided that:

“The Contractor shall hold recognised Land and Quantity Surveying qualifications issued by the Department of Education or the Malta College of Art, Science and Technology (MCAST) or by any other recognised University or Institution and shall preferably be a member of the Royal Institute for Chartered Surveyors.”

Ms Michelle Camilleri, also representing the appellant company, stated that Mr Mark Bugeja, an employee of the recommended tenderer, was an ex-employee of the firm she represented and she knew that he was qualified as a draughtsman which was not the qualification required.

Ing. Aurelio Attard, representing the contracting authority, remarked that the evaluation board was satisfied with the CVs submitted by the recommended tenderer and he noted that clause 8.3.1 stated that the contractor had to hold the qualifications but it did not request the tenderer to actually submit the certificate/s.

When Mr Attard's attention was drawn to the fact that the 'Tender Submission Checklist' of the tender document provided that 'proof of professional qualifications' had to be submitted as failure to do so would render the tender offer null, Mr Attard confirmed that the GeoMatrix Surveying, the recommended tenderer, did not submit proof of qualifications with its tender submission but submitted only the CVs.

Mr Mark Bugeja, representing GeoMatrix Surveying, under oath, gave the following evidence:-

- i. he held a certificate of draughtsman in civil engineering issued in 2001 by Mikilang Sapiano Technical Institute Paolo (presently MCAST) which among the main subjects included 'land surveying' and 'quantity surveying' (*at this point Mr Bugeja tabled the certificate at the hearing*);
- ii. Ms Alison Azzopardi, a part-time employee at GeoMatrix Surveying, possessed qualifications in land and quantity surveying but Mr Bugeja claimed that he did not have the certificate/s with him to present them to the Public Contracts Review Board;
- iii. other employees of GeoMatrix Surveying were Mr Matthew Camilleri and Mr Ryan Agius; and

- iv. when his attention was drawn to the fact that the ‘Tender Submission Checklist’ of the tender document provided that ‘proof of professional qualifications’ had to be submitted as failure to do so would render the tender offer null, Mr Bugeja confirmed that GeoMatrix Surveying did not submit proof of qualifications with its tender submission.

The Public Contracts Review Board instructed Mr Mark Bugeja to, eventually, furnish it with a certified true copy of the certificate/s of Ms Alison Azzopardi.

Ms Camilleri insisted that Mr Bugeja was qualified as a draughtsman and not in land and quantity surveying. She then presented at the hearing the following certificates:-

- a. in the name of Ms Michelle Camilleri: (i) Bachelor of Science in Quantity Surveying and Construction Cost Management issued by The Nottingham Trent University in 2001 and (ii) Land Surveying certificate issued by the Department of Further Studies & Adult Education Floriana in 1998 following an evening course (1995 – 1998);
- b. in the name of Mr Noel Azzopardi: Journeyman’s Certificate as Draughtsman (Civil) issued by the Education Department and the Employment and Training Corporation in 1996; and
- c. in the name of Mr Gordon Zahra – Land Surveying Certificate issued in 2002 by Mikilang Sapiano Technical Institute Paolo (presently MCAST).

C) Conflict of Interest

Ms Camilleri made the following claims:-

- a. Mr Mark Bugeja, the owner of GeoMatrix Surveying, was co-owner of LexarkSurveys with Mr Alex Bonnici who was the son of one of the directors of Bonnici Bros Ltd;
- b. one of the major tasks contemplated in the tender under review involved the calculation of the volume of excavation works carried out by Bonnici Bros. Ltd at Maghtab which calculation formed part of the verification/certification process to issue payments to Bonnici Bros. Ltd;
- c. should the tender be awarded to GeoMatrix Surveying there could be a conflict of interest in terms of clause 9 of the ‘Tenderer’s Declaration(s)’ since Mr Mark Bugeja and Mr Alex Bonnici were business partners in LexarkSurveys and
- d. it could have been the case that LexmarkSurveys had just changed its name to GeoMatrix Surveying (**).

*(**) It is noted that in its ‘Company Profile’ GeoMatrix Surveying highlighted the fact that GeoMatrix Surveying was formerly known as LexarkSurveys.*

With regard to point (d) the Chairman Public Contracts Review Board asked Ms Camilleri to provide proof and not just make allegations.

Dr Tufigno insisted that the recommended tenderer should have declared any, even a potential, conflict of interest, such as, his business connections with Mr Alex Bonnici even for the purposes of clause 9.1 of Article 9 titled ‘Conflict of Interest’ which read as follows:

“The Contractor shall take all necessary measures to prevent or end any situation that could compromise the impartial and objective performance of the Contract. Such conflict of interest could arise in particular as a result of economic interest, political or national affinity, family or emotional ties, or any other relevant connection or shared interest. Any conflict of interests which could arise during performance of the Contract must be notified in writing to the Contracting Authority without delay.”

Ing. Attard pointed out that, for the purposes of clause 9 of the ‘Tenderer’s Declaration’, it was evident in this case that:-

- i. LexarkSurveys was not one of the parties participating in this tendering procedure and that it was not engaged on any other WasteServ Malta Ltd contracts;
- ii. it did not result that GeoMatrix Surveying had any interest in any other bid submitted in connection with this tendering procedure; and
- iii. GoeMatrix Surveying was not proposing key experts or advisers who were engaged in the preparation of the tender.

Ing. Attard added that, on the other hand, the provisions of clause 9.1 titled ‘Conflict of Interest’ referred to by Dr Tufigno mentioned the ‘contractor’ and situations that could arise in the course of the execution of the contract in which case the contracting authority would, upon being notified, take the necessary measures, such as, assigning the particular task to another contractor.

Dr Karl Sammut, legal representative of Geomatrix Surveying, submitted that his client, Mr Mark Bugeja of GeoMatrix Surveying, had no intention to conceal his business connections with Mr Alex Bonnici and went on to state that these two persons have not operated together since 2008.

Dr Tufigno concluded that from the evidence it transpired that the offer made by the recommended tenderer was not compliant and, in the circumstances, he called upon the Public Contracts Review Board to take the appropriate decision/s, such as, the cancellation of the tender.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellant's company, in terms of the reasoned letter of objection of the 26th April 2011, and through the verbal submissions made during the hearing held on the 12th September 2011, had objected against the decision of WasteServ Malta Ltd to discard its offer as non-compliant and to recommend award to GeoMatrix Surveying;
- having noted the appellant firm's representatives claims and observations regarding the fact that (a) the appellant's objection centred on three issues, namely (1) that no quote had been given in respect of Item 4, (2) submission of professional qualifications and (3) conflict of interest, (b) the offer as submitted by the appellant was considered as non-compliant due to *'the fact that for item 4 of the Schedule of Rates'* the said tenderer *'inserted the text 'TBD', namely 'to be discussed or determined'* with the contracting authority claiming that that was not in line with the instructions given in the tender and in the schedule of rates itself where the tenderer was requested to give specific rates only on the basis requested with no ambiguous information, thus rendering the term 'TBD' as unacceptable as, in the first place, this was not a rate, (c) the appellant had been assigned this contract for the years 2007 to 2010 and that it had, invariably, indicated in all its previous tender submissions the term 'TBD' against item 4 which dealt with the surveying and plotting of buildings, claiming that this item could not be priced, (d) Mr Mark Bugeja, an employee of the recommended tenderer, was an ex-employee of the firm she represented and she knew that he was qualified as a draughtsman which was not the qualification required and (e) Mr Mark Bugeja, the owner of GeoMatrix Surveying, was co-owner of LexarkSurveys with Mr Alex Bonnici who was the son of one of the directors of Bonnici Bros Ltd claiming that this was a blatant conflict of interest considering that one of the major tasks contemplated in the tender under review involved the calculation of the volume of excavation works carried out by Bonnici Bros. Ltd at Maghtab which calculation formed part of the verification/certification process to issue payments to Bonnici Bros. Ltd;
- having considered the contracting authority's representative's submissions, namely that (a) the schedule of rates submitted by the appellant was not faithful to the schedule of rates included in the tender document and to clause 2.8.3 of the tender document, (b) the evaluation board was satisfied with the CVs submitted by the recommended tenderer and that clause 8.3.1 stated that the contractor had to hold the qualifications but it did not request the tenderer to actually submit the certificate/s, (c) LexarkSurveys was not one of the parties participating in this tendering procedure and that it was not engaged on any other WasteServ Malta Ltd contracts, (d) it did not result that GeoMatrix Surveying had any interest in any other bid submitted in connection with this tendering procedure and (e) GeoMatrix Surveying was not proposing key experts or advisers who were engaged in the preparation of the tender;
- having considered the recommended tenderer's reference to (a) the issue of CVs and (b) the fact that albeit the 'Tender Submission Checklist' of the tender document provided that 'proof of professional qualifications' had to be submitted as failure to do so would render the tender offer null, Mr Bugeja confirmed that

GeoMatrix Surveying did not submit proof of qualifications with its tender submission,

reached the following conclusions:

1. The Public Contracts Review Board maintains that its role in this hearing, like any other hearing, is solely to consider issues relevant to the tendering process under review and not with what would have taken place in similar previous tendering processes.
2. This Board opines that if the tenderer found it difficult to work out or to fill in the rate against item 4, the said tendering company should have asked for a formal clarification from the contracting authority because one had to appreciate that an evaluation board cannot compare bids like with like if tenderers do not submit all the rates requested.
3. The Public Contracts Review Board argues that if the appellant company chose to leave blank the space reserved for the rate in respect of item 4 in the schedule of prices then it would seem only natural for such exclusion to be interpreted as 'Nil'. Also, contrary to what the appellant company's representative was contending, the term 'TBD' could never be interpreted as 'uninterpretable' because what was meant with the term was that the issue in question was 'to be discussed/determined'.
4. The Public Contracts Review Board contends that the fact that the 'Tender Submission Checklist' of the tender document provided that 'proof of professional qualifications' had to be submitted as failure to do so would render the tender offer null meant simply that and the fact that GeoMatrix Surveying, the recommended tenderer, did not submit proof of qualifications with its tender submission but submitted only the CVs constituted a breach of conditions.
5. This Board does not agree with line of argument followed by the appellant company in so far as the business relationship between GeoMatrix Surveying, LexmarkSurveys and Bonnici Bros. Ltd is concerned.

As a consequence, this Board finds against the appellant company as well as recommending that both offers submitted by the tenderers in question, namely, Randolph Camilleri Surveys Ltd and GeoMatrix Surveying, be considered as non compliant in view of such offers not containing information which was mandatory.

In the circumstance this Board recommends that the deposit paid by the appellant company should be reimbursed.

Alfred R Triganza
Chairman

Edwin Muscat
Member

Joseph Croker
Member

30 September 2011