

## PUBLIC CONTRACTS REVIEW BOARD

### Case No. 312 and Case No. 313

#### **PARK/45/2010 Adv. No 7/2011**

#### **Period Contract for the Supply and Delivery of Trees and Shrubs for the P.A.R.K. and Initiatives Unit**

This call for tenders was published in the Government Gazette on 25<sup>th</sup> January 2011. The closing date for this call for offers with a department estimate of € 36,000 was 8<sup>th</sup> February 2011.

Six (6) tenderers submitted a total of five options.

#### **Case No. 312**

Calamatta Landscapes Ltd filed an objection on 24<sup>th</sup> March 2011 against the decision by the Ministry for Resources and Rural Affairs to disqualify their offer for being administratively non-compliant for the purposes of clause 2.3 of the tender document.

#### **Case No. 313**

Environmental Landscapes Consortium Ltd filed an objection 24<sup>th</sup> March 2011 against the decision by the Ministry for Resources and Rural Affairs to disqualify their offer for being administratively non-compliant for the purposes of clause 2.3 of the tender document.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Carmelo Esposito as members convened a public hearing on Wednesday, 13<sup>th</sup> July 2011 to discuss this objection.

Present for the hearing were:

#### **Calamatta Landscapes Ltd**

Dr Michelle Pace Micallef	Legal Representative
Mr Carlos Calamatta	Representative
Mr Herman Scifo	Representative

#### **Environmental Landscapes Consortium Ltd**

Dr Ronald Cuschieri	Legal Representative
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#### **Agri Products Ltd**

Mr Jeffrey Debono	Representative
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#### **Sicilville Landscaping Malta**

Dr Massimo Vella	Legal Representative
Mr Anthony Cassar	Representative

**F. Zammit Nurseries Ltd**

Mr Antoine Zammit                      Representative

**Ministry for Resources and Rural Affairs**

Dr Victoria Scerri                      Legal Representative

**Evaluation Board:**

Mr Herman Galea                      Chairperson

Mr David Attard                      Member

Mr Charles Camilleri                      Member

Mr Neville Ebejer                      Member

Mr Emmanuel Borg                      Secretary

After the Chairman's brief introduction, the appellant companies were invited to explain the motives of their objections.

Dr Michelle Pace Micallef, legal representative of Calamatta Landscapes Ltd, the appellant company (Case No. 312) stated that:

- i. by letter dated 23<sup>rd</sup> March 2011, the Ministry for Resources and Rural Affairs informed her client that its offer was found administratively not compliant in terms of clause 2.3;
- ii. sub-clause 2.3.2 provided that "*A Company shall not tender for a given contract both individually and as a partner in a joint venture/consortium*";
- iii. her client did not participate in any other bid in connection with this call for tenders and went on to explain that:-
  - a. her client was a regularly registered company and distinct from any other company with its own employees and operations;
  - b. there were instances when, in submitting a tender, her client did form a joint venture with other entities but it was not the case with regard to the tender under review; and
  - c. the fact that one of the bidders was Environmental Landscapes Consortium Ltd, in which Calamatta Landscapes Ltd was one of the shareholders, was irrelevant because the two entities had a distinct legal personality according to the Companies Act.

With regard to Case No. 313, Dr Ronald Cuschieri, representing Environmental Landscapes Consortium Ltd, submitted that:-

- i. Environmental Landscapes Consortium Ltd was registered in 2002 as a limited liability company in its own right bearing number C30405 when four firms had decided to form this company;
- ii. the term 'consortium' in the name of the Environmental Landscapes Consortium Ltd was accidental and it could have been named whatever because it did not matter;
- iii. Environmental Landscapes Consortium Ltd had a contract with central government that had been running for about nine years;
- iv. Originally, Environmental Landscapes Consortium Ltd had four shareholders but, presently, it had three, namely Calamatta Landscapes Ltd, Messrs Polidano Ltd and Messrs Green Supplies Ltd;
- v. in this particular tender Environmental Landscapes Consortium Ltd was acting in its own name/right and not as part of a joint venture or a consortium;

- vi. the wording of clause 2.3.1 was quite clear and one was aware that when one referred to a joint venture submission one would find the name of the various companies that make up the joint venture but, in the case under reference, Environmental Landscapes Consortium Ltd was tendering on its own and was not in partnership with any other company;
- vii. his client was not objecting because the tender was recommended to be awarded to other bidders but, as a matter of principle, his client was objecting because there was no valid reason for the company's disqualification because it had every right to participate in this tendering process.

Dr Victoria Scerri, legal representative of the contracting authority, submitted the following:

- a. one tenderer could only submit one tender so much so that Clause 2.3.1 provided that:
  - i. *Submission or participation by a tenderer in more than one tender for a contract shall result in the disqualification of all those tenders for that contract in which the party is involved;*
- b. Clause 8 of the Tenderer's Declaration requested tenderers to declare that:
  - i. *We have no potential conflict of interest or any relation with other candidates or other parties in the tender procedure at the time of the submission of this application. We have no interest of any nature whatsoever in any other tender in this procedure. We recognise that our tender may be excluded if we propose key experts who have been involved in preparing this project or engage such personnel as advisers in the preparation of our tender.*
- c. when you have a bidder who was a shareholder of another bidder to the same contract then there was no doubt that, even at face value, that situation gave rise to a conflict of interest.

Dr Pace Micallef insisted that Calamatta Landscapes Ltd and Environmental Landscapes Consortium Ltd were two totally separate entities each with their own management and employees.

Dr Cuschieri, categorically, excluded conflict of interest but stated that he looked upon Calamatta Landscapes Ltd as a competitor so much so that his client did not even offer discounts to Calamatta Landscapes Ltd for services rendered.

At this point Dr Massimo Vella, legal representative of Sicilville Landscaping Ltd, intervened and furnished a copy of the annual return that Environmental Landscapes Consortium Ltd lodged with the Malta Financial Services Authority and submitted that:

- i. in terms of clause 2.3.1 participation could either be direct or indirect in the sense that Calamatta Landscapes Ltd participated directly by submitting its

own bid and indirectly through the bid submitted by Environmental Landscapes Consortium Ltd as it held 25% shareholding in the latter company;

- ii. from the Malta Financial Services Authority records it resulted that Mr Carlos Alberto Calamatta was one of the four directors of Environmental Landscapes Consortium Ltd and a director and shareholder of Calamatta Landscapes Ltd and, as a result, one could not say that these two firms had separate or unrelated directorships when a director sat on the board of both companies. Such a situation could give rise to potential conflict of interest as mentioned at clause 8 of the Tenderer's Declaration because one director was or could be involved in the submission of two tenders submitted by two different companies;
- iii. Article 4 of the Companies Act provided that registered companies had a different legal personality but, apart from that, as had emerged from the 'Price Club' case, one might have a number of legal and separate companies but the Court and, for that matter even the Public Contracts Review Board, had the right to delve into who were the persons behind those companies by lifting the corporate veil;
- iv. one could not be simplistic and say that these two entities had two different names and that was that but the Public Contracts Review Board was duty bound to look into who were behind these two companies and to determine if Calamatta Landscapes Ltd was, effectively, participating in two bids;
- v. a case could arise where two persons would set up four different companies and, through them, submit four bids quoting four different prices for the same contract and the tender conditions were specifically designed to disallow such a practice;
- vi. in this case Calamatta Landscapes Ltd submitted its own bid and participated in the bid submitted by Environmental Landscapes Consortium Ltd; and
- vii. it was true that Environmental Landscapes Consortium Ltd was not incorporated as a consortium however the name itself provided an inkling as to the intended purpose behind this set up.

Dr Cuschieri contended that (a) the contracting authority and one of the recommended tenderers were trying to prevent his client, a legally constituted company, from participating in a public tender, (b) Calamatta Landscapes Ltd was not Environmental Landscapes Consortium Ltd but it constituted a small part of Environmental Landscapes Consortium Ltd and it was Environmental Landscapes Consortium Ltd that had submitted the tender and not Calamatta Landscapes Ltd and (c) if Environmental Landscapes Consortium Ltd were to be precluded from tendering in such tender processes then that would amount to a breach of his client's rights.

The Chairman Public Contracts Review Board observed that clause 2.3.2 referred to a joint venture or a consortium whereas, in this case, Environmental Landscapes Consortium Ltd was a company.

Dr Scerri agreed that the appellants could not be disqualified on the grounds of sub-clause 2.3.2 but Calamatta Landscapes Ltd was in breach of clause 2.3.1 with regard to participation in two tenders, one in its own name and the other through Environmental Landscapes Consortium Ltd.

Dr Pace Micallef disagreed with this argument because Calamatta Landscapes Ltd was not joining forces with another company to submit another bid for this contract and nor was it the case that the same people were involved in the preparation of two tender submissions.

Dr Scerri stated that the tender conditions make provision for different scenarios to avoid the type of situation that might give rise to conflict of interest, e.g. clause 2.3.4 provided that “*A company could act as a sub-contractor for any number of tenderers and joint ventures/consortia, provided that it does not participate individually or as part of a joint venture/consortium and that the nominations do not lead to a conflict of interest, collusion, or improper practice.*”

Dr Scerri added that it has already been established that there was a relation between Calamatta Landscapes Ltd and Environmental Landscapes Consortium Ltd and that was in breach of clause 8 of the Tenderer’s Declaration quoted earlier on.

Dr Cuschieri maintained that Environmental Landscapes Consortium Ltd was not part of Calamatta Landscapes Ltd and that there was no conflict of interest so much so that the latter was considered as a competitor and that, in this case, there were two tenders submitted by two tenderers.

Dr Vella submitted that (i) the Tenderer’s Declaration required ‘*no potential conflict or any relation*’ and he, therefore, wondered what stronger relation could one have than being a shareholder in the other bidding company, when shareholding – in this case 25% - entitled the holder to part - 25% - of the profits and (ii) in this respect there was a clear error in the Tenderer’s Declaration.

The Chairman Public Contracts Review Board referred to that part of clause 8 of the Tenderer’s Declaration where the tenderer was asked to declare:

*“We have no interest of any nature whatsoever in any other tender in this procedure ...”*

and he questioned how could Calamatta Landscapes Ltd deny that it had “*no interest of any nature.*”

Mr Carlos Calamatta, also representing Calamatta Landscapes Ltd, stated that the preparation and submission of a tender was the responsibility of management and that it was not a shareholders’ decision. He recalled that this was not the first instance where Calamatta Landscapes Ltd and Environmental Landscapes Consortium Ltd were competitors in tendering processes.

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 24<sup>th</sup> March 2011 (Case No. 312) and 24<sup>th</sup> March 2011 (Case No. 313, respectively, as well as, through their verbal submissions presented during the hearing held on the 13<sup>th</sup> July 2011, had objected to the decision taken by the pertinent authorities;
- having noted the appellant company’s (Case No. 312) representatives’ reference to the fact that (a) by letter dated 23<sup>rd</sup> March 2011, the Ministry for Resources and Rural Affairs informed the appellant company that its offer was found administratively not compliant in terms of clause 2.3, (b) sub-clause 2.3.2 provided that “*A Company shall not tender for a given contract both individually and as a partner in a joint venture/consortium*, (c) the appellant company did not participate in any other bid in connection with this call for tenders, (d) the appellant company was a regularly registered company and distinct from any other company with its own employees and operations, (e) there were instances when, in submitting a tender, the appellant company did form a joint venture with other entities but it was not the case with regard to the tender under review, (f) the participation in the same tender of Environmental Landscapes Consortium Ltd, in which Calamatta Landscapes Ltd was one of the shareholders had not breached any of the tender specifications and conditions in view of the fact that the two entities had a distinct legal personality according to the Companies Act, (g) Calamatta Landscapes Ltd and Environmental Landscapes Consortium Ltd were two totally separate entities each with its own management and employees, (h) Calamatta Landscapes Ltd was not joining forces with another company to submit another bid for this contract and nor was it the case that the same people were involved in the preparation of two tender submissions, (i) the preparation and submission of a tender was the responsibility of management and that it was not a shareholders’ decision and (j) this was not the first instance where Calamatta Landscapes Ltd and Environmental Landscapes Consortium Ltd were competitors in tendering processes;
- having noted the appellant company’s (Case No. 313) representatives’ reference to the fact that (a) Environmental Landscapes Consortium Ltd was registered in 2002 as a limited liability company in its own right bearing number C30405 when four firms had decided to form this company, (b) the term ‘consortium’ in the name of the Environmental Landscapes Consortium Ltd was accidental and it could have been named whatever because it did not matter, (c) Environmental Landscapes Consortium Ltd had a contract with central government that had been running for about nine years, (d) originally, Environmental Landscapes Consortium Ltd had four shareholders but, presently, it had three, namely Calamatta Landscapes Ltd, Messrs Polidano Ltd and Messrs Green Supplies Ltd, (e) in this particular tender Environmental Landscapes Consortium Ltd was acting in its own name/right and not as part of a joint venture or a consortium, (f) the wording of clause 2.3.1 was quite clear and one was aware that when one referred to a joint venture submission one would find the name of the various companies that make up the joint

venture but, in the case under reference, Environmental Landscapes Consortium Ltd was tendering on its own and was not in partnership with any other company, (g) the appellant company was not objecting because the tender was recommended to be awarded to other bidders but, as a matter of principle, the tendering company was objecting because there was no valid reason for the company's disqualification because it had every right to participate in this tendering process, (h) Environmental Landscapes Consortium Ltd categorically excluded conflict of interest stating that the company looked upon Calamatta Landscapes Ltd as a competitor so much so that it did not even offer discounts to Calamatta Landscapes Ltd for services rendered and (i) if Environmental Landscapes Consortium Ltd were to be precluded from tendering in such tender processes then that would amount to a breach of his client's rights;

- having considered the contracting authority's reference to the fact that (a) Clause 2.3.1 provided that one tenderer could only submit one tender (b) Clause 8 of the Tenderer's Declaration requested tenders to declare that they have "*no potential conflict of interest or any relation with other candidates or other parties in the tender procedure at the time of the submission of this application*", (c) when you have a bidder who was a shareholder of another bidder to the same contract then there was no doubt that, even at face value, that situation gave rise to a conflict of interest, (d) the authority agreed that the appellants could not be disqualified on the grounds of sub-clause 2.3.2 but Calamatta Landscapes Ltd was in breach of clause 2.3.1 with regard to participation in two tenders, one in its own name and the other through Environmental Landscapes Consortium Ltd and (e) the tender conditions make provision for different scenarios to avoid the type of situation that might give rise to conflict of interest, e.g. clause 2.3.4 provided that "*A company could act as a sub-contractor for any number of tenderers and joint ventures/consortia, provided that it does not participate individually or as part of a joint venture/consortium and that the nominations do not lead to a conflict of interest, collusion, or improper practice.*";
- having taken particular note of Dr Vella's intervention, particularly, his claim that (a) in terms of clause 2.3.1 participation could either be direct or indirect in the sense that Calamatta Landscapes Ltd participated directly by submitting its own bid and indirectly through the bid submitted by Environmental Landscapes Consortium Ltd as it held 25% shareholding in the latter company, (b) from the Malta Financial Services Authority records it resulted that Mr Carlos Alberto Calamatta was one of the four directors of Environmental Landscapes Consortium Ltd and a director and shareholder of Calamatta Landscapes Ltd and, as a result, one could not say that these two firms had separate or unrelated directorships when a director sat on the board of both companies, (c) such a situation could give rise to potential conflict of interest as mentioned at clause 8 of the Tenderer's Declaration because one director was or could be involved in the submission of two tenders submitted by two different companies, (d) one could not be simplistic and say that these two entities had two different names and that was that, but the Public Contracts Review Board was duty bound to look into who were behind these two companies and to determine if Calamatta Landscapes Ltd was, effectively,



participating in two bids - in this case Calamatta Landscapes Ltd submitted its own bid and participated in the bid submitted by Environmental Landscapes Consortium Ltd and (e) it was true that Environmental Landscapes Consortium Ltd was not incorporated as a consortium however the name itself provided an inkling as to the intended purpose behind this set up,

reached the following conclusions, namely:

1. The Public Contracts Review Board opines that with regard to Case No. 312 it is a fact that clause 2.3.4 provided that a “... *company could act as a sub-contractor for any number of tenderers and joint ventures/consortia, provided that it does not participate individually or as part of a joint venture/consortium and that the nominations do not lead to a conflict of interest, collusion, or improper practice.*” Fully cognisant of the said clause this Board feels that the appellant’s - Calamatta Landscapes Ltd – claim, namely that the company had “no interest of any nature” is considerably dubious in nature and substance. In this instance this Board agrees with arguments brought forward by the contracting authority’s representatives.
2. The Public Contracts Review Board feels that, with regard to Case No. 312, the claim made by Mr Calamatta wherein he stated that the preparation and submission of a tender was the responsibility of management and that it was not a shareholders’ decision, may be, *prima facie*, correct but, intrinsically, this Board argues that it is fundamentally incorrect as company directors are, ultimately, vested with the corporate responsibility.
3. With reference to Case No. 313 the Public Contracts Review Board acknowledges that clause 2.3.2 referred to a ‘joint venture’ or a ‘consortium’ whereas, in this case, Environmental Landscapes Consortium Ltd was a company participating in this tender in its own legal and operational capacity and the fact that the company name included ‘Consortium’ was not, in any way, implying that a “consortium” was specifically formed to enable participants to group and submit a bid in the tender under review.
4. Furthermore, in Case No. 313 and any declarations made were made by Environmental Landscapes Consortium Ltd and no other member. Undoubtedly, this Board cannot accede to the recommended tenderer’s claim that, whereas it was true that Environmental Landscapes Consortium Ltd was not incorporated as a consortium, yet, the name itself more than implied the real scope behind this set up.

In view of the above this Board finds

- a. in case of Case No. 312 against the appellant company
- b. in case of Case No. 313 in favour of the appellant company and recommends that the said company be reintegrated in the evaluation process.

Furthermore, this Board also recommends that, with reference to:

- a. Case No. 312 the deposit paid by the appellant company should not be reimbursed
- b. Case No. 313 the deposit paid by the appellant company should be reimbursed.

Alfred R Triganza  
Chairman

Edwin Muscat  
Member

Carmelo Esposito  
Member

*25<sup>th</sup> July 2011*