

PUBLIC CONTRACTS REVIEW BOARD

Case No. 510

VLC CCC/2/12

Tender for the Cleaning of the Commercial Centre in Valletta

This call for tenders was published in the Government Gazette on the 2nd October 2012. The closing date for this call with an estimated budget of €270,000 was the 2nd November 2012.

Six (6) tenderers submitted their offers.

Mr Anthony Zammit filed an objection on the 12th December 2012 against the decision of the Valletta Local Council to recommend the award of tender to Waste Collection Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Joseph Croker and Mr Carmel Esposito as members convened a public hearing on Wednesday, 9th January 2013 to discuss this objection.

Present for the hearing were:

Mr Anthony Zammit

Dr George Cutajar	Legal Representative
Mr Anthony Zammit	Appellant
Mr Joe Attard	Representative

Waste Collection Ltd

Dr George Hyzler	Legal Representative
Mr Mario Muscat	Representative
Mr Adrian Muscat	Representative

Valletta Local Council

Dr Joe Bonnici	Legal Representative
Mr Chris Pullicino	Adviser

Evaluation Board

Dr Alexiei Dingli	Chairman and Mayor of Valletta Local Council
Ms Gabriella Agius	Executive Secretary

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

Dr George Cutajar, legal representative of Mr Anthony Zammit, the appellant, made the following submissions:

- i. by letter dated 28th November 2012 the appellant was informed that the tender was being recommended for award to the lowest compliant bid;
- ii. the notice of award indicated Waste Collection Ltd as the recommended tenderer;
- iii. on the 30th November 2012 the appellant was informed that his bid was compliant;
- iv. the appellant quoted the price of €74,704, including VAT, for the 4 year contract period which was by far less expensive than the offer of €259,515 made by the recommended tenderer;
- v. it resulted that, by the closing date for the submission of tenders, the recommended bidder did not have the necessary permits from the Malta Environment and Planning Authority (MEPA) covering its vehicle/s and this matter of fact should have led to the outright disqualification of the recommended bid since this was a mandatory requirement as per Volume 1 Section 4 'Literature' 1.2;
- vi. in fact, the recommended tenderer had registered its vehicle no. JBR 119 with MEPA as per Legal Notice 106 of 2007 on the 8th November 2012 when the closing date of the tender was the 2nd November 2012;
- vii. the tender was drawn up in such a way that it did not allow for bidders to submit a tender and then, if awarded the contract, they would purchase and/or import the required vehicles/equipment but the tenderers had to possess the necessary equipment properly registered at least prior to the closing date of the tender;
- viii. according to the evaluation grid sections 1.2, 1.3 and 1.4, which concerned the vehicles that had to be used on the execution of this contract, carried 64 out of 100 points and, as a result, the appellant could not help questioning how the recommended tenderer could have been allocated any marks in this regard when it did not possess any MEPA registered vehicles by the closing date for the receipt of tenders;
- ix. on the other hand, the appellant, who had submitted all the required documentation, including that in respect of the MEPA registered vehicles, was awarded only 50 points;
- x. the details of the MEPA registration of the vehicles as requested in this tender were available and verifiable on the MEPA website;

- xi. Volume 1 Section 4 part 2 'Experience as Contractor' requested evidence of relevant experience over the years 2007 to 2012 whereas part 3 'Key Person' requested a minimum of 3 years experience and, moreover, these same requirements were also found in clause 6.1.2 of the tender document;
 - xii. the appellant has been executing cleaning contracts on behalf of the Valletta and Marsascala Local Councils for about seven years and his performance was quite satisfactory so much so that he had never been issued with any default notice;
 - xiii. on the other hand, the recommended bidder possessed no experience with regard to cleaning services;
 - xiv. at no stage was the appellant asked to provide any clarifications;
- and
- xv. the appellant lamented that he had not been informed by the contracting authority of shortcomings, if any, in his tender submission nor was he informed of the points awarded to his bid and, when requested, it provided inadequate information.

Mr Chris Pullicino, an accountant and adviser to the Valletta Local Council, under oath, gave the following evidence:-

- a. his role in this tender procedure was to prepare the tender document according to the template provided by the Contracts Department and, on receipt of the offers, he drew up a fact sheet comparing the bids received with the tender specifications;
 - b. the evaluation of the offers was made according to the evaluation grid published in the tender document and then he submitted the resultant fact sheet to the Local Council for its consideration and to make its decisions;
 - c. Volume 4, 'Financial Bid' of the tender document requested the 'daily rate' (inclusive of VAT) and whereas the recommended tenderer offered the average daily rate of €177.80, the appellant offered the average daily rate of €18,676 which rendered it excessively high;
 - d. although the contracting authority did note the wide difference in the prices quoted, still it was not permissible for rectifications to be made to the prices quoted - clause 16.1 (f) did not allow for any rectification with regard to the financial offer/bill of quantities;
- and
- e. the tender requirements indicated that the tenderers had to be in possession of the required vehicles and relevant MEPA registrations prior to the closing date of the tender so much so that proof had to be submitted in terms of log books and registration documents as per Volume 1 Section 4 'Literature'.

Dr Cutajar remarked that the excessive and illogical difference between the two daily rates, i.e. €177.80 vs €18,676, should have prompted the contracting authority to seek a clarification from the appellant to which he would have simply explained that he quoted the annual rate rather than the daily rate.

The Chairman Public Contracts Review Board observed that the contracting authority should not issue a set of tender conditions and specifications and then, during the evaluation process, ignore mandatory requirements and carry on with the evaluation and award. He added that it could have been the case that other potential tenderers declined to participate being aware that they could not satisfy in full the tender requirements. Needless to say that, with this in mind, these same potential tenderers might have participated had they known that the contracting authority was going to be very flexible or even not insist upon certain mandatory requirements.

Mr Pullicino continued giving evidence as follows:

- i. what he did was to present the Valletta Local Council with the fact sheet comparing the tender submissions with the tender specifications. He claimed that he did not make any recommendations and it was the same local council that decided to carry on with the evaluation of the recommended tender notwithstanding the shortcomings, such as the non availability of the MEPA vehicle registration at closing date of tenders;
 - ii. it turned out that all participating tenders were not compliant for one reason or other either because some were in the process of acquiring the vehicles and relative permits or because of lack of relevant experience. Albeit the contracting authority could have refused all tenders, yet the Local Council was faced with a problem regarding the cleaning of the commercial centre in Valletta and after considering all the circumstances it decided to proceed with the evaluation of all the tenders – *evaluation report dated 21st November 2012 referred*;
 - iii. the recommended tenderer had, in fact, provided details of the company's vehicles because such details, such as the year of manufacture and the engine model (Euro Standard) had a bearing on the allocation of points as per evaluation grid;
 - iv. on the other hand the appellant failed to submit the work plans;
 - v. as per evaluation grid, points were allocated with regard to vehicle ownership, date of manufacture and engine model but no points were allocated for having the MEPA permit although this permit was requested as per section 1.2 of Volume 1 Section 4;
- and
- vi. with regard to 'experience', whilst it was noted that the recommended tenderer possessed experience in the provision of transport services but not in waste collection or street cleaning yet the Local Council decided to award the contract to the recommended tenderer.

Dr George Hyzler, legal representative of the recommended tenderer, submitted that:-

- a. the vehicles to be dedicated to the contract were in Malta and the recommended tenderer had submitted the relevant log books;
- b. at no point did the recommended tender attempt to mislead the contracting authority with regard to the MEPA registration of the vehicles so much so that in its tender submission the company had declared that the MEPA registration certificate was not available at that stage but that the company had applied for the MEPA permit and that the latter would be available within days - *declaration dated 29th October 2012*;
- c. in fact, the MEPA permit was issued on the 8th November 2012, namely 6 days after the closing date of the tender but certainly before the start of the evaluation of the tenders;
- d. one had to appreciate that, with regard to experience, the main elements in the provision of such cleaning services concerned traffic management and the use of heavy duty vehicles and, in that regard, his client had extensive experience in the provision of transport services by coaches and, recently, in the transport of persons with special needs;

and

- e. this appeal had to be dealt with according to the points raised by the appellant in his letter of objection and no other elements should be introduced, namely, the likelihood that other tenderers could have participated if they had known that the contracting authority was going to be flexible in the interpretation of certain tender requirements.

Dr Alexiei Dingli, Mayor of Valletta and chairman of the evaluation board, explained that the major issues that arose from these contracts was the management of personnel and equipment on street sweeping and cleaning works such that it would not cause traffic jams. He added that the central government had abruptly stopped providing street cleaning services and, as a consequence, the local council had to step in to provide this service as a matter of urgency.

The Chairman Public Contracts Review Board remarked that the said Board was not against a certain degree of flexibility being applied to the tendering procedure but it was imperative that such flexibility had to be reflected in the published tender conditions and specifications for the benefit of all potential bidders because it was not acceptable for one to introduce and to apply a high degree of flexibility during the evaluation process.

At this point the hearing came to a close.

This Board,

- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated 12th December 2012 and also through its representatives verbal submissions presented during

the hearing held on the 9th January 2013, had objected to the decision taken by the pertinent authorities;

- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by letter dated 28th November 2012 the appellant was informed that the tender was being recommended for award to the lowest compliant bid, (b) the notice of award indicated Waste Collection Ltd as the recommended tenderer, (c) on the 30th November 2012 the appellant was informed that his bid was compliant, (d) the appellant quoted the price of €74,704, including VAT, for the 4 year contract period which was, by far, less expensive than the offer of €259,515 made by the recommended tenderer, (e) it resulted that, by the closing date for the submission of tenders, the recommended bidder did not have the necessary permits from the Malta Environment and Planning Authority (MEPA) covering its vehicle/s and this matter of fact should have led to the outright disqualification of the recommended bid since this was a mandatory requirement as per Volume 1 Section 4 'Literature' 1.2, (f) the recommended tenderer had registered its vehicle no. JBR 119 with MEPA as per Legal Notice 106 of 2007 on the 8th November 2012 when the closing date of the tender was the 2nd November 2012, (g) the tender was drawn up in such a way that it did not allow for bidders to submit a tender and then, if awarded the contract, they would purchase and/or import the required vehicles/equipment but the tenderers had to possess the necessary equipment properly registered at least prior to the closing date of the tender, (h) according to the evaluation grid sections 1.2, 1.3 and 1.4, which concerned the vehicles that had to be used on the execution of this contract, carried 64 out of 100 points and, as a result, the appellant could not help questioning how the recommended tenderer could have been allocated any marks in this regard when it did not possess any MEPA registered vehicles by the closing date for the receipt of tenders, (i) on the other hand, the appellant, who had submitted all the required documentation, including that in respect of the MEPA registered vehicles, was awarded only 50 points, (j) the details of the MEPA registration of the vehicles as requested in this tender were available and verifiable on the MEPA website, (k) Volume 1 Section 4 part 2 'Experience as Contractor' requested evidence of relevant experience over the years 2007 to 2012 whereas part 3 'Key Person' requested a minimum of 3 years experience and, moreover, these same requirements were also found in clause 6.1.2 of the tender document, (l) the appellant has been executing cleaning contracts on behalf of the Valletta and Marsascala Local Councils for about seven years and his performance was quite satisfactory so much so that he had never been issued with any default notice, (m) on the other hand, the recommended bidder possessed no experience with regard to cleaning services, (n) at no stage was the appellant asked to provide any clarifications, (o) the appellant lamented that he had not been informed by the contracting authority of shortcomings, if any, in his tender submission nor was he informed of the points awarded to his bid and, when requested, it provided inadequate information and (p) the excessive and illogical difference between the two daily rates, i.e. €177.80 vs €18,676, should have prompted the contracting authority to seek a clarification from the appellant to which he would have simply explained that he quoted the annual rate rather than the daily rate;
- having considered Dr Dingli's reference to the fact that (a) the major issues that arose from these contracts was the management of personnel and equipment on street sweeping and

cleaning works such that it would not cause traffic jams and (b) the central government had abruptly stopped providing street cleaning services and, as a consequence, the local council had to step in to provide this service as a matter of urgency;

- having considered Mr Chris Pullicino's testimony, including his reference to the fact that (a) his role in this tender procedure was to prepare the tender document according to the template provided by the Contracts Department and, on receipt of the offers, he drew up a fact sheet comparing the bids received with the tender specifications, (b) the evaluation of the offers was made according to the evaluation grid published in the tender document and then he submitted the resultant fact sheet to the Local Council for its consideration and to make its decisions, (c) Volume 4, 'Financial Bid' of the tender document requested the 'daily rate' (inclusive of VAT) and whereas the recommended tenderer offered the average daily rate of €177.80, the appellant offered the average daily rate of €18,676 which rendered it excessively high, (d) although the contracting authority did note the wide difference in the prices quoted, still it was not permissible for rectifications to be made to the prices quoted - clause 16.1 (f) did not allow for any rectification with regard to the financial offer/bill of quantities, (e) the tender requirements indicated that the tenderers had to be in possession of the required vehicles and relevant MEPA registrations prior to the closing date of the tender so much so that proof had to be submitted in terms of log books and registration documents as per Volume 1 Section 4 'Literature', (f) what he did was to present the Valletta Local Council with the fact sheet comparing the tender submissions with the tender specifications, (g) he did not make any recommendations and it was the same local council that decided to carry on with the evaluation of the recommended tender notwithstanding the shortcomings, such as the non availability of the MEPA vehicle registration at closing date of tenders, (h) it turned out that all participating tenders were not compliant for one reason or other either because some were in the process of acquiring the vehicles and relative permits or because of lack of relevant experience and, albeit the contracting authority could have refused all tenders, yet the Local Council was faced with a problem regarding the cleaning of the commercial centre in Valletta and after considering all the circumstances it decided to proceed with the evaluation of all the tenders – *evaluation report dated 21st November 2012 referred*, (i) the recommended tenderer had, in fact, provided details of the company's vehicles because such details, such as the year of manufacture and the engine model (Euro Standard) had a bearing on the allocation of points in accordance with the evaluation grid, (j) on the other hand, the appellant failed to submit the work plans, (k) in line with the evaluation grid, points were allocated with regard to vehicle ownership, date of manufacture and engine model but no points were allocated for having the MEPA permit although this permit was requested as per section 1.2 of Volume 1 Section 4 and (l) with regard to 'experience', whilst it was noted that the recommended tenderer possessed experience in the provision of transport services but not in waste collection or street cleaning yet the Local Council decided to award the contract to the recommended tenderer;
- having considered the recommended tenderer's representative's reference to the fact that (a) the vehicles to be dedicated to the contract were in Malta and the recommended tenderer had submitted the relevant log books, (b) at no point did the recommended tenderer attempt to mislead the contracting authority with regard to the MEPA registration of the vehicles so much so that in its tender submission the company had declared that the MEPA registration

certificate was not available at that stage (c) but that the company had applied for the MEPA permit and that the latter would be available within days - *declaration dated 29th October 2012*, (d) in fact, the MEPA permit was issued on the 8th November 2012, namely 6 days after the closing date of the tender but certainly before the start of the evaluation of the tenders, (e) one had to appreciate that, with regard to experience, the main elements in the provision of such cleaning services concerned traffic management and the use of heavy duty vehicles and, in that regard, the recommended tenderer had extensive experience in the provision of transport services by coaches and, recently, in the transport of persons with special needs and (f) this appeal had to be dealt with according to the points raised by the appellant in his letter of objection and no other elements should be introduced, namely, the likelihood that other tenderers could have participated if they had known that the contracting authority was going to be flexible in the interpretation of certain tender requirement,

reached the following conclusions, namely:

1. The Public Contracts Review Board opines that the contracting authority should not issue a set of tender conditions and specifications and then, during the evaluation process, ignore mandatory requirements and carry on with the evaluation and award. This Board is not against a certain degree of flexibility being applied to the tendering procedure but it is imperative that such flexibility has to be reflected in the published tender conditions and specifications for the benefit of all potential bidders because it is not acceptable for one to introduce and to apply a high degree of flexibility during the evaluation process.
2. This Board cannot overlook the fact that, whilst the tender document states in no equivocal term that tenderers had to be in possession of the required vehicles and relevant MEPA registrations prior to the closing date of the tender, subsequent to this, the evaluation board decided, out of its own free will, to carry on with the evaluation of the recommended tenderer notwithstanding the fact that the latter did not provide the MEPA vehicle registration at closing date of tender.
3. Indeed, this Board has no problem with establishing that the recommended tenderer did not, in any way, attempt to mislead the contracting authority with regard to the MEPA registration of the vehicles so much so that, in its tender submission, the company had declared that the MEPA registration certificate was not available at that stage and that the company had applied for the MEPA permit and that the latter would be available within days - *declaration dated 29th October 2012*. Nevertheless, at this point, the fact remains that the MEPA permit was issued on the 8th November 2012, namely six days after the closing date of the tender which was the cut-off point applicable to all tenderers.
4. With regard to the appellant, this Board cannot but concur with the decision taken by the contracting authority wherein, whilst in Volume 4, 'Financial Bid' of the tender document the 'daily rate' (inclusive of VAT) was requested, the latter decided that the fact that the appellant, erroneously, offered the average daily rate of €18,676 which rendered the appellant company's offer excessively high. Furthermore, the Public Contracts Review Board establishes that the contracting authority was correct when, albeit noting the wide difference in the prices quoted, still decided that it was not

permissible for rectifications to be made to the prices quoted in view of the fact that clause 16.1 (f) did not allow for any rectification with regard to the financial offer/bill of quantities.

In view of the above this Board recommends that this tender be cancelled and that another call be issued.

Furthermore, in view of the fact that, all in all, the appeal filed by the appellant was not frivolous, this Board recommends that the deposit paid by the appellant for the appeal to be lodged should be reimbursed.

Alfred R Triganza
Chairman

Joseph Croker
Member

Carmel Esposito
Member

24 January 2013