

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case No. 511**

**VLC SSCRA/3/12**

### **Tender for the Cleaning of the Commercial Centre in Valletta**

This call for tenders was published in the Government Gazette on the 2<sup>nd</sup> October 2012. The closing date for this call with an estimated budget of €509,760 was the 2<sup>nd</sup> November 2012.

Three (3) tenderers submitted their offers.

Mr Anthony Zammit filed an objection on the 12<sup>th</sup> 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 was invited to explain the motives of his 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. at no stage was the appellant informed that his bid was not technically compliant;
- iv. the appellant quoted the price of €375,220, including VAT, for the 4 year contract period which was by far less expensive than the offer of €670,505 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 the company's vehicle/s and this matter of fact should have led to the outright disqualification of the recommended bid since this was a mandatory requirement in line with Volume 1 Section 4 'Literature' 1.2;
- vi. in fact, the recommended tenderer had registered vehicle no. JBR 119 with the Malta Environment and Planning Authority (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 Board, 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 consequence, the appellant could not help questioning how the recommended tenderer could have been allocated the minimum 55 points required once he did not possess any Malta Environment and Planning Authority (MEPA) registered vehicles by the closing date for the receipt of tenders;
- ix. on the other hand the appellant had submitted all the required documentation, including that in respect of the Malta Environment and Planning Authority (MEPA) registered vehicles;

- x. the details of the Malta Environment and Planning Authority (MEPA) registration of the vehicles as requested in this tender were available and verifiable on the Malta Environment and Planning Authority (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 company 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 notices;
  - xiii. on the other hand the recommended bidder possessed no experience with regard to cleaning services;
- and
- xiv. 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, the contracting authority provided inadequate information.

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

- a. the Malta Environment and Planning Authority (MEPA) registration of the vehicles/equipment was not an issue in this tender even though (1) such registration was requested in Volume 1 Section 4 'Literature' 1.2 and (2) it was not unheard of that tender documents could contain requirements that were, effectively, inapplicable but were there because the standard template would not have been modified according to those particular services/supplies;
  - b. to his recollection mechanical sweepers/scrubbers did not require the Malta Environment and Planning Authority (MEPA) registration;
  - c. the appellant did not possess any experience with regard to street sweeping and cleaning in residential areas because his experience concerned the collection of waste which was a different activity altogether;
- and
- d. with regard to the experience of the 'Key Person', the recommended tenderer had been providing transport services by coaches for decades and for the past five years or so had also been providing transport services for persons with special needs and both activities involved traffic and personnel management which were the key elements of the tender under reference.

The Chairman Public Contracts Review Board remarked that it appeared that points 7 to 10 raised by the appellant in his letter of objection dated 10th December 2012 did not require the Malta Environment and Planning Authority (MEPA) registration.

Mr Anthony Zammit, the appellant, remarked that:-

- i. for the past three years he had undertaken street sweeping and cleaning after the annual feasts celebrated in Valletta and even in other localities and about 3 tons of material was collected after each events (*Dr Alexiei Dingli, Mayor of Valletta, acknowledged this statement*);
  - ii. albeit sections 1.3 and 1.4 of Volume 4 'Financial Bid' were not filled in but were crossed out because he was going to provide those services free of charge, yet he pointed out that the other rates were duly filled in and, at the end, even quoted the average daily rate over the four year period of €257 (€93,805 per annum);
  - iii. the debris resulting from street sweeping had to be disposed of by the same contractor and not disposed of, for example, in skips which belonged to another contractor – *in this regard the Chairman Public Contracts Review Board read out Section 07 of clause 7 of Volume 3 Section 2 'Terms of Reference' (page 47) which stated that the contractor was responsible for the disposal of waste collected*;
- and
- iv. likewise, the domestic waste collection contract catered for domestic waste and not for material resulting from street sweeping and, as a result, any waste transport vehicle had to be registered with the Malta Environment and Planning Authority (MEPA).

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

- a. his role in this tendering 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 for the latter to make its decisions;
- c. the equipment required for this contract were a pedestrian sweeper, a mechanical floor scrubber and high pressure washing equipment in line with Volume 1 Section 4 'Literature' 1.1;
- d. the appellant did not submit all the rates requested in the financial bid/bill of quantities, namely items 1.3 and 1.4 were crossed out although they represented a good part of the

services requested and, as a result the bid was not considered to be administratively compliant;

- e. the appellant was not awarded any points once he did not quote any rates in respect of items 1.3 and 1.4 in the *Financial Bid* and it was only at the hearing that it was being stated that the appellant was going to render these services free of charge;

and

- f. with regard to ‘experience’, it was noted that the recommended tenderer possessed experience in the provision of transport services but not in street sweeping and cleaning and it was the decision of the Local Council to award the contract to the recommended tenderer.

Dr Cutajar intervened and remarked that:-

- i. once the tender document requested the Malta Environment and Planning Authority (MEPA) registration then it had to be provided and one could not just pick or choose which conditions were applicable and which were not applicable;

- ii. L.N. 106 of 2007 provided that any vehicle involved in waste collection and/or transportation had to be registered by the Malta Environment and Planning Authority (MEPA);

and

- iii. it was clear that the tender was issued for the sweeping and cleaning of streets and the collection and disposal of the resulting material and that entailed the use of waste transport vehicles which required the Malta Environment and Planning Authority (MEPA) permit.

Mr Mario Muscat, also on behalf of the recommended tenderer, argued that the material resulting from street sweeping and cleaning operations, whether by mechanical means or manually, would be deposited in skips which, in turn, would be emptied by another contractor in waste collection vehicles.

Dr Alexiei Dingli, Mayor of Valletta and chairman of the evaluation board, explained that the major issues that arose from these contracts were 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 sweeping and cleaning services and, as a consequence, the local council had to step in to provide this service as a matter of urgency.

Dr Cutajar concluded that tender requirements, especially mandatory ones, had to be respected and that as far as public procurement was concerned it was not tolerated for one to discard

published tender conditions. He added that the urgency referred to by the Local Council was not a good enough excuse for one to do away with clear tender requirements.

The Chairman Public Contracts Review Board remarked that the Board was not against a certain degree of flexibility being applied to the tendering procedure but it was essential 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 to introduce and to apply a high degree of flexibility during the evaluation process. He added 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.

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 12<sup>th</sup> December 2012 and also through its representatives verbal submissions presented during the hearing held on the 9<sup>th</sup> 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) at no stage was the appellant informed that his bid was not technically compliant, (d) the appellant quoted the price of €375,220, including VAT, for the 4 year contract period which was, by far, less expensive than the offer of €670,505 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 the company's vehicle/s and this matter of fact should have led to the outright disqualification of the recommended bid since this was a mandatory requirement in line with Volume 1 Section 4 'Literature' 1.2, (f) in fact, the recommended tenderer had registered vehicle no. JBR 119 with the Malta Environment and Planning Authority (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 Board, 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 consequence, the appellant could not help questioning how the recommended tenderer could have been allocated the minimum 55 points required once he did not possess any Malta Environment and Planning Authority (MEPA) registered vehicles by the closing date for the receipt of tenders, (i) on the other hand, the appellant had submitted all the required documentation, including that in respect of the Malta Environment and Planning Authority (MEPA) registered vehicles, (j) the details of the Malta Environment

and Planning Authority (MEPA) registration of the vehicles as requested in this tender were available and verifiable on the Malta Environment and Planning Authority (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 notices, (m) on the other hand the recommended bidder possessed no experience with regard to cleaning services, (n) 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, the contracting authority provided inadequate information, (o) for the past three years he had undertaken street sweeping and cleaning after the annual feasts celebrated in Valletta and even in other localities and about 3 tons of material was collected after each event (*Dr Alexiei Dingli, Mayor of Valletta, acknowledged this statement*), (p) albeit sections 1.3 and 1.4 of Volume 4 'Financial Bid' were not filled in but were crossed out because he was going to provide those services free of charge, yet he pointed out that the other rates were duly filled in and, at the end, even quoted the average daily rate over the four year period of €257 (€93,805 per annum), (q) the debris resulting from street sweeping had to be disposed of by the same contractor and not disposed of, for example, in skips which belonged to another contractor – *in this regard the Chairman Public Contracts Review Board read out Section 07 of clause 7 of Volume 3 Section 2 'Terms of Reference' (page 47) which stated that the contractor was responsible for the disposal of waste collected*, (r) likewise, the domestic waste collection contract catered for domestic waste and not for material resulting from street sweeping and, as a result, any waste transport vehicle had to be registered with the Malta Environment and Planning Authority (MEPA), (s) once the tender document requested the Malta Environment and Planning Authority (MEPA) registration then it had to be provided and one could not just pick or choose which conditions were applicable and which were not applicable, (t) L.N. 106 of 2007 provided that any vehicle involved in waste collection and/or transportation had to be registered by the Malta Environment and Planning Authority (MEPA), (u) it was clear that the tender was issued for the sweeping and cleaning of streets and the collection and disposal of the resulting material and that entailed the use of waste transport vehicles which required the Malta Environment and Planning Authority (MEPA) permit, (v) concluded that tender requirements, especially mandatory ones, had to be respected and that, as far as public procurement was concerned, it was not tolerated for one to discard published tender conditions and (w) the urgency referred to by the Local Council was not a good enough excuse for one to do away with clear tender requirements;

- having considered the contracting authority's representative's reference to the fact that (a) his role in this tendering 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 for the latter to make its decisions, (c) the equipment required for this contract were a pedestrian sweeper, a

mechanical floor scrubber and high pressure washing equipment in line with Volume 1 Section 4 'Literature' 1.1, (d) the appellant did not submit all the rates requested in the financial bid/bill of quantities, namely items 1.3 and 1.4 were crossed out although they represented a good part of the services requested and, as a result, the bid was not considered to be administratively compliant, (e) the appellant was not awarded any points once he did not quote any rates in respect of items 1.3 and 1.4 in the *Financial Bid* and it was only at the hearing that it was being stated that the appellant was going to render these services free of charge, (f) with regard to 'experience', it was noted that the recommended tenderer possessed experience in the provision of transport services but not in street sweeping and cleaning and it was the decision of the Local Council to award the contract to the recommended tenderer, (g) explained that the major issues that arose from these contracts were the management of personnel and equipment on street sweeping and cleaning works such that it would not cause traffic jams and (h) the central government had abruptly stopped providing street sweeping and cleaning services and, as a consequence, the local council had to step in to provide this service as a matter of urgency.

- having considered the recommended tenderer's representative's reference to the fact that (a) the Malta Environment and Planning Authority (MEPA) registration of the vehicles/equipment was not an issue in this tender even though (1) such registration was requested in Volume 1 Section 4 'Literature' 1.2 and (2) it was not unheard of that tender documents could contain requirements that were, effectively, inapplicable but were there because the standard template would not have been modified according to those particular services/supplies, (b) to his recollection, mechanical sweepers/scrubbers did not require the Malta Environment and Planning Authority (MEPA) registration, (c) the appellant did not possess any experience with regard to street sweeping and cleaning in residential areas because his experience concerned the collection of waste which was a different activity altogether, (d) with regard to the experience of the 'Key Person', the recommended tenderer had been providing transport services by coaches for decades and for the past five years or so had also been providing transport services for persons with special needs and both activities involved traffic and personnel management which were the key elements of the tender under reference and (e) the material resulting from street sweeping and cleaning operations, whether by mechanical means or manually, would be deposited in skips which, in turn, would be emptied by another contractor in waste collection vehicles.

reached the following conclusions, namely:

1. The Public Contracts Review Board feels that points 7 to 10 raised by the appellant in his letter of objection dated 10<sup>th</sup> December 2012 did not require the Malta Environment and Planning Authority (MEPA) registration.
2. 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.

3. This Board notes that at the outset the evaluation committee admitted that “all the tenderers failed to fully satisfy the evaluation criteria and the requirements raised by Literature (Volume 1, Section 4). Etc etc”. Taking full cognisance of this comment in the evaluation report would suffice for this Board to establish that this tender had to be cancelled.
4. This Board has taken note of the fact that, in its evaluation process, the evaluation board has, arbitrarily, overlooked the fact that, in their respective submissions,
  - a. the appellant ...
    - did not submit his technical capacity and experience;
    - did not indicate the address of his Valletta office – Albeit it was not required that pertinent office had to be up and running before the tender is awarded in line with clause 8(a) page 47, yet, according to page 31 the address had to be identified;
    - erroneously filled in his offer since he did not split the daily rate according to items in the *Financial Offer* grid but repeated it in all the items and this whilst, on page 20 and page 63 the average daily rate was quoted at €257 amounting to a yearly cost of €93,805.
  - b. the recommended tenderer ...
    - did submit his technical capacity and experience but it transpires that this is not in waste collection but in transport for the disabled;
    - has indicated key experts whose expertise was not relevant as these were an accountant and a driver;
    - erroneously filled in its offer since if one were to add all the items the average daily rate would work out to some €882 and this when. on page 20. the offer was worked out at €13,927 per month and on page 63 at a daily rate of €229! This Board opines that the grid on page 62 and the lists from page 51 to page 53 are, at best, misleading and contribute in no small way to confusion.

This Board has no difficulty in realising that both the appellant and the recommended tenderer did not seem to understand the requirements listed in the tender documents to the extent that they did not fill them out properly. Furthermore, the Public Contracts Review Board opines that the grid and lists on pages 62 and from page 51 to 53 added to the confusion providing this Board with ample justification as to why this tender needs to be reissued with clearer and unambiguous guidelines.

The Public Contracts Review Board recommends that the contracting authority should ensure that (a) a more coherent tender be published with clearer and unambiguous tender specifications and (b) it abides with the Procurement Regulations when assessing the offers.

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*