

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case No. 528**

**ZBGLC/05/11**

### **Tender for Cleaning of Non-Urban Areas in Haz-Zebbug**

The call for tender was published in the Government Gazette of the 7th October 2011 with a closing date of the 4th November 2011. The estimated value of the tender was €24,000. The price of the recommended tender was €19,990.

Mr Owen Borg filed an objection on the 17<sup>th</sup> December 2012 against the decision of the Haz-Zebbug Local Council to disqualify his offer and to recommend award to Mr Wilson Mifsud at a higher price.

The Public Contracts Review Board composed of Mr Alfred Triganza (Chairman) and Mr Joseph Croker and Mr Carmelo Esposito as members convened a meeting on Thursday 28<sup>th</sup> March 2013 to discuss the appeal.

#### **Present:**

Dr Gianfranco Gauci	Legal Representative
Mr Owen Borg	Appellant

#### **Mr Wilson Mifsud**

Dr John Bonello	Legal Representative
Mr Wilson Mifsud	Appellant

#### **Haz-Zebbug Local Council**

Dr Anglu Farrugia	Legal Representative
Mr Alfred Grixti	Mayor
Mr Philip Gatt	Project Manager

#### **Evaluation Board**

Dr Stefan Vella	Member
Mr Christopher Formosa	(Executive) Secretary

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

Dr Gianfranco Gauci, representing Mr Owen Borg, the appellant, made the following submissions:

- i. by letter dated 7th December 2012 the contracting authority informed the appellant that the tender was being recommended for award to another bidder without giving any other details as to why his offer was not successful when he had submitted the cheapest offer;
  - ii. subsequently, on obtaining a copy of the evaluation report dated 30-31 October 2012 it transpired that the reason for rejection was that, a few months before, bidder Owen Borg was caught disposing of waste at the bring-in sites at Haz-Zebbug – waste which he had been contracted to collect from another locality (Santa Lucia). Furthermore it was claimed that this was established after the plastic bags were opened and, among the waste, circulars issued by another locality were found. The identity of the contractor (Mr Owen Borg) connected with these findings were verified with the local council concerned;
  - iii. it appeared that the appellant had been accused and found guilty of a very serious offence in his line of work without even having been given the opportunity to defend himself against such an accusation;
- and
- iv. the contracting authority was being asked to explain how it came to establish these 'facts' and whether it had interviewed the bidders in connection with this tender, something which other local councils did as a matter of course.

Mr Alfred Grixti, mayor of Haz-Zebbug Local Council, under oath, gave the following evidence:-

- a. the Council had been receiving complaints from GreenPak Ltd, the contractor responsible for the emptying of skips at bring-in sites for recycling purposes, that a number of plastic bags full of waste resulting from street sweeping/cleaning were found at the bring-in sites and that it was evident that someone was irregularly disposing of these waste bags at these sites and that GreenPak Ltd was now refusing to dispose of this waste;
- b. the bring-in sites were meant for the separation of waste for recycling purposes;
- c. consequently, he had instructed the project manager, Mr Philip Gatt - even with the assistance of the Police, who, however were not in a position to detail anyone for this job - to open these rubbish bags with a view to establishing from which locality the waste originated, a procedure that was followed by other local councils localities even overseas;

- d. among the waste, copies of a circular issued by the Santa Lucia Local Council were found and, subsequent to this, the local council concerned was duly informed and, from then onwards, this abuse did not repeat itself;
- e. this investigation was carried out around August 2012 whereas this tender was issued in October/November 2011;
- f. two photographs demonstrated the presence of a number of plastic bags full of waste lying at one of the Haz-Zebbug bring-in sites;
- g. each local council was allocated a given quantity/weight of waste which could be disposed of at WasteServ facilities and if the established limit were to be exceeded the local council concerned would have to pay for it;
- h. it was not acceptable that the appellant, who resided at Haz-Zebbug, would dispose at the Haz-Zebbug bring-in sites the waste he collected as contractor from the locality of Santa Lucia;
- i. this had to be seen in the background of complaints placed on 'facebook' by members of the appellant's partner to the effect that certain streets at Zebbug were not being kept properly clean;
- j. no measures were taken against Mr Owen Borg and he was not even spoken to once the action taken with Santa Lucia Local Council effectively stopped this abuse;
- k. there were instances when the domestic waste collection contractor had to be called in to dispose of the waste which accumulated at the bring-in sites but, whenever the culprit was caught red handed, he would be compelled to collect and dispose of the waste at his expense;
- l. the Santa Lucia Local Council was not asked to indicate whether it had other contractors, other than Mr Owen Borg, engaged on cleaning contracts;

and

- m. unlike various other local councils, as soon as he was elected mayor, the Zebbug Local Council detached itself from the technical evaluation of tenders and that task would be assigned to an 'ad hoc' evaluation board and then the Council would consider the recommendations of the evaluation board and decide thereon.

Mr Philip Gatt, project manager with the Haz-Zebbug Local Council, under oath, gave the following evidence:-

- i. the duties of project manager included the supervision of the execution of contracts;
- ii. the irregular disposal of bags full of waste generated from street cleaning/sweeping, namely tree leaves and branches and other material found

on streets and in public areas, was first noted at one bring-in site but then this practice spread to other similar sites and on a number of occasions;

- iii. the Council had instructed Mr Gatt, who in turn roped in the executive secretary and a GreenPak representative - the police had no staff to spare for this job - to open up the rubbish bags in an effort to establish the locality from where this waste originated;
- iv. the waste was scattered about and among other things they found copies of a circular issued by the Santa Lucia Local Council, a copy of which was kept as evidence;
- v. through experience he could tell from the type of bags and the contents that the source of that waste were not households but evidently the waste was collected by some contractor from street sweeping/cleaning;

and

- vi. whilst this was not an isolated case, yet, when the Council reported the matter to Santa Lucia Local Council this abuse did not recur.

Dr Anglu Farrugia, legal representative of the contracting authority, submitted the following remarks with regard to points raised by Dr Gauci:-

- a. the contractor responsible for the upkeep of public gardens at Santa Lucia was the Environment and Landscaping Consortium (ELC), which entity had its own sites where to dispose of the material collected from its commercial activities and it was not Environment and Landscaping Consortium's policy to irregularly dump waste at the bring-in sites of local councils;

and

- b. the police were brought in only if a person was caught red-handed dumping waste illegally at bring-in sights but one could not bring in the police to look into a state of fact that waste was being illegally dumped at bring-in sites when the culprit was not caught committing the act.

Dr Stefan Vella, a member of the evaluation board, under oath, gave the following evidence:-

- i. whilst the terms of reference of the evaluation board were to assess the bids and make recommendations thereon, yet, the final consideration and award decision rested with the Council;
- ii. the evaluation board was not vested with the authority to investigate but to evaluate the bids received, including the past experience and record of the bidders;

and

- iii. the remark that Mr Owen Borg had been disposing of waste at the Haz-Zebbug bring-in sites in an irregular manner was brought to the attention of the evaluation board by the executive secretary of the Council, who was present during the evaluation, albeit without a voting power, and the evaluation board did not question that information and neither did it interview Mr Borg in that regard.

Mr Owen Borg, the appellant, under oath, gave the following evidence:-

- a. after examining the photographs taken at of the bring-in site at Haz-Zebbug, he noted that the bags were all black in colour, except for one which was white, whereas he used white bags;
- b. he was never asked to comment or to give his version of events on the accusation levelled at him with regard to dumping waste at the bring-in sites at Haz-Zebbug, which accusation he categorically rejected;
- c. street cleaning at Santa Lucia generated on average three to four plastic bags per day;  
  
and
- d. the Environment and Landscaping Consortium was responsible for the upkeep of gardens in Santa Lucia and besides using black plastic bags, he was aware of at least one Environment and Landscaping Consortium employee who worked on the contract in Santa Lucia and who resided in Zebbug.

Mr Anthony Saliba, representative of GreenPak Ltd, under oath, gave the following evidence:-

- i. he confirmed that on one occasion he went to empty the skips at one of the Haz-Zebbug bring-in sites and, together with his colleague he found a number of bags which contained street cleaning waste which originated from Santa Lucia and he reported the matter to his superior;
- ii. this abuse was noted on subsequent occasions and at more than one bring-in site and he, therefore, contacted the Haz-Zebbug Local Council stating that he was refusing to dispose of waste which originated from another locality;
- iii. he had information from undisclosed eyewitnesses that the person dumping this waste was using a white van – *Mr Owen Borg confirmed that he had a white van*;
- iv. he confirmed that he and his colleague found a number of the Santa Lucia circulars in white plastic bags and although he was illiterate he had no doubt about what he was saying;

and

- v. this irregular dumping of waste was not carried out solely at the bring-in site that featured in the photograph but at other bring-in sites at Haz-Zebbug as well and similar Santa Lucia circulars were found at these sites.

Dr Gauci arrived at the following conclusions:-

- a. what one had to consider was whether the reason for the rejection of his client's bid brought forward by the Council was just and reasonable;
  - b. the evaluation board did not question the information provided by the executive secretary as to Mr Borg having been responsible for the illegal dumping of waste at Haz-Zebbug bring-in sites and neither did it or the Council discuss the matter with the appellant, which they had the right to do;
  - c. evidently, the Council did not file a report to the Police on this matter because it had no proof;
  - d. although the statement indicated that Mr Owen Borg was 'caught' – giving the impression that he was caught red-handed - the fact was that the Council was led to believe that the appellant was responsible only by alleged circumstantial evidence;
  - e. it was clear that the Council was prejudiced against Mr Borg because his partner's relatives denounced the same Council on 'facebook';
  - f. the Council said that two or so Santa Lucia circulars were found whereas Mr Saliba said that many more were in fact found;
  - g. whilst it was correct to state that Environment and Landscaping Consortium had its own facilities where to dump waste and that it was not its declared policy to dump its waste at bring-in sites, yet one could not exclude the possibility that, on these few occasions, say, one of its employees could have in a hurry and found it expedient to dump some waste at Haz-Zebbug bring-in sites where he resided instead of dumping it at the Environment and Landscaping Consortium facility, namely it could have been the act of an irresponsible Environment and Landscaping Consortium employee;
  - h. the fact that the abuse ceased on contacting the Santa Lucia Local Council it could well mean that the Council had informed Environment and Landscaping Consortium which, in turn, warned its employees against such bad practices;
- and
- i. it was not correct for the Council to accuse the appellant of a serious act in his line of work simply on alleged 'circumstantial evidence' without discussing the matter with the person concerned and, moreover, discard his bid which was 7% cheaper than that recommended.

Dr Anglu Farrugia concluded that:-

- i. the evaluation board was unanimous in its decision to reject the appellant's tender;
  - ii. this matter hinged on 'circumstantial evidence' gathered in the presence of three officers and as such it was not a 'criminal' matter but it was a case of circumstantial evidence which pointed in the direction of the appellant and, as a consequence, the Council could not have concluded otherwise;
  - iii. the Environment and Landscaping Consortium used black plastic bags whereas the printed matter issued by Santa Lucia Local Council was found in white bags similar to those used by the appellant;
  - iv. the Council decided to investigate the illegal dumping of waste following a series of such illegal activities;
  - v. this abuse ceased on reporting the matter to the Santa Lucia Local Council, where the appellant carried out street cleaning services;
- and
- vi. the Council acted correctly in disqualifying the appellant due to the repeated abuses committed by him against the Zebbug Local Council and it was, therefore, justified not to engage this same person on the execution of its cleaning contracts.

Dr John Bonello, legal representative of the recommended tenderer, endorsed the arguments put forward by Dr Farrugia

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 the 13<sup>th</sup> December 2012 and submitted on the 17<sup>th</sup> December 2012 as well as through its representatives verbal submissions presented during the hearing held on the 28<sup>th</sup> March 2013, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant's representative's claims and observations, particularly, the references made to (a) the fact that by letter dated 7th December 2012 the contracting authority informed the appellant that the tender was being recommended for award to another bidder without giving any other detail as to why his offer was not successful when he had submitted the cheapest offer, (b) the fact that subsequently, apart from the fact that, on obtaining a copy of the evaluation report dated 30-31 October 2012 it transpired that the reason for rejection was that, a few months before, bidder Owen Borg was caught disposing of waste at the bring-in sites at Haz-Zebbug – waste which he had been contracted to collect from another locality (Santa Lucia), it was also claimed that (1) this was

established after the plastic bags were opened and, among the waste, circulars issued by another locality were found and (2) the identity of the contractor (Mr Owen Borg) connected with these findings were verified with the local council concerned, (c) the fact that it appeared that the appellant had been accused and found guilty of a very serious offence in his line of work without even having been given the opportunity to defend himself against such an accusation, (d) the fact that the contracting authority was being asked to explain how it came to establish these 'facts' and whether it had interviewed the bidders in connection with this tender, something which other local councils did as a matter of course, (e) Mr Owen Borg's testimony including the fact that (1) after examining the photographs taken at of the bring-in site at Haz-Zebbug, he noted that the bags were all black in colour, except for one which was white, whereas he used white bags, (2) he was never asked to comment or to give his version of events on the accusation levelled at him with regard to dumping waste at the bring-in sites at Haz-Zebbug, which accusation he categorically rejected, (3) street cleaning at Santa Lucia generated on average three to four plastic bags per day (4) the Environment and Landscaping Consortium was responsible for the upkeep of gardens in Santa Lucia and, besides using black plastic bags, he was aware of at least one Environment and Landscaping Consortium employee who worked on the contract in Santa Lucia and who resided in Zebbug, (f) the appellant lawyer's concluding remarks, especially those related to (1) what one had to consider was whether the reason for the rejection of the appellant's bid brought forward by the Council was just and reasonable, (2) the fact that the evaluation board did not question the information provided by the executive secretary as to Mr Borg having been responsible for the illegal dumping of waste at Haz-Zebbug bring-in sites and neither did it or the Council discuss the matter with the appellant, which they had the right to do, (3) the fact that, evidently, the Council did not file a report to the Police on this matter because it had no proof, (4) the fact that although the statement indicated that Mr Owen Borg was 'caught' – giving the impression that he was caught red-handed - the fact was that the Council was led to believe that the appellant was responsible only by alleged circumstantial evidence, (5) the fact that it was clear that the Council was prejudiced against Mr Borg because his partner's relatives denounced the same Council on 'facebook' (6) the fact that the Council said that two or so Santa Lucia circulars were found whereas Mr Saliba said that many more were in fact found, (7) the fact that whilst it was correct to state that Environment and Landscaping Consortium had its own facilities where to dump waste and that it was not its declared policy to dump its waste at bring-in sites, yet one could not exclude the possibility that, on these few occasions, say, one of its employees could have in a hurry found it and expediently dumped some waste at Haz-Zebbug bring-in sites where he resided instead of dumping it at the Environment and Landscaping Consortium facility, implying that it could have been the act of an irresponsible Environment and Landscaping Consortium employee, (8) the fact that the fact that the abuse ceased on contacting the Santa Lucia Local Council could well mean that the Council had informed Environment and Landscaping Consortium which, in turn, warned its employees against such bad practices and (9) the fact that it was not correct for the Council to accuse the appellant of a serious act in his line of work simply on alleged 'circumstantial evidence' without discussing the matter with the person concerned and, moreover, discard his bid which was 7% cheaper than that recommended;

- having considered the contracting authority's representative's reference to (a) the Mayor's testimony wherein, inter alia, he stated that (1) the Council had been receiving complaints from GreenPak Ltd, the contractor responsible for the emptying of skips at bring-in sites for recycling purposes, that a number of plastic bags full of waste resulting from street sweeping/cleaning were found at the bring-in sites and that it was evident that someone was irregularly disposing of these waste bags at these sites and that GreenPak Ltd was not refusing to dispose of this waste, (2) the bring-in sites were meant for the separation of waste for recycling purposes, (3) consequently, he had instructed the project manager, Mr Philip Gatt - even with the assistance of the Police, who, however were not in a position to detail anyone for this job - to open these rubbish bags with a view to establishing from which locality the waste originated, a procedure that was followed by other local councils localities even overseas, (4) among the waste, copies of a circular issued by the Santa Lucia Local Council were found and, subsequent to this, the local council concerned was duly informed and, from then onwards, this abuse did not repeat itself, (5) this investigation was carried out around August 2012 whereas this tender was issued in October/November 2011, (6) two photographs demonstrated the presence of a number of plastic bags full of waste lying at one of the Haz-Zebbug bring-in sites, (7) each local council was allocated a given quantity/weight of waste which could be disposed of at WasteServ facilities and if the established limit were to be exceeded the local council concerned would have to pay for it, (8) it was not acceptable that the appellant, who resided at Haz-Zebbug, would dispose at the Haz-Zebbug bring-in sites the waste he collected as contractor from the locality of Santa Lucia, (9) this had to be seen in the background of complaints placed on 'facebook' by members of the appellant's partner to the effect that certain streets at Zebbug were not being kept properly clean, (10) no measures were taken against Mr Owen Borg and he was not even spoken to once the action taken with Santa Lucia Local Council effectively stopped this abuse, (11) there were instances when the domestic waste collection contractor had to be called in to dispose of the waste which accumulated at the bring-in sites but, whenever the culprit was caught red handed, he would be compelled to collect and dispose of the waste at his expense, (12) the Santa Lucia Local Council was not asked to indicate whether it had other contractors, other than Mr Owen Borg, engaged on cleaning contracts, (13) unlike various other local councils, as soon as he was elected mayor, the Zebbug Local Council detached itself from the technical evaluation of tenders and that task would be assigned to an 'ad hoc' evaluation board and then the Council would consider the recommendations of the evaluation board and decide thereon, (b) the Project Manager's testimony wherein, inter alia, he stated that (1) the duties of the project manager included the supervision of the execution of contracts, (2) the irregular disposal of bags full of waste generated from street cleaning/sweeping, namely tree leaves and branches and other material found on streets and in public areas, was first noted at one bring-in site but then this practice spread to other similar sites and on a number of occasions, (3) the Council had instructed Mr Gatt, who in turn roped in the executive secretary and a GreenPak representative - the police had no staff to spare for this job - to open up the rubbish bags in an effort to establish the locality from where this waste originated, (4) the waste was scattered about and among other things they found copies of a circular issued by the Santa Lucia Local Council, a copy of which was kept as evidence, (5) through experience he could tell from the type of bags and the contents that the source of

that waste were not households but evidently the waste was collected by some contractor from street sweeping/cleaning, (6) whilst this was not an isolated case, yet, when the Council reported the matter to Santa Lucia Local Council this abuse did not recur, (c) Dr Vella's testimony especially to references to the fact that (1) whilst the terms of reference of the evaluation board were to assess the bids and make recommendations thereon, yet, the final consideration and award decision rested with the Council, (2) the evaluation board was not vested with the authority to investigate but to evaluate the bids received, including the past experience and record of the bidders, (3) the remark that Mr Owen Borg had been disposing of waste at the Haz-Zebbug bring-in sites in an irregular manner was brought to the attention of the evaluation board by the executive secretary of the Council, who was present during the evaluation, albeit without a voting power, and the evaluation board did not question that information and neither did it interview Mr Borg in that regard, (d) the contracting authority's legal representative's concluding remarks, especially, (1) the evaluation board was unanimous in its decision to reject the appellant's tender, (2) this matter hinged on 'circumstantial evidence' gathered in the presence of three officers and as such it was not a 'criminal' matter but it was a case of circumstantial evidence which pointed in the direction of the appellant and, as a consequence, the Council could not have concluded otherwise, (3) the Environment and Landscaping Consortium used black plastic bags whereas the printed matter issued by Santa Lucia Local Council was found in white bags similar to those used by the appellant, (4) the Council decided to investigate the illegal dumping of waste following a series of such illegal activities, (5) this abuse ceased on reporting the matter to the Santa Lucia Local Council, where the appellant carried out street cleaning services and (6) the Council acted correctly in disqualifying the appellant due to the repeated abuses committed by him against the Zebbug Local Council and it was, therefore, justified not to engage this same person on the execution of its cleaning contracts;

- having also considered GreenPak Ltd's representative's reference to the fact that (a) he confirmed that on one occasion he went to empty the skips at one of the Haz-Zebbug bring-in sites and, together with his colleague, he found a number of bags which contained street cleaning waste which originated from Santa Lucia and he reported the matter to his superior, (b) this abuse was noted on subsequent occasions and at more than one bring-in site and he, therefore, contacted the Haz-Zebbug Local Council stating that he was refusing to dispose of waste which originated from another locality, (c) he had information from undisclosed eyewitnesses that the person dumping this waste was using a white van – *Mr Owen Borg confirmed that he had a white van*, (d) he confirmed that he and his colleague found a number of the Santa Lucia circulars in white plastic bags and although he was illiterate he had no doubt about what he was saying and (e) this irregular dumping of waste was not carried out solely at the bring-in site that featured in the photograph but at other bring-in sites at Haz-Zebbug as well and similar Santa Lucia circulars were found at these sites,

reached the following conclusions, namely:

1. The Public Contracts Review Board opines that the evaluation board was, at least, morally obliged to (a) question the information provided by the executive

secretary as to Mr Borg having been responsible for the illegal dumping of waste at Haz-Zebbug bring-in sites, as well as (b) discuss the matter with the appellant.

2. The Public Contracts Review Board feels that although the statement indicated that Mr Owen Borg was ‘caught’ – giving the impression that he was caught red-handed - the fact was that the Council was led to believe that the appellant was responsible only by alleged circumstantial evidence.
3. The Public Contracts Review Board has taken note of the divergent responses given during the hearing wherein, whilst the Council’s representatives claimed that two or so Santa Lucia circulars were found, Mr Saliba said that many more were in fact found.
4. This Board has positively taken cognizance of the comment passed by the appellant’s representative wherein it was stated that the fact that the abuse ceased on contacting the Santa Lucia Local Council it could well mean that the Council had informed Environment and Landscaping Consortium which, in turn, warned its employees against such bad practices.
5. This Board further opines that the fact that the evaluation board was unanimous in its decision to reject the appellant’s tender does not carry more import than if it were not to have been the outcome of a unanimous decision. This Board feels that the decision, regardless of its unanimity, was based on the wrong premise and thus considered to be flawed.
6. The Public Contracts Review Board thus contends that, in the circumstance, it disagrees with the arguments raised by the contracting authority’s representatives, namely that the Zebbug Local Council had acted correctly in disqualifying the appellant due to the repeated abuses committed by him against the same Local Council and it was, therefore, justified not to engage this same person on the execution of its cleaning contracts. This Board claims that such justification was also flawed.

In view of the above this Board finds in favour of the appellant and recommends that the said appellant’s offer be reintegrated in the evaluation process. Moreover, the Public Contracts Review Board establishes that the appellant should be reimbursed with the deposit paid to lodge the appeal.

Alfred R Triganza  
Chairman

Joseph Croker  
Member

Carmelo Esposito  
Member

*17 April 2013*