

PUBLIC CONTRACTS REVIEW BOARD

Case No. 539

VLC/CMHW/1/12

Tender for the Collection of Mixed Household Waste in Valletta

The call for tender was published in the Government Gazette of the 2nd October 2012 with a closing date of the 2nd November 2012. The estimated value of the tender was €600,000 (excl. VAT).

Five (5) tenderers submitted their offers.

Mr Victor Borg and Mr Antoine Bartolo filed an objection on the 19th December 2012 against the decision of the Valletta Local Council to discard their offer and to recommend the award of the tender to Waste Collection Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza (Chairman) and Mr Carmelo Esposito and Mr Paul Vella as members convened a meeting on Friday 3rd May 2013 to discuss the appeal.

Present:

Mr Victor Borg and Mr Antoine Bartolo

Dr George Cutajar	Legal Representative
Mr Victor Borg	Appellant
Mr Antoine Bartolo	Appellant
Mr Tony Zammit	Representative
Mr Joe Attard	Representative

Waste Collection Ltd

Dr George Hyzler	Legal Representative
Mr Mario Muscat	Representative

Valletta Local Council (VLC)

Dr Joe Borg	Legal Representative
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Evaluation Board

Dr Alexiei Dingli	Mayor/Chairman
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 Victor Borg and Mr Antoine Bartolo, the appellants, made the following submissions:-

- i. by letter dated 14th December 2012 the appellants were informed that their offer was discarded and that the tender was recommended for award to the cheapest administratively and technically compliant bidder, namely, Waste Collection Ltd.
 - ii. this tender was similar to another two tenders concerning waste collection/cleaning services issued by the Valletta Local Council and decided upon by the Public Contracts Review Board in the previous weeks/months;
 - iii. these tenders were awarded by the Valletta Local Council in an irregular and arbitrary manner so much so that the Public Contracts Review Board had declared that the recommended awards were null and that the tenders had to be re-issued and, moreover, these decisions taken by the Public Contracts Review Board even ended up before the Law Courts;
 - iv. the appellants were requesting that, in this case, the award recommendation by the Valletta Local Council should be revoked and, in the first instance, the tender be awarded to them;
 - v. moreover, if this tender were to be re-issued, the appellants were also requesting the Public Contracts Review Board to direct that the tender be issued under the same conditions that existed at the closing date of the original tender, namely 2nd November 2012, so that the recommended tenderer would not be allowed to rectify his shortcomings;
 - vi. among the shortcomings attributable to the recommended tenderer one found that no waste collection trucks were registered with the Malta Environment and Planning Authority by the closing date of the tender;
- and
- vii. it would, therefore, be unfair on the appellants, once they had everything in order at the closing date of this tender, whereas the recommended tenderer failed to satisfy the tender condition by the same date.

The Chairman Public Contracts Review Board remarked that, in case this Board would decide on the cancellation of this tender, it could not impose conditions with regard to the re-issue of the tender. He added that, however, it would be the responsibility of the contracting authority to include conditions and specifications which would allow fair competition and level playing field for all bidders. He reminded those present that, up to the closing date for the receipt of tenders, bidders had the right to raise objections with regard to unfair tender conditions or specifications.

Dr Cutajar remarked that:-

- a. it would not be fair if a tenderer who did not qualify to participate in the original tender would be allowed to use the time between the closing dates of the original tender and the second call to his advantage to rectify his original shortcomings;
- b. the appellants had submitted an offer amounting to €540,200 which was substantially cheaper than the recommended offer of €862,860;

and

- c. by the closing date of the tender, the recommended tenderer did not possess the Malta Environment and Planning Authority vehicle authorisation, did not have the required personnel on his books and did not have the necessary experience requested in the tender document.

Dr Joe Bonnici, legal representative of the Valletta Local Council, submitted as follows:-

- i. the appellant was requesting that, in case his appeal would be upheld and the tender re-issued, then the tender had to be issued under the same conditions of the original tender. However, as already pointed out by the Public Contracts Review Board, that was certainly not permissible because that would exclude new bidders from participating in the second call for tenders;
- ii. allegations made in public to the effect that the present contractor was engaged without a valid contract were unfounded since this contractor was engaged on a temporary basis to carry out the service of waste collection which, from a public health and commercial point of view, was both essential and urgent;
- iii. on the 3rd December 2012 the contracting authority had requested clarifications from the appellant who submitted their reply on the following day;
- iv. the price difference between the offers made by the appellant and the recommended bidder amounted to about €300,000 over four years however the appellant failed to explain how they arrived at the quoted price;
- v. this tender concerned the collection of household waste and the emptying of skips in respect of which the appellant submitted the daily rate of €370 for household waste collection whereas he proposed to empty of skips free of charge;
- vi. the recommended bidder quoted the daily rate of €230 for household waste collection, which was 50% cheaper than the appellant's, and the daily rate of €340 for the emptying of skips;
- vii. the part of the tender which the appellant proposed to carry out free of charge consisted of the emptying of 33 skips (25 skips as per Annex 4 page 58) three

times daily, i.e. 99 skips (75 skips) daily, at three different times of the day, which involved vehicles, manpower and dumping at approved sites;

- viii. the appellant's proposal to carry out the emptying of skips, which was a substantial part of the contract, free of charge, did not make commercial sense to the contracting authority so much so that it was compelled to seek clarifications in this regard;
- ix. the appellant was the current contractor to the Zebbug Local Council and he explained that he would service the Valletta contract with the same resources applied on the execution of the Zebbug contract, something which did not make sense to the Valletta Local Council because the physical and commercial environment of Valletta were certainly not comparable to those of Zebbug;
- x. for example, the appellant declared that one of the partners, after having finished his duties at Zebbug, would go to Valletta to empty the skips with one truck and the driver between 7am and 10 am - which was a very busy time during which services had to be delivered prior to closing down the commercial parts for traffic – and it was not possible or practical for one truck and the driver to deliver that service when the current contractor employed three trucks and five employees, apart from the drivers, to deliver this service;
- xi. the waste tipping fees were paid directly by the Council and therefore, in order to minimise his losses or to make a profit, the appellant could perhaps save on tipping fees from other contracts by attributing those costs to the Valletta Local Council;
- xii. the Valletta Local Council considered that, with the price quoted, the appellant would not make a profit but would operate at a loss and, in order to avoid that situation, he would either provide an inferior/incomplete service and/or burden the Valletta Local Council with tipping fees on waste which did not originate from this contract;
- xiii. it was conceded that whilst, at the closing date of the tender, namely the 2nd November 2012, the recommended tenderer did not have his vehicle/s registered with the Malta Environment and Planning Authority, yet it was a fact that, by that same date, he had purchased the vehicle/s and lodged the relative applications with the Malta Environment and Planning Authority so much so that a few days later – *the appellant indicated the Malta Environment and Planning Authority (JBR 119) dated 8th November 2012* – he obtained the Malta Environment and Planning Authority permit;
- xiv. it was agreed that the vehicles' registration with the Malta Environment and Planning Authority was a mandatory requirement;
- xv. the appellant had indicated that whilst, by way of experience, he had worked for various local councils however it was evident that, instead of expanding his business, the appellant kept moving from one local council to another, apparently unable to hold on for long with any one of the councils he worked for;

- xvi. whilst it was correct that the recommended tenderer did not possess experience in waste collection, yet it was equally true that, with regard to the provision of transport services, he was second to none and the services requested in this tender mainly concerned the transport of waste;
 - xvii. the vehicles/equipment presented by the recommended tenderer were superior to those presented by the appellant in terms of environmental considerations;
 - xviii. the tender document requested that the contractor ought to have an office in Valletta, a trash compactor (*Annex 1 page 55*) and a work plan (*according to Annex 5 after award*) and it was only the recommended bidder who complied in these respects which were mandatory requirements;
- and
- xix. the Valletta Local Council arrived at its recommendation after taking into consideration all the above in order to engage a suitable contractor.

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

- a. one had to appreciate that the Valletta Local Council was faced with a situation where none of the bidders satisfied all the mandatory requirements;
- b. at the closing date of the tender, the recommended tenderer had purchased the vehicles and had also submitted the relative applications with the Malta Environment and Planning Authority so much so that the authorisation was issued a few days after the closing date of tender;
- c. one could not help noting an article published in "The Times" just the day before this hearing with the sole purpose of influencing the Public Contracts Review Board. Nevertheless, Dr Hyzler continued that, he was confident that this article would not serve its intended purpose;
- d. one tended to assume that, in this case, the Public Contracts Review Board would be consistent with its previous rulings;

and

- e. the appellant was not correct in his request to stop the clock as at the 2nd November 2012 in the event of the tender being re-issued and neither was he correct that this contract ought to be awarded to him for the simple reason that his bid was not compliant.

The Chairman Public Contracts Review Board remarked that no exceptions could be made with regard to mandatory requirements otherwise the term 'mandatory' would end up meaningless.

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 18th December 2012 and also through its representatives verbal submissions presented during the hearing held on the 3rd May 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 the fact that (a) by letter dated 14th December 2012 the appellants were informed that their offer was discarded and that the tender was recommended for award to the cheapest administratively and technically compliant bidder, namely, Waste Collection Ltd, (b) this tender was similar to another two tenders concerning waste collection/cleaning services issued by the Valletta Local Council and decided upon by the Public Contracts Review Board in the previous weeks/months, (c) these tenders were awarded by the Valletta Local Council in an irregular and arbitrary manner so much so that the Public Contracts Review Board had declared that the recommended awards were null and that the tenders had to be re-issued and, moreover, these decisions taken by the Public Contracts Review Board even ended up before the Law Courts, (d) the appellants were requesting that, in this case, the award recommendation by the Valletta Local Council should be revoked and, in the first instance, the tender be awarded to them, (e) moreover, if this tender were to be re-issued, the appellants were also requesting the Public Contracts Review Board to direct that the tender be issued under the same conditions that existed at the closing date of the original tender, namely 2nd November 2012, so that the recommended tenderer would not be allowed to rectify his shortcomings, (f) among the shortcomings attributable to the recommended tenderer one found that no waste collection trucks were registered with the Malta Environment and Planning Authority by the closing date of the tender, (f) it would be unfair on the appellants for a fresh tender to be reissued with the same conditions allowing the recommended bidder to participate, once the said appellant had everything in order at the closing date of this tender, whereas the recommended tenderer failed to satisfy the tender condition by the same date, (g) it would not be fair if a tenderer who did not qualify to participate in the original tender would be allowed to use the time between the closing dates of the original tender and the second call to his advantage to rectify his original shortcomings, (h) the appellants had submitted an offer amounting to €540,200 which was substantially cheaper than the recommended offer of €862,860 and (i) by the closing date of the tender, the recommended tenderer did not possess the Malta Environment and Planning Authority vehicle authorisation, did not have the required personnel on his books and did not have the necessary experience requested in the tender document;
- having considered the contracting authority's representative's reference to the fact that (a) the appellant was requesting that, in case his appeal would be upheld and the tender re-issued, then the tender had to be issued under the same conditions of the original tender and, as already pointed out by the Public Contracts Review Board, that was certainly not permissible because that would exclude new bidders from participating in the second call for tenders, (b) allegations made in public to the effect that the present contractor was engaged without a valid contract were unfounded since this contractor was engaged on a temporary basis to carry out the

service of waste collection which, from a public health and commercial point of view, was both essential and urgent, (c) on the 3rd December 2012 the contracting authority had requested clarifications from the appellants who submitted their reply on the following day, (d) albeit the price difference between the offers made by the appellant and the recommended bidder amounted to about €300,000 over four years, yet the appellant failed to explain how they arrived at the quoted price, (e) this tender concerned the collection of household waste and the emptying of skips in respect of which the appellant submitted the daily rate of €370 for household waste collection whereas he proposed to empty of skips free of charge, (f) the recommended bidder quoted the daily rate of €230 for household waste collection, which was 50% cheaper than the appellant's, and the daily rate of €340 for the emptying of skips, (g) the part of the tender which the appellant proposed to carry out free of charge consisted of the emptying of 33 skips (25 skips as per Annex 4 page 58) three times daily, i.e. 99 skips (75 skips) daily, at three different times of the day, which involved vehicles, manpower and dumping at approved sites, (h) the appellant's proposal to carry out the emptying of skips, which was a substantial part of the contract, free of charge, did not make commercial sense to the contracting authority so much so that it was compelled to seek clarifications in this regard, (i) the appellant was the current contractor to the Zebbug Local Council and he explained that he would service the Valletta contract with the same resources applied on the execution of the Zebbug contract, something which did not make sense to the Valletta Local Council because the physical and commercial environment of Valletta were certainly not comparable to those of Zebbug, giving as an example that one of the partners, after having finished his duties at Zebbug, would go to Valletta to empty the skips with one truck and the driver between 7am and 10 am - which was a very busy time during which services had to be delivered prior to closing down the commercial parts for traffic – and it was not possible or practical for one truck and the driver to deliver that service when the current contractor employed three trucks and five employees, apart from the drivers, to deliver this service, (j) the waste tipping fees were paid directly by the Council and therefore, in order to minimise his losses or to make a profit, the appellant could perhaps save on tipping fees from other contracts by attributing those costs to the Valletta Local Council, (k) the Valletta Local Council considered that, with the price quoted, the appellant would not make a profit but would operate at a loss and, in order to avoid that situation, he would either provide an inferior/incomplete service and/or burden the Valletta Local Council with tipping fees on waste which did not originate from this contract, (l) it was conceded that whilst, at the closing date of the tender, namely the 2nd November 2012, the recommended tenderer did not have his vehicle/s registered with the Malta Environment and Planning Authority, yet it was a fact that, by that same date, he had purchased the vehicle/s and lodged the relative applications with the Malta Environment and Planning Authority so much so that a few days later – *the appellant indicated the Malta Environment and Planning Authority (JBR 119) dated 8th November 2012* – he obtained the Malta Environment and Planning Authority permit, (m) it was agreed that the vehicles' registration with the Malta Environment and Planning Authority was a mandatory requirement, (n) the appellant had indicated that whilst, by way of experience, he had worked for various local councils, yet it was evident that, instead of expanding his business, the appellant kept moving from one local council to another, apparently unable to hold on for long with any one of the councils he worked for, (o) whilst it was

correct that the recommended tenderer did not possess experience in waste collection, yet it was equally true that, with regard to the provision of transport services, he was second to none and the services requested in this tender mainly concerned the transport of waste, (p) the vehicles/equipment presented by the recommended tenderer were superior to those presented by the appellant in terms of environmental considerations, (q) the tender document requested that the contractor ought to have an office in Valletta, a trash compactor (*Annex 1 page 55*) and a work plan (*according to Annex 5 after award*) and it was only the recommended bidder who complied in these respects which were mandatory requirements and (r) the Valletta Local Council arrived at its recommendation after taking into consideration all the above in order to engage a suitable contractor;

- having also considered the recommended tenderer's representative's reference to the fact that (a) one had to appreciate that the Valletta Local Council was faced with a situation where none of the bidders satisfied all the mandatory requirements, (b) at the closing date of the tender, the recommended tenderer had purchased the vehicles and had also submitted the relative applications with the Malta Environment and Planning Authority so much so that the authorisation was issued a few days after the closing date of tender, (c) whilst one could not help but noting an article published in 'The Times' just the day before this hearing with the sole purpose of influencing the Public Contracts Review Board, yet Dr Hyzler was confident that this article would not serve its intended purpose, (d) one tended to assume that, in this case, the Public Contracts Review Board would be consistent with its previous rulings, (e) the appellant was not correct in his request to stop the clock as at the 2nd November 2012 in the event of the tender being re-issued and neither was he correct that this contract ought to be awarded to him for the simple reason that his bid was not compliant;

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. This Board notes that members of the evaluation committee admitted that all the tenderers failed to fully satisfy the evaluation criteria. Taking full cognisance of

these comments this Board feels that such comments should be enough for it to establish that this tender has to be cancelled.

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

The Public Contracts Review Board also recommends that the contracting authority should ensure that (a) a more coherent tender be re-issued 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

Carmelo Esposito
Member

Paul Mifsud
Member

7 May 2013