

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case No. 540**

**SVLC/T/07/2012**

### **Tender for Street/Pavement Sweeping, Weeding and Cleaning of Soft Areas, Gardens and Playing Fields - Santa Venera**

The call for tender was published in the Government Gazette of the 30<sup>th</sup> October 2012 with a closing date of the 30<sup>th</sup> November 2012. The estimated value of the tender was €25,272 (excl. VAT).

Eleven (11) tenderers submitted their offers.

Mr Owen Borg filed an objection on the 7<sup>th</sup> January 2013 against the decision of the Santa Venera Local Council to discard his offer and to recommend the award of the tender to Mr Carmel Mifsud.

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 3<sup>rd</sup> May 2013 to discuss the appeal.

#### **Present:**

#### **Mr Owen Borg**

Dr Gianfranco Gauci	Legal Representative
Mr Owen Borg	Appellant

**Mr Carmel Mifsud – no one was present**

**Santa Venera Local Council (SVLC)**

#### **Evaluation Board**

Mr Horace Anastasi	Chairman (ex Mayor)
Ms Louise Gusman	A/Executive Secretary

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

Dr Gianfranco Gauci, legal advisor of Mr Owen Borg, the appellant, submitted that:-

- i. the appellant had submitted an offer which was cheaper than the recommended one and, for that matter, the cheapest out of the eleven tenders submitted;
  - ii. by letter dated 2<sup>nd</sup> January 2013 the appellant was informed that the tender was recommended for award to Mr Carmel Mifsud who submitted the most advantageous offer;
  - iii. following the receipt of the letter dated 2<sup>nd</sup> January 2013, the appellant was verbally informed that his offer was excluded because the tender was submitted by an individual and not by a limited liability company. If this were to be the case that reason for exclusion was incorrect at law and, besides, it turned out that the recommended tenderer also submitted his bid as an individual and not as a company;
- and
- iv. albeit the contracting authority refused the appellant's repeated requests for a copy of the minutes of the relevant Council meeting/s, yet he then managed to access the Council minutes of meeting held on 28<sup>th</sup> December 2012 (approved on 7<sup>th</sup> February 2013) on the Santa Venera Local Council's website which had merely approved the recommendation of adjudicating board without giving any reasons.

The Chairman Public Contracts Review Board noted that the letter of exclusion did not include the reasons why the bidder had been disqualified as required by regulations and he pointed out that it was the bidder's right to be informed of the reasons for his exclusion both for the sake of transparency and to enable him to decide if it was the case to file an appeal.

Ms Louise Gusman, A/Executive Secretary of the Santa Venera Local Council, remarked that the reasons for rejection were in the evaluation report, the minutes of the Council meetings were publicly displayed on the website and, in this case, the appellant had called at her office and she had verbally informed him of the reasons for his exclusion. She added that, during the tendering process, she had followed the instructions of the Local Government Department.

The Chairman Public Contracts Review Board remarked that the Public Contracts Review Board could not help noting that, time and again, the local councils were not informing all unsuccessful bidders of the reasons for the rejection of their bids in a formal manner, whether by mail or electronic means, and it was certainly not fair on bidders to have to lodge an appeal before the Public Contracts Review Board simply to learn why their offer had been excluded. He added that contracting authorities had to, invariably, abide by regulations and that instructions had to be issued in line with regulations.

The Chairman Public Contracts Review Board read out the reason for the appellant's exclusion as indicated in the adjudicating report, namely, the lowest quote however no experience with local councils and no profile provided. He noted that once the Santa Venera Local Council acknowledged that the appellant had presented the lowest quote then the bone of contention was the non-submission of his profile and of details about his experience.

Mr Horace Anastasi, former mayor and chairman of the adjudication board, declared that he was prepared to state under oath that the appellant's submission did neither include his profile nor details about his experience. He added that, during the tender opening stage, those present, about twelve persons including bidders, were given the opportunity to scrutinise the process at close range for the sake of transparency. Mr Anastasi recalled that Mr Borg called twice at the offices of the Santa Venera Local Council where, on the first occasion, he did not mention that the missing information had, in fact, been submitted and that it was on the second occasion that he insisted that the missing information had, in fact, been submitted.

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

- a. he confirmed that he was not present at the tender opening stage.
- b. on two occasions the Santa Venera Local Council had refused to hand him the Council minutes;
- c. he had been informed that the reason for his rejection was that he submitted the bid as an individual and not in the name of a limited liability company;
- d. whilst in his tender submission he had included his profile and information about his experience, yet, it could be the case that these papers might have been mislaid at the contracting authority's end;
- e. with regard to experience, he had rendered satisfactory service to the San Gwann Local Council for two years and to the Santa Lucia Local Council for 18 months and he had letters of recommendation from these local councils which he claimed to have also submitted with his tender;

and

- f. if his wife were to be present at the hearing she would have confirmed the alleged missing information was, in fact, presented in the original tender.

On being handed over his tender submission to go through it with a view to verifying if he had in fact submitted the alleged missing information, Mr Borg confirmed that he could not trace the information.

Dr Gauci's request to defer the hearing so that the spouse of the appellant would give evidence was not entertained by the Public Contracts Review Board since it would amount to her affidavit against that of members of the contracting authority, whereas

what mattered most was what had actually been presented in the original tender submission.

Ms Gusman, under oath, gave the following evidence:-

- i. the first bullet of Annex 8 titled 'Documents to be submitted with the tender' referred to detailed covering letter including personal details and experience;
  - ii. the appellant called twice at the Council's office, once to give notice of appeal and the next to pay the deposit but he never asked for the Council minutes;
  - iii. the schedule of tenders received was compiled and endorsed by the board in the presence of all those present at tender opening stage and that schedule was then displayed on the Council's notice board;
  - iv. the reasons for rejection were those indicated in the notes on the schedule of offers received which were then reflected in the adjudication report;
  - v. the Council file contained all the information submitted by the appellant and the Santa Venera Local Council had no interest in withholding or destroying any documentation;
- and
- vi. as per instructions given by the Local Government Department, the tender document requested bidders to submit only one tender submission, that is, without requesting them to submit an identical copy.

The Chairman Public Contracts Review Board remarked that both the contracting authority and the bidders should communicate with one another formally in writing and that bidders should, invariably, be requested to submit the original submission along with an 'identical' copy which would be kept sealed so that, in case of any allegations of mislaid or missing documentation, one would open the sealed copy to verify if documentation found missing in the original submission were or were not in the copy.

Dr Gauci concluded that this tendering procedure should be rendered null if, according to regulations, the contracting authority should have requested bidders to submit the original and a copy of the tender submission for the sake of verification in case of alleged missing/mislaid documentation. He also pointed out that the appellant had declared under oath that he had submitted all the information requested.

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 7<sup>th</sup> January 2013 and also through its representatives verbal submissions presented during the hearing held on the 3<sup>rd</sup> 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) the appellant had submitted an offer which was cheaper than the recommended one and, for that matter, the cheapest out of the eleven tenders submitted, (b) by letter dated 2<sup>nd</sup> January 2013 the appellant was informed that the tender was recommended for award to Mr Carmel Mifsud who submitted the most advantageous offer, (c) whilst claiming that, following the receipt of the letter dated 2<sup>nd</sup> January 2013, the appellant was verbally informed that his offer was excluded because the tender was submitted by an individual and not by a limited liability company, yet, if this were to be the case, that reason for exclusion would be incorrect at law, apart from the fact that the recommended tenderer also submitted his bid as an individual and not as a company, (d) albeit the contracting authority refused the appellant's repeated requests for a copy of the minutes of the relevant Council meeting/s, yet the appellant then managed to access the Council minutes of meeting held on 28<sup>th</sup> December 2012 (approved on 7<sup>th</sup> February 2013) on the Santa Venera Local Council's website which had merely approved the recommendation of the adjudicating board without giving any reasons, (e) the appellant confirmed that he was not present at the tender opening stage, (f) on two occasions the Santa Venera Local Council had refused to hand the appellant the Council minutes, (g) whilst in his tender submission the appellant had included his profile and information about his experience, yet, it could be the case that these papers might have been mislaid at the contracting authority's end, (h) with regard to experience, the appellant had rendered satisfactory service to the San Gwann Local Council for two years and to the Santa Lucia Local Council for 18 months and he had letters of recommendation from these local councils which he claimed to have also submitted with his tender, (i) if the appellant's wife were to be present at the hearing she would have confirmed that the alleged missing information was, in fact, presented in the original tender, (j) this hearing should be deferred so that the spouse of the appellant would give evidence and (k) Dr Gauci concluded that this tendering procedure should be rendered null if, according to regulations, the contracting authority should have requested bidders to submit the original and a copy of the tender submission for the sake of verification in case of alleged missing/mislaid documentation;
- having also considered the fact that during his testimony, on being handed over his tender submission to go through it with a view to verifying if he had in fact submitted the alleged missing information, Mr Borg confirmed that he could not trace the information;
- having considered the contracting authority's representatives' reference to the fact that (a) the reasons for rejection were in the evaluation report, the minutes of the Council meetings were publicly displayed on the website and, in this case, the appellant had called at her office and she had verbally informed him of the reasons for his exclusion, (b) during the tendering process, Ms Gusman, on behalf of the said Local Council, had followed the instructions of the Local Government Department, (c) she (Ms Gusman) was prepared to state under oath that the appellant's submission did neither include his profile nor details about his experience, (d) Mr Anastasi claimed that, during the tender opening stage, those present, about twelve persons including bidders, were given the opportunity to

scrutinise the process at close range for the sake of transparency, (e) Mr Anastasi recalled that Mr Borg called twice at the offices of the Santa Venera Local Council where, on the first occasion, he did not mention that the missing information had, in fact, been submitted and that it was on the second occasion that he insisted that the missing information had, in fact, been submitted, (f) the first bullet of Annex 8 titled '*Documents to be submitted with the tender*' referred to a detailed covering letter including personal details and experience, (g) the appellant called twice at the Council's office, once to give notice of appeal and the next to pay the deposit but he never asked for the Council minutes, (h) the schedule of tenders received was compiled and endorsed by the board in the presence of all those present at tender opening stage and that schedule was then displayed on the Council's notice board, (i) the reasons for rejection were those indicated in the notes on the schedule of offers received which were then reflected in the adjudication report, (j) the Council file contained all the information submitted by the appellant and the Santa Venera Local Council had no interest in withholding or destroying any documentation and (k) as per instructions given by the Local Government Department, the tender document requested bidders to submit only one tender submission, that is, without requesting them to submit an identical copy,

reached the following conclusions, namely:

1. The Public Contracts Review Board contends that the letter of exclusion did not include the reasons why the bidder had been disqualified as required by regulations. This Board places emphasis on the fact that it was the bidder's right to be informed of the reasons for his exclusion both for the sake of transparency and to enable him to decide if it was the case to file an appeal. The Public Contracts Review Board could not help noting that, time and again, the local councils were not informing all unsuccessful bidders of the reasons for the rejection of their bids in a formal manner, whether by mail or electronic means, and it was certainly not fair on bidders to have to lodge an appeal before the Public Contracts Review Board simply to learn why their offer had been excluded. This Board cannot but stress enough that contracting authorities have to, invariably, abide by regulations and that instructions have to be issued in line with regulations.
2. Ideally, this Board suggests that both the contracting authority and the bidders should communicate with one another formally in writing and that bidders should, invariably, be requested to submit the original submission along with an 'identical' copy which would be kept sealed so that, in case of any allegations of mislaid or missing documentation, one would open the sealed copy to verify if documentation found missing in the original submission were or were not in the copy. The Public Contracts Review Board uses the word "suggests" rather than anything else as, on this particular matter, it transpires that albeit there exists a requirement (wherein tenderers are requested to comply with the condition to submit their tender in one original, marked 'original' and one copy marked 'copy') in the '*Instructions to Tenderers*' in the tender document, yet it is not stipulated in the Public Procurement Regulations. With regard to tenders issued by Local Councils no one from

the Contracts Department could confirm whether such praxis is also being strictly observed at this level, namely in the Local Council tenders.

3. This Board also argues that, despite verbal claims during the hearing to the contrary by the appellant, one cannot disregard conflicting claims made by the contracting authority as regards the non-submission of the appellant's profile. This Board fully acknowledges the fact that, in this particular objection, the bones of contention were the non-submission of the appellant's profile and of details about his experience. With regard to the former, this Board feels that (a) once requirement for the inclusion of request by Local Councils for tenderers to comply with the condition to submit their tender in one original, marked 'original' and one copy marked 'copy is not mandatory and (b) also, considering that in this particular instance, the Local Council refrained from rendering such request formally, all this leaves this Board with a dubious scenario facing conflicting statements, both given under oath. In this particular instance this Board feels that one has to give the benefit of the doubt to the appellant and this is not because the version of the Council representative was not believed but because it could have well been the case that such profile could have been provided and was, eventually, genuinely misplaced. As a result both versions were deemed to have been given in good faith. With regards to level of 'experience' this Board feels that it would be better for the evaluation board to properly analyse the appellant's profile once this is (re) submitted.

In view of the above this Board finds in favour of the appellant and recommends that he be reinstated in the evaluation process. Furthermore, the Public Contracts Review Board is allowing seven (7) working days from the date of this decision for the appellant to submit the said 'profile' to the contracting authority to enable a quick analysis of same by the said authority.

Finally, this Board recommends that the deposit paid by the same appellant for the appeal to be lodged should be reimbursed.

Alfred R Triganza  
Chairman

Carmelo Esposito  
Member

Paul Mifsud  
Member

*7 May 2013*