

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case No. 541**

**BLC/025/2012**

### **Tender for the Construction of Fleur-de-Lys Arch**

The call for tender was published in the Government Gazette of the 14<sup>th</sup> November 2012 with a closing date of the 10<sup>th</sup> December 2012. The estimated value of the tender was €241,488.50 (Excl. VAT).

Three (3) tenderers submitted their offers.

Vaults Ltd filed an objection on the 23<sup>rd</sup> January 2013 against the decision of the B’Kara Local Council to discard its offer and to recommend the award of the tender to V & C Contractors 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 3<sup>rd</sup> May 2013 to discuss the appeal.

#### **Present:**

##### **Vaults Ltd**

Dr Alessandro Lia	Legal Representative
Mr Ivan Farrugia	Operations Manager
Ms Yvonne Farrugia	Representative

##### **V & C Contractors Ltd**

Mr Vincent Borg	Managing Director
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##### **Contracting Authority – B’Kara Local Council (including Santa Venera Local Council and Fleur de Lys Administration Commission)**

Dr Sandra Sladden	Legal Representative
Mr Michael Fenech Adami	Councillor/Former Mayor B’Kara Local Council
Mr Stephen Sultana	Mayor, Santa Venera LC
Mr Arthur Pizzuto	Executive Secretary (B’Kara Local Council)

##### **Evaluation Board**

Mr Joseph Sammut	Chairman
Ms Doris Borg	Member
Mr Anthony Buttigieg	Member
Mr Emanuel Farrugia	Member
Mr Antoine Attard	Member
Mr Paul Micallef	Secretary
Mr Arthur Pizzuto	Executive Secretary

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

Dr Alessandro Lia, legal representative of Vaults Ltd, the appellant company, submitted that:-

- i. around the 15th January 2013 the appellant company's representative had called at the B'Kara Local Council to enquire about developments with regard to the adjudication of this tender and thereupon he was informed that the tender had in fact been awarded on the 24<sup>th</sup> December 2012;
  - ii. on the 15th January 2013 the appellant company was issued with a letter informing it that, following the Council meeting held on 24th December 2012, it was decided not to accept its offer and to recommend the award of the tender in favour of V & C Contractors Ltd;
  - iii. this action by the contracting authority was in violation of the Public Procurement Regulations and of the principles of natural justice and, moreover, the appellant company was still in the dark as to why its offer had been rejected and, as a result, it was not in a position to prepare its defence;
- and
- iv. one had to point out that the contracting authority had contacted the appellant company on two occasions asking for information which it complied with in time.

Dr Sandra Sladden, legal advisor of the B'Kara Local Council, submitted that:-

- a. as correctly stated by the appellant company the contracting authority had communicated with the company in two instances and whilst, in both cases, the appellant company replied in time, however, in the third instance, namely to the letter of clarification dated 20th December 2012, the appellant company failed to send its reply within the stipulated date/time, i.e. 9:30 am of Monday 24th December 2012, i.e. within 4 days;
- b. the third request for clarification dealt with three specific issues which were crucial to the execution and to the costing of this contract;
- c. any mail received by the mayor was automatically transmitted to all the councillors and to the executive secretary and it was confirmed that none of them had received the reply from the appellant company to the letter dated 20th December 2012;
- d. moreover, emails received in the Council's email box was also transmitted to the gmail account of the executive secretary and, likewise, there was no trace of any email received from the appellant company concerning the clarification letter;

- e. during the Council meeting held on 24th December 2012 the adjudicating board noted that the appellant company had failed to react to the request for clarification dated 20th December 2012 neither by mail nor by email, and, as a result, it had no option but to discard its offer;
- f. had the appellant company sent its reply in time, the Council would have taken it into account during adjudication because, as far as the Council was concerned, it would have been better to have as many bidders as possible so as to obtain the required service at the most competitive price;

and

- g. the appellant company was correct that, through an oversight, the contracting authority had not informed the appellant company and the other unsuccessful tenderer that their offers were rejected and the tender awarded.

Mr Michael Fenech Adami, former mayor of B’Kara Local Council, explained that:-

- i. this tendering procedure had been in progress for quite some time and the central government was exerting pressure to expedite matters so as to absorb the funds already allocated to this project;
- ii. according to the architect in charge, the issues raised in the third request for clarifications dealt with the main aspects of the project and in respect of which there resulted a substantial difference in the financial offers received;
- iii. whilst it was correct for one to state that, through an oversight, the appellant company and another unsuccessful tenderer were not informed of the award of the tender, yet, while acknowledging its mistake, the contracting authority took care that when issuing the exclusion letter to these two unsuccessful tenderers the date of the letter would not be backdated so as not to prejudice their position should they opt to lodge an objection;

and

- iv. he even took the time to, personally, explain to the appellant company’s representative the reasons for the company’s bid rejection.

Mr Ivan Farrugia, another representative of the appellant company, explained that:-

- a. the request for clarification, although dated Thursday 20th December 2012, was, in fact, received on Friday 21st December 2012, namely on the last day prior to the Christmas shutdown, and, as a result, effectively, only three days were given for the company to submit the reply which included Saturday and Sunday;
- b. the company had, in fact, sent its reply to the clarification on Monday 24th December 2012 at 8:30 am, i.e. one hour prior to the deadline, from Mr Farrugia’s gmail account to the B’Kara Local Council’s email address ,, birkirkara.lc@gov.mt;

and

- c. he could confirm this as a state of fact at the hearing by accessing his gmail account on his smart phone, a record which he could not temper with.

Dr Lia argued that the appellant company had, in fact, submitted its reply to the clarification letter dated 20th December 2012 within the deadline established by the contracting authority and, as a result, the reason for the appellant company's rejection quoted in the adjudication report was not a valid one.

Dr Sladden stated that whilst the email box where the appellant company was claiming to have sent its reply could be accessed by the mayor, all the councillors and the executive secretary simultaneously, yet, she reiterated that none of them had received the appellant company's reply.

The Chairman Public Contracts Review Board remarked that it was the right of participating tenderers to be informed in writing of the reasons behind their disqualification, irrespective of whether the Council minutes were publicly available on the website, and the Board was certainly not the proper venue for tenderers to learn the reasons for their rejection.

Dr Lia pointed out that, at that stage, the appellant company was requesting the revocation of the award recommendation once the reason for rejection was unfounded and to award the company the tender since it presented the cheapest offer. He added that, if that would not be the case, then the appellant company should be given another opportunity to look into the substance of any new reasons for rejection that the contracting authority might come up with.

Dr Sladden argued that, in view of the way things have developed, it would seem that the way forward was to reintegrate the appellant company in the tendering process, adjudicate its tender submission and, if necessary, review the original award recommendation.

Mr Stephen Sultana, mayor of Santa Venera, pointed out that since the adjudication of this tender there have been changes within the local councils of both B'Kara and Santa Venera as a consequence of recent local elections in both localities and, therefore, the adjudicating board would probably have to be reconstituted.

The Chairman Public Contracts Review Board and Dr Sladden shared the view that, whilst this tendering procedure should stand irrespective of the changes that took place in the local councils following the elections, yet the adjudicating board might require changes in view of the developments that had taken place.

Dr Sladden concluded that the contracting authority was presently in possession of the email and the accompanying documents which the appellant company claimed to have sent at 8:30 am of the 24th December 2012.

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 23<sup>rd</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) around the 15th January 2013 the appellant company's representative had called at the B'Kara Local Council to enquire about developments with regard to the adjudication of this tender and thereupon he was informed that the tender had, in fact, been awarded on the 24<sup>th</sup> December 2012, (b) on the 15th January 2013 the appellant company was issued with a letter informing it that, following the Council meeting held on 24th December 2012, it was decided that its offer was not to be accepted and that the award of the tender in favour of V & C Contractors Ltd should be recommended, (c) this action by the contracting authority was in violation of the Public Procurement Regulations and of the principles of natural justice and, moreover, the appellant company was still in the dark as to why its offer had been rejected and, as a result, it was not in a position to prepare its defence, (d) one had to point out that the contracting authority had contacted the appellant company on two occasions asking for information which it complied with in time, (e) the request for clarification, although dated Thursday 20th December 2012, was, in fact, received on Friday 21st December 2012, namely on the last day prior to the Christmas shutdown, and, as a result, effectively, only three days were given for the company to submit the reply which included Saturday and Sunday, (f) the company had, in fact, sent its reply to the clarification on Monday 24th December 2012 at 8:30 am, namely one hour prior to the deadline, from Mr Farrugia's gmail account to the B'Kara Local Council's email address ,, birkirkara.lc@gov.mt, (g) the appellant could confirm this as a state of fact at the hearing by accessing his gmail account on his smart phone, a record which he could not temper with, (h) Dr Lia argued that the appellant company had, in fact, submitted its reply to the clarification letter dated 20th December 2012 within the deadline established by the contracting authority and, as a result, the reason for the appellant company's rejection quoted in the adjudication report was not a valid one and (i) the appellant company's legal representative pointed out that, at that stage, the appellant company was requesting the revocation of the award recommendation once the reason for rejection was unfounded and to award the company the tender since it presented the cheapest offer, adding that, if that would not be the case, then the appellant company should be given another opportunity to look into the substance of any new reasons for rejection that the contracting authority might come up with;
- having considered the contracting authority's representative's reference to the fact that (a) as correctly stated by the appellant company the contracting authority had communicated with the company in two instances and whilst, in both cases, the appellant company replied in time, yet, in the third instance, namely to the letter of clarification dated 20th December 2012, the appellant company failed to send its reply within the stipulated date/time, i.e. 9:30 am of Monday 24th December 2012, i.e. within 4 days, (b) the third request for clarification dealt with three

specific issues which were crucial to the execution and to the costing of this contract, (c) any mail received by the mayor was automatically transmitted to all the councillors and to the executive secretary and it was confirmed that none of them had received the reply from the appellant company to the letter dated 20th December 2012, (d) moreover, emails received in the Council's email box was also transmitted to the gmail account of the executive secretary and, likewise, there was no trace of any email received from the appellant company concerning the clarification letter, (e) during the Council meeting held on 24th December 2012 the adjudicating board noted that the appellant company had failed to react to the request for clarification dated 20th December 2012 neither by mail nor by email, and, as a result, it had no option but to discard its offer; (f) had the appellant company sent its reply in time, the Council would have taken it into account during adjudication because, as far as the Council was concerned, it would have been better to have as many bidders as possible so as to obtain the required service at the most competitive price, (g) the appellant company was correct that, through an oversight, the contracting authority had not informed the appellant company and the other unsuccessful tenderer that their offers were rejected and the tender awarded, (h) this tendering procedure had been in progress for quite some time and the central government was exerting pressure to expedite matters so as to absorb the funds already allocated to this project, (i) according to the architect in charge, the issues raised in the third request for clarifications dealt with the main aspects of the project and in respect of which there resulted a substantial difference in the financial offers received, (j) whilst it was correct for one to state that, through an oversight, the appellant company and another unsuccessful tenderer were not informed of the award of the tender, yet, while acknowledging its mistake, the contracting authority took care that when issuing the exclusion letter to these two unsuccessful tenderers the date of the letter would not be backdated so as not to prejudice their position should they opt to lodge an objection, (k) the former mayor even took the time to, personally, explain to the appellant company's representative the reasons for the company's bid rejection, (l) Dr Sladden argued that, in view of the way things have developed, it would seem that the way forward was to reintegrate the appellant company in the tendering process, adjudicate its tender submission and, if necessary, review the original award recommendation and (m) Dr Sladden concluded that the contracting authority was presently in possession of the email and the accompanying documents which the appellant company claimed to have sent at 8:30 am of the 24th December 2012,

reached the following conclusions, namely:

1. The Public Contracts Review Board feels that it was the right of participating tenderers to be informed in writing of the reasons behind their disqualification, irrespective of whether the Council minutes were publicly available on the website and the Public Contracts Review Board was certainly not the proper venue for tenderers to learn the reasons for their rejection.
2. This Board has to give the benefit of the doubt to the appellant company with regard to the timely transmission of the requested information as, after all, it is clearly manifested in the document submitted at the hearing for all those

present to be able to view a copy of which had already been made available prior to this hearing to the contracting authority by the same appellant.

3. Having also considered points raised during the hearing by Mr Stephen Sultana, mayor of Santa Venera, particularly those relating to the fact that, following the adjudication of this tender, there have been developments within the local councils of both B'Kara and Santa Venera as a consequence of recent local elections in both localities and, as a result, the adjudicating board would, probably, have to be reconstituted, this Board concurs with the contracting authority's view, namely that, whilst this tendering procedure should stand irrespective of the changes that took place in the local councils following the elections, yet the adjudicating board might require changes in view of the developments that had taken place.

In view of the above this Board finds in favour of the appellant company. The Board also recommends that the appellant company shall not only be reintegrated in the adjudication process but also reimbursed with the deposit paid to lodge the appeal.

Alfred R Triganza  
Chairman

Carmelo Esposito  
Member

Paul Mifsud  
Member

*7 May 2013*