

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case No. 543**

**SLC/06/2012**

### **Tender for the Supply of Outdoor Gym Equipment**

The call for tender was published in the Government Gazette of the 3<sup>rd</sup> January 2013 with a closing date of the 4<sup>th</sup> February 2013. The estimated value of the tender was €15,000 (excl. VAT). The price of the recommended tender was €14,668.78 (incl. VAT).

Three (3) tenderers submitted their offers.

JGC Ltd filed an objection on the 8<sup>th</sup> March 2013 against the decision of the Swieqi Local Council to discard its offer and to recommend the award of the tender to Forestals Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza (Chairman) and Mr Carmelo Esposito and Mr Paul Mifsud as members convened a meeting on Tuesday 7<sup>th</sup> May 2013 to discuss the appeal.

#### **Present:**

##### **JGC Ltd**

Dr Alex Schembri	Legal Representative
Mr Pierre Cuschieri	Representative
Mr Simon Micallef	Representative

##### **Forestals Ltd**

Dr David Zahra	Legal Representative
Mr Gordon Dimech	CEO (Commercial)

##### **Swieqi Local Council**

Mr Noel Muscat	Mayor
Dr Justin Fenech	Deputy Mayor
Mr Hugh Zammit	Executive Secretary

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

Dr Alex Schembri, legal representative of JGC Ltd, the appellant company, made the following submissions:-

- i. by letter dated 28th February 2013 the Swieqi Local Council informed the appellant company that its offer had been refused without giving any reasons for discarding its offer;
  - ii. according to regulations and to clause 34.2 of the tender document the contracting authority was obliged to furnish all unsuccessful tenderers with the reasons for the rejection of their bids and with the details of the recommended award;
  - iii. in the circumstances, the appellant company was totally in the dark as to why its offer had been rejected and as to whether there were sufficient grounds to file an appeal so much so that the company ended up filing a generic appeal stating that its offer was in line with specifications and the cheapest;
- and
- iv. the appellant company was calling for the cancellation of the award recommendation even on the grounds that the contracting authority did not abide by the provisions of the tender document and of regulations as indicated above.

Mr Noel Muscat, Mayor of Swieqi Local Council, explained that:-

- a. this was practically his first experience in the adjudication of tenders;
- b. the procedure followed was that the Council appointed an expert, in this case architect Dieter Falzon, to advise on the offers received and then the Council decided on the award of the tender;
- c. the expert expressed the professional opinion that the most advantageous offer was that of JGC Ltd – report dated 9<sup>th</sup> February 2013;
- d. although he could not clearly recall all the reasons why the Council had decided on the award of the tender in favour of Forestals Ltd, it appeared that the main issue was that the appellant's product was made in Korea while that of the recommended tenderer was made in the EU;
- e. the difference between the cheaper price offered by the appellant company, €12,994.75 and the cheaper price offered by the recommended tenderer, €14,668.78 was not that significant;
- f. he acknowledged that although the product offered by the appellant company was made in Korea it must have been up to EU standards as, otherwise, it could not have been marketed in EU Member States;

- g. after the award, Council members did visit sites where the products offered by both the appellant company and the recommended tenderer had already been installed and it was conceded that it would have been better had the decision been taken after these site visits;

and

- h. the tender document did not stipulate that the equipment had to be made in the EU.

Dr Justin Fenech, Deputy Mayor of the Swieqi Local Council, explained that when comparing prices, one would note that the appellant company offered a product made in Korea for the price of €12,994.75 and another product made in Spain (EU) for the price of €23,324.25 whereas the recommended tenderer offered two options with the cheaper priced at €14,668.78 and made in the EU. He added that the Council opted for the latter since it was made in the EU, aesthetically it looked better, other councils had opted for this kind of equipment and the price for EU-made equipment was cheaper, namely €14,668.78 as against €23,324.25.

The Chairman Public Contracts Review Board remarked that:-

- i. the appellant company was correct that it should have been notified, by mail or electronic mail, of the reasons why its offer had not been recommended for award and that it had to be so notified within a stipulated time frame;
- ii. it was not enough for a bidder to be referred to the Council's notice board or website but a participating tenderer had to be notified as soon as the decision was taken, which often took quite some time;
- iii. the appellant company had the right of appeal and the company could only exercise that right if it was informed of the reasons that led to its disqualification/rejection and it was certainly not the case that a bidder had to lodge an appeal to obtain that information;

and

- iv. if the tender document did not specify that the product had to be manufactured in the EU then the contracting authority should not disqualify the appellant company merely because it offered a product manufactured in Korea.

Mr Muscat acknowledged that, given the benefit of hindsight, the Council could have acted more diligently in its deliberations, however, the Council acted the way it did through inexperience and in good faith and not for any other ulterior motive.

The Chairman Public Contracts Review Board remarked that technically compliant offers had then to be considered on the basis of price as per clause 32.1 of the tender document.

At this point the hearing was brought 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> March 2013 and also through its representatives verbal submissions presented during the hearing held on the 7<sup>th</sup> May 2013, had objected to the decision taken by the pertinent authority;
- 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 28<sup>th</sup> February 2013 the Swieqi Local Council informed the appellant company that its offer had been refused without giving any reasons for discarding its offer, (b) according to regulations and to clause 34.2 of the tender document the contracting authority was obliged to furnish all unsuccessful tenderers with the reasons for the rejection of their bids and with the details of the recommended award, (c) in the circumstances, the appellant company was totally in the dark as to why its offer had been rejected and as to whether there were sufficient grounds to file an appeal so much so that the company ended up filing a generic appeal stating that its offer was in line with specifications and the cheapest and (d) the appellant company was calling for the cancellation of the award recommendation even on the grounds that the contracting authority did not abide by the provisions of the tender document and of regulations as indicated above;
- having considered the contracting authority's representative's reference to the fact that (a) this was practically the Mayor's first experience in the adjudication of tenders, (b) the procedure followed was that the Council appointed an expert, in this case architect Dieter Falzon, to advise on the offers received and then the Council decided on the award of the tender, (c) the expert expressed the professional opinion that the most advantageous offer was that of JGC Ltd – report dated 9<sup>th</sup> February 2013, (d) although the Mayor could not clearly recall all the reasons why the Council had decided on the award of the tender in favour of Forestals Ltd, it appeared that the main issue was that the appellant company's product was made in Korea while that of the recommended tenderer was made in the EU, (e) the difference between the cheaper price offered by the appellant company, €12,994.75 and the cheaper price offered by the recommended tenderer, €14,668.78 was not that significant, (f) the Mayor acknowledged that although the product offered by the appellant company was made in Korea it must have been up to EU standards as, otherwise, it could not have been marketed in EU Member States, (g) after the award, Council members did visit sites where the products offered by both the appellant company and the recommended tenderer had already been installed and it was conceded that it would have been better had the decision been taken after these site visits, (h) the tender document did not stipulate that the equipment had to be made in the EU and (i) whilst, given the benefit of hindsight, the Council could have acted more diligently in its deliberations, yet, the Council acted the way it did through inexperience and in good faith and not for any other ulterior motive,

reached the following conclusions, namely:

1. The Public Contracts Review Board opines that the appellant company was correct in claiming that it should have been notified, by mail or electronic mail, of the reasons why its offer had not been recommended for award and that it had to be so notified within a stipulated time frame.
2. This Board feels it was not enough for a bidder to be referred to the Council's notice board or website arguing that a participating tenderer has to be notified as soon as the decision is taken.
3. The Public Contracts Review Board also argues that the appellant company had the right of appeal and the company could only exercise that right if it was informed of the reasons that led to its disqualification/rejection and it was certainly not the case that a bidder had to lodge an appeal to obtain that information.
4. The Public Contracts Review Board contends that if the tender document did not specify that the product had to be manufactured in the EU then the contracting authority should not have disqualified the appellant company merely because it offered a product manufactured in Korea.
5. This Board further remarks that technically compliant offers had to be considered on the basis of price as per clause 32.1 of the tender document.

In view of the above this Board finds in favour of the appellant company and recommends that the said company, apart from being reintegrated in the evaluation process, it should also be reimbursed with the deposit paid to lodge the appeal.

Alfred R Triganza  
Chairman

Carmelo Esposito  
Member

Paul Mifsud  
Member

*16 May 2013*