

PUBLIC CONTRACTS REVIEW BOARD

Case No. 544

SPBLC/009/2013

Tender for the Building and Maintenance of Footpaths

The call for tender was published in the Government Gazette of the 21st December 2012 with a closing date of the 2nd January 2013. The estimated value of the tender was €25,000 (excl. VAT).

Seven (7) tenderers submitted their offers.

Dimbros Ltd filed an objection on the 6th February 2013 against the decision of the St Paul's Bay Local Council to discard its offer and to recommend the award of the tender to Mr Emanuel Pisani.

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 7th May 2013 to discuss the appeal.

Present:

Dimbros Ltd

Dr Gianfranco Gauci	Legal Representative
Ms Josephine Dimech	Representative

Mr Emanuel Pisani

Mr Emanuel Pisani	Appellant
-------------------	-----------

St Paul's Bay Local Council

Dr Alex Sciberras	Legal Representative
Mr Mario Salerno	Mayor
Mr Raymond Tabone	Councillor
Mr Frans Chircop	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 Gianfranco Gauci, legal representative of Dimbros Ltd, the appellant company, made the following submissions:-

- i. by letter issued by the St Paul's Bay Local Council on the 27th January 2013 the appellant company was informed that its offer was not accepted and that the tender was recommended for award to the most advantageous bid;
 - ii. according to the workings of the appellant company the latter's offer was about 30% cheaper than the recommended offer;
 - iii. the appellant company tried to obtain the reason behind its rejection but all it obtained was the Council's declaration dated 24th January 2013 which simply stated that the tender was awarded to Mr Emanuel Pisani and that the Council based its decision on the most frequently required items intended for pavement construction;
- and
- iv. in the circumstances, the appellant company had to lodge this appeal while still in the dark as to what had led to the rejection of its offer.

Dr Alex Sciberras, legal representative of the contracting authority, submitted that:-

- a. the appellant company's claim that it submitted the cheaper offer was disputable and, even if it were to be so, the tender document did not lay down that the award would be made to the cheapest offer but to the most favourable offer;
- and
- b. with regard to the appellant company's complaint that it had not been informed of the reasons that led to its offer being rejected, he proposed that this sitting be postponed so that the appellant company, in all fairness, would have the time to prepare its case.

The Chairman Public Contracts Review Board expressed the view that the hearing should continue and if, from the information gathered, it would be reasonable to continue the hearing on another day then action would be taken in that direction. He remarked that whilst, if the tender was adjudicated on the basis of MEAT (Most Economically Advantageous Tender) then a procedure had to be followed whereby the evaluation grid would have to be published in the tender document and so forth, yet clause 12 of the tender document seemed to indicate that the award would be made on the basis of the cheapest compliant tender.

The Chairman Public Contracts Review Board stressed that contracting authorities were obliged by regulations to inform, either by post or email, unsuccessful tenderers of the reasons for the rejection of their bids and that it was not appropriate to direct

them to a website, because one should not expect bidders to continuously check websites especially when tendering processes tended to take months to conclude.

Mr Mario Salerno, Mayor of the St Paul's Bay Local Council, under oath, gave the following evidence:-

- a. from an examination of the offers received, the evaluation board shortlisted the best two offers, namely those of Dimbros Ltd and Emanuel Pisani which data read as follows:-

Tenderer	Hourly Rate	Taking up Kerbs	Laying of Kerbs	Laying of curved Kerbs
	€	€	€	€
Emanuel Pisani	13.00	3.40	16.00	5.40
Dimbros Ltd	19.50	3.59	11.95	1.20

- b. from enquiries carried out on these two bidders it transpired that Dimbros Ltd had been issued by two default notices with regard to the collection of bulky refuse issued by the Council's two former executive secretaries namely Mr John Camilleri in October 2011 and Mr George Abdilla in July 2012;
- c. the Council had information about an incident which took place in Paola between a representative of the appellant company, namely Mr Melchiorre Dimech, and the Mayor of Paola over the quality of the work carried out on pavement construction, which incident was reported to the Police and ended up before the Law Courts;
- d. WasteServ Malta Ltd had also reported to the St Paul's Bay Local Council that representative/s of Dimbros Ltd, the bulk refuse contractor of the St Paul's Bay Local Council, was regularly disobeying instructions issued by WasterServ Malta Ltd and appropriate action was being contemplated which could affect the St Paul's Bay Local Council;
- e. Council members were not comfortable to work with the appellant company;
- f. the advice given by the architect engaged to assist in the adjudication was that the rates of the recommended tenderer and of the appellant company were, more or less, at the same level and that the final decision rested with the Council;
- g. with regard to the rates quoted by the recommended tenderer and the appellant company it was noted that there was quite a difference in the hourly rate and in his opinion the hourly rate was an element common to all works and which influenced the overall price of works the most;
- h. when he personally compared the work carried out by Mr Emanuel Pisani and Dimbros Ltd it clearly transpired that the works carried out by the former were superior in quality;

- i. the Council arrived at its decision after taking into account all these elements together;

and

- j. he was aware that Dimbros Ltd had carried out pavement works at Paola and at Zebbug (Hal Muxi) and that Dimbros Ltd was the contractor of the St Paul's Bay Local Council on the collection of bulky refuse.

Dr Gauci pointed out that:-

- i. the two default notices mentioned by Mr Salerno had, eventually, been withdrawn and that had the appellant company been informed beforehand of the reasons for rejection it would have presented documentary evidence to this effect at the hearing;
- ii. the incident that took place between the appellant company and the Mayor of Paola was still *sub-judice* and, as a result, it should not be taken into consideration since the outcome was not yet known and the appellant company was still presumed innocent;
- iii. contrary to what was being claimed, he was informed that in fact it was the Mayor of Paola who attacked the appellant company's representative and that the quarrel arose through no fault on the part of the appellant company;
- iv. with regard to the claim that the Council was not comfortable to work with the appellant company because of its staff member/s behaviour, it was worth noting that the St Paul's Bay Local Council had renewed the company's contract for the collection of bulky refuse only recently;

and

- v. Dimbros Ltd did not perform any previous pavement construction and/or maintenance works at Zebbug.

Dr Sciberras argued that:-

- a. it was evident that the Council had evaluated the bids and found that the recommended tenderer and the appellant company were both competitive as far as price was concerned;
- b. the next step that followed was that the Council considered a number of other factors, such as past experiences and default notices, which distinguished one bidder from the other;
- c. the Council minutes were publicly available but the evaluation report was not available to all tenderers in its entirety because of commercial/confidential information but each tenderer had the right to view that part which concerned the adjudication of one's bid;

- d. the bidders had the right of access to the decisions of the contracting authority but not to the deliberations of the evaluation board;
- e. the technical evaluation was the sole responsibility of the adjudicating board and what one had to ensure was transparency and equal treatment in the process;

and

- f. the Local Councils faced the problem that they had to manage their affairs by Local Government legislation dating back to 1993 and 1996 whereas, for example, the Public Procurement Regulations were amended as recently as 2010.

Ms Josephine Dimech, also representing the appellant company, under oath, gave the following evidence:-

- i. according to architect Stephen Farrugia, who advised Dimbros Ltd on the matter, the offer made by Dimbros Ltd was 30% cheaper than the recommended one;
- ii. the two default notices mentioned by Mr Salerno had been withdrawn and those two instances involved issues connected with the collection of bulky refuse;
- iii. the case involving the representative of Dimbros Ltd and the Paola Mayor was still pending before the Courts and it was worth pointing out that those works were carried out on behalf of the Water Services Corporation, whose architects had certified that the work was to their satisfaction even though the Paola Mayor intervened because he thought otherwise;

and

- iv. Dimbros Ltd never carried out any works at Zebbug.

The Chairman Public Contracts Review Board observed that:-

- a. one was dealing with rates and it was therefore questionable how one could arrive at a total price when the quantities involved were unknown;
- b. at page 29 “Bills of Quantity” the bidder was required to fill in items 1 to 6 from the Annex 3 (Schedule of Works) and, whereas Mr Emanuel Pisani provided this information, Dimbros Ltd did not;
- c. if the information requested at page 29 of the tender document was mandatory then the tender submitted by Dimbros Ltd should have been considered non-compliant from the start because the bidder had, practically, signed a blank statement;

- d. if the appellant company encountered difficulties in filling in the details requested at page 29, then it should have asked for a clarification prior to submitting its bid because it was not an option for the bidder to omit that information;

and

- e. on the other hand, it was not clear how the recommended tenderer arrived at the amounts quoted adjacent to items 1 to 6 at page 29 of its submission from the rates he quoted in Annex 3.

Ms Dimech replied that Dimbros Ltd was not in a position to provide this information because certain data, such as the number of hours and the volume of works, were unknown.

Dr Gauci concluded that:-

- i. it appeared to be evidently clear that the only written report relating to the adjudication of this tender was the declaration or resolution dated 24th January 2013;
- ii. no written record was kept listing the strengths and deficiencies of the bids received but the records available simply indicated that Mr Pisani's bid was the most advantageous;
- iii. according to the St Paul's Bay Local Council Mayor, the architect compared the four rates quoted and whilst he opined that the rates given by the recommended tenderer and the appellant company were at the same level yet, the mayor later remarked that, in his opinion, the hourly rate prevailed over the other rates;
- iv. the two default notices which, apparently, were used against the appellant company had, eventually, been withdrawn and the relevant documentation would be made available;
- v. it transpired that the Paola mayor got into an argument with Mr Melchior Dimech, a representative of the appellant company, over a contract which the latter was executing on behalf of the Water Services Corporation, which incident was *sub-judice* and, therefore, that incident should not be taken into account – this prejudice by itself should vitiate the tendering process;
- vi. contrary to what the St Paul's Bay Local Council Mayor said, the appellant company never carried out any pavement works in Zebbug and, in all probability, he mentioned works at Paola because of the incident which occurred between the appellant company's representative and the Paola Mayor and not because Mr Salerno had actually viewed the works;

and

- vii. it was not amiss to consider other elements given that whilst, on the basis of the price, the two offers were at par, yet the Council should have verified those other elements/circumstances.

Dr Sciberras concluded that:-

- a. at law the adjudicating board had discretion over the technical evaluation of the tenders;
- b. the tender spelled out that the award had to be made to the most advantageous offer and, in its final declaration dated 24th January 2013, the evaluation board did just that;
- c. if the bidders did not agree with the tender conditions then they had the opportunity to question them prior to the closing date of the tender;
- d. the architect assisting the evaluation board expressed the opinion that the recommended tenderer and the appellant company had submitted offers which, on the basis of price, were at the same level but the ultimate decision rested with the Council;
- e. the Council then took into account other elements such as past work experience with contractors and, therefore, given that on the objective criteria, namely the price, they were at par, then the deciding factor/s had to be rather subjective ones, e.g. past experiences and reputation;
- f. the fact that the appellant company had been awarded other contracts by the same Council proved that the Council was not blatantly prejudiced against Dimbros Ltd, besides, it could well be that, on those occasions, the price difference was such that it was advantageous to award the contract/s to Dimbros Ltd;
- g. cases which were *sub-judice* could not always be overlooked especially when it was a matter of trust so much so that, at times, one had to resign one's post until the case would be decided upon;

and

- h. it appeared evident that the Council did not abuse of its discretion but acted diligently considering all the circumstances it was operating in.

Dr Gauci undertook to present the costings and the documentation attesting to the default notices having been withdrawn. This information was in fact made available on the 8th May 2013.

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 4th February 2013 and also through its representatives verbal submissions presented during the hearing held on the 7th 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 issued by the St Paul's Bay Local Council on the 27th January 2013 the appellant company was informed that its offer was not accepted and that the tender was recommended for award to the most advantageous bid, (b) according to the workings of the appellant company the latter's offer was about 30% cheaper than the recommended offer, (c) the appellant company tried to obtain the reason behind its rejection but all it obtained was the Council's declaration dated 24th January 2013 which simply stated that the tender was awarded to Mr Emanuel Pisani and that the Council based its decision on the most frequently required items intended for pavement construction, (d) in the circumstances, the appellant company had to lodge this appeal while still in the dark as to what had led to the rejection of its offer, (e) the two default notices mentioned by Mr Salerno had, eventually, been withdrawn and that had the appellant company been informed beforehand of the reasons for rejection it would have presented documentary evidence to this effect at the hearing, (f) the incident that took place between the appellant company and the Mayor of Paola was still *sub-judice* and, as a result, it should not be taken into consideration since the outcome was not yet known and the appellant company was still presumed innocent, (g) contrary to what was being claimed it was the Mayor of Paola who attacked the appellant company's representative and that the quarrel arose through no fault on the part of the appellant company, (h) with regard to the claim that the Council was not comfortable to work with the appellant company because of its staff member/s behaviour, it was worth noting that the St Paul's Bay Local Council had renewed the company's contract for the collection of bulky refuse only recently, (i) Dimbros Ltd did not perform any previous pavement construction and/or maintenance works, (j) according to architect Stephen Farrugia, who advised Dimbros Ltd on the matter, the offer made by Dimbros Ltd was 30% cheaper than the recommended one, (k) the two default notices mentioned by Mr Salerno had been withdrawn and those two instances involved issues connected with the collection of bulky refuse, (l) in the case involving the representative of Dimbros Ltd and the Paola Mayor it was worth pointing out that those works were carried out on behalf of the Water Services Corporation, whose architects had certified that the work was to their satisfaction even though the Paola Mayor intervened because he thought otherwise, (m) Dimbros Ltd never carried out any works at Zebbug, (n) Dimbros Ltd was not in a position to provide this information because certain data, such as the number of hours and the volume of works, were unknown, (o) it appeared to be evidently clear that the only written report relating to the adjudication of this tender was the declaration or resolution dated 24th January 2013, (p) no written record was kept listing the strengths and deficiencies of the bids received but the records available simply indicated that Mr Pisani's bid was the most advantageous, (q) according to the St Paul's Bay Local Council Mayor, the architect compared the four rates quoted and whilst he opined that the

rates given by the recommended tenderer and the appellant company were at the same level yet, the mayor later remarked that, in his opinion, the hourly rate prevailed over the other rates, (r) it transpired that the Paola mayor got into an argument with Mr Melchior Dimech, a representative of the appellant company, over a contract which the latter was executing on behalf of the Water Services Corporation, which incident was *sub-judice* and, therefore, that incident should not be taken into account – this prejudice by itself should vitiate the tendering process; (s) contrary to what the St Paul's Bay Local Council Mayor said, the appellant company never carried out any pavement works in Zebbug and, in all probability, he mentioned works at Paola because of the incident which occurred between the appellant company's representative and the Paola Mayor and not because Mr Salerno had actually viewed the works and (u) it was not amiss to consider other elements given that whilst, on the basis of the price, the two offers were at par, yet the Council should have verified those other elements / circumstances;

- having considered the contracting authority's representative's reference to the fact that (a) the appellant company's claim that it submitted the cheaper offer was disputable and, even if it were to be so, the tender document did not lay down that the award would be made to the cheapest offer but to the most favourable offer, (b) with regard to the appellant company's complaint that it had not been informed of the reasons that led to its offer being rejected, the contracting authority's legal representative proposed that this sitting be postponed so that the appellant company, in all fairness, would have the time to prepare its case, (c) from an examination of the offers received, the evaluation board shortlisted the best two offers, namely those of Dimbros Ltd and Emanuel Pisani, (d) from enquiries carried out on these two bidders it transpired that Dimbros Ltd had been issued by two default notices with regard to the collection of bulky refuse issued by the Council's two former executive secretaries namely Mr John Camilleri in October 2011 and Mr George Abdilla in July 2012, (e) the Council had information about an incident which took place in Paola between a representative of the appellant company, namely Mr Melchior Dimech, and the Mayor of Paola over the quality of the work carried out on pavement construction, which incident was reported to the Police and ended up before the Law Courts, (f) WasteServ Malta Ltd had also reported to the St Paul's Bay Local Council that representative/s of Dimbros Ltd, the bulk refuse contractor of the St Paul's Bay Local Council, was regularly disobeying instructions issued by WasteServ Malta Ltd and appropriate action was being contemplated which could affect the St Paul's Bay Local Council, (g) Council members were not comfortable to work with the appellant company, (h) the advice given by the architect engaged to assist in the adjudication was that the rates of the recommended tenderer and of the appellant company were, more or less, at the same level and that the final decision rested with the Council, (i) with regard to the rates quoted by the recommended tenderer and the appellant company it was noted that there was quite a difference in the hourly rate and, in the contracting authority's legal advisor's opinion, the hourly rate was an element common to all works and which influenced the overall price of works the most, (j) when the St Paul's Bay Local Council Mayor, personally, compared the work carried out by Mr Emanuel Pisani and Dimbros Ltd it clearly transpired that the works carried out by the former were superior in quality, (k) the Council arrived at its decision after taking into account all these

elements together, (l) Mr Salerno claimed that he was aware that Dimbros Ltd had carried out pavement works at Paola and at Zebbug (Hal Muxi) and that Dimbros Ltd was the contractor of the St Paul's Bay Local Council on the collection of bulky refuse, (m) it was evident that the Council had evaluated the bids and found that the recommended tenderer and the appellant company were both competitive as far as price was concerned, (n) the next step that followed was that the Council considered a number of other factors, such as past experiences and default notices, which distinguished one bidder from the other, (o) the Council minutes were publicly available but the evaluation report was not available to all tenderers in its entirety because of commercial/confidential information but each tenderer had the right to view that part which concerned the adjudication of one's bid, (p) the bidders had the right of access to the decisions of the contracting authority but not to the deliberations of the evaluation board, (q) the technical evaluation was the sole responsibility of the adjudicating board and what one had to ensure was transparency and equal treatment in the process, (r) the Local Councils faced the problem that they had to manage their affairs by Local Government legislation dating back to 1993 and 1996 whereas, for example, the Public Procurement Regulations were amended as recently as 2010, (s) at law the adjudicating board had discretion over the technical evaluation of the tenders, (t) the tender spelled out that the award had to be made to the most advantageous offer and, in its final declaration dated 24th January 2013, the evaluation board did just that, (u) if the bidders did not agree with the tender conditions then they had the opportunity to question them prior to the closing date of the tender, (v) the architect assisting the evaluation board expressed the opinion that the recommended tenderer and the appellant company had submitted offers which, on the basis of price, were at the same level but the ultimate decision rested with the Council, (w) the Council then took into account other elements such as past work experience with contractors and, therefore, given that on the objective criteria, namely the price, they were at par, then the deciding factor/s had to be rather subjective ones, e.g. past experiences and reputation, (x) the fact that the appellant company had been awarded other contracts by the same Council proved that the Council was not blatantly prejudiced against Dimbros Ltd, besides, it could well be that, on those occasions, the price difference was such that it was advantageous to award the contract/s to Dimbros Ltd, (y) cases which were *sub-judice* could not always be overlooked especially when it was a matter of trust so much so that, at times, one had to resign one's post until the case would be decided upon and (z) it appeared evident that the Council did not abuse of its discretion but acted diligently considering all the circumstances it was operating in,

reached the following conclusions, namely:

1. The Public Contracts Review Board places emphasis on the fact that contracting authorities are obliged by regulations to inform, either by post or email, unsuccessful tenderers of the reasons for the rejection of their bids and that it was not appropriate to direct such tenderers to a website because one should not expect bidders to continuously check third party websites especially when tendering processes tend to take months to conclude.
2. This Board contends that the evaluation board was wrong in stating that its members based their decision "on the most frequent items required for pavement

construction” without being able to provide, at least those present during the hearing, with any workings they may have done to reach this conclusion. ‘Transparency’ requires such workings to be available and not arrived at verbally and forgotten. In fact, two items out of four of the appellant company’s bid were substantially lower than the preferred bidder’s. This Board argues that, in this particular instance, one was dealing with rates and, as a result, it was questionable how one could, for example, arrive at a total price when the quantities involved were unknown. It is also still unclear for this Board as to how the recommended tenderer arrived at the amounts quoted adjacent to items 1 to 6 at page 29 of its submission from the rates he quoted in Annex 3.

3. The Public Contracts Review Board argues that, with regard to the other factors that have been taken into consideration during adjudication, no proof of any such apprehensions were properly minuted and explained.
4. This Board feels that, as it transpired following the hearing, the fact that the default notices referred to during the hearing had already been withdrawn more than placed emphasis on the fact that such issue would have very likely prejudiced the appellant company’s position during the evaluation stage.
5. The Public Contracts Review Board could not but notice that, during the hearing, members of the adjudication board could not show any documentation in connection with the reason for choosing the preferred bidder.
6. This Board contends that any adjudicator must be able to show how he / she arrived at one’s decision - whatever this may be. It is not acceptable just to state that a decision was arrived at unless the reasoning behind it is transparent. This Board establishes that it is even more critical when the decision being made involves highly subjective criteria as is in the present case where the “*most advantageous*” offer was being chosen.
7. The Public Contracts Review Board could not but notice that at page 29, “Bills of Quantity”, the bidder was required to fill in items 1 to 6 from the Annex 3 (‘Schedule of Works’) – however, whereas Mr Emanuel Pisani provided this information, Dimbros Ltd, the appellant company did not. Needless to say that this constituted a breach of tender document’s conditions in view of the ‘Schedule’s’ mandatory requirement. At this point this Board feels that once this ‘Schedule’ was mandatory and the appellant company failed to submit it then the tender submitted by Dimbros Ltd should have been considered non-compliant from the start because the bidder had, practically, signed a blank statement. Undoubtedly, this Board contends that if the appellant company encountered difficulties in filling in the details requested at page 29, then it should have asked for a clarification prior to submitting its bid because it was not an option for the bidder to omit that information.
8. This Board acknowledges that the pertinent ‘Form’ could not be filled since the tender prices were rates without any quantities. Nevertheless, this Board also notes that the totals shown on the said ‘Form’ by Mr Emanuel Pisani are not correct either.

9. In the circumstance the Public Contracts Review Board expresses its view that none of the interested parties managed to convince the members with the points / arguments raised.

In view of the above this Board recommends that this tender be cancelled and reissued.

Furthermore, this Board finds in favour of the appellant company since it had no idea on what the rejection was about and recommends that the said company be reimbursed with the deposit paid to lodge the appeal.

Alfred R Triganza
Chairman

Carmelo Esposito
Member

Paul Mifsud
Member

16 May 2013