

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case No. 545**

**SPBLC/08/2013**

### **Tender for the Upkeep and Maintenance of Soft Areas**

The call for tender was published in the Government Gazette of the 30<sup>th</sup> November 2012 with a closing date of the 2<sup>nd</sup> January 2013. The estimated value of the tender was €40,000 (excl. VAT). The price of the recommended tender was €36,700 (incl. VAT).

Seven (7) tenderers submitted their offers.

Environmental and Landscapes Consortium Ltd filed an objection on the 6<sup>th</sup> February 2013 against the decision of the St Paul's Bay Local Council to recommend the award of the tender to WM Environmental 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:**

#### **Environmental and Landscapes Consortium Ltd**

Dr Ronald Cuschieri	General Manager
Mr Charles Attard	Representative
Mr Charles Zammit	Representative

#### **WM Environmental Ltd**

Dr Joe Mizzi	Legal Representative
Mr Wilson Mifsud	Appellant

#### **St Paul's Bay Local Council**

Dr John Bonello	Legal Representative
Dr Josef Laferla	Legal Representative
Mr Mario Salerno	Mayor

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

Dr Ronald Cuschieri, representing Environmental and Landscapes Consortium Ltd, the appellant company, made the following submissions:-

- i. by letter dated 27th January 2013 the St Paul's Bay Local Council informed the appellant company that its offer was not accepted as the tender was recommended for award to the most advantageous offer;
- ii. the appellant company was not informed when the award was made so as to guide itself as up to when it should lodge its appeal besides not knowing the reasons for the offer having been unsuccessful;
- iii. the firm operated about 38 contracts similar to the one under reference and, in submitting its tender, Environmental and Landscapes Consortium Ltd took into account all that was required including adherence to the Green Public Procurement Criteria for Gardening Services as detailed in Contracts Circular No. 21/2011 dated 14th December 2011 which, among other things, directed that "Departmental Contracts Committees of each Ministry are being directed not to approve the award of tenders for the chosen Green Public Procurement products or services without the confirmation that the mandatory technical specifications have been adopted" and 'gardening products and services' were among the products and services which had to be fully compliant with the Green Public Procurement criteria and, therefore mandatory requirements;
- iv. on the 21<sup>st</sup> January 2013, namely, prior to the award of the tender, the Environmental and Landscapes Consortium Ltd had drawn the attention of the Council that the tender in question did not include the mandatory Green Public Procurement criteria and that might render the tendering process null, which communication remained unanswered;
- v. the observance of the Green Public Procurement criteria imposed costs and, as a result, it amounted to unfair competition if contracting authorities allowed tenderers who did not abide by Green Public Procurement criteria to compete with tenderers who did comply with the Green Public Procurement mandatory criteria;
- vi. notwithstanding the exclusion of the Green Public Procurement criteria, the Environmental and Landscapes Consortium Ltd participated in this tendering process as stopping the whole process was considered to be a drastic measure when considering that the attention of the contracting authority had been drawn up and, if need be, there was recourse to appeal;
- vii. the Environmental and Landscapes Consortium Ltd presented the cheapest compliant tender in line with mandatory directives in force considering also that it provided for the permanent placement of three qualified staff on this site as was the case with the current contract Environmental and Landscapes Consortium Ltd operated at the St Paul's Bay Local Council.;

- viii. the appellant company was not going to go into the bids submitted by competitors but its intention was to explain its submission and to express its view that, in this case, it appeared that the bids were not submitted and adjudicated on a like-with-like basis.

The Chairman Public Contracts Review Board remarked that contracting authorities operated within a given budget and their requirements normally reflected those budgetary constraints and, therefore, the bidder's offer should not go much beyond those requirements otherwise it would become uncompetitive in terms of price even if superior in quality.

Dr John Bonello, legal advisor of the contracting authority, submitted that:-

- a) albeit, prior to the closing date of the tender, the appellant company and, for that matter, all other bidders could have requested the contracting authority to amend the tender conditions/specifications, yet no one presented any such request for a pre-contractual remedy;
- b) once bidders submitted compliant offers then the deciding factor had to be the price and if a bidder offered something which was over and above what was requested in the tender document that would be taken into account only if the prices were at the same level;
- c) the contracting authority had to adjudicate bids on a like-with-like basis and to do that it had to stick strictly to the requisites contained in the tender document;
- d) it was correct that circulars had been issued with regard to Green Public Procurement criteria but this tender was issued by a local council and, in line with Schedule 3 of the Public Procurement Regulations, local councils were allowed to administer their own public procurement in accordance with the provisions of Public Procurement Regulations and, as a consequence, in this case the tender document should prevail;
- e) the difference between the recommended tenderer and the appellant company's offers was quite significant especially considering the budgetary constraints that local councils had to operate with;
- f) in the case of the appellant company and the recommended tenderers, the contracting authority was presented with two compliant bids and it simply opted for the significantly cheaper one.

The Public Contracts Review Board noted that from the schedule of tenders received dated 8<sup>th</sup> January 2013, the site which had to be covered was divided into five areas and against the offer made by the recommended bidder, namely WM Environment Ltd, there was a note which read "less 5% if awarded all tender" (or areas) and that this condition was, likewise, included in the tender's covering letter dated 31<sup>st</sup> December 2012 which stated as follows, viz "*Il-Kumpanija lesta li toffri roġs ta' ħamsa fil-mija f'każ li l-kunsill jiddeċiedi li jagħti l-ħames offerti l-kumpanija.*"

One of the notes in the Specific Conditions of Contract read “This tender can be split between different contractors the Council may deem necessary”. Therefore the tenderer had to state the costing factor according to the area as indicated in Annex 2;

One of the notes to the Bill of Quantities at page 30 of the tender document clearly stated that “*The Council reserves the right to award each area to different contractors*”. As a result, the recommended offer amounted to a conditional offer, not a discount because, whilst a discount would apply across the board, yet, the price reduction by 5% was on condition that all areas would be awarded in the recommended tenderer’s favour. The Public Contracts Review Board argues that this amounted to a conditional offer and that rendered the tender to be administratively non compliant.

Mr Mario Salerno, Mayor of St Paul’s Bay Local Council, remarked that it appeared that the Council could still award each and every area to the respective cheapest compliant bidder.

Dr Cuschieri insisted that it was a mandatory requirement for a bidder to include the Green Public Procurement Criteria in the tender document and, as a consequence, that rendered the tender document as published invalid and any decisions on the basis of that tender document should be considered null.

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 4<sup>th</sup> February 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 27<sup>th</sup> January 2013 the St Paul’s Bay Local Council informed the appellant company that its offer was not accepted as the tender was recommended for award to the most advantageous offer, (b) the appellant company was not informed when the award was made so as to guide itself as up to when it should lodge its appeal besides not knowing the reasons for the offer having been unsuccessful, (c) the firm operated about 38 contracts similar to the one under reference and, in submitting its tender, Environmental and Landscapes Consortium Ltd took into account all that was required including adherence to the Green Public Procurement Criteria for Gardening Services as detailed in Contracts Circular No. 21/2011 dated 14<sup>th</sup> December 2011 which, among other things, directed that “Departmental Contracts Committees of each Ministry are being directed not to approve the award of tenders for the chosen Green Public Procurement products or services without the confirmation that the mandatory technical specifications have been adopted” and ‘gardening products and services’ were among the products and services which had to be fully compliant with the Green Public Procurement criteria and, therefore mandatory requirements, (d) on the 21<sup>st</sup> January 2013, namely, prior to the award of the tender, the Environmental and

Landscapes Consortium Ltd had drawn the attention of the Council that the tender in question did not include the mandatory Green Public Procurement criteria and that might render the tendering process null, which communication remained unanswered, (e) the observance of the Green Public Procurement criteria imposed costs and, as a result, it amounted to unfair competition if contracting authorities allowed tenderers who did not abide by Green Public Procurement criteria to compete with tenderers who did comply with the Green Public Procurement mandatory criteria, (f) notwithstanding the exclusion of the Green Public Procurement criteria, the Environmental and Landscapes Consortium Ltd participated in this tendering process as stopping the whole process was considered to be a drastic measure when considering that the attention of the contracting authority had been drawn up and, if need be, there was recourse to appeal, (g) the Environmental and Landscapes Consortium Ltd presented the cheapest compliant tender in line with mandatory directives in force considering also that it provided for the permanent placement of three qualified staff on this site as was the case with the current contract Environmental and Landscapes Consortium Ltd operated at the St Paul's Bay Local Council and (h) the appellant company was not going to go into the bids submitted by competitors but its intention was to explain its submission and to express its view that, in this case, it appeared that the bids were not submitted and adjudicated on a like-with-like basis;

- having considered the contracting authority's representative's reference to the fact that (a) albeit, prior to the closing date of the tender, the appellant company and, for that matter, all other bidders could have requested the contracting authority to amend the tender conditions/specifications, yet no one presented any such request for a pre-contractual remedy, (b) once bidders submitted compliant offers then the deciding factor had to be the price and if a bidder offered something which was over and above what was requested in the tender document that would be taken into account only if the prices were at the same level, (c) the contracting authority had to adjudicate bids on a like-with-like basis and to do that it had to stick strictly to the requisites contained in the tender document, (d) it was correct that circulars had been issued with regard to Green Public Procurement criteria but this tender was issued by a local council and, in line with Schedule 3 of the Public Procurement Regulations, local councils were allowed to administer their own public procurement in accordance with the provisions of Public Procurement Regulations and, as a consequence, in this case the tender document should prevail, (e) the difference between the recommended tenderer and the appellant company's offers was quite significant especially considering the budgetary constraints that local councils had to operate with and (f) in the case of the appellant company and the recommended tenderers, the contracting authority was presented with two compliant bids and it simply opted for the significantly cheaper one.

reached the following conclusions, namely:

1. The Public Contracts Review Board notes that contracting authorities operate within a given budget and their requirements normally reflected those budgetary constraints and, therefore, the bidder's offer should not go much beyond those

requirements otherwise it would become uncompetitive in terms of price even if superior in quality.

2. The Public Contracts Review Board noted that, from the schedule of tenders received dated 8<sup>th</sup> January 2013, the site which had to be covered was divided into five areas and against the offer made by the recommended bidder, namely WM Environment Ltd, there was a note which read “less 5% if awarded all tender” (or areas) and that this condition was, likewise, included in the tender’s covering letter date 31<sup>st</sup> December 2012 which stated as follows, viz “*Il-Kumpanija lesta li toffri roħs ta’ ħamsa fil-mija f’każ li l-kunsill jiddeċiedi li jagħti l-ħames offerti l-kumpanija.*”. As a result, this Board concludes that the recommended offer amounted to a conditional offer, not a discount because, whilst a discount would apply across the board, yet, the price reduction by 5% was on condition that all areas would be awarded in the recommended tenderer’s favour. The Public Contracts Review Board argues that this amounted to a conditional offer and that rendered the recommended tenderer’s bid to be administratively non compliant.
3. This Board acknowledges that one of the notes in the ‘Specific Conditions of Contract’ read that “This tender can be split between different contractors the Council may deem necessary”. As a result, the tenderer had to state the costing factor according to the area as indicated in Annex 2.
4. The Public Contracts Review Board argues that, albeit, prior to the closing date of the tender, the appellant company and, for that matter, all other bidders could have requested the contracting authority to amend the tender conditions/specifications, yet no one presented any such request for a pre-contractual remedy.

In view of the above this Board finds against the appellant company and recommends that the appellant company should not be reimbursed with the deposit paid to lodge the appeal.

Furthermore, the Public Contracts Review Board, now fully aware of the fact that the offer submitted by the recommended tenderer was found to be ‘conditional’ thus rendering it to be administratively non-compliant, recommends that this offer be withdrawn.

Finally, this Board recommends that the evaluation process should proceed with the remaining bidders.

Alfred R Triganza  
Chairman

Carmelo Esposito  
Member

Paul Mifsud  
Member

16 May 2013