

PUBLIC CONTRACTS REVIEW BOARD

Case No. 681

TXLG 15/13

Street Sweeping and Weed Cutting Services

The tender was published on the 6th November 2013. The closing date was the 6th December 2013.

The estimated value of the Tender was €17,138 (Exclusive of VAT).

Seven (7) bids had been received for this tender.

On the 4th February 2014 Mr Owen Borg filed an objection against the award of the tender.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Thursday the 6th March 2014 to discuss the objection.

Present for the hearing were:

Mr Owen Borg - Appellant

Mr Owen Borg	Representative
Dr Gianfranco Gauci	Legal Representative

General Cleaners - Preferred Bidder

Mr Ramon Fenech	Representative
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Ta' Xbiex Local Council - Contracting Authority

Mr Paul Pace	Acting Executive Secretary
Ms Anna Micallef	Representative

Following a brief introduction by the Chairman, the appellant's representative was invited to make his submissions.

Dr Gianfranco Gauci on behalf of the appellant said that the present objection arose since his client's offer, although being the cheapest was not awarded the tender, without any reasons being given by the contracting authority for discarding his offer. He contended that appellant had every right to be given an explanation of why his bid although cheapest was discarded. Should the reasons for the rejection of appellant's offer be given at this stage, he stated that he should be given a chance to rebut them.

The Chairman remarked that it has become a common practice for cases of tenders issued by the local councils to have rejection letters not giving any reasons whatsoever, as in the present case. This practice is unacceptable and should not be continued. The reasons for bidders not being awarded should be clearly given.

Mr Paul Pace, Executive Secretary of the Ta' Xbiex Local Council, on behalf of the contracting authority stated that the contracting authority had appointed an evaluation board that had to make recommendations to the Council. This board, composed of him, the Mayor and the Vice Mayor as well as another councillor, had examined the offers and found that three of these were approximately the same. Therefore the evaluation board did not feel it should make recommendations as to who would be awarded the tender. It had requested the Council for permission to send for the three best tenderers who would be questioned and from the answers given, be able to assess who would be awarded. The three bidders were sent for and attended a board meeting and replied to the questions. After this meeting, having heard all three bidders, the board evaluated the best offer. The board recommended according to what the bidders replied. It resulted that the best offer was that of General Cleaners. This recommendation was brought before the Council. The Council during a hearing discussed the recommendation and asked for more clarifications. Having heard the case, the Mayor decided to take a vote on the board's recommendation. A vote was taken and it was decided that General Cleaners had made the best offer and should be awarded the tender. All this procedure was written in the minutes and these minutes were published. The minutes were uploaded to the Council's website within two days for transparency's sake. Therefore appellant could have gotten the reasons behind the award at any time, either through the website or by calling at the Council. This was done during sitting number 11 on the 27th January 2014, as can be seen from page 3 and 4 of the minutes.

The Chairman remarked that the minutes did not state the reason for the choice of bidders. The minutes just say that "the board, having asked several questions to the bidders feels that the best tender is that of General Cleaners", this does not constitute an explanation.

Mr Paul Pace stressed that this was not a MEAT tender. In tenders such as the present the Council has to choose the best offer and can refuse any bid, even the most advantageous. In the present case an evaluation board had been appointed and the latter board had questioned bidders about their equipment and what manpower they would be using. It was then that the board made its recommendation. Furthermore, this recommendation was then subjected to the Council for its opinion. The preferred bidder has the necessary equipment and manpower. He stressed that a difference existed between the tenders falling under the Public Contracts Regulations and those issued by the Local Councils.

Dr Gianfranco Gauci on behalf of the appellant wanted to minute down a request to be given a copy of the evaluation report mentioned above.

Mr Paul Pace for the contracting authority said that he did not object to this request and promised to send it by email to appellant, and copy it to the PCRB.

The hearing was at this point brought to an end and adjourned to the 3rd April 2014.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard Matrenza as members convened a second hearing on Thursday the 3rd April 2014 for continuation and the production of the breakdown of points given to the appellant and the preferred bidder by the evaluation board.

Present for the second hearing were:

Mr Owen Borg, appellant's representative;
Dr Gianfranco Gauci appellant's legal representative;
Ms Anna Micallef contracting authority representative;
Mr Paul Pace, the Ta'Xbiex Local Council Executive Secretary.

The Chairman reminded the contracting authority that the hearing was held to examine the breakdown of the marks given to the appellant and to the preferred bidder by the adjudication board.

Mr Paul Pace on behalf of the contracting authority said that the working papers of the evaluation process were not available. On the Chairman's specific request to be shown this breakdown of marks, Mr Pace promised to send them by email to the Public Contracts Review Board through an email this same day or on the day after at the latest.

The hearing of this case was then adjourned once again to Tuesday the 8th April 2014 for the examination of these documents and continuation as necessary.

Third Hearing:

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Mr Richard A Matrenza and Mr Lawrence Ancilleri as members convened a hearing on Tuesday the 8th April 2014 to discuss the objection.

Present for the third hearing:

Mr Owen Borg, appellant's representative;
Dr Gianfranco Gauci appellant's legal representative;
Ms Anna Micallef contracting authority representative;
Mr Paul Pace, the Ta'Xbiex Local Council Executive Secretary.

Dr Gianfranco Gauci was handed a copy of the breakdown presented by the contracting authority and asked that he may examine the Executive Secretary under oath as witness.

Mr Paul Pace on behalf of the contracting authority under oath said that he confirmed the

contents of the document that had been mailed to the Board regarding the breakdown of the marks. He stated that he was not a voting member of the adjudication board and had no say in the marks assigned. He said that regarding the employees, the adjudication board felt that the preferred bidder had a considerable number of employees and could thus be more flexible when certain contingencies arose. The preferred bidder had assigned two employees, but also submitted a list with all its employees who could be used as a reserve. Regarding experience, he explained that 8 points had been assigned to the appellant and 10 to the preferred bidder because bidders had submitted a list of contracts that they had been awarded and the preferred bidder had indicated a list of over thirty contracts with diverse entities and the evaluation board felt that he had more experience.

Dr Gianfranco Gauci stated that from research it resulted that the preferred bidder had no ongoing contract involving the cleaning of streets; their only experience was the cleaning of offices. He asked how could the evaluation board compare this experience with that at street cleaning?

Mr Paul Pace replied that if he was not mistaken the evaluation board had examined the works carried out by the preferred bidder which included the cleaning of Smart City including street cleaning.

Dr Gianfranco Gauci on behalf of the appellant contended that since preferred bidder street sweeping experience only at Smart City while his client had for a number of years provided local councils with street sweeping services it followed that appellant should have been assigned the 10 points for experience. One should compare like with like.

Mr Paul Pace for the contracting authority said that the preferred bidder had submitted a list of entities that were their major clients. The three lowest bidders were sent for and interviewed. The preferred bidder had declared that they performed the works listed including road sweeping and sweeping of the surrounding areas. The same questions were made to all the three bidders. Appellant's bid was also considered and he had listed five local councils for which he provided service.

Dr Gianfranco Gauci for the appellant stressed that no evidence of experience by the preferred bidder was submitted.

The Chairman said that for the sake of transparency the Board wanted to know about the street sweeping experience and the hearing was being adjourned for the production of witnesses about this to Thursday 10th April 2014.

Fourth Hearing:

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Thursday the 10th April 2014 to continue discussing the objection.

Present for the fourth hearing:

Mr Owen Borg, appellant's representative;
Dr Gianfranco Gauci appellant's legal representative;

Mr Ramon Fenech recommended bidder's representative;
Ms Anna Micallef contracting authority representative;
Mr Paul Pace, the Ta' Xbiex Local Council Executive Secretary.
Mr Max Zammit Mayor Ta' Xbiex Local Council.

The Chairman in his introduction said that this was the final hearing of this objection and asked the preferred bidder's representative to testify under oath.

Mr Ramon Fenech on behalf of the preferred bidder, General Cleaners said under oath, replying to questions by the Chairman, regarding whether street sweeping was done at:

Air Malta Cargo Handling	-	yes.
Bank of Valletta	-	yes at the perimeter
Brandstatter	-	yes at the perimeter
Central Bank of Malta	-	yes at the perimeter, including the surrounding
Fimbank	-	no
Malta International Airport	-	yes
HSBC	-	no
Junior College	-	yes
House of Representatives	-	no
Mount Carmel Hospital	-	yes
St Luke's Hospital	-	yes
Several Government Offices	-	no
Malta Freeport	-	yes, both manual and mechanical sweeping
Mizzi Group	-	no
Wands Limited	-	no
University of Malta	-	yes
McDonalds	-	no

Replying to questions by Dr Gianfranco Gauci witness said that the preferred bidder had offered this service since before the setting up of the local councils and had the first mechanical sweeper in Malta. They had worked in the streets of Siggiewi, Kalkara and Luqa using both mechanical and manual sweeping, but this was before the Local Councils were set up. They never had been awarded a contract by any local council. He explained that the perimeter he referred to meant the surrounding area and not the street. The preferred bidder had 2 mechanical sweepers, one sweeping trolley. General Cleaners had about 10 to 12 employees used for street sweeping.

Mr Owen Borg, the appellant under oath said that he has six years experience in street cleaning with Local Councils. There are five of these at present and are Balzan, Rabat, San Gwann, St Venera and Sta Lucija. He had never received any complaints.

Mr Ramon Fenech recalled for cross examination, replying to questions by Mr Paul Pace said that during the interview by the evaluation board he had told the truth regarding the cleaning of Smart City that the preferred bidder had been cleaning since 2011.

Dr Gianfranco Gauci for the appellant said that evaluation should be done on a like with like bases. He contended that sweeping of pavement cannot be considered as street cleaning. He contended that at most the preferred bidder had two years experience in one locality while the appellant has 15 years experience and 6 years experience in working for Local Councils. Yet his client was awarded 8 points while the preferred bidder was awarded 10. He claimed that

it was his client the appellant who should have been awarded the 10 points. Regarding the points awarded for personnel he contended that consideration should have been taken of the work load of the service and not the number employed by the bidder.

The Chairman asked the contracting authority to explain how the points were assigned regarding the number of employees.

Mr Paul Pace for the contracting authority said that during the interview the preferred bidder had he had 10 persons assigned to street cleaning. The preferred bidder had ISO certification that shows its employees had reached a certain standard both outside as well as inside. The authority had to ensure that the contractor had enough labour supply to deal with contingencies. The appellant had one employee assigned plus himself. It was apparent that the preferred bidder had great experience. The preferred bidder had explained that some of the venues were used to hold parties outside and had to be cleaned after such events.

Dr Gianfranco Gauci for appellant said that ISO certification was not a basis for experience.

At this point the hearing was closed.

This board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 31st January 2014 and also through Appellant's verbal submissions during the hearings held on 6th March 2014 (first hearing), 3rd April 2014 (second hearing), 8th April 2014 (third hearing) and 10th April (fourth hearing), had objected to the decision taken by the pertinent Authority, in that:

- a) Appellant contends that he was not given the reasons why his offer was discarded by the Contracting Authority.**
- b) The allocation of points given by the Evaluation Board was not fairly allotted with regards to 'street sweeping' and the relative experience.**
- c) The experience clause should have been evaluated and related to 'street sweeping' only, by the Evaluation Board and not otherwise.**

Having considered the Contracting Authority's verbal submissions during the four sittings of this Appeal, in that:

- a) After adjudicating all tenders, three tenderers were found to be fully compliant. In this regard, the Council (Contracting Authority), opted for a final test in the form of an 'interview', in order to choose the preferred bidder.**
- b) All details of the decision taken by the Contracting Authority were minuted and in this respect, Appellant could have obtained the reasons why his offer was discarded.**

- c) **The Preferred Bidder was more equipped with regards to employees and the Contracting Authority took this aspect into account to arrive at a preventive decision should the necessity arise in case of emergencies.**
- d) **The Preferred Bidder had the most proven experience in the field of the tendered services.**

Reached the following conclusions:

- 1. **This Board is disturbed by the fact that the regulations of the local Councils differ from with regards to local procurements differ from those stipulated of the Public Procurement Regulations. This same Board opines that funds being expended by Local Councils are in fact Public Funds and in this respect these funds should be subject to scrutiny and also should abide by the procedures as laid out by the Public Procurement Regulations.**
- 2. **This Board opines that the adjudicating system and methodology should be applied as that stipulated in the Public Procurement Regulations.**
- 3. **This Board, also opines that the allocation and methodology of awarding marks or points should be based on a 'like with like' basis.**

In view of the above, this Board finds in favour of the Appellant and recommends that:

- i) **Appellant be reintegrated in the evaluation process.**
- ii) **The deposit paid by the Appellant be reimbursed.**

Dr. Anthony Cassar
Chairman

Dr. Charles Cassar
Member

Mr. Lawrence Ancilleri
Member

27 May 2014