

PUBLIC CONTRACTS REVIEW BOARD

Case No. 684

LCS 23/2013

Tender for Cleaning and Clearing of Surfaced Urban and Non-Urban Areas.

The tender was published on the 4th October 2013. The closing date was the 4th November 2013.

The estimated value of the tender was €45,000 (Excluding VAT).

Seven (7) bidders had submitted their offer.

On the 24th December 2013 WM Environmental Limited filed an objection against the decision to award the tender to Mr Mario Mizzi for the amount of €43,500.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Thursday 3rd April 2014 to discuss this objection.

Present for the hearing were:

WM Environmental Limited - Appellant

Mr Wilson Mifsud	Representative
Dr John Bonello	Legal Representative

No representatives from the **preferred bidder Mr Mario Mizzi** were present.

Siggiewi Local Council - Contracting Authority

Dr Karol Aquilina	Mayor
Mr Nikol Baldacchino	Executive Secretary

The Chairman introduced the case briefly and asked the appellant's representative to make his submissions.

Dr John Bonello on behalf of his client WM Environmental Limited, the appellant said that his client had submitted the cheapest offer. In spite of this the tender was being awarded to Mr Mario Mizzi. The reason given for this award was, according to the minutes of the Siggiewi Local Council, that the preferred bidder had great experience and therefore was in a better position to carry out the work than the other bidders. The tender document was clear that it was the intention of the contracting authority to award the tender to the most favourable bidder provided that he was compliant with the tender specifications. The appellant had not been found to be non-compliant so it follows that since he submitted an offer cheaper than that of the preferred bidder, he should have been awarded the tender. He contended that it went against public procurement policies to award tenders without criteria, or criteria established after the publication date of the tender. Regulation 4 of the Public Procurement Regulations stated that tenders should be transparent and non-discriminatory. The criteria should be established before the tender was issued.

In the present case, Dr Bonello continued, the award criterion was the price. The cheapest compliant tender should have been awarded the tender. The appellant had submitted the cheapest offer and should have been awarded. Appellant had great experience; he had twelve years experience although not with the Siggiewi Local Council. Appellant was totally compliant and therefore the award criteria should have prevailed. He also remarked that although the objection was filed in December 2013 it was brought to this Board's notice much later.

Dr Karol Aquilina, the Mayor, on behalf of the contracting authority explained the procedure followed by his Council when adjudicating tenders. An internal board is appointed by the Council to be the evaluation committee. The board can interview all bidders or decide on the documents available to adjudicate the tender. In most cases the evaluation committee chooses to interview all the bidders as was done in this tender. A number of questions had been set in writing and these would be asked to all bidders, the same questions to each bidder. The incumbent in the present case was interviewed first. The evaluation board had informed the Council of the questions that had been set before the interviews. The questions are shown in the evaluation report. There were five in all and were about the number of employees, the machinery to be used, the days and time the service would be offered, experience in this type of work and lastly the familiarity of the bidders with the locality. The reason behind the last question is that Siggiewi in area is the third largest locality in Malta, having a vast non-urban area. A extensive network of non-urban roads are found in the locality and if the contractor was not familiar with the locality difficulties could ensue. There had been instances before where the contractor did not understand where a specific service was to be provided and question 5 tried to take this into consideration. The replies to these questions was noted and reported in the evaluation report.

Dr Karol Aquilina continued that for example, in question:

1 about employees, the preferred bidder was going to use 3 persons full-time while the appellant said that he would be employing 2 full-time employees.

2. machinery, the preferred bidder informed us that he would be using a sweeper, a mechanical shovel, a bob cat, an excavator, two vans, one large truck, a high-up and six mowers, and explained that he had an arrangement with a local firm to use its tools in case his were inoperable. The appellant stated that he would be using one mechanical shovel, one

truck and six grass cutters.

3. The preferred bidder said that he would be offering the service 5 days a week at eight hours daily and emergency service after normal office hours, Saturdays, Sundays and public holidays. Appellant offered eight and half hours for five days. When multiplying hours with number of employees it worked out that the preferred bidder was offering more.

4. Mario Mizzi the preferred bidder said that he had 16 years experience in Siggiewi and that his employees also had similar experience. The appellant did not state that he had 11 years experience but said that he had one and half year's experience at Gudja and recently at Zejtun. He also explained that his firm had worked at Rabat following call for quotations.

5. The preferred bidder said that he knew the locality well. We asked him about specific areas and obtained replies from him. In the appellant's case he stated that he did not know Siggiewi well but indicated that he was approximately aware of the several zones. For example when asked if he knew where "Fuq in-Nadur" was situated he did not know. He was also asked about several other localities like ta' Zuta.

Replying to a question by the Board, Dr Karol Aquilina said that the questions had been prepared previously and discussed during a Council Meeting but he was not aware of any relationship between councillors or their families with the family of the preferred bidder. He denied that the parameters of question 5 limited the choice of bidders in any way and said that the question was not the determining factor in the evaluation. The Council insists that in emergencies in the locality, like the dumping of material or of dead cattle in valleys, which was a frequent occurrence, the contractor should clear these immediately there and then. It was a common occurrence to have either the executive secretary or the mayor having to accompany the contractor when the latter had difficulty in finding the place where the dumping had been made.

On being questioned if this was reflected in the tender specifications Dr Aquilina said that it was not but the question was asked of all the bidders and all of the relative replies were noted accordingly. The fact that an emergency service was required was clearly set down in the tender. Most of the bidders were aware of this emergency service requirement.

Mr Richard A Matrenza asked if the evaluation took into consideration the standing of the employees being used by the bidders. Dr Aquilina stated that the contracting authority did not examine if the employees being used by the bidders were according to law. Neither did it consider the rates per hour for any of the bidders.

Dr John Bonello for the appellant said that the rate for the preferred bidder works out at €5.62 per hour which clearly falls under precarious employment. The rate for the appellant works out at €6.77 per man per hour.

At this point the Chairman remarked that if the Board found out that the offers could infer precarious employment then the Board had to take action. He asked the parties to submit the workings of rate for employees, per hour per employee for both the appellant and the preferred bidder, which is to be worked out by the contracting authority.

They are to submit through an email giving the breakdown of costs, giving the basic hourly pay, the National Insurance contribution hourly per employee, the Bonuses, Public Holidays and vacation leave as an hourly rate per employee, excluding VAT.

The Chairman explained what constitutes precarious employment and that if these result, the tender will not be valid.

Dr Aquilina stated that as far as he knows there were no grounds of possible conflict of interest for any of the councillors through parentage with any of the bidders.

Mr Wilson Mifsud, Id No. 527284M, the appellant, under oath said that he has been trading as WM Environmental for the past one and half years. However he had been working under his own name, as self employed for eleven years more. He was from Zebbug and knew where Fawwara at Siggiewi was situated. He knew where the following were situated: Ghar Lapsi, Tal-Providenza, Siggiewi Square, Qrendi Road, and Wied Qirda. Presently he was working similar contracts with the Gudja Local Council and the Zejtun Local Council. Appellant at present was also providing some work to the Rabat Council by quotation. All these involve non-urban roads. He would be using 2 employees to provide the service in this tender because he went through the area and made his calculations. He offered to provide the service for forty hours per week, not as the Mayor stated. He was going to use grass cutters, vans, and a mechanical shovel to provide the service. Being cross examined by Dr Aquilina, Mr Mifsud confirmed that during the interview he only mentioned Gudja and Zejtun and at Rabat on a quotation bases. The questions were about WM Environmental Limited, he confirmed. He had not mentioned the fact that he previously had experience in his personal capacity; but with the tender had submitted references from other Local Councils for the previous period which were in his own name. He is the sole Director and Shareholder of the appellant company. On being asked how to reach Ta' Zuta he replied that he knew, and explained that you reached it from Rabat. He did not know where Ta' Manduca area was situated. Neither did he know where Ta' Bria was situated. He knew where tar-Ramel was situated and explained that it abutted with Zebbug.

Dr Karol Aquilina said that the council insisted that the contractors knew the basic areas of the locality for which they were tendering.

Mr Wilson Mifsud continued replying to the cross examination by stating that he replied only to questions made to him during the interview.

The hearing was brought to a close at this point.

This Board,

Having noted the Appellant's objection , in terms of the 'Reasoned Letter of Objection' dated 24th December 2013 and also through Appellant's verbal submissions during the hearing held on 3rd April 2014, had objected to the decision taken by the pertinent Authority, in that:

- a) Appellant contends that his offer was fully compliant and was also the cheapest.**
- b) Appellant declared that he had the necessary experience in the activities as stipulated in the tender document.**
- c) Appellant also contends that the selection criteria were established after the closing date of the tender. One of the criteria did in fact limit the scope of competition. The fact that the one of the selection criteria was that the selected**

tenderer had to prove knowledge of ‘Siggiewi’ and its requirements did in fact limit, to some extent, the number of prospective bidders.

- d) The Hourly rate of labour, as quoted by the Preferred Bidder might lead to precarious working environment.

Having considered the Contracting Authority’s verbal submissions during the hearing held on 3rd April 2014, in that:

- a) Since Siggiewi is the third largest locality in Malta, the Contracting Authority felt the requisite that the Prospective tenderer had to be familiar with the locality and its particular areas.
- b) The Contracting Authority contends that the ‘Knowledge of the Area’ was only one of the several other selection criteria band and was not the detrimental factor in the evaluation process. This, in no way, limited the choice of bidders.

Reached the following conclusions:

1. This Board opines that the Contracting Authority had the right to establish ‘selection criteria’ and this, in order to evaluate and select the most favourable offer for services to be rendered by the successful bidder. Although, one of the selection criteria referred to ‘Geographical Knowledge’ of the area of Siggiewi, this Board notes, that since this village is the third largest Locality, it was imperative that the successful bidder be acquainted with the area in question. In this regard, this Board opines that the element of the ‘selection criteria’ with regards to knowledge of the area of Siggiewi was not, in any way, a limitation of choice of bidders. If the tendered services to be provided for in the Siggiewi area, the successful bidder must be fully familiar with the area, same has to cater for.
2. However, This Board was highly concerned regarding allegations made by the Appellant Company; in that the Preferred Bidder’s hourly rates were precarious. In this regard, from information submitted by both the Appellant and Preferred Bidder, this Board carried out a simple exercise, yet indicative, to assess the financial situation with regards to this tender , as shown hereunder:

From information submitted by both Appellant and Preferred Bidder, the following statistical info has been arrived at:

	Preferred Bidder	Appellant
Mandatory Minimum Wage (All inclusive) (Excluding VAT) per Hour	5.4	5.4
No of Employees (Full Time)	3	2
Weekly Wage per Employee at Cost	216	216
Total Weekly Wage Costs	648	432
Annual Wage Cost	33,696	22,464
Quoted Bid Price (Excluding VAT)	36,8464	29,576
Gross Profit before Running Expenses	3,168	7,112
Expenses, such as repairs, fuel etc.	?	?

3. This Board is not convinced that, when taking into account both the Appellant and Preferred bids calculation of the hourly rates, the tendered price will reap a reasonable expected margin of profit , after taking into consideration the omission of running expenses , such as fuel, repairs and other administrative expenses. This Board opines that a commercial trader who opts for a public tender should also cater for a reasonable profit margin. In this regard, this Board is of the opinion that the profit element could only be achieved through precarious situations.

In view of the above, this Board finds against the Appellant Company and recommends the following:

- i) Since this Board, opines that both the Appellant’s and Preferred Bidder’s bids can lead to precarious situations, this same Board is recommending that the same tender be re issued to ensure that no possibility of precarious situations are possible.
- ii) At the same time, this Board emphasises the issue that the ‘Evaluation Board’ should carry out the same exercise that this Board has carried out prior to the award of the Contract. In this regard, the Evaluation Board should ask for a Breakdown of the quoted price, in full detail.

- iii) **This board recommends that the deposit paid by the Appellant should not be reimbursed.**

Dr. Anthony Cassar
Chairman

Dr. Charles Cassar
Member

Mr. Richard A. Matrenza
Member

1 July 2014