

PUBLIC CONTRACTS REVIEW BOARD

Case No. 898

GS 67/08/15B

Tender for Horticultural Works at Public Gardens and Maintenance of Soft Areas using Environmentally Friendly Products and Practices.

The Tender was published on the 22nd September 2015. The closing date was on the 23rd October 2015. The Estimated Value of the Tender was €16,600.00 (Exclusive of VAT)

Three (3) bidders had submitted an offer for this Tender.

On the 24th November 2015 Callus Landscaping and Gardening filed an objection against the decision taken by the Contracting Authority to award the Tender to Environmental Landscapes Consortium for the price of €18,500.00.

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 the 4th February 2016 to discuss the objection.

Present for the hearing were:

Callus Landscaping & Gardening:

Mr Jonathan Callus	Representative
Dr Mattia Felice	Legal Representative

Environmental Landscapes Consortium:

Mr Charles Attard	Representative
Mr Josef Borg	Representative
Dr Ronald Cuschieri	Legal Representative

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Ms Josianne Cilia Mumford	Executive Secretary
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The Chairman made a brief introduction and then invited the Appellant's representative to make his submissions.

Dr Mattia Felice on behalf of the Appellant explained that his client's offer was €16,950 and it was all inclusive in that it comprised all the Tender requirements including VAT, management fee and the provision of plants and labour. The list submitted by the Appellant showing the plants to be used was a Tender requisite but the cost of the plants was included in the bid. The Contracting Authority claimed to have assigned the Tender to the Recommended Bidder because he would have supplied two employees. He declared that his client has 5 employees and intended to employ two others. However to state the number of employees was not a Tender requisite. He intended to detail two employees to this Tender. Thus the number of employees should at any rate not have been used to disadvantage Appellant. The Appellant firm is a family-run concern and also has vast experience. He contended that small businesses should be given the opportunity to win Tenders.

The Chairman remarked that experience could no longer be an award criterion.

Dr Mattia Felice continued that his client's offer was €16,950 while that of the Recommended Bidder was €18,500 and thus Appellant's offer was cheaper. Since Appellant's offer was also compliant, it was the cheapest compliant, thus the most advantageous. He contended that the Tender should have been awarded to Appellant.

Ms Josianne Cilia Mumford on behalf of the Contracting Authority stated that the Council had unanimously decided to award the Tender to the Recommended Bidder because of the previous experience of the Council itself. The Recommended Bidder has assigned two employees who would attend each day and sign the attendance sheet.

Mr Jonathan Callus ID No. 305783M under oath confirmed that he offered the same service offered by the Recommended Bidder – two employees 24 hours per day availability. The price was all-inclusive including flowers. The submitted flower list meant to indicate which flowers would be used and the cost to Appellant.

Dr Mattia Felice for the Appellant explained that the latter had indicated the prices for each flower he would be using but the offered price for everything was €16,950. He pointed out that even the Recommended Bidder had stated the cost of each flower that would be used.

Dr Ronald Cushieri on behalf of the Recommended Bidder explained that his clients always supplied the plants in such Tenders free. In previous contracts with the Contracting Authority the Recommended Bidder had supplied over €6,000 of free plants. He contended that the cost of flowers was not the determining factor, but added value to the service. When preparing the Tender the Recommended Bidder averages the cost of plants at around 40 cents each. He declared that the Recommended Bidder would be assigning two full time employees to the service. He pointed out that according to a Government circular, the minimum labour cost had to be €6.44 per hour, in order to safeguard against precarious employment. It can be seen from this, when worked out, that the wages for just one employee for one year would cost around €16,000. He claimed that the Recommended Bidder would be losing money on this Tender but the economy of scales enabled this to be done.

The Chairman remarked that there are remedies available to the Contracting Authority if it is found out that the contracted service is not being provided by the awardees.

Ms Josianne Cilia Mumford said that the Contracting Authority had previous experience of a

contractor defaulting but it was not so easy to stop a Tender like the present because trees are living organisms and may not be abandoned for any length of time.

Dr Mattia Felice on behalf of the Appellant contended that what the Recommended Bidder stated goes against the spirit of the European Union conventions. Dr Ronald Cuschieri, on behalf of the Recommended Bidder's stated that they do not make predictive pricing and abuse of dominant position.

At this point the hearing was closed.

This Board,

Having noted the Appellant's Objection, in terms of the "*Reasoned Letter of Objection*", dated 24 November 2015 and also through their verbal submissions during the Public Hearing held on 4 February 2016 and had objected to the decision taken by the pertinent Authority, in that:

- a) The Appellant maintains that the reasons given by the Contracting Authority, with specific reference to experience and allocation of two employees by the Recommended Bidder, were unfounded. The Appellant also maintains that his offer was cheaper than that of the Recommended Bidder and fully compliant to provide the Tendered Services;**

- b) The Appellant also contends that the cost of the flowers to be planted was only stated, to identify the type of flowers which the Appellant would be planting. The Appellant's quoted price was all inclusive.**

Having considered the Contracting Authority's "*Letter of Reply*" dated 24 November 2015 and also through the Contracting Authority's verbal submissions during the Public Hearing held on 4 February 2016, in that:

- a) The Contracting Authority confirmed through the "*Letter of Reply*" and verbal submissions that the main two factors which were weighed by the Contracting Authority in the award of this Tender was experience and allocation of two full time employees by the Recommended Bidder.**

Reached the following conclusions:

- 1. With regards to the Appellant's First Grievance, this Board after having examined the relative Tender Document and heard credible submission, opines that the accent made by the Contracting Authority on the fact that the Recommended Bidder will be allocating two Full Time Employees for the Tendered services, should not, in any credible way, influence the Evaluation Committee of the Contracting Authority.**

This Board justifiably point out that the Tender was for a particular service and this service was not indicative as to how many employees are to be deployed.

The Tender Document did not dictate the number of full time employees which the prospective bidders had to allocate, but to provide the service as dictated in the Tender Document and to the satisfaction of the Contracting Authority.

This Board also notes that there was no question or doubt that the Appellant's offer was not fully compliant. The factor which the Evaluation Committee took into account was the number of employees which the Recommended Bidder was going to deploy for the service.

As a statement of fact, this Board is justifiably convinced that the "*call for offers*" was made for a prospective bidder to provide the service as stipulated in the Tender Document.

In this regard, this Board does not find any credible reason why the "*number of employees*" factor should be accentuated for the award of this Tender. At the same time, this Board notes that the Appellant's offer was the cheapest fully compliant bid. In this regard, this Board upholds the Appellant's First Grievance.

2. With regards to the Appellant's Second Grievance, this Board, from

the credible submissions made by the Appellant, opines that the price list of flowers is not relevant to the total price quoted by both bidders.

It has been credibly established that such lists were submitted by bidders to clearly indicate the type of “*Flora*” which each bidder would supply under the quoted total price.

- 3. On a general note, this Board had, on many occasions, ruled that it is not this Board’s jurisdiction to delve into the fact whether the quoted price by a prospective bidder will result in a loss or profit to the same bidder. This ruling was upheld by the Hon. Court of Appeal. In this regard, this Board opines that, it will be futile to discuss this issue further.**

With regards to the experience as maintained by the Contracting Authority, this Board would justifiably point out that such an issue should not have been taken into consideration by the Evaluation Committee of the Contracting Authority, simply due to the fact that the Estimated Value of Tender was below € 500,000. In fact, this Tender’s Estimated Value was € 16,600.

This Board also notes that, from submissions made under oath

during the Public Hearing, the Appellant had the necessary experience to provide the Tendered Service. This Board would also like to point out that it is the obligation and duty of the Contracting Authority to carry out the necessary supervision, to ensure that the successful bidder would abide by all the conditions as dictated in the Tender Document, as otherwise, other remedies are available to the Contracting Authority.

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

- i) The Appellant's Offer is to be re-integrated in the Evaluation Process;**

- ii) The deposit paid by the Appellant is to be fully reimbursed.**

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Richard A Matrenza
Member

11 February 2016