

## PUBLIC CONTRACTS REVIEW BOARD

Case No. 412

**SGNLC/T/02/2012**

**Tender for Cleaning and Maintenance of Parks and Gardens – San Gwann Local Council**

This call for tenders was published in the Government Gazette on the 10<sup>th</sup> January 2012. The closing date for this call – which attracted no fewer than four (4) tenderers was the 13<sup>th</sup> February 2012.

Mr Owen Borg filed an objection on the 30<sup>th</sup> March 2012 against the decision of the San Gwann Local Council to reject his tender and to recommend tender award in favour of Environmental Landscaping Consortium Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr. Carmel Esposito and Mr Paul Mifsud as members convened a public hearing on Wednesday 16<sup>th</sup> May, 2012 to discuss this objection.

### **Mr Owen Borg**

Dr Jean Franco Gauci	Legal Representative
Mr Owen Borg	Representative
Mr Malcolm Dimech	Representative
Ms Svetlana Dimech	Representative

### **Mr Christopher Bezzina**

Dr Luciano Busuttil	Legal Representative
Mr Christopher Bezzina	Representative

### **Environment and Landscaping Consortium Ltd**

Dr Ronald Cuschieri	Legal Representative
Mr Charles Attard	Representative

### **San Gwann Local Council**

Dr Keith Grech	Legal Representative
Mr Kurt Guillaumier	Executive Secretary

**Evaluation Board/Council** – no one was present.



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

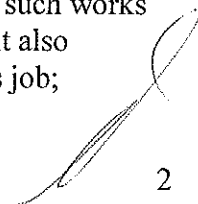
The Public Contracts Review Board noted that no estimated cost was attached to this tender.

Dr Jean Franco Gauci, legal representative of Mr Owen Bonnici, the appellant, submitted that:-

- i. by letter dated 27<sup>th</sup> March 2012, the San Gwann Local Council informed his client that his bid was unsuccessful and that it was recommended that the tender be awarded to Environment and Landscaping Consortium Ltd since it was the only tendering entity which employed qualified gardeners;
  - ii. according to the schedule of tenders received his client had submitted the second cheapest offer at €23,950 as against the recommended offer of €27,500;
  - iii. although this tender was to be adjudicated on the Most Economically Advantageous Tender (MEAT) basis, yet one could not overlook the substantial price difference unless that was adequately justified;
  - iv. whilst the contracting authority rejected his client's offer citing that only Environment and Landscaping Consortium Ltd provided qualified gardeners, yet one should note that the tender document did not request bidders to submit qualifications otherwise his client would have submitted his own issued by the School of Agriculture where he had attended for two years;
- and
- v. as a result, it transpired that his client was rejected on something which was not even requested in the tender document and which his client had documentary evidence that he has that requisite.

Dr Keith Grech, legal representative of San Gwann Local Council, remarked that:-

- a. the award criterion of this tender was not solely price but the most advantageous offer;
- b. the tender document, at Doc 06 'Details of Experience', requested the tenderer to provide details of work with public entities since 1994 in the field covered under the contract;
- c. the Council had no problems with the appellant, Mr Borg, with regard to contract/s for cleaning services but, in this case, Mr Borg did not possess the experience requested;
- d. on the other hand, Environment and Landscaping Consortium Ltd had considerable experience in this sector so much so that it carried out such works on behalf of about thirty eight out of sixty eight local councils and it also declared that it would be allocating two full-time employees on this job;



and

- e. the pertinent legislation did not bind local councils to simply adjudicate tenders on the basis of price only but it provided local councils with a measure of discretion provided that there were valid reasons.

Dr Gauci argued that:-

- i. the reason for rejection was that his client was not qualified and not for lack of experience;

and

- ii. the tender involved cleaning, maintenance and gardening works and, by way of experience, his client submitted the cleaning works he carried out for public entities, including for San Gwann Local Council itself, but he had not carry out any gardening works on behalf of public entities as requested in the tender document. Nevertheless, the appellant's legal advisor proceeded by stating that his client was qualified in gardening and had carried out gardening works on behalf of private concerns, which he did not provide evidence of in his tender submission since the tender mentioned only public entities.

Mr Kurt Guillaumier, executive secretary to the San Gwann Local Council, under oath, gave the following explanations:

- a. he had been performing the duties of executive secretary with San Gwann Local Council since October 2011 and that, prior to that, he had served as mayor and councillor of the same locality for a number of years;
- b. he had informed the members of the adjudicating board of the hearing but, evidently, none of them turned up;
- c. the tender document did not request bidders to submit qualifications and none of the tenderers participating in the tender procedure submitted the qualifications of their employees;
- d. in the case of Environment and Landscaping Consortium Ltd he was aware that their employees were ex-Department of Agriculture employees;
- e. no interviews were held with tenderers, which were permissible by legislation, and no verifications of any sort were carried out with a view to establishing whether the bidders possessed any academic qualifications since the Council relied on the documentation presented in the tender submissions;
- f. although Environment and Landscaping Consortium Ltd indicated that it would provide two full-time employees on this job, he could not tell whether, presently, Environment and Landscaping Consortium Ltd employees – Environment and Landscaping Consortium Ltd being the current contractor - dedicated 40hrs a week to the upkeep of gardens and parks in San Gwann as he had no control over them as they were not on his books;



- g. Environment and Landscaping Consortium Ltd presented evidence of experience and the list of employees according to the Employment and Training Corporation indicating various personnel who were engaged on gardening works;

and

- h. Mr Borg did not provide any past gardening works he carried out on behalf of public entities and he did not submit the Employment and Training Corporation list of employees but all that he submitted was a letter – not on an Employment and Training Corporation letterhead - indicating that he employed no one and that he would engage employees if he were to be awarded this contract.

Dr Gauci claimed that the two Environment and Landscaping Consortium Ltd employees only dedicated an average of 20hrs a week on these works and that the fountains and other areas were not being properly maintained by the current contractor, namely Environment and Landscaping Consortium Ltd. He added that had the contracting authority carried out the usual clarification interviews with bidders his client would have presented his qualification along with his experience with private concerns.

Dr Grech argued that:-

- i. that Environment and Landscaping Consortium Ltd had submitted its extensive experience in the maintenance of gardens and parks and, as required in the tender document, the Employment and Training Corporation list of its employees indicating their job description which included a number of gardeners;
  - ii. the certificate presented by Mr Borg at the hearing was not, in itself, proof of experience;
- and
- iii. the preferred bidder was not selected and the other bidders were not discarded solely on the merits of qualifications.

The Chairman Public Contracts Review Board noted that (a) the only reason for rejection communicated to the unsuccessful bidders was that Environment and Landscaping Consortium Ltd had qualified gardeners, which although the issue had been raised by Councillor Marica Bayliss, yet it was emerging that there were other issues such as the lack of experience which shortcoming was not mentioned to Mr Borg and (b) Mr Borg could have sought a clarification as to whether experience with private entities was admissible.

Dr Ronald Cuschieri, legal advisor of Environment and Landscaping Consortium Ltd, the recommended tenderer, submitted that:-

- a. the difference between the price of his client and that of the appellant amounted to about €4,000;



- b. his client was engaged by about thirty eight other local councils on similar works which was ample evidence of the company's experience in this sector;
  - c. his client was the current contractor and, as a consequence, the Council was aware of the quality of the work it performed;
  - d. the council's contracts manager assigned the work to be performed to the two Environment and Landscaping Consortium Ltd employees deployed on these works and, if need be, his client could deploy more personnel on a particular job because it possessed the resources to do so;
  - e. any shortcomings pinpointed by the contracting authority were invariably rectified and the price quoted by his client was identical to the one it had offered in the 2005 tendering process thereby maintaining the same price in spite of the fact that operating costs were constantly on the increase;
- and
- f. the tendering process was a fair and a transparent one.

Dr Gauci maintained that it was not possible to detail two full time employees on these works since their wages would amount to about €23,000 p.a. when the contract was worth about €27,000 p.a. On his part, Dr Cuschieri contended that, in his client's case, that was possible through economies of scale.

Dr Grech concluded that the contracting authority reached its decision after considering the whole package offered by bidders and Environment and Landscaping Consortium Ltd provided the contracting authority with peace of mind that the contract would be properly executed whereas Mr Borg lacked both the experience and the personnel to do the job.

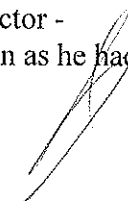
At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their 'letter of objection' dated 29<sup>th</sup> March 2012 and also through their verbal submissions presented during the hearing held on the 16<sup>th</sup> May 2012, had objected to the decision taken by the pertinent authorities;
- 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> March 2012, the San Gwann Local Council informed the appellant that his bid was unsuccessful and that it was recommended that the tender be awarded to Environment and Landscaping Consortium Ltd since it was the only tendering entity which employed qualified gardeners, (b) according to the schedule of tenders received the appellant had submitted the second cheapest offer at €23,950 as against the recommended offer of €27,500, (c) although this tender was to be adjudicated on the Most Economically Advantageous Tender (MEAT) basis, yet one could not overlook the substantial price difference unless that was adequately justified, (d) whilst the contracting authority rejected the appellant's offer citing that only

Environment and Landscaping Consortium Ltd provided qualified gardeners, yet one should note that the tender document did not request bidders to submit qualifications otherwise the appellant would have submitted his own issued by the School of Agriculture where he had attended for two, (e) as a result, it transpired that the appellant was rejected on something which was not even requested in the tender document and which the appellant had documentary evidence that he has that requisite, (f) the reason for rejection was that the appellant was not qualified and not for lack of experience, (g) the tender involved cleaning, maintenance and gardening works and, by way of experience, the appellant submitted the cleaning works he carried out for public entities, including for San Gwann Local Council itself, but he had not carry out any gardening works on behalf of public entities as requested in the tender document. Nevertheless, the appellant's legal advisor proceeded by stating that the appellant was qualified in gardening and had carried out gardening works on behalf of private concerns, which he did not provide evidence of in his tender submission since the tender mentioned only public entities, (h) the two Environment and Landscaping Consortium Ltd employees only dedicated an average of 20 hrs a week on these works and that the fountains and other areas were not being properly maintained by the current contractor, namely Environment and Landscaping Consortium Ltd adding that had the contracting authority carried out the usual clarification interviews with bidders the appellant would have presented his qualification along with his experience with private concern and (i) Dr Gauci maintained that it was not possible to detail two full time employees on these works since their wages would amount to about €23,000 p.a. when the contract was worth about €27,000 p.a;

- having considered the contracting authority's representatives' reference to the fact that (a) the award criterion of this tender was not solely price but the most advantageous offer, (b) the tender document, at Doc 06 'Details of Experience', requested the tenderer to provide details of work with public entities since 1994 in the field covered under the contract, (c) the Council had no problems with the appellant, Mr Borg, with regard to contract/s for cleaning services but, in this case, Mr Borg did not possess the experience requested, (d) on the other hand, Environment and Landscaping Consortium Ltd had considerable experience in this sector so much so that it carried out such works on behalf of about thirty eight out of sixty eight local councils and it also declared that it would be allocating two full-time employees on this job, (e) the pertinent legislation did not bind local councils to simply adjudicate tenders on the basis of price only but it provided local councils with a measure of discretion provided that there were valid reasons, (f) the tender document did not request bidders to submit qualifications and none of the tenderers participating in the tender procedure submitted the qualifications of their employees, (g) in the case of Environment and Landscaping Consortium Ltd the evaluation board was aware that their employees were ex-Department of Agriculture employees, (h) no interviews were held with tenderers, which were permissible by legislation, and no verifications of any sort were carried out with a view to establishing whether the bidders possessed any academic qualifications since the Council relied on the documentation presented in the tender submissions, (i) although Environment and Landscaping Consortium Ltd indicated that it would provide two full-time employees on this job Mr Guillaumier could not tell whether, presently, Environment and Landscaping Consortium Ltd employees – Environment and Landscaping Consortium Ltd being the current contractor - dedicated 40 hrs a week to the upkeep of gardens and parks in San Gwann as he had

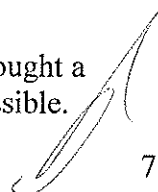
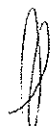


no control over them as they were not on his books, (j) Mr Borg did not provide any past gardening works he carried out on behalf of public entities and he did not submit the Employment and Training Corporation list of employees but all that he submitted was a letter – not on an Employment and Training Corporation letterhead - indicating that he employed no one and that he would engage employees if he were to be awarded this contract, (k) that Environment and Landscaping Consortium Ltd had submitted its extensive experience in the maintenance of gardens and parks and, as required in the tender document, the Employment and Training Corporation list of its employees indicating their job description which included a number of gardeners, (l) the certificate presented by Mr Borg at the hearing was not, in itself, proof of experience and (m) the preferred bidder was not selected and the other bidders were not discarded solely on the merits of qualifications and that the contracting authority reached its decision after considering the whole package offered by bidders and Environment and Landscaping Consortium Ltd provided the contracting authority with peace of mind that the contract would be properly executed whereas Mr Borg lacked both the experience and the personnel to do the job;

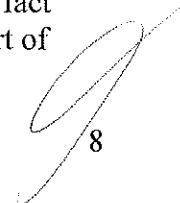
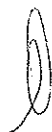
- having considered the interested party's representatives' reference to the fact that (a) the difference between the price of Environment and Landscaping Consortium Ltd and that of the appellant amounted to about €4,000, (b) Environment and Landscaping Consortium Ltd was engaged by about thirty eight other local councils on similar works which was ample evidence of the company's experience in this sector, (c) Environment and Landscaping Consortium Ltd was the current contractor and, as a consequence, the Council was aware of the quality of the work it performed, (d) the council's contracts manager assigned the work to be performed to the two Environment and Landscaping Consortium Ltd employees deployed on these works and, if need be, the company could deploy more personnel on a particular job because it possessed the resources to do so, (e) any shortcomings pinpointed by the contracting authority were invariably rectified and the price quoted by Environment and Landscaping Consortium Ltd was identical to the one it had offered in the 2005 tendering process thereby maintaining the same price in spite of the fact that operating costs were constantly on the increase, (f) the company could quote for such a price due to economies of scale and (g) the tendering process was a fair and a transparent one,

reached the following conclusions, namely:

1. The Public Contracts Review Board notes the fact that the only reason for rejection communicated to the unsuccessful bidders was that Environment and Landscaping Consortium Ltd had qualified gardeners. Nevertheless, during the hearing it also emerged that there were other issues such as the lack of experience which shortcoming was not mentioned to Mr Borg. This Board cannot but stress the need for full justifications for exclusion to be given to appellants by contracting authorities in order to enable the latter to (a) establish whether they are justified in filing an appeal and (b) if they decide to do so, to ensure an adequate defence of the respective arguments which one would be raising during a hearing.
2. The Public Contracts Review Board feels that Mr Borg could have sought a clarification as to whether experience with private entities was admissible.



3. This Board observes that the contracting authority could have been more explicit as to the level of gardening experience / professional level needed. Yet, this Board acknowledges the fact that the tender document, at Doc 06 'Details of Experience', requested the tenderer to provide details of work with public entities since 1994 in the field covered under the contract and, considering that the title of the tender was '*Tender for Cleaning and Maintenance of Parks and Gardens*', it seemed natural that a tenderer would have been expected to demonstrate his level of competency as well as the facility to provide the service in an effective manner including the number of employees one would be inclined to allocate to fulfill one's obligations. It is a fact that (a) the tender document did not request bidders to submit qualifications and none of the tenderers participating in the tender procedure submitted the qualifications of their employees and (b) no interviews were held by evaluators with tenderers, which were permissible by legislation, and no verifications of any sort were carried out with a view to establishing whether the bidders possessed any academic qualifications since the Council relied on the documentation presented in the tender submissions. However, it is also a fact that Mr Borg did not provide any past gardening works he carried out on behalf of public entities and he did not submit the Employment and Training Corporation list of employees but all that he submitted was a letter – not on an Employment and Training Corporation letterhead - indicating that he employed no one and that he would engage employees if he were to be awarded this contract. Needless to say that no contracting authority would ask for an Employment and Training Corporation list of employees if one were to be agreeing to be informed by any participating tenderer that one would be engaging employees if he were to be awarded the contract. In this Board's opinion this is unacceptable as it gives anything but peace of mind as well as a solid demonstration of some semblance of track record.
4. The Public Contracts Review Board agrees with the contracting authority that the appellant was qualified to carry out his contractual obligations with regard to the contract/s for cleaning services but, in this case, Mr Borg did not possess the experience requested and this Board also contends that the certificate presented by Mr Borg at the hearing was not, in itself, proof of experience.
5. This Board agrees with the contracting authority that the pertinent legislation did not bind local councils to simply adjudicate tenders on the basis of price only but it provided local councils with a measure of discretion provided that there were valid reasons.
6. The Public Contracts Review Board cannot but agree with the evaluation board's line of thought wherein it was acknowledged that the whole package offered by bidders and Environment and Landscaping Consortium Ltd provided the contracting authority with peace of mind that the contract would be properly executed whereas Mr Borg lacked both the experience and the personnel to do the job.
7. The Public Contracts Review Board would like to place emphasis on the fact that it has serious reservations on the fact that Council members form part of




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adjudication panels. It is this Board's opinion that the persons fulfilling such a pivotal role should be independent.

In view of the above, this Board finds against the appellant company and recommends that the said appellant forfeits the deposit paid for the appeal to be lodged.



Alfred R Triganza  
Chairman



Carmel Esposito  
Member



Paul Mifsud  
Member

28<sup>th</sup> May 2012