

PUBLIC CONTRACTS REVIEW BOARD

Case No. 542

KLBO/02/2012

Tender for the Up-keep and Maintenance of soft areas within ‘Access Roads’, ‘Access Only and Pedestrian Streets’ and ‘Parks and Gardens’ using environmentally friendly materials and practices – Bormla Local Council

The call for tender was published in the Government Gazette of the 23-24 October 2012 with a closing date of the 22nd November 2012.

Two (2) tenderers submitted their offers.

V & A Services filed an objection on the 28th January 2013 against the decision of the Bormla Local Council to recommend the award of the tender to Environmental Landscaping Consortium Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza (Chairman) and Mr Carmelo Esposito and Mr Paul Vella as members convened a meeting on Friday 3rd May 2013 to discuss the appeal.

Present:

V & A Services Ltd

Dr Michael Grech	Legal Representative
Mr Ronald Attard	Representative
Mr Brian Vella	Representative

Environmental Landscaping Consortium Ltd (ELC) –no representative turned up

Bormla Local Council

Dr Luciano Busuttil	Legal Representative
Mr Ivan Agius	Deputy Mayor

Evaluation Board

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

Dr Michael Grech, legal advisor of V & A Services, the appellant company, made the following submissions:-

- i. by public notice issued by the Bormla Local Council on the 23rd January 2013 it was announced that the tender was recommended for award to Environmental Landscaping Consortium Ltd, which quoted the cheapest and most advantageous offer;
- ii. the appellant company was contending that the recommended tenderer had, in fact, submitted an incomplete tender submission as explained hereunder:-
 - a. according to the tender document, the bidder had to submit a monthly schedule of works, something which the recommended bidder did not provide and this was supported by the statement made by Mr Joseph Scerri, Mayor, Bormla Local Council, in the evaluation report dated 22nd January 2013 where he explained that he voted against the recommendation to award the tender to Environmental Landscaping Consortium Ltd because Environmental Landscaping Consortium Ltd did not indicate the number of hours in respect of two items which it marked as 'under construction';
 - b. the tender document provided a site plan indicating the sites where the services were to be delivered and this site plan included the areas which Environmental Landscaping Consortium Ltd indicated as 'under construction' and in respect of which it did not provide the man-days on the lists it submitted;
 - c. that meant that the price quoted by Environmental Landscaping Consortium Ltd did not include the sites marked 'under construction' and therefore the price quote by Environmental Landscaping Consortium Ltd might or would increase to take into account the sites presently 'under construction' once these would be completed;
 - d. this point of view was reinforced by the comments made by Mr John Vella, Councillor, in the evaluation report where he stated that he voted in favour of awarding the tender to Environmental Landscaping Consortium Ltd on the proviso that the price quoted included the servicing of the soft areas which it indicated as 'under construction', namely, no extra costs were involved;
 - e. one had to keep in mind that the areas Environmental Landscaping Consortium Ltd indicated as 'under construction' were quite substantial;
 - f. in this case the variation procedure contemplated under Reg. 79 of the Public Procurement Regulations was not applicable because this was

not a *force majeure* or unforeseen or unforeseeable case but these soft areas were already included in the tender document;

- g. even if, for the sake of the argument, Environmental Landscaping Consortium Ltd could increase its overall quoted price then one would have to question whether the amended price would remain the cheapest compliant;
- h. Reg. 28 (3) of the Public Procurement Regulations laid down the award criteria, in this case, the cheapest offer compliant with the tender specifications and in this case, although Environmental Landscaping Consortium Ltd's offer was the cheapest, it was not compliant because it amounted to an incomplete tender submission

and

- i. in the light of the above, the appellant company was calling on the Public Contracts Review Board to revoke the award decision made by the Bormla Local Council whilst also requesting that the tender be awarded to the appellant company since it, effectively, submitted the cheapest compliant offer.

Dr Luciano Busutil, legal representative of the Bormla Local Council, made the following submissions:-

- a. the first issue raised by the appellant company concerned the non-submission of the monthly work schedule and, in this regard, one had to refer to clause 8 of the 'General Conditions' which provided that the contractor had to submit his proposed programme and proposed method of work for the performance of the service within 7 days from the date of the letter of acceptance, and not at tender stage;
- b. what Environmental Landscaping Consortium Ltd submitted was a list of the sites which had to be serviced and, against each one of them, it indicated the number of man days involved by way of 'minimum yearly intervention';
- c. the sites Environmental Landscaping Consortium Ltd marked as 'under construction' were Triq Santa Teresa, Triq ix-Xatt ta' Bormla and Pjazza Anthony Coleiro, although the appellant company also included in its letter of appeal Pjazza Gavino Gulia and Pjazza Paolino Vassallo;
- d. Environmental Landscaping Consortium Ltd offered the price of €34,500, including VAT and contract manager's fee at 5% free, but it did not indicate, in any way, that it would depart from that offer, in other words, the Council would only pay €34,500 for the services requested in the call for tenders and so it should be because the price tendered could not be conditional;
- e. Environmental Landscaping Consortium Ltd noted that, at the time of drawing up its tender submission, certain sites were still under construction but it did

not indicate that it would charge extra to service these sites once works were completed;

- f. the remarks made by the Mayor Joseph Scerri and Councillor John Vella were meant only to explain their vote but, nonetheless, their vote remained unchanged, namely the former against and the latter in favour of the proposed award to Environmental Landscaping Consortium Ltd;
- g. the contract would, eventually, reflect the tender document and Environmental Landscaping Consortium Ltd did not make any reservations with regards to what was requested in the tender document;
- h. Environmental Landscaping Consortium Ltd chose not to assume when the works under construction would be completed and what services they would entail under this contract but, still, it included them in its global offer of €34,500;

and

- i. Environmental Landscaping Consortium Ltd was recommended for award because it submitted an offer which was compliant and about €5,000 cheaper even though it also offered some extras.

Dr Grech remarked that:-

- i. the fact remained that the mayor voted against, councillor John Vella voted in favour and councillor Raymond Balzan abstained, with the former two expressing reservations as to the way they voted and it appeared that no clarifications were requested from Environmental Landscaping Consortium Ltd in these respects;
- ii. by inserting a note, namely, 'under construction', Environmental Landscaping Consortium Ltd had qualified its offer and that amounted to a conditional offer which was not permissible;

and

- iii. at page 8 of its tender submission, Environmental Landscaping Consortium Ltd stated that 'The quoted price is inclusive of seasonal pruning and trimming of trees within the areas included and covered by the contract' and that statement made matters worse because it meant that Environmental Landscaping Consortium Ltd only guaranteed seasonal pruning and trimming to the exclusion of the other services thus rendering the tender submission incomplete.

Mr Brian Vella, also representing the appellant company, remarked that Environmental Landscaping Consortium Ltd made reference to pruning and trimming because in previous similar calls for tenders this service had been excluded.

Dr Busuttil explained that:-

- a. whilst the areas under construction referred to works in hand on the Bormla Quay project, yet Environmental Landscaping Consortium Ltd's offer covered all the areas and services included in the tender;
- b. if, for the sake of the argument, the Bormla Quay project would remain work in progress for the duration of the two year contract period the global sum tendered by Environmental Landscaping Consortium Ltd would remain the same;

and

- c. the appellant company's tender submission just listed the sites where the service was to be provided but it did not mention the services that it was going to provide and this, apparently, because it was understood that it would be rendering the services requested in the tender document and, by the same token, one could argue that Environmental Landscaping Consortium Ltd was going to provide all the services requested in the tender including the pruning and trimming.

Dr Grech argued that:-

- i. once Environmental Landscaping Consortium Ltd decided to indicate the man-days against each site and, in so doing, it did not allocate any man-days against the sites 'under construction' then that meant that no works were contemplated in the latter sites except, perhaps, the seasonal pruning and trimming mentioned at page 8 of the submission which covered all the areas in the contract;
- ii. the appellant company chose to mention only the sites without indicating the relative man-days or services which, in itself, meant that the sites would be serviced as requested in the tender.

Dr Busuttill stated that with the same argument put forward by the appellant company then the contracting authority could not request the said company to perform any services on any site because in its tender submission it did not indicate the services which it would provide in every site.

At this point the hearing came to a close.

This Board,

- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated the 28th January 2013 and also through its representatives verbal submissions presented during the hearing held on the 3rd May 2013, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant's representative's claims and observations, particularly, the references made to the fact that (a) by public notice issued by the Bormla Local Council on the 23rd January 2013 it was announced that the tender was

recommended for award to Environmental Landscaping Consortium Ltd, which quoted the cheapest and most advantageous offer, (b) the appellant company was contending that the recommended tenderer had, in fact, submitted an incomplete tender submission as (1) according to the tender document, the bidder had to submit a monthly schedule of works, something which the recommended bidder did not provide and this was supported by the statement made by Mr Joseph Scerri, Mayor, Bormla Local Council, in the evaluation report dated 22nd January 2013 where he explained that he voted against the recommendation to award the tender to Environmental Landscaping Consortium Ltd because Environmental Landscaping Consortium Ltd did not indicate the number of hours in respect of two items which it marked as 'under construction', (2) the tender document provided a site plan indicating the sites where the services were to be delivered and this site plan included the areas which Environmental Landscaping Consortium Ltd indicated as 'under construction' and in respect of which it did not provide the man-days on the lists it submitted, (3) that meant that the price quoted by Environmental Landscaping Consortium Ltd did not include the sites marked 'under construction' and, as a result, the price quoted by Environmental Landscaping Consortium Ltd might or would increase to take into account the sites presently 'under construction' once these would be completed, (4) this point of view was reinforced by the comments made by Mr John Vella, Councillor, in the evaluation report where he stated that he voted in favour of awarding the tender to Environmental Landscaping Consortium Ltd on the proviso that the price quoted included the servicing of the soft areas which it indicated as 'under construction', namely, no extra costs were involved, (5) one had to keep in mind that the areas Environmental Landscaping Consortium Ltd indicated as 'under construction' were quite substantial, (6) in this case the variation procedure contemplated under Reg. 79 of the Public Procurement Regulations was not applicable because this was not a *force majeure* or unforeseen or unforeseeable case but these soft areas were already included in the tender document, (7) even if, for the sake of the argument, Environmental Landscaping Consortium Ltd could increase its overall quoted price then one would have to question whether the amended price would remain the cheapest compliant, (8) Reg. 28 (3) of the Public Procurement Regulations laid down the award criteria, in this case, the cheapest offer compliant with the tender specifications and in this case, although Environmental Landscaping Consortium Ltd's offer was the cheapest, it was not compliant because it amounted to an incomplete tender submission, (9) in the light of the above, the appellant company was calling on the Public Contracts Review Board to revoke the award decision made by the Bormla Local Council whilst also requesting that the tender be awarded to the appellant company since it, effectively, submitted the cheapest compliant offer, (10) the fact remained that the mayor voted against, councillor John Vella voted in favour and councillor Raymond Balzan abstained, with the former two expressing reservations as to the way they voted and it appeared that no clarifications were requested from Environmental Landscaping Consortium Ltd in these respects, (11) by inserting a note, namely, 'under construction', Environmental Landscaping Consortium Ltd had qualified its offer and that amounted to a conditional offer which was not permissible and (12) at page 8 of its tender submission, Environmental Landscaping Consortium Ltd stated that 'The quoted price is inclusive of seasonal pruning and trimming of trees within the areas included and covered by the contract' and that statement made matters worse because it meant that Environmental Landscaping Consortium Ltd only guaranteed seasonal pruning and trimming to the exclusion of the other services thus rendering the tender submission incomplete, (c) Mr Brian Vella, also representing the appellant company, remarked that Environmental Landscaping Consortium Ltd made reference to pruning and trimming

because, in previous similar calls for tenders, this service had been excluded, (d) once Environmental Landscaping Consortium Ltd decided to indicate the man-days against each site and, in so doing, it did not allocate any man-days against the sites 'under construction' then that meant that no works were contemplated in the latter sites except, perhaps, the seasonal pruning and trimming mentioned at page 8 of the submission which covered all the areas in the contract and (e) the appellant company chose to mention only the sites without indicating the relative man-days or services which, in itself, meant that the sites would be serviced as requested in the tender;

- having considered the contracting authority's representative's reference to the fact that (a) the first issue raised by the appellant company concerned the non-submission of the monthly work schedule and, in this regard, one had to refer to clause 8 of the 'General Conditions' which provided that the contractor had to submit his proposed programme and proposed method of work for the performance of the service within 7 days from the date of the letter of acceptance, and not at tender stage, (b) what Environmental Landscaping Consortium Ltd submitted was a list of the sites which had to be serviced and, against each one of them, it indicated the number of man days involved by way of 'minimum yearly intervention', (c) the sites Environmental Landscaping Consortium Ltd marked as 'under construction' were Triq Santa Teresa, Triq ix-Xatt ta' Bormla and Pjazza Anthony Coleiro, although the appellant company also included in its letter of appeal Pjazza Gavino Gulia and Pjazza Paolino Vassallo, (d) Environmental Landscaping Consortium Ltd offered the price of €34,500, including VAT and contract manager's fee at 5% free, but it did not indicate, in any way, that it would depart from that offer, in other words, the Council would only pay €34,500 for the services requested in the call for tenders and so it should be because the price tendered could not be conditional, (e) Environmental Landscaping Consortium Ltd noted that, at the time of drawing up its tender submission, certain sites were still under construction but it did not indicate that it would charge extra to service these sites once works were completed, (f) the remarks made by the Mayor Joseph Scerri and Councillor John Vella were meant only to explain their vote but, nonetheless, their vote remained unchanged, namely the former against and the latter in favour of the proposed award to Environmental Landscaping Consortium Ltd, (g) the contract would, eventually, reflect the tender document and Environmental Landscaping Consortium Ltd did not make any reservations with regards to what was requested in the tender document, (h) Environmental Landscaping Consortium Ltd chose not to assume when the works under construction would be completed and what services they would entail under this contract but, still, it included them in its global offer of €34,500, (i) Environmental Landscaping Consortium Ltd was recommended for award because it submitted an offer which was compliant and about €5,000 cheaper even though it also offered some extras, (j) whilst the areas under construction referred to works in hand on the Bormla Quay project, yet Environmental Landscaping Consortium Ltd's offer covered all the areas and services included in the tender, (k) if, for the sake of the argument, the Bormla Quay project would remain work in progress for the duration of the two year contract period the global sum tendered by Environmental Landscaping Consortium Ltd would remain the same, (l) the appellant company's tender submission just listed the sites where the service was to be provided but it did not mention the services that it was going to provide and this, apparently, because it was understood that it would be rendering the services requested in the tender document, (m) by the same token, one could argue that Environmental Landscaping Consortium Ltd was going to provide all the services requested in the tender including the pruning and trimming and (n) with the same argument put forward by the appellant company then the contracting authority could

not request the said company to perform any services on any site because in its tender submission it did not indicate the services which it would provide in every site,

reached the following conclusions, namely:

1. The Public Contracts Review Board argues that the first issue raised by the appellant company concerned the non-submission of the monthly work schedule and, in this regard, one had to refer to clause 8 of the 'General Conditions' which provided that the contractor had to submit his proposed programme and proposed method of work for the performance of the service within 7 days from the date of the letter of acceptance, and not at tender stage.
2. This Board contends that what Environmental Landscaping Consortium Ltd submitted was a list of the sites which had to be serviced and against each one of them it indicated the number of man days involved by way of minimum yearly intervention.
3. The Public Contracts Review Board opines that the remarks made by the Mayor Joseph Scerri and Councillor John Vella were meant only to explain their vote but, nonetheless, their vote remained unchanged, namely the former against and the latter in favour of the proposed award to Environmental Landscaping Consortium Ltd.
4. This Board cannot but agree that submissions made by tenderers should not be conditional.
5. Nevertheless, in order to ensure that there is no misunderstanding at a later stage, prior to signing any agreement, this Board recommends that the Council should formally place emphasis on its terms and conditions, namely that, in line with contract still to be signed, it would be only paying the recommended tenderer, in this case Environmental Landscaping Consortium Ltd, the sum of €34,500 including VAT for the services requested in the call for tenders.

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

Alfred R Triganza
Chairman

Carmelo Esposito
Member

Paul Mifsud
Member

7 May 2013