PUBLIC CONTRACTS REVIEW BOARD

Case No. 302

RN/01 /10
Tender for the Provision of Local Warden Services – Reġjun tan-Nofsinhar

This call for tenders was published in the Government Gazette on 30th November 2010. The closing date for this call with an estimated budget of € 2,100,000 was 21st January 2011.

Two (2) tenderers submitted their offers.

Messrs Aurelia Enforcement Ltd filed an objection on 6th May 2011 against the decision by the South Region to disqualify its offer on being non-compliant at administrative and technical stage.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr. Edwin Muscat and Mr Joseph Croker as members convened a public hearing on Friday, 10th June 2011 to discuss this objection.

Present for the hearing were:

Messrs Aurelia Enforcement Ltd

Dr Adrian Delia	Legal Representative
Ms Jean Camilleri	Representative
Mr Peter Formosa	Managing Director

Guard & Warden Service House Ltd

Dr Andrew Borg Cardona	Legal Representative
Mr Kenneth De Martino	Representative

Sterling Security Co Ltd

Dr Reuben Farrugia	Legal Representative
Mr Noel Schembri	Representative
Mr David Stabbings	Representative

Reġjun tan-Nofsinhar (South Region)

Dr Alex Sciberras	Legal Representative

Evaluation Board:

Ms Claudette Abela Baldacchino	Chairperson
Mr Jesmond Aquilina	Member
Mr Anthony Borg Caruana	Member
Mr George Cremona	Member
Mr Reuben Sciberras	Secretary

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

Dr Adrian Delia, legal representative of Aurelia Enforcement Ltd, the appellant company, stated that by means of letter dated 27th April 2011, his client was informed that the company's tender was not successful since "*(i) the company does not have the required experience indicated in the tender document* and *(ii) the number of wardens on the company's register as at closing date of the tender is not sufficient to service the requirements of the Region as indicated, i.e. 261 hrs weekly in blocks of 40 hrs.*"

(i) The company does not have the required experience indicated in the tender document

Dr Delia made the following submissions:

a. it was not correct that his client did not register five years experience and it was equally incorrect to state that the tender document required a minimum of five years experience;

b. Clause 12 of the 'Instructions to Tenderers' under 'Award' provided that:

> *"It is the intention of the Region to award the Contract on the basis of the cheapest and administratively compliant tender, having regard to the extent of compliance with the conditions specified in the tender documents and also the level of prices quoted; provided that the tender has been submitted in accordance with the requirements of the Tender Documents. Quality Standards, experience and track record (minimum 5 years), work plan proposed, company set up and conditions of work of employees, organizational capabilities and professionalism will be taken into consideration and will be the basis of the award."*

This provision was rather ambiguous with regard to whether an award was to be made according to the lowest price or on the basis of the most economically advantageous tender (MEAT) and, in fact, he had challenged this by filing a judicial protest and, whilst, the Public Contracts Review Board held that *prima facie* the claims made by his client did not subsist, yet, the same Board had added that *" ... Needless to say that this Board would be concerned if such addenda could lead to a lack of level playing amongst participating tenderers giving certain advantages to one or more bidder but not to all such tenderers".*

c. the 'selection criteria' and the 'reasons for award' were separate and distinct such that the selection criteria referred to mandatory requirements which had to be satisfied whereas the 'reasons for award' referred to the basis on which the award would be made but the 'reasons for award' could not lead to exclusion;

d. the minimum 5 year requirement was not mentioned anywhere else except under the 'award criteria' and therefore his client should not have been excluded at 'award stage' but, if anything, at the 'selection stage' which preceded the 'award stage';

e. having said that, his client still satisfied the 5 year experience requirement by having provided his services to Malta Drydocks from 2003 to 2010, Motherwell Bridge Malta Ltd from 2006 to 2010 and Wasteserv (Malta) Limited from 2004 to 2010;

f. Reg. 52 (2) (a) of the Public Procurement Regulations made a distinction between works and services such that it stipulated that in the case of certain services 3 years experience was required whereas in the case of works 5 years experience were required;

g. the technical evaluation was to be carried out only on the basis of 'selection' criteria' whereas the 'award' was to be made on the basis of 'price' from among technically compliant bidders. Nevertheless, continued Dr Delia, under Clause 12 'award' there was included the 5 year experience requirement which, if anything, should have featured as a 'selection' criterion rather than an 'award' criterion. If the reason for exclusion was based on the experience required in Clause 12 under 'Award' then the exclusion of his client was illegal because there was no 'selection' criterion in the tender document that referred to the mandatory requirement of 5 years minimum experience.

(ii) The number of wardens on the company's register as at closing date of the tender is not sufficient to service the requirements of the Region as indicated, i.e. 261 hrs weekly in blocks of 40 hrs.

Dr Delia made the following submission:

i. contrary to what the evaluation board stated, his client did not indicate that the company would render the service requested in the tender with five wardens;

ii. this tender referred to the provision of loca.l warden services to cover a whole region and that entailed the engagement of a number of wardens, who had to be in possession of a specific licence which took a period of time to obtain;

iii. his client had up till then provided limited warden services, namely only to Floriana and Marsa local councils, and, as a result, one should not expect his client to employ say, 30 wardens, prior to being awarded the tender and thus leaving this workforce idle until such time when, and only if, the company would be awarded the tender. If the contracting authority was going to insist on this then that, effectively, meant that only the present/incumbent operators, who employed practically all the existing licensed wardens, could participate to the exclusion of the rest;

iv. the tender document itself did not require this from the bidder; and

v. his client had indicated two ways or a mixture of both as to how the company would obtain the number of local wardens required for this contract, namely the 'transfer of business' or 'the submission of a call for applications'.

Dr Alex Sciberras, legal representative of the South Region, made the following submissions:-

a. the appellant company should refrain from repeating its allegations, namely that various provisions in the tender document were irregular or even illegal because it's representatives had already sought legal remedy but without success, so much so that the Public Contracts Review Board, *inter alia*, opined that there was no contradiction in the way the tender had been issued and that the principle of transparency had not been adversely affected and that the document, as drafted, was totally in line with established procurement criteria;

b. moreover, the appellant company was requesting that it should be reinstated and, logically, the company's representatives could not expect that the company could be reinstated in a tendering process that they were alleging to be null; and

c. the appellant company did not lodge an appeal in court with regard to the decision taken by the Public Contracts Review Board but its representatives decided to participate in the process and, as a result, the hearing should not deal with whether the tender provisions were valid or not but one had to limit oneself to the interpretation of the tender provisions.

On the issue of '<u>experience</u>' Dr Sciberras stated that

i. contrary to the appellant company's declaration that the 5 years experience was not mandatory, Clause 12 established a 'minimum' which, together with other considerations, like the organizational capabilities, *'will be taken very much into consideration and will be the basis of the award'*;

ii. Addendum No. 2 dated 5th January 2011 also clarified, if there was any doubt, that it was the intention of the region to award the contract on the basis of the cheapest technically and administratively compliant tender ;

iii. Regulation 52 (2) had to be considered in the light of Regulation 28 which stated that the:

> "(2) *Contracting authorities may require candidates and tenderers to meet minimum capacity levels in accordance with regulatios 51 and 52. The extent of the information referred to in regulations 51 and 52 and the minimum levels of ability required for a specific contract must be related and proportionate to the subject-matter of the contract. The minimum levels shall be referred to in the contract notice."*

iv. the 5 year minimum requirement was reasonable given the onerous responsibilities attached to the local warden service, which involved public order and which duties were previously vested in the Police Force;

v. the experience quoted by the appellant company was not relevant to the service requested in the tender and, moreover, the reference made to Schedule 8 (23) – investigation and security services except for armoured car services – mentioned, among others, investigation services, alarm monitoring and guard services, which had nothing to do with local warden services so much so that a local warden had a different licence from that of a private guard. Dr Sciberras opined that local warden services should fall under Schedule 8 (27) 'other services'; and

vi. in the case of the appellant company it was not only a question of 3 years versus 5 years experience but also that the kind of experience presented was not of a similar nature.

In making reference to the points raised with the 'number of wardens' Dr Sciberras argued that:

a. it was conceded that the tender document did not stipulate the number of wardens required but on the other hand Clause 12 provided that the tenderer had to have the organizational capabilities to deliver the service;

b. when the evaluation board considered the documentation submitted by the appellant company it emerged that the company only had 4 full-time and 1 part-time local wardens and, as a result, it was clear that the appellant company did not have the organizational capabilities to provide the 261 minimum weekly hours indicated in Annex 6 – Region's Requirements (page 55);

c. regarding the three options mentioned by the appellant company as to how it could engage the additional number of wardens required to render this service, one had to note that, in spite of the fact that the company had ample time to prepare itself for this reform, which started in 2009, yet it did not. As an example Dr Sciberras stated that the company did not present any letters of understanding from firms that were willing to join it if the said company would win the contract or any sub-contracting arrangements or that a number of persons were following a course that would lead to a local warden licence;

d. evidently, the adjudicating board did not have enough evidence to have the peace of mind that the appellant company was capable of undertaking this task and, worse still, the contracting authority risked being left without the provision of a local warden service for a number of months if the contract were be awarded to the appellant company; and

e. although one could argue that foreign wardens were likely to encounter communication problems, the fact was that the tender was open to competition from other EU member states

Dr Sciberras proceeded by making reference to the adjudication procedure arguing that:

i. Directive 2004/18/EC was equivalent to Malta's public procurement regulations and this dealt with procedures for the award of public works contracts, public supply contracts and public service contracts and provided that public service contracts listed under Annex IIB of the said Directive, which was identical to Schedule 8 under our Regulations, were not regulated by Article 53 (2) of the Directive, which article was the equivalent of our Regulation 28(5);

ii. in the case '*European Commission v. Ireland*' which was decided upon on the 18th November, 2010, in para 43 it was stated that "*while the requirement to state the relative weighting for each of the award criteria at the stage of publication of the contract notice, as now provided for under Article 53(2) of the Directive, meets the requirement of ensuring compliance with the principle of equal treatment and the consequent obligation of transparency, it cannot legitimately be argued that the scope of that principle and obligation extends, in the absence of a specific provision to that effect in the Directive, to require that,... the relative weighting of criteria used by the contracting authority is to be determined in advance and notified to potential tenderers when they are invited to submit their bids. Indeed as the Court indicated by the use of the words 'where possible' ... the reference to weighting of the award criteria... does not constitute an obligation for the contracting authority.*"

iii. para. 48 further stated that moreover, "*the relative weighting of the award criteria communicated to the members of the evaluation committee in the form of a matrix would not have provided potential tenderers, had they been aware of that weighting at the time the bids were prepared, with information which could have had a significant effect on that preparation....*" (see also *ATI EAC and Viaggi di Maio and Others)";*

iv. more importantly, Regulation 55 (4)(b) made it clear that "*Public contracts which have as their object the services listed in Schedule 8 shall be subject solely to regulations 46 and 49(4)*" and, as a consequence, reference to any other regulation was superfluous and had no bearing on these proceedings; and

v. effectively, the principle of non-discrimination and transparency in the award of public contracts entailed that the adjudicating authority indicated beforehand which were those criteria upon which it shall evaluate the award "*in such a way as to allow the reasonably well-informed and normally diligent tenderers to interpret them in the same way*" *(AT! EAC and Viaggi di Maio and Others).*

At this point Dr Sciberras made reference to the selection and award criteria wherein, *inter alia*, he argued that:

a. the 'Tenderer's Declaration' and Addendum No. 2 (2) 'Adjudication of tenders', which referred to Clause 12, mentioned the criteria that would be applied in the process of selection and award;

b. the appellant company was trying to cover its shortcomings that surfaced at administrative and technical compliance stage by forcing the contracting authority to move on to envelope three knowing that, at that stage, it was only the price that had to be decided upon and that no administrative/technical issues could be raised; and

c. the role of the Public Contracts Review Board was to ensure that the contracting authority had abided by the procedural rules and that it had not misused its power but, according to the ECJ, it was not the role of the Public Contracts Review Board to replace the discretion of the contracting authority.

Mr Anthony Borg Caruana, the authorized officer of the South Region and a member of the adjudication board, under oath gave the following evidence:-

i. the appellant company was disqualified for not adhering to the provisions of Clause 12 and the Tenderer's Declaration (page 14);

ii. the evaluation board drew up a list of requisites that emerged from the tender document and at envelope 2 stage that list was compared with the appellant company's tender submission;

iii. Annex 6 – Region's Requirements – outlined the current minimum weekly requirement of 261 hours which, considering the 40-hour week included in the collective agreement of local wardens, worked out at a daily requirement of 7 local wardens, besides the provision of two senior grades;

iv. the Employment and Training Corporation records indicated that the appellant company had 3 full-time and 1 part-time wardens on its book whereas the South Region estimated that about 11 wardens in all would be required. It was also argued that whilst in its tender submission the appellant company undertook to provide the service anytime after the award of tender it was evident from the documentation submitted that it would not be have been able to fulfill that commitment;

v. from the options presented by the appellant company, the licensing of new wardens was out to the question given that it took a number of months for one to obtain the local warden licence whereas the 'transfer of business' was a possibility but no documentation, such as letters of understanding, was submitted and the evaluation board could not rest on such possibilities but it needed evidence and facts;

vi. it was up to the contracting authority to decide on the date when the contractor had to start rendering the service and, as a result, the contractor had to have the resources in place otherwise the region would end up without the warden service for months;

vii. the tender document was quite clear that the tenderer had to have a minimum of 5 years experience and that experience had to be in the provisions of local warden services as had been stated by the Chairman of the Management Committee, Local Enforcement Systems, the entity that compiled and issued the tender document;

viii. the adjudication was carried out according to published guidelines and the three envelope system entailed that a tenderer had to qualify from envelope 1 to proceed to envelope 2 - the administrative and technical evaluation – and to qualify from envelope 2 to be considered in envelope 3 which was the financial offer; and

ix. had the appellant company been adjudicated administratively and technically compliant at envelope 2 then the next step would have been envelope 3, where one had to decide only on the price.

In conclusion, Dr Delia made the following observations and passed the following comments:-

a. he insisted that at no stage did his client declare that the company was going to service the contract with only 5 wardens so much so that his client proposed three ways how to engage/recruit the required local wardens;

b. he questioned the use of issuing a tender when it was being claimed that the bidder had to have a good number of wardens on their books at the closing date of the tender when, practically, all licenced wardens were employed by the incumbent contractors;

c. he referred to Clause 4 of Annex 11 (page 70) – Contractor's information Statement – which stated that if *"the information is not available on the closing date for the submissions of this tender, it is to be submitted by the successful tenderer within one week from the receipt of acceptance and the award shall be subject to this condition."* As a result, claimed Dr Delia, according to that provision, the contracting authority could not disqualify the bidder even if the latter did not submit the information requested at Annex 11 by the closing date of the tender;

d. he referred to Regulation 28 which stated that

> "*(2) Contracting authorities may require candidates and tenderers to meet minimum capacity levels in accordance with regulations 51 and 52. The extent of the information referred to in regulations 51 and 52 and the minimum levels of ability required for a specific contract must be related and proportionate to the subject-matter of the contract. The minimum levels shall be referred to in the contract notice."*

Consequently, the appellant company's legal representative continued by arguing that, according to Reg. 28, the contracting authority 'may' require a minimum and that it was Reg. 51 and 52 respectively that stated that the minimum level 'shall' be referred to in the contract notice;

e. he stated that the 5 years experience was not a mandatory 'selection' criterion because the 5 years experience was included under Clause 12 which related to the 'award', which, in turn, did not deal with administrative or technical compliance but it dealt with the decision as to who should be awarded the tender;

f. he claimed that the complaint lodged by his client referring to the pre-contract procedure was unsuccessful because, at the time, the Public Contracts Review Board did not have the opportunity to hear and see all the evidence but, following this hearing, it had emerged that Clause 12 was not all that clear as to whether the award was to take place on the basis of the price or the most economically advantageous tender (MEAT) so much so that there were those who said that the basis was the 'price' and there were others who said the basis was the most economically advantageous tender (MEAT);

g. he referred to the fact that his client should not have been disqualified because of the number of wardens because the tender document did not contain 'selection criteria' but it contained 'award criteria' and even if the number of wardens were to be one of the selection criteria it had to be tied to a date; and

h. he argued that, once the appellant company's claim - at the pre-tendering procedure that the tender document, as drafted, was illegal - had not been upheld, his client was now requesting that the company's offer be reintegrated in the process once the reasons for its exclusion were unfounded.

On his part Dr Sciberras concluded his case by stating that:

i. it was evident that the purpose of the appeal was to open up the case that the appellant company had previously brought before the Public Contracts Review Board without success, so much so that the said company was, once again, challenging the provision of the tender document;

ii. the appellant company failed to relate Clause 12 to Addendum No. 2 which, together, clearly stated that Clause 12 was the basis for the selection and the award;

iii. the appellants kept on insisting with witnesses on what they would do once the process got to envelope no. 3, namely 'the award', a stage which had not been considered up till then because the process was halted at envelope no. 2, the selection stage;

iv. the appellant company did not have on its books the number of wardens required for the execution of this contract and the same company failed to indicate what arrangements it had entered into to secure the services of wardens if it were to be awarded the contract or else if it had any sub-contracting agreements; and

v. the adjudicating board had to evaluate on facts and documentation and not on abstract submissions.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated 6th May 2011 and also through their verbal submissions presented during the hearing held on 10th June 2011, had objected to the decision taken by the pertinent authorities;

- having noted all of the appellant company's representatives' claims and observations, particularly, the references made to the fact that (a) at no stage did the appellant company declare that it was going to service the contract with only 5 wardens so much so that it proposed three ways how to engage/recruit the required local wardens including a 'transfer of business' or 'the submission of a call for applications', (b) there seemed to be little scope in a contracting authority issuing a call like this one when it was being claimed that the bidders had to have a good number of wardens on their books at the closing date of the tender when, practically, all licenced wardens were employed by the incumbent contractors, (c) according to Clause 4 of Annex 11 (page 70) – Contractor's information Statement – the contracting authority could not disqualify the bidder even if the company did not submit the information requested at Annex 11 by the closing date of the tender, (d) the 5 years experience was not a mandatory 'selection' criterion because the 5 years experience was included under Clause 12 which related to the 'award', which in turn did not deal with administrative or technical compliance but it dealt with the decision as to who should be awarded the tender and (e) the appellant company should not have been disqualified because of the number of wardens because the tender document did not contain 'selection criteria' but it contained 'award criteria' and even if the number of wardens were to be one of the selection criteria it had to be tied to a date;

- having considered the contracting authority's representative's reference to the fact that (a) contrary to the appellant company's declaration that the 5 years experience was not mandatory, Clause 12 established a 'minimum' which, together with other considerations, like the organizational capabilities, *'will be taken very much into consideration and will be the basis of the award'*, (b) Addendum No. 2 dated 5th January 2011 also clarified, if there was any doubt, that it was the intention of the region to award the contract on the basis of the cheapest technically and administratively compliant tender, (c) the experience quoted by the appellant company was not relevant to the service requested in the tender, (d) when the evaluation board considered the documentation submitted by the appellant company it emerged that the company only had 4 full-time and 1 part-time local wardens and, as a result, it was clear that the appellant company did not have the organizational capabilities to provide the 261 minimum weekly hours indicated in Annex 6 – Region's Requirements (page 55), (e) regarding the three options mentioned by the appellant company as to how it could engage the additional number of wardens required to render this service, one had to note that, in spite of the fact that the company had ample time to prepare itself for this reform, which started in 2009, yet it did not - the company did not present any letters of understanding from firms that were willing to join it if the said company would win the contract or any sub-contracting arrangements or that a number of persons were following a course that would lead to a local warden licence, (f) the contracting authority risked being left without the provision of a local warden service for a number of months if the contract were be awarded to the appellant company, (g) although one could argue that foreign

wardens were likely to encounter communication problems, the fact was that the tender was open to competition from other EU member states, (h) from the options presented by the appellant company, the licensing of new wardens was out to the question given that it took a number of months for one to obtain the local warden licence whereas the 'transfer of business' was a possibility but no documentation, such as letters of understanding, was submitted and the evaluation board could not rest on such possibilities but it needed evidence and facts and (i) it was up to the contracting authority to decide on the date when the contractor had to start rendering the service and, as a result, the contractor had to have the resources in place otherwise the region would end up without the warden service for months;

reached the following conclusions, namely:

1. The Public Contracts Review Board contends that, whilst the appellant company was correct in arguing that the contracting authority did not indicate the number of wardens required, yet it is also true that the contracting authority did indicate the minimum number of hours per week needed to service this contract which amounted to 796 hours per week, which, when divided by 40 hours – as per collective agreement for local wardens - worked out at 20 wardens.

2. The Public Contracts Review Board argues that it was a matter of fact that the incumbent contractor/s already possessed the assets to undertake this tender and that was a point to their advantage. Yet, this Board is also aware of the fact that this tender was issued both locally and across the European Union and, as a result, at least *prima facie*, this Board cannot conclude that this tender had the semblance of a pure monopolistic scenario. As a matter of fact this Board agrees with the contracting authority's position, namely that, albeit one could argue that foreign wardens were likely to encounter communication problems, yet the fact was that the tender was open to competition from other EU member states.

3. The Public Contracts Review Board agrees with the evaluation board with regard to the fact that the experience quoted by the appellant company was not relevant to the service requested in the tender. The Public Contracts Review Board feels that the argument raised by the appellant company's representative with regard to the said company satisfying the 5 year experience requirement by having provided its services to Malta Drydocks from 2003 to 2010, Motherwell Bridge Malta Ltd from 2006 to 2010 and Wasteserv (Malta) Limited from 2004 to 2010 does not apply in this context considering that the scope of this tender, namely the provision of local warden services, bears no similarity to experience gained when providing services to the likes of Malta Drydocks, Motherwill Bridge, Wasteserv (Malta) Limited and so forth.

4. Considering that up to the closing date of tender submission the appellant company only had 5 wardens on its books, the Public Contracts Review Board feels that the evaluation board was provided with little comfort that the appellant company would be able to provide the requested service as from day one following the award and this regardless of the fact that no date was specified within which the successful tenderer had to start the service following the signing of the contract.

5. The Public Contracts Review Board agrees with the contracting authority's arguments, namely that (a) the appellant company did not present any letters of understanding from firms that were willing to join it if the said company would win the contract or any sub-contracting arrangements or that a number of persons were following a course that would lead to a local warden licence and (b) the contracting authority risked being left without the provision of a local warden service for a number of months if the contract were be awarded to the appellant company.

In view of the above this Board finds against the appellant company and also recommends that the deposit paid by the latter should not be reimbursed.

Alfred R Triganza	Edwin Muscat	Joseph Croker
Chairman	Member	Member

4 July 2011