

PUBLIC CONTRACTS REVIEW BOARD

Case No. 325

GHPS/124002d10LZ

Tender for Cleaning Services at GHPS, G'Mangia and Marsa Stores

This call for tenders was published in the Government Gazette on the 7th December 2010. The closing date for this call with an estimated value of € 23,509.20 was the 22nd December 2010.

Two (2) tenderers submitted their offers.

Gafá Safeway Cleaners Ltd filed an objection on the 30th May 2011 against the decision of WasteServ Malta Ltd to recommend the award of tender to VSV Cleaning Service.

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 Monday, 12th September 2011 to discuss this objection.

Gafá Safeway Cleaners Ltd

Dr Edward Gatt	Legal Representative
Mr Joseph Sammut	Representative
Ms Paulette Gafá	Representative

VSV Cleaning Service

Mr Derek Spiteri	Representative
Ms Maria Buscema Spiteri	Representative

Procurement and Supplies, Ministry of Health, the Elderly and Community Care

Mr Karl Farrugia	Chief Executive Officer
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Evaluation Board

Ms Miriam Dowling	Chairperson
Ms Bernardette Brincat	Member
Ms Pamela Attard	Member
Ms Valerie Schembri	Member
Ms L Zahra	Secretary

Contracts Department

Mr Francis Attard	Director General
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After the Chairman's brief introduction, the appellant company was invited to explain the motives of its objection.

Dr Edward Gatt, legal representative of Gafá Safeway Cleaners Ltd, the appellant company, made the following submissions:

- i. the hourly rate quoted by the recommended tenderer did not respect the National Minimum Wage National Standard Order;
- ii. the Public Contracts Review Board had already pronounced itself on similar cases, e.g. those bearing reference numbers 277 to 282, in the sense that, albeit the adjudication process was properly conducted, yet the Public Contracts Review Board was wary that the minimum conditions of employment might not necessarily have been respected and, in spite of the fact that the Public Contracts Review Board was not the watchdog as to whether the conditions of employment were being respected or not, it had recommended that the Department of Industrial and Employment Relations ought to monitor the matter with regard to adherence to the statutory minimum wage requirements;
- iii. the Director General (Contracts) had even communicated instructions to all departments and public sector organisations to set up a mechanism that would monitor the conditions of work;
- iv. notwithstanding the recommendation put forward by the Public Contracts Review Board, in practice, little had been achieved mainly because cleaning services attracted a category of employees who were more vulnerable than others;
- v. although, on occasions, the Industrial and Employment Relations Department did take court action against employers, it often happened that the employees concerned would not testify against their employer;
- vi. in this case, the question of whether the minimum conditions of employment were met or not should not be dealt with *post facto*, namely after the abuse would have actually taken place but *a priori*, or else once at tendering stage it was evident that there was going to be an infringement then the tendering process should be stopped; and
- vii. in this particular case, it had resulted that the rate quoted by the recommended tenderer did not cover the statutory minimum wage and, as a result, there was no need for any monitoring but the matter called for a sanction by the Public Contracts Review Board.

The Chairman Public Contracts Review Board opined that whilst he personally agreed that there could perhaps be room to fine tune the procedure, yet the Public Contracts Review Board could only submit recommendations but it could not overstep its remit. He added that there were other fora where tenderers could seek redress in such circumstances.

Mr Karl Farrugia, CEO, Procurement and Supplies at the Ministry of Health, the Elderly and Community Care, remarked that:

- a. as stated by the appellant company, similar cases had been decided upon by the Public Contracts Review Board on the 28th April 2011 and his department had acted according to the instructions issued by the Public Contracts Review Board; and
- b. since the current contract expired, the Permanent Secretary at the Ministry of Health, the Elderly and Community Care had recently issued two requests for quotations for the provision of similar cleaning services for a few weeks duration to bridge the gap and Gafá Safeway Cleaners Ltd, the appellant company, submitted two rates, namely €5.39 (awarded on 9th September 2011) and €5.35 (still had to be awarded), which were, in fact, cheaper than the rate of €5.55 quoted by the preferred bidder in the tendering process under review.

Note: A copy of these rates were circulated among those present at the hearing

Ms Miriam Dowling, chairperson of the evaluation board, informed those present that the department's estimated value of the contract was based on the previous contract that had been awarded to Gafá Safeway Cleaners Ltd, namely €23,509.20. She added that the recommended bid amounted to €23,809.50.

Mr Kurt Balzan, inspector at the Industrial and Employment Relations Department, under oath, stated that the minimum national wage rate per hour was €5.94 broken down as follows:-

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3.84 - basic rate
0.35 - vacation leave
0.25 - statutory bonuses
0.21 - public holidays
<u>0.38</u> - national insurance
5.03
<u>0.91</u> - VAT
<u>5.94</u>

Mr Balzan remarked that, according to employment legislation, an employee was entitled to payment in respect of public holidays irrespective of whether one worked on a shift basis or if one reported for work or not.

At this point the members of the Public Contracts Review Board noted that the rates quoted by the preferred bidder and by the appellant company, namely €5.55 and €5.75 respectively, were both below the statutory hourly rate of €5.94.

Mr Joseph Sammut, also representing the appellant company, pointed out that the hourly rate of €5.94 excluded the cleaning material, transport and other overheads. He added that he disputed the Department of Industrial and Employment Relations' inclusion in the hourly rate of the €0.21 for public holidays and, in his opinion, the hourly rate excluding VAT should read €4.82 (€5.69 with VAT).

Dr Gatt recalled that during the appeal decided upon on the 28th April 2011 the recommended tenderer justified the low rate it had quoted by claiming that it had obtained the cleaning materials through sponsorships.

The Public Contracts Review Board remarked that:-

- i. it appears that the contracting authority was helpless to dispute the rate quoted in this call for tenders and, for that matter, the rates obtained following the two calls for quotations mentioned by Mr Farrugia;
- ii. expressed the view that a mechanism ought to be in place to eliminate abuse or even the perception of abuse taking place in such cases, e.g. by, henceforth, including in the tender document the minimum national wage as per pertinent legislation which all tenderers would have to respect leaving the commercial risk to the other elements that make up the tenderer's offer; and
- iii. the Public Contracts Review Board could not impose such provisions but it was within its remit to make recommendations for due consideration by the competent authorities.

Mr Farugia pointed out that in their tender submission the bidders had signed a general declaration whereby they pledged to adhere to legislation in force.

In conclusion, Dr Gatt:-

- a. declared that during the hearing it resulted beyond any shadow of doubt that the rate per hour quoted by the recommended tenderer (€5.55) did not cover the national minimum wage (€5.94) and there was no need for any monitoring by the Industrial and Employment Relations Department. Also, the Public Contracts Review Board was well placed to remedy the situation by rejecting the offer; and
- b. if the Public Contracts Review Board should, once again, hold that the question of rates was not within its realm then the Public Contracts Review Board should make it clear in its decision that such cases should not recur.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellant's company, in terms of the reasoned letter of objection of the 30th May 2011, and through the verbal submissions made during the hearing held on the 12th September 2011, had objected against the decision of WasteServ Malta Ltd to recommend the award of tender to VSV Cleaning Service;
- having noted the appellant firm's representatives claims and observations regarding the fact that (a) the hourly rate quoted by the recommended tenderer did not respect the National Minimum Wage National Standard Order, (b) the Public

Contracts Review Board had already pronounced itself on similar cases, e.g. those bearing reference numbers 277 to 282, in the sense that, albeit the adjudication process was properly conducted, yet the Public Contracts Review Board was wary that the minimum conditions of employment might not necessarily have been respected and, in spite of the fact that the Public Contracts Review Board was not the watchdog as to whether the conditions of employment were being respected or not, it had recommended that the Department of Industrial and Employment Relations ought to monitor the matter with regard to adherence to the statutory minimum wage requirements, (c) the Director General (Contracts) had even communicated instructions to all departments and public sector organisations to set up a mechanism that would monitor the conditions of work, (d) notwithstanding the recommendation put forward by the Public Contracts Review Board, in practice, little had been achieved mainly because cleaning services attracted a category of employees who were more vulnerable than others, (e) in this particular case, it had resulted that the rate quoted by the recommended tenderer did not cover the statutory minimum wage and, as a result, there was no need for any monitoring but the matter called for a sanction by the Public Contracts Review Board and (f) the hourly rate of €5.94 excluded the cleaning material - , transport and other overheads, the Department of Industrial and Employment Relations' inclusion in the hourly rate of the €0.21 for public holidays and the hourly rate excluding VAT should read €4.82 (€5.69 with VAT);

- having considered the contracting authority's representative's submissions, namely that (a) as stated by the appellant company, similar cases had been decided upon by the Public Contracts Review Board on the 28th April 2011 and the contracting department had acted according to the instructions issued by the Public Contracts Review Board, (b) since the current contract expired, the Permanent Secretary at the Ministry of Health, the Elderly and Community Care had recently issued two requests for quotations for the provision of similar cleaning services for a few weeks duration to bridge the gap and Gafá Safeway Cleaners Ltd, the appellant company, submitted two rates, namely €5.39 (awarded on 9th September 2011) and €5.35 (still had to be awarded), which were, in fact, cheaper than the rate of €5.55 quoted by the preferred bidder in the tendering process under review and (c) the minimum national wage rate per hour was €5.94,

reached the following conclusions:

1. The Public Contracts Review Board opines that, albeit it agrees that there could be room for one to fine tune the procedure, yet the Board can only submit recommendations and cannot overstep its remit. Undoubtedly, however, there are other *fora* where tenderers could seek redress in such circumstances.
2. The Public Contracts Review Board will not tolerate any more similar scenarios such as in this particular instance wherein the contracting authority was helpless to dispute the rate quoted in this call for tenders and, for that matter, the rates obtained following the two calls for quotations mentioned by the CEO, Procurement and Supplies, Ministry of Health, the Elderly and Community Care.
3. At this point the Public Contracts Review Board cannot but express its view that a mechanism ought to be in place to eliminate abuse or even the perception of abuse

taking place in such cases, e.g. by, henceforth, including in the tender document the minimum national wage as per pertinent legislation which all tenderers would have to respect leaving the commercial risk to the other elements that make up the tenderer's offer. Needless to say that this Board expects the Department of Contracts to assume a leading role in the design and implementation of this mechanism.

4. The Public Contracts Review Board notes that the rates quoted by the preferred bidder and by the appellant company, namely €5.55 and €5.3 respectively, were both below the statutory hourly rate of €5.94

In view of the above, this Board has decided that once the offers made by the two bidders - the preferred bidder and the appellant company - were both below the statutory hourly rate of € 5.94, this tender should be cancelled and a new one issued. The contracting authority should ensure that the 'new' tender document should specify that offers below the statutory hourly rate would not be accepted.

In the circumstance this Board recommends that the deposit paid by the appellant company should be reimbursed.

Alfred R Triganza
Chairman

Edwin Muscat
Member

Joseph Croker
Member

30 September 2011