

PUBLIC CONTRACTS REVIEW BOARD

Case No. 433

WSM/231/2011

Tender for a Period Contract for the Sampling, Analysis and Reporting of Results for Seawater and Sediment as part of the Ghallis Non-Hazardous Waste Engineered Landfill Environment Monitoring Programme – Lot 2

This call for tenders was published in the Government Gazette on the 6th September 2011. The closing date for this call with an estimated budget of € 120,000 for Lots 1 and 2 over 24 months (excl. VAT) was the 4th October 2011.

Five (5) tenderers submitted their offers

ISTS Ltd filed an objection on the 15th June 2012 against the decision of WasteServ Malta Ltd not to award Lot 2 of the tender since its offer was considered financially non-compliant.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr. Joseph Croker and Mr Paul Mifsud as members convened a public hearing on Thursday, 26th July 2012 to discuss this objection.

Present for the hearing were:

ISTS Ltd

Mr Mark Mifusd Director

WasteServ Malta Ltd

Dr Victor Scerri Legal Representative

Evaluation Board

Ms Daniela Grech Chairperson

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

Mr Mark Mifsud, director of ISTS Ltd, the appellant company, explained that:

- i. he had filed another appeal on this matter and that the hearing was held on 12th April 2012;
- ii. the 'Notice of Award' issued by WasteServ Malta Ltd on 11th June 2012 indicated that his company's offer was financially non-compliant as it was over the tender estimate;
- iii. clause 6.2.1 of the tender document stated that:-

'The Contract shall be operative for a period of twenty-four (24) months on an 'if and when required' basis, or until the value of €120,000 exclusive of VAT is exhausted, whichever is the earlier. In the event where the €120,000 are not exhausted by the end of the contract period, the Chief Executive Officer reserves the right to extend the validity of the contract for a further period, up to six (6) months, after the termination date of the contract.'

- iv. on querying this decision with the contracting authority, he was furnished with the relevant extract of the evaluation report which read as follows:-

"The Evaluation Committee found that the offer submitted by ISTS Ltd for €931.38 (excl. VAT) was much higher than our estimate, which amounts to €400 per unit (excl. VAT). This was only determined during re-evaluation of the tenders since in the previous evaluation only the offer of PT Matic was financially evaluated since at that point it was the cheapest. Thus, the evaluators recommend that Lot 2 of this tender is not to be awarded to ISTS Ltd, as the offer is deemed as not being fair and reasonable"

- v. albeit this tender was issued for two lots, yet, the 12-month estimate of €120,000 was not apportioned between Lots 1 and 2;

and

- vi. it was his company's contention that the price of €931.38 per unit the company had offered was not above the tender estimate and that in submitting his company's bid he had abided by the tender conditions laid down in the tender document.

Ms Daniela Grech, chairperson of the adjudicating board, explained that, as per Schedule of Prices & Rates at page 27 of the tender document, tenderers were asked to quote the 'rate per unit (excl. VAT)' and, as a result, the evaluation board compared the unit rate offered by the appellant company with WasteServ Malta Ltd's estimated unit rate which was established at €400. She added that the evaluation

board did not compare the unit rate *vis-a-vis* the €120,000 which represented the total estimated 24-month allocation for Lots 1 and 2 included in this tender.

Dr Victor Scerri, legal representative of WasteServ Malta Ltd, remarked that:-

- a. WasteServ Malta Ltd based its decision to reject the offer and to cancel the procedure in accordance with clause 5.2.1 of the tender document which listed the grounds on which the contracting authority reserved the right to reject and/or to cancel the tender procedure, and specifically to sub-clause (d) which provided that the tender procedure could be cancelled if

"All technically compliant tenders exceed the financial resources available."

- b. WasteServ Malta Ltd was not bound to accept any unit rate which was within this tender's 24-month budget of €120,000.

The Chairman Public Contracts Review Board noted that:-

- i. the maximum rate per unit of (€400) which, apparently, was acceptable to WasteServ Malta Ltd had not been communicated to the bidders in the tender document but what was communicated was the overall 24-month allocation for Lots 1 and 2. He added that it would have been more appropriate had the tender document also indicated WasteServ Malta Ltd's maximum rate per unit – as per Schedule of Prices and Rate - so that bidders would have known beforehand that they had to compete with offers below the maximum indicated by WasteServ Malta Ltd;
 - ii. as things stood the appellant company had abided by the conditions laid down in the tender document in submitting its bid;
- and
- iii. WasteServ Malta Ltd had to amend clause 6.2.1 of the tender document so as to include the maximum rate acceptable to it something which, according to what had been stated during a previous hearing (WSM/58/2012), apparently was already in hand.

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' filed on the 16th June 2012 and also through their verbal submissions presented during the hearing held on the 26th July 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) the 'Notice of Award' issued by WasteServ Malta Ltd on 11th June 2012 indicated that the



appellant company's offer was financially non-compliant as it was over the tender estimate, (b) clause 6.2.1 of the tender document stated that "*The Contract shall be operative for a period of twenty-four (24) months on an 'if and when required' basis, or until the value of €120,000 exclusive of VAT is exhausted, whichever is the earlier. In the event where the €120,000 are not exhausted by the end of the contract period, the Chief Executive Officer reserves the right to extend the validity of the contract for a further period, up to six (6) months, after the termination date of the contract*", (c) albeit this tender was issued for two lots, yet, the 12-month estimate of €120,000 was not apportioned between Lots 1 and 2 and (d) it was the appellant company's contention that the price of €931.38 per unit the company had offered was not above the tender estimate and that in submitting its bid the appellant company had abided by the tender conditions laid down in the tender document;

- having considered the contracting authority's representatives' reference to the fact that (a) as per Schedule of Prices & Rates at page 27 of the tender document, tenderers were asked to quote the 'rate per unit (excl. VAT)' and, as a result, the evaluation board compared the unit rate offered by the appellant company with WasteServ Malta Ltd's estimated unit rate which was established at €400, (b) the evaluation board did not compare the unit rate *vis-a-vis* the €120,000 which represented the total estimated 24-month allocation for Lots 1 and 2 included in this tender, (c) WasteServ Malta Ltd based its decision to reject the offer and to cancel the procedure in accordance with clause 5.2.1 of the tender document which listed the grounds on which the contracting authority reserved the right to reject and/or to cancel the tender procedure, and specifically to sub-clause (d) which provided that the tender procedure could be cancelled if "*All technically compliant tenders exceed the financial resources available*" and (d) WasteServ Malta Ltd was not bound to accept any unit rate which was within this tender's 24-month budget of €120,000,

reached the following conclusions, namely:

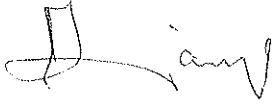
1. The Public Contracts Review Board feels that the maximum rate per unit of (€400) which, apparently, was acceptable to WasteServ Malta Ltd had not been communicated to the bidders in the tender document but what was communicated was the overall 24-month allocation for Lots 1 and 2. This Board acknowledges the fact that it would have been more appropriate had the tender document also indicated WasteServ Malta Ltd's maximum rate per unit – as per *Schedule of Prices and Rate* - so that bidders would have known beforehand that they had to compete with offers below the maximum indicated by WasteServ Malta Ltd.
2. This Board observes that, as things stood, the appellant company had abided by the conditions laid down in the tender document and, as a consequence, the stand taken by the contracting authority at this stage went beyond its operational parameters and this in view of the fact that a participating tenderer cannot be penalised for observing '*ad litteram*' a tender document's specifications. Needless to say that, albeit public procurement regulations provide the contracting authority with some degree of operational leverage and rights when it comes to the adjudication of tenders, yet, these should not be interpreted as if they are effective in total oblivion of the rights of the tendering entities.

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In view of the above, this Board finds in favour of the appellant company and recommends that the said appellant be reinstated in the tender evaluation process as well as recommending that the deposit paid by the appellant company for the appeal to be lodged be reimbursed.



Alfred R Triganza
Chairman



Joseph Croker
Member



Paul Mifsud
Member

31st July 2012