

PUBLIC CONTRACTS REVIEW BOARD

Case No. 456

OPM/2115/2012

Tender for the Provision of Environmentally Friendly Cleaning services at the Office of the Prime Minister

This call for tenders was published in the Government Gazette on the 18th May 2012. The closing date for this call with an estimated budget of € 47,500 (excl. VAT) for 12 months was the 1st June 2012.

Five (5) tenderers submitted their offers.

Clentec Ltd filed an objection on the 27th June 2012 against the decision of the Office of the Prime Minister to recommend the award of the tender to Gafa Safeway Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Joseph Croker and Mr Carmel Esposito as members convened a public hearing on Friday, 17th September 2012 to discuss this objection.

Present for the hearing were:

Clentec Ltd

Dr Victor Axiak	Legal Representative
Mr Simon Turner	Representative

Gafa Safeway Ltd

Dr Edward Gatt	Legal Representative
Ms Paulette Gafa	Representative

Office of the Prime Minister (OPM)

Mr Alex Magro	Director General Support Services
Mr Mario Borg Olivier	Representative
Mr Charles Vella	Representative
Ms Marica Saliba	Representative

Evaluation Board

Dr Charles Grech	Chairman
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Industrial and Employment Relations Department

Mr Antoine Grech	Representative
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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 Victor Axiak, acting on behalf of Clentec Ltd, the appellant company, made the following submissions:-

- i. by email dated 20th June 2012 the contracting authority informed his client that the company's offer was not the cheapest compliant tender and that it was recommending award of tender to Gafa Safeway Ltd at the rate of €5.83/hr inclusive of VAT;
 - ii. his client was contending that, *prima facie*, the recommended rate together with the second cheapest rate of €5.841 quoted by VSV Cleaning Services were below the national minimum wage and/or abnormally low when considering the other expenses that had to be added to the wage element, such as the provision of cleaning materials especially when this call for tenders called for the use of environmentally friendly cleaning materials which were more costly than other types of cleaning products;
- and
- iii. with the permission of the Public Contracts Review Board he wished to call two witnesses to take the stand to substantiate his case.

Mr Antoine Grech, representative of the Department for Industrial and Employment Relations, under oath, provided the following breakdown of the minimum wage per hour applicable to the cleaning services sector – exclusive of sick leave and maternity leave:-

€
3.95 – basic rate
0.36 – vacation leave
0.25 – bonus & weekly allowance
0.21 – public holidays
<u>0.40</u> – national insurance
5.17
<u>0.93</u> – VAT
<u>6.10</u>

Mr Benjamin Farrugia, director of Longbow Ltd, under oath, gave the following evidence:-

- a. his firm represented foreign suppliers of cleaning materials, including eco-certified products such as those indicated in the specifications of this tender;
- b. as far as he was aware there were no locally manufactured eco-certified cleaning products;



- c. the price of eco-certified products would be between 30 to 40% more expensive than the price of non eco-certified products supplied by the same manufacturer;
- d. since he did not go into the details of the requirements and specifications of this particular tender he could not provide the cost of the eco-certified cleaning material required to execute this contract and, as a consequence, to what extent that influenced the hourly rate;

and

- e. as far as he was aware this was the first public tender issued calling for environmentally friendly cleaning services and that was in line with EU directives.

Dr Charles Grech, chairman of the evaluation board, provided the following explanations:-

- i. the evaluation board had to ascertain that the cleaning products offered were technically compliant as per section 5.3 'Technical Specifications of Cleaning Products' at page 32 of the tender document which laid down that either the products had to carry the EU Ecolabel or else one had to provide the information laid down in sub-section 5.3.4;
- ii. the recommended tenderer provided a certificate issued by the Regulatory Affairs Directorate of the Malta Competition and Consumer Affairs Authority (MCCAA) that the cleaning products the company offered were compliant;
- iii. the recommended tenderer also endorsed Form 2 'Statement on Conditions of Employment' whereby it's representative committed the company for the latter to abide by employment legislation, namely he declared that all employees engaged would enjoy working conditions stipulated by law;
- iv. the recommended tenderer had furnished the contracting authority with the list of employees who would be detailed on this contract and he even bound the company he represents to submit, at the contracting authority's request, a copy of the monthly payslips and annual FS3 forms;
- v. once Gafa Safeway Ltd had submitted all the above and since it submitted the cheapest offer, the contracting authority then went on to recommend the award of the tender to this firm according to the rules laid down in the tender document;
- vi. the evaluation board did not go into the merits of whether the bidder was going to make a profit or not or by what margin but the contracting authority retained the right to terminate the contract if the contractor would breach the contract conditions, including the employment legislation;

and



- vii. a few days prior to the hearing, government had terminated a contract for cleaning services when it was found that the contractor was breaching labour legislation.

Dr Axiak argued that the minimum hourly rate for cleaning services arrived at by the Employment and Industrial Relations Department including VAT amounted to €6.10/hr which was higher than the rate of €5.83/hr (inclusive of VAT) quoted by the recommended tenderer and that rendered the recommended offer abnormally low especially when one still had to add the cost of the cleaning materials.

Mr Alex Magro, Director General Support Services at the Office of the Prime Minister, remarked that:-

- a. if a tender for cleaning services was awarded above the minimum wage for this sector this would not guarantee that the contractor's employees would actually be paid according to employment legislation;
 - b. to ensure that employees were paid according to employment legislation the contracting authority and the inspectorate of the Industrial and Employment Relations Department had to check the payslips and FS3 forms of the employees deployed on the contract;
 - c. at tendering stage the bidders were not instructed to submit offers above any benchmark but they committed themselves to abide by, among other things, employment legislation;
- and
- d. the adjudication board evaluated the bids in accordance with the conditions laid down in the tender document which were applicable throughout the public services.

On one hand, Dr Axiak repeatedly asked whether it was acceptable for a government entity to award a tender for cleaning services at a rate which was below the minimum wage rate and, on the other hand, the contracting authority insisted that that was not a condition laid down in the tender document.

Dr Edward Gatt, legal representative of the recommended tenderer, submitted that:-

- i. in previous identical cases the Public Contracts Appeals Board/Public Contracts Review Board always took the stand that it was not within its remit to consider if a bidder was going to abide by labour laws or not because that fell within the remit of the contracting authority and/or of the Industrial and Employment Relations Department;
- ii. in its various decisions the Public Contracts Appeals Board/Public Contracts Review Board had recommended that the Industrial and Employment Relations Department should be vigilant with regard to operators in the cleaning sector adhering to employment legislation so much so that the inspectors of the Industrial and Employment Relations Department were



carrying out inspections almost on a monthly basis because this issue had also been taken up at the national political level;

and

- iii. the Public Contracts Review Board should stick to its past rulings, namely that tenders were to be adjudicated according to tender conditions and that the operators' adherence to employment legislation should be left up to the Industrial and Employment Relations Department.

Dr Axiak pointed out that the procurement regulations catered for a situation when a bidder made an offer which was abnormally low.

The Chairman Public Contracts Review Board remarked that:-

- i. it was not the role of the Public Contracts Review Board to review the commercial decisions taken by bidders;
- ii. it was up to bidders to decide if they wanted to undertake a contract (a) at a profit and, in that case, to establish the profit margin, or (b) at breakeven or (c) perhaps even at a loss;

and

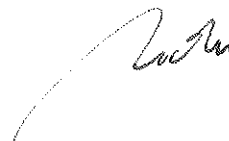

- iii. the Public Contracts Appeals Board/Public Contracts Review Board had suggested on previous occasions that one way of dealing with abnormally low offers in response to a call for tenders like the one under review was for the contracting authority to establish a rate, for instance, the minimum wage, below which offers would be considered abnormally low and rejected outright.

At this point Mr Magro:-

- a. explained that no benchmarking was taken into account in the adjudication of this tender but the contracting authority arrived at the award decision on the basis of clause 32.1 'Criteria for Award' of the tender document which provided that *'The sole award criteria will be the price. The contract will be awarded to the cheapest priced tender satisfying the administrative and technical criteria'*;

and

- b. insisted that even if, for the sake of the argument, the benchmark or starting point were to be the minimum wage rate of €6.10/hr that, in itself, was no guarantee that the contractor would, in fact, pay the employees according to labour laws but the only way to ensure that was to check the employees' payslips.



This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated the 27th June 2012 and also through their verbal submissions presented during the hearing held on the 17th September 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 email dated 20th June 2012 the contracting authority informed the appellant company that its offer was not the cheapest compliant tender and that it was recommending award of tender to Gafa Safeway Ltd at the rate of €5.83/hr inclusive of VAT, (b) the appellant company was contending that, *prima facie*, the recommended rate, together with the second cheapest rate of €5.841 quoted by VSV Cleaning Services, were below the national minimum wage and/or abnormally low when considering the other expenses that had to be added to the wage element, such as the provision of cleaning materials especially when this call for tenders called for the use of environmentally friendly cleaning materials which were more costly than other types of cleaning products, (c) the minimum wage per hour applicable to the cleaning services sector – exclusive of sick leave and maternity leave – was € 6.10 (€ 5.17 + VAT € 0.93), (d) the said appellant company was unaware of other locally manufactured eco-certified cleaning products, (e) the price of eco-certified products would be between 30 to 40% more expensive than the price of non eco-certified products supplied by the same manufacturer, (f) as far as the appellant company's representatives were aware this was the first public tender issued calling for environmentally friendly cleaning services and that was in line with EU directives and (g) the procurement regulations catered for a situation when a bidder made an offer which was abnormally low;
- having considered the contracting authority's representative's reference to the fact that (a) the evaluation board had to ascertain that the cleaning products offered were technically compliant as per section 5.3 'Technical Specifications of Cleaning Products' at page 32 of the tender document which laid down that either the products had to carry the EU Eco label or else one had to provide the information laid down in sub-section 5.3.4, (b) the recommended tenderer provided a certificate issued by the Regulatory Affairs Directorate of the Malta Competition and Consumer Affairs Authority (MCCAA) that the cleaning products the company offered were compliant, (c) the recommended tenderer also endorsed Form 2, 'Statement on Conditions of Employment', whereby it's representative committed the company for the latter to abide by employment legislation, namely he declared that all employees engaged would enjoy working conditions stipulated by law, (d) the recommended tenderer had furnished the contracting authority with the list of employees who would be detailed on this contract and the said company's representative even bound the company he represents to submit, at the contracting authority's request, a copy of the monthly payslips and annual FS3 forms, (e) once Gafa Safeway Ltd had submitted all the above and since it submitted the cheapest offer, the contracting authority then went on to recommend the award of the tender to this firm according to the rules laid down in the tender document, (f) the evaluation board did not go into the merits of whether the bidder was going to make a profit or not or by what margin

but the contracting authority retained the right to terminate the contract if the contractor would breach the contract conditions, including the employment legislation, (g) a few days prior to the hearing, government had terminated a contract for cleaning services when it was found that the contractor was breaching labour legislation, (h) explained that no benchmarking was taken into account in the adjudication of this tender but the contracting authority arrived at the award decision on the basis of clause 32.1 'Criteria for Award' of the tender document which provided that *'The sole award criteria will be the price. The contract will be awarded to the cheapest priced tender satisfying the administrative and technical criteria'* and (i) insisted that even if, for the sake of the argument, the benchmark or starting point were to be the minimum wage rate of €6.10/hr that, in itself, was no guarantee that the contractor would, in fact, pay the employees according to labour laws but the only way to ensure that was to check the employees' payslips;

- having considered the recommended tenderer's representative's reference to the fact that (a) in previous identical cases the Public Contracts Appeals Board/Public Contracts Review Board always took the stand that it was not within its remit to consider if a bidder was going to abide by labour laws or not because that fell within the remit of the contracting authority and/or of the Industrial and Employment Relations Department, (b) in its various decisions, the Public Contracts Appeals Board/Public Contracts Review Board had recommended that the Industrial and Employment Relations Department should be vigilant with regard to operators in the cleaning sector adhering to employment legislation so much so that the inspectors of the Industrial and Employment Relations Department were carrying out inspections almost on a monthly basis because this issue had also been taken up at the national political level and (c) the Public Contracts Review Board should stick to its past rulings, namely that tenders were to be adjudicated according to tender conditions and that the operators' adherence to employment legislation should be left up to the Industrial and Employment Relations Department,


reached the following conclusions, namely:

1. Once again, the Public Contracts Review Board reiterates a suggestion it had made in the past on many another similar occasion wherein it had highlighted that one way of dealing with abnormally low offers in response to a call for tenders like the one under review was for the contracting authority to establish a rate, for instance, the minimum wage, below which offers would be considered abnormally low and rejected outright.
2. The Public Contracts Review Board argues that it is not its role to review the commercial decisions taken by bidders and that it was up to bidders to decide if they wanted to undertake a contract (a) at a profit and, in that case, to establish the profit margin, or (b) at breakeven or (c) perhaps even at a loss.
3. This Board agrees with the contracting authority's argument wherein the latter claimed that, whilst retaining the right to terminate the contract if the contractor would breach the contract conditions, including the employment legislation, yet it was not within its remit to consider if a bidder was going to



abide by labour laws or not because that fell within the remit of the Industrial and Employment Relations Department.

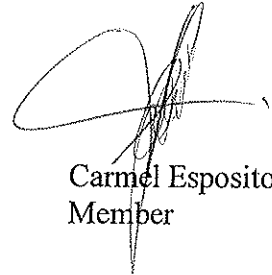
In view of the above, this Board finds against the appellant company and recommends that the deposit paid by the same appellant for the appeal to be lodged should not be reimbursed.



Alfred R Triganza
Chairman



Joseph Croker
Member



Carmel Esposito
Member

28th September 2012