PUBLIC CONTRACTS REVIEW BOARD

Case No. 477

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) (€400 per sample) for two trucks was the 4th October 2011.

Five (5) tenderers submitted their offers.

ISTS Ltd filed an objection on the 24th August 2012 against the decision of WasteServ Malta Ltd to recommend the cancellation of the tender.

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, 26th October 2012 to discuss this objection.

Present for the hearing were:

ISTS Ltd

Dr Ivan Gatt	Legal Representative
Mr Mark Mifusd	Director

WasteServ Malta Ltd

Dr Antoine Cremona	Legal Representative
Mr William Spiteri	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 the company's objection.

Preliminary

Dr Antoine Cremona withdrew this letter of complaint wherein, on behalf of the appellant company, he had requested that this third appeal would not be heard by the same chairman and members of the Public Contracts Review Board who had dealt with the previous two hearings on this same subject matter.

Dr Ivan Gatt, legal representative of ISTS Ltd, the appellant company, made the following submissions:

i. by Notice of Award dated 17th August 2012 the contracting authority informed his client that it was not going to award Lot No. 2 on the basis of clause 5.2.1 (a), namely "*the Tender procedure has been unsuccessful, namely where no qualitatively or financially worthwhile tender has been received or there has been no response at all*";

ii. the contracting authority could not bring up this reason for rejection, namely not "financially worthwhile", at the stage of the third appeal;

iii. clause 6.2.1 read as follows "*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.*"

The Chairman Public Contracts Review Board observed that the financial aspect of this tender had already been deliberated upon in Case No. 433 whereby the appellant company had been re-integrated in the tendering process because it had abided by the tender conditions. He also noted that, at the hearing culminating in decision no. 433, the Public Contracts Review Board had dealt even with the provisions of clause 5.2.1 (d) which read "*all technically compliant tenders exceed the financial resources available.*"

Dr Antoine Cremona, legal advisor of WasteServ Malta Ltd, the contracting authority, submitted that:

a. in line section 5.2, the contracting authority had the right to cancel the tender procedure and, technically speaking, it was not obliged to communicate the reason/s for cancellation although, in this case, the reason had been communicated;

b. the cancellation decision was subject to appeal where the appellant company had to prove that the cancellaton was resorted to in breach of the law or in a discrimatory manner;

c. there were five participating tenderers in this procedure of whom three were found to be technically or administratively non compliant and the other two, including the appellant company, were found financially to be not worthwhile as per clause 5.2.1 (d);

d. the appellant company even had the right to claim any damages the said company sustained throughout this tendering processs from the contracting authority but insisted that the contracting authority still retained the right to cancel a tender;

and

e. albeit the estimate of €120,000 published in the tender document was for Lots 1 and 2, and no indication had been given as to how much was earmarked for each lot, yet, for the purposes of this hearing it was being estimated that €60,000 were earmarked for lot 2, the lot under review.

Ing. Aurelio Attard, representative of WasteServ Malta Ltd, explained that:

i. in Case 433 WasteServ Malta Ltd had requested that the tendering procedure be cancelled because the bids had exceeded the financial allocation and his interpretation of that Public Contracts Review Board decision was in the sense that it had found that the quote of about €59,000 made by the appellant company was within the financial estimate of WasteServ Malta Ltd, say, €60,000 (lot 2) for 24 months and, as a result, WasteServ Malta Ltd's decision to cancel the tender was, factually, incorrect;

ii. WasteServ Malta Ltd's reason for cancellation was more or less the same this tme round because, with the unit price of €913.38 per sample quoted by the appellant company, WasteServ Malta Ltd would only be in a postion to carry out the eight (8) mandatory sessions – one every quarter over 2 years - mentioned in the tender, namely €7,451 per sssion x 8 = €59,608, but it did not cover 'any other tests' which WasteServ Malta Ltd could request during the contract period;

iii. WasteServ Malta Ltd did not specify the maximum or minimum number of tests it could ask for during the contract period over and above the eight (8) mandatory tests;

iv. as per schedule of prices, the bidder was requested to quote the rate per sample/session;

v. Clause 6.3.7 read as follows "*the company may appoint a representative who may request to be prosent at any point in the sampling process. The representative may request the Tenderer to carry out any additonal sampling.*

Any additional cost incurred shall be reimbursed by the company using the same rate of prices provided in the Tender"

and

vi. it was most likely that the appellant company had arrived at its unit price by dividing by 8 - being the number of tests mandatorily requested - the estimated value, which the company's representative might have figured that it was around €60,000, whereas it should have worked out the unit rate on the basis of the fixed costs involved.

Mr Mark Mifsud, also representing the appellant company, remarked that, at tendering stage, he was not aware of the exact budget allocation for 'lot 2' and it was only at the hearing that one was assuming that the €120,000 was to be split equally between the two lots - neither was he aware of the number of additional tests, even tentatively, which WasteServ Malta Ltd might request.

Dr Gatt made the point that the contracting authority was aware of all the issues being raised now right from the first hearing and that most of these issues had been decided upon in the two previous hearings, which decisions should be accepted and acted upon by WasteServ Malta Ltd.

The Chairman Public Contracts Review Board remarked that the tenderer was put in a rather difficult position in the absence of the estimate for 'lot 2' and a clear indication of the total number of tests which would be required over the contract period.

Dr Cremona conceded that the tender document, as published, was not clear enough to explain WasteServ Malta Ltd's requirements and that notion was reinforced by the wide differences in the quotes per sample received, namely €377.50, €458.40 and, the appellant company's unit price of €931.38, and that was the main reason that was leading to tender cancellation. Dr Cremona concluded that it was not correct to assume that once a contracting authority issued a tender then it was obliged to award that tender irrespective of the circumstances that might arise in the process;

At this point the hearing came to a close.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated the 23rd August 2012 and also through their verbal submissions presented during the hearing held on the 26th October 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 Notice of Award dated 17th August 2012 the contracting authority informed the appellant company that it was not going to award Lot No. 2 on the basis of clause 5.2.1 (a), namely *"the Tender procedure has been unsuccessful, namely where no qualitatively or financially worthwhile tender has been received or there has been no response at all"*, (b) the contracting authority could not bring up this reason for rejection, namely not

"financially worthwhile", at the stage of the third appeal, (c) clause 6.2.1 read as follows "*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.*", (d) Mr Mark Mifsud, also representing the appellant company, remarked that, at tendering stage, he was not aware of the exact budget allocation for 'lot 2' and it was only at the hearing that one was assuming that the €120,000 was to be split equally between the two lots - neither was he aware of the number of additional tests, even tentatively, which WasteServ Malta Ltd might request and (e) the contracting authority was aware of all the issues being raised now right from the first hearing and that most of these issues had been decided upon in the two previous hearings, which decisions should be accepted and acted upon by WasteServ Malta Ltd;

- having considered the contracting authority's representative's reference to the fact that (a) in line section 5.2, the contracting authority had the right to cancel the tender procedure and, technically speaking, it was not obliged to communicate the reason/s for cancellation although, in this case, the reason had been communicated, (b) the cancellation decision was subject to appeal where the appellant company had to prove that the cancellaton was resorted to in breach of the law or in a discrimatory manner, (c) there were five participating tenderers in this procedure of whom three were found to be technically or administratively non compliant and the other two, including the appellant company, were found financially to be not worthwhile as per clause 5.2.1 *(d)*, (d) the appellant company even had the right to claim any damages the said company sustained throughout this tendering processs from the contracting authority but insisted that the contracting authority still retained the right to cancel a tender, (e) albeit the estimate of €120,000 published in the tender document was for Lots 1 and 2, and no indication had been given as to how much was earmarked for each lot, yet, for the purposes of this hearing it was being estimated that €60,000 were earmarked for lot 2, the lot under review, (f) in Case 433 WasteServ Malta Ltd had requested that the tendering procedure be cancelled because the bids had exceeded the financial allocation and Ing. Attard's interpretation of that Public Contracts Review Board decision was in the sense that it had found that the quote of about €59,000 made by the appellant company was within the financial estimate of WasteServ Malta Ltd, say, €60,000 (lot 2) for 24 months and, as a result, WasteServ Malta Ltd's decision to cancel the tender was, factually, incorrect, (g) WasteServ Malta Ltd's reason for cancellation was more or less the same this tme round because, with the unit price of €913.38 per sample quoted by the appellant company, WasteServ Malta Ltd would only be in a postion to carry out the eight (8) mandatory sessions – one every quarter over 2 years - mentioned in the tender, namely €7,451 per sssion x 8 = €59,608, but it did not cover 'any other tests' which WasteServ Malta Ltd could request during the contract period, (h) WasteServ Malta Ltd did not specify the maximum or minimum number of tests it could ask for during the contract period over and above the eight (8) mandatory tests, (i) as per schedule of prices, the bidder was requested to quote the rate per sample/session, (j) Clause 6.3.7 read as follows "*the company may appoint a representative who may request to be prosent at any point in the sampling*

process. The representative may request the Tenderer to carry out any additonal sampling. Any additional cost incurred shall be reimbursed by the company using the same rate of prices provided in the Tender", (k) it was most likely that the appellant company had arrived at its unit price by dividing by 8 - being the number of tests mandatorily requested - the estimated value, which the company's representative might have figured that it was around €60,000, whereas it should have worked out the unit rate on the basis of the fixed costs involved, (l) one could concede that the tender document, as published, was not clear enough to explain WasteServ Malta Ltd's requirements and that notion was reinforced by the wide differences in the quotes per sample received, namely €377.50, €458.40 and, the appellant company's unit price of €931.38, and that was the main reason that was leading to tender cancellation and (m) it was not correct to assume that once a contracting authority issued a tender then it was obliged to award that tender irrespective of the circumstances that might arise in the process,

reached the following conclusions, namely:

1. The Public Contracts Review Board recognizes the fact that the financial aspect of this tender had already been deliberated upon in Case No. 433 whereby the appellant company had been re-integrated in the tendering process because it had abided by the tender conditions.

2. The Public Contracts Review Board, at the hearing culminating in decision no. 433, had already dealt even with the provisions of clause 5.2.1 (d) which, *inter alia*, read "*all technically compliant tenders exceed the financial resources available*". As a result, this Board finds it difficult to understand why the contracting authority - after failing to specify in the tender document (a) the exact budget allocation for 'lot 2' considering that the perceived *quantum* was solely divulged at the hearing due to the fact that the contracting authority was assuming that the estimated budget of €120,000 was to be split equally between the two lots and (b) the number of additional tests which WasteServ Malta Ltd might request – was persisting in penalizing a tenderer because, oblivious of all these suppositions, the latter ended up submitting a bid which ended up being not in line with what the contracting authority had perceived 'ab initio'. Over the years this Board has, incessantly, stated that in public procurement one deals in documents and not perceived expectations or intentions, regardless of where these emanate from, namely the contracting authority or the tenderer. This Board feels that the tenderer was put in a rather difficult position to establish 'a priori', in the absence of the estimate for 'lot 2' and a clear indication of the total number of tests which would be required over the contract period, the best possible bid to submit.

3. The Public Contracts Review Board opines that the contracting authority has, in this particular instance, to shoulder its responsibility for sending the wrong messages in the tender document. Undoubtedly, this Board expects that common sense will prevail and remedial action will be taken by the contracting authority to circumvent this impasse which action will definitely not turn out to be against the interest of the tenderer.

In view of the above, this Board finds in favour of the appellant company and, apart from recommending that the company's bid be reintegrated in the evaluation process,

it also recommends that, should it be found that, following further evaluation carried out within the parameters of this decision and of the tender's terms and conditions (not as perceived by the contracting authority but as documented), its offer turns out to be administratively and technically compliant - considering that it is the only offer which remained in contention following the disqualification of all the other bids - then it should be awarded the tender.

This Board also recommends that the deposit paid by the same appellant for the appeal to be lodged should be reimbursed.

Alfred R Triganza
Chairman

Joseph Croker
Member

Carmel Esposito
Member

30 October 2012