

## PUBLIC CONTRACTS APPEALS BOARD

### Case No. 122

#### CT 2305/2007 - ECSD/34/2003

#### Tender for Cleaning and Ancillary Services at St Vincent de Paule Elderly Residence

This call for tenders was published in the Government Gazette on 07.08.2007.

The closing date for this call for offers was 04.10.2007 and the estimated contract value was Lm 135,692.

Six (6) different tenderers submitted their offers.

Following the publication of the Notification of Recommended Tenderers, *Messrs Gafa Safeway Cleaners Ltd* filed an objection on 28.12.2008 against the intended award of the tender in caption to *Messrs Clentec Cleaning Services Ltd*.

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Edwin Muscat, respectively, acting as members, convened a public hearing on 16.04.2008 to discuss this objection.

Present for the hearing were:

#### **Gafa Safeway Cleaners Ltd**

Mr Joe Sammut                      Accountant

#### **Clentec Cleaning Services Ltd**

Dr Antoine Naudi                      Legal Representative  
Mr Simon Turner

#### **Evaluation Committee**

Mr Alfred Briffa                      Chairman  
Mr Rudolph Cini                      Member  
Mr John Bottiglieri                      Member

#### **Department of Elderly and Community Care**

Dr Stephanie Xuereb                      Director

After the Chairman's brief introduction, Mr Joe Sammut, the appellants' representatives was invited to explain the motive which led to their objection.

Mr Sammut stated that in his letter of the 2<sup>nd</sup> January 2008 addressed to the Director General (Contracts) he listed seven points which, in his opinion, had vitiated the tendering process under review. He went on to further explain that:

- i. the tender document did not indicate explicitly that tenderers had to submit their offer on the basis of unit rate/s and not on the basis of a global amount;
- ii. moreover, article 13.2 of the 'Instructions to Tenderers for Service Contracts' illustrated the definition of the mechanism whereby the tendering process would proceed if there was a discrepancy between the unit price and the total amount;
- iii. article 7.8 under Preliminary Provisions stated, among other things, that the performance guarantee "... shall not exceed 10 % of the amount of the contract price.." and so, by default, according to Mr Sammut, in this instance, it seems obvious that they were referring to the global price;
- iv. the 'Evaluation Committee' could have easily arrived at the hourly rate by simply establishing the number of hours in a 7-day week;
- v. the 'hourly rate' did not make much sense as the schedule made a difference between the rate for weekdays and the rate/s for Sundays and public holidays;
- vi. in addition to (v) above, almost all tenderers, and not the least successful tenderer, quoted one rate for weekdays, Sundays and public holidays and this indicated that during Sundays and public holidays employees were going to be remunerated with a rate that was not according to legislation in force; and
- vii. the successful tenderer inserted the 'hourly rate' in the space reserved for the grand total in Schedule B4 and this should have disqualified him had the Evaluation Committee used the same yardstick that it used in the case of Gafa Safeway Cleaners Ltd. The reason given to Gafa Safeway Cleaners Ltd for them being disqualified was that they did not quote the 'hourly rates' but only quoted the global amount, and this contrary to the fact that the other tenderers were, in turn, not disqualified for having submitted only the 'hourly rate', totally ignoring the 'global' amount.

Mr Sammut explained that he was not saying that his clients' offer should not have been discarded at adjudication stage because, at that stage, the Evaluation Committee would have used its other criteria as to how to arrive at awarding this contract. However, he stressed that, in these circumstances, his clients' offer should not have been disqualified at the preliminary stage but should have been considered along with the rest up to evaluation stage.

For all these reasons mentioned above, Mr Sammut considered that the process of this tender was vitiated and, as a consequence, the process should be halted and the tender re-issued.

Mr Alfred Briffa, Chairman of the Evaluation Committee, stated that during its evaluation exercise the Committee noted that, while five tenderers had quoted the 'hourly rate' for the provision of this service, the sixth tenderer, namely, Gafa Safeway Cleaners Ltd, quoted a global amount of Lm 145,008.52. Mr Briffa then quoted from the letter he sent to the Department of Contracts on the 1<sup>st</sup> November 2007, viz:

*“While five tenderers submitted an hourly rate for services required the sixth tenderer, namely Gafa Safeway Cleaners Ltd, submitted a global sum amounting to Lm 145,008.52. The Board is recommending that in order to reach a correct evaluation of the financial offers Gafa Safeway Cleaners Ltd must submit the hourly rate per cleaner per day as indicated. Referred for your advice, please”*

By way of Minutes 39 and 40 the General Contracts Committee communicated to the Evaluation Committee that:

*“The Committee discussed the letter and after referring to the official tender document agreed that in the absence of the submission of rates by Gafa Safeway Cleaners Ltd the respective bid cannot be considered for adjudication and eventual recommendation for award of contract”*

At this stage, the Chairman, PCAB, intervened to remark that the Evaluation Committee did not even have to refer this issue to the General Contracts Committee (GCC) but it should have reached the same conclusion itself as part of the adjudicating process.

In reply to a series of questions put forward by the PCAB, Mr Briffa stated that:

- in his opinion, bidders had to submit their offers on a 'rate' basis and that emerged from the heading "Rate/Prices" at Schedule B4. He added that he did not consider the grand total because in the past years, the Department had been contracting services on an 'hourly rate' basis;
- in his opinion, the Schedule at B4 was abundantly clear because, whilst, five tenderers had quoted the 'hourly rate' but not the 'grand total', it was only the appellants who did not indicate the 'hourly rate' but gave a 'global' figure – in line with the *adjudication report* dated 1<sup>st</sup> December 2007;
- the 'hourly rate' was more important because, given the 'hourly rate', one could arrive at the 'grand total' whereas from the 'grand total' one could not arrive at the hourly rate. Besides, payments for cleaning services were effected on an hourly basis in the sense that he would hand over to the Administration /Accounts Department/s the number of hours worked by the contractors' employees and then the Accounts Section would apply the 'hourly rate'; and
- the 'hourly rate' was necessary because given that, at times, the Department's cleaning requirements would fluctuate, the Department would be able to calculate relative expenditure by applying the 'unit rate'.

Mr Sammut contended that at this stage one was resorting to many assumptions because, for example, in Schedule B4 there was no clear indication that the rate being requested was 'hourly' or 'daily' or 'weekly' but it simply indicated rate/prices and therefore the 'grand total' was the only unambiguous amount requested.

When the appellants' attention was drawn to the fact that the number of cleaners on Schedule B4 was termed 'approximately', the appellants' representatives explained that their 'grand total' was arrived at on the basis of Appendix 'A' which stated that "*Cleaning personnel would be required to perform duties outlined hereunder..*". Furthermore, Mr Sammut stated that in Appendix 'B' there was clearly indicated the number of cleaners required, i.e. twelve *wards* requiring two cleaners each and the *kitchen* requiring another two cleaners. The appellants' representative pointed out that the word "approximately" was not used in this part of the tender document. The appellants also stated that the tender document did not contemplate additional services. He argued that the other tenderers quoted the 'hourly rate' at their discretion because the template did not request the 'hourly rate'. The appellants complained that the template in respect of Schedule B4 ought to be amended as it was misleading, so much so that even the Evaluation Committee sought a clarification from the Contracts Department. He added that if the Evaluation Committee required the 'hourly rate' it should have requested his client to furnish the 'hourly rate'. Mr Sammut remarked that if the tender submitted by his client was disqualified because the 'rate' was not quoted, then, using the same yardstick, the other bidders should have been disqualified for not quoting the 'grand total'. The appellant Company argued that their bid should not have been disqualified at the preliminary stage.

The Chairman, PCAB, remarked that the template, should there still be any left, of the Schedule at B4 could be improved upon so as to indicate beyond any doubt that bidders had to quote only the 'hourly rate', stating that this would eliminate any room for interpretation on the part of bidders. The Chairman, PCAB, added that, having said that, however, in unclear circumstances, a bidder should always seek a clarification from the Department as, in this context, the onus to properly and completely fill in the tender submission always rests with the tenderer.

At this point, the appellants raised the point that the other bidders were legally incorrect to quote a uniform rate for weekdays and Sundays/public holidays because, according to legislation in force, one could not pay an employee the same 'rate' for a weekday and for Sunday/public holiday.

In this regard, Mr Briffa stated that the 'hourly rate' quoted by tenderers represented the 'rate' that they would charge the Department for the provision of this service and it did not represent the 'hourly rate' that the contractors would be actually paying their employees.

The PCAB observed that the 'rate' quoted by tenderers would most likely include an administration charge and/or an element of profit, apart from the wages payable to their employees.

The appellants quoted Article 7.8 of the *Preliminary Provisions* which, with reference to the performance guarantee indicated, *inter alia*, that "*It shall not exceed 10 % of the amount of the contract price...*" and so, by default, reference was actually being

made to the global price. At this point, the appellants went on to question how could one arrive at the ‘performance guarantee’ if one would have quoted an ‘hourly rate’?

Dr Antoine Naudi, representing Clentec Cleaning Services Ltd, the awarded tenderer, stated that the contract price would be established later on in the tendering process when the contract was awarded and not at the preliminary stage which was under discussion at this meeting.

Dr Naudi remarked that from what the appellants were requesting in the last paragraph of their letter of objection, it was evident that, instead of trying to justify why their bid should not have been disqualified, the appellants have requested that the tender be re-issued.

Moreover, Dr Naudi referred to Article 13.2 of the Instructions to Tenderers which, *inter alia*, stated that

*“Upon completion of the technical evaluation, the financial offers for tenders which were not eliminated during the technical evaluation will be evaluated. In the case where unit-prices are quoted, any arithmetical errors are corrected without prejudice to the tenderer such that, where there is a discrepancy between a unit rate and the total amount derived from the multiplication of the unit rate by the corresponding number of units, the unit rate as quoted shall prevail.....”.*

Dr Naudi (i) pointed out that the appellant did not quote the unit price – but the ‘global’ amount only – and so Article 13.2. was not applicable in the appellants’ case and (ii) argued that the unit rate prevailed over the total amount.

Another point raised by Dr Naudi concerned the appellants’ objection in para. (iv) which assumed that the Evaluation Committee could have easily arrived at the ‘hourly rate’ on the basis of a seven-day week, when in fact the appellants themselves had failed to furnish the ‘hourly rate’ in case the Department required additional services.

Clentec Cleaning Services Ltd’s legal advisor concluded that the appellants had every opportunity to clarify with the department any doubts that they might have had at compilation stage but they did not do so. Furthermore, Dr Naudi agreed with the Chairman, PCAB, that the template needed revision so as to eliminate any anomalies.

Mr Sammut concluded that his clients’ position was very clear, in the sense that, the tender document established the number of wards involved and there was no request for additional services in the tender document as regards the number of cleaners required over a 7-day week. Also, Mr Sammut continued, the template was anomalous because it allowed for assumptions to be made and that the ‘grand total’ was the only clear requirement whereas the ‘rate/prices’ requested did not indicate whether an ‘hourly’ or a ‘daily’ or a ‘weekly rate’ was being requested. Therefore, in view of these valid reasons, the appellants argued that their bid’s rejection at the preliminary stage had vitiated this tendering process.

The Chairman, PCAB, stated that the Schedule at B4 could possibly advise tenderers that templates which are not fully and correctly filled would automatically be disqualified.

The PCAB also remarked that, when in doubt, tenderers should seek clarifications from the Department at compilation stage, such as, what kind of 'rate' is required and not leave the relative spaces blank.

Finally, the Chairman, PCAB, remarked that when considering approximate scenarios, particularly, when requirements can fluctuate and when 'estimated requirements' are based on past experience the 'grand total' would not be reliable. On the contrary, the 'hourly rate' would be the most adequate when comparing similar data or when drafting budgets. In the context under review, the latter option would allow the Department some flexibility during the execution of the said contract.

At this stage the public hearing was brought to a close and the PCAB proceed with the deliberation before reaching its decision.

This Board,

- having noted that the appellants, in terms of their 'motivated letter of objection' dated 02.01.2008, and also through their verbal submissions presented during the public hearing held on the 16.04.2008, had objected to the decision taken by the General Contracts Committee;
- having considered the fact that while five tenderers submitted an hourly rate for services required, only the sixth tenderer, namely Gafa Safeway Cleaners Ltd, submitted a global sum;
- having noted Mr Briffa's comments, particularly, the fact that the 'hourly rate' was more important because given the 'hourly rate' one could arrive at the 'grand total' whereas from the 'grand total' one could not arrive at the hourly rate;
- having also observed the relevance of Mr Briffa's point regarding the fact that the 'hourly rate' was convenient because, at times, the Department's cleaning requirements would change and in case additional services would be required one would be able to work out the additional expense by applying the 'unit rate';
- having also taken cognizance of the appellants' interpretation of the word 'approximately' within the context of the said tender document;
- having taken into consideration the remarks made by the appellants regarding the fact that the template in respect of Schedule B4 ought to be amended as it was misleading as well as Mr Sammut's claims that (a) the other bidders should have been disqualified for not quoting the 'grand total' and (b) the other bidders were legally incorrect to quote a uniform rate for weekdays and Sundays/public holidays because, according to legislation in force, one could not pay an employee the same rate for a weekday and for Sunday/public holiday;
- having reflected on Mr Briffa's reply in regard to the issues raised and mentioned in the preceding paragraph, particularly, the fact that the 'hourly rate' quoted by tenderers represented the rate that they would charge the Department for the provision of this

service and it did not represent the 'hourly rate' that the contractors would be actually paying their employees;

- having also reflected on Dr Naudi's claims and remarks;

reached the following conclusions, namely:

1. there is not enough proof that the relevant Schedule at B4 contained information which could be considered as anomalous, especially when five out of six participating tenderers went on to provide 'hourly rates' rather than a 'global' figure as was the case with the appellants. Albeit, there may be a slight room for improvement to the existing template, yet, this buy no means is meant to imply that the current format is absolutely misleading. Undoubtedly, the fact that five of six participating tenderers submitted an 'hourly' rate more than amply demonstrates that the possible level of ambiguity was not huge enough;
2. the points raised by appellants regarding the fact that the document specifically referred to the number of wards and number of cleaners but desisted from making reference to 'additional services', as well as minimising the use of the term 'approximately, thus justifying why the appellants submitted a 'global' figure rather than an 'hourly' rate, is considered by this Board as an over-extension of an argument which does not ultimately convince this Board about its validity;
3. agrees with Mr Briffa's claim that the 'hourly rate' quoted by tenderers represented the 'rate' that they would charge the Department for the provision of this service and it did not represent the 'hourly rate' that the contractors would be actually paying their employees;
4. the appellants' claim that the Evaluation Committee could have easily arrived at the 'hourly' rate by simply establishing the number of hours in a seven day week, apart from being simplistic in nature, it also, erroneously, expects the same Committee to go beyond its terms of reference, namely that of evaluating what is submitted to it whilst adding, substituting or in a way tampering with the original bid submitted. Clarifications may be sought but when conditions are pertinent enough to warrant them. This Board cannot but stress enough the fact that the onus of a tender submission being in conformity with the tender document's terms and conditions remain entirely with the bidder.

As a consequence of (1) to (4) above this Board finds against appellants.

In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the appellants should not be refunded.

Alfred R Triganza  
Chairman

Anthony Pavia  
Member

Edwin Muscat  
Member

28 May 2008