

PUBLIC CONTRACTS APPEALS BOARD

Case No. 143

Advert. No. 264/2008 – CT 2282/2008 – WSM 182/2007/1

Tender for the Collection of Waste from Various Recyclable Waste Collection Sites

This call for tenders was, for a contracted value of € 1,062,401 was originally published in the Government Gazette on 19.12.2008. The closing date for this call for offers was 24.02.2008.

Six (6) different tenderers submitted their offers.

Following notification sent by Director of Contracts containing the decision taken by the General Contracts Committee not to allow Mr Wayne Cassar's offer to be analysed further due to the latter's non compliance with submission of the required bid bond, considered as a mandatory requirement, the tenderer in question filed an objection on 27.02.2008 appealing against such decision.

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Carmel Esposito, respectively, acting as members, convened a public hearing on 12.03.2009 to discuss this objection.

Present for the hearing were:

Wayne Cassar

Dr Mark Busuttil
Mr Wayne Cassar
Mr Mario Agius

Legal Representative
Director
Financial Consultant

WasteServ Malta Ltd

Dr Victor Scerri
Mr Anton Borg

Legal Representative
Junior Lawyer

Department of Contracts

Mr Francis Attard

Director General

Pullicin Development Ltd

Mr Charles Pullicino
Mr Joe Magro

Director
Assistant to Director

DDE Attard Ltd

Mr Disma Attard

Director

After the Chairman's brief introduction about this case, Dr Mark M Busuttil, the legal representative of Mr Wayne Cassar, the appellant, was invited to explain the motive which led to his client's objection. This was followed by the Dr Victor Scerri, legal representative of WasteServ Malta Ltd., the contracting authority

Dr Busuttil started by making reference to their reasoned letter of objection dated 1 March 2009 submitted by his client. He explained that his client was a creditor of WasteServ Malta Ltd for an amount of € 82,000. The appellant's legal representative claimed that, in spite of the fact that WasteServ Malta Ltd accepted that they owed this substantial sum of money and knew that his client needed € 11,000 in order to pay the mandatory Bid Bond which had to be submitted with the tender in question, nonetheless, this amount was paid just fifteen minutes after the closing time of tender. He alleged that this could have been done on purpose. Dr Busuttil sustained that they could not understand why the cheque was handed to his client just a quarter of an hour after closing time of tender. The lawyer stressed that this situation was unacceptable.

When the PCAB asked if the Bid Bond was submitted with the tender, Mr Mario Agius, Mr Cassar's Financial Consultant, replied that they were unable to do this. He elaborated by explaining that they sought the intervention of Mr Tagliaferro (Manager BOV) who, after contacting WasteServ Malta Ltd, was given the assurance that the cheque was going to be issued.

Mr Agius said that they were also informed that although there were no difficulties in obtaining WasteServ Malta Ltd's Chairman's signature, yet, they did not know when the cheque was going to be countersigned by anyone of the other Directors because the latter were part timers. Mr Agius proceeded by stating that the Bank would not comply without such endorsement.

Answering another question by the PCAB, Mr Agius said that the Bank could not guarantee the € 11,000 due to the fact that they did not have sufficient money because of other investments. Furthermore, the Financial Consultant declared that the bid bond was submitted only one hour after closing time of tender, that is, immediately after receiving the cheque from WasteServ Malta Ltd and that they had recorded this with their Bid Bond.

On cross-examination by the PCAB, Mr Cassar confirmed that the tender was issued before he went abroad for medical treatment. Here, the PCAB argued that in the prevailing circumstances the necessary financial arrangements could have been made beforehand and that they did not need to rely completely on WasteServ Malta Ltd to pay the Bid Bond. Mr Cassar said that BOV required a written confirmation from WasteServ Malta Ltd that they owed him that sum of money, but they did not comply with the Bank's request. Mr Triganza intervened by saying that, technically, from an audit perspective, appellant could have sent letters to respective creditors to confirm the amounts of money each owed to him. Mr Agius confirmed that they did not send such a letter to WasteServ Malta Ltd because they were usually regular in their payments. He also said that out of the € 81,000 due to them by WasteServ Malta Ltd they had received € 61,000. At this point, Dr Busuttil reiterated that this amount was received just after closing time of tender.

Dr Victor Scerri, legal representative of WasteServ Malta Ltd, said that the appellant made a number of allegations without substantiating them. He explained that just before this hearing he checked with their Chief Financial Officer whether any letter was received from the appellant requesting the money for the bid bond, and the reply given was that they never had any correspondence in this sense from the appellant. With regard to the allegation in respect of late payment, Dr Scerri explained that WasteServ Malta Ltd could not pay before receiving the money from the Treasury. Furthermore, the contracting authority's lawyer sustained that, although he could not exclude the possibility that there could have been some kind of insistence for payment from the appellant, yet, WasteServ Malta Ltd needed to have the money first in order to pay its suppliers. He claimed that the appellants were aware of this procedure.

During the proceedings, the PCAB stressed on the importance of cut-offs. It was stated that the Board's role was to ensure that the appropriate procedures were followed and, in this particular case, it had to establish whether the 'Bid Bond' was submitted in accordance with the instructions indicated in the tender document. The PCAB explained to those present, particularly to the appellants' representatives, that it was difficult for the PCAB to accept that the closing time be extended because otherwise it would be creating a dangerous precedent. It was also argued that if such extensions were to be allowed, in this instance the appellants might benefit from such a situation, however, in future this could work against them.

Replying to Dr Busuttil's remark, the Chairman PCAB declared that it was always consistent in its arguments and decisions. He claimed that if this was not the case, their job would be rendered more difficult because tenderers would then start quoting their inconsistencies.

The appellants' attention was drawn by the PCAB that, considering the fact that their bid was linked to whether one of their primary creditors paid or not, raised more than a concern, especially when one considers that the debtor in question is the contracting authority initiating this tender.

If WasteServ Malta Ltd were to accede to a tenderer's request to accelerate the payment procedures with the Treasury, this could give the perception of a conflict of interest. The Chairman, PCAB, maintained that he, personally, would not have relied on a creditor to pay the deposit on the Bid Bond and felt that the appellants' bankers could have been more practical knowing that there was an outstanding amount of € 82,000. At this point, Mr Agius agreed with this line of reasoning, however, he said that this case should be considered on its own merit and consequent implications.

The Chairman, PCAB explained that it was not the Board's competence to adjudicate on the issue of late payment by WasteServ Malta Ltd. However, he concluded by stating that if the appellants had any suspicion that the cheque was knowingly issued to them late to, say, favour someone else, they could refer the matter to another forum. He maintained that once the appellants admitted that they did not submit the mandatory bid bond on time because they were awaiting a payment from WasteServ Malta Ltd, then the case was resolved by itself.

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 ‘reasoned letter of objection’ dated 01.03.2009, and also through their verbal submissions presented during the public hearing held on the 12.03.2009, had objected to the decision taken by the General Contracts Committee;
- having taken note of all the documentation presented;
- having during the public hearing heard and, subsequently, thoroughly deliberated upon, all points raised by all witnesses and other interested parties’ representatives;
- having noted that the appellant’s own financial consultant admitted that Mr Cassar did not submit the required ‘Bid Bond’ along with the offer;
- having established that the appellant’s bankers did little to provide ancillary financial comfort and was anything but proactive to support further its client’s need for some extra money to be made available considering that enough money was soon forthcoming to the same appellant within the foreseeable future;
- having acknowledged that, whilst there was no argument against the fact that the tender may have been issued before the appellant went abroad for medical treatment, yet, considering the prevailing circumstances, necessary alternative financial arrangements could have been made by appellant prior to his departure;
- having observed that, technically, from an audit perspective, appellant could have sent letters to respective debtors to confirm the amounts of money each owed to him, thus obtaining the required written confirmation from WasteServ Malta Ltd stating that they owed him (the appellant) that sum of money;
- having also noted Dr Scerri’s claim that WasteServ Malta Ltd could not pay before receiving the money from the Treasury;
- having also taken cognizance of the fact that the appellants’ bid was linked to whether one of their primary debtors paid or not, raised more than a concern, especially when one considers that the debtor in question is the contracting authority initiating this tender;
- having further observed that if WasteServ Malta Ltd were to accede to a tenderer’s request to accelerate the payment procedures with the Treasury to enable the submission of a ‘Bid Bond’ in connection with a call for offers initiated by the same entity in the capacity of a contracting authority, this could give rise to not so much of an unfounded perception of a potential conflict of interest;

reached the following conclusions, namely, the PCAB

1. feels that, in similar circumstances, the appellants did not need to rely completely on WasteServ Malta Ltd to pay the 'Bid Bond' and that it was, ultimately, their prerogative to comply with tender requirements and not manage to do so solely subject to some 3rd party's intervention;
2. cannot agree to a scenario wherein the 'closing time' be extended for such peculiar instances because, otherwise, it would be creating a dangerous precedent;
3. notes that it is not its competence to adjudicate as to why payment for services rendered by the appellants to the contracting authority, namely, WasteServ Malta Ltd., did take so long to be effected. On this issue the PCAB concludes that should there be sufficient cause as to suggest foul play then there are other trajectories which could be explored but, definitely, not within the PCAB;

As a consequence of (1) to (3) above, this Board feels that the evaluating committee acted in a just manner and, as a consequence, finds against the appellant.

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

Alfred R Triganza
Chairman

Anthony Pavia
Member

Carmel Esposito
Member

23 March 2009