

PUBLIC CONTRACTS APPEALS BOARD

Case No. 163

Advert. No. CT/185/2009; CT/2163/2009

Provision of School Transport for Students with Special Needs for Scholastic Year 2009-2010

This call for tenders was, for a contracted estimated value of € 390,800 was published in the Government Gazette on 15.05.2009. The closing date for this call for offers was 07.07.2009.

Four (4) different tenderers submitted their offers.

On 14.08.2009 Messrs *Transport Services For Disabled Persons Cooperative Ltd* filed an objection against the decision by the Contracts Department not to award it all the routes included in this tender when it had submitted the cheapest overall offer.

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 9.09.2009 to discuss this objection.

Present for the hearing were:

Transport Services for Disabled Persons Cooperative Ltd (TDP Ltd)

Dr Michael Zammit Maempel	Legal Representative
Mr Mario Muscat	Chairman TDP

Ministry of Education, Culture, Youth and Sport (Education Department)

Dr Stephen Zammit	Legal Representative
-------------------	----------------------

Evaluation Committee:

Mr Tonio Briguglio	Member
Mr Franco Costa	Secretary

Peppin Garage Ltd

Dr Franco Debono	Legal Representative
Dr Marion Camilleri	Legal Representative
Mr Raymond Abela	Representative
Mr Joseph Abela	Representative

Paramount Garage Ltd

Dr Aldo Vella	Legal Representative
Mr Leo Grech	Representative

Department of Contracts

Mr Francis Attard	Director General
-------------------	------------------

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

Dr Michael Zammit Maempel, on behalf of Transport Services for Disabled Persons Cooperative Ltd (TDP Ltd), the appellants, hereinafter referred to as *TDP Ltd*, explained that the objection put forward by his client was based on 'costings'. He elaborated by stating that this claim was made in the sense that his client had submitted that if the Company were to be awarded the whole contract it would offer a 15% reduction on all the quoted rates and, in which event, Dr Zammit Maempel claimed that the package offered by his client would have been the cheapest. Dr Zammit Maempel informed the PCAB that his client had been rendering this service to the Education Department for a number of years with practically no complaints. He concluded that besides rendering a good service, the discounted price offered by his client would be saving the Education Department up to €32,000 per annum.

Dr Stephen Zammit, on behalf of the Education Department, referred to para. 18 Annex II of the tender document which stated, among other things, that:

"The award may be given to more than one tenderer."

He also explained that a route could not be serviced by more than one contractor.

Mr Franco Costa, secretary of the evaluation committee, informed the PCAB that the chairman of the evaluation committee was abroad on official duties and that the PCAB had been duly informed.

The Chairman PCAB requested clarifications as to whether the 15% reduction on all the rates quoted by the appellant Company in case awarded the entire contract could have amounted to a conditional tender.

Dr Zammit Maempel argued that the contracting authority had the prerogative to award this contract to more than one bidder but in this case that would mean a financial loss to the contracting authority. He added that the tender document did not preclude tenderers from resorting to an overall reduction in the individual rates quoted in their submission.

The Chairman PCAB noted that, according to the table at page 4 of the evaluation report, the appellant was awarded the routes at the full rate that he quoted and not at the discounted rate.

Mr Mario Muscat, Chairman of TDP Ltd, wondered how the contracting authority was reluctant to save about €32,000 annually all the more when his Company had been delivering this service to the department without any complaints for a period of five years. He added that his cooperative could offer the discount because if it were to be awarded all the routes it would have been able to organise work in such a manner that it would result in a mitigation of overall operational costs.

The Chairman PCAB, while conceding that the discount offered made sense on the basis of economies of scale and similar factors, insisted on establishing whether a tenderer could offer a discount across the board which could condition the decision of the contracting authority. He added that the public procurement regulations did not allow tenderers to introduce conditions in their submissions.

Dr Zammit Maempel argued that the discount offered did not come out of a hat but that the discount was based on technical and logistical considerations and could not therefore be considered as a conditioning of the tendering process.

Mr Costa explained that the evaluation committee had to consider 25 routes and that tenderers could quote for one or more routes. He further explained that, according to the comparative table in page 4 of the evaluation report under the column titled "Tenderer 1", two prices were indicated, i.e. the full rate and the rate discounted by 15%, whereas one rate was indicated against the other two administratively compliant tenderers 3 and 4. Mr Costa referred to route 1 and stated that in that case Tenderer 3 was the cheapest even in relation to the discounted rate offered by the appellants and so were the other routes that were awarded to Tenderers 3 and 4.

Mr Costa informed the PCAB that the department requested bidders to provide a driver for each and every route and added that, under "Instructions to Tenderers for Service Contracts" para. 3.1 "Selection Criteria", tenderers had to submit in respect of each driver the driving licence (para. b), the ADT Driver Tag (para. c) and the police conduct (para. d). Mr Costa remarked that in spite of the fact that the appellant Company had provided 25 drivers, on checking the documentation submitted, it resulted that in respect of four (4) of the said drivers, the appellant Company either did not submit the driving licence or the ADT tag, or else, those submitted had expired thus rendering these drivers non-compliant. Mr Costa argued that, consequently, the appellants did not, effectively, provide the 25 drivers required to cover the 25 routes. Mr Costa remarked that, in these circumstances, the evaluation committee could not award all the 25 routes to the appellant Company but, at most, could only award it 21 routes. Needless to say, continued Mr Costa, in the circumstances, the 15% discount could not be applied so much so that the appellant Company was awarded 10 routes at the full rate quoted and not at the discounted rate.

Mr Muscat remarked that with regard to the expired ADT tags - one of which was his own - these were exchanged by the ADT on the presentation of the police conduct, which conduct certificate he claimed was taking some six weeks to be issued. He maintained that the ADT tags were still valid because they could not exchange them since they had not been issued with the required police conduct certificate.

Mr Costa confirmed that there were other tenderers who did not present all the documents in respect of their drivers and that these bidders were treated in the same way.

Mr Costa conceded that the evaluation committee did not ask for clarifications with regard to the ADT tags.

Mr Muscat contended that, although certain tags had expired, they were still valid because the ADT knew about the problem that operators were encountering and also due to the administrative problems arising from the restructuring process that the ADT itself was going through. Dr Zammit Maempel remarked that this situation was similar to that with regard to personal ID cards where, in most instances, these had expired but were still in use.

Mr Costa confirmed that the evaluation committee could not take into account the 15% reduction offered by the appellant Company because the committee could not award all the routes to the appellants since out of the 25 drivers submitted four (4) of them did not meet requirements.

Dr Zammit Maempel asked how was it that the department did not seek a clarification on this point when such a clarification could save the public coffers some €32,000 annually.

Mr Muscat remarked that a driver could have mistakenly presented the old licence instead of the renewed one. Furthermore, Mr Muscat added that he could replace any of the drivers referred to in his submission any time.

The Chairman PCAB stressed that the responsibility to ensure that the tender documentation was in place rested with the tenderer and not with the contracting authority. He added that the evaluation committee adjudicated an offer on the documents presented.

Mr Costa went through the tender submission of the appellant Company and indicated that

- (i) the licence of Mr David Axisa had expired on the 2nd March 2008
- (ii) Mr Emanuel Mifsud submitted his ADT tag and police conduct but not his driving licence
- (iii) Mr Mario Muscat presented an expired ADT tag

Mr Muscat contended that he had repeatedly contacted Mr Micallef Pule' at the ADT for these tags but the latter kept on telling him that, as a priority, the ADT had first to deal with taxis and minibuses.

Mr Anthony Pavia, a PCAB member, remarked that it would appear that even the disqualification of one driver would render inoperative the 15% overall reduction in the rates quoted by the appellant Company. Mr Pavia drew the attention of Mr Costa to what the evaluation committee stated in letter dated 10th August 2009, in the sense that the bidders recommended more drivers than were necessary and that they had enough drivers who were fully compliant to cater for all the routes that can be assigned to each bidder. On the same lines the Chairman PCAB asked Mr Costa to explain the second paragraph of page 3 of the evaluation report in respect of T1 – Disabled Persons Cooperative Ltd (TDP):

“TDP proposed 25 drivers. Each driver had to present the driving licence, the ADT tag and the police conduct. 4 drivers had one of these items missing or had the driving licence/ADT tag expired. However, even though these 4 drivers are not taken into consideration, TDP would still be able to fulfil the targets set out in the tender document. Each vehicle proposed by TDP was up to specifications.”

Mr Costa remarked that those declarations had to be seen in the light of the fact that each bidder had enough drivers to cover the routes awarded as per table in page 4 of the evaluation report. As an example Mr Costa referred to the fact that the appellant Company was awarded 10 routes and had presented 21 drivers who were compliant.

Mr Costa remarked that the evaluation committee considered each route on its own merit taking into account the 15% discount quoted by the appellant Company. He added that even if the appellant Company had presented 25 compliant drivers the committee would not have considered the 25 routes as one lot but it would have still considered each route on its own because it did not want to be conditioned by the 15% overall discount.

At this point the Chairman PCAB asked Mr Costa whether had the appellant Company had everything in order with regard to the 25 routes, would he have considered the 15% overall discount which meant a saving of €32,000 to the taxpayer?

Dr Stephen Zammit, intervening on behalf of the contracting authority, expressed the opinion that the appellant Company did not condition the tendering process by offering the 15% discount because it did not condition the quality of the service requested but it was rather an option, namely an alternative price.

Mr Costa remarked that if the situation was such, he thought that the evaluation committee might have sought appropriate legal advice but since none of the bidders were fully compliant with regard to all 25 drivers that question did not arise. He added that even if a bidder submitted one driver less than the 25 requested then that bidder could not be considered for the award of all the routes. Mr Costa contended that the method used by the evaluation committee was fair and transparent because it took into account which bidder was the cheapest lot by lot and recommended the award accordingly.

Mr Costa informed the PCAB that none of the members of the evaluation committee were present except for Mr Tonio Briguglio. The latter stated that, albeit he was not present when the evaluation report was drawn up, yet he was confirming to those present that he agreed with the contents of the report.

Mr Muscat claimed that although his cooperative was delivering the service with regard to vehicles with lifters, it often happened that the Education Department gave out work for the transport of persons in wheelchair to contractors using chauffeur driven cars with the consequence that wheelchairs were carried in luggage booths and disabled persons were seated in back seats. He added that his complaints with the Education Department in this regard fell on deaf ears.

To a direct question by the Chairman PCAB, Mr Costa declared that he could not confirm whether the department carried out on-the-spot checks during the contract period to ensure that the service given met the conditions of the contract. However, he added that he could safely say that the department did monitor the execution of contracts in some way. Mr Costa remarked that the evaluation committee checked the vehicle numbers submitted by bidders with the records held at the ADT and it had noted that the number plates themselves were indicative that these vehicles were intended for the transportation of disabled persons.

The Chairman PCAB made it clear to those present that the responsibility of the PCAB was to ascertain that the tendering process was conducted in a correct and transparent manner and that all bidders were on a level playing field. He added that complaints which concerned other public entities should be directed to the appropriate authorities.

Mr Muscat maintained that, as far as his cooperative was concerned, its ADT tags were in order and that he was assured by ADT officers that his drivers could continue to use the ADT tags in their possession. With regard to the driving licence which had expired on the 2nd March 2008, Mr Muscat remarked that Mr David Axisa must have overlooked the fact that his licence should have been renewed acknowledging, however, that, in itself, that was not a justification for one not to renew the licence.

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 25.08.2009 and also through their verbal submissions presented during the public hearing held on the 9.09.2009, had objected to the decision taken by the General Contracts Committee;
- having taken note of the appellants’ claim that if the Company were to be awarded the whole contract it would offer a 15% reduction on all the quoted rates, saving the Education Department up to €32,000 per annum;
- having also taken note of the fact that tenderers had to submit in respect of each driver the (a) driving licence, (b) ADT Driver Tag (c) police conduct and that on the same subject matter Mr Costa stated that in the appellant Company’s tender submission (1) the licence of Mr David Axisa had expired on the 2nd March 2008, (2) Mr Emanuel Mifsud submitted his ADT tag and police conduct but not his driving licence and (3) Mr Mario Muscat presented an expired ADT tag;
- having considered the issue that, in view of the fact that four of the 25 drivers as submitted by the appellant Company in its tender submission were not compliant with tender specifications, the evaluation committee could not award all the 25 routes to the appellant Company but, at most, could only award it 21 routes and

that, in the circumstances, the 15% discount could not be applied so much so that the appellant Company was awarded 10 routes at the full rate quoted and not at the discounted rate;

- having heard the arguments brought by Mr Muscat, representing the appellant Company, for not having four drivers' documentation according to the required specifications including (a) the point raised about the fact that although certain tags had expired, they were still valid because the ADT knew about the problem that operators were encountering and also due to the administrative problems arising from the restructuring process that the ADT itself was going through and (b) the fact that a driver could have mistakenly presented the old licence instead of the renewed one and (c) the fact that, with regard to Mr Axisa's driving licence which had expired on the 2nd March 2008, the appellants' representative stated that, whilst it might have been that his employee must have overlooked the fact that his licence should have been renewed, yet admitted that, in itself, that was not a justification for one not to renew the licence;
- having noted Mr Muscat's remark that he could replace any of the drivers referred to in his submission any time;
- having heard Mr Costa state that there were other tenderers who did not present all the documents in respect of their drivers and that these bidders were treated in the same way;
- having also heard Mr Costa state that the evaluation committee considered each route on its own merit taking into account the 15% discount quoted by the appellant Company adding that, even if the appellants had presented 25 compliant drivers, the committee would not have considered the 25 routes as one lot but it would have still considered each route on its own because it did not want to be conditioned by the 15% overall discount;

reached the following conclusions, namely:

1. The PCAB opines that the responsibility to ensure that the tender documentation is in place rests with the tenderer and not with the contracting authority and that since an evaluation committee adjudicates an offer on the documents presented by the tenderer on the closing date of the call in question, then it is only licit to expect that the absence of such document/s from the tender submission / package be adversely considered by such committee during the evaluation process;
2. The PCAB feels that the views expressed by the representative of the appellant Company provided it with no comfort whatsoever, especially when the lack of presentation of such documentation was, contemporaneously, contrastingly blamed on the ADT, as well as, on an oversight by an employee thus giving, in the said circumstance, more credibility to the evaluation committee's decision to discard the tenderer's (the appellant Company's) 15% reduction proposal;

3. The PCAB feels that in view of '2' above the decision taken by the evaluation committee to ignore the 15% overall reduction in the rates quoted by the appellant Company was justified as the absence of the full compliance of the entire list of drivers (namely 21 out of 25 drivers) as submitted by the appellant company rendered the application of such discount inoperative.

As a consequence of (1) to (3) above this Board finds against the appellant Company.

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 be forfeited.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

22 September 2009