

PUBLIC CONTRACTS APPEALS BOARD

Case No. 169

Ref No M 476/2009

Tender for the Provision of Cleaning Services to Malta Information Technology Agency (MITA)

This call for tenders which was for a contracted estimated value of € 150,000 (exclusive of VAT) was published in the Government Gazette on 29.05.2009. The closing date for this call for offers was 08.07.2009.

Four (4) different tenderers submitted their offers.

On 24.08.2009 *Messrs Gafa Safeways Ltd* filed an objection against the intended award of the tender in caption to *M.C.C.S. Co Ltd (Mr Clean)*.

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 11.11.2009 to discuss this objection.

Present for the hearing were:

Gafa Safeways Ltd

Dr Edward Gatt

Legal Representative

Malta Information Technology Agency Ltd (MITA)

Dr Kristina Pullicino

Legal Representative

Ms Marisa Azzopardi

Representative

Ms Pauline Debono

Representative

Adjudication Board:

Mr Wayne Valentine

Chairman

Mr Lawrence Briffa

Member

Dr Danielle Cordina

Member

M.C.C.S Ltd (Mr Clean)

Dr Arthur Azzopardi

Legal Representative

Mr Joseph Degiorgio

Representative

Ms Carmen James

Representative

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

Dr Edward Gatt, legal representative of Gafa Saveways Ltd, the appellant Company, explained that the objection was lodged for two reasons, namely with respect to the:

- i. hourly rate vis-a-vis a lump sum scenario. According to Dr Gatt, the tender document requested bidders to quote an hourly rate and not a lump sum whereas it appeared that the adjudication process was carried out on a global sum basis. Dr Gatt declared that his client was unaware as to how the contracting authority arrived at the global amount, however, he claimed that various factors had to be considered like, the number of employees, national insurance (NI) contributions, bonus, vacation leave and so forth;
- ii. rate quoted by the recommended tenderer which, according to Dr Gatt, was below labour statutory costs and for which, the appellant Company's legal advisor contended that the recommended tenderer's offer should have, therefore, been rejected. Dr Gatt proceeded by explaining that the current minimum wage was €3.66 per hour and when one added on €0.37 for national insurance (NI), €0.26 for bonus and €0.35 for vacation leave, a total of €4.66 would result which, together with €0.83 VAT, would add up to € 5.47 per hour as against the €5 per hour quoted by the recommended tenderer. Dr Gatt contended that the tender conditions stipulated that a tender could not be awarded below labour statutory costs and, as a result, this contract should not have been awarded to *Mr Clean* as its offer of €5 per hour was below the statutory hourly rate of € 5.47 and, hence, in violation of legislation. At this point, Dr Gatt recounted a similar case decided upon by the Contracts Department where the Department of Labour was directed to monitor the wages paid to the employees deployed on the execution of a particular contract. The appellants' legal representative remarked that in that case a *post* remedy was provided for in case workers' rights were violated but he expressed the opinion that workers' rights should be safeguarded *a priori*.

Dr Kristina Pullicino, legal representative of the Malta Information Technology Agency Ltd (MITA), the contracting authority, submitted the following:

- i. the adjudication board worked on the hourly rates quoted by each and every bidder as requested in the tender document and, as amply indicated in the adjudication report – which, quite obviously, was not available to the appellant Company. She added that the global amount of €152,000 published in the award notification and referred to by the appellants was worked out and published for the sole purpose of establishing the estimated value to the contract on which one had to work out the deposit payable in case a bidder opted to file an objection. Dr Pullicino stated that MITA had worked out an estimated value of the contract prior to the publication of the call for tenders but it had not been made public. She informed the PCAB that no bid bond was requested in this call for tenders;

- ii. with regard to the second point raised by the appellants, Dr Pullicino started by quoting from section 4.5.1. 'Contractual relationship': *The Tenderer shall undertake to regulate the legal relationship with its own employees in accordance with all relevant legal requirements, including*

Dr Pullicino also referred in regard to page 19 of the tender document, section 1 'General' box (g) of the table where tenderers were requested "to *provide a statement accepting to abide to all legislation related to the provision of the service.....*" Dr Pullicino argued that the contracting authority did not have to go into the profit margin that *Mr Clean* would make out of this contract because that was purely a commercial decision on the part of the contractor. She explained that various aspects had to be considered with regard to the price, such as, whether the employees were full-timers or part-timers and that the service covered only four hours daily from 4pm to 8pm. The contracting authority's legal representative contended that the price of €5 per hour quoted by the recommended tenderer was not below the minimum wage of €3.66 per hour.

Mr Wayne Valentine, chairman of the adjudication board, under oath, gave the following evidence the:

- i. adjudication board made its recommendations on the basis of the hourly rates submitted by the bidders which included the standard rate applicable to the period 4pm to 8pm and the rate for occasional services such as the cleaning of carpets. He added that the recommended tenderer had quoted the same rate for both instances; *and*
- ii. evaluation criteria at page 15 of the tender document indicated that 500 out of the total of 1000 points were allocated to pricing. He explained that the allocation of points was arrived at by dividing the lowest hourly rate submitted by the bidders' hourly rate multiplied by the maximum points (500 points).

Dr Gatt intervened and declared that in the light of the explanation given by Mr Valentine he was withdrawing his first objection since it emerged that the bids were evaluated on the hourly rate and not on a global sum basis.

However, Dr Gatt asked Mr Valentine if, in its deliberations, the adjudication board had taken into account the fact that the rate quoted by the recommended tenderer fell short of the labour statutory costs and whether there was any indication that the workers to be deployed on this contract were going to be full-timers or part-timers since, in his opinion, that would have a bearing on the costs.

Mr Valentine stated that the adjudication board considered it sufficient that the recommended tenderer had indicated that it would undertake the contractual relationship with its employees as laid down in section 4.5.1 of the tender document – referred to earlier on by Dr Pullicino – and that the recommended tenderer had confirmed that all its employees would operate within the legal framework. The chairman of the adjudication

board went through the documentation and confirmed that all bidders had, in fact, submitted this undertaking and confirmation. He went on to add that section 4.1 of the tender document laid down the following requirements for the delivery of this cleaning service, namely 7 personnel (6 cleaners and a supervisor) for 4 hours daily (Monday to Friday) for 4 years.

Dr Arthur Azzopardi, legal representative of *Mr Clean*, explained that the tender document did not request bidders to declare if their employees were full-timers or part-timers but it requested bidders to declare that the persons to be deployed on the execution of this contract were going to operate within the law and that the employer was responsible to ensure that. Dr Azzopardi added that the employees to be deployed on these cleaning services were already in full-time employment and, as a consequence, the question of National Insurance (NI), bonus and vacation leave payments did not arise. He further stated that the rate of €5 quoted by his client covered the minimum hourly rate of €3.66 and even allowed a margin of profit because the cleaning materials were to be provided by the contracting authority.

On his part, Mr Joseph Degiorgio, M.C.C.S Ltd (*Mr Clean Ltd*), under oath:

1. stated that *Mr Clean Ltd* forms part of the consortium *Servizzi Malta Ltd* which employed 320 persons of whom about 100 were attached to *Mr Clean*;
2. informed those present that, on a daily basis, about 50 employees of the consortium were off duty and, therefore, could be detailed to work on a part-time basis on contracts such as the one in question in which case the payment of NI, bonus and vacation leave were already provided for under their full-time employment with the same consortium. He remarked that this scenario enabled *Mr Clean Ltd* to quote €5 per hour; and
3. when asked by the PCAB regarding the possibility that companies could employ foreigners to do work at below standard rates, replied that his company only employed Maltese nationals.

Dr Gatt argued that, in awarding a contract, a contracting authority ought to take into account the working conditions of the employees. He stated that it was contradictory for a contracting authority to request a declaration that the contractor would be abiding by the law and, at the same time, accept rates below the statutory labour costs. Dr Gatt called upon the PCAB not to go into the merits as to whether the employees were going to be part-timers or full-timers but to focus on the fact that the rate quoted by the recommended tenderer, irrespective of commercial considerations, was below the statutory minimum wage and that one could not depart from these minimum standards. Dr Gatt also pointed out that, according to Mr Degiorgio, the employees were not employed by *Mr Clean Ltd* but by a consortium.

On his part Dr Azzopardi remarked that, according to the evidence given by Mr Degiorgio, the consortium *Servizzi Malta* employed 320 persons and that *Mr Clean* had

about 100 employees on its books as had been indicated in the tender submission. Dr Azzopardi declared that Mr Clean was even prepared to furnish MITA with the payslips of the employees who would be deployed on these cleaning services to verify that statutory employment conditions would not be breached.

Dr Pullicino concluded that the

- i. awarded tenderer had submitted the declaration that it would abide by all legislation and remarked that a false declaration on the part of the contractor would amount to a breach of contract and, consequently, to the termination of contract *and*
- ii. rate of €5 per hour quoted by the recommended tenderer was way above the minimum wage of €3.66 per hour keeping in view that Mr Degiorgio had indicated that part-timers were going to be deployed on these services and, as a result, no additional expenses would be involved.

Finally, Dr Pullicino argued that the contracting authority did not have to go into the commercial risks that the bidders were prepared to run so long as it obtained all the assurances, declarations and confirmations requested in the tender document.

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 27.08.2009 and also through their verbal submissions presented during the public hearing held on the 11.09.2009, had objected to the decision taken by the General Contracts Committee;
- having taken note of the fact that, as a result of what transpired during the same hearing, Dr Gatt, on behalf of the appellant Company, declared that in the light of the explanation given by Mr Valentine he was withdrawing his first objection since it emerged that the bids were evaluated on the hourly rate and not on a global sum basis;
- having considered the appellant Company’s legal advisor’s arguments relating to the second objection, namely that the rate quoted by the recommended tenderer, was below labour statutory costs;
- having also considered Dr Gatt’s query as to whether there was any indication that the workers to be deployed on this contract were going to be full-timers or part-timers since, in his opinion, that would have a bearing on the costs;

- having also taken note of both Dr Pullicino’s and Mr Valentine’s arguments in so far as the appellants’ second objection is concerned, particularly the references made to:
 - a. section 4.5.1 which refers to the fact that the tenderer “*was expected to undertake to regulate the legal relationship with its own employees in accordance with all relevant legal requirements*”;
 - b. page 19 of the tender document, section 1 ‘General’ box (g) of the table requesting all tenderers “*to provide a statement accepting to abide to all legislation related to the provision of the service.....*” ;
 - c. the fact that the adjudication board made its recommendations on the basis of the hourly rates submitted by the bidders which included the standard rate applicable to the period 4pm to 8pm and the rate for occasional services such as the cleaning of carpets;
- having heard Dr Azzopardi’s argument that (a) the tender document did not request bidders to declare if their employees were full-timers or part-timers but it requested bidders to declare that the persons to be deployed on the execution of this contract were going to operate within the law and that the employer was responsible to ensure that, and (b) the employees to be deployed on these cleaning services were already in full-time employment and, as a consequence, the question of National Insurance (NI), bonus and vacation leave payments did not arise;
- having also heard Mr Degiorgio’s explanation regarding the fact that (a) *Mr Clean Ltd* forms part of the consortium *Servizzi Malta Ltd* with the latter employing 320 persons of whom, approximately, 100 were attached to Mr Clean, (b) on a daily basis, about 50 employees of the consortium were off duty and, therefore, could be detailed to work on a part-time basis on contracts such as the one in question in which case the payment of NI, bonus and vacation leave were already provided for under their full-time employment with the same consortium, and (c) as a result of existing ‘modus operandi’ and organisational set-up, the Company was in a position to afford taking a commercial decision to offer a better deal to the contracting authority whilst still remaining profitable and operative within statutory parameters;

reached the following conclusions, namely:

1. The PCAB has taken note of Dr Gatt’s withdrawal of his client’s first objection since it emerged that the bids were evaluated on the hourly rate and not on a global sum basis.

2. The PCAB feels that during the hearing, the arguments that were brought forward to prove that not all was carried out according to legal parameters and in a transparent manner were more than counterbalanced by the evidence given by the same contracting authority and the recommended company.
3. The PCAB also opines that, with regards to the second objection, all legal and statutory obligations have been observed by both the contracting authority and the recommended bidder alike.
4. The PCAB argues that the rate, as offered by the recommended tenderer, is based on a commercial decision which is arrived at after adherence to recognised labour laws and that, regardless of such rate, the country's central administration, but, definitely not, this forum, has in-built checks and balances to ensure that workers' rights are safeguarded.

As a consequence of (1) to (4) 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

20 November 2009