

PUBLIC CONTRACTS APPEALS BOARD

Case No. 315

CT 2593/2009. Adv No CT/492/2009; WSM 294/2009 Service Tender - Transport Services of Municipal Solid Waste and Recyclables from Gozo to Malta

This call for tenders was published in the Government Gazette on the 18th December 2009. The closing date for this call with an estimated budget of € 920,102 was the 9th February 2010.

Two (2) tenderers submitted their offers.

J. Bonavia & Nephews Ltd filed an objection on 18th April 2011 against the decision by the Contracts Department to award the tender to Green Skip Services Ltd.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman, Mr. Carmel Esposito and Mr Joseph Croker as members convened a public hearing on Wednesday, 20th July 2011 to discuss this objection.

Present for the hearing were:

Mr J. Bonavia & Nephews Ltd

Dr Joseph Grech	Legal Representative
Dr Paul Farrugia	Legal Representative
Mr Gordon Bonavia	Representative
Mr Joseph Mercieca	Representative
Ms Carmen Magro	Representative

Green Skip Services Ltd

Dr Raphael Fenech Adami	Legal Representative
Ms Mary Gaerty	Representative

WasteServ Malta Ltd (WasteServ)

Dr Victor Scerri	Legal Representative
Evaluation Board	
Mr Mario P. Agius	Member
Ms Elaine Mifsud	Member

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

Dr Joseph Grech, legal representative of J. Bonavia & Nephews Ltd, the appellant company, made the following submission:

- i. by letter dated 6th April 2011 the Contracts Department informed his client that its offer for lot 1 (a) lot 2 had been cancelled since the service was no longer required (b) was not successful since it was not the cheaper offer and that the tender had been awarded to Green Skip Services Ltd;
- ii. with regard to the procedural aspect to this tendering process there were two shortcomings, namely:
 - (a) his client had not been notified about what was taking place during this tendering process except with its award so much so that his client was never approached to extend the validity of its tender which, according to clauses 4.1 and 6 of the 'Instructions to Tenderers', remained valid up to 8th July 2010, i.e. 5 months from the closing date of the tender on 9th February 2010;
 - (b) whereas Reg. 82 (2) of the Public Procurement Regulations provided that the various packages of the tendering process had to be opened in public, his client had not been informed of the date, time and place of the tender opening stage/s except for the opening of the bid bond; and
- iii. in view of these two procedural shortcomings this tendering process ought to be declared null and a fresh tender issued.

Dr Paul Farrugia, another legal representative of the appellant company, stated that with regard to the period of validity of the tender, the tender document provided as follows:

Clause 6 -In exceptional cases and prior to the expiry of the original tender validity period, the Central Government Authority may ask tenderers in writing to extend his period.....;

and

Clause 15 – Before the period of validity of tenders expires, the Central Government Authority will notify the successful tenderer in writing that its tender has been successful as well...

He added that the fact that his client had not been asked to extend the validity date of the company's tender should render the tendering process null.

Dr Victor Scerri, legal representative of WasteServe Ltd, the contracting authority, stated that he was leaving the procedural issues raised by the appellant company up to the Contracts Department which he deemed was the authority responsible in that regard.

Dr Raphael Fenech Adami, legal representative of the recommended tenderer, made the following remarks:-

- a. the appeal had the sole purpose of delaying the tender award because, in the meantime, the current contractor, the appellant company itself, was having its contract extended time and again;
- b. with regard to the issue raised on the extension of the validity period of the tender, article 6 stated that “... *the contracting authority may ask tenderers in writing to extend this period*”;
- c. the validity of the tender was tied to the bid bond and it was in the interest of the tenderer to maintain a valid bid bond, even after the initial period of 5 months from the closing date of the tender; and
- d. Reg. 82 (2) of the Public Procurement Regulations provided that the tenders shall be opened in public but not necessarily in the presence of the participating tenderers.

With regard to the issue of ‘*Equipment & Proof of Number of Similar Projects Completed and Operative by Tenderer*’ Dr Farrugia stated that clause 3 (g) (ii) under ‘Selection Criteria’ at page 4 of the tender document requested tenderers to provide “*Proof of number of similar projects completed and operative by Tenderer*”. He argued that the recommended tenderer could not have provided such proof since the transport of solid waste from Gozo to Malta had, invariably, been carried out by his client and, as a result, the recommended tenderer could not satisfy this selection criterion.

Dr Grech explained the relevance of the experience requested by the contracting authority in the sense that the tenderer would have to provide specialised equipment and experienced personnel otherwise the Gozo Channel Ltd would have to face complaints by passengers due to odours and spillage besides having to withdraw the ferry from service until it was cleaned up. He further explained that the vehicles that collect domestic solid waste were not sealed but the container/trailer – some 40 feet long - in which solid waste was transported from Gozo to Malta had to be properly sealed to prevent odours and spillage.

Dr Scerri submitted that:

- i. the recommended tenderer had been in the business of solid waste transport for a number of years and that what rendered the transport of solid waste from Gozo to Malta rather different was the equipment that had to be used;
- ii. whenever a contracting authority requested a specific type of equipment it did not necessarily expect the tenderer to actually have that equipment at tendering stage but it expected that the equipment that would eventually be made available would be up to specifications;

- iii. the vehicle had to be equipped with a trailer that could compress the solid waste material and that it would be sealed to prevent the emission of odours and the spillage of waste; and
- iv. the specifications of the equipment proposed by the successful tenderer were compliant with those requested in the 'Vehicles and Plants - Technical Specifications' at pages 61 to 63.

Dr Farrugia intervened to point out that in Annex IV: *Vehicles Specifications Form* (page 66) the tenderer had to indicate under the heading 'Vehicles Available' the registration number of the vehicles which included the tractors and the container units which had to have certain specifications, such as 3 axles, a moving floor and a sealed leachate storage tanks. He stressed that it was clear that the vehicles had to be in Malta at tender submission stage.

Ms Elaine Mifsud, an evaluation board member, remarked that the tender document did not mention that the vehicles had to be available prior to the award of the tender. She added, however, that, after the award of the tender, the contracting authority reserved the right to inspect the vehicles and if it would result that the vehicles were not up to specifications then the contract would be cancelled and awarded to the second cheaper tenderer. Ms Mifsud opined that the kind of experience that the contracting authority was after was that involving the transport of solid waste.

Dr Scerri contended that it was at the discretion of the contracting authority whether to inspect the vehicles before or after that award of the tender and, in any case, the vehicles had to be inspected on an on-going basis because the contractor could change the vehicles at any time during the contract execution period.

Dr Grech referred to page 61 of the tender document 'Scope of Work' which provided as follows:

"4.1.1 – Tenderers are obliged to provide all the facilities for the inspection of the vehicles and plant being offered. All vehicles to operate under this contract shall be inspected simultaneously in one single session."

Dr Grech questioned how a tendering company could possibly provide such facilities when the vehicles themselves were not in Malta following which he went on to place emphasis on the fact that the tender document referred to the 'tenderer' whereas Dr Scerri had just stated that the vehicles could be inspected after the tender would have been awarded at which point the term 'contractor' would be used instead of 'tenderer'.

The Public Contracts Appeals Board noted that the evaluation report dated 26th March 2010 attached to WasteServ Malta Ltd covering the letter dated 2nd July 2010 under 'Technical Compliance Grid' (page 3 of 8) stated, *inter alia*, that *"The TEC concluded that prior to recommending the opening of Package III the vehicles offered by the bidders for lot 1 are to be inspected to ensure compliance."*

Ms Mifsud explained that in another report dated 26 March 2010 (page 2 of 7) under 'Evaluation Grid' the evaluation board had noted that:

“The vehicles of Messrs Green Skip Services Ltd are not yet in Malta and it is not stated in the tender if the vehicles are to be inspected before or after the award of tender.”

Ms Mifsud added that the evaluation board had concluded that it would be unfair on bidders, other than the current contractor, to have their vehicles inspected prior to the award of the tender since this particular equipment could only be used to service this contract and hence one did not expect a bidder to acquire beforehand such equipment when such bidder was still in the dark as to whether one would be awarded the tender or not. Ms Mifsud remarked that the evaluation board retained the options either to go overseas to inspect the vehicles or else to inspect the vehicles when they were brought over to Malta.

Ms Mary Gaerty, also representing the recommended tenderer, stated that the vehicles were going to be imported from the UK and Italy.

Dr Grech observed that:

- a. in terms of clause 4.1.1 (page 61) all the vehicles had to be inspected simultaneously in one single session and it was, therefore, questionable how the recommended tenderer could satisfy that requirement when the vehicles were still in the UK and Italy; and
- b. under ‘Preliminary Provisions’ article 16.1 under ‘Personnel and Equipment’, among other things, provided that the contractor “.... *shall specify the minimum level of training, qualifications and experience of the personnel and, where appropriate, the specialisation*”.
- c. article 17 (1) and (2) provided that the contractor could not make changes in the personnel agreed under the terms of the contract except in specified circumstances. Dr Grech again questioned how the recommended tenderer could provide experienced personnel when the said tenderer did not even have the necessary equipment.

Dr Scerri’s interpretation of clause 4.1.1 was that the tenderer was obliged to make the necessary arrangements for the inspection of all the vehicles on the date communicated to the same tenderer by the contracting authority.

Dr Scerri stated that, nowadays, one could even bring over both the equipment and the drivers from any other EU member state. Dr Scerri informed that this specialised trailer was, in fact, loaded at WasteServ Malta Ltd.’s facility and by the latter’s workers and what the contractor had to do was to transport the trailer to the facility of WasteServ Malta Ltd. in Malta.

Dr Farrugia said that the term ‘available’ used in Annex IV was indicative that the equipment had to be actually in Malta and he stressed that the availability of the equipment had a direct bearing on the experience of the tenderer in similar works.

Dr Fenech Adami made the following remarks:-

- a. it was improper for Dr Joseph Grech, Chairman of Gozo Channel Ltd, to assist the appellant company in connection with a tender that concerned the transport of waste on Gozo Channel ferries;
- b. his client had been operating since 1982 waste transport services, even industrial waste and at times also on the transport of solid waste between Gozo and Malta;
- c. given that this was a unique contract, namely there was only one local contract for the transport of solid waste on ferries, one could not expect bidders, other than the current contractor, to have identical experience but, then again, the tender did not require identical but similar experience;
- d. the tender document requested the technical specifications of the vehicles that would be used in the execution of the contract but it did not specify that the vehicles had to be in Malta at tendering stage;
- e. articles 16 and 17 (pages 36 and 37) dealing with 'Personnel and Equipment' did not refer to the 'Tenderer' but to the 'Contractor', which was indicative that those provisions were applicable to the stage following tender award. That made sense, continued Dr Fenech Adami, as the contracting authority did not expect the tenderer to have in place all the equipment and personnel prior to the award of such a unique tender;
- f. the technical specifications provided by his client were compliant and easily verifiable; and
- g. the arguments put forward by the appellant company were aimed at maintaining the current monopoly in this particular activity.

Dr Grech stated that it appeared that no documentation was presented from overseas suppliers indicating that the equipment was available to the recommended tenderer and, in the absence of such certification, the recommended tenderer could have well downloaded the specifications from the internet without seeking guarantees as to the availability of the equipment in case the same company would be awarded the tender.

Ms Gaerty, after offering a brief description of the required equipment, referred to Annex IV of her company's submission which, in her opinion, met all the required specifications in terms of loading capacity, number of axles, moving floor, sealed storage tanks, top loading and so forth.

Ms Mifsud, under oath, gave the following evidence:-

- i. the local registration numbers quoted by the recommended tenderer referred to open solid waste vehicles (the usual scammels), which probably were intended for use in connection with the recyclables in lot 2, whereas the trailer and tractor still had to be locally registered;

- ii. the recommended tenderer supplied the specifications of the vehicles but did not produce any documentation from the supplier that such equipment was available or at the disposal of Green Skip Services Ltd;
 - iii. the request for the vehicle registration number at Annex IV was meant for those vehicles which were already registered in Malta, however, on inspection, all the vehicles had to be locally registered;
 - iv. the tender document did not specify that all the vehicles had to be in Malta prior to the award of the tender;
 - v. the recommended tenderer supplied all the technical specifications and brochures of the vehicles as required of the company in the tender document;
- and
- vi. the recommended tenderer had also submitted the details of the personnel supported by the certificate of the *Employment and Training Corporation* that they were actually employed by Green Skip Services Ltd.

Dr Farrugia reiterated that his letter of appeal on behalf of his client was questioning the availability of the required equipment and the experience and capacity on the part of the recommended tenderer to execute this contract.

Dr Grech concluded that even if one were to, somehow, concede that it was not mandatory for the equipment to be in Malta, yet, the equipment had to, at least, be available as indicated in Annex IV. Nevertheless, it was evident from the evidence given by Ms Mifsud that the required equipment was not at the disposal of the recommended tenderer neither locally nor abroad.

Dr Fenech Adami referred to Annex III of his client's tender submission where under 'Strategy' the recommended tenderer indicated the type of vehicles that the company would use, namely Legras trailers and DAF CF85FTT tractors or similar models provided by United Equipment Company of Burmarrad and, as a consequence, his client had provided all that was required of a tendering company.

The Chairman Public Contracts Appeals Board brought this hearing to a close by remarking that the Board could not but be fully cognisant of the length of time it took for this tender to reach this stage in the evaluation / adjudication process. As a matter of fact the process was initiated on the 18th December 2009 whereas the appeal was lodged on the 18th April 2011. Undoubtedly, remarked the Chairman, this was way too long for a process to take its course.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 18th April 2011 and also through their verbal submissions presented during the hearing held on 20th July 2011, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant company’s representatives’ claims and observations, particularly, the references made to the fact that (a) by letter dated 6th April 2011 the Contracts Department informed the appellant company that its offer for lot 1 (i) lot 2 had been cancelled since the service was no longer required (ii) was not successful since it was not the cheaper offer and that the tender had been awarded to Green Skip Services Ltd, (b) the tendering company had not been notified about what was taking place during this tendering process except with its award so much so that the appellant company was never approached to extend the validity of its tender which, according to clauses 4.1 and 6 of the ‘Instructions to Tenderers’, remained valid up to 8th July 2010, i.e. 5 months from the closing date of the tender on 9th February 2010, (c) whereas Reg. 82 (2) of the Public Procurement Regulations provided that the various packages of the tendering process had to be opened in public, the appellant company had not been informed of the date, time and place of the tender opening stage/s except for the opening of the bid bond, (d) with regard to the issue of ‘*Equipment & Proof of Number of Similar Projects Completed and Operative by Tenderer*’ clause 3 (g) (ii) under ‘Selection Criteria’ at page 4 of the tender document which requested tenderers to provide “*Proof of number of similar projects completed and operative by Tenderer*” the recommended tenderer could not have provided such proof since the transport of solid waste from Gozo to Malta had, invariably, been carried out by the appellant company and, as a result, the recommended tenderer could not satisfy this selection criterion, (e) the experience requested by the contracting authority implied that the tenderer would have to provide specialised equipment and experienced personnel otherwise the Gozo Channel Ltd would have to face complaints by passengers due to odours and spillage besides having to withdraw the ferry from service until it was cleaned up, (f) whereas vehicles that collect domestic solid waste were not sealed, the container/trailer – some 40 feet long - in which solid waste was transported from Gozo to Malta had to be properly sealed to prevent odours and spillage, (g) in Annex IV: *Vehicles Specifications Form* (page 66) the tenderer had to indicate under the heading ‘Vehicles Available’ the registration number of the vehicles which included the tractors and the container units which had to have certain specifications, such as 3 axles, a moving floor and a sealed leachate storage tanks all implying that it was clear that the vehicles had to be in Malta at tender submission stage, (h) in terms of clause 4.1.1 (page 61) all the vehicles had to be inspected simultaneously in one single session and it was, therefore, questionable how the recommended tenderer could satisfy that requirement when the vehicles were still in the UK and Italy, (i) it was impossible for the recommended tenderer to provide experienced personnel when the said tenderer did not even have the necessary equipment, (j) it appeared that no documentation was presented from overseas suppliers indicating that the equipment was available to the recommended tenderer and, in the absence of such certification, the recommended tenderer could have well downloaded the specifications from the internet without seeking guarantees as to the availability of

the equipment in case the same company would be awarded the tender, (k) even if one were to, somehow, concede that it was not mandatory for the equipment in be in Malta, yet, the equipment had to, at least, be available as indicated in Annex IV and (l) it was evident from the evidence given by Ms Mifsud that the required equipment was not at the disposal of the recommended tenderer neither locally nor abroad;

- having considered the contracting authority's representative's reference to the fact that (a) the recommended tenderer had been in the business of solid waste transport for a number of years and that what rendered the transport of solid waste from Gozo to Malta rather different was the equipment that had to be used, (b) whenever a contracting authority requested a specific type of equipment it did not necessarily expect the tenderer to actually have that equipment at tendering stage but it expected that the equipment that would eventually be made available would be up to specifications, (c) the vehicle had to be equipped with a trailer that could compress the solid waste material and that it would be sealed to prevent the emission of odours and the spillage of waste, (d) the specifications of the equipment proposed by the successful tenderer were compliant with those requested in the 'Vehicles and Plants - Technical Specifications' at pages 61 to 63, (e) the contracting authority reserved the right to inspect the vehicles and if it would result that the vehicles were not up to specifications then the contract would be cancelled and awarded to the second cheaper tenderer, (f) it was at the discretion of the contracting authority whether to inspect the vehicles before or after that award of the tender and, in any case, the vehicles had to be inspected on an on-going basis because the contractor could change the vehicles at any time during the contract execution period, (g) the evaluation board had concluded that it would be unfair on bidders, other than the current contractor, to have their vehicles inspected prior to the award of the tender since this particular equipment could only be used to service this contract and hence one did not expect a bidder to acquire beforehand such equipment when such bidder was still in the dark as to whether one would be awarded the tender or not, (h) the evaluation board retained the options either to go overseas to inspect the vehicles or else to inspect the vehicles when they were brought over to Malta, (i) clause 4.1.1 was to be interpreted as obliging a tenderer to make the necessary arrangements for the inspection of all the vehicles on the date communicated to the same tenderer by the contracting authority, (j) the term 'available' used in Annex IV was indicative that the equipment had to be actually in Malta, (k) the local registration numbers quoted by the recommended tenderer referred to open solid waste vehicles (the usual scammels), which probably were intended for use in connection with the recyclables in lot 2, whereas the trailer and tractor still had to be locally registered, (l) the recommended tenderer supplied the specifications of the vehicles but did not produce any documentation from the supplier that such equipment was available or at the disposal of Green Skip Services Ltd, (m) the request for the vehicle registration number at Annex IV was meant for those vehicles which were already registered in Malta, however, on inspection, all the vehicles had to be locally registered, (n) the recommended tenderer supplied all the technical specifications and brochures of the vehicles as required of the company in the tender document and (o) the recommended tenderer had also submitted the details of the personnel supported by the certificate of the *Employment and Training Corporation* that they were actually employed by Green Skip Services Ltd;

- having considered the recommended tenderer's representative's reference to the fact that (a) the appeal had the sole purpose of delaying the tender award because, in the meantime, the current contractor, the appellant company itself, was having its contract extended time and again, (b) with regard to the issue raised on the extension of the validity period of the tender, article 6 stated that "... *the contracting authority may ask tenderers in writing to extend this period*", (c) the validity of the tender was tied to the bid bond and it was in the interest of the tenderer to maintain a valid bid bond, even after the initial period of 5 months from the closing date of the tender, (d) Reg. 82 (2) of the Public Procurement Regulations provided that the tenders shall be opened in public but not necessarily in the presence of the participating tenderers, (e) the vehicles were going to be imported from the UK and Italy, (f) it was improper for Dr Joseph Grech, Chairman of Gozo Channel Ltd, to assist the appellant company in connection with a tender that concerned the transport of waste on Gozo Channel ferries, (g) the recommended tenderer had been operating since 1982 waste transport services, even industrial waste and at times also on the transport of solid waste between Gozo and Malta, (h) given that this was a unique contract, namely there was only one local contract for the transport of solid waste on ferries, one could not expect bidders, other than the current contractor, to have identical experience but, then again, the tender did not require identical but similar experience, (i) the tender document requested the technical specifications of the vehicles that would be used in the execution of the contract but it did not specify that the vehicles had to be in Malta at tendering stage, (j) articles 16 and 17 (pages 36 and 37) dealing with 'Personnel and Equipment' did not refer to the 'Tenderer' but to the 'Contractor', which was indicative that those provisions were applicable to the stage following tender award, (k) the technical specifications provided by the recommended tenderer were compliant and easily verifiable, (l) the arguments put forward by the appellant company were aimed at maintaining the current monopoly in this particular activity and (m) under 'Strategy' (referred to Annex III) the recommended tenderer's tender submission indicated the type of vehicles that the company would use, namely Legras trailers and DAF CF85FTT tractors or similar models provided by United Equipment Company of Burmarrad,

reached the following conclusions, namely:

1. The Public Contracts Appeals Board opines that the length of time it took for this tender to reach this stage in the evaluation / adjudication process, namely, sixteen months, is, in principle, highly unacceptable.
2. The Public Contracts Appeals Board maintains that, from the documents submitted by the recommended tenderer, it remains very much doubtful as to the possibility for the evaluation board appointed by the contracting authority to be in a position to reach some kind of conclusion in view of the fact that no tangible supporting document was actually submitted by the vehicle's foreign supplier attesting purchase agreements reached as well as other pertinent details connected with the transfer of a vehicle or vehicles to the recommended tenderer in Malta.
3. The Public Contracts Appeals Board argues that the recommended tenderer was unable to complete that part in Annex IV: *Vehicles Specifications Form* (page 66) wherein the tenderer had to indicate under the heading 'Vehicles Available' the

registration number of the vehicles. The Public Contracts Appeals Board considers the reference made to 'Registration No.' as a requirement referring to a vehicle which is registered under Maltese laws. In this context, however, this Board observes that the understanding claimed by both the contracting authority and the recommended tenderer differs from the one claimed by the appellant company. This Board is somewhat dubious as to the clarity of the entire scope albeit it, *prima facie*, one could come to the conclusion that the term 'registration' would be normally associated with something which is formally recognised by local authorities under whose jurisdiction all interested parties should fall.

4. The Public Contracts Appeals Board cannot accede to the claim made by the appellant company with regard to the fact that its representatives were not informed of the opening in public of tender submission documents and this in view of an email dated 29th September 2010 wherein it is clearly manifested that such notification was served.
5. The Public Contracts Appeals Board feels that the phrase one comes across in the Evaluation Report dated 2nd July 2010 – Annex III, namely "*Vehicles to be inspected prior to the opening of Package 3*", contradicts what had been stated during the hearing.
6. The Public Contracts Appeals Board acknowledges that, at this juncture, it would be ironic if one were to place major emphasis on the relevance of expertise and CVs in view of the time frame involved in this tender reaching the stage it is in today, namely some sixteen months after it was originally published which, undoubtedly, has, most probably, rendered all reference made in the tender submission relating to expertise and CVs superfluous.
7. The Public Contracts Appeals Board contends that, due to the timeline involved between original publication and the recommendation for award of this tender, the scope of this tender has been rendered ineffective and recommends that this tender be cancelled and reissued within three (3) months. Furthermore, this Board suggests that the document content be revisited to ensure full clarity of scope, transparency and equal opportunity for potential tenderers to participate on an equal footing thus, manifestly, including a proper scope for new entrants to participate enhancing in the process the competitive element supported and encouraged in public procurement. Also, it is considered crucial for the period contemplated in the new tender for this to cover a longer time frame, say, 36 months, in order to enable proper recoupment by the awarded tenderer of the capital expenditure involved.

In view of the above this Board recommends that the deposit paid by the latter should be reimbursed.

Alfred R Triganza
Chairman

Carmel Esposito
Member

Joe Croker
Member

1st August 2011