

PUBLIC CONTRACTS REVIEW BOARD

Case No. 289

JHA 140/2010

Tender for Cleaning Services at the Offices of the Ministry for Justice and Home Affairs

This call for tenders was published in the Government Gazette on 16th November 2010. The closing date for this call with an estimated budget of € 38,530 was 10th December 2010.

Four (4) tenderers submitted their offers.

Clentec Ltd filed an objection on 23rd March 2011 against the decisions by the Ministry for Justice and Home Affairs (i) that its offer was not the most advantageous and (ii) to recommend tender award to Gafa Safeway Cleaners Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr. Edwin Muscat and Mr Carmel Esposito as members convened a public hearing on Wednesday, 18th May 2011 to discuss this objection.

Present for the hearing were:

Clentec Ltd

Dr Antoine Naudi	Legal Representative
Mr Saviour Turner	Representative
Mr Simon Turner	Representative

Gafa Safeway Cleaners Ltd

Mr Joseph Sammut	Representative
Ms Paulette Gafa	Representative

Ministry for Justice and Home Affairs (MJHA)

Evaluation Board:

Mr Carmel Vella	Chairman
Mr Andre Azzopardi	Member
Mr Peter Attard	Member
Mr Paul Azzopardi	Member

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

Dr Antoine Naudi, legal representative of Clentec Ltd, the appellant company, explained that, by letter dated 16th March 2010, the contracting authority informed his client that the company's offer had not been recommended for award as it was neither the cheapest nor the most advantageous offer. He explained that the two reasons behind the objection were (i) the non-payment of taxes by the recommended tenderer and (ii) the abnormally low price quoted for window cleaning by the recommended tenderer.

With regard to the non-payment of taxes Dr Naudi made the following submission:-

- i. Clause 32 (1) of the tender document provided that:

“The sole award criterion will be the price. The contract will be awarded to the cheapest priced tender satisfying the administrative and technical criteria.”

- ii. Moreover, one of the administrative criteria concerned the eligibility of the tenderer and in that connection, Article 50 of the Public Procurement Regulations stated, among other things, that:

“(1) Any economic operator may be excluded from participating in a public contract where the economic operator:

(f) has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of Malta or the country in which he is established.”

- iii. Dr Naudi produced as evidence a document issued by the Civil Courts (First Instance) on the 10th December 2010 declaring that Gafa Safeway Ltd had to pay to the Commissioner of Inland Revenue the tax due in respect of years of assessment from 1999 to 2009 plus additional tax thereon. He added that this legal document was, in itself, an executive order for Gafa Safeway Ltd to fulfil its tax obligations.
- iv. Although Regulation 50 (1) (f) was not mandatory, yet, it was felt that it should have been given its due weight for adjudication purposes.

Mr Carmel Vella, chairman of the evaluation board, conceded that the evaluation board had not checked on the question of taxes due to government by the participating tenderers. He added that he would have to consult with the other board members as to what consequences would that have had on the evaluation process. Nevertheless, proceeded Mr Vella, his personal view was that the knowledge that Gafa Safeway Ltd had not fulfilled its obligations towards the Commission of Inland Revenue would have influenced the deliberations of the evaluation board to the point of the said Board reconsidering its recommendation.

Mr Joseph Sammut, representing Gafa Safeway Cleaners Ltd, declared that with regard to the amounts due to the Commissioner of Inland Revenue Department, the said company had

availed itself of the scheme that had been launched by the Commissioner of Inland Revenue somewhere around July 2010 and which scheme, he claimed, was still in operation. Mr Sammut insisted that his client had regularised its position with regard to the payment of income tax.

Dr Naudi intervened to point out that even if the scheme referred to by Mr Sammut was launched around July 2010, the fact remained that the closing date of the tender was the 10th December 2010 which was the date on the Court order and it therefore followed that at the time that the recommended tenderer participated in and submitted its offer the income tax payments were not in order. Dr Naudi also noted that the recommended tenderer did not present any documentary evidence to back its representative's claim that the appellant company had regularised its position with regard to income tax payment.

Mr Sammut remarked that the Court order was exhausted once the taxpayer entered into an agreement with the Commissioner of Inland Revenue and, though he could not furnish the exact date, the indicative date when his client settled the issue with the Commissioner of Inland Revenue was within the period December 2010 to January 2011.

With regard to prices Dr Naudi stated that his client had quoted the rate of €112 per session for window cleaning whereas Gafa Safeway Cleaners Ltd quoted the price of €23.60 per session which represented a very substantial variation. He considered the rate of €23.60, including VAT, as abnormally low for the purposes of Public Procurement Regulations, Reg. 29. (1), which, *inter alia*, provided as follows:

“A contracting authority shall be entitled to reject tenders which appear to be abnormally low in relation to the activity to be carried out ...”

On his part, Mr Simon Turner, representing Clentec Ltd, explained that a window cleaning session involved the cleaning of apertures from the inside – maids cleaned windows only up to a certain height - and even from the outside which task had to be performed by properly insured employees and often with the use of a high-up. Mr Turner remarked that his quote of €12 was based on the wages of 3 employees x 8 hours.

Mr Vella explained that a session meant the cleaning of all the windows of two buildings, namely the Ministry of Justice and Home Affairs at the Auberge d'Aragon together with the House of Catalunya and that such a task was undertaken about four times a year. Mr Vella stated that it was up to contractors to determine what resources they would dedicate to perform this particular task.

The chairman of the evaluation board admitted that there was a very evident difference between the quote submitted by the recommended tenderer and the one submitted by the appellant company with regard to the rate per window cleaning session, so much so that, the contracting authority had sought a clarification and, in response, Gafa Safeway Cleaners Ltd had confirmed, by way of a letter dated 1st March 2011, that the price per session was of €23.60, including VAT. Mr Vella stated that he considered the quotes given by tenderers as a commercial decision on their part.

Mr Sammut referred to previous rulings handed down by both the Public Contracts Appeals Board and the Public Contracts Review Board with regard to the rates offered by tenderers for cleaning services wherein it was consistently decided that the evaluation board should not go into the make-up of the rates offered but that it had to treat the rates as commercial decisions on the part of the bidders. Mr Sammut declared that the rate for window cleaning was requested per session and not per hour as indicated in Volume 4 'Financial Bid' (page 37).

Dr Naudi agreed that the evaluation board should not take over the functions of the *Employment and Industrial Relations Department* with regard to the hourly rate paid to cleaning staff and so forth but the point that he was raising in this instance was that the rate offered was 'abnormally' low which issue was provided for in the Public Procurement Regulations.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated 23rd March 2011 and also through their verbal submissions presented during the hearing held on 18th May 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) the contracting authority informed the appellant company that the company's offer had not been recommended for award as it was neither the cheapest nor the most advantageous offer, (b) the two reasons behind the objection were (i) the non-payment of taxes by the recommended tenderer and (ii) the abnormally low price quoted for window cleaning by the recommended tenderer, (c) although Regulation 50 (1) (f) of the Public Procurement Regulations was not mandatory, yet, it was felt that it should have been given its due weight for adjudication purposes, (d) a document issued by the Civil Courts (First Instance) on the 10th December 2010 declaring that Gafa Safeway Ltd had to pay to the Commissioner of Inland Revenue the tax due in respect of years of assessment from 1999 to 2009 plus additional tax thereon, which fact was, according to the same representatives, an executive order for Gafa Safeway Ltd to fulfil its tax obligations, (e) even if the scheme referred to by Mr Sammut was launched around July 2010, the fact remained that the closing date of the tender was the 10th December 2010 which was the date on the Court order and it therefore followed that at the time that the recommended tenderer participated in and submitted its offer the income tax payments were not in order, (f) the recommended tenderer did not present any documentary evidence to back the claim that the appellant company had regularised its position with regard to income tax payment, (g) with regard to prices the appellant company had quoted the rate of €112 per session for window cleaning whereas Gafa Safeway Cleaners Ltd quoted the price of €23.60 per session which represented a very substantial variation, (h) the rate of €23.60, including VAT, was abnormally low for the purposes of Public Procurement Regulations, Reg. 29. (1), (i) the quote of €12 was based on the wages of 3 employees x 8 hours, (j) it was up to contractors to determine what resources they would dedicate to perform this particular

task and (k) whilst agreeing with the fact that the evaluation board should not take over the functions of the *Employment and Industrial Relations Department* with regard to the hourly rate paid to cleaning staff and so forth, yet the point being made in this instance was that the rate offered by the recommended tenderer was ‘abnormally’ low;

- having considered the contracting authority’s representative’s reference to the fact that (a) the evaluation board did not check on the question of taxes due to government by the participating tenderers, (b) the difference between the quote submitted by the recommended tenderer and the one submitted by the appellant company with regard to the rate per window cleaning session was very evident, so much so that, the contracting authority had sought a clarification and, in response, Gafa Safeway Cleaners Ltd had confirmed, by way of a letter dated 1st March 2011, that the price per session was of €23.60, including VAT and (c) the quotes given by tenderers were considered as a commercial decision on their part;
- having taken note of the recommended tenderer’s representatives’ arguments, particularly, the fact that (a) with regard to the amounts due to the Commissioner of Inland Revenue Department, the said company had availed itself of the scheme that had been launched by the Commissioner of Inland Revenue somewhere around July 2010 and which scheme was still in operation, (b) Gafa Safeway Cleaners Ltd had regularised its position with regard to the payment of income tax, (c) in previous rulings, handed down by both the Public Contracts Appeals Board and the Public Contracts Review Board, with regard to the rates offered by tenderers for cleaning services, it was consistently decided that the evaluation board should not go into the make-up of the rates offered but that one had to treat the rates as commercial decisions on the part of the bidders and (d) the rate for window cleaning was requested per session and not per hour as indicated in Volume 4 ‘Financial Bid’ (page 37),

reached the following conclusions, namely:

1. The Public Contracts Review Board argues that, with regard to the non payment of taxes by the recommended tenderer, whilst it was submitted by the appellant company that a document was issued by the Civil Courts (First Instance) on the 10th December 2010 declaring that Gafa Safeway Ltd had to pay to the Commissioner of Inland Revenue the tax due in respect of years of assessment from 1999 to 2009 plus additional tax thereon, yet no proof of further action taken was submitted which, *prima facie*, corroborated the recommended tenderer’s claim that the said company had availed itself of the scheme that had been launched by the Commissioner of Inland Revenue and had since regularised its position.
2. The Public Contracts Review Board feels that the argument submitted by the appellant company with regard to the fact that the price of €23.60 per session including VAT, as offered by the recommended tenderer, was abnormally low for the purposes of Public Procurement Regulations, Reg. 29. (1), was untenable in view of the fact that this Board considers the issue of pricing as a commercial decision taken by a participating tenderer knowing well enough that, unlike this Board, other competent authorities have the remit to ensure observance of local legal provisions by employers and so forth.

In view of the above this Board finds against the appellant company and also recommends that the deposit paid by the latter should not be reimbursed.

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmel Esposito
Member

26 May 2011