

PUBLIC CONTRACTS REVIEW BOARD

Case No. 300

RC/01 /10

Tender for the Provision of Local Warden Services – Reġjun Ċentrali

This call for tenders was published in the Government Gazette on 30th November 2010. The closing date for this call with an estimated budget of € 2,080,000 was 2nd January 2011.

Two (2) tenderers submitted their offers.

Messrs Aurelia Enforcement Ltd filed an objection on 8th April 2011 against the decision by the Central Region to disqualify its offer on being non-compliant at administrative and technical evaluation stage.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr. Edwin Muscat and Mr Joseph Croker as members convened a public hearing on Friday, 10th June 2011 to discuss this objection.

Present for the hearing were:

Messrs Aurelia Enforcement Ltd

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| Dr Adrian Delia | Legal Representative |
| Ms Jean Camilleri | Representative |
| Mr Peter Formosa | Managing Director |

Guard & Warden Services House Ltd

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| Dr Andrew Borg Cardona | Legal Representative |
| Mr Kenneth De Martino | Representative |

Sterling Security Co Ltd

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| Dr Reuben Farrugia | Legal Representative |
| Mr Noel Schembri | Representative |
| Mr David Stabbings | Representative |

Reġjun Ċentrali (Central Region)

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| Dr Keith Grech | Legal Representative |
| Dr Veronica Aquilina | Legal Representative |

Evaluation Board:

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| Dr Malcolm Mifsud | Chairman |
| Mr Peter Bonello | Member |
| Mr David Soler | Member |
| Mr George Cremona | Member |
| Mr Samuel Herd | Secretary |

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

Dr Adrian Delia, legal representative of Aurelia Enforcement Ltd, the appellant, stated that by means of letter dated 30th March 2011, the Central Region informed his client that the company's tender was not successful since (i) "*Aurelia Enforcement Ltd will not be in a position to service the Region with five wardens*" and (ii) "*Aurelia Enforcement Ltd has registered three years experience when the said tender document requires a minimum of five years experience.*"

Aurelia Enforcement Ltd will not be in a position to service the Region with five wardens

Dr Delia made the following submissions:

- i. contrary to what the evaluation board stated, his client did not indicate that the company would render the service requested in the tender with five wardens;
- ii. this tender referred to the provision of local warden services to cover a whole region and that entailed the engagement of a number of local wardens, who had to be in possession of a specific licence which took a period of time to obtain;
- iii. his client had up till then provided limited warden services, i.e. only to Floriana and Marsa local councils, and therefore one should not expect his client to employ say, 30 wardens, prior to being awarded the tender and thus leaving this workforce idle until such time when, and only if, the company would be awarded the tender;
- iv. the tender document itself did not require this - as stated in (iii) above - from the bidder; and
- v. his client had indicated two ways or a mixture of both as to how to obtain the number of local wardens required for this contract, namely via a 'transfer of business' or 'the submission of a call for applications'.

Aurelia Enforcement Ltd has registered three years experience when the said tender document requires a minimum of five years experience

Dr Delia made the following remarks:-

- a. it was not correct that his client did not register five years experience and it was equally incorrect to state that the tender document required a minimum of five years experience;
- b. Clause 12 of the 'Instructions to Tenderers' under 'Award' provided as follows:

“It is the intention of the Region to award the Contract on the basis of the cheapest and administratively compliant tender, having regard to the extent of compliance with the conditions specified in the tender documents and also the level of prices quoted; provided that the tender has been submitted in accordance with the requirements of the Tender Documents. Quality Standards, experience and track record (minimum 5 years), work plan proposed, company set up and conditions of work of employees, organizational capabilities and professionalism will be taken into consideration and will be the basis of the award.”

This provision was rather ambiguous with regard to whether the award was to be made according to the lowest price or on the basis of the most economically advantageous tender (MEAT) and, in fact, the appellant had challenged this by filing a judicial protest and, consequently, the Public Contracts Review Board held that *prima facie* the claims made by his client did not subsist, however the Public Contracts Review Board added that needless *“to say that this Board would be concerned if such addenda could lead to a lack of level playing amongst participating tenderers giving certain advantages to one or more bidder but not to all such tenderers”*.

- c. the ‘selection criteria’ and the ‘reasons for award’ were separate and distinct such that the ‘selection criteria’ referred to mandatory requirements which had to be satisfied whereas the ‘reasons for award’ referred to the basis on which the award would be made but the ‘reasons for award’ could not lead to exclusion;
- d. the minimum 5 year experience requirement was not mentioned anywhere else except under the ‘award criteria’ and, as a consequence, his client should not have been excluded at ‘award stage’ but, if anything, at the ‘selection stage’ which preceded the award stage;
- e. having said that, his client, the appellant company, still satisfied the 5 year experience requirement by having provided its services to Malta Drydocks from 2003 to 2010, Motherwell Bridge Malta Ltd from 2006 to 2010 and Wasteserv (Malta) Limited from 2004 to 2010;
- f. Reg. 52 (2) (a) of the Public Procurement Regulations made a distinction between works and services such that it stipulated that, in the case of certain services, 3 years experience was required whereas, in the case of works, 5 years experience were required;
- g. the technical evaluation was to be carried out only on the basis of ‘selection criteria’ whereas the ‘award’ was to be made on the basis of price from among technically compliant bidders, however, under Clause 12 ‘award’ there was included the 5 year experience requirement which, if anything, should have featured as a ‘selection’ criterion rather than an ‘award’ criterion.

Dr Keith Grech, legal representative of the Central Region, made the following submissions:-

- i. the tender was issued for a very specific purpose, namely the provision of a local warden service which had to do with public order so much so that these services were previously rendered by the Police force;
- ii. Clause 12 was only one of the provisions of the tender document because there were also the general and specific conditions which amply described the kind of services that were being requested;
- iii. the appellant company seemed to imply that the adjudication should move straight on to envelope 3, 'the award', but before that the tenders had to be certified administratively and technically compliant, i.e. envelope 2 stage, at which stage the appellant was found deficient;
- iv. the European Court of Justice (ECJ) had held that the contracting authority had the right to ensure that the participating bidders were administratively and technically compliant – the award would follow later – and it was at that stage that the appellant failed to progress because the company did not possess the required experience and it did not have sufficient resources as far as local wardens were concerned to execute the contract;
- v. the appellant had four full-time and one part-time local wardens and although the company was indicating that it could make use of the licensed wardens already available on the market, the appellant failed to provide any assurance that any of the licenced wardens had actually committed themselves to work for him;
- vi. although the tender document did not indicate the number of wardens required, at Annex 6 (page 55) it did indicate the minimum requirement of 796 hours per week, which, when divided by 40 hours – as per collective agreement for local wardens - worked out at 20 wardens whereas the appellant had only 4 full-time and 1 part-time wardens and, as a consequence, the appellant was far from having the required resources to service the minimum requirements of this tender as the company had declared in its tender submission;
- vii. as to the appellant's claim that the tenderer should not be expected to engage a large number of wardens in the hope that the company would use them on a contract which might be awarded to it, one should note that in its tender submission the appellant company had declared that it would be ready to start the service the day after being awarded the tender when one was aware that it took a number of months for a person to obtain a local warden licence;
- viii. the 'Arriva' and 'Palumbo' cases cited by the appellant's representative in his letter of objection were completely different cases from the one under review;
- ix. the requirements were clearly indicated in the tender document and in the four

addenda/clarifications incorporated in the tender document and hence the process was transparent to all;

- x. the appellant had lodged a judicial protest whereby the Public Contracts Review Board opined, among other things, that there was no contradiction in the way the tender had been issued and that the principle of transparency had not been adversely affected and that the document, as drafted, was totally in line with established procurement criteria.
- xi. the appellant did not have the required 5 years experience in the provision of warden services because the experience the same tendering company submitted referred to services rendered to private or public entities which were very different from those performed by a licensed local warden;
- xii. the tender was issued locally, where there were about three or four operators, and also EU-wide and hence the claim by the appellant that the tender was meant to be won by the incumbent contractor/s was unfounded; and
- xiii. the contracting authority had the right and the responsibility to put its mind at rest that the bidders were technically competent to deliver the requested service.

Dr Andrew Borg Cardona, legal representative of Guard and Warden House Ltd, remarked that (a) contrary to what the appellant seemed to imply, the wardens employed by his client were not going to be available to other contractor/s, including the appellant, because his client would deploy them elsewhere, (b) the 'transfer of business' applied to employees who would lose their job, (c) the 'Palumbo' case cited by the appellant referred to a case where the contractor had taken over the dockyard and the appellant was left free to employ ex-dockyard employees as well as other workers, (d) optimistically, a person required about 6 months to obtain a warden licence, and (e) it was a matter of fact that the incumbent contractor/s already possessed the assets to undertake this tender and that was a point to their advantage.

Dr Malcolm Mifsud, President of the Central Region and Chairman of the Evaluation Board, under oath gave the following evidence:-

- a. he confirmed that he was involved in the drafting of the tender document;
- b. he conceded that albeit there was no particular section for 'selection criteria', however, the tenderers submitted their bids in terms of all the provisions contained in the tender document, including the provisions at page 13 and 14 of the tender document under 'Tenderer's Declaration' and Annex 7 'Rates for Services Requested';
- c. although the number of local wardens was not spelled out, on the other hand, Annex 6 clearly indicated the minimum number of weekly hours required with regard to each locality which, collectively, amounted to 796 hours, however, it was left up to the tenderers to make their own proposals;
- d. the appellant company had opted out of its own free will to participate in the tendering

process and had the opportunity to request clarifications;

- e. up to the closing date of tender submission the appellant company only had 5 wardens on its books and whilst it did not specify how many wardens it would employ on the contract, yet, it proposed three ways how it would recruit the other wardens that it would require, namely via 'transfer of business', 'call for applications' or a mixture of both;
- f. unlike waste collection or cleaning services, where it was relatively easy to engage employees, a warden had to be licensed according to law and it took about two months to complete the course besides the time taken by the Commissioner of Police to issue the licence and that the newly licenced warden had to be shadowed for the first weeks of service;
- g. no date was specified within which the successful tenderer had to start the service following the signing of the contract, however, that was the prerogative of the contracting authority ;
- h. 'The Private Guards and Local Wardens Act (Cap 389)' referred to local wardens and also to persons licensed overseas provided they were recognized by the Commissioner of Police;
- i. there were four addenda to the tender document, which formed an integral part of the tender document, and Addendum No. 2 (issued on 5th January 2011) para. 2 'Adjudication of Tenders' stated that:

"It is the intention of the Region to award the Contract on the basis of the cheapest technically and administratively compliant tender... (cfr. Clause 12 of the "Instructions to Tenderers") is a basic principle of tenders evaluation procedures. Clarification of this statement is given in the remaining context of Clause 12 which mentions the criteria that will be applied in the process of selection and award."

- j. from the appellant's tender submission it was evident to the evaluation board that the company could not render the service requested with just five wardens and it failed to indicate in clear and concrete terms how and when it would engage the extra wardens that it would require; and
- k. he opined that this tender was going to be adjudicated on the basis of the most economically advantageous tender (MEAT) principle.

At this point Dr Delia intervened and made the following concluding remarks:-

- a. he insisted that at no stage did his client declare that the company was going to service the contract with only 5 wardens so much so that his client proposed three ways how to engage/recruit the required local wardens;

- b. he questioned the use of issuing a tender when it was being claimed that the bidders had to have a good number of wardens on their books at the closing date of the tender when, practically, all licenced wardens were employed by the incumbent contractors;
- c. he referred to Clause 4 of Annex 11 (page 70) – Contractor’s information Statement – which stated that *“If the information is not available on the closing date for the submissions of this tender, it is to be submitted by the successful tenderer within one week from the receipt of acceptance and the award shall be subject to this condition.”* Therefore, according to that provision, the contracting authority could not disqualify the bidder even if the company did not submit the information requested at Annex 11 by the closing date of the tender;
- d. referred to Regulation 28 which stated that

“(2) Contracting authorities may require candidates and tenderers to meet minimum capacity levels in accordance with regulations 51 and 52. The extent of the information referred to in regulations 51 and 52 and the minimum levels of ability required for a specific contract must be related and proportionate to the subject-matter of the contract. The minimum levels shall be referred to in the contract notice.”

Therefore, according to Reg. 28 the contracting authority ‘may’ require a minimum and that it was Regs. 51 and 52 that stated that the minimum level ‘shall’ be referred to in the contract notice;

- e. the 5 years experience was not a mandatory ‘selection’ criterion because the 5 years experience was included under Clause 12 which related to the ‘award’, which in turn did not deal with administrative or technical compliance but it dealt with the decision as to who should be awarded the tender;
- f. the pre-contract procedure instituted by his client was without success because the Public Contracts Review Board then did not have the opportunity to hear and see all the evidence but now it had emerged that Clause 12 was not all that clear as to whether the award was to take place on the basis of the price or the most economically advantageous tender (MEAT) principle so much so that there were those who said the basis was the ‘price’ and there were others who said the basis was the most economically advantageous tender (MEAT) principle;
- g. his client should not have been disqualified because of the number of wardens because the tender document did not contain ‘selection criteria’ but it contained ‘award criteria’ and even if the number of wardens were to be one of the selection criteria it had to be tied to a date; and
- h. once the appellant company’s claim at the pre-tendering procedure that the tender document, as drafted, was illegal had not been upheld, his client was now requesting that its offer be reintegrated in the process once the reasons for its exclusion were

unfounded.

Dr Keith Grech made the following concluding remarks:-

- i. the second page of the tender document titled 'Important Notice' stated, among other things, that *"tenderers are to make sure that all technical details relevant to their offers are included in Envelope 2. It is still their responsibility to ensure that any relevant literature, brochure, data, drawings, calculations etc necessary for the technical evaluation of their offers are submitted by the closing time and date."*
- ii. the issue as to whether there were selection or award criteria or both, was resolved by Addendum No 2 which had been cited earlier on by Dr Mifsud and Clause 6 (d), which *inter alia*, stated that *"Clarification notes will constitute an integral part of the tender document."*
- iii. The appellant company was correct that the contracting authority did not indicate the number of wardens required but the same appellant failed to mention that the contracting authority did indicate the minimum number of hours per week needed to service this contract;
- iv. In its submission the appellant company had stated that the company's "local wardens are already trained"; they "have all the necessary resources to ensure the successful implementation of the contract" and they "will be able to continue without pause". Notwithstanding, the tender submission as a whole and what had been said at the hearing did not lead in that direction;
- v. Clause 14 (c) at page 9 stated that

"Prior to the award of the contract, the Executive Secretary will notify the tenderer in writing if the Region, after due investigation, has reasonable objection to any such proposal or entity. If the Region has a reasonable objection to any such person or entity, the tenderer must submit an acceptable substitute with an adjustment in his tender price to cover the difference in cost occasioned by such substitution."

Dr Grech stated that that meant that the tenderer had not only to specify the number of wardens but even to give the details of the persons for verification by the contracting authority;

- vi. In the circumstances, one had to ask how could the evaluation board put its mind at rest that the appellant company would provide the requested service as from day one of the award, as the company had declared, with only 4 full-time and 1 part-time wardens;
- vii. The tender was issued locally and across the European Union and it emerged that there were three to four local operators and, as a consequence, it was not a monopolistic market; and

- viii. If one were to accede to the appellant company's request to reinstate the company and, in the alleged absence of selection criteria, move on to award stage, then that would preclude the adjudicating board from ensuring that the tenderer was, in fact, administratively and technically competent to undertake the contract.

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 8th April 2011 and also through their verbal submissions presented during the hearing held on 10th June 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) at no stage did the appellant company declare that it was going to service the contract with only 5 wardens so much so that it proposed three ways how to engage/recruit the required local wardens including a 'transfer of business' or 'the submission of a call for applications', (b) there seemed to be little scope in a contracting authority issuing a call like this one when it was being claimed that the bidders had to have a good number of wardens on their books at the closing date of the tender when, practically, all licenced wardens were employed by the incumbent contractors, (c) according to Clause 4 of Annex 11 (page 70) – Contractor's information Statement – the contracting authority could not disqualify the bidder even if the company did not submit the information requested at Annex 11 by the closing date of the tender, (d) the 5 years experience was not a mandatory 'selection' criterion because the 5 years experience was included under Clause 12 which related to the 'award', which in turn did not deal with administrative or technical compliance but it dealt with the decision as to who should be awarded the tender, (e) the appellant company still satisfied the 5 year experience requirement by having provided its services to Malta Drydocks from 2003 to 2010, Motherwell Bridge Malta Ltd from 2006 to 2010 and Wasteserv (Malta) Limited from 2004 to 2010 and (f) the appellant company should not have been disqualified because of the number of wardens because the tender document did not contain 'selection criteria' but it contained 'award criteria' and even if the number of wardens were to be one of the selection criteria it had to be tied to a date;
- having considered the contracting authority's representative's reference to the fact that (a) the tender was issued for a very specific purpose, namely the provision of a local warden service which had to do with public order so much so that these services were previously rendered by the Police force, (b) the issue as to whether there were selection or award criteria or both, was resolved by Addendum No 2 and Clause 6 (d), which *inter alia*, stated that "Clarification notes will constitute an integral part of the tender document.", (c) whilst the appellant company was correct in arguing that the contracting authority did not indicate the number of wardens required, yet it failed to mention that the contracting authority did indicate the minimum number of hours per week needed to service this contract, (d) in its submission the appellant company had stated that the company's "local wardens are

already trained’; they “have all the necessary resources to ensure the successful implementation of the contract” and they “will be able to continue without pause”, (e) Clause 14 (c) at page 9 meant that the tenderer had not only to specify the number of wardens but even to give the details of the persons for verification by the contracting authority, (f) one had to ask could the evaluation board put its mind at rest that the appellant company would provide the requested service as from day one of the award – despite the fact that no date was specified within which the successful tenderer had to start the service following the signing of the contract - as the company had declared, with only 4 full-time and 1 part-time wardens when Annex 6 (page 55) did indicate the minimum requirement of 796 hours per week, which, when divided by 40 hours – as per collective agreement for local wardens - worked out at 20 wardens, (g) the tender was issued locally and across the European Union and it emerged that there were three to four local operators and, as a consequence, it was not a monopolistic market, (h) the appellant company had opted out of its own free will to participate in the tendering process and had the opportunity to request clarifications, (i) unlike waste collection or cleaning services, where it was relatively easy to engage employees, a warden had to be licensed according to law and it took about two months to complete the course besides the time taken by the Commissioner of Police to issue the licence and that the newly licenced warden had to be shadowed for the first weeks of service and (j) from the appellant’s tender submission it was evident to the evaluation board that the company could not render the service requested with just five wardens and it failed to indicate in clear and concrete terms how and when it would engage the extra wardens that it would require;

- having also considered Dr Borg Cardona’s remarks, particularly, the ones referring to the fact that (a) contrary to what the appellant seemed to imply, the wardens employed by his client were not going to be available to other contractor/s, including the appellant, because his client would deploy them elsewhere, (b) optimistically, a person required about 6 months to obtain a warden licence, and (c) it was a matter of fact that the incumbent contractor/s already possessed the assets to undertake this tender and that was a point to their advantage

reached the following conclusions, namely:

1. The Public Contracts Review Board argues that it was a matter of fact that the incumbent contractor/s already possessed the assets to undertake this tender and that was a point to their advantage. Yet, this Board is also aware of the fact that this tender was issued both locally and across the European Union and, as a result, at least *prima facie*, this Board cannot conclude that this tender had the semblance of a pure monopolistic scenario. Nevertheless, this Board would have been more comfortable had the 5 years’ experience requirement in the tender specifications not been mandatory.
2. The Public Contracts Review Board feels that the argument raised by the appellant company’s representative with regard to the said company satisfying the 5 year experience requirement by having provided its services to Malta Drydocks from 2003 to 2010, Motherwell Bridge Malta Ltd from 2006 to 2010 and Wasteserv (Malta) Limited from 2004 to 2010 does not apply in this context considering that the scope of this tender, namely the provision of local warden services, bears no similarity to experience gained when

providing services to the likes of Malta Drydocks, Motherwill Bridge, Wasteserv (Malta) Limited and so forth.

3. The Public Contracts Review Board contends that, whilst the appellant company was correct in arguing that the contracting authority did not indicate the number of wardens required, yet it is also true that the contracting authority did indicate the minimum number of hours per week needed to service this contract which amounted to 796 hours per week, which, when divided by 40 hours – as per collective agreement for local wardens - worked out at 20 wardens.
4. The Public Contracts Review Board cannot accept the claim made by the appellant company when its representatives stated that the company's local wardens are already trained; they have all the necessary resources to ensure the successful implementation of the contract and they will be able to continue without pause. As amply demonstrated during the hearing such claims were made with the presumption that the evaluation board would accept any of its declared three proposals as possibilities of a way forward, namely that, if successful, the company would be recruiting the other wardens that it would require, namely via 'transfer of business', 'call for applications' or a mixture of both. Now, considering that up to the closing date of tender submission the appellant company only had 5 wardens on its books, this Board feels that the evaluation board was provided with little comfort that the appellant company would be able to provide the requested service as from day one following the award and this regardless of the fact that no date was specified within which the successful tenderer had to start the service following the signing of the contract.
5. The Public Contracts Review Board feels that, notwithstanding the point raised in (1) above, the appellant company, being fully cognisant that its resources fell short of the immediate human capital requirement as contemplated in the tender document, had enough time to enter into some kind of strategic business relationship (e.g. a foreign counterpart) who could have the right staff complement who would, most probably, need only some basic training, rather than adopting a non-committal wait and see approach until the publication of a tender. This Board opines that, assuming that upon the bid being successful one would have had direct access to trained staff by virtue of the possible adoption of a 'transfer of business' clause was too much of a shot in the dark, especially when one also considers the remark passed by the current operator's representatives who, *inter alia*, stated that, contrary to what the appellant seemed to imply, the wardens employed by his client were not going to be made available to other contractor/s, including the appellant company, because, if unsuccessful in this tender, his client would deploy them somewhere else.

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

Joseph Croker
Member

4 July 2011