

PUBLIC CONTRACTS REVIEW BOARD

Case No. 301

RGH/02 /10

Tender for the Provision of Local Warden Services – Regjun Ghawdex

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 25th April 2011 against the decision by the Gozo Region to disqualify its offer on being non-compliant at administrative and technical 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

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

Guard & Warden Services House Ltd

Dr Andrew Borg Cardona	Legal Representative
Mr Kenneth De Martino	Representative

Sterling Security Co Ltd

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

Regjun Ghawdex (Gozo Region)

Dr Georganne Schembri	Legal Representative
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Evaluation Board:

Dr Samuel Azzopardi	Chairman
Mr David Soler	Member
Mr George Cremona	Member
Mr Ian Paul Bajada	Secretary

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

Dr Adrian Delia, legal representative of Aurelia Enforcement Ltd, the appellant company, stated that by means of a letter dated 13th April 2011, his client was informed that its tender was not successful since the *"tender presented by Aurelia Enforcement Ltd is administratively non-compliant since the documents included in the tender do not show proof of experience and track record (minimum 5 years) in the local warden services."*

Dr Delia made the following submissions:

- i. in the case of the Gozo Region no mention had been made as to whether his client had a sufficient number of local wardens on its books to execute this contract but the only reason for exclusion was related to the 5 years minimum experience and, in this case, that had to be related to 'the local warden services';
- ii. Clause 12 of the 'Instructions to Tenderers' under 'Award' reads 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."

There was no reference to the term 'in the local warden services' and the evaluation board therefore had to explain why in its deliberations it went beyond what was provided in the tender document;

- iii. once the requirement of 5 year minimum experience was included under the 'Award' – and not under 'Selection Criteria' – the evaluation board could not exclude a bidder on administrative or technical grounds at award stage; and
- iv. moreover, the decision of the Gozo Region was illegal because it was based on a criterion which was not included in the tender document, namely, it did not specify that the 5 years experience had to be 'in the local warden services'

Dr Georganne Schembri, legal representative of the Gozo Region, made the following submissions:

- a. once the appellant company was alleging that certain provisions of the tender document were not in order or even illegal, one would have expected the said company, either not to take part in the tendering procedure or to take all legal measures that it deemed

necessary to safeguard its interests;

- b. the sole reason for exclusion was that the appellant company did not demonstrate that it had the experience requested at Clause 12 of the tender document;
- c. the Gozo Region had requested an explanation from the drafters of the tender document, the Local Enforcement Systems (LES) Management Committee, and the reply by the chairman of that committee, Mr Maurice Caruana, was that the experience had to be in the provision of local warden services;
- d. reference was made to:

“page 15 of the tender document – Tender Declaration – which stated that:
11. Our tender submission has been made in conformity with the Instructions to Tenderers, and in this respect we confirm having included in the appropriate packages as required, the following documentation: among them, (d) ‘Technical Capacity’ ‘Experience as Contractor’”

Dr Schembri stated that this confirmed that the experience requested at Clause 12 formed part of the technical selection criteria;

- e. the clarifications, e.g. addendum no. 2, which formed an integral part of the tender document, indicated that the selection and award criteria were complementary;
- f. considering the very title of the tender, the contracting authority expected the experience of the tenderer to be in the provision of local warden services;
- g. in general, she agreed with the legal submissions that had been made by Dr Keith Grech, legal representative of the Central Regions, on this aspect of the appeal, particularly those relating to the following:
 - i. the appellant company did not have the required 5 years experience in the provision of warden services because the experience the company submitted referred to services rendered to private or public entities which were very different from those performed by a licensed local warden; and
 - ii. the contracting authority had the right and responsibility to put its mind at rest that the bidders were both, administratively and technically, competent to deliver the requested service.

Dr Samuel Azzopardi, Chairman of the Evaluation Board, under oath, declared that:

- a. the appellant company did not have 5 years experience in local warden services;
- b. albeit Clause 12 and para. (d) of the ‘Tenderer’s Declaration’ referred to contractor’s experience, yet the former indicated 5 years experience whereas the latter did not

indicate the number of years;

- c. at envelope two, stage one of the tenderers was found compliant whereas the other tenderer, the appellant company, was not found compliant;
- d. the next step would have been the opening of envelope 3, which contained the price, and in this case Dr Azzopardi opined that the award had to be given on the basis of price and not the Most economically Advantageous Tender (MEAT) principle;
- e. the evaluation board felt that, in order to eliminate any doubts, a clarification had to be sought from the Chairman, Management Committee, Local Enforcement Systems, who, by email dated 17th February 2011, confirmed that the experience had to be in the provision of local warden services which, ultimately, was the scope of the tender under review.

Mr Maurice Caruana, Chairman Management Committee, Local Enforcement Systems, under oath, gave the following evidence:-

- i) he confirmed his advice given as per email dated 17th February 2011 that the experience of the tenderer had to be related to the provision of local warden services and that the 5 year minimum experience was included in Clause 12 of the tender document as a mandatory requirement;
- ii) at the start the Management Committee, Local Enforcement Systems, had not included a specific number of years in terms of experience and that it was on the advice of the Contracts Department that the number of years was specified otherwise the adjudication would be subjective rather than objective;
- iii) the purpose of the reform of the Local Enforcement Systems was to do away with the various present local council contracts for local warden services and to issue a tender at a regional level and, since this reform started in February 2009, the operators/contractors had ample time to make the necessary adjustment;
- iv) albeit the Local Enforcement Systems Management Committee did not consider Regulation 52 with regard to whether a period of 3 or 5 years of experience was required, yet, in this regard, he rested on the extensive experience of the Contracts Department;
- v) he considered Clause 12 was a crucial provision in the tender document and that the Department of Contracts had organized a seminar to thoroughly brief the committees that were to adjudicate these tenders; and
- vi) he could not recall if the tender award was to be based on price only or the Most economically Advantageous Tender (MEAT) principle.

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 25th 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) in the case of the Gozo Region no mention had been made as to whether the appellant company had a sufficient number of local wardens on its books to execute this contract with the only reason for exclusion being the one which made reference to the 5 years minimum experience and, in this case, that had to be related to ‘the local warden services’, (b) once the requirement of 5 year minimum experience was included under the ‘Award’ – and not under ‘Selection Criteria’ – the evaluation board could not exclude a bidder on administrative or technical grounds at award stage and (c) the decision of the Gozo Region was illegal because it was based on a criterion which was not included in the tender document, namely, it did not specify that the 5 years experience had to be ‘in the local warden services’;
- having considered the contracting authority’s representative’s reference to the fact that (a) once the appellant company was alleging that certain provisions of the tender document were not in order or even illegal, one would have expected the said company, either not to take part in the tendering procedure or to take all legal measures that it deemed necessary to safeguard its interests, (b) the sole reason for exclusion was that the appellant company did not demonstrate that it had the experience requested at Clause 12 of the tender document because the experience the company submitted referred to services rendered to private or public entities which were very different from those performed by a licensed local warden and (c) the clarifications, e.g. addendum no. 2, which formed an integral part of the tender document, indicated that the selection and award criteria were complementary;
- having taken note of the testimony given by the Chairman Management Committee, Local Enforcement Systems, especially the points referred to in connection with the fact that (a) the experience of the tenderer had to be related to the provision of local warden services and that the 5 year minimum experience was included in Clause 12 of the tender document as a mandatory requirement, (b) at the start the Management Committee, Local Enforcement Systems, had not included a specific number of years in terms of experience and that it was on the advice of the Contracts Department that the number of years was specified otherwise the adjudication would be subjective rather than objective and (c) since this reform started in February 2009, the operators/contractors had ample time to make the necessary adjustment,

reached the following conclusions, namely:

1. 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.

2. This Board feels that the appellant company aimed at pushing the argument somewhat a bit too far when it was contended that the decision of the Gozo Region was illegal because it was based on a criterion which was not included in the tender document, namely, it did not specify that the 5 years experience had to be ‘in the local warden services’. Apart from the evidence given by the Chairman Management Committee, Local Enforcement Systems wherein the latter, *inter alia*, placed emphasis on the fact that the experience of the tenderer had to be related to the provision of local warden services, this Board feels that one could not expect the interpretation to be anything but.
3. The Public Contracts Review Board feels that the evaluation board’s claim that the sole reason for the appellant company’s exclusion was that the said company did not demonstrate that it had the experience requested at Clause 12 of the tender document because the experience the company submitted referred to services rendered to private or public entities which were very different from those performed by a licensed local warden was correct.

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