

PUBLIC CONTRACTS REVIEW BOARD

Case No. 303

RX/1 /10

Tender for the Provision of Local Warden Services – Regjun Xlokk

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.

Three (3) tenderers submitted their offers.

Messrs Aurelia Enforcement Ltd filed an objection on 6th May 2011 against the decision by the Regjun Xlokk 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 Service 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 Xlokk

Dr Joseph Mifsud	Legal Representative
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Evaluation Board:

Chev Paul Farrugia	Chairman
Mr Joseph Attard	Member
Mr John Bonavia	Member
Mr George Cremona	Member
Ms M' Lourdes Lautier	Secretary

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

Dr Adrian Delia, legal representative of Aurelia Enforcement Ltd, the appellant company, remarked that by means of a letter dated 16th May 2011, his client was informed that its tender was not successful since:

- (i) *"... it results that Aurelia Enforcement Limited does not have the required years of experience according to the tender document at page 9 - Article 12 - Award, which states that one of the requirements was that of a track record (minimum 5 years) that would have been taken very much into consideration and will be one of the basis of the award and*
- (ii) *Besides, the number of Local Wardens enrolled by your company is not enough to cater of the requirements of this region."*

On the issue of 'experience' Dr Delia made the following submissions:

- 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 that:

"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, argued Dr Delia, was rather ambiguous with regard to whether award was to be made according to the lowest price or on the basis of the most economically advantageous tender (MEAT) and, in fact, he had challenged this by filing a judicial protest/complaint and consequently the Public Contracts Review Board held that, *prima facie*, the claims made by his client did not subsist. Notwithstanding, claimed Dr Delia, the same 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 requirement was not mentioned anywhere else except under the 'award criteria' and, as a result, 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 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. If the reason for exclusion was based on the experience required in Clause 12 under 'Award' then, argued Dr Delia, the exclusion of his client was illegal because there was no 'selection' criterion in the tender document that referred to the mandatory requirement of 5 years minimum experience;
- h. The European Court of Justice, in its judgment *Lianakis et vs Alexandroupolis et* (C-532/06), stated *inter alia* that:

"it must be held that, in a tendering procedure, a contracting authority is precluded by Articles 23(1), 32 and 36(1) of Directive 92/50 from taking into account as 'award criteria' rather than as 'qualitative selection criteria' the tenderers' experience, manpower and equipment, or their ability to perform the contract by the anticipated deadline."

As a result, the issue of experience should not be considered as an 'award' criterion "if the reason for exclusion was based on the experience required in Clause 12 under 'Award' then the exclusion of his client was illegal because there was no 'selection' criterion in the tender document that referred to the mandatory requirement of 5 years minimum experience."

With regards to the issue of insufficient number of local 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 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. If the contracting authority was going to insist on this then that, effectively, meant that only the present/incumbent operators, who employed all the existing licensed wardens could participate to the exclusion of the rest;
- iv. the tender document itself did not require this 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 by way of 'transfer of business' or 'the submission of a call for applications'.

Dr Joseph Mifsud, legal representative of the Xlokk Region, - while expressing his agreement with the legal arguments put forward by Dr Keith Grech and Dr Alex Sciberras, the legal representatives of the Central and South Regions respectively, on the same reasons for the appellant company's disqualification in respect of similar contracts - went on to add his own remarks, namely:

- i. the adjudicating board carried out its evaluation according to standard evaluation procedures which laid down the various stages of the process;
- ii. the process conducted by the Xlokk Region was quite thorough as evidenced from the various clarifications made, the number of meetings held and the reports generated;
- iii. Reg. 52 of the Public Procurement Regulations requested a lot of information from the tenderer in terms of evidence of technical capacity even with regard to personnel and their qualifications;
- iv. Art. 32 of Directive 92/50 stipulated the 5 year experience which reflected itself in Clause 12 of the tender document;
- v. a local warden was a public officer whose responsibilities at law were much more onerous than those of, say, a private guard or bouncer so much so that a local warden possessed a specific licence and Art. 19 of the Private Guards and Local Wardens Act (Cap 389) even provided additional protection to the local warden in the exercise of his/her duties;
- vi. the local warden service was very particular in its nature such that it involved aspects of public order and that, besides justifying the requirement of a minimum 5 years experience, also warranted that the experience had to be related to local warden

services;

vii. Clause 14 'Submissions' at page 9 of the tender document stated that:

“

(a) the tenderer shall include with his tender, among others, the following information:

(i) a designation of the works and services to be performed by the Tenderer with his own resources;

(ii) a list of names of any sub-contractors or other persons or entities of work, if any, whom he may be proposing to engage on this contract

(iv) conditions of work of local wardens ..; and

(v) organizational and staff ranking structures.

(b) the tenderer will be required to establish to the satisfaction of the Region the reliability and responsibility of the persons or entities proposed to furnish and perform the works or the services described in the Tender Documents;”

As a consequence, the evaluation board had to base its assessment and to ensure that the service would be provided satisfactorily on the documentation provided by the tenderer and not on what might take place at later stages;

viii. the appellant company did not indicate what concrete steps the company was taking, such as training courses or letters of understanding, to secure the services of the required number of local wardens;

ix. the documents submitted by the appellants with regard to the number of local wardens registered in the company name produced three different versions:

(a) 1 full-time, 3 on reduced hours and 1 part-time wardens - as per Employment and Training Corporation list;

(b) 4 full-time and 1 part-time wardens - Aurelia Enforcement Ltd ;

(c) 7 full-time and 2 part-time wardens - Vinci Group ;

x. it was inconceivable to participate in a tendering process that required specialized services of a public order nature without having *a priori* the required resources;

xi. it was not correct to quote from court cases without giving the full details thereof as, for example, the case *Consorzio Azienda Metano (Co.Na.Me) vs Comune di Cingia de' Botti* referred to an in-house service which was totally different from the public service requested in this tender; and

xii. the European Court of Justice judgment *Lianakis et vs Alexandroupolis et (C-532/06)*, quoted Art. 36 of Directive 92/50 to deplore one who had not followed the established *modus operandi*, namely not to modify the criteria for the award of an

indefinite contract and not to include elements which, if known at the preparation stage of the offers, would have affected the tender submissions.

Ms Marie Lourdes Lautier, Executive Secretary of the Xlokk Region, under oath, gave the following evidence:-

- i. the tender was not to be awarded on the basis of price only;
- ii. the three tenderers were requested to submit the details of the personnel that were to be assigned on the Xlokk contract, including their name and experience;
- iii. the evaluation board had compiled a table of the requirements of the region and when it compared that list against the resources at the disposal of the appellant company, discrepancies emerged;
- iv. Clause 14 (b) obliged the tenderer to establish to the satisfaction of the Region the reliability and responsibility of the persons or entities proposed to furnish and perform the works or the services described in the Tender Documents;
- v. the evaluation board had to adjudicate on the situation as it stood at the closing date of the tender and the evaluation board could not assume that the tenderer would provide the service on what might take place later on or on what steps could be taken at later stages;
- vi. confirmed from the minutes of the meetings that there were inconsistencies and ambiguity with regard to the actual number of local wardens of the appellant company as had been mentioned earlier on by Dr Joe Mifsud;
- vii. the Employment and Training Corporation list, which was hardly legible, was requested twice from the appellant company in the hope that the latter sorts out the ambiguity in the number of local wardens but the same Employment and Training Corporation list resubmitted the same copy; and
- viii. two other clarifications were sought from the appellant company (a) one requesting the Police licence to establish the five years experience, which licence was backdated to 16 February 2004 where it was indicated that actual local warden services started in 2007, and (b) the other requesting the dates when they started rendering local warden services to the Floriana and Marsa local councils, as claimed in the tender submission, and the reply was October 2007 and 2009 respectively which fell short of the minimum 5 years experience requested.

At this point Dr Delia 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. 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.”*

As a consequence, according to that provision, the contracting authority could not disqualify the bidder even if the said company did not submit the information requested at Annex 11 by the closing date of the tender;

- d. Regulation 28 stated *“(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 Reg. 51 and 52 respectively 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 was without success because the Public Contracts Review Board then did not have the opportunity to hear and see all the evidence but now, for example, 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;
- g. his client was a group of companies that employed about 500 persons in different sectors, including local warden services, admittedly, to the two small local councils of Floriana and Marsa for the previous 3 ½ years;
- h. 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

- i. once the appellant company's plea at the pre-tendering procedure that the tender document, as drafted, was illegal had not been upheld, his client was now requesting that the company's offer be reintegrated in the process once the reasons for its exclusion were unfounded.

On his part Dr Mifsud concluded his remarks as follows:

- i. this tender was issued locally and across the European Union;
- ii. the adjudicating board had conducted its evaluation in a diligent and transparent manner and that was demonstrated by the 15 meetings held to deliberate on the matter;
- iii. the experience submitted by the appellant company related to services rendered to private firms which were different altogether from the public services requested in this tender; and
- iv. Clause 14 (b) stated that

“The tenderer will be required to establish to the satisfaction of the Region the reliability and responsibility of the persons or entities proposed to furnish and perform the works or the services described in the Tender Document.”

As a consequence, argued Dr Mifsud, the adjudication board was not expected to assess a submission hypothetically but on hard evidence so as to ascertain that the service would be delivered as requested. Besides, Dr Mifsud concluded, Reg. 52 (2) (b) requested *“an indication of the technicians or technical bodies involved, whether or not belonging directly to the economic operator's undertaking, especially those responsible for quality control and, in the case of public works contracts, those upon whom the contractor can call in order to carry out the work.”*

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 26th May 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 had indicated two ways or a mixture of both as to how to obtain the number of local wardens required for this contract, namely by way of ‘transfer of business’ or ‘the submission of a call for applications’ 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) Reg. 52 of the Public Procurement Regulations requested a lot of information from the tenderer in terms of evidence of technical capacity even with regard to personnel and their qualifications, (b) Art. 32 of Directive 92/50 stipulated the 5 year experience which reflected itself in Clause 12 of the tender document, (c) a local warden was a public officer whose responsibilities at law were much more onerous than those of, say, a private guard or bouncer so much so that a local warden possessed a specific licence and Art. 19 of the Private Guards and Local Wardens Act (Cap 389) even provided additional protection to the local warden in the exercise of his/her duties, (d) the local warden service was very particular in its nature such that it involved aspects of public order and that, besides justifying the requirement of a minimum 5 years experience, also warranted that the experience had to be related to local warden services, (e) the evaluation board had to adjudicate on the situation as it stood at the closing date of the tender and the evaluation board could not assume that the tenderer would provide the service on what might take place later on or on what steps could be taken at later stages, (f) the appellant company did not indicate what concrete steps the company was taking, such as training courses or letters of understanding, to secure the services of the required number of local wardens, (g) it was inconceivable to participate in a tendering process that required specialized services of a public order nature without having *a priori* the required resources, (h) the evaluation board had compiled a table of the requirements of the region and when it compared that list against the resources at the disposal of the appellant company, discrepancies emerged, (i) two other clarifications were sought from the appellant company (1) one requesting the Police licence to establish the five years experience, which licence was backdated to 16 February 2004 where it was indicated that actual local warden services started in 2007, and (2) the other requesting the dates when they started rendering local warden services to the Floriana and Marsa local councils, as claimed in the tender submission, and the reply was October 2007 and 2009 respectively which fell short of the minimum 5 years experience requested and (j) this tender was issued locally and across the European Union;

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. 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.
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. This Board feels that the fact that the experience of the tenderer had to be related to the provision of local warden services had to be considered as a '*sine qua non*'.

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