

PUBLIC CONTRACTS REVIEW BOARD

Case No. 306

MRRRA/W/230/2011; Adv. No. 32/2011

Tender for the Supply, Delivery and Planting of Standard Tamarix Gallica Trees and Atriplex Bushes along St Julians Promenade to Balluta Bay

This call for tenders was published in the Government Gazette on the 8th April 2011. The closing date for this call with an estimated budget of € 20,000 was the 26th April 2011.

Two (2) tenderers submitted their offers.

Agriproducts Ltd filed an objection on 5th May 2011 against the decision by the Ministry for Resources and Rural Affairs to award the tender to KAP Services Ltd for submitting the cheaper offer.

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 Friday, 1st July 2011 to discuss this objection.

Present for the hearing were:

Agriproducts Ltd

Dr Edward Woods	Legal Representative
Mr Jeffrey Debono	Representative

KAP Services Ltd

Dr Geoffrey Mifsud Farrugia	Legal Representative
Mr Kenneth Abela	Representative

Ministry for Resources and Rural Affairs

Dr Victoria Scerri	Legal Representative
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Evaluation Board:

Perit Ray Farrugia	Chairman
Mr Mario Bonello	Member
Mr Aldo Borg	Member
Mr Peter Calleja	Member
Mr Joseph Casaletto	Secretary

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

Dr Edward Woods, legal representative of Agriproducts Ltd, the appellant company, stated that it transpired that the KAP Services Ltd, the recommended tenderer, was a fiduciary company which meant that the beneficial owners were unknown and that any rights held by a person in a fiduciary capacity was treated as not held by him as per Companies Act (Cap. 386). He added that that meant that the recommended tenderer could not have satisfied Art. 2.2 'Eligibility'; Art. 2.3 'Only one Tender per Tenderer'; Art. 5.2.3 (e); Art. 7.4 to 7.9; Art.5, 6 and 8 of Part C 'Tenderer's Declaration(s)'.

Dr Woods made the following submissions:-

- i. a fiduciary company was the kind of set up where the beneficiaries were unknown such that it gave rise to possible abuse, lack of transparency and conflict of interest;
- ii. the limited information that one could get about this kind of company did not reveal who, at the end of the day, would benefit from this contract and, as a result, one had to question how come that a public tender could be awarded to such a fiduciary company given that it could not satisfy certain provisions in the tender document;
- iii. a fiduciary company could, after having been awarded a tender, sub-contract the works to another company thus bypassing regulations;
- iv. one had to also question whether it was transparent enough for a government department to award a public tender to unknown persons, who were behind the fiduciary company, since the legal representative of KAP Services Ltd was not the person responsible for the organisation; and
- v. the question as to whether KAP Services Ltd was going to sub-contract any of the works would be answered once one knew the persons who were behind KAP Services Ltd.

Dr Victoria Scerri, legal representative of the Ministry for Resources and Rural Affairs, the contracting authority, remarked that:-

- a. the recommended tenderer was a legally registered entity with the Malta Financial Services Authority and the fact that its shareholding was a trustee was quite in order;
- b. there was nothing amiss if such a company submitted an offer for a public contract because a fiduciary company was a regular and lawful set-up capable to conduct business activities; and
- c. a fiduciary company had its shareholding held by a trustee, then it had its directorship and Ministry for Resources and Rural Affairs was going to enter into an agreement with the legal person representing KAP Services Ltd, the fiduciary entity which had

submitted the tender.

The Chairman, Public Contracts Review Board, requested a copy of the memorandum and articles of association of the recommended tenderer with a view to determine, from its objectives, if the type of works requested in the tender document formed part of the activities that it could carry out and also if it had the resources to carry out the works contemplated in the tender.

Architect Ray Farrugia, chairman of the evaluating board, explained that:-

- i. the 'Tenderer's Declaration' indicated the person 'Duly authorised to sign this tender on behalf of' and, in this case, that person was Ms Lucia Gauci;
- ii. the adjudicating board relied on the declarations made by the tenderer and which formed part of the tender document but it did not conduct any further inquiries;
- iii. one had to note that, whereas in the past one used to request such documentation as the memorandum and articles of association, for some reason one did not request such documentation any more when issuing public tenders;
- iv. the standard section in the tender document, whereby the tenderer had to declare if one was going to sub-contract part of the works, had been left blank which was indicative that the said tenderer was not going to sub-contract;
- v. in this call for tenders the bidders were not asked to submit their track record in this line of work, which dealt with the replacement of existing trees along St Julian's Promenade, but it was stated during the hearing that, throughout the execution of the contract, the department would supervise the works. Furthermore, it was also a fact, continued the chairman of the evaluating board that penalties were contemplated for bad workmanship and so forth; and
- vi. the evaluating board was not aware of the fact that the recommended tenderer was a fiduciary company and, in fact, this was a new concept to him.

Dr Geoffrey Mifsud Farrugia, legal representative of KAP Services Ltd, the recommended tenderer, submitted that:-

- a. KAP Services Ltd was a legally registered company with the Malta Financial Services Authority and had been set up in January 2011;
- b. it was not the aim of the hearing to delve into who were the beneficiaries of KAP Services Ltd;
- c. with regard to the operational set up, KAP Services Ltd, like any other company, had its own premises, located at Ta' Maggi Ind. Park Xghajra l/o Zabbar as well as three full-time clerks together with a number of part-time employees who were capable of

carrying out the works connected with tree planting described in the tender document;

- d. KAP Services Ltd, as a fiduciary company, was represented by an accountant or a company of accountants, but behind the accountant there was a fully-fledged set-up that operated as any other company;
- e. Mr Kenneth Abela, who was present at the hearing, was indicated as the ultimate beneficiary of the company and that demonstrated that there was no intention to conceal the ultimate beneficiary of the company;
- f. his client had undertaken, through signed declarations contained in the tender document, to carry out the works and that the company was not going to sub-contract any part thereof; and
- g. the recommended tenderer could carry out these works in terms of its memorandum and articles of association.

Dr Woods insisted that:-

- i. apart from the operational aspect, which was quite relevant, this was a matter of principle as to how a government department could award a tender to a bidder who was unknown to it because that, by itself, should have excluded the recommended tenderer from even submitting its offer because it could not offer certain guarantees as per tender document, such as those at Clause 8 of the 'Tenderer's Declaration' which stated as follows:

"We have no potential conflict of interest or any relation with other candidates or other parties in the tender procedure at the time of the submission of this application. We have no interest of any nature whatsoever in any other tender in this procedure. We recognize that our tender may be excluded if we propose key experts who have been involved in preparing this project or engage such personnel as advisers in the preparation of our tender."

In spite of that declaration one had to question how the contracting authority could verify this given the fiduciary set up of the recommended tenderer as against the set up of his client which was transparent and verifiable;

- ii. the data protection act prevented even the accountant/representative of a fiduciary company from revealing who was behind the fiduciary company, unless such person was specifically authorized to do so;
- iii. at company formation stage, the Malta Financial Services Authority carried out enquiries with regard to matters concerning money laundering but it did not go into the criminal record of shareholders;
- iv. if one were to allow fiduciary companies to tender then, for example, one could form

three fiduciary companies where each would submit a tender quoting different prices for the same works when the beneficiaries would be the same persons thus the same persons would be increasing their chance or effectively securing the contract award;

- v. in this case, KAP Services Ltd had nothing to do with Agriproducts Ltd but one questioned how, in other cases, could one vouch that KAP Services Ltd and X Ltd had nothing to do with one another. As a consequence, proceeded Dr Woods, if one were to allow fiduciary companies to participate in public tenders then one would be creating a precedent whereby transparency in public procurement could be compromised and, in such an event, he would even advise his client to, henceforth, operate as a fiduciary company; and
- vi. even a private person or entity would want to know with whom one was dealing when awarding a contract and that should apply even more in the case of public procurement for the sake of equity, transparency and level playing field.

Dr Mifsud Farrugia submitted these reactions:-

- a. there were no provision in the tender document or in legislation that excluded or discriminated against a fiduciary company from submitting its bid;
- b. the 'Tenderer's Declaration' cited by the appellant company referred to a number of declarations which each bidder had to make with regard to bankruptcy and such other matters;
- c. the appellant company was correct in its argument that fiduciary beneficiaries could submit different tenders under different entities for the same contract but one had to note that in this tendering process there were only two bidders, his client and the appellant company, and, therefore, the prospect of conflict of interest raised by the appellant company was inexistent;
- d. if, in this case, there were any doubts about the beneficiary of KAP Services Ltd, a fiduciary company, those doubts have been swept aside as the beneficiary, Mr Kenneth Abela, was present in person at the hearing even though the tender document did not request his client to divulge the fiduciary beneficiaries;
- e. his client, KAP Services Ltd, had been awarded this tender on its own merits and, in the process, adhered to tender conditions and regulations;
- f. the filtering carried out by the Malta Financial Services Authority in order to register a fiduciary company was more rigorous than that carried out with regard to the registration of a company under the normal procedure such that a person with a criminal record could set up a company but not a fiduciary company;
- g. a fiduciary company and a 'normal' company were both recognized and could both be registered under local and EU legislation;

- h. the regulations listed a number of companies which were precluded from tendering but fiduciary services was not one of them and that proved that the legislators had no intention of excluding fiduciary companies from participating in such tendering processes otherwise they would have made provisions to that effect; and
- i. his client had already been awarded about 13 tenders.

Dr Woods contended that:-

- i. contrary to what the recommended tenderer stated, fiduciary companies were prevented from doing certain things and, in this case, a fiduciary company could not have satisfied certain provisions in the tender document;
- ii. it was preoccupying to hear that 13 tenders were awarded to an unknown entity, i.e. without lifting the corporate veil for the sake of knowing who the beneficiaries were;
- iii. the tender document included provisions for the purpose of establishing who the bidder was but in this case the contracting authority failed to enforce those provisions; and
- iv. the claim made by the recommended tenderer that fiduciary companies were scrutinized more closely by the Malta Financial Services Authority was not correct.

At this point the Chairman, Public Contracts Review Board, remarked that the evaluation exercise did not delve into certain aspects such as the track record and the viability of the bidder but the evaluation board felt comfortable that when problems occurred during contract execution it could have recourse to legal action with all the time, money and effort that that would involve when certain precautionary measures at tender document preparation stage would avoid all that. He added that, in order to get value for money, it was crucial for the contracting authority to ensure 'a priori' that the contract was going to be carried out by a competent person or group of persons and up to the desired standard.

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 5th May 2011 and also through their verbal submissions presented during the hearing held on 1st 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) a fiduciary company was the kind of set up where the beneficiaries were unknown such that it gave rise to possible abuse, lack of transparency and conflict of interest, (b) a public tender cannot be awarded to a fiduciary company given that it cannot satisfy certain provisions in the tender document, (c) a fiduciary company could, after having been awarded a tender, sub-contract the works to

another company thus bypassing regulations, (d) the data protection act prevented even the accountant/representative of a fiduciary company from revealing who was behind the fiduciary company, unless such person was specifically authorized to do so, (e) if one were to allow fiduciary companies to tender then, for example, one could form three fiduciary companies where each would submit a tender quoting different prices for the same works when the beneficiaries would be the same persons thus the same persons would be increasing their chance or effectively securing the contract award, (f) if one were to allow fiduciary companies to participate in public tenders then one would be creating a precedent whereby transparency in public procurement could be compromised, (g) even a private person or entity would want to know with whom one was dealing when awarding a contract and that should apply even more in the case of public procurement for the sake of equity, transparency and level playing field and (h) it was preoccupying to hear that 13 tenders were awarded to an unknown entity, i.e. without lifting the corporate veil for the sake of knowing who the beneficiaries were;

- having considered the contracting authority's representative's reference to the fact that (a) the recommended tenderer was a legally registered entity with the Malta Financial Services Authority and the fact that its shareholding was a trustee was quite in order, (b) there was nothing amiss if such a company submitted an offer for a public contract because a fiduciary company was a regular and lawful set-up capable to conduct business activities, (c) a fiduciary company had its shareholding held by a trustee, then it had its directorship and Ministry for Resources and Rural Affairs was going to enter into an agreement with the legal person representing KAP Services Ltd, the fiduciary entity which had submitted the tender, (d) the 'Tenderer's Declaration' indicated the person 'Duly authorised to sign this tender on behalf of' and, in this case, that person was Ms Lucia Gauci, (e) the adjudicating board relied on the declarations made by the tenderer and which formed part of the tender document but it did not conduct any further inquiries, (f) the standard section in the tender document, whereby the tenderer had to declare if one was going to sub-contract part of the works, had been left blank which was indicative that the said tenderer was not going to sub-contract, (g) in this call for tenders, which dealt with the replacement of existing trees along St Julian's Promenade, the bidders were not asked to submit their track record in this line of work, (h) throughout the execution of the contract, the department would be supervising the works and (i) the evaluating board was not aware of the fact that the recommended tenderer was a fiduciary company;
- having considered the recommended tenderer's representative's reference to the fact that (a) KAP Services Ltd was a legally registered company with the Malta Financial Services Authority and had been set up in January 2011, (b) with regard to the operational set up, KAP Services Ltd, like any other company, had its own premises, located at Ta' Maggi Ind. Park Xghajra l/o Zabbar as well as three full-time clerks together with a number of part-time employees who were capable of carrying out the works connected with tree planting described in the tender document, (c) Mr Kenneth Abela, who was present at the hearing, was indicated as the ultimate beneficiary of the company and that demonstrated that there was no intention to conceal the ultimate beneficiary of the company, (d) the recommended tenderer, through signed declarations contained in the tender document, had undertaken to carry out the works and that the company was not going to sub-contract any

part thereof, (e) the recommended tenderer could carry out these works in terms of its memorandum and articles of association, (f) there were no provision in the tender document or in legislation that excluded or discriminated against a fiduciary company from submitting its bid - a fiduciary company and a 'normal' company were both recognized and could both be registered under local and EU legislation, (g) the appellant company was correct in its argument that fiduciary beneficiaries could submit different tenders under different entities for the same contract but one had to note that in this tendering process there were only two bidders and, therefore, the prospect of conflict of interest raised by the appellant company was inexistent and (h) the recommended tenderer had already been awarded about 13 tenders,

reached the following conclusions, namely:

1. The Public Contracts Review Board opines that, in order to get value for money, it was crucial for the contracting authority to ensure 'a priori' that the contract would, eventually, be carried out by a competent person or group of persons and up to the desired standard.
2. The Public Contracts Review Board argues that an evaluation exercise should delve into certain aspects such as the (a) track record and the (b) economic viability of the bidder's offer. This Board contends that the attitude adopted by the evaluation board, namely wherein the latter felt, seemingly, comforted by the fact that if problems were to arise during the contract execution the contracting authority would have recourse to legal action, left to be desired. Such an attitude, this Board argues, could lead to the incurrence of an unnecessary waste of time, money and effort that could easily be spared if certain precautionary measures at tender document preparation stage were to be implemented.
3. Nevertheless, the Public Contracts Review Board feels that the position taken by the Evaluation Board, including the fact that (a) the recommended tenderer was a legally registered entity with the Malta Financial Services Authority and the fact that its shareholding was a trustee was quite in order and (b) there was nothing amiss if such a company submitted an offer for a public contract because a fiduciary company was a regular and lawful set-up capable to conduct business activities, was legally, technically and administratively correct.
4. This Board notes that it has not come across anything which precludes such fiduciary companies from participating in similar tenders and, as a result, it is not within its remit to deny any legally recognised entity from carrying on its business in the same manner as other equally legally recognised entities do.

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

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmel Esposito
Member

15 July 2011