

PUBLIC CONTRACTS REVIEW BOARD

Case No. 324

WSC/666/2010; CT/WSC/T/3/2011

Period Contract for the Provision of Skip Service – Water Services Corporation

This call for tenders was published in the Government Gazette on the 7th January 2011. The closing date for this call was the 28th January 2011.

Four (4) tenderers submitted their offers.

Raymond Zammit (J & R Skip Hire) filed an objection on the 14th March 2011 against the decision of the Water Services Corporation to award the tender to Dimbros Ltd.

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 Monday, 5th September 2011 to discuss this objection.

Raymond Zammit (J & R Skip Hire)

Dr Charmaine Cherrett	Legal Representative
Mr Raymond Zammit	Representative

Dimbros Ltd

Dr Josette Grech	Legal Representative
Ms Josephine Dimech	Representative

Water Services Corporation

Evaluation Board

Ing. Mark Perez	Chairman
Dr Neville Young	Member
Mr Neil Buhagiar	Member
Mr Emanuel Galea	Member
Mr Anthony Camilleri	Secretary

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

Dr Charmaine Cherrett, legal representative of Raymond Zammit, the appellant, submitted the following:

- i. Part 3 'Tenderer's Details' of the tender document included a declaration whereby the bidder had to confirm that he held '*the applicable permits and licences as required by Maltese Law to operate a skip collection service and disposal of related waste.*'
- ii. apart from the permit issued by the Malta Environment and Planning Authority (MEPA), the bidder had to be in possession also of the police/trade licence;
- iii. in his tender submission her client had indicated all the permits in his possession; and
- iv. on being informed that the tender had been recommended for award to Dimbros Ltd, her client decided to lodge an appeal as he had proof that the recommended tenderer did not have one of the required permits, namely the police/trade permit.

Ing. Mark Perez, chairman of the evaluation board, remarked that, from the tender submission, the board was satisfied that the recommended tenderer had the permits required to render the service requested in the call for tenders.

Dr Neville Young, a member of the evaluation board and a lawyer by profession, explained that:

- a. the contracting authority did not list all the permits/licences that the bidder had to possess to operate a skip service, the reason being that there were several of them emanating from the various legislation that regulated a commercial activity in general and waste collection/disposal in particular;
- b. in order not to risk omitting any permit, the Water Services Corporation resorted to the inclusion of the general provision whereby the bidder had to declare that he had all the necessary permits to operate and that would also cover permit/s required by regulations that might come into force after the closing date of the tender; and
- c. at the same time, the tender document did specifically request the presentation of the MEPA permit which covered this particular activity, especially with regard to the environmental liability which was requested by legislation and in respect of which the Water Services Corporation was responsible.

The Chairman Public Contracts Review Board remarked that the contracting authority ought to have listed the permits required since that would have served as a checklist for evaluation purposes rather than rely on a general declaration.

Dr Josette Grech, representing the recommended tenderer, had the following to say: -

- i. in the first instance lamented as to the manner in which the appeal had been presented which was very generic as to what had prompted the objection such that she was not in a position to prepare the case on behalf of her client;
- ii. Reg. 21 (3) stipulated, among other things, that the aggrieved tenderer may “... *file a letter of objection, together with a deposit, with the contracting authority, clearly setting forth any reason for his complaint.*”
- iii. had her client known that the objection was about the trade permit then he would have presented it at the hearing;
- iv. the trade licence, along with the other general licences, were included in the tender document and, particularly, in the declaration at Part 3 ‘Tenderer’s Details’ and a bidder would have to face the consequences if he were to make a false declaration in that regard;
- v. her client did present the MEPA permit, which regulated the operation of a skip service, because it was specifically requested; and
- vi. the appellant’s objection, as presented, should be considered by the Public Contracts Review Board as inadmissible.

The members of the Public Contracts Review Board intervened to remark that the appellant was expected and obliged to be specific as to what he was complaining about and not present a general objection with the intention of embarking on a fishing expedition. The Board added that if the appellant’s only complaint had to do with the trade licence then it should have been clearly stated in the letter of objection as the other parties had the right to be aware of the specifics of the appeal. The Chairman Public Contracts Review Board also explained that if a bidder noted from the start some kind of anomaly in the tender document then that bidding entity could have availed itself of the opportunity to stop the tendering process.

Dr Charrett declared that her client’s complaint was that the recommended tenderer did not have the trade licence. To substantiate her claim Dr Charrett exhibited a letter dated 15th March 2011 received by her client from the Director of Trade where the latter identified two persons, none of whom referred to the recommended tenderer, who held this particular licence. She added that her client got hold of this information on the 15th March 2011 and so he could not have stopped the tendering process prior to the closing date. The members of the Public Contracts Review Board went through this letter and commented that the letter did not categorically exclude that Dimbros Ltd could have the trade licence.

Dr Charrett handed to the Chairman Public Contracts Review Board a letter dated 31st January 2011 whereby she had furnished the Water Services Corporation with the licences held by Mr Zammit, her client, and at the same time drew the attention of the Water Services Corporation that most of the bidders did not operate in line with the tender requirements as far as licences were concerned which fact had to be taken into account at adjudication stage.

The submission of a copy of letters dated 31st January and 15th March 2011 was not retained necessary.

Ing. Perez reiterated that the Water Services Corporation relied on the declaration made by the tenderer and if, following adjudication, it would turn out that the said tenderer had made a false declaration then he would be penalised accordingly.

The Chairman Public Contracts Review Board remarked that, unless the MEPA permit already covered all the other required permits, it would have been much better had the Water Services Corporation listed the licences that it retained necessary and, in addition to that, include the general declaration to cover any other permit that inadvertently it might have left out of the list. He expressed the Public Contracts Review Board's disapproval to the practice of inserting general declarations to serve as exculpation clauses. The Chairman Public Contracts Review Board felt that the contracting authority should seek to have the peace of mind that it was going to enter into an agreement with a properly licensed operator because it could be the case that a bidder was facing difficulties in obtaining a particular licence or that one of the 'general' licences might have been taken away from him.

Dr Young explained that, whilst, as an evaluation board, it had to see to it that the bidders satisfied the tender conditions and specifications, yet, the Water Services Corporation, acting as the contracting authority, would inflict the penalties contemplated in the eventual contract should it result that the tenderer/contractor had submitted false declarations such as that dealing with the permits to operate.

Dr Grech pointed out that the appellant had just indicated that way back in January 2011 she had already raised with Water Services Corporation the issue regarding the trade licence however she failed to mention it in her letter of objection dated 14th March 2011 by opting to give a very general reason for her complaint. Without prejudice to what she had already submitted, Dr Grech (a) stated that her client had satisfied all the requests laid down in the tender document, which did not include the submission of the trade licence, and as a result, in her opinion, the hearing was going beyond its purpose and (b) confirmed that her client did have the trade licence and was prepared to submit it should the Public Contracts Review Board so request.

The Chairman Public Contracts Review Board requested the recommended tenderer to submit to the Secretary Public Contracts Review Board a certified true copy of the trade licence which would then be circulated among those present at the hearing.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellant's company, in terms of the reasoned letter of objection of the 14th March 2011, and through the verbal submissions made during the hearing held on the 5th September 2011, had objected against the decision of the Water Services Corporation to award the tender to Dimbros Ltd;

- having noted the appellant firm's representatives claims and observations regarding the fact that the appellant had proof that the recommended tenderer did not have one of the required permits, namely the police/trade permit and this claim was corroborated by the fact that in a letter dated 15th March 2011 received from the Director of Trade the latter identified two persons - none of whom referred to the recommended tenderer - who held this particular licence;
- having considered the contracting authority's representative's submissions, namely that (a) from the tender submission, the board was satisfied that the recommended tenderer had the permits required to render the service requested in the call for tenders, (b) the contracting authority did not list all the permits/licences that the bidder had to possess to operate a skip service, the reason being that there were several of them emanating from the various legislation that regulated a commercial activity in general and waste collection/disposal in particular, (c) in order not to risk omitting any permit, the Water Services Corporation resorted to the inclusion of the general provision whereby the bidder had to declare that he had all the necessary permits to operate and that would also cover permit/s required by regulations that might come into force after the closing date of the tender and (d) the tender document did specifically request the presentation of the MEPA permit which covered this particular activity, especially with regard to the environmental liability which was requested by legislation and in respect of which the Water Services Corporation was responsible;
- having considered the recommended tenderer's reference to the fact that (a) the appeal was presented in a very generic way as to what had prompted the objection such that the said interested party was not in a position to prepare the case, (b) had the recommended tenderer known that the objection was about the trade permit then he would have presented it at the hearing, (c) the trade licence, along with the other general licences, were included in the tender document and, particularly, in the declaration at Part 3 'Tenderer's Details' and a bidder would have to face the consequences if he were to make a false declaration in that regard, (d) it did present the MEPA permit, which regulated the operation of a skip service, because it was specifically requested, (e) the Water Services Corporation relied on the declaration made by the tenderer and if, following adjudication, it would turn out that the said tenderer had made a false declaration then he would be penalised accordingly and (f) whilst, as an evaluation board, it had to see to it that the bidders satisfied the tender conditions and specifications, yet, the Water Services Corporation, acting as the contracting authority, would inflict the penalties contemplated in the eventual contract should it result that the tenderer/contractor had submitted false declarations such as that dealing with the permits to operate,

reached the following conclusions:

1. The Public Contracts Review Board opines that the contracting authority ought to have listed the permits required since that would have served as a checklist for evaluation purposes rather than rely on a general declaration submitted by a tenderer.
2. This Board feels that the appellant was expected and obliged to be specific as to what he was complaining about and not present a general objection with the

intention of embarking on a fishing expedition. In the circumstance, the Board adds that if the appellant's only complaint had to do with the trade licence then it should have been clearly stated in the letter of objection as the other parties had the right to be aware of the specifics of the appeal. This Board also maintains that if, in a tender document, a bidder notes from the start some kind of anomaly then such bidder should avail oneself of the opportunity to stop the tendering process.

3. Following the holding of the hearing and in line with the request made by this Board at the end of the hearing to the recommended tenderer for the latter to submit to the Secretary, Public Contracts Review Board, a certified true copy of the trade licence which would then be circulated among those present at the hearing, this Board received from Dr Josette Grech, on behalf of Dimbros Ltd, a certified true copy of the trade licence issued in the name of Ms Josephine Dimech, the sole director of Dimbros Ltd as evidenced in the extract from the Memorandum and Articles of Association. In her submission Dr Grech explained that the trade licence was issued and paid for with the current licence covering the period January to December 2010. The Public Contracts Review Board is, as a result, fully satisfied that the recommended tenderer was in conformity with issues relating to trade licensing.

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

Alfred R Triganza
Chairman

Edwin Muscat
Member

Joseph Croker
Member

30 September 2011