

PUBLIC CONTRACTS REVIEW BOARD

Case No. 345

RT/01/10; Advert No. 01/10

Title: Tender for the Provision of Local Warden Services – Regjun Tramuntana

This call for tenders was published in the Government Gazette on 22 November 2010. The closing date for offers was 21 January 2011.

The estimated value of this tender was €642,510.

Two (2) tenderers had originally submitted their offers.

Messrs Aurelia Enforcement Ltd filed an objection on 30th July 2011 against the decision taken by the Regjun Tramuntana that its offer was administratively non-compliant since it did not have the experience required as per clause 12 (page 9) of the tender document.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman and Mr Edwin Muscat and Mr Joseph Croker as members convened a meeting on Wednesday 11th November 2011 to discuss this objection.

Aurelia Enforcement Ltd

Dr Adrian Delia	Legal Representative
Not. Matthew Paris	Representative
Mr Peter Formosa	Representative
Ms Jean Camilleri	Representative

The Guard and Warden House Ltd

Mr Martin Azzopardi	Representative
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Regjun Tramuntana

Dr Victor Scerri	Legal Representative
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Evaluation Committee:

Mr Anthony Mifsud	Chairman
Mr George Cremona	Member
Mr Raymond Grima	Member
Mr Kurt Guillaumier	Secretary

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

Dr Adrian Delia, legal representative of Aurelia Enforcement Ltd, the appellant company, explained that his client was informed by Regjun Tramuntana through a letter dated 22 June 2011 that its offer was found to be administratively not compliant as the firm did not have the required experience specified in clause 12 of the tender document.

Dr Delia made the following submissions:-

- i. although, as the Public Contracts Review Board would recall, other appeals had been lodged with regard to similar tenders issued by other regions, yet, this case was a bit different in the sense that the only reason for disqualification was the 5 years experience as per clause 12;
- ii. clause 12 'Award' of the tender document stated as follows:-

"It is the intention of the Region to award the Contract on the basis of the cheapest technical 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 very much into consideration and will be the basis of the award";
- iii. the content of this clause was not mandatory so much so that the term 'having regard' was used;
- iv. the 5 year minimum was tied to the track record whereas the reason for exclusion referred to 'experience' and not to 'track record';
- v. by way of track record his client presented a list of current projects;
- vi. the tender document was not clear as to whether the minimum 5 year experience was cumulative or not and whether the track record was meant to be substantive or merely a period of time rendering whatever service e.g. providing warden service with, say, two, wardens for the previous five year period was deemed better in terms of capacity than providing warden service with, say, 50, wardens for the previous 4 years;
- vii. the tender did not call for the provision of local wardens only but it included such other services as traffic management, CCTV cameras, speed cameras and attendance at tribunals;

- viii. his client possessed the required experience in all the areas specified in the tender document and that was demonstrated in the company's tender submission;
- ix. his client had submitted the licence for a local warden agency issued by the Police on 2 November 2004 to Aurelia Asset Protection Ltd and, as a result, the appellant company had started acquiring experience within the industry as from that date since, according to the Police it had "effective control" (L.N. XIII of 1996 Art. 10) of the services provided; and
- x. as a consequence, contrary to what the contracting authority was claiming, his client did possess the required 5 years minimum experience.

Dr Victor Scerri, legal representative of Regjun Tramuntana, remarked that:-

- a. one had to note that, although the tender document was identical to all regions, the only reason for disqualification brought up in this particular case was the minimum 5 years experience;
- b. as per clause 12 of the tender document the 5 year minimum experience applied to both experience and track record and one had to make a clear distinction between having a warrant to practice a profession and, actually, practising that profession because, for example, a lawyer might have been in possession of the warrant for 10 years but only practiced as a lawyer for 4 years. Needless to say, continued Dr Scerri, one had to argue that, in this particular instance, only the latter would have constituted the said lawyer's track record; and
- c. the appellant company might have had the local warden agency licence since 2004 but it only operated in the sector since July 2007 as per own tender submission.

Mr Kurt Guillaumier, a member of the adjudicating board, under oath, gave the following evidence:-

- i. the adjudicating board had made a checklist of the tender requirements and two recurring issues that arose during the evaluation concerned the number of local wardens employed by the bidder and the 5 year experience;
- ii. the adjudicating board had conceded that a bidder did not need to have on his books at the closing date of the tender the number of wardens requested in the tender but the number of wardens required could be engaged after the award of the contract;
- iii. confirmed that the tender document for the provision of warden services was identical to all regions and the Regjun Tramuntana was the last region to conclude the adjudication of the tender;

- iv. during the adjudication process the Regjun Tramuntana did take into consideration the decisions that had already been taken with regard to the tendering process of the other four regions, even with regard to the issue of the 5 year experience;
- v. experience related to the number of years that the firm operated in the sector whereas the track record referred to the type of work carried out in the sector and, for the purposes of clause 12 in the tender document, the minimum of 5 years applied to both experience and track record;
- vi. the appellant company was quite experienced in the various services requested in the tender but it did not have the minimum 5 year experience and track record in the provision of local warden service;
- vii. whilst he had his own personal opinion about the adequacy of clause 12 of the tender document, yet, the adjudicating board had to evaluate according to the provisions of the tender document and, therefore, a bidder who carried out local warden services with, say, 100 wardens for two years would fail whereas a bidder who carried out local warden services with, say, five wardens, for 5 years or more would qualify;
- viii. the appellant company had objected to clause 12 of the tender document at pre-tendering stage but the company's objection had been rejected by the Public Contracts Review Board;
- ix. the tender document demanded 5 years minimum experience and the adjudicating board had interpreted that as 5 years since the bidder started rendering local warden services;
- x. although the Police licence issued to Aurelia was dated November 2004, according to the company's tender submission, the appellant company started rendering local warden services in July 2007 and the closing date of the tender was 21 January 2011;
- xi. the list of current projects submitted by tendering company (the appellant company) covering the period 2006 to 2010 included various services, e.g. in 2006 referred to services given to Malta Drydocks (by Alberta), Motherwell Bridge Malta Ltd and Wasteserv (Malta) Ltd (by J.F. Security Ltd), which services did not include local warden services; and
- xii. according to the payment effected in September 2011 by the Regjun Tramuntana for similar services, i.e. local wardens, CCTV, speed cameras and so forth, the provision of local wardens on the beat accounted for about 90% of the bill.

(During the hearing, the appellant company's representative was handed that part of the evaluation report relevant to the company's bid, which, somehow, had not been made available to the said company).

Ms Jean Camilleri, representing Aurelia Enforcement Ltd, explained that (a) in the case of the Malta Drydocks, Aurelia Enforcement Ltd used to invoice Alberta Ltd which, in turn, invoiced the Malta Drydocks for CCTV monitors, (b) in the case of Wasteserv (Malta) Ltd Aurelia Enforcement Ltd used to invoice J.F. Security Ltd which, in turn, invoiced Wasteserv (Malta) Ltd for the installation of cameras and related services and, (c) in case of Motherwell Bridge Malta Ltd Aurelia Enforcement Ltd used to issue invoices direct to client. Ms Camilleri placed emphasis on the fact that Aurelia Enforcement Ltd, J.F. Security and Alberta belonged to the same Group of Companies.

At this point Dr Delia intervened and argued that:-

- a. the minimum 5 years requirement was tied to experience and his client's experience was demonstrated by the period of time during which the company was the holder of the relevant local warden agency licence, i.e. since Nov. 2004;
- b. the track record was meant to provide comfort to the contracting authority that the bidder could carry out the contract successfully and, in this regard, he further argued that, once the wardens that were already on the books of his client, together with the other wardens that it would have engaged following the award of the contract, would all have five years experience, then what had to be ascertained was whether the bidding company was capable in the management of personnel, which it certainly was as the group had about 600 employees on its books mostly engaged on security duties; and
- c. the tender document did not specify that the bidder had to have 5 years minimum experience in all the 8 services requested in the tender, which included, local wardens (12 in number), CCTV, towing and clamping, traffic management, etc.

Mr Raymond Grima, a member of the adjudicating board, under oath, gave the following evidence:-

- i. he confirmed that he was the authorised officer of the Regjun (previously known as 'Kumitat') Tramuntana and a member of the adjudicating board;
- ii. the Regjun Tramuntana had awarded a contract for the supervision of all the services contracted by the same region and he was employed by that contractor to carry out that supervision;
- iii. his role as an authorised officer was to supervise the execution of the contracts, to report shortcomings in the region and to, eventually, issue default notices acting on instructions by the region;
- iv. one of the services contracted by the Regjun Tramuntana and which he supervised was that for the provision of local wardens by *Guard and Warden House*, which was a bidder in the tender under review; and

- v. his employer had no connection with any of the bidders participating in the tender under review.

Dr Delia concluded that:-

- i. once Mr Guillaumier had indicated that the adjudicating board was conditioned to a certain extent by what had taken place in the tendering processes of the other regions, the Public Contracts Review Board ought to annul the award decision of the adjudicating board;
- ii. Mr Grima, one of the evaluators, had a conflict of interest or a potential conflict of interest since, in the course of his duties, he supervised the performance of *Guard and Warden House* which was one of the bidders in this tendering process;
- iii. clause 12 was an 'award' criteria, namely it should only be considered once the 'selection' criteria/process had been concluded during which a bidder would be disqualified if found not compliant;
- iv. the adjudicating board could not exclude his client outright at award stage but, according to clause 12, the board had to 'have regard' to all circumstances as to whether his client had the capability to execute the tender which primarily concerned the management of personnel and his client formed part of a group that managed about 600 personnel most of whom were engaged on security services, not to mention that one of the companies of the group offered training to local wardens;
- v. his client qualified to participate in this tendering process because the company possessed the relevant licence since November 2004 and, as a consequence, the contracting authority had to evaluate his client's bid and not exclude it at administrative stage in terms of clause 12 which referred to the 'Award'; and
- vi. Reg. 52 of the Public Procurement Regulations - Evidence of technical capacity - provided as follows:

“(2) (ii) a list of the principal deliveries effected or the main services provided in the past three years, with the sums, dates and recipients, whether public or private, involved. Evidence of delivery and services provided shall be given: - where the recipient was a contracting authority, in the form of certificates issued or countersigned by the competent authority; - where the recipient was a private purchaser, by the purchaser's certification or, failing this, simply by a declaration by the economic operator.”

On his part Dr Scerri concluded that:-

- a. there was no evidence of any conflict of interest on the part of Mr Raymond Grima, a member of the adjudicating board;

- b. the tender document was specific in its request for a 5 years minimum experience both by way of experience – possession of licence – and track record with regard not solely to personnel but to the whole organisational set-up; and
- c. he referred to case no. 300 concerning a similar tender of the Regjun Centrali where the Public Contracts Review Board had expressed itself specifically on the requirement of the 5-years experience.

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 dated 30th July 2011 and through the verbal submissions made during the hearing held on the 11th November 2011, had objected against the decision taken by the Regjun Tramuntana that its offer was administratively non-compliant since it did not have the experience required as per clause 12 (page 9) of the tender document;
- having noted the appellant firm's representatives claims and observations regarding the fact that (a) the appellant company was informed by Regjun Tramuntana through a letter dated 22 June 2011 that its offer was found to be administratively not compliant as the firm did not have the required experience specified in clause 12 of the tender document, (b) although, as the Public Contracts Review Board would recall, other appeals had been lodged with regard to similar tenders issued by other regions, yet, this case was a bit different in the sense that the only reason for disqualification was the 5 years experience as per clause 12, (c) the content of clause 12 was not mandatory so much so that the term 'having regard' was used, (d) the 5 year minimum was tied to the track record whereas the reason for exclusion referred to 'experience' and not to 'track record', (e) by way of track record the appellant company presented a list of current projects, (f) the tender document was not clear as to whether the minimum 5 year experience was cumulative or not and whether the track record was meant to be substantive or merely a period of time rendering whatever service e.g. providing warden service with, say, two, wardens for the previous five year period was deemed better in terms of capacity than providing warden service with, say, 50, wardens for the previous 4 years, (g) the tender did not call for the provision of local wardens only but it included such other services as traffic management, CCTV cameras, speed cameras and attendance at tribunals, (h) the appellant company possessed the required experience in all the areas specified in the tender document and that was demonstrated in the company's tender submission, (i) the appellant company had submitted the licence for a local warden agency issued by the Police on 2 November 2004 to Aurelia Asset Protection Ltd and, as a result, the same company had started acquiring experience within the industry as from that date since, according to the Police it had "effective control" (L.N. XIII of 1996 Art. 10) of the services provided, (j) contrary to what the contracting authority was claiming, the appellant company did possess the required 5 years minimum experience, (k) (1) in the case of the Malta Drydocks, Aurelia Enforcement Ltd used to invoice Alberta Ltd which, in turn,

invoiced the Malta Drydocks for CCTV monitors, (2) in the case of Wasteserv (Malta) Ltd Aurelia Enforcement Ltd used to invoice J.F. Security Ltd which, in turn, invoiced Wasteserv (Malta) Ltd for the installation of cameras and related services and, (3) in case of Motherwell Bridge Malta Ltd Aurelia Enforcement Ltd used to issue invoices direct to client, (l) the track record was meant to provide comfort to the contracting authority that the bidder could carry out the contract successfully and, in this regard, the appellant company further argued that, once the wardens that were already on its books, together with the other wardens that it would have engaged following the award of the contract, would all have five years experience, then what had to be ascertained was whether the bidding company was capable in the management of personnel, which it certainly was as the group had about 600 employees on its books mostly engaged on security duties, (m) the tender document did not specify that the bidder had to have 5 years minimum experience in all the 8 services requested in the tender, which included, local wardens (12 in number), CCTV, towing and clamping, traffic management, etc., (n) once Mr Guillaumier had indicated that the adjudicating board was conditioned to a certain extent by what had taken place in the tendering processes of the other regions, the Public Contracts Review Board ought to annul the award decision of the adjudicating board, (o) Mr Grima, one of the evaluators, had a conflict of interest or a potential conflict of interest since, in the course of his duties, he supervised the performance of *Guard and Warden House* which was one of the bidders in this tendering process, (p) clause 12 was an 'award' criteria, namely it should only be considered once the 'selection' criteria/process had been concluded during which a bidder would be disqualified if found not compliant, (q) the adjudicating board could not exclude the appellant company's submission outright at award stage but, according to clause 12, the board had to 'have regard' to all circumstances as to whether the appellant company's had the capability to execute the tender which primarily concerned the management of personnel and the said company formed part of a group that managed about 600 personnel, most of whom were engaged on security services, not to mention that one of the companies of the group offered training to local wardens and (r) the contracting authority had to evaluate the appellant company's bid and not exclude it at administrative stage in terms of clause 12 which referred to the 'Award';

- having considered the contracting authority's representative's submissions, namely that (a) one had to note that, although the tender document was identical to all regions, the only reason for disqualification brought up in this particular case was the minimum 5 years experience, (b) as per clause 12 of the tender document the 5 year minimum experience applied to both experience and track record and one had to make a clear distinction between having a warrant to practice a profession and, actually, practising that profession, (c) the appellant company might have had the local warden agency licence since 2004 but it only operated in the sector since July 2007 as per own tender submission, (d) the adjudicating board had made a checklist of the tender requirements and two recurring issues that arose during the evaluation concerned the number of local wardens employed by the bidder and the 5 year experience, (e) the adjudicating board had conceded that a bidder did not need to have on his books at the closing date of the tender the number of wardens requested in the tender but the number of wardens required could be engaged after the award of the contract, (f) confirmed that the tender document for the provision of warden services was identical to all regions and the

Regjun Tramuntana was the last region to conclude the adjudication of the tender, (g) during the adjudication process the Regjun Tramuntana did take into consideration the decisions that had already been taken with regard to the tendering process of the other four regions, even with regard to the issue of the 5 year experience, (h) experience related to the number of years that the firm operated in the sector whereas the track record referred to the type of work carried out in the sector and, for the purposes of clause 12 in the tender document, the minimum of 5 years applied to both experience and track record, (i) the appellant company was quite experienced in the various services requested in the tender but it did not have the minimum 5 years experience and track record in the provision of local warden service, (j) the tender document demanded 5 years minimum experience and the adjudicating board had interpreted that as 5 years since the bidder started rendering local warden services, (k) although the Police licence issued to Aurelia was dated November 2004, according to the company's tender submission, the appellant company started rendering local warden services in July 2007 and the closing date of the tender was 21 January 2011, (l) the list of current projects submitted by tendering company (the appellant company) covering the period 2006 to 2010 included various services, e.g. in 2006 referred to services given to Malta Drydocks (by Albtarta), Motherwell Bridge Malta Ltd and Wasteserv (Malta) Ltd (by J.F. Security Ltd), which services did not include local warden services, (m) there was no evidence of any conflict of interest on the part of Mr Raymond Grima, a member of the adjudicating board and (n) the tender document was specific in its request for a 5 years minimum experience both by way of experience – possession of licence – and track record with regard not solely to personnel but to the whole organisational set-up;

- having also given due consideration to Mr Grima's testimony, in particular the fact that (a) he was the authorised officer of the Regjun (previously known as 'Kumitat') Tramuntana and a member of the adjudicating board, (b) the Regjun Tramuntana had awarded a contract for the supervision of all the services contracted by the same region and he was employed by that contractor to carry out that supervision, (c) his role as an authorised officer was to supervise the execution of the contracts, to report shortcomings in the region and to, eventually, issue default notices acting on instructions by the region, (d) one of the services contracted by the Regjun Tramuntana and which he supervised was that for the provision of local wardens by *Guard and Warden House*, which was a bidder in the tender under review and (e) his employer had no connection with any of the bidders participating in the tender under review,

reached the following conclusions:

1. The Public Contracts Review Board is fully cognizant of the fact that, whilst it is true that other appeals had been lodged in the past with regard to similar tenders issued by other regions, yet, this case was different in the sense that the only reason for disqualification was the 5 years experience / track record as per clause 12.
2. The Public Contracts Review Board opines that the Regjun Tramuntana should have refrained from taking into consideration the decisions that had already been

taken with regard to the tendering process of the other four regions, even with regard to the issue of the 5 year experience.

3. The Public Contracts Review Board thoroughly deliberated upon the question of the perceived / potential conflict of interest of Mr Grima, one of the evaluators, wherein it was alleged that, in the course of his duties, he supervised the performance of *Guard and Warden House* which was one of the bidders in this tendering process. This Board does not agree with the claim made by the appellant company's representatives. The justification given by Mr Grima under oath was uncontested, as well as, deemed as justifiable and pertinent by this Board.
4. The Public Contracts Review Board agrees with the interpretation given by the contracting authority and the evaluation board in so far as the fact that 'experience' related to the number of years that the firm operated in the sector whereas the 'track record' referred to the type of work carried out in the sector and, for the purposes of clause 12 in the tender document, the minimum of 5 years applied to both 'experience' and 'track record'.
5. From evidence submitted, the Public Contracts Review Board opines that albeit, seemingly, the appellant company was quite experienced in the various services requested in the tender, yet, it did not have the minimum 5 years experience and track record in the provision of local warden service. This Board, whilst agreeing with the appellant company in so far as the fact that the tender document did not specify that the bidder had to have 5 years minimum experience in all of the eight (8) services requested in the tender, yet it fails to comprehend how an evaluation board, evaluating a submission in connection with the award of a tender for the provision of local warden services, could have been expected to, positively, assess such a submission – as filed by the appellant company – which, predominantly, included the supply / installation / supervision of CCTV monitors and related services. All this when all is considered within a context where such services would have, largely, been carried out outside the scope of the requirements as contemplated in the tender in question, namely, the provision of local warden service.
6. This Board acknowledges the fact that, whilst the appellant company might have had the local warden agency licence since 2004, yet it only operated in the sector since July 2007 - as per own tender submission - and that the closing date of the tender was 21 January 2011.

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

Joseph Croker
Member

23rd November 2011