

PUBLIC CONTRACTS REVIEW BOARD

Case No. 350

MRRA/W/428/2011

Tender for the Supply Fruit Trees, Rootstock and other Propagation Material to St Vincent de Paule Fruit Tree Nursery

This call for tenders was published in the Government Gazette on 6th September 2011. The closing date for this call with an estimated budget of €40,000 was the 27th September 2011.

Four (4) tenderers submitted their offers.

Agriproducts Ltd an objection on the 7th November 2011 against the decision taken by the Ministry for Resources and Rural Affairs to recommend award of tender to B.S.S. Ltd.

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 Wednesday, 2nd December 2011 to discuss this objection.

Present for the hearing were:

Agriproducts Ltd

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| Dr Edward Woods | Legal Representative |
| Mr Jeffrey Debono | Representative |

B.S.S. Ltd

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| Dr Anne Marie Spiteri | Legal Representative |
| Mr Godfrey Bezzina | Representative |
| Dr Stephanie Deguara | Legal Representative |

Ministry for Resources and Rural Affairs (MRRA)

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| Dr Mario Spiteri | Director General |
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Adjudicating Board

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| Mr Louis Gatt | Chairman |
| Mr Carmelo Briffa | Member |
| Ms Natasha Farrugia | Member |
| Mr Dennis Sciberras | Member |

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

Dr Edward Woods, legal representative of Agriproducts Ltd, the appellant company, furnished the Public Contracts Review Board with a copy of the Seventh Schedule – Contents and Form of Annual Return – with regard to B.S.S. Ltd dated 5th June 2011 and Bezzina Bros Ltd dated 21 November 2010 which he had downloaded from the website of the Malta Financial Services Authority. Dr Woods then made the following submissions:

- i. three tenderers participated in this tender procedure, namely, B.S.S. Ltd, the recommended tenderer, Agriproducts Ltd, his client, and Bezzina Bros. Ltd;
- ii. the directors of B.S.S Ltd were Mr Dennis Bezzina, Mr Godfrey Bezzina and Mr Leo Grima;
- iii. the shareholders of B.S.S Ltd were Bezzina Bros Ltd, with 4,999 shares, and Mr Godfrey Bezzina, with 1 share;
- iv. Bezzina Bros Ltd, which ranked third in this tendering procedure, effectively owned B.S.S. Ltd, the recommended tenderer;
- v. two of the three bidding firms were effectively owned by the same shareholders and, as a result, had the bids of B.S.S. Ltd and Bezzina Bros Ltd ranked first and second, then B.S.S. Ltd could have renounced its bid so that the tender would be awarded to Bezzina Bros Ltd at a higher price;
- vi. made reference to the tender document, specifically to the tenderer's declaration:-

- a. clause 5 which, among other things, stated that,

“We confirm that we are not tendering for the same contract in any other form”

- b. clause 8, which, inter alia, stated that

“We have no potential conflict of interests 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”

- c. clause 9, which, among other things, stated that

“We also fully recognise and accept that any false, inaccurate or incomplete information deliberately provided in this application may result in our exclusion from this and other contracts funded by the Government of Malta and the European Communities”

- vii. this was a clear case of conflict of interest coupled with a breach of tender conditions; and
- viii. referred the Public Contracts Review Board to case no. 312 (convened by this same Board) where a bidder was disqualified on similar grounds

Dr Mario Spiteri, Director General, representing the contracting authority, declared that albeit he was not directly involved in the adjudication of this tender, yet he could state that the contracting authority had noted that B.S.S. Ltd and Bezzina Bros Ltd had submitted two separate VAT registration numbers but the contracting authority had not delved into the shareholding structure of the bidders or whether they were interconnected. He added that, given this evidence it would appear that certain conditions of the tender document had not been respected. Dr Spiteri appreciated the immediate attention given to this case by the Public Contracts Review Board because if these items would not be available for planting by February 2012 then it would be a useless exercise.

Mr Louis Gatt, chairman of the adjudicating board, confirmed that, during the evaluation stage, the board did not check the shareholding of the bidding companies but it checked that they had a different VAT registration number and it also noted the declarations made by bidders in their tender submission.

The Chairman Public Contracts Review Board remarked that it did not seem to be the practice for contracting authorities in general to examine the shareholding structure of bidding companies to watch out for any conflict of interest. Nevertheless, he continued by stating that, as rightly pointed out by Dr Woods, since such information was readily and publicly available at the Malta Financial Services Authority, then the Public Contracts Review Board would recommend that such verifications with the Malta Financial Services Authority data ought to be carried out as a matter of course.

Mr Godfrey Bezzina, representing the recommended tenderer, claimed that the tender provisions quoted by the appellant company were irrelevant to this tender and he requested the appellant company to explain the implied conflict of interest especially since the two companies were registered at and operated from separate addresses, had different VAT registration numbers and a different administration. Mr Bezzina insisted that one could not preclude two separate and distinct companies from competing in a tendering process.

Dr Woods reiterated that the conflict of interest resulted from the facts that he exposed at the start of the hearing and he added that it was not up to him to prove anything because the evidence was quite clear. Dr Woods reiterated that if Bezzina Bros Ltd had ranked second in this tendering process instead of Agriproducts, then B.S.S. Ltd could have dropped its offer so that the tender would be awarded to the second ranked bidder at a higher price.

Dr Anne Marie Spiteri, also representing the recommended tenderer, questioned the argument as to why a company which had a broad shareholding, e.g. GO plc, could not participate in tenders where one or some of its shareholders were shareholders in other companies bidding for the same contract.

Mr Bezzina contended that the case of a company presenting different options in its tender submission and the case under examination were one and the same thing. Mr Bezzina also objected to the appellant being represented by one of its shareholders, in the person of Mr Jeffrey Debono, claiming that he was not legally authorised.

The Chairman Public Contracts Review Board observed that this was not the case of an individual having shares in different companies but that a company was a shareholder in another company and, in this case, the main shareholder. Furthermore, he also remarked that, generally speaking, a company was not precluded from presenting different options in a tendering process. He added that a company could be represented by its legal adviser or by anyone which the company decided to represent it.

Mr Bezzina concluded that B.S.S. Ltd was technically compliant and the cheapest and hence there was no reason why it should not be awarded the tender.

The Chairman Public Contracts Review Board observed that the appeal did not question the technical compliance or the price of the bids but it raised the element of conflict of interest between two companies bidding for the same contract.

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 7th November 2011 and through the verbal submissions made during the hearing held on the 2nd December 2011, had objected against the decision taken by the Ministry for Resources and Rural Affairs to recommend award of tender to B.S.S. Ltd;
- having noted the appellant firm's representatives claims and observations regarding the fact that (a) three tenderers participated in this tender procedure, namely, B.S.S. Ltd, the recommended tenderer, Agriproducts Ltd, his client, and Bezzina Bros. Ltd, (b) the directors of B.S.S Ltd were Mr Dennis Bezzina, Mr Godfrey Bezzina and Mr Leo Grima, (c) the shareholders of B.S.S Ltd were Bezzina Bros Ltd, with 4,999 shares, and Mr Godfrey Bezzina, with 1 share, (d) Bezzina Bros Ltd, which ranked third in this tendering procedure, effectively owned B.S.S. Ltd, the recommended tenderer, (e) clauses 5, 8 and 9 respectively which, *inter alia*, included declarations made by tenderers, more than amply demonstrated that the tender document did not accept any instances of possible conflict of interests, (f) this was a clear case of conflict of interest coupled with a breach of tender conditions and (g) the Public Contracts Review Board, in Case Ref. No. 312 (convened by this same Board) had disqualified a tenderer on similar grounds;
- having considered the contracting authority's representative's submissions, namely that (a) the contracting authority had noted that B.S.S. Ltd and Bezzina Bros Ltd had submitted two separate VAT registration numbers but the contracting authority had not delved into the shareholding structure of the bidders or whether they were interconnected, (b) the board noted the declarations made by bidders in their tender submission and (c) given this evidence it would appear that certain conditions of the tender document had not been respected;
- having also considered the recommended tenderer's representative's submissions namely that (a) the tender provisions quoted by the appellant company were irrelevant to this

tender, (b) the appellant company had still to explain the implied conflict of interest especially since the two companies were registered at and operated from separate addresses, had different VAT registration numbers and a different administration, (c) one could not preclude two separate and distinct companies from competing in a tendering process and (d) the case of a company presenting different options in its tender submission and the case under examination were one and the same thing,

reached the following conclusions:

1. The Public Contracts Review Board disagrees with the recommended tenderer's claim wherein it was stated that the case of a company presenting different options in its tender submission and the case under examination were one and the same thing. This Board argues that in the first instance the scenario contemplates the same company offering different options whilst the second instance refers to two different companies submitting two different offers.
2. The Public Contracts Review Board takes full cognisance of the statement made by the contracting authority's representative wherein it was stated that, given the evidence as presented by the appellant company, it would appear that certain conditions of the tender document had not been respected.
3. The Public Contracts Review Board agrees with the recommended tenderer that, generally speaking, one could not preclude two separate and distinct companies from competing in a tendering process. Nevertheless, the Public Contracts Review Board also opines that, whilst fully aware of the different *persona* that each company is vested with, yet, it is also undeniable that, in this particular instance, the conflict of interest that, separately, the components of the respective companies had formally denied from being present, went beyond being dubious. This Board concludes that enough evidence was presented by the appellant company's representatives as to the blatant manifestation of conflict of interest which went against the formal declarations made by both B.S.S. Ltd and Bezzina Bros. Ltd which declarations had been unilaterally endorsed by the respective directors.

In view of the above this Board finds in favour of the appellant company and recommends that (a) its bid should not only be reintegrated in the tendering process but also (b) the deposit paid by the latter should be reimbursed.

Furthermore, this Board also recommend that the evaluation board should re-assess and verify for correctness the declarations submitted by B.S.S. Ltd and Bezzina Bros Ltd in their respective offers.

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmel Esposito
Member

9th December 2011