

PUBLIC CONTRACTS REVIEW BOARD

Case No. 277, 278, 279, 280, 281, 282

Case No. 277

DH/1203/10 - Various Offices with the Health Division

Case No. 278

DH/1204/10 - Sir Paul Boffa Hospital

Case No. 279

NBTC/052/10 - National Blood Transfusion Centre

Case No. 280

DH/2733/10 - Cospicua, Paola, Floriana Health Centres, Speech Language Department & Occupational Health Unit

Case No. 281

DH/3440/09 - St Luke's Hospital

Case No. 282

DH/1205/10 - B'Kara, Rabat, Qormi, Mosta and Gzira Health Centres and Professional Development Unit Mtarfa

These calls for tenders were published in the Government Gazette on 3rd August 2010. The closing date for these calls with an estimated budget of:

€ 108,305.60 (Case No. 277)

€ 83,361.20 (Case No. 278)

€ 30,594.20 (Case No. 279)

€ 106,919.80 (Case No. 280)

€ 75,833.60 (Case No. 281)

€ 106,419.60 (Case No. 282)

was 15th September 2010.

The number of tenderers who submitted their offers were:

Case No. 277

Four (4) tenderers

Case No. 278

Four (4) tenderers

Case No. 279

Four (4) tenderers

Case No. 280

Four (4) tenderers

Case No. 281

Four (4) tenderers

Case No. 282

Four (4) tenderers

Mach Clean Ltd filed an objection on 22 February 2011 against the decision by the Health Division within the Ministry of Health, the Elderly and Community Care to award these tenders to Clentec 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 Monday, 18th April 2011 to discuss this objection.

Present for the hearing were:

Mach CleanLtd

Mr Joe Sammut
Ms Paulette Gafa'

Accountant/Auditor
Representative

Clentec Ltd

Dr Antoine Naudi
Dr Victor Axiak
Ms Petra Pace
Mr Saviour Turner
Mr Simon Turner

Legal Adviser
Legal Adviser
Representative
Representative
Representative

Health Division – Ministry of Health, the Elderly and Community Care

Ms Rita Tirchett

Representative

Evaluation Board

Mr Marvic Fenech Adami
Ms Lorraine Muscat
Mr Adrian Pace
Mr Paul Mercieca
Ms Maria Galea

Chairman
Member
Member
Member
Secretary

Industrial and Employment Relations Department

Mr Kurt Balzan

Principal Officer/Inspector

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

Mr Joe Sammut, representing Mach Clean Ltd, contended that the six tenders in question should not be awarded at the prices/rates quoted by Clentec Ltd, the recommended tenderer, because the hourly rate quoted was below the minimum wage rate stipulated by regulations, namely the National Minimum Wage National Standard Order, 2010, (L.N. 527 of 2010), whereas his client had submitted quotes in accordance with statutory requirements. Mr Sammut stated that the minimum hourly rate was fixed at €3.84 which, after adding up the benefits, e.g. statutory bonuses, vacation leave and so forth, would work out at €4.82 and, inclusive of VAT, would add up to €5.688 per hour. Mr Sammut stressed that the rate of €5.688 per hour was exclusive of cost of materials and profit.

Mr Sammut declared that the recommended tenderer quoted the rate of €4.90 which did not even cover the minimum wage set out in the national standard order and he claimed that that was unacceptable.

Mr Marvic Fenech Adami, chairman of the evaluation board, remarked that the board had checked that the price quoted covered the minimum wage plus a small amount for overheads. Mr Fenech Adami stated that the evaluation board did not go through the recommended tenderer's costs to render this service, e.g. overheads, profit margins or if the tenderer was taking a commercial decision to work at breakeven or even at a loss. Mr Fenech Adami argued that it was the responsibility of the Department of Industrial and Employment Relations, through its inspectorate, to carry out inspections to ascertain that employers were paying their employees according to statutory requirements.

Mr Sammut stated that it was evident that at the hourly rate of €4.90 the recommended tenderer would be operating below cost and he retained that no reasonable economic operator would operate at a loss given that the lowest total hourly rate for employees on cleaning duties worked out at €5.688, representing a loss of €0.79 per hour which meant that the more the contractor worked on these contracts the bigger the losses that he would sustain. He therefore concluded that, should the rate of €4.90 be accepted, then that would amount to social dumping. Mr Sammut rejected the argument that the recommended tenderer was making some kind of strategic commercial decision because these cleaning services were labour intensive and it was definitely different from, say, the case of selling slow moving stock of items at prices below cost otherwise one would risk being stuck with the stock in store which eventually would become obsolete and worthless. Mr Sammut called upon the Public Contracts Review Board to reject the offer of the recommended tenderer.

Dr Antoine Naudi, legal representative of Clentec Ltd, the recommended tenderer, presented the following arguments:-

- a) the tender called for the submission of rates to provide cleaning services and he categorically denied that the rate quoted by his client was below the minimum wage;

- b) the fact that his client quoted a low price was not, necessarily, attributable to social dumping, as claimed by the appellant company, but that could be attributed to various factors, e.g. economies of scale, efficient management, bargain prices for the acquisition of supplies and sponsorships – Dr Naudi furnished a sponsorship document issued by SKAT Pharma in favour of Clentec Ltd;
- c) if there were no such variables then tenderers would end up offering the same price;
- d) it was not within the remit of the Public Contracts Review Board to go into the merit as to whether contractors were paying their employees the minimum wage or not because that responsibility rested with the Industrial and Employment Relations Department, but the Public Contracts Review Board's responsibility was to ascertain whether bidders abided by the tender conditions and specifications;
- e) a contracting authority was entitled, but not obliged, to reject an abnormally low offer as provided for in the Public Procurement Regulations:

Reg. 29 (1): A contracting authority shall be entitled to reject tenders which appear abnormally low in relation to the activity to be carried out:

- f) about three annual inspections/audits were carried out by the competent authorities on the activities of his client, which, among other things, covered the payment of wages to his employees;
- g) the tender document did not specify that tenderers should not quote prices for this service that were below the National Minimum Wage National Standard Order; and
- h) pointed out that Ms Gafa' was a director of Mach Clean Ltd and also of Gafa Safeways Ltd and that in 2009 the latter company had lodged appeals with the Contracts Department on 16 tenders for cleaning services claiming that the rates quoted by Clentec Ltd and Salamander Janitor Services were illegal since they were lower than the minimum wage per hour, however, the General Contracts Committee had rejected those appeals on the 11th February 2009.

Mr Sammut reiterated that the tender under reference referred to cleaning services the main element of which consisted of labour costs and, as a result, if the contracts were to be awarded at the quoted price that would likely result in either one paying employees below the national minimum standard or that the number of hours requested to service each site would not be respected. Mr Sammut declared that it was not acceptable that a tenderer would submit a bid below one's costs because there was no commercial justification for one to work at a loss. Mr Sammut called on the Public Contracts Review Board to consider this matter in the light of the provisions of Reg. 29 (1) quoted earlier on.

Mr Kurt Balzan, principal officer/inspector at the Department of Industrial and Employment Relations, under oath, gave the following evidence:

- LN 527 of 2010 ‘National Minimum Wage National Standard Order, 2010’ stipulated the minimum wage at €153.45 per week or €3.84 per hour and, as a consequence, the total minimum wage and related benefits per hour worked out as follows:

€	
3.840	(Minimum wage per hour)
0.250	(Statutory bonuses)
0.210	(Public holidays)
0.350	(Vacation leave)
<u>0.384</u>	(National Insurance contributions - 10% of €15345/40hrs)
5.034	excluding VAT

- a part-timer who also had a full-time job with another employer was also entitled to benefits under his part-time employment;
- the Industrial and Employment Relations Department carried out over 3,000 inspections annually and the inspector’s main concern was that the employees were paid the wages and related benefits according to regulations and so the inspector did not delve into the profitability of the business or the source from where the employer derived the income, i.e. the contracts that the employer worked on; and
- when he was detailed to attend this hearing he was not advised to get with him information on the inspections carried out with regard to Clentec Ltd

Mr Paul Mercieca, a member of the evaluation board, remarked that the board carried out its evaluation according to the conditions of tender which, among other things, laid down that the tender was to be awarded to the cheapest compliant bidder. Mr Mercieca added that although the evaluation board might have noted that the offer by Clentec Ltd was rather on the low side, yet the same board retained that it was not within its remit to go into details such as profit margins or the wages bidders paid their employees.

Dr Naudi remarked that the appellant company was making a number of assumptions, such as, (a) that his client would be executing these contracts at a loss, (b) that his client would pay his employees under the minimum wage and (c) that there was a contract between his client and the contracting authority. Dr Naudi concluded that the contracts ought to be awarded to his client and if it would result to the competent authorities that in the execution of these contracts his client had violated regulations, then, and only then, it would be opportune to take action against his client.

Mr Sammut concluded that the bid submitted by the recommended tenderer should be rejected (i) because it did not make sense, commercially or otherwise, to undertake contracts, the main component of which was the provision of labour, at below costs and (ii) that it was evident that should these services be rendered at the quoted price then the bidder concerned was bound to be in breach of regulations.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letters of objection’ all dated 22 February 2011 and also through their verbal submissions presented during the hearing held on 18th April 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) the six tenders in question should not be awarded at the prices/rates quoted by Clentec Ltd, the recommended tenderer, because the hourly rate quoted was below the minimum wage rate stipulated by regulations, namely the National Minimum Wage National Standard Order, 2010, (L.N. 527 of 2010) and that was unacceptable and that the rate of €4.90 was tantamount to social dumping, (b) his client had submitted quotes in accordance with statutory requirements and (c) the minimum hourly rate was fixed at €3.84 which, after adding up the benefits, e.g. statutory bonuses, vacation leave and so forth, would work out at €4.82 and, inclusive of VAT, would add up to €5.688 per hour;
- having considered the contracting authority’s representative’s reference to the fact that (a) the evaluation board did not go through the recommended tenderer’s costs to render this service, e.g. overheads, profit margins or if the tenderer was taking a commercial decision to work at breakeven or even at a loss and (b) it was the responsibility of the Department of Industrial and Employment Relations, through its inspectorate, to carry out inspections to ascertain that employers were paying their employees according to statutory requirements;
- having also taken note of the recommended tenderer’s legal advisor, especially the reference made to the fact that (a) the rate quoted by his client was below the minimum wage, (b) the fact that his client quoted a low price was not, necessarily, attributable to social dumping, as claimed by the appellant company, but that could be attributed to various factors, e.g. economies of scale, efficient management, bargain prices for the acquisition of supplies and sponsorships, (c) if there were no such variables then tenderers would end up offering the same price, (d) it was not within the remit of the Public Contracts Review Board to go into the merit as to whether contractors were paying their employees the minimum wage or not because that responsibility rested with the Industrial and Employment Relations Department, but the Public Contracts Review Board’s responsibility was to ascertain whether bidders abided by the tender conditions and specifications, (e) a contracting authority was entitled, but not obliged, to reject an abnormally low offer as provided for in the Public Procurement Regulations, (f) about three annual inspections/audits were carried out by the competent authorities on the activities of his client, which, among other things, covered the payment of wages to his employees, (g) the tender document did not specify that tenderers should not quote prices for this service that were below the National Minimum Wage National Standard Order, (h) Ms Gafa’ was a director of Mach Clean Ltd and also of Gafa Safeways Ltd and that in 2009 the latter company had lodged appeals with the Contracts Department on 16 tenders for cleaning services claiming that the rates quoted by Clentec Ltd and Salamander Janitor Services were illegal since they were lower than the

minimum wage per hour, however, the General Contracts Committee had rejected those appeals on the 11th February 2009, (i) the appellant company was making a number of assumptions, such as, (1) that his client would be executing these contracts at a loss and that (2) that his client would pay his employees under the minimum wage and (j) the contracts ought to be awarded to his client and if it would result to the competent authorities that in the execution of these contracts his client had violated regulations, then, and only then, it would be opportune to take action against his client;

- having taken full cognisance of Mr Balzan's testimony, especially the reference to (a) LN 527 of 2010 'National Minimum Wage National Standard Order, 2010' stipulated the minimum wage at €153.45 per week or €3.84 per hour (b) the Industrial and Employment Relations Department carried out over 3,000 inspections annually and the inspector's main concern was that the employees were paid the wages and related benefits according to regulations and (c) inspectors did not delve into the profitability of the business or the source from where the employer derived the income, i.e. the contracts that the employer worked on,

reached the following conclusions, namely:

1. The Public Contracts Review Board notes that the regulation entitles but does not oblige the contracting authority to reject abnormally low offers.
2. The Public Contracts Review Board agrees with the decision taken by the evaluation board not to go through the recommended tenderer's costs to render this service, e.g. overheads, profit margins or if the tenderer was taking a commercial decision to work at breakeven or even at a loss.
3. The Public Contracts Review Board opines that it remains the responsibility of the Department of Industrial and Employment Relations, through its inspectorate, to carry out inspections to ascertain that employers were paying their employees according to statutory requirements.
4. The Public Contracts Review Board recommends that the contracting authority should monitor the observance of the employment legislation and that, upon the award of the respective tenders, the pertinent contracting authority should immediately inform the Director of Industrial and Employment Relations so that appropriate actions are taken by the said Directorate.

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

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmel Esposito
Member

28 April 2011