

PUBLIC CONTRACTS REVIEW BOARD

Case No. 422

TQ/06/2011

Tender for the Hiring, Servicing and Cleaning of Skips at various Open Centres

This call was published in the Government Gazette of the 18th February 2011 with a closing dated of the 11th March 2011. The estimated value of this tender exclusive of VAT amounted to €27,939.40 and €32,968 inclusive of VAT.

Five tenders submitted an offer.

On the 30th September 2011, Greenlines Environmental Services Ltd filed an objection against the decision of the Agency for the Welfare of Asylum Seekers (AWAS) to recommend the award of the tender to Fair Trading Ltd.

The Public Contracts Review Board composed of A/Chairman Mr Joseph Croker and Messrs Carmelo Esposito and Paul Mifsud as members convened a public meeting on the 15th June 2012 to discuss the complaint.

Present for the hearing were:

Greenlines Environmental Services Ltd

Dr Franco Vassallo	Legal Representative
Dr Jimmy Vella	Legal Representative
Ms Suzanne Zammit	Representative
Mr Sandro Micallef	Representative

Fair Trading Ltd

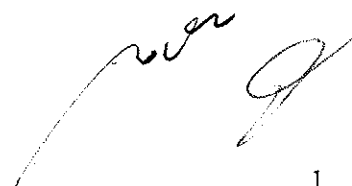
Mr John Said	Representative
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Agency for the Welfare of Asylum Seekers (AWAS)

Mr Alex Tortell	Head of AWAS
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Evaluation Board

Ms Sarah Borda Bondin	Chairperson
Ms Victoria Farrugia	Member
Ms Aloysia Abela	Member
Mr Peter Attard	Member
Perit Anthony Mangion	Technical Consultant



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

Dr Franco Vassallo, on behalf of Greenlines Environmental Services Ltd, the appellant, submitted that:-

- i. by letter dated 26th September 2011, the contracting authority had informed his client that his offer was not successful because it was not the cheapest tender and that the tender was recommended for award to Fair Trading Ltd;
- ii. the price offered by the recommended tenderer, € 28,931, was abnormally low';
- iii. the Public Procurement Regulations provided as follows:

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

Provided that the contracting authority shall, before it may reject those tenders, request in writing details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements by consulting the tenderer taking account of the explanations received.

- iv. the preferred bidder was quoting such a low price because this particular bidder was the contractor entrusted with the collection of waste on behalf of local councils and it was a widespread practice by this contractor and/or by his sub-contractors to mix the waste generated by, say, 'AWAS contract', with that generated by the 'local councils contracts' thereby avoiding the fee due to WasteServ Malta Ltd in respect of the 'AWAS contract', which stood at €20 per ton, by making it a charge on local councils – dumping fees in respect of local council contracts was paid directly by the local councils to WasteServ Malta Ltd;
- v. through such irregular practices contractors, including the recommended tender, could afford to quote abnormally low prices in tendering procedures such as the one in hand;
- vi. when one took into account the expenses involved in the execution of the contract under reference, such as, licences of refuse collecting vehicles, wages, fuel and charges by WasteServ Malta Ltd, it would clearly emerge that the price quoted by the preferred bidder did not even cover the costs involved;
- vii. Regulation 29 of the Public Procurement Regulations obliged contracting authorities to investigate abnormally low offers but in this case it would appear that the contracting authority failed to do so;
- viii. although the award criterion was the cheapest price, one had to keep in view that public procurement obliged contracting authorities to be vigilant so that contractors would not violate regulations in the course of public contracts execution and contracting authorities could verify matters by checking the invoices against the work performed;




- ix. these irregular practices were brought to the attention of the Local Councils Department by repeated written submissions, led his client to file a Judicial Protest in the First Hall of the Civil Court on 15th July 2011 against WasteServ Malta Ltd, the Director Local Councils and the Malta Environment and Planning Authority and, in May 2012, a report was lodged with the Police to investigate the matter; and
- x. it was fraudulent to allow a practice whereby a contractor who operated a waste disposal contract on behalf of local councils and concurrently operated contracts on behalf of other clients, e.g. AWAS, mixed the waste so that he would dispose of all of it as if it was generated by the local councils thus overcharging local councils with the WasteServ Malta Ltd charges which were due in respect of other waste collecting contracts.

Ms Sarah Borda Bondin, chairperson of the evaluation board, remarked that:

- a. five tenderers participated in this tender procedure and the recommended offer of €28,931 was not the cheapest one so much so that another tenderer had quoted €22,209.50;
- b. the evaluation board was aware of the provisions of Regulation 29 such that the lowest offer of €22,209.50 was deemed abnormally low when compared to the estimated value of €32,968 (€27,939.40 excluding VAT) and the evaluation board did query the lowest offer and when the bidder concerned failed to submit the information in time the bid was disqualified; and
- c. whereas the cheapest offer received was about €10,700 cheaper than the estimated value of the tender, the recommended offer was slightly over €4,000 cheaper and in the latter case the evaluation board did not feel the need to raise any queries.

Perit Anthony Mangion, consultant on behalf of AWAS, under oath, explained that:-

- i. he arrived at the estimated value of the tender by taking into account past invoices submitted to AWAS for the provision of this service and by obtaining verbal information from other operators in this sector about the going rates;
- ii. he did not arrive at the estimated value by breaking it down into the various constituent elements, e.g. charges by WasteServ Malta Ltd, because he considered the invoices presented to AWAS for rendering this service to be inclusive of all charges, including dumping fees;
- iii. he conceded that he did not consult with WasteServ Malta Ltd when he drew up the estimated value of the tender; and
- iv. he considered the estimated value of the tender to be a reasonable one because although it was not broken down into the various constituent elements still it was based on past invoices/payments for the same service.



Dr Franco Vassallo referred to the General Conditions of the tender, namely clauses G2 and G4, which stated that:-

G2. The tendered rate shall be inclusive of all service as specified as well as any other works which are of a contingent or indispensable nature for completing the service in its entirety and to the satisfaction of the Agency. The tendered rates shall be inclusive of all wages, profits, VAT, provision of hand tools, transport vehicles, other machinery, and all transport of to and from the sites of work.

G4. Prices shall be inclusive of VAT, transport, dumping fees, and any other charges as applicable. Moreover, the successful bidder shall be bound to conform in all respects with VAT legislation and regulations.

Mr Mangion reiterated that in compiling the estimated value of the tender he did not go into the details mentioned in G2 and G4 of the General Conditions and he argued that it was up to the bidders to take all these elements into account when submitting their quotes.

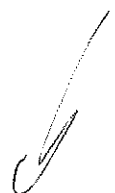
The A/Chairman PCRБ noted that if AWAS based its estimate of the tender value on invoices which might not have reflected the true cost of the service, e.g. excluded WasteServ Malta Ltd dumping charges through malpractices, then that exercise was flawed. He added that public procurement demanded that public contracts were issued and executed in accordance with regulations.

Mr John Said, on behalf of Fair Trading Ltd, the recommended tenderer, remarked that:-

- a. the appellant had made allegations which the same appellant was presenting as they were facts;
- b. a bidder could quote cheaper prices not necessarily through irregular practices but through other considerations, such as, savings through economies of scale;
- c. in the execution of such services, his firm entered into arrangements with other refuse collectors whereby they would share the profits but ultimately his firm would remain the entity responsible for the proper delivery of the service; and
- d. the price he offered took into account all expenses involved and his firm was renowned for the good quality service it rendered.

Dr Vassallo concluded by stating that:-

- i. the Public Contracts Review Board and the contacting authority had the onus of ascertaining the proper use of public funds and to arrive at that they had to evaluate on objective criteria;
- ii. although acting in good faith, still, it resulted at the hearing that the contracting authority did not follow the provisions of the tender document, e.g. the workings that had to be made to determine the estimated value of the contract which in turn would serve as a benchmark to determine if an offer was abnormally low or not;



- iii. the difference of €4,000 in a contract which estimated value was €33,000 (incl. VAT) could not be considered trivial and it should have prompted the contracting authority to request a breakdown of that offer;
- iv. the preferred bidder had just admitted that he would enter into arrangements with other refuse collectors to carry out this contract and then share the benefits, however, clause 17 of the General Conditions (page 16) prohibited such arrangements:-

It shall not be lawful for the contractor to transfer or assign the contract, directly or indirectly, or any part, share or interest in it or any amount due by the Government therefore, to any person or persons whomsoever, or to sublet the contract or any part of it, or to allow any portion of the work to be done otherwise than in his own establishment, without the written consent of the Government.

- v. document marked Doc A, which he presented to the PCRБ and to the interested parties, indicated the costs and other considerations involved in the hiring and servicing of bins, which workings should have been carried out by the contracting authority to arrive at the estimated value of the tender and to evaluate the offers.

Mr Alex Tortell, head of AWAS, remarked that (a) the agency did not have data available as to the amount of waste generated by the various open centres and he agreed that it made sense to have such data available and (b) the population at the open centres tended to vary over time due to several factors;

This Board

1. having noted that the appellant in terms of a letter of objection and also their verbal submissions during the meeting held on the 15th June 2012 had objected to the decision taken by the Contracting Authority;
2. having noted the appellant's representative's claim and observations particularly to the preferred bidder's price being abnormally low which should have triggered the contracting authority to query the quoted price in terms of Regulation 29(1) of the Public Procurement Regulations; having also noted the appellant's allegation that prices quoted were low through the application of malpractices amounting to fraud; having noted the appellant's contention that the tender stipulated that the value quoted should cover all expenses including relevant dumping fees; having also noted appellant's claim that since Clause 17 of the General Tender Conditions states "*It shall not be lawful for the contractor to transfer or assign the contract, directly or indirectly, or any part, share or interest in it or any amount due by the Government therefore, to any person or persons whomsoever, or to sublet the contract or any part of it, or to allow any portion of the work to be done otherwise than in his own establishment, without the written consent of the Government.*" the arrangements whereby the preferred bidder namely Fair Trading Limited declared were reached with other refuse collectors could not be entered into;



3. having also noted the Contracting Authority's claim that the price quoted was not considered to be abnormally low since it only varied by approx €4,000 from the estimated value, and that moreover the recommended tenderer's quote was not the cheapest;
4. having also noted the methodology applied by the Contracting Authority to arrive at the estimated value,

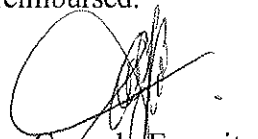
reached the following conclusions:

- The Board is not in a position to establish whether or not the alleged malpractices are actually taking place and leaves it to the pertinent authorities to decide on this issue;
- The Board contends that the term 'abnormally low' might be interpreted in a rather subjective manner, and that the difference in value amounting to approx 12% might or might not be termed 'abnormally low'; however, one has also to determine whether or not the estimated value of the tender reflects the actual cost of the tender taking into consideration all relevant parameters including Government imposed costs e.g. in this instance dumping fees and the amount of waste generated by the various units making up the contracting entity;
- The Board is not in agreement with the methodology used to establish the estimated value of this particular tender;
- The Board noted that the recommended tenderer's explanation as to the manner whereby he would be making use of the services of other refuse collectors to carry out the tender, is in contravention of the General Tender Conditions.

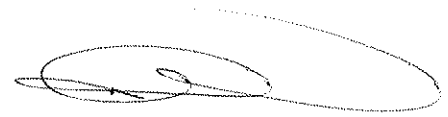
In view of the above, the Public Contracts Review Board finds in favour of the appellant and recommends that the tender be reissued after having established a true and correct estimated value so that any abnormally low quote may be queried in a proper manner. The Board also recommends that the tender conditions be drawn up in a manner which would as far as possible guard against the contracting authority being unknowingly party to any malpractice, alleged or otherwise. The Board recommends that the deposit paid for the appeal to be heard be reimbursed.



J Croker
A/Chairman



Carmelo Esposito
Member



Paul Mifsud
Member

26 June 2012