

PUBLIC CONTRACTS REVIEW BOARD

Case No. 470

DH/2460/12

Tender for the Provision Cleaning Services for the Ministry for Health, the Elderly and Community Care (MHEC)

This call for tenders was published in the Government Gazette on the 15th June 2012. The closing date for this call with an estimated budget of € 120,000 was the 11th July 2012.

Two (2) tenderers submitted their offers.

TF Services Ltd filed an objection on the 7th August 2012 against the decision of Ministry for Health, the Elderly and Community Care to recommend the award of the tender to Gafà Safeway Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Joseph Croker and Mr Paul Mifsud as members convened a public hearing on Tuesday, 16th October 2012 to discuss this objection.

Present for the hearing were:

TF Services Ltd

Dr Victor Axiak	Legal Representative
Mr Simon Turner	Representative
Mr Ramon Fenech	Representative

Gafà Safeway Ltd

No representative turned up

Ministry for Health, the Elderly and Community Care

Ms Stephanie Abela	Representative
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Evaluation Board

Mr Charlo Muscat	Chairman
Ms Mary Grace Balzan	Member
Mr Nazju Muscat	Member
Ms Rita Tirchett	Secretary

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

Dr Victor Axiak, legal representative of TF Services Ltd, the appellant company, made the following submissions:

- i. by letter/email dated 2nd August 2012 the contracting authority had informed his client that its bid was not successful and that the tender was recommended for award to Gafa Safeway Ltd;
- ii. the tender document requested bidders to declare that they were going to abide by employment legislation;
- iii. the rate of €5.84 per hour offered by the recommended tenderer was abnormally low;
- iv. although there was no representative of the Department of Industrial and Employment Relations to give evidence, he recalled the minimum wage hourly rate from a previous case which was made up as follows:-

€
3.95 – basic rate
0.36 – vacation leave
0.25 – bonus & weekly allowance
0.21 – public holidays
<u>0.40</u> – national insurance
5.17
<u>0.93</u> – VAT
<u>6.10</u>

- v. from these workings it emerged that if the recommended tenderer was going to pay the minimum wage to the company's employees then the said company would operate this contract at a loss;
- vi. the Public Contracts Review Board had already expressed itself with regard to other similar cases in the sense that it considered the quotation of such rates as a commercial decision on the part of the bidder concerned;
- vii. according to the European Court of Justice (ECJ) Case C-599/10 it was decided that when it would result to the contracting authority that the offer was abnormally low then the contracting authority should ask the tenderer to clarify its proposal;
- viii. this European Court of Justice's ruling had concluded as follows:-

“Article 55 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as requiring the inclusion in national legislation of a provision such as Article 42(3) of Slovak Law



No 25/2006 on public procurement, in the version applicable in the main proceedings, which, in essence, provides that if a tenderer offers an abnormally low price, the contracting authority must ask it in writing to clarify its price proposal. It is for the national court to ascertain, having regard to all the documents in the file placed before it, whether the request for clarification enabled the tenderer concerned to provide a sufficient explanation of the composition of its tender.

Article 55 of Directive 2004/18 precludes a contracting authority from taking the view that it is not required to ask a tenderer to clarify an abnormally low price.”

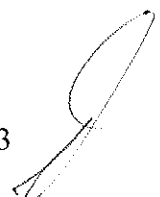
- ix. although that judgement did not come up with what constituted an abnormally low offer, a working group had established that an abnormally low offer would be when it was evident that the contractor would be operating at a loss;
 - x. if the contracting authority did not ask Gafa Safeway Ltd to explain the price it quoted then that would represent an infringement in the procedure that should have been followed and that, by itself, should render the award decision irregular;
 - xi. to his recollection, in a case involving Gafa Safeway Ltd, the local courts did not rule on what constituted an abnormally low offer because the case in question was dismissed on matters of procedure but, nonetheless, the court had remarked that, even if the case was admissible, the offer was abnormally low anyway;
- and
- xii. in previous decisions the Public Contracts Review Board had recommended that in the tender document there should be included a benchmark below which bids would be refused outright and it was suggested that the benchmark could be the minimum wage.

The Chairman Public Contracts Review Board remarked that:-

- a. despite the fact that, in the absence of a definite decision by our Courts on what constituted an abnormally low tender, the Public Contracts Review Board had recommended that, in the case of such tenders, there ought to be a benchmark, say, the national minimum wage, below which offers would be refused, yet this suggestion to establish a starting point, even if one could argue that it was not the best solution, had, so far, not been taken up;
- b. the current situation was not ideal but, in the meantime, the contracting authority had to rely on the bidder's declarations, namely to abide by labour legislation and on the supervision carried out by the Department of Industrial and Employment Relations over employers to see that the workers were being paid at least the minimum legal rates;



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- c. to date, the decisions of the Public Contracts Review Board in this regard have not been challenged in court and, as a consequence, there were no court rulings;
- and
- d. the Public Contracts Review Board had to be careful not to overstep its remit by entering into the merits of the commercial viability of economic operators provided that the employees got paid according to regulations, which aspect was being supervised by the Department of Industrial and Employment Relations.

Mr Charlon Muscat, chairman of the evaluation report, explained that:-

- i. the tender document did not provide a benchmark or scale below which offers should be refused outright;
- ii. the evaluation board worked out the minimum hourly rate as follows:-

€
3.95 – basic rate
0.36 – vacation leave
0.25 – bonus & weekly allowance
0.18 – sick leave
0.40 – national insurance
5.14

- iii. this rate differed from that cited by the appellant company in the following respects, namely that it excluded €0.21 for public holidays, since almost all the sites included in the tender did not require cleaning on public holidays, but included €0.18 for 12 days sick leave and excluded VAT because that was not payable to the employee;
- iv. if one were to exclude the sick leave (€0.18) and include VAT (€0.89) the rate would work out at €5.85 which was equal to the recommended rate except for €0.01;
- and

- v. the evaluation board did not ask the recommended bidder to explain its offer.

Ms Stephanie Abela, also representing the contracting authority, explained that this tender was divided into 6 lots and all lots/sites specifically excluded cleaning on public holidays except for one lot (no. 4) – page 56 and 57 of the tender document.

At this point the hearing came to a close.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated the 7th August 2012 and also through their verbal submissions presented

during the hearing held on the 16th October 2012, had objected to the decision taken by the pertinent authorities;


- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by letter/email dated 2nd August 2012 the contracting authority had informed the appellant company that its bid was not successful and that the tender was recommended for award to Gafa Safeway Ltd, (b) the tender document requested bidders to declare that they were going to abide by employment legislation, (c) the rate of € 5.84 per hour offered by the recommended tenderer was abnormally low, (d) although there was no representative of the Department of Industrial and Employment Relations to give evidence, the appellant company's representative recalled the minimum wage hourly rate from a previous case as being Euro 5.17 + VAT, (e) from these workings it emerged that if the recommended tenderer was going to pay the minimum wage to the company's employees then the said company would operate this contract at a loss, (f) the Public Contracts Review Board had already expressed itself with regard to other similar cases in the sense that it considered the quotation of such rates as a commercial decision on the part of the bidder concerned, (g) according to the European Court of Justice (ECJ) Case C-599/10 it was decided that when it would result to the contracting authority that the offer was abnormally low then the contracting authority should ask the tenderer to clarify its proposal, (h) although that judgement did not come up with what constituted an abnormally low offer, a working group had established that an abnormally low offer would be when it was evident that the contractor would be operating at a loss, (i) if the contracting authority did not ask Gafa Safeway Ltd to explain the price it quoted then that would represent an infringement in the procedure that should have been followed and that, by itself, should render the award decision irregular, (j) to the appellant company's recollection, in a case involving Gafa Safeway Ltd, the local courts did not rule on what constituted an abnormally low offer because the case in question was dismissed on matters of procedure but, nonetheless, the court had remarked that, even if the case was admissible, the offer was abnormally low anyway and (k) in previous decisions the Public Contracts Review Board had recommended that in the tender document there should be included a benchmark below which bids would be refused outright and it was suggested that the benchmark could be the minimum wage
- having considered the contracting authority's representative's reference to the fact that (a) the tender document did not provide a benchmark or scale below which offers should be refused outright, (b) the evaluation board worked out the minimum hourly rate as € 5.14, (c) this rate differed from that cited by the appellant company in the following respects, namely that it excluded €0.21 for public holidays, since almost all the sites included in the tender did not require cleaning on public holidays, but included €0.18 for 12 days sick leave and excluded VAT because that was not payable to the employee, (d) if one were to exclude the sick leave (€0.18) and include VAT (€0.89) the rate would work out at €5.85 which was equal to the recommended rate except for €0.01, (e) the evaluation board did not ask the recommended bidder to explain its offer and (f) this tender was divided into 6 lots and all lots/sites specifically excluded cleaning on public holidays except for one lot (no. 4) – page 56 and 57 of the tender document,



reached the following conclusions, namely:

1. The Public Contracts Review Board opines that it had to be careful not to overstep its remit by entering into the merits of the commercial viability of economic operators provided that the employees got paid according to regulations, which aspect was being supervised by the Department of Industrial and Employment Relations.
2. The Public Contracts Review Board argues that the current situation is not ideal. However, in the meantime, it is also a fact that a contracting authority has to keep on relying on the bidder's declarations, namely to abide by labour legislation and on the supervision carried out by the Department of Industrial and Employment Relations over employers to see that the workers are being paid at least the minimum legal rates.
3. This Board can only reiterate what it had expressed before on similar occasions, namely that, in the absence of a definite decision by our Courts on what constituted an abnormally low tender, the Public Contracts Review Board recommends that, in the case of such tenders, there ought to be a benchmark, say, the national minimum wage, below which offers would be refused. Yet, despite it receiving many favourable feedback from many an interested player, this suggestion to establish a starting point, even if one could argue that it was not the best solution, had, so far, not been taken up.

In view of the above, this Board finds against the appellant company and recommends that the actual deposit payable by the same appellant for the appeal to be lodged should not be reimbursed.



Alfred R Triganza
Chairman



Joseph Croker
Member



Paul Mifsud
Member

26 October 2012