

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case No. 706**

**T 079/2013**

### **Provision of Environmental Friendly Cleaning Services at MITA.**

The tender was published on the 9<sup>th</sup> September 2013. The closing date was the 21<sup>st</sup> October 2013.

The estimated value of the Tender was €300,000 (Exclusive of VAT).

Six (6) bids had been received for this tender.

On the 4<sup>th</sup> April 2014 Gafa` Saveway Cleaners Limited filed an objection against the rejection of its offer.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Tuesday the 27<sup>th</sup> May 2014 to discuss the objection.

Present for the hearing were:

#### **Gafa` Saveway Cleaners Limited - Appellant**

Ms Paulette Gafa`	Representative
Mr Joe Sammut	Representative

#### **JF Services Limited - Preferred Bidder**

Mr Matthew Formosa	Representative
Dr Matthew Paris	Legal Representative

#### **Malta Information Technology Agency - Contracting Authority**

Mr Tony Sultana	Chairman
Mr Sandro Calleja	Member Evaluation Board
Mr Rudiger Ellul	Member Evaluation Board
Mr Wayne Valentine	Member Evaluation Board
Mr Victor Camilleri	Representative
Dr Pauline Debono	Legal Representative
Dr Danielle Cordina	Legal Representative

The Chairman made a brief introduction and invited appellant's representative to make his submissions.

Mr Joe Sammut on behalf of his clients Gafa` Saveway Cleaners Limited explained that the main issue in this objection was the new threshold issued after the closing date of the tender. This threshold had effectively changed the original tender conditions imposing new minimum costs of labour because of the precarious employment factor after all the bidders had already submitted their offers. He contended that if a bidder had submitted a bid under certain conditions and the conditions had been changed after the closing date, then it stands to reason that tender should have been cancelled. Appellant had submitted the cost factor of labour in its offer, giving the detailed breakdown and explanations according to the position as in 2013. No explanation has been given how the threshold was calculated. Appellant had submitted, as required by the original tender conditions, the bid according to the conditions prevailing in 2013, working out mathematically the unit cost at €5.30 that safeguarded against precarious employment conditions. This figure included the wages, the national insurance, the vacation leave, the bonuses and the public holidays. The tender conditions had however been changed by the issuing of the threshold. Other government agencies in similar circumstances had cancelled the already issued tenders and had them re-issued because of this threshold. He claimed that there was no standardisation in the treatment of tenders following the setting of the threshold since just last week the Office of the Prime Minister had awarded a tender based on unit cost of €5.51 that is below the threshold. And yet the OPM had defended that decision before this Board.

Dr Pauline Debono on behalf of the contracting authority said that the call for tender had been issued on the 9<sup>th</sup> September 2013. During the evaluation of the tender, on the 14<sup>th</sup> March 2014 the contracting authority had received a communication from the Ministry whereby directives had been issued to contracting authorities that offers for the provision of cleaning and security services of less than €5.78 per hour could not be awarded. She contended that there had been no changes in the tender conditions with the establishment of the threshold, since the amount of €5.78 is made up of several different elements. She confirmed that appellant had in fact submitted the necessary breakdown. The law had not changed about what to incorporate into the hourly rate. The contracting authority had to see what hourly rates were acceptable. When examining the appellant's breakdown figures it can be seen that there was no estimate for sick leave and other special entitlements. Appellant's offer therefore of €5.30 is not necessarily in line with regulations.

Mr Joe Sammut on behalf of the appellant said that sick leave cannot be estimated but instead this would be taken into consideration when assessing the fixed costs of the company. Sick leave is not included into the breakdown since it is a fixed cost. Fixed costs do not feature into the labour costs. He said that the breakdown given by appellant including wages was for direct variable costs that vary according to the number of hours. Sick leave on the other hand is not quantifiable is a fixed cost which the company pays and is not included in the hour rates. He insisted that the figure of €5.78 has not been explained while appellant had explained the €5.30 rate.

Mr Tony Sultana MITA Chairman said that the contracting authority had consulted with the Ministry before adjudicating the tender and had been given the €5.78 rate that had to be met. The evaluation board had examined appellant's offer and had found certain inaccuracies in its workings. For example it stated that the minimum wage was €4.06 when in fact it should be €4.05; Vacation leave was calculated as €0.37 when in fact it was €0.52. The MITA Board

also took into consideration the importance being given to the subject of precarious employment.

Dr Pauline Debono for the contracting authority said that there were several bidders for the present tender and some of these had offered more than the €5.78 of the threshold.

Dr Matthew Paris on behalf of the preferred bidder said the Board should discard all that was said that did not refer to the present tender. He said that the Public Contracts Review Board should decide whether the award of the tender had been just or not. He referred to another circular issued on the 1st July 2013 where sick leave had been mentioned. Whereas previously some sub contracting had been allowed and therefore the sick leave element could be ignored, now since no subcontracting is allowed the question of sick leave had to be taken into consideration, since otherwise the amount offered would be below the minimum required.

Mr Joe Sammut on behalf of the appellant reiterated that the costings submitted by appellant had been correct as applicable for 2013. Sick leave is a fixed cost and should not be included into the workings of the hourly rates of labour. Appellant's labour costs as submitted were according to law. The conditions of the tender had been changed and he contended that the tendere should be cancelled because it was not the same tender that had been issued.

Mr Joe Sammut explained that the circular cited by Dr Paris did not say that sick leave had to be part of the costings just that sick leave had to be included in the payslip.

At this point the hearing was closed.

**This Board,**

**Having noted the Appellant's Objection , in terms of the 'Reasoned Letter of Objection' dated 3<sup>rd</sup> April 2014 and also through Appellant's verbal submissions during the hearing held on 27<sup>th</sup> May 2014, had objected to the decision taken by the pertinent Authority, in that:**

- a) **Appellant contends that his offer was discarded, due to the fact that his bid did not reach the minimum bench mark of 'hourly labour rate' as established through an internal government circular dated 14<sup>th</sup> March 2014, well after the closing date of the tender, which was on 11<sup>th</sup> January 2013. The instructions contained in the said circular of 14<sup>th</sup> March 2014 did in fact alter the conditions of the tender.**
- b) **The cost of hourly labour rate as submitted by Appellant was correct and this was based on the conditions as applicable for the year 2013.**

**Having considered the Contracting Authority's verbal submissions during the hearing held on 27<sup>th</sup> May 2014, in that:**

- a) **The lengthy interval between the closing date of the tender and the adjudication date was due to the fact that, after the evaluation was effected, same decision had also to be endorsed by the Board of the Contracting Authority and since there**

was a change in the Administration of the same Contracting Authority, the Evaluation Board had to wait for this endorsement to be carried out by new members of the Contracting Authority's Board, as and when appointed.

- b) Since the award of tender was effected after the directives contained in Circular dated 14<sup>th</sup> March, the Evaluation Board could not ignore same.

Reached the following conclusions:

1. This Board opines that the delay in issuing the 'Award of tender' was justified. It is an accepted custom that due to a change in Government, changes in members of Boards are expected to be effected, so that there is a time lag, sometimes a lengthy one' in choosing the appropriate person for the right position. In this regard, the Evaluation Board was prudent in awaiting the endorsement of the new Board for the award of tender.
2. The Evaluation Board made the award of the tender, four days after, the same Board received the instructions contained in the Circular regarding precarious employment conditions. A minimum bench mark was imposed and in this respect, the Evaluation Board acted in a transparent manner in following these directives. Among the tendered offers, there was an existing bid that quoted beyond the minimum bench mark of the hourly rate, as dictated in the circular of the 14<sup>th</sup> March 2014.
3. This Board opines that the minimum bench mark as dictated in the circular dated 14<sup>th</sup> March 2014, does not in fact, establish the minimum rate to be quoted when, one should take into consideration the hourly rate of employment. It does not; in fact take into consideration the Overheads and other expenses. To the effect, that offers below the threshold of Euros 5.78, would definitely lead to precarious labour conditions.
4. The rate quoted by the Appellant Company would have led to precarious working conditions, as this Board, strongly contends that no commercial enterprise would bid for an offer at a 'Premeditated Financial Loss'
5. This Board also opines that when a tendered service is for a period of three years, the tenderer has to ensure the enough provisions were made for increase of wages, overheads, etc, to recoup a modest percentage of profit. Otherwise, the possibility of precarious working conditions will arise.

**In view of the above, this Board finds against the Appellant Company, however due to circumstances beyond the Appellant, this same Board recommends that the deposit paid by Appellant should be reimbursed.**

Dr. Anthony Cassar  
Chairman

Dr. Charles Cassar  
Member

Mr. Richard A. Matrenza  
Member

*22 July 2014*