

PUBLIC CONTRACTS REVIEW BOARD

Case 1128 – ARMS/T/004/2017 – Tender for the Provision of Environmentally Friendly Cleaning Services at ARMS Ltd

The publication date of the call for tenders was the 12th April 2017 whilst the closing date of the call for tenders was the 2nd May 2017. The estimated value of the tender (exclusive of VAT) was € 110,000.

Specialist Group Cleaners Ltd filed an appeal on 12th January 2018 against the Contracting Authority's decision that their tender had been rejected as it was considered to be abnormally low.

On 6th February 2018 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Richard A Matrenza as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellant – Specialist Group Cleaners Ltd

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| Dr John Bonello | Legal Representative |
| Ms Marika Mifsud Bonello | Legal Representative |

Contracting Authority – Automated Revenue Management Services Ltd

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| Ing. Mark Perez | Chairperson Evaluation Board |
| Ms Maria Magri | Secretary Evaluation Board |
| Ms Nikita Zammit Alamango | Member Evaluation Board |

Recommended Bidder – Clentec Ltd

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| Dr Victor G Axiak | Legal Representative |
| Mr Simon Turner | Representative |
| Ms Roann Avallone | Representative |

In a brief introduction, the Chairman, Dr Anthony Cassar, noted that there had been an adjustment in the amount paid as deposit in this case and then welcomed the parties and asked Appellant's representative to make their submission.

Dr John Bonello, Legal Representative of Specialist Group Cleaners Ltd, said his client's objection was based on two points which could be dealt with jointly as both were covered by the Contracting Authority's decision that his client's offer had been refused as considered to be 'abnormally low'.

The Chairman pointed out that the Appellants' Offer was not abnormally low. He also stated that to assess whether an offer was abnormally low, one had to arrive at an average of all offers and then compare such result with that of the Appellants Bid, which, in this particular case, does not indicate that their offer was abnormally low.

Dr Bonello, continuing his submission, referred to Cases 1033 and 1077 decided by the PCRB where the offers had been abysmally lower than the minimum wage and therefore not acceptable. If an offer was in the area of covering the cost of wages then, contended Dr Bonello, it should not be refused.

At this stage the Chairman of the Board invited Ing. Mark Perez, Chairperson of the Evaluation Board, to testify on oath, and asked him if he could confirm if the Appellant's offer met the terms of the Circular regarding the minimum wage.

Ing. Perez stated that the financial offer consisted of two items – the rate payable to employees and the rate to cover overhead costs. In this case the former was acceptable but the rate to cover overheads had been left blank. Following the directives of Public Procurement Regulations Article 239, the Authority sought clarification on the latter point. In their reply Appellant stated that item one included overhead costs. This led the Authority to conclude that the rate quoted of € 6.52 per hour, was therefore going to be reduced to cover the cost of overheads.

The Chairman said that that was up to this Board to interpret. This Board has to be careful that it did not delve into the profit element in a tender. This had been confirmed by the Court of Appeal in several cases, and in another sentence the Court had ruled that if the offer covered the minimum wage it would not contest the decision. . If the Contracting Authority was certain that the Appellant was paying the minimum wage a tender should be accepted.

Dr Victor Axiak on behalf of the Recommended Bidder asked the Contracting Authority to confirm that the price of the tender meets the minimum wage regulations.

The Chairman in concluding the hearing said that the Evaluation Board's first decision was the correct one and it had carried out its role properly. He then thanked the parties for their submissions and declared the hearing closed.

This Board,

Having noted this objection filed by Specialist Group Cleaners Limited (herein after referred to as the Appellant) on 12 January 2018, refers to the Contentions made by the latter with regards to the award of Tender of Reference ARMS/T/004/2017 listed as Case No 1128 in the records of the Public Contracts Review Board, awarded by ARMS Limited (herein after referred to as the Contracting Authority).

Appearing for the Appellant: Dr John Bonello

Appearing for the Contracting Authority: Ing Mark Perez

Whereby, the Appellant contends that:

- a) He disagrees with the Contracting Authority's alleged decision that their offer was abnormally low. In this regard, Specialist Group Cleaners Limited maintain that their offer covered the minimum wage payable to workers as prescribed by law and through various decisions of this Board and the Court of Appeal, such offers are not to be deemed as abnormally low.**

This Board also noted the Contracting Authority’s “*Letter of Reply*” dated 18 January 2018 and its verbal submissions during the Public Hearing held on 6 February 2018, in that:

- a) ARMS Limited insists that since the Appellants declared that in their offer, apart from the cost of wages, there was also included all other expenses. When one considers such inclusions, the Contracting Authority deemed that the cost of the minimum wage as prescribed by Law would not be covered.**

This same Board also noted the testimony of the witness namely, Ing Mark Perez duly summoned by this same Board. The Transcript of the latter is herewith attached.

This Board after having examined the relevant documentation to this appeal and heard submissions made by all interested parties, including the testimony of the witness duly summoned by this same Board, opines that the main issue of this appeal is ARMS Limited’s consideration of Specialist Group Cleaners Limited’s offer as being abnormally low. In this regard, this Board would like to first and foremost define what is considered to be as an abnormally low offer.

- 1. In the current economic climate, there is often keen competition between economic operators, which submit competitive low-price bids in order to**

secure work and maintain their presence on the market. Low-price can, potentially result in significant financial benefits to Contracting Authorities. It may also be “*too good to be true*”. It is in this context that the concept of “*abnormally low Tenderers*” arises. In other words, the concept is nevertheless generally recognized as referring to the situation where the price offered by an economic operator raises doubts as to whether the offer is economically sustainable and can be performed properly. One of the risks in such a situation is where there is doubt as to whether the economic operator will be compliant with social and labour laws.

Abnormally low offers can be identified by any one of the following methods:

- An analysis of the price (costs) proposed by an economic operator in comparison with the objective of the procurement;
- A comparison made between the Tender price and the average price proposed by the other compliant Bidders.

In this particular instance, it is not this Board's or the Evaluation Committee's jurisdiction to delve into whether, through their offer, the Appellants will make a profit or sustain a loss on this particular project as long as the Contracting Authority is assured that the minimum wage to be paid is accounted for in the Appellants' offer.

In this case, this Board notes that the minimum wage is covered and therefore does not deem that the offer submitted by Specialist Group Cleaners Limited is abnormally low.

2. This Board justifiably notes that the Evaluation Committee, initially recommended the Appellant's Bid for the award. However, due to the fact that ARMS Limited felt that it had to delve into other expenses which Specialist Group Cleaners Limited had to bear, arrived at the conclusion that the latter's offer did not cover the minimum wage.

In this regard, this Board refers to previous decisions taken by this Board and confirmed by the Court of Appeal, in that, one should not calculate whether the Bidders' offer will be profitable or not, but as long as there is left no room for precarious working conditions and the Contracting Authority obtained the necessary confirmation from the

successful bidder that all the Tendered works, as stipulated, will be carried out at the quoted offer, the offer should be accepted.

In view of the above, this Board:

i) Revokes the decision of ARMS Limited in the award of the Tender;

ii) Upholds Specialist Group Cleaners Limited's contention and recommends that the latter's offer is to be reintegrated in the Evaluation Process;

iii) Recommends that the deposit paid by the Appellants is to be fully refunded.

Dr Anthony Cassar

Chairman

13 February 2018

Mr Lawrence Ancilleri

Member

Mr Richard A Matrenza

Member