

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case No. 566**

**RX 1/10**

### **Tender for the Provision of Local Warden Services.**

The tender was published on the 30<sup>th</sup> November 2010. The closing date was the 21<sup>st</sup> January 2011.

The estimated value of the Tender was €2,080,000.00 (Exclusive of VAT).

Three (3) bidders submitted their offers.

On the 24<sup>th</sup> August 2012, Aurelia Enforcement Limited filed an objection, against a decision by the contracting authority, Regjun Xlokk to award the tender to Sterling Security Company Limited.

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 Thursday 18<sup>th</sup> July 2013 to discuss the appeal.

### **Present:**

#### **Aurelia Enforcement Limited - Appellants**

Dr Adrian Delia	Legal Representative
Mr Peter Formosa	Representative

#### **Sterling Security Company Limited – Recommended Bidder**

Dr Reuben Farrugia	Legal Representative
Mr Noel Schembri	Representative
Mr David Stubbings	Representative

#### **Regjun Xlokk – Contracting Authority**

No representatives from the contracting authority were present when the case was called.

The Chairman informed the parties present that the Contracting Authority, Regjun Xlokk had failed to turn up for the hearing although it had been formally informed of the date and time. It was however the Board's intention to continue with the hearing nonetheless, unless there were any objections raised by the other parties involved.

It was an insulting behaviour on the part of the contracting authority to fail to appear before this Board, having been summoned to do so, and the Board would be taking any appropriate measures as necessary.

Dr Adrian Delia appearing for appellants and Dr Reuben Farrugia appearing for Sterling Security Limited stated that they would not object and that there was nothing in the law that prevented the hearing to continue.

The Chairman invited the appellants to explain the reasons for the objection.

Dr Adrian Delia on behalf of appellants started to make his case. However, at this point, Dr Reuben Farrugia appearing for the preferred bidder brought to the Board's notice that in his letter of reply to the objection, he had explained in detail that the grievances forming the merits of the present objection had already been decided upon by this board, and which decisions had also been confirmed by the Court of Appeal by a judgement given on the 30<sup>th</sup> October 2012. Hence the Board now cannot go into the same grievances and decide again differently. He insisted that his preliminary plea on this point be decided upon first because it does not help the administration of justice to have the same points decided upon again as it could be an abuse of the system to do so.

The Chairman stated that the Board would go into the matter at a later stage after hearing what the appellant had to say.

Dr Adrian Delia explained that he first would give a brief summary of the tender proceedings so far and if it results that the merits were identical, and then there would be no grounds for altering the decision previously given. But if circumstances had changed then the Board could see if it would change its decision.

Aurelia Enforcement Limited had raised a pre contractual objection as per Article 85 on other matters to those being discussed today. They had brought to the notice of the Director of Contracts the fact that there was no clear difference between the Selection Criteria and the Award Criteria. The five year minimum experience, that should have been award criteria, was being used as selection criteria. This objection had been decided by the Public Contracts Review Board without any hearing. The Public Contracts Review Board had decided that there was no apparent contradiction in the award mechanisms. Following this, the tendering process continued using the three package system.

The three package system is clear in that the first package should contain only the bid bond, the second package the technical bid and the third package should only contain the financial bid. When evaluating this tender, the contracting authority decided to add an administrative compliance column to the evaluation grid.

Here Dr Reuben Farrugia objected because appellants had not raised the administrative compliance grievance in their letter of objection and the Board could only hear matters raised in the original objection.

Dr Adrian Delia continued by explaining the administrative compliance reason given to his clients for being administratively non-compliant. That Aurelia Enforcement Limited did not have the required years of experience. This is not an administrative compliance, this is a selection criteria. Admittedly this could have been a mandatory condition and it would then mean that non-compliance would have led to disqualification. Award criteria does not entail disqualification, but should be given weight in the evaluation process. The tender should be clear and show all the criteria being used to assess the strength of the bids. He reiterated that once his clients' bid was technically compliant, he could not have been disqualified through an administrative fault.

When tendering bids, Maltese law requires three years experience, but in the present tender they exceeded this by asking for five years. The contracting authority should explain clearly why this period was chosen. Administrative hurdles should not be used to restrict the number of bidders.

The last point raised by Dr Adrian Delia was that Regjun Xlokk is not a juridical entity and thus would not be in a position to sign any eventual tender agreement.

Dr Reuben Farrugia on behalf of the preferred bidder here filed a copy of a Court of Appeal judgement dated the 30<sup>th</sup> October 2012, in the case "Aurelia Enforcement Limited vs Dipartiment tal-Kunsilli Lokali, Regjun Xlokk u Bord ta' Revizjoni dwar il-Kuntratti Pubblici". He explained further the time frame which led to today's hearing. Aurelia Enforcement Limited had filed a pre-contractual objection asking for explanations regarding the award and selection criteria. The Board had decided that Aurelia's constraints had no basis and found nothing amiss in the tender documents. Aurelia Enforcement Limited could have filed an appeal against that decision but instead chose to bid in the tender. Subsequently, on being disqualified, Aurelia Enforcement Limited filed another appeal before the Public Contracts Review Board. In that appeal all the submissions made today had already been made during the hearing and decided upon, the Public Contracts Review Board rejecting appellant's claims. Then Aurelia Enforcement Limited appealed before the Court of Appeal which also decided on the same merits being raised again today. The court judgement copy filed today contains both the minutes of the Public Contracts Review Board case and the Public Contracts Review Board decision, which the court of appeal confirmed.

The same questions are being raised again now abusively. The Public Contracts Review Board had already decided that the five year condition was mandatory and entailed disqualification. Yet now three years down the line the Board is being asked to reconsider. This is repetition three times over. The Public Contracts Review Board cannot take over the functions of the evaluation board, nor can it simply overturn previous decisions taken by it and by the Court of Appeal. As regards the administratively non compliance question, it was clear that the requisites of experience and the number of employees had to be satisfied. Both these points have also been decided upon.

Dr Adrian Delia on behalf of the appellants stated that the letter sent to his clients did not give any reason for his disqualification and moreover the contracting authority should have given the price of the award.

Furthermore when the decision was taken in August 2012 his clients satisfied the five year experience.

The Chairman remarked that the experience period had to be satisfied at the time of the closing date and not of the evaluation date.

At this stage the hearing was brought to a close.

**This Board,**

**Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 20<sup>th</sup> August 2012 and also through the Appellant's verbal submissions during the hearing held on the 18<sup>th</sup> July 2013, had objected to the decision taken by the pertinent Authority, in that:**

- a) The Appellant confirmed that if after hearing his case, the same situation arises as that already arisen in the decision taken by PCRB on 4 July 2011 and upheld by the Court of Appeal as per the latter's decision taken on 30<sup>th</sup> October 2012, then the PCRB could not overturn this decision;**
- b) The Appellant had raised a pre contractual objection to the Contracting Authority in that 'There existed no clear cut distinction between a selection criteria and an award criteria during the evaluation stage of the tender';**
- c) The 'Minimum five year experience' requirement should have been treated as an award criteria and not as a selection criteria;**
- d) When evaluating the tender, the Contracting Authority decided to add an administrative compliance column to the evaluation grid. In this regard, the Appellant was administratively non compliant as he did not have 5 years of experience in the field requested in the tender.**

**Having considered the Preferred Bidder's 'Letter of Reply' dated 5<sup>th</sup> March 2013 and also the verbal submissions during the hearing held on the 18<sup>th</sup> July 2013, in that:**

- a) The Appellant did not mention the 'Administrative Compliance Grievance' in his letter of objection;**
- b) The PCRB had already decided upon the 'Five year experience' condition;**
- c) It was made clear in the tender requisites that the number of employees was to be taken into account during the evaluation process.**

**Reached the following conclusions:**

- 1. The '5 year experience' clause was mandatory and if this clause is not satisfied by any bidder, then he is administratively not compliant. The Appellant did not**

**satisfy this condition and the Evaluation Board of the Contracting Authority, justifiably, disqualified the Appellant's bid;**

- 2. Although the Appellant was aware of the fact that he did not satisfy the '5 year experience' condition from the very beginning, he submitted his offer for adjudication which in actual fact represented an acceptance to all the conditions laid out in the tender document , including the '5 year experience' clause;**
- 3. The 'Five year experience' clause should have been satisfied by the Appellant at the time of the closing date of the tender and not at the evaluation process date.**

**In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed. Furthermore, this Board upholds the previous decision taken by PCRB dated 4 July 2011 and the decision taken by the Court of Appeal dated 30<sup>th</sup> October 2012.**

Dr. A. Cassar  
Chairman

Dr. C. Cassar  
Member

Mr. R. A. Matrenza  
Member

*26 August 2013*