

## PUBLIC CONTRACTS REVIEW BOARD

Case No. 647

CT 2096/2013

### **Service Tender for the Provision of Security Services, Custodian and Senior Clerk Duties at the Heritage Malta.**

The tender was published on the 22<sup>nd</sup> October 2013. The closing date was the 19<sup>th</sup> December 2013.

The estimated value of the Tender was €3.5 million.

On the 6<sup>th</sup> December 2013 Protection Services (Malta) Limited filed an objection raising **pre-contractual concerns** regarding the tender in terms of Regulation 85 of the Public Contracts Procurement Regulations.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancillieri as members convened a hearing on Tuesday the 7<sup>th</sup> January 2014 to discuss the objection.

Present for the hearing were:

#### **Protection Services (Malta) Limited - Appellant**

Mr Jason Pisani	Representative
Ms Elinor Svennson Moller	Representative

#### **Heritage Malta - Contracting Authority**

Arch David Zahra	Representative
Mr Kenneth Gambin	Representative
Dr Alex Sciberras	Legal representative

#### **Department of Contracts**

Ms Ninette Gatt	Procurement Manager
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The Chairman made a brief introduction and asked the appellant's representative to make his submissions.

Mr Jason Pisani, a Director of the appellant company, which is a new company, on its behalf said that the tender document contradicted itself in that while Clause 5.1 stated that the tender was open to all bidders, Clause 6.1.1 – Eligibility Criteria, on the other hand limited the tender to bidders who had a yearly turnover of not less than €200,000 in each of the years 2010, 2011 and 2012, thus making it discriminatory against new bidders. Technical capacity is not measured by the financial capacity.

The Chairman explained that the contracting authorities had the right to impose conditions in tenders to ensure that the bidders had the necessary competence to carry out the project of a certain entity, being tendered for.

Dr Alex Sciberras on behalf of the contracting authority said Regulation 28.2 of the Public Procurement Regulations states that contracting authorities may require tenderers to meet minimum capacity levels in accordance with Regulations 51 and 52. Thus the contracting authority may impose conditions regarding the previous experience, turnover and number of employees. This is not a question of discrimination. The law is clear and in fact most of the conditions in the present tender arise specifically from Regulation 52. The reason why this tender imposed these conditions is because the awarded contractor would be supervising all Heritage Sites in Malta and the contracting authority needed to ensure that bidders had the necessary experience to carry out such work and that they had the necessary resources and manpower. He contended that the present tender would not be suitable and would be too big for a newly set up contractor. Regulation 55 states that for those contracts listed in Schedule 8 only the restrictions imposed by Regulation 46 and 49 apply. Security services fall under schedule 8. The services falling under this schedule are normally specialized services requiring a very good background and a level of trust. Other restrictions do not apply for these kinds of service. The contracting authority in similar tenders has a more free hand.

Mr Jason Pisani on behalf of the appellant stated that any exclusion in his opinion equates to discrimination. The tender limits the opportunity to the same three companies who have the necessary experience. He claimed that he personally had the experience because when employed with the armed services he was in charge of the security at the Palace and Castille.

The Chairman explained that the contracting authority in such tenders has to impose certain conditions. The nature of the tender requires it; the contractor has to provide security to national treasures and has to have the necessary manpower.

Dr Alex Sciberras said that is not correct to state that the tender was open to three operators because the tender was open to all security companies in Europe. It is in the interest of the contracting authority to open up the tender to as many bidders as possible. But it cannot accept offers from anyone to render this service.

Mr Jason Pisani said that his company had paid the same fees and licences as the other big companies. He claimed that the Minister informed him that the relative clause is going to be changed.

At this point the hearing was brought to a close.

**This Board,**

**Having noted the Appellant's objection , in terms of the 'Reasoned Letter of Objection' dated 3<sup>rd</sup> December 2013 and also through the Appellant's verbal submissions during the hearing held on 7<sup>th</sup> January 2014, had objected to the decision taken by the pertinent Authority, in that:**

- a) Appellant felt he is being discriminated due to the fact that since Appellant is a newly setup Company, same could not conform with the requirements laid out in clause 6.1.1. , i.e. in that 'bidders had to have achieved a minimum annual turnover of at least Euros 200,000 for the years 2010, 2011 and 2012'.**
- b) Appellant contends that the above clause limited the circle of possible bidders.**

**Having considered the Contracting Authority's verbal submissions during the hearing held on 7<sup>th</sup> January 2014, in that:**

- a) In accordance with current Public Procurement Regulations, the Contracting Authority had the power and obligation to lay down conditions to ensure deliverance and expertise in the execution of the assignment of duties as specified in the tender document.**
- b) Since this tender involved a very sensitive area of Malta's Heritage sites, it was imperative for the Contracting Authority to ensure that the Preferred Bidder had the necessary experience and knowhow how to execute the required duties.**
- c) The Appellant did not possess the necessary resources to carry out the mandatory requirements as stipulated in the tender document.**

**Reached the following conclusions:**

- 1. This Board opines that there should not be unreasonable conditions laid out by the Contracting Authority, to create a 'Cartel'. But this same Board strongly feels that the Preferred Bidder must be capable of carrying out the assignment which is stipulated in the tender document.**
- 2. The experience claimed by the Appellant was in fact, that the main shareholder of the Appellant Company was employed with the Armed Forces of Malta and in charge of security at Castille. This does not; in any way qualify the Appellant Company to satisfy the experience and resources required as stipulated in the tender document.**

- 3. The treasured Architectural Sites of Malta must be preserved and protected in all respects so that the successful bidder must possess the required resources and knowhow to qualify for this tendered assignment. This Board opines that the Appellant does not possess such requisites.**

**In view of the above, this Board finds against the Appellant Company and recommends that the evaluation process of the tender is to be continued.**

Dr. Anthony Cassar  
Chairman

Dr. Charles Cassar  
Member

Mr. Lawrence Ancillieri  
Member

*12 February 2014*