

PUBLIC CONTRACTS REVIEW BOARD

Case No. 670

DCS 38/2010

Tender for the Provision of Carriage Services Using Vehicles Meeting EuroIV Standards.

The tender was published on the 23rd April 2013. The closing date was the 14th May 2013.

The estimated value of the tender was €100,000 (Exclusive of VAT).

On the 9th January 2014 Borg Bros filed an objection against the cancellation of the tender.

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 20th February 2014 to discuss these concerns.

Present for the hearing were:

Borg Brothers - Appellants

Mr Carmelo Borg	Representative
Mr Nicholas Borg	Representative
Dr John L. Gauci	Legal Representative

Ministry for the Family and Social Solidarity - Contracting Authority

Mr John Degiorgio	Director Corporate Services
Ms Elizabeth Vella	Chairperson Evaluation Board
Mr Martin Buhagiar	Member Evaluation Board
Mr Vince Ellul	Member Evaluation Board
Dr Toni Abela	Legal Representative

After making a brief introduction, the Chairman invited the appellant's representative to make his submissions regarding the objection.

Dr John L. Gauci on behalf of the appellants said that his clients were objecting to the cancellation of this tender in which they had submitted the cheapest compliant tender. He stated that the contracting authority failed to give the reason for the cancellation of the tender. The notice received by appellants just stated that the tender had been cancelled in terms of clauses 33.1 and 33.3 (b) of the Instructions to Tenderers, no specific reason had been given. Clause 33.1 refers to the right of the contracting authority to cancel the tender, clause 33.3 (b) however reads "*the economic or technical parameters of the project have been fundamentally altered.*" He explained that the present tender was for the provision of a service and has been provided for decades, awarded to around three different bidders alternately. This is considered an essential service. Government Department always have need of carriage service. He contended that albeit the notice of cancellation referred to clause 33.3 (b), this clause refers to "project" while the tender was not for a project but for an ongoing service, and such a service has not been fundamentally altered. His clients had submitted the cheapest offer that had been compliant and should have been awarded the tender. He referred to previous decisions handed down by the PCRB that stated that whenever a cancellation of a tender was resorted to, this had to be justified and the contracting authority should give such justification.

Dr Toni Abela on behalf of the contracting authority explained that it is apparent that it had become the praxis that whoever tendered the cheapest offer automatically was awarded the tender. This meant, in the present case that for years the same contractor had been awarded the tender. Nothing in the tender document prevented the contracting authority from changing its attitude in obtaining the service. For a long number of years the contracting authority had followed the procedure which awarded the tender to the cheapest but not necessarily the best offer. The new administration that came into power after the last election wanted to ensure that it obtained the best value for money; wanted more competition and efficiency and distribution of services. Article 26 of the Public Procurement Regulations allows such services to be acquired through framework agreements which provide more flexibility in pricing and more bidders. The contracting authority would thus obtain the best service and better value for money. Clause 33.3 (b) mentioned the changing of economical or technical parameters as reason for cancellation. In the present case both circumstances are present, from the technical aspect because the contracting authority wanted to opt for a framework agreement which would be the best way to maximise the country's resources, and from the economical aspect. The economical aspect means that it is not the best price that matters but that the best service is obtained. In the present tender, appellants offered €14.80 while the other bidder offered €24.00. At face value it seems that the appellants offer is the cheapest but it resulted that in the previous tender, appellants had offered around €22. The contracting authority could not understand how the appellants today, when prices are rising, could tender a price 40% less than their previous bid. This fact raised doubts on the service being provided. For these reasons he contended that the cancellation was justified.

Mr John Degiorgio, the Director Corporate Services said during the evaluation process, at the first meeting of the evaluation board, a note from the new permanent secretary was received which ordered that the services be obtained through a framework agreement and to cancel the present tender. The evaluation board had no other options but to recommend the cancellation of the tender. He agreed with the Chairman that whenever tenders were cancelled a more detailed notice is given containing the reasons for such cancellation.

Dr John Gauci for the appellants said that the Public Procurements Regulations explained how the tenders should be awarded. Regulation 28.3 of the regulations specified that tenders should either be awarded to the cheapest bidder or else using the Most Economical Advantageous Tender criteria. If the contracting authority wished to use the MEAT criteria then it should have issued such a tender in the first place.

The Chairman remarked that on examining the bids it is seen that there is a great discrepancy between the two bids and it is reasonable for the contracting authority to have doubts whether the service could be provided at the cheaper price.

Dr John Gauci replied that the reason given to appellants for the cancellation was not that. The present objection was made on that decision. The appellant firm is made up of six brothers and the question of employees and the minimum wage does not arise since the brothers are self-employed and could absorb the reduced price. He contended that if the real reason was the question of the price then it should have been given to appellants in order to enable them to object on that reason. He reiterated that Regulation 28.3 regulated the award of tenders and cited the regulation.

Dr Toni Abela agreed with Dr Gauci that contracting authorities should give extensive reasons for the cancellation of tenders as this would enable the proper objections to be raised. But in the present case the reason given was clear enough because through a new policy is to go for framework agreements. This policy changed completely the previous existing position. He referred to the tender document which the appellants accepted and agreed with. The tender, which is in itself a contract, contained clause 33.3 (b) with which appellants agreed by signing the tender declaration. The contracting authority chose to proceed according to sub paragraph (b). This reserved the right to cancel for the contracting authority if circumstances changed between the date when the tender was submitted by the bidder and the award. He explained that MEAT does not mean the cheapest offer but the offer that gave the most value for money. He said that the difference between appellants' bids was so great that they could not possibly explain it away if a clarification was requested by the contracting authority.

Dr John Gauci said that according to clause 32.1 at page 13 of the tender the sole award criterion will be the price. He reiterated that the reason given to his clients was not one of those mentioned by the contracting authority during the hearing. Appellants were denied the opportunity to object properly on the real reason for cancellation.

Dr Toni Abela for the contracting authority said that the argument of the contracting authority is that it had the right to cancel the tender in order to issue a framework agreement according to the new policy. All that has been said about the economic and technical parameters was as collateral to the main issue. The contracting authority insists that it follows a new policy in spending public funds. The past practice of bidders having niches has been changed.

Dr John Gauci said that to remove the established parameters and contractual relations after a tender has been issued, just because of a change of policy, is a dangerous practice. The contracting authority should have brought the proof of how the project had changed and no such proof has been brought. The change of policy should have been applied in future tenders not in one that was in process.

The hearing was at this point brought to an end.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 9th January 2014 and also through Appellant's verbal submissions during the hearing held on 20th February 2014, had objected to the decision taken by the pertinent Authority, in that:

- a) The Appellant's bid was the cheapest and the Contracting Authority failed to give the reasons for the cancellation of the tender.**
- b) Appellant contends that the tender was intended for an 'ongoing service', and in this regard the Contracting Authority altered the system of how the tendered service is to be provided.**

Having considered the Contracting Authority's verbal submissions during the hearing held on 20th February 2014, in that:

- a) The Contracting Authority had all the necessary rights to cancel the tender, if policies and circumstances change between the date of the issue of the tender and the date of the award of the tender.**
- b) The Contracting Authority contended that under new Governmental policy guidelines, it has been decided to adopt a 'Framework Agreement' system.**

Reached the following conclusions:

- 1. From submissions made during the hearing of this appeal, it resulted the following:**
 - i) The Contracting Authority had all the rights to cancel the tender.**
 - ii) However, this Board notes that the Contracting Authority was in duty bound to state the specific reasons to all bidders for the cancellation of the tender.**
 - iii) The new Governmental directive to adopt a 'framework agreement' policy is a logical and valid concept.**
- 2. The adoption of a 'Framework Agreement' concept, will allow a wider range of prospective tenderers. This, in turn will create more competition and eventually will result in a 'Value for Money' situation.**
- 3. The Contracting Authority acted diligently in cancelling the tender to adopt a more competitive and selective outlay.**

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.

Dr. Anthony Cassar
Chairman

Dr. Charles Cassar
Member

Mr. Richard A. Matrenza
Member

18 March 2014