

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case No. 705**

**T 091/2012**

### **Provision of Security Services Requested by MITA.**

The tender was published on the 2<sup>nd</sup> November 2012. The closing date was the 11<sup>th</sup> January 2013.

The estimated value of the Tender was €285,000 (Exclusive of VAT).

Four (4) bids had been received for this tender.

On the 3<sup>rd</sup> April 2014 Khiron Security 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:

#### **Khiron Security Limited - Appellant**

Mr John Muscat	Representative
Mr Martin Sammut	Representative
Dr Franco Galea	Legal Representative

#### **Sterling Security Limited - Preferred Bidder**

Mr Noel Schembri	Representative
Dr Reuben Farrugia	Legal Representative

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

Mr Tony Sultana	Chairman
Ms Roderika Bongailas	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
Mr Sandro Calleja	Observer

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

Dr Franco Galea on behalf of the appellant firm referred to his client's letter of objection and explained the sequence of events in this tender. He said that tender had been issued on the 2<sup>nd</sup> November 2012 and closed on the 11<sup>th</sup> January 2013. The adjudication had been made on the 25<sup>th</sup> March 2014 and his client's tender had been disqualified because "*your financial offer amounting to €5.39 after adjustment to reflect the 2014 COLA was not ranked because it failed to meet the threshold €5.78 set by the government on 'Precarious Employment and contract awards by Government Department of Entities' for Cleaning and Security Services;*". His client on receiving the disqualification notice tried to verify whether the law had been changed and made some research. It resulted that an internal circular had been issued on the 14<sup>th</sup> March 2014 but the Department of Industrial Relations stated that it was not aware of the document, and referred appellant's representative to the Ministry of Social Dialogue. He had spoken to the Permanent Secretary at the Ministry who had informed him that it was not available and that the contents could not be divulged to him. It was not available to the public. The main point is that the tender had closed on the 11<sup>th</sup> January 2013 and at that time the circular had not existed because this was effective as from 10<sup>th</sup> March 2014. He stressed that his client was not endowed with precognitive abilities and could not have known what guidelines would be issued in the future. Up to this morning he had checked and found that the only law that had been issued quantifying the minimum wage was LN 444/2013. On the 2<sup>nd</sup> October 2013 the contracting authority had asked the appellant to submit a breakdown of the rates, and the circular in question had not been issued on that date. His client had complied with the request and submitted the breakdown, and thus was compliant.

Dr Franco Galea continued that when the circular was issued, the contracting authority instead of informing bidders of this and giving them an opportunity of changing the offers, had asked bidders to extend their offers up to the end of June 2014. A week later, appellant received the disqualification notice informing it that its offer was rejected because of this new threshold.

The Chairman remarked that the Employment Training Agency had furnished the circular in question to the PCRБ and also gave the breakdown of the rates in relation to the minimum wage.

Dr Pauline Debono on behalf of the contracting authority replying to a question by the Chairman said that the length of time taken for adjudication was because following the evaluation by the evaluation committee, the decision had to be also passed by the MITA Board as part of an internal process; and since the closing date there had been a change in the administration of MITA. She confirmed the dates mentioned by appellant's representative. She said that during the evaluation stage, the contracting authority had on the 14<sup>th</sup> March 2014 received a ministerial communication through an internal circular which stated that offers not reaching the threshold of €5.78 per hour should be discarded. Since the tender was still being processed this directive could not be disregarded. The evaluation continued and those having bids of less than €5.78 per hour were eliminated. Appellant's original offer had been at €5.30 and when this was adjusted to reflect COLA for 2014 this came to €5.39 which was less than the threshold of €5.78. The preferred bidder's original offer was €6.58 which when adjusted surpassed the threshold and was thus compliant.

Mr Tony Sultana Chairman MITA said the new Board had found that the present tender had been adjudicated but not yet awarded when it was appointed. In view of the importance

given by government to the avoidance of precarious employment, and in view of the tender offers, the Board had asked for directives from the Ministry before deciding. These directives took some time to be given but the tender had been awarded 4 days after the receipt of the directives.

Dr Franco Galea said that the law regulating precarious employment had been in existence when the tender was issued. His client's offer complied both with this law as well as with the Industrial Employment Relations Act and was compliant. At the very least the contracting authority, since the tender was still being adjudicated, should have explained the new position to all bidders, since the law had not been changed. It was not right to award the tender to a bidder who had submitted an offer that was higher than the threshold, since bidders were not aware of the threshold. The threshold did not exist at the tender closing date. He insisted that it was not right to adjudicate on a threshold that had not existed when the bids were submitted. Even if the law had been changed the contracting authority should have asked all bidders if they accepted the threshold and it would have been for bidders to accept the rate or not. He insisted that appellant was totally compliant with the provisions of the Industrial Employment Act and with the current Wage Orders and both of these had not changed yet. He said that the contracting authority had informed him that the circular was an internal government document and therefore MITA could not furnish appellant with a copy. This was on the 1<sup>st</sup> April 2014. He only got to know the content of the circular today.

Dr Reuben Farrugia on behalf of the preferred bidder said that the principle guarding against precarious employment had to ensure that the cost of wages be taken into consideration when submitting bids. The cost of wages included all the separate elements included in the fixed rate. This was not a case of the authority applying a directive retroactively. In order to avoid making an offer that risked making the employees subject to precarious employment, bidders had to ensure the right wages being given to employees. Regulation 55 of the European legislation specifically speaks of abnormally low tenders, and this regulation is there to safeguard against precarious employment. This tender was for a period of three years. Thus bidders should have included in their cost of wages everything over a period of three years, making provisions for each of the three years. The contracting authority had asked all bidders to give breakdown of rates. When bidders had submitted the methodology of how the rate had been calculated, the contracting authority had concluded that when assessing the submissions, that appellant for the year 2014 would be underpaying, because no provision had been made. The law requires that when abnormally low tenders are encountered, the bidders should be asked to explain. This was precisely what the contracting authority had done. There was no retroactivity involved. The contracting authority had been given guidelines that any offer below the threshold should be considered to be abnormally low. European Court judgements deal with this principle – one is the Norwich Union case and the other is the Mantovani case. These cases established all principles regulating abnormally low tenders. In the latter case, it was decided that the contracting authority did not need to ask for clarifications. In the first case the court said that it would be right to ask for explanations. In the present case MITA confirmed that in October 2013 it had asked bidders to submit breakdown of rates. Appellant had not made any provision for a three year contract.

Dr Franco Galea on behalf of the appellant explained that this reasoning was wrong. The tender clearly stated that the rates submitted should be exclusive of the COLA adjustments to be made for the years 2014 and 2015; in fact the COLA has already been adjusted by the contracting authority itself for the year 2014 in appellant's bid. He reiterated that appellant had been asked for a breakdown in October 2013 which was submitted. Appellant was not

told that its bid was abnormally low. The only reason given to appellant for rejection was that a circular was issued in March 2014 had set a threshold, and appellant was not aware of this. He agreed that safeguards against precarious employment should be in force but not through an internal circular but through changes in the law. The specific law in this case was the Employment Relations Act as amended in December 2012. Appellant's bid conformed to this Act. His client was asked to extend the offer up to the end of June 2014 on the 14<sup>th</sup> March 2014. Tender are regulated by the laws in force at the time of the issuing and he insisted that his client was compliant according to those laws. The contracting authority in the circumstances should have either cancelled and reissued the tender or asked the bidders to submit new bids. At this point Dr Galea filed a copy of an email that his client had sent to the contracting authority and a list of awarded tenders from which it can be seen that as late as April 2014 there were awarded tenders at rates of €4.13 by the government. Finally he stressed that his client's tender had not been discarded because of precarious employment but because of the threshold set in March 2014.

The Chairman remarked that when submitting a tender for services for three years provision for increases should be made.

Dr Franco Galea for the appellant insisted that rules are made before the closing of tenders and not after. The present tender should therefore be cancelled.

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 Company contends that its offer was discarded due to the fact that when taking into account the Cost of Living allowance for 2014, the offer ranked short of the threshold of Euros 5.78 per hour as dictated in the Government Circular which came into effect as from 10<sup>th</sup> March 2014.**
- b) Appellant claims that the closing date of the tender was 11<sup>th</sup> January 2013 and the new guidelines came into force in 2014, so that new guidelines should not change or alter the conditions as laid out in the original tender document. Appellant complied with all the working conditions as was present at the time of the closing date of the tender.**
- c) Since the Evaluation was carried out in 2004, the Contracting Authority had the obligation to inform all bidders of the new guidelines regarding precarious employment rates. Especially, when the same contracting Authority requested all bidders to extend their offers up to the end of June 2014. At the same time, Appellant Company was not aware of the new guidelines.**

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

- a) The Evaluation Board could not ignore the Governmental instructions which came into effect as from 10<sup>th</sup> March 2014 and since the finalisation of the evaluation of the tendering process, was carried out after the issue of these guidelines, same Board had to abide by the issued guidelines.
- b) The lengthy period taken from the date of the issue of tender and the date of the award of same, was beyond the control of the newly appointed Evaluation Board.

Reached the following conclusions:

1. This Board notes that there was a considerable length of time between the date of the issue of the tender, which was on 2<sup>nd</sup> November 2012 and the date of the award of the tender which occurred on 25<sup>th</sup> March 2014. The explanation given by the Contracting Authority for this unusual lengthy process of deliberation on the part of the Evaluation Board, was logical, since during that period, there was a change in the Administration of the Elected Boards and to this effect, since the Evaluation Board had to evaluate this tender, same had to take into consideration of the directives given through Circular which came into force from 10<sup>th</sup> March 2014, regarding precarious conditions. To this effect, the Evaluation Board chose the tenderer who abided by these conditions.
2. This Board opines that any prospective bidder, when tendering for more than one year, in this particular case, for a period of three years, should provide for increases in the wage (COLA) and this provision should reflect a modest but prudent margin of profit. This Board cannot and will not accept a 'scenario' where a commercial enterprise will bid for a long term tender without making provisions for increase in wages, etc. And without providing for a moderate percentage mark up of profit. Otherwise, the margin of profit will be created through precarious conditions.
3. This Board also notes that the Evaluation Board, at the time of awarding the tender, could not ignore the directive effective from 10<sup>th</sup> March 2014, since the decision of the award of the tender was effected on the 25<sup>th</sup> March 2014.
4. In this particular case, the lengthy 'time frame' between the issue of the tender and the award of same, was justified through reasons brought forward by the Evaluation Board of the Contracting Authority. In this regard, the Evaluation Board acted in a diligent and transparent manner.

5. **This Board also contends that the Evaluation Boards of all Contracting Authorities, should request a full breakdown of ‘Employment Cost’ as stipulated by the ETC together with all other expenses (Overheads), to ensure that the successful bidder will enjoy a moderate percentage of profit, as is regarded, as decent, in the commercial community. If this condition is not respected, then precarious conditions will persist.**
6. **Appellant had the remedy to enquire about the minimum wage costs for 2013 and also to provide for all necessary increases in these costs, since the tender was for a period of three years.**
7. **Preferably bidder’s offer was a reasonable price.**

**In view of the above, this Board finds against the Appellant Company, however , due to ‘circumstances’ of ‘Time Lag’, from issue and award of tender, due to change of directives, this same Board recommends that the deposit paid by the Appellant should be reimbursed.**

Dr. Anthony Cassar  
Chairman

Dr. Charles Cassar  
Member

Mr. Richard A. Matrenza  
Member

*4 July 2014*