

PUBLIC CONTRACTS REVIEW BOARD

Case No. 788

CT 2138/2014

Negotiated Procedure for the Provision of Security Guard Services at the Courts of Justice.

The call was published on the 23rd October 2014. The closing date for the call was on the 11th November 2014. The estimated value of tender was €603,780.00.

Five (5) offers had been received for this tender.

On the 16th January 2015 JF Security & Consultancy Services Limited filed a letter of objection against the rejection of its offer and asking for the cancellation of the tender.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Thursday the 26th February 2015 to discuss the objection.

Present for the hearing were:

JF Security & Consultancy Services Ltd - Appellant

Mr Matthew Formosa	Director
Dr Matthew Paris	Legal Representative

Signal 8 Security Services Ltd - Preferred Bidder

Mr Josef Cuschieri	Director
Dr Steffi Vella Laurenti	Legal Representative

Courts of Justice - Contracting Authority

Mr Raymond Spiteri	Chairperson Evaluation Board
Mr Joseph Borg	Member Evaluation Board
Ms Rosita Sammut	Member Evaluation Board
Dr Noel Bartolo	Legal Representative

Department of Contracts

Mr Anthony Cachia	Director General
Dr Franco Agius	Senior Manager
Mr Antoine Galea	Procurement Manager

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

Dr Matthew Paris on behalf of appellant said that his client's tender had been rejected because it offered a rate of €5.78 inclusive of VAT when the tender required a minimum rate of €5.78 exclusive of VAT. Dr Paris submitted that:

1. The appellant's contention is that this amounted to an arithmetic error and that its offer should not have been rejected but corrected arithmetically. According to decisions by the European Court of Justice, obvious mistakes should be corrected and in this case it was evident that the appellant did not want to submit an offer that would be rejected, and thus the appellant contends that the submission with the rate "including VAT" was a genuine mistake that should have been rectified;
2. That after the tender's closing date, the circular issued on the 23rd December 2014, established the minimum hourly rates payable for security services. These new rates increased the previously applicable rates by as much as 35%. And this was applicable to all bidders. This meant a change of parameters and amounted to a material change of the tender. This material change was not admissible and was included in the European Union Directive. Also there were several decisions by the ECJ that affirmed this. Appellant contended that therefore the tender should be re-issued.

Dr Franco Agius on behalf of the Department of Contracts submitted that:

- i. The appellant's rates not the result of an arithmetical error. It was clearly written in the appellant's tender that the rate of €5.78 was inclusive of VAT; this was confirmed in the appellant's mathematical workings. Thus the evaluating board had no option but to disqualify the offer. The appellant's disqualification was just and valid;
- ii. That the award of the tender is not affected by the circular. Any effects would be felt after the signing of the contract with the preferred bidder. The circular dealt with a fact that still has to occur. Therefore since the fact has not occurred, it follows that the appellant had no juridical interest to raise the matter;
- iii. That the appellant had made two conflicting claims in the letter of objection – one asking to be reintegrated to the evaluation and the other stating that the tender should be cancelled. These contradicting claims render the objection itself null. He cited jurisprudence where this point had been decided by the Courts;
- iv. Disagrees with appellant regarding jurisprudence in matters of material change. Previous decisions dealt with co-respective changes in works offered and not only on the price increases. In the present tender this did not occur. The tender specified rates and number of hours, 20,000 hours, and this number was not changed. The agreement with the contractor with the new rates would come afterwards. The changes would be in the future and not in the award itself, but when the contract was signed. The tender was correctly awarded to the cheapest compliant tender; and whatever the decision, this must not be changed;

- v. The Government has the right to change its policies affecting contracts unless such a contract has already been signed and this principle has been upheld by the Court of Appeal.

Dr Matthew Paris on behalf of the appellant submitted that:

- a. Although following a future agreement, the contract would be signed according to the terms of the circular in question. He contended that the tender should have been withdrawn and re-issued. He asked if the contract would be signed according to the letter of rejection delivered to the appellant or for a different amount. He also contended that the new Government policies should be according to law. Parameters cannot be changed midway through an adjudication process;
- b. The appellant had not made conflicting claims. One claim dealt with the appellant's exclusion while the other was about the change in parameters;
- c. The appellant contended that there is a material change in the parameters of the tender and these would take effect as soon as the contract is signed. If the contract is signed at the bid price and the payment would later be done as per circular, at that point the material change would take effect when payment is made. The European Court of Justice Directives had dealt with signed contracts where material changes had been made. The Directive insists that when a material change occurs the tender should be reissued. Should these directives also apply at the pre-contract change? It is only the European Court of Justice that can clear this through a preliminary reference.

Dr Franco Agius on behalf of the Department of Contracts continued his submissions as follows:

1. The appellant cannot ask for reintegration into the evaluation process and cancellation of the tender procedure at the same time;
2. That any judicial interest in a tender must be based on an event that has already occurred and not on any future event. In this case, although the Government had reached an agreement with various contractors, the contract for the present tender has not yet been signed and appellant's claim was vitiated. The circular was clear and treated all bidders equally;
3. The appellant's offer was invalid since not according to specifications. The Appellant's error was not rectifiable.

The Chairman remarked that the appellant's tender was disqualified because of the rate submitted and pointed out that this was not an arithmetical mistake; and it cannot be deemed as an obvious mistake.

Dr Matthew Paris for the appellant insisted that appellant's submission was an obvious mistake and the European Court of Justice had dealt with such obvious mistakes before. It is evident that the payment of the award would be based on the circular.

Mr Raymond Scicluna, ID No. 48975M, Chairman of the Evaluation Board, under oath explained that the evaluation of the tender was based on the tender document only and the

evaluation report had been already finalised by the time the circular was issued. The report was finished on the 11th December 2014 and had recommended the preferred bidder at the price offered in the preferred bidder's tender.

Dr Matthew Paris for the appellant submitted that since the European Directive speaks of material changes after the contract is signed and not before the contract is signed, and since the European Court of Justice dealt with material change on several occasions but never at the stage before the signing of the contract, demanded that the Board issued a Preliminary Reference Procedure to have the point cleared by the European Court of Justice. Insisted that material change is not permissible but since this case is unique he insisted on the Preliminary Reference Procedure.

Dr Noel Bartolo on behalf of the contracting authority said that such a claim cannot be made at this venue and at this moment. He said that the contracting authority agreed with the submissions and preliminary pleas raised by the Department of Contracts.

Dr Steffi Vella Laurenti on behalf of the preferred bidder agrees with the submissions made by the Department of Contracts. The claim made by appellant is futile since the directive itself states that no changes are permissible during the term of the contract. This is not an interpretation. The Directive itself allows in certain instances for change without having to reissue the tender. The present case falls under article 721 of the Directive. A change in rates does not amount to material change. The changes envisaged in the current tender do not fall under these instances.

Dr Franco Agius for the Director of Contracts said that the European Court of Justice Jurisprudence had several instances where the tender document itself stipulated possible changes. There was no material change in the present tender since the service required remained the same at 20,000 hours. Material change requires a change of scope and in the present tender there is no such change of scope.

Dr Matthew Paris insisted that the tender document itself in clause 30 stated that the prices quoted are fixed and are not subject to revision or escalation. The European Court of Justice does not limit material change to activity but included even the change in the sub-contractor. Material changes are not admissible. This was a unique situation and that is the reason why he asked for the preliminary reference procedure.

At this point the hearing was closed.

This Board,

Having noted the Appellant's objection in terms of the "Reasoned Letter of Objection" dated 16th January 2015 and also through appellant's verbal submissions during the Hearing held on 26th February 2015, had objected to the decision taken by the Pertinent Authority in that:

- a) **Appellant contends that the rate quoted by the same was inadvertently quoted as "Inclusive of VAT" instead of "Exclusive of VAT". This was an obvious arithmetical error and in this regard the Evaluation Committee should have rectified such an obvious mistake;**

- b) After the closing date of the Tender, substantially higher rates were established and in this regard there was a material change in the tender conditions. The appellant contends that the Tender should have been cancelled and re-issued;
- c) The appellant requested a preliminary reference procedure to determine whether the increase in rates, after the closing date of the tender represents a “material change” of conditions in the tender, and whether this directive is applicable at the pre-contract change.

Having noted the Contracting Authority’s “Letter of Reply” dated 24th February 2015 and also through the Authority’s Verbal submissions during the hearing held on 26th February 2015 in that:

- a) The Contracting Authority maintains that there was no arithmetical error in the appellant’s bid. The latter’s offer was disqualified due to the fact that he quoted a rate “inclusive of VAT” which turned out to be a precarious condition of employment;
- b) The Appellant had in fact made a conflicting claim in that he requested to be reintegrated and yet at the same time asking the Public Contracts’ Review Board to cancel the same tender;
- c) The Contracting Authority maintains that there was no “material change” in the Tender. Any changes were to be effected in the future;
- d) With regards to the appellant’s request for a “Preliminary Reference Procedures”, the Contracting Authority insists that there is no case for this request at this venue and moment.

Reached the following conclusions

1. With regards to the appellant’s first contention, this Board credibly affirms that the rate quoted, (inclusive of VAT), by the appellant did not contain any arithmetical error and in this regard, the Evaluation Committee could not correct an incorrectly quoted rate. An arithmetical error would have been appropriate only in cases where additions or multiplications are incorrect. This Board opines that it was the duty of the appellant to quote a rate, not inclusive of VAT. This was clearly dictated in the Tender Document. In this regard, this same Board does not uphold the appellant’s first contention. The latter’s offer was not according to specifications in the first place;
2. With regards to the appellant’s second contention, this Board justifiably confirms that there was no material change in the Tender. A material change requires as well a “change in scope” or activity. In this regard, this Board opines that the scope and activity remained the same so that the “material change” factor does not apply. A change in rates does not represent a material change. This Board noted that all bidders were treated on the same level playing field. This Board also justifiably opines that the circular 27/2014 issued by the Department of Contracts dated 23 December 2014 did not affect the award of the tender in that, the same tender referred to an event which had still to be

implemented and since the event had not occurred, this same Board opines that the appellant's second contention is not justified. In this regard, this Board does not uphold this same contention.

- 3. With regards to the appellant's third contention, this Board opines that since it has been credibly proved that there was no arithmetical error, and no material change in the tender, this same Board does not find any justifiable and credible reason why this Board should seek a "preliminary reference procedure" from the European Court of Justice. In this respect, this Board does not uphold the appellant's request in this instance as this is not the right time and venue to decide the matter;**
- 4. This Board upholds the Contracting Authority's contention in that the appellant made a conflicting claim when requesting to be integrated, yet at the same time asking this Board to cancel the tender.**

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. Lawrence Ancillieri
Member

10 March 2015