

PUBLIC CONTRACTS REVIEW BOARD

Case No. 791

DH 1447/2014

Quotations with Extended Threshold for Clerical Services at the Rehabilitation Hospital, Karin Grech.

The call was published on the 14th August 2014. The closing date for the call was on the 28th August 2014. The estimated value of tender was €120,000.00 (Exclusive of VAT).

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

On the 3rd February 2015 JF Services Limited filed a letter of objection against the award of the tender to G4S Security Service (Malta) Limited.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Wednesday the 11th March 2015 to discuss the objection.

Present for the hearing were:

JF Services Limited - Appellant

Mr Matthew Formosa	Director
Dr Matthew Paris	Legal Representative

G4S Security Services (Malta) Ltd - Preferred Bidder

Mr Julian Dimech	Representative
Mr Eder Catania	Representative
Dr Albert Grech	Legal Representative

Central Procurement & Supplies Unit - Contracting Authority

Mr Albert Briffa	Chairperson Evaluation Board
Ms Mary Grace Balzan	Secretary Evaluation Board
Mr Ray Bezzina	Member Evaluation Board
Mr Carl Camilleri	Member Evaluation Board
Ms Donna Micallef	Member Evaluation Board
Dr Stefan Zrinzo Azzopardi	Legal Representative
Ms Rita Zammit	Procurement Manager

Dr Stefan Zrinzo Azzopardi on behalf of the contracting authority filed a reasoned letter of reply to the appellant's objection letter.

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

Dr Matthew Paris on behalf of the appellant explained that the closing date for this call for quotations was the 28th August 2014 however a letter informing the appellant that the award was to be recommended to the preferred bidder was received on the 27th January 2015. The same letter also informed the appellant that the rate as submitted by the preferred bidder would be re-aligned to be in conformity with the Circular 27/2014 issued by the Department of Contracts on the 23rd December 2014. He contended that this case is different from Case 788 decided earlier by the Board, because in that tender it had been clearly explained that adjudication had been done solely on the bidders' submissions. In the present objection, although the closing date had been more than 7 months before, the Evaluation Board was also taking into consideration the same Circular. Had the latter only evaluated bids in the present tender on what was submitted by bidders then there would have been no problems but the latter went further by taking into consideration the said circular. This decision leads to the subject of material change. He contended that even if a change was made by the contracting authority itself it was inadmissible. He contended that the change in rate payable to the preferred bidder consists in material change, and this change would exceed 15%. Any increase over 15% constituted a material change. Dr. Paris contended that the change in rates necessitates the re-issue of the call for quotations as material change is not allowed. The European Court of Justice and the European Union Directive are very clear on this point. He reiterated that a change in rate amounts to a material change. There had been no urgency in this case since the closing date had been on the 28th August 2014 and the circular had not yet been issued on that date. The appellant's representative insisted that the tender should have been re-issued.

Dr Stefan Zrinzo Azzopardi on behalf of the contracting authority explained the sequence of events in this call for quotations. The evaluation report was completed on the 23rd October 2014, and had been submitted to the Departmental Contracts Committee on the 6th November 2014. However by the time the green light had been given by the DCC, circular 27/2014 had been issued. This shows that the evaluation had been done taking only into consideration the original rates as submitted by the bidders. Adjudication was made to the cheapest compliant bidder. The changes in rates as proposed by Government affect all government services and not just the present call for quotes. Circular 27/2014 reflected a clear revised policy by the government; the Government chose and wanted to pay more, but the bids remained the same. He insisted that there was no material change. Finally he pointed out that the rate submitted by appellant had been not only higher than the preferred bidder's but it was also higher than the rate resulting when the preferred bidder's offer was increased according to the circular.

Dr Albert Grech on behalf of the preferred bidder said that the circular in question was clear in that *"It is important to underline that these new rates are payable and effective with all new services contracts entered into from 1st January 2015. In the case of tenders already issued and not awarded before the 1st January 2015, the contract shall be drawn up using the tender conditions and specifications as published"* this did not imply any material changes as contended by appellant. The circular continued – *"however, an addendum to the contract shall then be issued reflecting the above mentioned minimum rate. It is imperative that Contracting Authorities issuing new service tenders include the above mentioned minimum*

hourly rates in the tender document.” This shows that there was no material change. There was just a change in policy and the preferred bidder had submitted the cheapest offer.

Dr Matthew Paris for the appellant said that the addendum constituted a material change, since this involved a change from what the bidder offered. He referred to the EU Directive about material change stating, *“It is necessary to clarify the conditions under which modifications to a contract during its performance require new procurement procedure taking into account the relevant case law of the European Court of Justice. A new procurement procedure is required in case of material changes to the original contract.”* Once an offer has been accepted a contract has been made and the European Directive is very clear. He said that appellant was not asking to be awarded the tender instead of the preferred bidder but was asking that in line with the European Directive and European Court of Justice decisions, once a material change in the original bid occurs then this necessitates a re-issue of the tender. Any change in policy must also be within the law.

At this point the hearing was closed.

This Board,

Having noted the Appellant’s Objection in terms of the “Reasoned Letter of Objection” dated 2 February 2015 and also through the Appellant’s verbal submissions during the Public Hearing held on the 11th March 2015, had objected to the decision taken by the pertinent Authority, in that:

- a) The Appellant contends that the Contracting Authority took into consideration Circular 27/2014 whereby the rates as submitted by the Preferred Bidder were to be increased by 15%. This will reflect a “material change” to the tender and to this effect; the Contracting Authority should re-issue the Tender.**

Having considered the Contracting Authority’s verbal submissions during the Public Hearing held on the 11th March 2015, in that:

- a) The Contracting Authority maintains that the Evaluation Committee had taken into consideration the rates submitted by tenderers. The Recommended Bidder’s offer was “fully compliant” and also the cheapest**
- b) The Contracting Authority also contends that there was no “material change”, but just a “Governmental Change of policy”**
- c) The rate quoted by the Appellant Company was not only the cheapest but also higher than the rates as quoted in Circular 27/2014 issued by the Department of Contracts**

Reached the following Conclusions:

- 1. It was credibly proved that the Evaluation Board’s report was already finalised before the circular 27/2014 of the Department of Contracts issued on the 23rd December 2014. In fact it was justifiably established that the decision for award by the Evaluation Board was issued and completed on the 23rd October 2014. This Board noted that although the green light was given for the award of the**

Contract by the Departmental Contracts' Committee on the 26th January 2015, this Board credibly contends that the decision taken by the Evaluation Committee was correct in adopting the maxim that the most economical and technical compliant tender should be awarded to the cheapest compliant bidder. This Board also justifiably affirms that there was no “material change” in the Tender Contents. The principle of material change should be described as a change in the substance of the activity of the tendered works both in activity and in magnitude. In this particular tender, this Board opines that these elements of changes were not present and in this regard, this Board upholds the Contracting Authority’s claim that there was no “material change” in the Tender contents;

- 2. This Board also notes from credible submissions made by the Contracting Authority that the Evaluation Committee acted in a just, fair and transparent manner in the Evaluation Process. This Board, maintains that the Evaluation Process has been carried out in accordance with the criteria of choosing the cheapest “fully compliant” offer. In this regard, this same Board upholds the Contracting Authority’s contentions;**
- 3. This Board would also point out that this Appeal contains the same objective elements as objected to in case 788 in which the same had decided that there was no “material change” in the tendering process. A “material change” entails a “change in scope” and magnitude of the tender itself. This Board justifiably contends that such an element did not occur. In this regard, this Board does not uphold the Appellant’s contention.**

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

9 April 2015