

PUBLIC CONTRACTS REVIEW BOARD

Case No. 796

AG 1613/2014

Tender for the Provision of Security/Messenger Services at the Office of the Attorney General.

The tender was published on the 12th August 2014. The closing date was the 26th September 2014. The estimated value of tender is €28,700 per annum (Exclusive of VAT).

On the 3rd February 2015 JF Security & Consultancy Services Ltd. filed an objection against the decision of the contracting authority to award the tender and demanding that the tender be cancelled.

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 9th April 2015 to discuss the objection.

Present for the hearing were:

JF Security & Consultancy Services Ltd - Appellant/Preferred Bidder

Mr Peter Formosa	Director
Dr Matthew Paris	Legal Representative

Security Services Malta - Preferred Bidder

Mr Bernard Vella	Director
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Office of the Attorney General - Contracting Authority

Mr Adrian Tonna	Secretary Evaluation Board
Mr Keith Ellul	Member Evaluation Board
Dr Abigail Caruana	Legal Representative

The Chairman, following a brief introduction, invited the appellant's representative to make his submissions on the objection.

Dr Matthew Paris for the appellant, and also one of the preferred bidders, explained that this tender had been issued for a period of four (4) years but the award was made to four bidders, one year per bidder, sharing the award between 4 bidders. Although his client was one of the intended awardees, they were objecting to the award because there had been a material change to the tender's parameters. He referred to another previous case already decided by the Public Contracts Review Board, Case 788. That case was about a negotiated procedure however, and in such a procedure, changes were admissible; while the present case involved a tender. Thus circumstances were different and material changes to the tender are prohibited by the European Directive. There were enough cases decided by the European Court of Justice, and that court always decided that whenever a material change was made to a tender, the only option was to cancel the tender and have it re-issued.

Dr Paris contended that certain changes affecting the tender amounts to material change. The European Court of Justice decisions referred to material changes after the contract was signed. In the present case the change was made before the award of the tender. However he contends that once a tender offer is accepted by the contracting authority, this acceptance has the same validity as a contract. He insisted that clause 17.6 of the tender document stated that *"The prices quoted are fixed and not subject to revision or escalation of costs, except for revision of prices due to Cost of Living Adjustment (COLA) or otherwise provided for in the Special Conditions"*. This was because otherwise there would not be transparency in a goal-post change. There was nothing in the special conditions and neither was the change through the COLA and the prices should have been fixed. He reiterated that the tender should be cancelled according to clause 33.3 (b) because the economic parameters of the project have been fundamentally altered. In Case number 788 there was no cancellation option, but in the present case there is. Dr Paris filed a copy of a decision of the Department of Contracts in another tender to cancel the tender (CT 2096/2013) because of the same reason.

Dr Abigail Caruana for the contracting authority queried the appellant's juridical interest in filing the objection. Appellant had been awarded the tender according to the original specifications; all 4 preferred bidders had in fact bid the same price of €6.82.

Mr Keith Ellul, ID No 629182M, a member of the evaluation board, under oath said that the Circular of the 23rd December 2014 was not taken into consideration when adjudicating the tender. The evaluation report was submitted on the 18th December 2014 and the circular was issued on the 23rd December 2014, and the report recommended that the tender be shared between 4 bidders who had offered the same price.

Mr Adrian Tonna, the secretary of the evaluation board said that the finalized report was forwarded to the Attorney General for approval, and when this was given the necessary action was taken.

Dr Matthew Paris for the appellant insisted between the finalizing the evaluation report and the notice of award, a month had passed and the circular had been taken into consideration during that period.

Dr Abigail Caruana for the contracting authority contended that:

- i) The new prices would come into effect in a future date and the tender award was correct, the scope remained the same;
- ii) The previous decision delivered by the Public Contracts Review Board on material change, had not been appealed from and has thus become “Res Judicata”;
- iii) The tender price parameters had not been changed; any increase in prices that would be absorbed by the Government;
- iv) Clause 17.6 is directed towards bidders and not to the contracting authority.

Mr Peter Formosa for the appellant said the rates as set down in the circular did not take into consideration the actual overheads and left no margin of profit.

Dr Matthew Paris for the appellant explained that with those rates the security companies would be working at a loss. He insisted that the only just and logical solution would be to cancel the tender and re-issue under new parameters. Otherwise he did not exclude the possibility of appellant asking for the issue of a prohibitory injunction.

At this point the hearing was closed.

This Board,

Having noted the Appellant’s objection, in terms of the “Reasoned Letter of Objection” dated 29th January 2015 and also through the Appellant’s verbal submissions during the Public Hearing held on the 9th April 2015 had objected to the decision taken by the pertinent Authority in that:

- a) **The Appellant contends that since there was a material change to the Tender’s parameters, the tender should have been cancelled and re-issued under the revised parameters;**
- b) **The Appellant maintains that the Evaluation Committee had taken into consideration the contents of the Circular 27/2014 issued by the Department of Contracts on the 23rd December 2014 in arriving at the Evaluation Report and the recommendation of the award of the Tender.**

Having considered the Contracting Authority’s “Letter of Reply” received by this Board on the 10th March 2015 and also through the verbal submissions during the Public Hearing held on the 9th April 2015 in that:

- a) **The Contracting Authority maintains that there was no “material change” to the parameters of the tender. The Evaluation process was carried out to conform with the conditions as laid out in the Tender Document and not in conformity with the contents of Circular 27/2014 issued by the Department of Contracts on the 23rd December 2014;**
- b) **The Contracting Authority also contends that the Tender “Price Parameters” were not changed; any increase in rates would be absorbed by the Government.**

Reached the Following conclusions:

- 1. First and foremost this Board noted the Contracting Authority's concern with regards to the Appellant's juridical interest. This Board opines that since the issues being contested by the Appellant company were of importance to establish and re-affirm this same Board's previous decisions, this issue is being waived;**
- 2. With regards to the Appellant's first contention, this Board re-affirms its previous decisions with regards to what constitutes a "Material Change" in a Tender. This Board opines that a "Material Change" occurs when the extent or scope of the tender is altered or otherwise is extended to include additional works or services from those stipulated in the original Tender Document. This Board justifiably notes that the conditions, scope and extent of the Tender Document remained unaltered. In this regard, this Board does not uphold the Appellant's first contention;**
- 3. With regards to the appellant's second contention, this Board does not find a credible or justifiable reason or proof that the Evaluation Committee was in any way conditioned by the contents of the circular 27/2014 issued by the Department of Contracts on the 23rd December 2014. This Board credibly notes that since there were four compliant bidders at the same rates, the Evaluation committee rightly awarded the Tender, to be shared among these four bidders. In this regard, this Board does not uphold the Appellant's second 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

17 April 2015