

PUBLIC CONTRACTS REVIEW BOARD

Case No. 876

CT 3042/2015

Tender for the Supply, Delivery, Installation, Commissioning and Maintenance of CCTV Cameras and Control Room Equipment.

The Tender was published on the 19th May 2015. The closing date was on the 25th May 2015. The estimated value of Tender is €1,058,407.00 (Inclusive of Vat).

On the 7th November 2015 G4 Security Services (Malta) Limited filed an objection against the disqualification of their bid and the award of the Tender to Indra Sistemas S.A..

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Tuesday the 24th November 2015 to discuss the objection.

Present for the hearing were:

G4 Security Services (Malta) Limited:

Mr Kenneth De Martino	Representative
Mr Julian Dimech	Representative
Mr Eder Catania	Representative
Dr Albert Grech	Legal Representative
Dr Annabel Hili	Legal Representative

Indra Sistemas S.A.:

Mr Sergi Prieto Fraile	Representative
Mr Karim Cassar	Representative
Dr Robert Abela	Legal Representative

Transport Malta:

Ms Audrey Testaferrata de Noto	Chairperson Evaluation Board
Mr Glenn Ellul	Secretary Evaluation Board
Mr Ivan Jurkovic	Member Evaluation Board
Mr Carmel Muscat	Member Evaluation Board
Mr Emanuel Zammit	Member Evaluation Board
Mr Joseph J Agius	Representative
Ms Liz Markham	Representative
Mr Ray Stafrace	Representative
Dr Joseph Camilleri	Legal Representative

Department of Contracts:

Dr Christopher Mizzi	Legal Representative
Dr Franco Agius	Legal Representative

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

Dr Albert Grech on behalf of the Appellant explained that the original Tender had been discontinued and the present negotiated procedure had been started with two of the original bidders. He said that the definition of "negotiated procedure" meant that the Contracting Authority would meet with the bidders and negotiate with them the best deal. The original offers had stood. One request for clarification had been received by the Appellant following the closing date, to which the latter had replied. The next thing that the Appellant knew was in October, and this was that the Tender had been awarded to the Recommended Bidder. This raised doubts on whether the Tender had been negotiated or not since there had been no contact with his clients in order to negotiate. Had this been done, the Appellant would have explained the items on which its offer had been disqualified. Furthermore, Dr Grech contended that the financial parameters had been changed – the award shows that the value of the award was around €800,000 more than the estimated value of the Tender. He contended that Appellant should have been given the chance to explain matters.

Dr Christopher Mizzi on behalf of the Department of Contracts explained that the present negotiated procedure was started following the cancellation of a previous Tender where no bidders had been successful. This Tender had nothing to do with the cancelled Tender 3178/2014, and does not form part of the present case. All communication with the chosen bidders for negotiations had been carried through the EPPS system. The Appellant had in fact submitted an offer on which the Contracting Authority had asked for clarification as is normally done. The law does not dictate the method or parameters to be used when a negotiated procedure is followed, and the rights of both bidders, that is proportionality, transparency, non-discrimination and equal treatment had been safeguarded.

Dr Joseph Camilleri on behalf of the Contracting Authority contended that 'negotiated procedure' does not mean that the latter had to meet the bidders and negotiate; the electronic Tender procedures had been used to conduct the negotiations in the present procedure.

Dr Franco Agius for the Department of Contracts contended that when the Appellant had submitted an offer through the electronic procurement system, the latter had accepted the procedure being used implicitly, since their offer would not have been accepted by the system otherwise.

Dr Albert Grech for the Appellant insisted that 'negotiated' means just that – negotiations and consultations with the bidders. This should have included negotiations on the points on which the Appellant's Tender had been disqualified. But this was not done and the Appellant had just received an invitation to participate in a negotiated procedure on the 19th May 2015 but was never contacted again for negotiations and thus could not submit the necessary clarifications. He contended that the Public Procurement Regulations defined negotiated procedure as meaning "*those procedures whereby contracting authorities consult the economic operators of their choice and negotiate the terms of a contract with one or more of these*"; his client had been denied the right offered by law and was left completely in the dark.

Dr Joseph Camilleri for the Contracting Authority insisted that it was not true that Appellant had not received any communication since three requests for clarification had been sent to the Appellant on the 13th August, 11th September and 15th September 2015, and everything was done in a transparent manner. On the contrary, had meetings with bidders been held individually this could be seen as non transparent.

Dr Robert Abela on behalf of the Recommended Bidder said that the facts of the case were uncontested. The Appellant had neither denied nor contested the reasons for which his offer had been deemed to be non-compliant. Since the Technical Specifications allowed no rectification, whatever the Appellant contended does not make sense as that would have meant that the Contracting Authority was asking for a rectification. The Recommended Bidder had made an offer according to all the specifications while the Appellant had submitted a non-compliant offer. He cited a decision given on the 8th August 2013 by the Court of Appeal, (Steelshape Limited vs Department of Contracts), wherein it was held that a bidder had to be perfectly clear when submitting his offer. Dr Abela could not expect to be asked to explain his *modus operandi*, when the Appellant had the responsibility to submit a clear offer. In the original Tender no bidder had been compliant and therefore when submitting the present Tender, the Appellant had a chance to change the original specifications that had been deemed non-compliant.

Dr Franco Agius for the Department of Contracts explained that the call for negotiation sent to the Appellant had included the Tender award criteria – cheapest technically compliant. Once a bidder had failed to conform to the specifications there was no need to negotiate or clarify with him. He cited a decision in the case by Fusion Energy where it was declared that the bidder was obliged to make clear submissions of his Tender. The Contracting Authority could not legally allow the Appellant to rectify his offer. He also mentioned case T 415/10 where the court decided that once a process had been specified it had to be followed. By the word “Negotiated”, it did not mean that a meeting was to be held around a table. Had the Appellant’s offer been corrected to accept all the points where it had not been compliant, this would have meant that the Tender requisites had been changed and this was not allowed.

Dr Robert Abela for the Recommended Bidder stated that the law allows negotiations to be held even with one bidder. This meant that negotiations could be held only with technically compliant bidders.

Mr Eder Catania on behalf of the Appellant explained that the requests for clarification did not cover the points on which their offer has been disqualified. He insisted that the Appellant was not asked to explain the 6 pages of items deemed to be non-compliant. He said that they could explain the reasons countering these items; he said the objection was against the technical compliancy of Appellant’s offer.

The Chairman explained that the Letter of Objection did not include the technical reasons as grievances for objection.

Dr Albert Grech for the Appellant insisted that the question of technical non-compliance should have been treated during negotiations with the Appellant. In negotiated procedures, the technical non-compliance should have been raised and clarified during negotiations. He contended that Appellant could have answered any clarifications about the technical non-compliance had these been received. He contended that these items should have been addressed during negotiations.

At this point the hearing was closed.

This Board,

Having noted the Appellant’s objection, in terms of the “*Reasoned Letter of Objection*” dated 7 November 2015 and also through their verbal submissions during the Public Hearing held on 24 November 2015, had objected to the decision taken by the Pertinent Authority, in that:

- a) The Appellant Company contends that since the Tender was on a “*Negotiated Procedure*” basis, the Contracting Authority was in duty bound to approach the Appellant and discuss and negotiate their offer. In this regard, the Appellant maintains that due to lack of negotiations, the same was not given the opportunity to clarify any points deemed necessary.**

- b) The Appellant also contends that if his offer was discarded due to “*Technical Non Compliance*”, then this should have been clarified and discussed during the negotiated procedure. In this regard, the Appellant maintains that he was never asked to discuss his offer with the Contracting Authority.**

Having considered the Contracting Authority’s “*Letter of Reply*” dated 23 November 2015 and also through their verbal submissions during the Public Hearing held on 24 November 2015, in that:

- a) The Contracting Authority maintains that the “*Negotiated Procedure*”, was applied through the Clarifications made to the Appellant. In this regard, the Contracting Authority maintains that “*Negotiated Procedure*” does not necessarily imply that the same Authority had to meet and discuss the**

Appellant's offer;

- b) The Contracting Authority contends that the “Award Criteria” was clearly dictated in the Tender Document and the Appellant had accepted all the conditions of the Tender by submitting his offer. In this respect the “Award Criteria” was the “Cheapest Technically Compliant” and the Appellant's offer was not “Technically Compliant”.**

Reached the following conclusions:

- 1. With Regards to the Appellant's First Grievance, this Board after having examined the correspondence, (which was in the form of clarifications), justifiably opines that a Negotiated Procedure does not necessarily imply meetings between the Contracting Authority and Bidders.**

The Clarifications dated 2 June 2015 sent to all bidders clearly stated what was required. At the same instance this Board credibly notes that there are no regulations of the procedure to be conducted under the “Negotiated Procedure” system.

However, the Principles of “Equal Treatment” and “Transparency and Proportionality” will apply. With regards to these principles, this Board credibly opines that no evidence was submitted by the Appellant in order to establish whether any one of these basic principles was not adhered to by the Contracting Authority.

In this regard, this Board is credibly convinced that the Contracting Authority acted in a just and transparent manner. This Board also confirms that the clarifications sent by the Contracting Authority to all bidders were sufficient to inform the bidders of what was actually required. In this regard, this Board does not uphold the Appellant's First Contention.

- 2. With Regards to the Appellant's Second Contention, this Board justifiably opines that the Appellant Company was fully aware of the Technical Requirements of the Tender; so that no negotiations regarding the Technical Compliance can be made as otherwise there will be "*Rectifications*", which are not permissible.**

At the same time this Board credibly notes that although not contested, the Appellant's bid was technically non compliant and therefore the Contracting Authority acted in a just and diligent manner by discarding the Appellant's bid. It was the Appellant's responsibility to adhere to the Technical Specifications and the clarifications.

In this regard, the Appellant failed to do so and therefore, this Board does not uphold their Second Grievance. This Board also notes that detailed reasons were given to the Appellant for discarding his offer.

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
Chairperson

Dr Charles Cassar
Member

Mr Lawrence Ancillieri
Member

1 December 2015