

PUBLIC CONTRACTS REVIEW BOARD

Case No. 963 – CT 2076/2015: Tender for the Provision of Internal Audit and Services at ARMS Limited.

The Tender was published on the 11th September 2015. The closing date was on the 22nd October 2015. The estimated value of the Tender is €200,000 (Exclusive of VAT).

Eight (8) offers had been submitted for this Tender.

On the 22nd April 2016 PKF Accountants & Business Advisors filed an Objection against the decision taken by the Contracting Authority to cancel the Tender.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a hearing on Tuesday the 23rd August 2016 to discuss the Objection.

Present for the hearing were:

PKF Accountants & Business Advisors:

Dr Marilyn Mifsud

Business Associate

Dr Alessandro Lia

Legal Advisor

Water Services Corporation – ARMS Limited:

Mr Mark Perez

Chairperson Evaluation Board

Department of Contracts:

Dr Chris Mizzi

Legal Representative

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

Dr Alessandro Lia for PKF Malta declared that he would like to hear some clarifications from a witness, - The Chairperson of the Evaluation Board.

Mr Mark Perez, the Chairperson of the Evaluation Board at the request of Appellant, under oath stated that in this Tender he was a consultant for ARMS Limited. The Evaluation Board had taken a decision to cancel the Tender. The role of the Evaluation Board was to evaluate the Tender and had no say with the decision to appoint internal auditors.

The Evaluation Board had been informed that the internal audit would be dealt with by internal auditors in house. The ARMS Board of Directors had changed and the new Board, on the 13th January 2016 had taken the decision to go in-house for the internal audit. The Evaluation Board had thus decided on cancellation.

This decision had been taken after the Tender's closing date and when the Schedule of Offers had already been published. He did not know who the in-house internal auditors are or would be. The Evaluation Board deemed this policy change as a change in parameters because of the change which has occurred within the Board of Directors'. He did not know whether the internal audit team was made up of company employees. He remembered seeing an advert in the papers regarding this.

The Chairman remarked that it would a different matter if the internal auditors were selected from employees who were already employed with the Contracting Authority or if the new employees were specifically employed to provide the service.

At this point the hearing was stopped to await the arrival of the person who could state this.

Mr Charles Attard Bezzina ID No. 123052M an internal auditor with ARMS, under oath testified that he was aware of the Tender and its cancellation. The Board of Directors had changed in the beginning of 2016 and the new board had changed the policy. They wanted an internal audit team.

Two persons have been employed for this purpose and are in the process of employing two more. One of these was an accountant while the other was not qualified but had experience. These were Mr Kenneth Schranz and Ms Marcelle Sacco and they were employed after January 2016.

Dr Marilyn Mifsud, employed with PKF Malta confirmed under oath the list of damages claimed to have been suffered by the Appellant in relation to the cancellation of the Tender. These were shown in a document exhibited by Dr Lia.

Dr Chris Mizzi on behalf of the Department of Contracts filed a copy of the General Rules where in section 18.3 there was stated that the Contracting Authority was not liable for damages in cases where the cancellation of the Tender was ordered.

Dr Alessandro Lia for the Appellant submitted that the section quoted by Dr Mizzi states that cancellation may occur where:

- a) The procedure has been unsuccessful;
- b) Exceptional circumstances or force majeure;
- c) All compliant Tenders exceeded the financial resources;
- d) There have been irregularities;
- e) The duration of Evaluation had exceeded the time limit.

None of these has in fact occurred. The Contracting Authority is quoting b) where the economic or financial parameters have been altered. But this does not mean that the changes have been made by the Contracting Authority itself, as in the present case.

The Contracting Authority had in fact asked PKF Malta Ltd for clarification in November 2015 and 2016 and the Appellant had replied that it would absorb any additional expenses. The Contracting Authority could have awarded the Tender to the Appellant who was the cheapest bidder but instead chose to cancel the Tender after the prices had been published and instead engaged personnel to carry out the services requested in the Tender.

Dr Mizzi insisted that cancellation was only allowed where it was beyond the Contracting Authority's control. The adverts for the engagement of personnel had been issued while the Tender was in progress.

Dr Alessandro Lia insisted that the law gave this Board the power to assess and award damages by regulation 85. The Appellant had gone through expenses when preparing the Tender submission and thus had a right to be awarded damages, more so as the cancellation was capricious.

Dr Chris Mizzi for the Department of Contracts does not agree. He said that the General Rules allow instances where cancellations can be made. Policies were changed by the new Board of Directors. Had a new call for Tenders or a direct order been given things would be different and the Appellant would have been right.

Tenders have a validity period of 90 days during which both bidders and the Contracting Authority were bound. The Appellant had not extended the validity of its offer and once the 90 days have lapsed the parties are no longer bound. The Evaluation must be completed within 90 days and the Contracting Authority felt the need to give reasons for cancellation. Article 18 covers both instances of cancellation.

The Tender declaration forms informs bidders, who have to accept the possibility of cancellation. Dr Mizzi maintains that the regulation 85 where damages are mentioned refer to cases where award of Tenders had been made and does not cover similar instances. Once the cancellation has been resorted under one of the Article 18 sub-articles then there can be no damages awarded.

Dr Alessandro Lia for PKF Malta Ltd insisted that the parameters had not changed by themselves but had been changed by the Contracting Authority and the sub-articles of the law do not anticipate an active decision by the Contracting Authority for the cancellation.

At this point the hearing was closed.

This Board,

Having noted the Appellant’s Objection, in terms of the “*Reasoned Letter of Objection*” dated 22 April 2016 and also through their verbal submissions during the Public Hearing held on 23 August 2016 had objected to the decision taken by the Pertinent Authority, in that:

- a) PKF Malta Ltd’s main contention was that after the closing date of the Tender and after the quoted prices of bidders were published, the Contracting Authority decided to cancel the Tender.**

In this regard, the Contracting Authority is claiming that the reason for the cancellation of the Tender was that “*The Economic or Financial Parameters have been altered*”. The Appellant is contesting the validity of the reason for cancellation;

- b) PKF Malta Ltd is also requesting damages suffered to cover expenses when preparing the Tender submission, even more due to the fact that the cancellation was capricious.**

Having considered the Contracting Authority’s “*Letter of Reply*” dated 27 June 2016 and also their verbal submissions during the Public Hearing held on 23 August 2016, in that:

- a) Water Services Corporation – ARMS Ltd had the right to cancel the Tender in accordance with article 18.3 (b) of the General Rules Governing Tenders. The reason for stating that “*The Economic Parameters of the project have been altered*” is simply due to the fact that the newly elected Board of Directors of the Contracting Authority implemented a policy to carry out the Tendered Services “*In House*”;**
- b) Water Services Corporation – ARMS Ltd maintain that there was no justified grounds for the Appellants to request damages, as the cancellation was the end result of a change in policy within the Contracting Authority.**

Reached the following conclusions:

1. With regards to PKF Malta Ltd’s First Grievance, this Board, after having examined the relative documentation and heard submissions during the Public Hearing, would respectfully treat this matter under two main issues which are the decision to Cancel the Tender and the Economic Parameters

i) The Decision to cancel the Tender

This Board credibly notes that the Cancellation of the Tender was due to a “*Board of Director’s Decision*” dated 13 January 2016, clearly states that instead of Tendering for Internal Audit assignments from “*Outside Sources*”, the Company, (the Contracting Authority), should instead carry out this service, “*In House*” by employing the proper personnel.

Neither the Appellants nor by this Board can contest the decision taken by the Board of Directors of Water Services Corporation – ARMS Ltd in no way whatsoever. Policies are altered to better the performance of the entity and in this particular case, as it is quite normal, newly appointed Board members bring in fresh ideas.

This Board justifiably notes that the Evaluation Board of the Contracting Authority had no other choice but to cancel the Tender from outside sources relating to internal auditing to ensure that the Board’s policy is carried out.

However, this Board cannot but mention the fact that the last communication made through requests for Clarifications was made in October 2015 and in this regard, this Board is perturbed by the fact that Water Services Corporation – ARMS Ltd informed the Bidders of the outcome on 12 April 2016, which is definitely considered “*A Long Time*”.

This Board, as had on many occasions emphasized the obligation of Bidders to conform to the conditions of the Tender Document. On the other hand, the Contracting Authority should also comply with their obligations.

In this particular case, it was expected that the time taken by the Evaluation Board to communicate the result to bidders is unreasonable, taking also into account that no justified reason was submitted for this “*Longer than Normal*” duration.

In this regard, this Board opines that the Evaluation Board had to abide by the Contracting Authority’s Board decision to cancel the Tender for outside audit service. On the other hand, this Board deplores the length of time taken from the closing date of the Tender to the date of communication of the final results to the Bidders.

ii) Economic Parameters

This Board deems that the reason given by the Contracting Authority could, perhaps, been stated in a more direct manner, in that from the documentation and submissions, this Board could assess the viability and adequacy of the reasons given by the Contracting Authority.

An economic parameter can be described as the economic impact of a particular nature which would alter the Terms of Reference of a particular project. In this particular case, the parameters of internal audit have not been changed but rather extended to cover more hours dedicated to the service by having “*In House*” employees carrying out assignments, so that by having an “*In House*” service there in an economic advantage to the Authority.

This Board respectfully points out that the reasons given in the “*Letter of Rejection*” should have clearly stated that the “*In House*” factor was to be implemented by the Contracting Authority.

In this regard, this Board deems that although the type of Tendered Service was not changed, the economic benefits to be rendered through an “*In House*” service are more economically advantageous to the Contracting Authority.

- 2. With regards to the Appellant’s Second Grievance, this Board would credibly point out that the cancellation of the Tender was not capriciously done. It was clearly proven that the Evaluation Board abided by the decision of the Board of Directors of Water Services Corporation – ARMS and the decision taken cannot be contested.**

This Board reviewed the sequence of events attached to this Appeal and strongly feels that there is no justified reason why damages are to be awarded, in that, PKF Malta Ltd did not provide credible evidence that they have suffered costs in reaction to the additional

labour force employed for this assignment during the waiting period of six months except for the payment of a deposit which was made in accordance with the Public Procurement Regulations.

In this regard, this Board does not see justified reasons why damages should be awarded to the Appellant.

In view of the above, this Board confirms the decision taken by the Evaluation Board, in that, their adjudication was in accordance with the decision taken by the Board of Directors. However, due to the unreasonable length of time to convey this decision to the Appellant, the deposit paid by the latter should be fully refunded.

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member

5 September 2016