

## **PUBLIC CONTRACTS REVIEW BOARD**

---

### **Case 1266 – CT 3123/2018 – Tender for the Supply, Installation, Testing and Commissioning Equipment and Software partially using Environmentally Efficient Equipment: Mobile Lab Technologies Lot 1.**

The publication date of the call for tenders was the 14<sup>th</sup> September 2018 whilst the closing date of the call for tenders was 23rd October 2018. The estimated value of the tender (exclusive of VAT) was € 2,289,366

On the 21<sup>st</sup> January 2019 Alberta Fire & Security Equipment Ltd filed an appeal against the Ministry for Home Affairs and National Security as the Contracting Authority objecting that their bid was found to be non-compliant and that the tender was cancelled. A deposit of € 11,446 was paid.

There was one (1) bidder.

On 19<sup>th</sup> February 2019 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

#### **Appellants – Alberta Fire & Security Equipment Ltd**

Dr Ryan C Pace	Legal Representative
Dr Ian Borg	Legal Representative
Mr Duncan Barbaro Sant	Representative
Mr Oliver Fenech	Representative
Mr Jamie Clarke	Representative
Mr Jonathan Graff	Representative

#### **Contracting Authority – Ministry for Home Affairs and National Security**

Mr Chris Bell	Chairperson Evaluation Committee
Ms Doreen Seracino	Secretary Evaluation Committee
Mr Charlo Casha	Member Evaluation Committee
Mr Ismael Vassallo	Member Evaluation Committee
Prof Saviour Formosa	Member Evaluation Board
Mr Charles Vella	Representative

## **Department of Contracts:**

Dr Franco Agius

Legal Representative

Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties and prior to inviting them to make their submissions stated as a point of clarification that this appeal would be dealing with only Lot 1 of the tender.

Dr Ian Borg Legal Representative of Alberta Fire & Security Equipment Ltd (Alberta) stated that the appeal was based on the claim that bidders were declared non-compliant when in reality they had offered a product that was far superior than the standard required in the tender, and would be producing witnesses to prove this point.

Mr Jonathan Graff (German ID Card) called as a witness by Appellants testified on oath that he was the Sales and Technical Manger of MH Service GmbH. The tender asked for the provision of a mobile IT laboratory for undercover investigations. The product offered by Alberta exceeds the standards requested in the tender and incorporated the newest possible products whilst fulfilling the tender requirements. He then went through the various items contested by the Contracting Authority:

- Better racks provided – 36 Units instead of the 14 required
- CPU included with higher operational speed than the one requested
- 48 ports offered with speed of 10GB as requested and as shown in the documents submitted
- Blade storage connectivity offered more speed with fewer number of ports
- Drive bays requested all included in a different configuration

Questioned by Dr Franco Agius Legal Representative of the Director of Contracts, witness confirmed that the Appellant had offered a 19.25 MB instead of the 30 MB cache specified in the tender. He explained that the cache is like fluent memory and is related to speed. What Alberta offered was less cache which reached the same speed functionality because of more modern efficient components. He was not aware if Alberta had asked for clarification regarding the type of cache as he was not involved in the tender process. He was aware that the number of drive bays offered was lower than requested but he explained the reason for this difference earlier in his testimony. The rack offered was different as it was mounted on a vehicle.

Questioned by Dr Ryan Pace Legal Representative of Alberta, witness stated that the Contracting Authority requested a mobile lab and this was what was provided. The drive bays, the rack and the DIMM slots had all been provided for, although new generation equipment meant that what was offered exceeded the tender requirements. The architecture of a 19.25 MB cache was faster and more efficient than the 30 MB which is the older version of the same product.

Mr Chris Bell (11769M) called as a witness by the Contracting Authority testified on oath that he was the Chairperson of the Evaluation Committee and stated that the reasons for the disqualification were amplified in the letter of rejection. What the Authority requested was a standalone tower as there was the need to have a mobile unit while Appellants had assumed that they wanted a rack mounted unit which did not satisfy the criteria – the point that their offer was more effective was immaterial. Computations had been carried out on the technicality of the offer from Appellants and it was concluded that the offer did not reach the requirements – this applied to the cache, the rack cabinet, the DIMM points and the fact that a rack mounted unit was offered which is not what was wanted.

Questioned by Dr Pace witness confirmed that what was required was mobile lab technology. A rack mounted unit was not suitable as it was not mobile – Alberta offered a suspended unit which enabled limited mobility but what was required was a standalone server. A picture of the offered rack was tabled (Doc 1) but witness did not recall seeing it among the technical documents which he said did not always agree with what was submitted.

Mr Ismael Vassallo (120771M) called as a witness by the Contracting Authority testified on oath that he was a member of the Evaluation Committee. He stated that the number of drive bays offered was not sufficient to meet the tender criteria and clarifications were sought. It could be the case that Appellants were offering a better product but it did not meet the tender requirements. The offer was very technical and what was offered was near to what was requested but did not quite meet it, probably because of costs. Certain items like the rack were not suitable due to lack of space in a van. The Main board was architecturally more advanced than requested but the configuration offered was not balanced hence limiting use.

Witness confirmed that this project was EU funded but he was not aware of its ultimate use. He concluded by saying that a top quality product did not necessarily equate to what was requested.

Dr Pace said that there was a simple point to consider in this appeal, namely that a functional product superior to what was requested was being refused. Where convenient the evaluators had overlooked certain aspects despite confirming that superior technology was offered and that the offer had met all that was requested as confirmed by the technical witnesses.

Dr Borg said that here was a risk of a dangerous precedent being set. In this appeal disqualification was not due to technical non-compliance but because superior technology was offered. This could in future discourage better offers from bidders leading to a general downgrading of products offered.

In conclusion, Dr Agius said that in this bid some items met requirements others did not. It was explained by witnesses that what was requested overall was not offered. The Contracting Authority decided what it is that it wanted and had every right to turn down offers that did not meet its requirements – the server was the prime example where what was offered was not what was requested.

The Chairman thanked the parties for their submissions and declared the hearing closed.

**This Board,**

**having noted this Objection filed by Alberta Fire & Security Equipment Limited, (hereinafter also referred to as the Appellants) on 21 January 2019, refers to the contentions made by the latter with regards to the cancellaiton of Tender of Reference CT 3123/2018 listed as Case No 1266 in the records of the Public Contracts Review Board, issued by the Ministry for Home Affairs and National Security, (hereinafter also referred to as the Contracting Authority).**

**Appearing for the Appellants:**

**Dr Ryan C Pace**

**Dr Ian Borg**

**Appearing for the Contracting Authority:**

**Mr Chris Bell**

**Appearing for the Department of Contracts:**

**Dr Franco Agius**

**Whereby the Appellants contend that:**

- a) the cancellation of the Tender was not justified as the reasons given by the Contracting Authority do not indicate the exact and specific reason for such cancellation;**
  
- b) their main contention is that, they neither agree nor accept the alleged fact that their offer was deemed to be technically non-compliant. In this**

**regard, the Appellants maintain that the equipment offered was by far superior to that requested by the Contracting Authority.**

**This Board has also noted the Contracting Authority’s “*Reasoned Letter of Reply*” dated 31 January 2019 and their verbal submissions during the Public Hearing held on 19 February 2019, in that:**

- a) The Ministry for Home Affairs and National Security insists that since none of the bids were technically compliant, it had no other option but to cancel the Tender. In this regard, the Contracting Authority maintains that it had given clear specific reasons why the Appellants’ offer was deemed technically non-compliant;**
  
- b) The Contracting Authority maintains that the Appellants’ offer did not meet the technical requirements dictated in the Tender Document. In this respect, the “*Letter of Rejection*” dated 11 January 2019 specified clearly how and why the Appellants’ offer did not meet the stipulated requirements.**

**This same Board has also noted the testimony of the following witnesses:**

- 1. Mr Jonathan Graff, who was duly summoned by Alberta Fire & Security Equipment Limited;**

2. Mr Chris Bell, who was duly summoned by the Ministry for Home Affairs and National Security;

3. Mr Ismael Vassallo, who was duly summoned by the Ministry for Home Affairs and National Security.

This Board, having examined the relevant documentation to this Appeal and heard submissions made by the parties concerned, including the testimony of the witnesses duly summoned, opines that the issues that merit consideration are twofold namely:

a) The “*Letter of Rejection*” sent to the Appellants

b) The technical compliance of the Appellants’ offer

1. The “*Letter of Rejection*” sent to the Appellants

With regards to Alberta Fire & Security Equipment Limited’s first contention, this Board would refer to Article 18.3 (a) of the General Rules Governing Tenders which states that:

*“Cancellation may occur where the Tender procedure has been unsuccessful, namely where no qualitatively or financially worthwhile Tender has been received or there has been no response at all.”*

**In this particular case, there was one Bidder for Lot No 1, that is, Alberta Fire & Security Equipment Limited. During the Evaluation Process for this lot, the Appellants’ offer was found to be technically non-compliant for reasons specifically communicated to the Appellants, so that the Ministry, quite appropriately, cancelled the Tender. In this respect, this Board notes that the Appellants were also given the opportunity to rectify the shortcomings as duly listed in the Contracting Authority’s request for rectification letter dated 20 November 2018.**

**In its *“Letter of Rejection”* dated 11 January 2019, the Ministry for Home Affairs and National Security gave specific reasons why their offer was deemed technically non-complaint and at the same instance, the Contracting Authority stated the fact that the Tender is being cancelled. The decision to cancel the Tender derives from the fact that there was no qualitatively worthwhile Tender, i.e. technically compliant offers, so that the Ministry had only one course of action to take and that is, to cancel the Tender for Lot No 1. In this regard, this Board**

opines that the Contracting Authority acted in a just and transparent manner, so that this Board does not find any justifiable cause to uphold Alberta Fire & Security Equipment Limited’s First Contention.

**2. The Technical Compliance of the Appellants’ offer**

With respect to the Appellants’ Second Contention, this Board would respectfully refer to the latter’s offer defaults, as clearly stated in the “*Letter of Rejection*”, as follows:

<p><b>L1H1.1 Two (2) High-End Analysis Forensics Laboratory – PC Chasis (Case)</b></p>	<ul style="list-style-type: none"> <li>➤ <b>Not Compliant as per Specification Chasis was requested 12 x 3.5” and 3 x 5.25” Drive Bays</b></li> <li>➤ <b>Alberta Fire &amp; Security Equipment Ltd stated in their reply for clarification that “<i>the number of Drive Bays is slightly lower because it’s a different case</i>”</b></li> </ul>
<p><b>L1H1.2 Password Recovery Technologies – Central Processing Unit</b></p>	<ul style="list-style-type: none"> <li>➤ <b>Not Compliant as per Specification 30 megabyte cache was requested.</b></li> <li>➤ <b>Alberta Fire &amp; Security Equipment Limited stated in their reply for clarification that “<i>you have quoted the specifications from our stand-alone version. You need the rack mount version for the vehicle</i>”</b></li> </ul>
<p><b>L1H1.4 Blade Chassis – PC Chasis (Case)</b></p>	<ul style="list-style-type: none"> <li>➤ <b>Not Compliant as per Specification 14 U rack was requested.</b></li> <li>➤ <b>Alberta Fire &amp; Security Equipment Limited stated in their reply for clarification that “<i>This is the server with a separate 14U cabinet, but since a server cabinet is already included in the vehicle, it will not be required. The server has a height unit</i>”</b></li> </ul>

	<i>of 7U.”</i>
<b>L1H1.6 Blade Storage Server - Mainboard</b>	<ul style="list-style-type: none"> <li>➤ <b>Not Compliant as per Specifications 3TB ECC 3DSLRIMM up to DDR4-2400MHz; 24 x DIMM slot was requested.</b></li> <li>➤ <b>Alberta Fire &amp; Security Equipment Limited offered 8 DIMMs and in their reply for clarifications stated “<i>you have quoted the specifications from our stand-alone version. You need the rack mount version for the vehicle.</i>”</b></li> </ul>
<b>L1H1.6 Blade Storage Server - Connectivity</b>	<ul style="list-style-type: none"> <li>➤ <b>Not Compliant as per Specifications Quad 10G Base – T LAN was requested;</b></li> <li>➤ <b>Alberta Fire &amp; Security Equipment Limited in their reply for clarification stated that “<i>If four Ethernet ports are required, this can be adjusted to your request</i>”</b></li> </ul>

1. With regards to the first item “*LIHI*”, the Appellants offered a “*rack mountable*” whilst the Tender stipulated a “*Tower*”. In this respect, this Board would refer to the testimony of the Chairman of the Evaluation Committee wherein, it was declared that:

“*Fil-fatt, wahda mill-affarijiet, tower capable of having 12.3.5 and 3.5.25. Qed naghmluha cara li “it is not a rack mountable. It is a tower.” Jigifieri hemmhekk diga’ hemm distinzjoni li ahna mhux qed nitolbu “rack mountable”.*”

**2. With regards to item “L1H1.2”, the Appellants offered a CPU which will not achieve the stipulated 30 MB. In this respect, this Board refers to the testimony of Mr Chris Bell, as follows:**

*“It-30 MB cache mhux neċessarjament ser tagħtihielek u skond is-CPU li tawnha huma, jidher li ma jlahħqux ukoll.”*

**3. With regards to item “L1H1.4”, the Tender Documents stipulated a 14 U rack cabinet whilst the Appellants offered a 7 U rack cabinet, again, not according to the technical specifications.**

**4. With regards to item L1H1.6, again, the Tender stipulated a 24 DIMM slot whilst the Appellants quoted an 8 DIMM slot.**

**5. With regards to the last item L1H1.6 representing the connectivity system, the Tender stipulated that Quad 10 G Base-T Lan was to be supplied. Alberta Fire & Security Equipment Limited submitted a clarification indicating that such a specification can be adjusted to the request of the Contracting Authority**

**From the above, it is evidently clear that the Appellants' offer, even if it represented a more advanced technological system than that requested in the Tender Document, was not in adherence to the technical specifications as duly dictated by the Ministry for Home Affairs and National Security.**

**3. This Board would respectfully point out that the technical specifications are not capriciously stipulated but are dictated to suit and achieve the Contracting Authority's objectives. At the same instance, one has to acknowledge and appreciate the fact that the Evaluation Committee, in their deliberations must adhere to the principle of self limitation.**

**This Board would also note that although it may be the case that Appellants offered a more advanced system, the product and system as so dictated in the Tender Document, is still available on the market, as duly indicated by the technical witness namely, Mr Ismael Vassallo as follows:**

**“Avukat:** *Pero’ jien qed nifhem li dak li ntalab originarjament, ghax inti ghidt originarjament, il-prodott kien tali. Din it-teknologija li ntalbet naqblu li hija wahda antika?*

**Xhud:** *Mhux antika le. Hija teknologija li għadek issib tixtriha llum il-ġurnata”*

**In this respect this Board would refer to a judgement delivered on the 24 June 2016 by the Hon Court of Appeal in the names of Disabled Persons Co-Operative Limited vs *Direttur Ġenerali tal-Kuntratti*, where it was held that:**

*“Jibqa’ l-fatt pero’, li għalkemm il-vetturi offruti kienu “the best value for money”, ma humiex konformi ma’dak mitlub. Din il-Qorti, f’każijiet simili, mhux l-ewwel darba li ikkonfermat li l-prinċipju li l-offerent, anke jekk joffri prodotti aħjar, għandu jkun skwalifikat jekk il-prodott offrut ma jkunx skont kif indikat fis-sejha. Il-prinċipju ta’trasparenza jrid li l-Kumitat ta’evalwazzjoni jimxi mad-dettalji tekniċi kif imniżżla fid-dokumenti tas-sejha, u mhux jiddeċiedi li jagħzel liema li jidhirlu li hi l-aħjar offerta.”*

**In view of the above, this Board,**

- i) justifiably establishes and confirms that, due to the fact that there were no compliant offers, the Ministry for Home Affairs and National Security had no other options but to cancel the Tender;**
- ii) does not uphold the contentions made by Alberta Fire & Security Equipment Limited;**
- iii) directs that an amount of one thousand and five hundred euro (€ 1,500) is to be retained from the deposit paid by the Appellants, to cover the costs of this Appeal**

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Lawrence Ancilleri  
Member

*28<sup>th</sup> February 2019*