

PUBLIC CONTRACTS REVIEW BOARD

Case 1518– Servizz/20/08 – Tender for the Provision of Services of a Data Protection Officer for Servizz.Gov (Agency)

The tender was published on the 31st August 2020 and the closing date of the tender was the 24th September 2020. The estimated value of the tender (exclusive of VAT) was € 62,500.

On the 6th November 2020 Juris Malta Advocates filed an appeal against the Servizz.Gov (Agency) as the Contracting Authority objecting to their disqualification on the grounds that the tender was cancelled after they had been recommended for its award.

A deposit of € 400 was paid.

There were four (4) bidders.

On 30th November 2020 the Public Contracts Review Board composed of Dr Charles Cassar as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – Iuris Malta Advocates

Dr Peter Fenech	Legal Representative
Dr Rita Mifsud	Representative
Dr Romina Bartolo	Representative

Contracting Authority – Servizz.Gov (Agency)

Dr Marco Woods	Legal Representative
Dr Alexia Farrugia Zrinzo	Legal Representative
Ms Melissa Vella Buhagiar	Chairperson Evaluation Committee
Ms Abigail Abela Cavallaro	Secretary Evaluation Committee
Mr Massimo Vella	Representative
Mr Henry Cipriott	Representative

Dr Charles Cassar Deputy Chairman of the Public Contracts Review Board welcomed the parties. He noted that since this was a virtual meeting all the parties agreed to treat it as a normal hearing of the Board. He then invited submissions.

Dr Peter Fenech Legal Representative for Iuris Malta Advocates (hereinafter referred to as Iuris) related the course of events in the award of this tender and mentioned how on the 12th October 2020 his firm had been advised that it had been awarded the tender followed by a letter dated 29th October advising that the tender had been cancelled in terms of Article 18.3 (b) of the General Rules Governing Tenders. Dr Fenech said that reason given for cancellation was not acceptable and the clause under which the Contracting Authority had chosen to cancel was not an escape clause. One is dealing with public funds where a transparent process had to be followed and decisions cannot be abusive and discriminatory.

Appellants were contesting the Authority's decision on the following grounds:

Abusive decision – the Authority is dealing with public funds and the Government is not entitled to choose awardees – Iuris is perfectly competent and entitled to be awarded and to fulfil tenders

Discrimination – Iuris have been regularly turned down from being awarded Government tenders but they are entitled to participate immaterial of political philosophy. Iuris has been turned down previously on tenders published by Jobsplus, Communications Authority and Active Ageing among others.

Decision is legally incorrect – the Authority used Regulation 18.3 (b) as the basis for cancellation but the economic parameters were established before the issue of the tender with full details specified including the number of hours which Appellants had fulfilled on all points which were extensive and which did not provide any terms for cancellation. The evaluation committee is bound by these regulations and cannot act outside the set terms.

Escape Clause – has to be used before a successful bidder is identified and cannot be used to suit the whims of the Authority. Laws cannot be used or allowed to justify cancellation because the Authority decided to fill the position internally.

Process unacceptable – the Authority has also changed rules in previous cases and this is what makes this decision unacceptable.

Dr Marco Woods Legal Representative for Servizz.Gov (Agency) (referred to hereafter as Agency) said that reference to previous tenders was not allowed and the Board should ignore that point. Appellants are claiming that Regulation 18.3 cannot be used – this is quite in order as the Authority had changed policy and decided that the work can be carried out internally. They are not obliged to issue a fresh tender and Regulation 18.1 entitles the Agency to cancel the tender even after the closing date established for the submission of the tender and has full discretion in their decisions.

Dr Fenech contended that witnesses should have been heard before Dr Woods made any submissions and requested the Board to proceed with hearing of witnesses.

Ms Melissa Vella Buhagiar (28499M) called as a witness by the Public Contracts Review Board testified on oath that she was the Chairperson of the Evaluation Committee. She confirmed that Iuris was the cheapest tender and said that the Executive Head of the Agency at one stage approached her

and told her that the Head of the Civil Service wanted extension of work responsibility internally within the Agency. She accepted that she had failed to sign the tender evaluation addendum confirming cancellation but stated that this was a failure of communications. She also confirmed that as Chief Operating Officer of the Agency she was responsible for operations.

Questioned by Dr Fenech witness stated that she does not recall why there was a change of decision between the 22nd and the 29th Octobers 2020 and does not recall who the decision to cancel came from or whether it was passed on to her just verbally. She did not attend any meeting where the matter was discussed. She recalls speaking to Mr Vella the Executive Head of the Agency who stated that the Agency's remit had been widened and as part of the digitalisation process the Agency would be taking over internally the role of data protection officer. She could not recall any dates when these discussions took place. Witness stated that she had taken the decision to cancel the tender and there had only been verbal discussions that led her to take this decision.

Mr Massimo Vella (455568M) called as a witness by the Contracting Authority testified on oath that since the 1st August 2020 he has been the Executive Head of the Agency. He confirmed that he was not involved in the drafting of the tender and that the Agency has been given a wider remit since the tender was issued. Digitalisation was already in process and was increasing from time to time and he had set up a unit to cater for this. In line with this he had decided that he preferred a full time data protection officer – recruitment had not started for this post but someone was acting in that role at the moment.

Questioned by Dr Fenech witness stated that he was answerable to the Principal Permanent Secretary (PPS) at the Office of the Prime Minister. He agreed that digitalisation was evolving at the time and this led him to a discussion with the Chairperson of the evaluation committee in regard to this tender. He confirmed that he did not discuss with the PPS either the decision to cancel the tender or that he intended to fill the post of data protection officer internally. The decision to cancel the tender was solely that of the Chairperson of the evaluation committee.

In reply to further questions he agreed that the Agency falls within the sphere of responsibility of the PPS but he changed the decision on the filling of the position himself without informing the PPS, and that subsequent to their discussion the Chairperson took the decision to cancel the tender – he further stated that to reach the decision to cancel they had consulted Dr Marco Woods.

Straightaway Dr Woods refuted this statement stating that it was not so and that the only time he had been consulted by the Agency is when they asked him to file a reply to the letter of appeal in November. He was not concerned with any decision to cancel the tender.

In reply to questions from Dr Woods witness stated that he does not need to consult the PPS on all decisions and it was himself who decided to change the parameters and advised the Chairperson accordingly.

Dr Peter Fenech said that the cancellation of the tender was abusive and the Executive Head of the Agency was not a credible witness in that it was impossible to believe that he had decided to change the PPS's decision without referring to him. He found it inexplicable to accept that the Chairperson off her own bat felt that she had the power to cancel a tender. The two testimonies heard today gave rise to serious doubts as to their veracity and Mr Massimo Vella had not told the truth and was not only incorrect but abusive in his decisions.

Dr Woods stated that he must emphasise that it was the Agency that had decided to issue the tender and it was not the PPS who decided what the said Agency needed. As Executive Head Mr Massimo Vella was entitled to make the decision that he needed a full time person to do the work involved, and his action to cancel the tender on economic and technical grounds was in line with Public Procurement Regulations

Dr Fenech said that the need for further digitalisation did not change in seven days and if the need was there why the tender not was cancelled prior to adjudication? It is impossible to change such a decision unless the instructions came in writing from someone higher up the scale.

Dr Woods re-iterated that Mr Vella was entitled to take the decision to cancel the tender.

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

End of Minutes

This Board,

having noted the objection filed by Iuris Malta Advocates, (hereinafter also referred to as the Appellants), on the 6th November 2020, refers to the contentions made by the latter with regards to the cancellation of Tender of Reference Servizz/20/08 listed as Case No 1518 in the records of the Public Contracts Review Board issued by Servizz.Gov (Agency), (hereinafter also referred to as the Contracting Authority) as well as the verbal submissions made during the virtual public hearing on the 30th November 2020.

Appearing for the Appellants:

Dr Peter Fenech

Appearing for the Contracting Authority:

Dr Marco Woods

Whereby, the Appellants contend that the tender had been irregularly cancelled after their offer had been clearly and regularly awarded and after the stand-off period allowed for appeals had lapsed. The Appellants thus were asking the Board

to revoke the decision taken by the Contracting Authority to cancel the tender.

This Board has noted also the Contracting Authority’s “Reasoned Letter of Reply” dated the 13th November 2020 and also its verbal submissions during the virtual Public Hearing held on the 30th November 2020, in that:

a) the Contracting Authority had decided to cancel the tender because “*The economic or technical parameters had been fundamentally altered*” since the position was going to be filled in-house and thus the service was no longer required.

b) the Contracting Authority had the right to cancel the tender at any time, citing Article 18.3 (b) of the General Rules Governing Tenders.

This same Board has also noted and taken into consideration the testimony of the witnesses produced namely:

Ms Melissa Vella Buhagiar who was the Chairperson of the Evaluation Committee;

Mr Massimo Vella, who is the Executive Head of the Contracting Authority.

This Board, after having examined the relevant documentation and heard the submissions made by all the interested parties, including the testimony of the witnesses duly summoned, opines that the issue that has to be considered is whether the cancellation procedure was made according to Public Procurement Regulations and ancillary regulations.

The facts that emerge are that the Evaluation Report was issued on the 6th October 2020 and that the Appellants at the time were technically,

administratively and financially fully compliant. Their bid was also the cheapest. This was confirmed by the Chairperson of the Evaluation Board during her testimony. Thus, Appellants were awarded the tender by letter dated 12th October 2020. This award which was not appealed against had been approved by the Departmental Contracts Committee on the 9th October 2020.

On the 23rd October 2020, the Chairperson of the Evaluation Board sent another notice to Appellants informing them that the tender was being cancelled in terms of Article 18.3 (b) of the General Rules Governing Tenders namely:

“Cancellation may occur where the economic or technical parameters of the project had been fundamentally altered”.

It stands to reason therefore that this Board had to examine the events that led to this cancellation. The Executive Head of the Agency stated that he did not order the cancellation but had just expressed his wish to the Chairperson of the Evaluation Committee to have the post filled in-house. He also declared that the Agency had obtained legal advice from its lawyer, Dr Marco Woods, that such cancellation could be made in terms of Art 18.3 (b) of the General Rules Governing Tenders. This was however immediately denied by Dr Woods himself who declared that he was only consulted following the filing of the letter of objection.

It is the Board’s view that the Contracting Agency did not provide any proof of the date when the claimed parameters had been fundamentally changed; neither

did witnesses from the same Agency give clear indications of who had taken the decision to cancel the tender.

The Chairperson of the Evaluation Board, who incidentally along with another evaluator failed to sign the Addendum to Evaluation Report, confirming the decision to cancel the tender, could not remember any of the dates when her Executive Head expressed his wish for the position to be filled in-house. However, she admitted that she took the decision to cancel the tender herself following verbal discussions with the Executive Head, and as Chairperson of the Evaluation Committee signed the confirmatory letter. It was this admission that renders the same decision null. The remit of Evaluation Committee members normally ends as soon as the Evaluation Report is signed and presented. In the present case no evidence of any written or verbal instructions for cancellation was offered and it appears that the Chairperson had no remit to issue an addendum to the first evaluation report, much less to order the cancellation. She appears to have acted ‘ultra vires’.

For the above reasons, this Board:

- i. Declares that the decision to cancel the tender as per Addendum to Evaluation Report was irregular as it was taken by the Chairperson of the Evaluation Committee without authority and against regulations; further the letter cancelling the tender was signed by the Chairperson of the Evaluation Committee in lieu of the Contracting Authority.**

- ii. Orders the revocation of the cancellation of the tender as detailed in the Addendum to Evaluation Report dated 19th October 2020 since the said cancellation was not correctly authorised and infringed Public Procurement Regulations;**

- iii. orders that the deposit paid by Appellants to be refunded in full.**

Dr Charles Cassar
Chairman
9th December 2020

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member