

PUBLIC CONTRACTS REVIEW BOARD

Case No. 392

OPM/DCS/08/2011

Tender for the Provision of Watchmen/Security Services at Ex-Computer Centre Premises in Swatar I/o Dingli

This call for tenders was published in the Government Gazette on the 29th November 2011. The closing date for this call with an estimated budget of € 33,000 was the 15th December 2011.

Seven (7) tenderers submitted their offers.

Global Security Services Ltd filed an objection on the 12th January 2012 against the decisions of the Office of the Prime Minister to disqualify its offer as the latter was considered to be administratively non-compliant and to recommend the award of the tender to JF Security and Consultancy Services Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr. Carmel Esposito and Mr Joseph Croker as members convened a public hearing on Friday, 23rd March 2012 to discuss this objection.

Global Security Services Ltd

Dr Jan Karl Farrugia	Legal Representative
Mr Mario Cardona	Representative
Ms Patricia Borg	Representative

Executive Security Services Ltd

Mr Stephen Ciangura	Representative
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JF Security and Consultancy Services Ltd

Ms Carina Azzopardi	Representative
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Office of the Prime Minister

Mr Alex Magro	DG Support Services
Mr Charles Vella	Representative
Mr Mario Borg Olivier	Representative

Evaluation Board

Mr Joseph Bugelli	Chairman
Mr Mario Pace	Member
Mr Raymond Micallef	Member



After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of his company's objection.

Dr Jan Karl Farrugia legal representative of Global Security Services Ltd, the appellant company, made the following submissions:

- i. by email dated 6th January 2012, the contracting authority had informed his client that the company's offer was adjudicated to be administratively non-compliant and that the tender was being awarded to JF Security and Consultancy Services Ltd;
- ii. his client had participated in other public tendering processes and so the said tendering company was well versed with this standard tender document;
- iii. Global Security Services Ltd's representative maintained that albeit the company had provided all the requested information, yet even if, for the sake of the argument, there were any shortcomings in its tender submission, the Public Procurement Regulations and the tender document allowed the contracting authority to request the bidding company to rectify its submission within a prescribed time and against a fee;
and
- iv. the sole award criterion was the price – clause 32.1 of the tender document – and the appellant company submitted the cheapest offer.

The Chairman Public Contracts Review Board observed that it was not sufficient for the contracting authority to inform the bidder that its offer was not administratively compliant but the unsuccessful tenderer had to be given the reasons that led to the company's disqualification as laid down in the Public Procurement Regulations, namely,

"Reg. 84 The communication to each tenderer of the proposed award shall be accompanied by a summary of the relevant reasons relating to the rejection of the tender as set out in regulation 44(3), and by a precise statement of the exact standstill period.

Reg. 44 (3) The contracting authority shall, within fifteen days of the date on which the request is received by a party concerned, inform:
(a) any unsuccessful candidate, of the reasons for rejection of its application;
(b) any unsuccessful tenderer, of the reasons for the rejection of his tender, including, for the cases referred to in regulations 46(3) and (4), the reasons for its decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirement";

The Chairman Public Contracts Review Board stressed that the contracting authority was obliged to communicate in the letter of objection the reasons for the bidder's disqualification so as to enable the latter to (a) verify the facts and (b) decide if there were sufficient grounds to lodge an appeal and, if so, to prepare a case. He admonished the contracting authority to refrain from its current practice.



Mr Alex Magro, representing the Office of the Prime Minister, the contracting authority, remarked that, in reply to the request made by the appellant company on the 12th January 2012, on that same day, the contracting authority informed the former's representative that the company's bid was administratively non-compliant because its representative/s did not submit Form 3.4 'Key Experts' and Form 3.4.1 'Statement of Exclusivity and Availability' as stipulated in clause 16.1 (b) (ii) of the tender document.

Mr Mario Cardona, also representing the appellant company, stated that prior to the award of the tender he was not in a position to indicate the key persons that the company would detail on this contract. He added that he was the key expert in connection with this contract and that he had a control room where his clients could phone in on a 24-hour basis.

The Chairman Public Contracts Review Board noted that, apparently, one was mixing up the role of the 'key person' with that of the 'key expert' and he went on to explain as follows:

- i) the 'key expert' referred to a person not employed by the bidding company who would be engaged to provide consultancy services on a particular project and hence the requirement of Form 3.4.1 'Statement of Exclusivity and Availability' so that there would be a commitment on the part of the 'key expert' that he would be available to provide his services and that he would not render his services to others on the same project;

and

- ii) the 'key person' would be an employee of the bidding company who would act as a point of reference in case the contracting authority would need to contact the contractor and in that case there was no need of Form 3.4.1 'Statement of Exclusivity and Availability' as the 'key person' would be available to the bidder at all times.

The Chairman Public Contracts Review Board remarked that it was highly questionable whether the services requested in this tender necessarily required the engagement of a 'key expert' and he also observed the on Form 3.4.1 it was indicated in bold print 'To be Completed by Each Individual Key Expert If Required'. He opined that, ideally, the bidder should have indicated that Forms 3.4 and 3.4.1 were not applicable since the company would not require a 'key expert' to execute this contract.

Mr Magro remarked that this was a standard tender document and that, given the nature of the services requested, what the contracting authority had in mind by the term 'key expert' was, effectively, a contact person.

The Chairman Public Contracts Review Board conceded that the evaluation board was correct to note that the appellant company did not submit Forms 3.4 and 3.4.1 but, on the other hand, one had to look into whether it was necessary for the bidders to have a 'key expert' to render this service once they had the required expertise in-house. He added that had the appellant required a 'key expert' then the appellant company's failure to submit Forms 3.4 and 3.4.1 would have assumed a different dimension. The Chairman Public Contracts Review Board opined that the template might require modification when used for this kind of tenders.



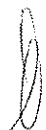
At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their 'letter of objection' dated 12th January 2012 and also through their verbal submissions presented during the hearing held on the 23rd March 2012, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by email dated 6th January 2012, the contracting authority had informed the appellant company that its offer was adjudicated to be administratively non-compliant and that the tender was being awarded to JF Security and Consultancy Services Ltd, (b) the appellant company had participated in other public tendering processes and so the said tendering company was well versed with this standard tender document, (b) Global Security Services Ltd's representative maintained that albeit the company had provided all the requested information, yet even if, for the sake of the argument, there were any shortcomings in its tender submission, the Public Procurement Regulations and the tender document allowed the contracting authority to request the bidding company to rectify its submission within a prescribed time and against a fee, (c) the sole award criterion was the price – clause 32.1 of the tender document – and the appellant company submitted the cheapest offer, (d) prior to the award of the tender the appellant company was not in a position to indicate the key persons that it would detail on this contract and (e) Mr Cardona was the key expert in connection with this contract and that he had a control room where his clients could phone in on a 24-hour basis;
- having considered the contracting authority's representatives' reference to the fact that (a) in reply to the request made by the appellant company on the 12th January 2012, on that same day, the contracting authority informed the former's representative that the company's bid was administratively non-compliant because its representative/s did not submit Form 3.4 'Key Experts' and Form 3.4.1 'Statement of Exclusivity and Availability' as stipulated in clause 16.1 (b) (ii) of the tender document and (b) this was a standard tender document and that, given the nature of the services requested, what the contracting authority had in mind by the term 'key expert' was, effectively, a contact person,

reached the following conclusions, namely:

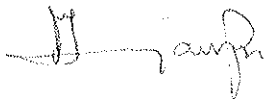
1. The Public Contracts Review Board opines that it was not sufficient for the contracting authority to inform the bidder that its offer was not administratively compliant but the unsuccessful tenderer had to be given the reasons that led to the company's disqualification as laid down in the Public Procurement Regulations. This Board cannot but place enough emphasis on the fact that a contracting authority is obliged to communicate the reasons for a bidder's disqualification so as to enable the latter to (a) verify the facts and (b) decide if there were sufficient grounds to lodge an appeal and, if so, to prepare a case.



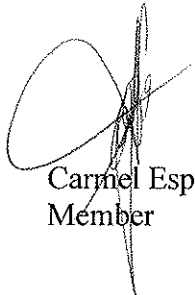
2. The Public Contracts Review Board argues that it was evident that the contracting authority was confusing the role of the 'key person' with that of the 'key expert' which, in this instance, rendered the requirement for the submission of Form 3.4.1, namely, 'Statement of Exclusivity and Availability', futile as this form was intended to obtain a formal commitment on the part of the 'key expert' that he would be available to provide his services and that he would not render his services to others on the same project. The futility of the form was in virtue of the fact that this was usually used in cases where bidders would be engaging the services of external consultancy services but, definitely, not in the case of employees already listed on the bidder's payroll. It transpired that in this case the contracting authority was after a 'contact person' and this could have easily been identified in the role of a 'key person'.

3. This Board notes that, ideally, the bidder should have indicated that Forms 3.4 and 3.4.1 were not applicable since the company would not require a 'key expert' to execute this contract. Whilst it is a fact that had the appellant required a 'key expert' then the appellant company's failure to submit Forms 3.4 and 3.4.1 would have assumed a different dimension, yet this Board rightly feels that, in this instance, this was not the case as explained in (2) above.

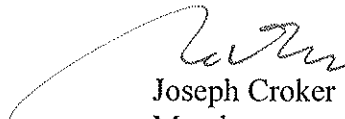
In view of the above, this Board finds in favour of the appellant company and apart from recommending that the latter's bid be reintegrated in the evaluation process, this Board also recommends that the appellant company be reimbursed with the deposit paid for the appeal to be lodged.



Alfred R Triganza
Chairman



Carmel Esposito
Member



Joseph Croker
Member

11th April 2012