

PUBLIC CONTRACTS REVIEW BOARD

Case No. 549

MCH/136/2012

Tender for Security Services at Mount Carmel Hospital

The tender under reference was published on the 18th September 2012 with a closing date on the 24th October 2012. Four candidates submitted a tender by the closing date.

Executive Security Ltd on the 13 February 2013 filed an objection against the decision of the Ministry for Health to disqualify its offer as administratively non-compliant and to recommend the award of tender to JF Security Ltd.

The Public Contracts Review Board composed of Mr Joseph Croker as Acting Chairman and Messrs Carmel Esposito and Paul Mifsud as Members convened a public meeting on the 10th May 2013 to discuss the appeal.

Present:

Executive Security Ltd

Dr Veronique Dalli	Legal Representative
Dr Dean Hili	Legal Representative
Mr Stephen Ciangura	Representative

JF Security Ltd

Dr Matthew Pulis	Legal Representative
Mr Matthew Formosa	Representative

Central Procurement and Supplies Unit – Ministry for Health

Dr Adrian Mallia	Legal Representative
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Evaluation Board

Mr Joseph Piscopo	Chairman
Mr Jude Taddeo Camilleri	Member
Ms Sally Zammit	Member
Mr Oswald Balzan	Member

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

Dr Veronique Dalli, on behalf of Executive Security Ltd, the appellant, made the following submissions:-

- i. by letter dated 7th February 2013 the contracting authority informed her client that his offer was adjudicated administratively non-compliant because (i) the Licence Form was incomplete and (ii) the Police Conduct was incomplete, and, moreover, that the award was recommended in favour of JF Security at the rate of €7.10/hr when her client had offered the rate of €6.29/hr;
- ii. her client maintained that the two reasons for exclusion did not influence the substance of the tender submission but were rather of minimal importance and which could have been rectified by a request for clarification against the payment of the statutory €50 fee;
- iii. in his tender submission her client had indicated the names of the personnel who would be detailed to provide this service and against each one of them quoted the respective licence number and it was therefore quite obvious that each one of them was the holder of a security guard licence;
- iv. whoever possessd the licence of a security guard had to have a clean Police conduct, i.e. even as far as administrative fines and pending court cases were concerned;
- v. moreover, given the nature of the duties involved the Police, the authority which issued security guard licences, had to renew the licence on an annual basis and therefore the holder had to maintain a clean police conduct at all times;
- vi. the PCRB was an administrative tribunal and therefore these minor shortcomings, termed *de minimis*, and which had no bearing on the substance of the tender submission, should be dealt with according to administrative law and therefore the PCRB and the contracting authority should apply the principle of reasonableness, whereby the bidder be asked to provide the minor missing details against an administrative fee but not disqualify the bidder and in so doing end up paying a high price for the service requested; and
- vii. the license number itself meant that that person did possess a licence and that he/she had a clean Police conduct.

Dr Adrian Mallia, on behalf of the contracting authority, submitted that:-

- a. it appeared that the appellant was not contesting the fact that a number of licences and police conduct certificates had not been submitted;
- b. Volume 1 Section 3 Form 2 titled 'Documents to be furnished' indicated 'the list of documents to be submitted with the tender' and (a) item 1.2 requested the 'private guard license of the proposed security guards' i.e. the licence itself and not the licence number, and item 1.3 requested the 'Police conduct of the proposed security guards';

- c. these requirements were essential considering that these personnel would be engaged on security duties which entailed a considerable degree of responsibility;
- d. clause 16.1 of the 'General Instructions' para. (f) 'Evaluation Criteria/Technical Specifications' (ii) 'Documents to be furnished with the tender (Volume 1 Section 3 Form 2)' which referred, among other things, to the submission of the licence and the Police conduct;
- e. Note 3 was applicable with regard to clause 16.1 (f) which read as follows: *No rectification shall be allowed. Only clarifications on the submitted information may be requested.*
- f. Note 3 was significantly different from Note 2 which stated that: *Tenderers will be requested to either clarify/rectify any incorrect and/or incomplete documentation, and/or submit any missing documents within two working days from notification.*
- g. therefore, once the missing documentation fell under Note 3 then the contracting authority was precluded from seeking a rectification and the contracting authority had no discretion in the matter;
- h. for the sake of equal treatment to all bidders, the contracting authority was legally bound to abide by the tender conditions;
- i. price was taken into account once a bid was adjudicated administratively and technically compliant;
- j. it was not enough for the appellant to submit the licence number because that meant that the person concerned had once been issued with a security guard licence but it did not provide the contracting authority with the comfort that the person concerned did possess a licence and, more importantly, a valid licence;
- k. one should not expect the contracting authority to check the licence numbers provided as to whether they in fact represented security guard licences and if they had been regularly renewed and still valid; and
- l. it was the responsibility of the contracting authority to publish a correct and complete tender document however it was the responsibility of the bidder to provide a complete and correct tender submission.

Dr Matthew Paris, on behalf of the recommended tenderer, shared the arguments put forward by the contracting authority while adding that this was not a question of *de minimis* but a question of whether a bid was compliant or not and, moreover, if the appellant had any questions to raise with regard to the tender conditions he should have raised them prior to the closing date for the receipt of tenders.

Dr Dalli stated that her client had submitted his tender in good faith and one should not infer that her client tried in some way to mislead the contracting authority by

providing false or invalid licence number. She reiterated that the tender document provided the means to the contracting authority to seek clarifications and that in such instances the principle of reasonableness should prevail.

The Board,

- having noted that Messrs Executive Security had by letter dated 13th February 2013 objected to the decision taken by the Contracting Authority to refuse his bid and recommend the award of the tender in question to Messrs JF Security;
- having noted that in his submission appellant maintained that the tender was submitted correctly albeit some documentation i.e. copies of licence forms and police conduct certificates, were not attached to the document; that the fact that a licence number was placed against the name of each proposed guard meant that the person in question was licensed and that as a result he/she also had a clean conduct certificate since that was one of the conditions for the retention of a licence to act as a security guard; that this was a minor infraction and could have been rectified through the payment of an administrative fine of €50 had the contracting authority sought a clarification;
- having noted the contracting authority's counter statements that the submission of the mentioned documentation was a crucial requirement given the nature of the service to be provided; that if breached this condition could not be rectified but only clarified according to the tender conditions; that the tendered price could only be taken into consideration once the tender submission was determined to be both technically and administratively compliant,

came to the following conclusions:

1. that the submission of the mentioned documentation was required by the tender document;
2. that non-submission of the documentation could not be rectified by a simple request for clarification; and
3. that the fact that not all the documentation requested was attached to the tender submitted by the appellant was not in doubt.

In view of the above, the Board finds against the appellant and recommends that the deposit paid for the appeal to be heard be forfeited in full.

Joseph Croker
A/Chairman

Carmel Esposito
Member

Paul Mifsud
Member

17 May 2013