

PUBLIC CONTRACTS REVIEW BOARD

Case No. 769

WSM 015/2014

Tender for the Provision of Auditing Services to WasteServ Malta.

The tender was published on the 14th March 2014. The closing date was the 14th April 2014.

The estimated value of the Tender was €45,000 (Exclusive of VAT).

Seven (7) bidders had submitted an offer for this tender.

On the 3rd December 2014 PKF Malta filed a letter of objection against the decision of the contracting authority to cancel the tender.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Tuesday the 6th January 2015 to discuss the objection.

Present for the hearing were:

PKF Malta - Appellant

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| Ms. Tiziana Gauci | Representative |
| Mr George Mangion | Managing Director |
| Dr Marilyn Mifsud | Business & Securities |
| Dr Alessandro Lia | Legal Representative |

WasteServ Malta - Contracting Authority

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| Mr Clayton Azzopardi | Member Evaluation Board |
| Dr Aaron Mifsud Bonnici | Legal Representative |

The Chairman made a brief introduction and invited appellant's representative to make his submissions.

Dr Alessandro Lia on behalf of the appellant stated that the right of the contracting authority to cancel the tender was limited according to the criteria set down in the tender document itself. He referred to clause 5.2 which gave a list of instances when the tender could be cancelled. The reasons given to appellant for the cancellation were that “ *b) the economic or technical parameters of the project have been fundamentally altered.*” He contended that the parameters for the audit arose from law and these have certainly not been changed. There was no room to change the parameters of the audit. It is not acceptable to leave the accounts of a public entity without an audit up to December of the year. It can be seen from the schedule that appellant's bid was the cheapest and should have been awarded the tender. If there were really grounds for cancelling the tender then the bids should have been returned to the bidders unopened. Instead the bids have been opened and the evaluation was kept pending for nine months before opting for cancellation.

The Chairman asked the contracting authority to confirm that it had awarded a direct order for the services demanded in the present tender. He read from a copy of the contracting authority's Board minutes of a meeting held on the 30th September 2014 wherein the Board had instructed the CEO “to proceed with a direct order to RSM Malta to cover the new scope of the audit.”

Dr Aaron Mifsud Bonnici for the contracting authority admitted this but said that the final decision was taken on the 26th November 2014. He explained that the appellant's contention is that the contracting authority is breaking the law by not finalizing the audit. However this fact is not the responsibility of appellant and neither it is the remit of the Public Contracts Review Board. The reasons brought forward by appellant for the objection do not hold. It is true that the parameters of an audit cannot be changed but the scope of the audit can. This scope can however be amplified by including additional projects.

During the evaluation of the present tender, the Board of Directors had decided that the financial audit would not be possible unless an audit of the Information Technology had also been done. (At this point, Dr Mifsud Bonnici exhibited a copy of the full minutes when the decision had been taken) In the circumstances the contracting authority had the choice to either continue with the present tender and issue a separate tender for an IT audit or act as it in fact did to cancel the tender. The Board had decided to include the IT function in the tender and to cancel the previous tender. The scope had been widened and the parameters changed. Because of time constraints, it was decided to award a direct tender. It was decided that a better value for money could be obtained in this way. The evaluation process was at the time still checking the administrative compliance of the bidders.

Dr Mifsud Bonnici continued that clause 5.2.5 explained the possibility of the tender being cancelled and appellant had accepted this in its entirety when the tender declaration was signed, accepted unconditional cancellation. He insisted that the contracting authority had not changed the parameters and had acted and abided within the law.

Dr Alessandro Lia on behalf of the appellant explained that appellant was not asking for any damages in terms of clause 5.2.5. However he reiterated that the reason for cancellation had not been given to appellant. He insisted that the contracting authority should not have awarded a direct order while the present tender was still being processed. The appellant had still been awaiting the outcome. The contracting authority has to abide with the Public

Procurement Regulations and if it wanted a negotiated tender, to include the IT audit, then the appellant should have also been asked to quote for this IT audit. The procedure adopted by the contracting authority was incorrect and should not have been adopted.

Dr Aaron Mifsud Bonnici remarked that direct orders are also governed by the Public Procurement Regulations and are admissible. He contended that the present objection dealt with the cancellation of the tender and not with the issue of direct orders. The Public Contracts Review Board is not called to investigate the direct order but has to determine whether the cancellation of the tender was within the law and according to regulations.

Dr Alessandro Lia on behalf of the appellant concluded that the scope of the tender had finished as soon as the direct order was awarded, therefore the PCRB should also question the direct order procedure. He insisted that the appellant's offer was the cheapest and thus appellant should have been awarded the tender.

At this point the hearing was brought to an end.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 2nd December 2014 and also through Appellant's verbal submissions during the hearing held on 6th January 2015, had objected to the decision taken by the pertinent Authority, in that:

- a) Appellant contends that the reasons given by the Contracting Authority, for cancelling the tender; do not fall within the ambit and circumstances as dictated in clause 5.2 of the tender document.**
- b) Appellant claims that it was not proper for the Contracting Authority to issue a direct order whilst the evaluation process of same tender was still in progress. In this regard, Appellant contends that the Contracting Authority should have issued a separate tender for the additional audit work that had to be performed to all Bidders.**

Having considered the Contracting Authority's verbal submissions during the hearing held on 6th January 2015, in that:

- a) The Contracting Authority did confirm that a direct order was issued for the additional audit services to be performed, after having obtained the necessary clearance for such an issue, however, same contends that it is not the onus of the Appellant to dictate what the Contracting Authority's duties are.**
- b) The Contracting Authority maintains that direct orders are permissible in accordance with the 'Public Procurement Regulations', provided proper procedures are followed and approved.**

Reached the following conclusions:

- 1. With regards to the Appellant's first contention, this Board confirms that the 'changes of parameters' as specified in the letter of notice of cancellation, does**

not fall within the circumstances as laid out in clause 5.2 of the tender document. In this instance, this Board would point out that, the declaration signed by the Tenderer/Appellant whereby, same has agreed and consented to unconditional cancellation of the tender by the Contracting Authority should prevail. In this regard, this Board opines that:

- i) The Appellant has no right to dictate or describe any breach of obligations of the Contracting Authority in so far as ‘Companies Act’ regulations. It is the responsibility and obligation of the Contracting Authority to abide by any defaults in its administration. In this respect, this Board does not uphold Appellant’s in this regard.
 - ii) Although this Board, recognises the fact that the reason for the cancellation of the tender in question does not fall within the ambit of clause 5.2 of the tender document, same document provides for a declaration, signed by Appellant, that “any cancellation of the tender by the Contracting Authority, cannot be contested on all eventualities, provided same Contracting Authority follows the Proper procedure”. In this regard, this Board opines that the Evaluation Committee did, in fact, follow the allowed procedure in accordance with the ‘Public Procurement Regulations’.
2. This Board is perturbed by the fact that, although the Contracting Authority acted within the parameters of its competence, it did not exercise prudence, in that, a direct order should not have been issued whilst the evaluation process of the same tender is still ongoing. In this regard, this Board feels that although procedures were followed, more due diligence should have been observed by the Contracting Authority.

In view of the above, this Board, although it confirms the Evaluation Board’s decision to be within the framework of the ‘Public Procurement Regulations’, same recommends that the deposit paid by Appellant firm be reimbursed.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

15 January 2015