

PUBLIC CONTRACTS REVIEW BOARD

Case 1856 – CFT009-0490/22 (CPSU 2113/21) – Supplies Tender – Tender for the Supply, Delivery and Installation of Fire, CCTV, Door Access and Network ELV Systems for FW2 at Mount Carmel Hospital

28th March 2023

The Board,

Having noted the letter of objection filed by Mr Kenneth De Martino acting for and on behalf of G4 Security Service (Malta) Ltd, (hereinafter referred to as the appellant) filed on the 23rd February 2023;

Having also noted the letter of reply filed by Dr Alexia J Farrugia Zrinzo and Dr Leon Camilleri acting for Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority) filed on the 6th March 2023;

Having heard and evaluated the testimony of the witness Mr Sherwin Bonnici (Representative of G4 Security (Malta) Ltd) as summoned by Dr Damien Degiorgio acting for G4 Security Service (Malta) Ltd;

Having heard and evaluated the testimony of the witness Mr Stephen Ellul (Member of the Evaluation Committee) as summoned by Dr Damien Degiorgio acting for G4 Security Service (Malta) Ltd;

Having heard and evaluated the testimony of the witness Mr Robert Micallef (Representative of FMS) as summoned by Dr Damien Degiorgio acting for G4 Security Service (Malta) Ltd;

Having heard and evaluated the testimony of the witness Mr Stephen Ellul (Member of the Evaluation Committee) as summoned by Dr Leon Camilleri acting for Central Procurement and Supplies Unit;

Having heard and evaluated the testimony of the witness Ing Ignatiadis Konstantinos (Representative of FMS) as summoned by Dr Leon Camilleri acting for Central Procurement and Supplies Unit;

[repeated]Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by representatives of the parties;

Having noted and evaluated the minutes of the Board sitting of the 21st March 2023 hereunder-reproduced.

Minutes

Case 1856 – Cft 009-0490/22 – Supplies – Tender for the Supply, Delivery and Installation of Fire, CCTV, Door Access and Network ELV Systems for FW2 at Mount Carmel Hospital.

The tender was issued on the 29th April 2022 and the closing date was the 20th May 2022. The estimated value of the tender excluding VAT, was € 104,261.

On the 23rd February 2023 G4S Security Services (Malta) Ltd lodged an appeal against the Central Procurement and Supplies Unit as the Contracting Authority on the grounds that its award of the tender was subsequently cancelled.

A deposit of € 525 was paid.

There were four (4) bids.

On the 21st March 2023 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Ms Stephanie Scicluna Laiviera as members convened a virtual public hearing to consider the appeal.

The attendance for this virtual public hearing was as follows:

Appellant – G4S Security Services Ltd

Dr Damien Degiorgio	Legal Representative
Dr Paul Felice	Legal Representative
Mr David Sultana	Representative
Mr Sherwin Bonnici	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Alexia Farrugia Zrinzo	Legal Representative
Dr Leon Camilleri	Legal Representative
Ms Ruth Spiteri	Chairperson Evaluation Committee
Mr Hristo Ivanov Hristov	Secretary Evaluation Committee
Mr Stephen Ellul	Evaluator
Engineer Franco Cassar	Evaluator

Representing the Foundation for Medical Services

Mr Noel Bonello	Representative
Mr Robert Micallef	Representative
Eng Ignatiadis Konstantinos	Representative

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Before proceedings started the Board Secretary Mr Harry Fenech asked for it to be recorded that he is related to Mr Kenneth De Martino the Chairman of the Appellant Company. There were no objections to him continuing to participate in the meeting.

Dr Damien Degiorgio Legal Representative for G4S Security Services Ltd (G4S) outlined the basis of the appeal and mentioned that the Contracting Authority had only quoted the clause used in cancelling the tender but not the actual reason. Their right to cancel was not absolute and reasons had to be stated. He then requested that witnesses be heard.

Mr Sherwin Bonnici (570880M) called to testify by Appellant stated on oath that he was the Senior Operations Manager responsible for security solutions at G4S. He stated that this is the third time that this tender had been issued and then cancelled. The letter of award was dated 2nd October 2022 and some two weeks after that enquiries were made regarding the start date but no concrete answers

were given. On the 13th February 2023 the cancellation letter was received without any reason being given for the cancellation. By this time the process to ensure that supplies were in hand had been completed and items like the fire alarm system and the security system had already been ordered.

Mr Stephen Ellul (464880M) called as a witness by G4S stated on oath that he was not aware why the tender had been issued three times. His role was to evaluate the bids received compared to the terms of the tender.

Mr Robert Micallef (402584M) called as a witness by G4S confirmed on oath that the tender was issued three times. The area that the tender covered was originally operated part by the Hospital and part by a private company. When the company withdrew in September 2022 the Foundation for Medical Services took over from them. He was not aware of the earlier history. Around September or October 2022 he was advised that Mount Carmel Hospital (MCH) was eligible for EU funding – this was before the tender was awarded. Witness was not aware when the EU funding first became available. There were certain criteria to be followed before one became eligible to receive EU funds as, for example, energy performance and carbon footprint which involved structural changes. He confirmed that these things were known prior to the award of the tender but the evaluation committee were not advised of these new requirements.

In reply to a question from Dr Farrugia Zrinzo on behalf of the Contracting Authority, witness said that he was a Project Manager in charge of this project and had no role in the tender process.

Mr Stephen Ellul (464880M) called to testify by the Authority stated on oath that he was one of the evaluators responsible for evaluating the engineering aspect. He confirmed that the G4S bid was compliant and had been recommended for the award. He was later advised that the tender was not viable. He does not recall the reason for this but seems to think that it was along the lines of the need to redesign the project.

Engineer Ignatiadis Konstantinos (018051A) called to testify by the Authority stated on oath that he was the Senior Engineer at the Foundation for Medical Services and had no role in the tender. He suggested that if the tender was granted a major redesign would be necessary and recommended cancellation. He explained that he still did not know the total impact of the changes and it would have been necessary to have a variation of the contract if the tender had been awarded as extra works would be required. One extra block had to be added to be eligible for EU funding and a 30% improvement had to be shown. Witness was not aware how much the EU funding amounted to.

In reply to questions from Dr Degiorgio witness said that the redesign was now in progress. He became aware of the possibility of EU funding through the work that was being carried out in other blocks. He did not know when the block mentioned in the tender became eligible to benefit from EU funds or how much extra funds will be obtained through this block. Witness knew that there was funding for the other blocks and so decided to add this block.

Mr Robert Micallef (402584M) recalled to testify by the Authority stated on oath that the total funding through the RRP scheme was around € 20 million.

This concluded the testimonies.

Dr Degiorgio stated that it is clear that the project was already eligible for funding when the tender was issued and the cancellation is now being dressed as of benefit in obtaining EU funding. There is evidence of a very nonchalant attitude in letting the tender run and then cancel it. This tender was issued three times involving the economic operator in work and expense and there was lack of good faith in the way the process was handled. The Board should confirm the award as the facts were known beforehand and his clients had expectation in this regard.

Dr Leon Camilleri on behalf of the Authority said that the claim of lack of good faith was not warranted as funds of € 20 million could not be ignored. Cancellation of a tender is allowed at any time even at

advanced stage. The RRP funds only became available recently after Covid. The parameters changed and this was the only way of securing funds – there was no intention of harming the economic operators. If changes became necessary there was no point in proceeding with the tender. The cancellation process was allowed by the PPR and the General Rules and the Authority acted correctly.

Dr Degiorgio said that the figure of € 20 million was being used as a play toy as it was not this whole sum that was involved in this tender. There was bad faith as the facts about the funding were fully known but the economic operator was not informed.

Dr Camilleri pointed out that the technical specifications of the tender could not be changed.

There being no further submissions the Chairman thanked the parties and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 21st March 2023.

Having noted the objection filed by G4 Security Service (Malta) Ltd (hereinafter referred to as the Appellant) on 23rd February 2023, refers to the claims made by the same Appellant with regard to the tender of reference CFT009-0490/22 (CPSU2113/21) listed as case No. 1856 in the records of the Public Contracts Review Board.

Appearing for the Appellant:

Dr Damien Degiorgio and Dr Paul Felice

Appearing for the Contracting Authority:

Dr Leon Camilleri & Dr Alexia Farrugia Zrinzo

Whereby, the Appellant contends that:

- a) The Authority based its cancellation order on article 18.3(b) of General Rules Governing Tenders v4.6, namely is: *“18.3 Cancellation may also occur where: (b) the economic or technical parameters of the project have been altered”*, essentially the only sub-article in the said provision which may have remotely been relied up to cancel the Tender.
- b) In fact, the provision, as a whole provides various limbs which may lead to the cancellation of the tendering process, none of which could have possibly applied to the present case.
- c) Hence the Authority seems to have clinched to item (b), claiming that the parameters of the project had to be altered, without explaining how the said parameters would be altered and, possibly more importantly, why they were being altered.

- d) Clearly the present reliance being made by the authority on this provision is unlawful. In fact, one cannot do away with all the safeguards established by the Procurement Regulations, to create a transparent procedure, which ensures that public funds are availed of in a legitimate manner, simply by reproducing an article which states that one may cancel a tender if the project parameters are changed, without giving an objective reason for doing so.
- e) Otherwise, one might be tempted to think that the change in parameters is being made on the basis of reasons which are not necessarily objective and in good faith.
- f) The authority issued this tender, established its parameters/requirements and awarded the tender to G4S, because the latter fulfilled all the requirements established by the Authority, and offered the most favourable financial price to deliver and install the equipment required by the Authority.
- g) However, the Authority is now apparently changing its requirements without providing an objective reason for the said change. This well over 4 months after the tender was awarded.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 6th March 2023 and its verbal submission during the virtual hearing held on 21st March 2023, in that:

- a) CPSU Primarily submits that as is well established, it was well within its rights to cancel the tender process since a situation which in its humble opinion falls within the parameters of 18.3 has arisen. Clause 18.1. of the General Rules Governing Tenders, provides that: *"The Central Government Authority/ Sectorial Procurement Directorate/ Contracting Authority reserves the right to accept or reject any tender and or to cancel the whole tender procedure before and after the closing established for the submission of the tenders, including instances where the financial offer submitted exceeds the estimated value for the tender; and or reject all tenders. The Central Government Authority/ Sectorial Procurement Directorate/ Contracting Authority reserves the right to initiate a new invitation to tender."* The same general rules provide for a number of instances where this can be done and one of these instances is that specified in clause 18.3(b), where (b) the economic or technical parameters of the project have been fundamentally altered. Regulation 18 goes on to state even that: *"In no circumstances will the Central Government Authority/ Sectorial Procurement Directorate/ Contracting Authority be liable for damages, whatever their nature (in particular damages for loss of profits) or relationship to the cancellation of a tender, even if the Central Government Authority/ Sectorial Procurement Directorate/ Contracting Authority has been advised of the possibility of damages. The publication of a contract notice does not commit Central Government Authority/ Sectorial Procurement Directorate/ Contracting Authority to implement the programme or project announced. CPSU submits that the objector's application fails to comply with this basic requirement as it does not give any reasons for its complaints but merely makes an allegation which is not based with any reasons."* Without prejudice to the above CPSU positively notes that what is being challenged in this objection is not the right of CPSU as a contracting authority to cancel the process, but the reason given to the cancellation. CPSU will explain in this reasoned letter of reply and in further detail during the sitting which shall be held that the reason for cancellation was

a valid one at law and in lines with the parameters of clause 18 of the General Conditions Governing tenders.

- b) In this particular case, the project of Mount Carmel Hospital was being administered by project manager directly appointed by Mount Carmel Hospital and eventually in September 2022 the project was handed over to FMS. The request for tender in question was issued 3 times and eventually upon the third time it was recommended for award. In the meantime FMS became aware that the renovation project at Mount Carmel Hospital could benefit from the Recovery and Resilience Plan fund (RRP fund). For the project to fall within the parameters of the RRP fund, a number of amendments to the designs and plans had to be made for the project to fall within the parameters of the said fund. These changes which are certain but their extent is still being determined, will also change the parameters of what is required from the tender in question. Little would it have made sense for the contracting authority to proceed with signing of the contract and its implementation, and then change, alter and add to what is installed.
- c) CPSU has thus, since it was still within its legal rights to terminate the process, due to change in project parameters, cancel (sic) this procedure to eventually re-issue with the new project's parameters. As will be further evidenced during the hearing, some changes will have to be done on works which are ongoing at Mount Carmel Hospital and tenders which were published but not awarded were not republished for now until the revised renovation project plans are concluded. CPSU strongly rebuts to the claims or allegations that this change was not done in good faith, and submits that this was done with the utmost of good faith, to ensure that the project benefits from European Union Funds at Malta's disposal and that no unnecessary or extra expenses are incurred. CPSU submits that unlike the objector, its interest is not a commercial interest but a public interest and it submits that the public interest in the case at hand is crystal clear and any cancellation was done within the parameters of the law and tender conditions.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties including the testimony of the witnesses duly summoned, will now consider Appellant's grievances.

- a) The Board notes that the main bone of contention in this appeal, revolves on whether the Contracting Authority was right in its decision to cancel the tender procedure. If in the affirmative a second point to consider is whether the Contracting Authority communicated such decision as per the regulations governing public procurement.
- b) Initially this Board will analyse and decide on the former. Reference is made to the General Rules Governing Tenders clause 18.3 (b) whereby it is stated "*Cancellation may occur where the economic or technical parameters of the project have been fundamentally altered*". Moreover clause 20.6 specifically states that "*Only the signed contract will constitute an official commitment on the part of the Central Government*

Authority/Sectoral Procurement Directorate/Contracting Authority". Therefore, the right to cancel an award or a tender procedure is clearly afforded to the contracting authority. However, it must meet one of the instances as listed in sub clauses (a) to (f) of clause 18.3.

- c) As per the testimonies under oath of Mr Robert Micallef and Ing Ignatiadis Konstantinos, this Board is confident [convinced ???] enough that the prerequisites of clause 18.3 (b) have been met. This due to the fact that a "*major redesign would be necessary*". Even though it is 'unfortunate' that this tender procedure has been issued three (3) times and a contract of commitment has never been entered into, it would be irresponsible to enter into such a contract, knowing *a priori*, that a significant variation to the original tender would be necessary for its correct execution.
- d) With regards to the latter, regulation 272 of the Public Procurement Regulations ("PPR") is adamant when it states "*The communication to each tenderer or candidate concerned of the proposed award or of the cancellation of the call for tenders **shall be accompanied by a summary of the relevant reasons relating to the rejection** of the tender as set out in regulation 242 **or the reasons why the call for tenders is being cancelled** after the lapse of the publication period, and by a precise statement of the exact standstill period.*" (bold & underline emphasis added). This was clearly not done when the Contracting Authority, in its rejection letter, advising the appellant that the tender was being cancelled, made reference only to clause 18.3 (b) of the General Rules Governing Tenders. No specific reasons were provided and hence the economic operator, now appellant, had to file this appeal just to get to know the actual specific reasons of such a cancellation!
- e) Moreover, this Board opines that such a cancellation of tender should first and foremost have been done through a revocation of award, and then a cancellation of tender.

Hence, while this Board does not uphold the main grievance of the Appellant, it does in fact recognize that the rejection letter dated 13th February 2023 has been poorly drafted and did not follow regulation 272 of the PPR.

The Board,

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) Does not uphold Appellant's main grievance,
- b) Upholds the Contracting Authority's decision in the cancellation of the tender,
- c) Due to point (d) of the Board's considerations, directs that the deposit be refunded to the Appellant.

Mr Kenneth Swain
Chairman

Dr Charles Cassar
Member

Ms Stephanie Scicluna Laiviera
Member