

PUBLIC CONTRACTS REVIEW BOARD

Case 1939 – SPD7/2023/028 – Services – Tender in Lots for the Provision of Cleaning Services excluding Products and Materials for the Ministry for the Economy, European Funds and Lands (MEFL) and the Commerce Department.

LOT 1

12th December 2023

The tender was issued on the 7th July 2023 and the closing date was the 7th August 2023.

The estimated value of this tender, excluding VAT, was € 222,920 for Lot 1

On the 11th October 2023 JF Services Ltd filed an appeal against the Ministry for the Economy, European Funds and Lands (MEFL) as the Contracting Authority objecting to their disqualification on the grounds that their bid was deemed not to satisfy the BPQR criterion award.

A deposit of € 1,114.60 was paid.

There were ten bids on this Lot.

On the 9th November 2023 the Public Contracts Review Board composed of Dr Charles Cassar as Chairman, Mr Lawrence Ancilleri and Ms Stephanie Scicluna as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – JF Services Ltd

Dr Matthew Paris	Legal Representative
Dr Zach Esmail	Legal Representative
Mr Matthew Formosa	Representative

Contracting Authority – Ministry for the Economy, European Funds and Lands

Dr Noel Camilleri	Legal Representative
Mr Dolan Debattista	Chairperson Evaluation Committee
Ms Caroline Debono	Secretary Evaluation Committee
Ms Michelle Bonello	Evaluator
Ms Amanda Zammit	Evaluator
Mr Alessandro Cristina	Evaluator

Recommended Bidder – AGV Non-Ferrous Malta Ltd

Dr Gianella Farrugia	Legal Representative (Online)
Ms Gillian Seymour	Representative

Recommended Bidder – Mr Melchior Dimech

Mr Melchior Dimech	Representative
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Department of Contracts

Dr Mark Anthony Debono

Legal Representative

Dr Charles Cassar Deputy Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Zach Esmail Legal Representative for J F Services Ltd said that the crucial point of the appeal was that there is a points difference on the interpretation of the validity of the Collective Agreement.

Mr Dolan Debattista Representative for the Ministry for the Economy, European Funds and Lands (MEFL) said that the tender was on BPQR basis and that the Appellant had secured maximum points except on the Collective Agreement criterion. The Agreement presented by the Appellant expired on the 31st December 2019 and since the tender stated that if it was expired then only four marks could be awarded, the Tender Evaluation Committee (TEC) had to follow suit.

Dr Gianella Farrugia Legal Representative for AGV Non-Ferrous Malta said that the tender terms were clear and the appeal should be discarded.

Appellant requested the hearing of witnesses.

Mr Dolan Debattista (492682M) called to testify by the Appellant stated on oath that he was the Chairperson of the TEC and detailed the composition of the Committee. He said that the TEC had not checked if any notice of renewal of the Agreement had been served. Since the Agreement submitted in the bid was expired only four marks could be allotted and since this section came under Note 3 no new notifications could be considered as this was tantamount to additional information.

In reply to a question from Dr Noel Camilleri, witness said that bidders had to present a current Agreement. Appellant submitted one that expired in 2019 and this was the only document submitted.

Mr Kevin Abela (416668M) called to testify by the Appellant stated on oath that he was the Secretary of the Catering and Hospitality Section at the General Workers Union. He had only held that office since February and was not aware of the details of the Collective Agreement of J F Services neither if they had made any requests lately.

Mr Abela, still under oath was recalled to testify by the Contracting Authority and stated that in his many years' experience at the Union renegotiations of collective agreements led to improvements in workers conditions and the normal process was to have back-to-back negotiations for renewal towards the end of the validity of an agreement.

Mr Matthew Formosa (453883M) called to testify by the Appellant stated on oath that he is the Chief Executive Officer of J F Services Ltd. Referred to the firm's Collective Agreement he confirmed that it expired in 2019 but was still being used as the basis for employees' relations. The Company had recently started discussions with the GWU.

Questioned by Dr Camilleri witness confirmed that there have been no negotiations with the Union since 2019.

In reply to a question by the Chairman, witness stated that the discussions with the GWU had taken place in the last three months but he was not aware of the individuals involved.

This concluded the testimonies.

Dr Paris said that this was an identical situation as that in the case involving the DIER. The Authority cannot just select part of the Agreement which remains fully in force until such time as a new agreement is negotiated. The parties are still bound by the same conditions. What the PCRB decided in case 1900 was that what the TEC decided was not stated in the tender. Self-limitation binds them to follow the tender and in Section C2 of the tender the same number of points should have been awarded to the Appellant. It is not up to the TEC to decide on the validity period of an agreement and their decision does not apply if an agreement is still running.

Mr Debattista stated that Note 3 prevented rectification or the submission of a new document. The TEC acted transparently in this decision. The clause regarding an agreement being still in force is common in all agreements and the clause in the tender was inserted to differentiate precisely between a live and an expired agreement. The marks suggested the difference between the validity of agreements.

Dr Camilleri wondered why Appellants claim to have started negotiations when according to them the present Agreement was still valid. The PCRB must discern between an agreement that is current and one that has expired. Agreements have an effect on the conditions affecting the labour force. Appellants have only starting talking about renewal in the last three months – why trying to renew if Agreement is still valid?

Mr Melchior Dimech representing himself said that according to witness Mr Formosa conversations with the union started after the submissions of the bids - this *ex admissis* is proof that Appellants knew that the Agreement had expired.

Dr Farrugia said the protection of employees is important and that there were no negotiations but simply talks with the Union. A lapse of four years was more than ample time to renegotiate a new agreement. If the decision in the previous case (Case 1900) is disagreed with the PCRB has the power to change it.

Dr Paris said that the wages of employees were not dictated by the Collective Agreement but by law so it was immaterial when the Agreement was dated.

Dr Mark Anthony Debono Legal Representative for the Department of Contracts said that the Department distinguished which agreements are valid and which are expired. In Case 1557 the PCRB decided that it has discretion in its decisions.

Dr Camilleri, in a final comment said that the Appellant's bid is limited by the stated period of validity of the Collective Agreement.

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

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 9th November 2023.

Having noted the objection filed by JF Security Services Limited (hereinafter referred to as the Appellant) on 11th October 2023, refers to the claims made by the same Appellant regarding the tender of reference SPD7/ 2023/028 listed as case No. 1939 in the records of the Public Contracts Review Board.

Appearing for the Appellant:	Dr Matthew Paris/Dr. Zack Esmail
Appearing for the Contracting Authority:	Dr Noel Camillieri/Mr. Dolan Debastista
Appearing for the Preferred Bidder A (AGV Non-Ferrous Malta Ltd.):	Dr Gianella Farrugia
Appearing for the Preferred Bidder B (Mr Melchior Dimech)	Mr Melchior Dimech

Whereby, the Appellant mainly contends that:

The collective agreement that was submitted is valid and is appropriately registered with the Department of Industrial and Employment Relations. The points afforded to JF should have been the maximum, in accordance with the criteria weighting matrix, and thus the evaluation and the ensuing marking is erroneous

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 17th October 2023 and its verbal submission during the hearing held on 9th November 2023, in that:

- . JF Services submitted a copy of the collective agreement, in which Article 4 of the stated agreement stated that *'The agreement shall be effective from 1 January 2017 and shall remain in force until the 31st December 2019'*. Thus, the evaluation committee deemed the collective agreement as an expired collective agreement and as such awarded JF Services four (4) marks out of six (6).
The Contracting Authority did not make a wrong evaluation of the documentation submitted nor of the criteria established in the tender document.
Indeed, the collective agreement submitted to the Contracting Authority was an expired one and hence it could not allocate full marks in terms of the above-cited criteria.

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 in their entirety.

This Board opines that the Collective Agreement as presented by the Appellant is still in force, although the 'time frame' 1st January 2017 - 31st December 2019 came to an end.

Section 4 of such Collective Agreement states *"This Agreement shall be effective from 1st January 2017 and shall remain in force until 31st December 2019"*, it then goes on to mention the validity in 'interim periods' when it states *"During negotiations, and until a new Agreement is signed, the contents of this Agreement shall remain in force"*.

The Board understands that the Contracted Authority wanted to make a distinction between those collective agreements that are within the 'time frame' agreed upon by the parties concerned and/or are in a stage of re-negotiation and those who are not. However, this distinction could not be ascertained when considering sub-criteria of 8.2 'F'. An expired 'time frame' does not implicitly mean an expired collective agreement.

Although the tender document deems the Validity Period of the Collective Agreement as having an expiry date that shall at least be for 90 days from the Submission Deadline of the Procurement Call, the collective agreement submitted by the appellant shows that the collective agreement remains in force until such time that a new collective agreement is in place.

Hence, this Board upholds the Appellant's grievances.

The Board,

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

- i) To uphold the Appellant's concerns and grievances;
- ii) To cancel the letter of award on Lot 1 dated 2nd October 2023; iii) To cancel the Letter of Rejection on Lot 1 dated 2nd October 2023 sent to JF Security Services Limited;
- iv) To order the contracting authority to re-evaluate the bid of the Appellant on Lot 1 received in the tender procedure whilst also taking into consideration this Board's findings;
- v) To refund the deposit on Lot 1 to the Appellant.

Dr Charles Cassar
Chairman

Mr Lawrence Ancilieri
Member

Ms Stephanie Scicluna Laiviera
Member