

PUBLIC CONTRACTS REVIEW BOARD

Case 1725 – SPD7/2021/042 – Tender for Legal Services to Research and Draft the Conduct of Business Rulebook for Credit Institutions

20th May 2022

The Board,

Having noted the letter of objection filed by Dr Karl John Tanti acting for and on behalf of Aequitas Legal, (hereinafter referred to as the appellant) filed on the 25th March 2022;

Having also noted the letter of reply filed by Mr Reuben Camilleri acting for the Malta Financial Services Authority (hereinafter referred to as the Contracting Authority) filed on the 30th March 2022;

Having heard and evaluated the testimony of the witness Mr Gilbert Camilleri (Chairperson of the Evaluation Committee) as summoned by Dr Karl Tanti acting for Aequitas Legal;

Having heard and evaluated the testimony of the witness Dr Karl Tanti (Representative of Aequitas Legal) as summoned by Mr Reuben Camilleri acting for the Malta Financial Services Authority;

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 17th May 2022 hereunder-reproduced.

Minutes

Case 1725 – SPD7/2021/042 – Tender for Legal Services to Research and Draft the Conduct of Business Rulebook for Credit Institutions

The tender was issued on the 12th October 2021 and the closing date was the 2nd November 2021. The value of the tender, excluding VAT, was € 60,000.

On the 25th March 2022 Aequitas Ltd filed an appeal against the Malta Financial Services Authority as the Contracting Authority objecting to their disqualification on the grounds that their bid was deemed to be technically not compliant.

A deposit of € 400 was paid.

There were four (4) bids.

On the 17th May 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Ms Stephanie Scicluna Laiviera as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Aequitas Ltd

Dr Kris Scicluna	Legal Representative
Dr Karl Tanti	Legal Representative

Contracting Authority – Malta Financial Services Authority

Mr Gilbert Camilleri	Chairperson of the Evaluation Committee
Mr Reuben Camilleri	Secretary Evaluation Committee
Ms Sarah Pulis	Member Evaluation Committee
Ms Annabelle Mallia	Member Evaluation committee
Mr Godon Scicluna	Representative

Preferred Bidder – Ernst & Young

Not represented

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties. He noted that since this was a virtual meeting all the parties agreed to treat it as a normal hearing of the Board in line with Article 89 of the Public Procurement Regulations. He then invited submissions.

Dr Karl Tanti Legal Representative for Aequitas Legal stated that Appellant's offer had been refused on a matter that should not affect compliance with the tender; this besides being the cheapest offer.

Mr Reuben Camilleri Representing the Malta Financial Services Authority said that the point of the disqualification was that it was impossible for the Contracting Authority to ask for further clarifications when Appellant failed to submit the CV of one of the key experts.

Mr Gilbert Camilleri (60479M) called as a witness by Appellant testified on oath that he was the Chairperson of the Evaluation Committee (TEC) and confirmed that a clarification had been sent to Appellant allowing the replacement of one of the key experts. At this stage Mr Bamber was substituted by Dr Karl Tanti who has an LL.D. degree at MQF Level 8 and practises law in Malta as indicated on the key expert form submitted. The professional declaration form confirms that any document necessary will be provided and be made available when requested. At tendering stage the CV had to be provided but this was not submitted although the degree certificate and the warrant, which were not asked for, were provided. The lack of the CV made the bid not compliant – this being the only shortcoming in the offer.

Witness confirmed that Appellant's bid was cheaper than that of the preferred bidder. The CV was a tender requirement and its contents were immaterial to the tender – what matters is that it is provided as it is a form of declaration.

Dr Karl Tanti (121990M) called as a witness by the Contracting Authority testified on oath that there were several declarations required to be submitted in the tender. He agreed that the

key expert was replaced although Appellant felt that the original name submitted was sufficiently qualified to meet the requisites of the tender. To remove any doubts a fresh key expert was submitted. Through an oversight it is accepted that the CV was not submitted although it had been provided in the case of the previous key expert.

This concluded the testimonies.

Dr Karl Tanti said that the simple fact that the CV had not been submitted was not contested when the key expert was replaced and therefore the bid was not compliant; otherwise the bid is fully conforming. The CV offers no new information on qualifications or professional standard and one wonders why it was required. Contrary to what the Authority claims there was no necessity for a second clarification. This was a Note 2 situation and all that was required, in line with existing case law, was to ask for a correction to be made. The submission of a CV would not alter anything. The TEC went against the basic principles of procurement. Reference was made to Court of Appeal Case 348/21 where the Court made it clear that where possible bids should be saved. Appellant's offer was the most favourable one and the Board should consider refunding the deposit even if it did not agree with the Appellant's submissions.

Mr Reuben Camilleri said that the first submission included CVs but the replacement submission had the CV missing and the TEC could not ask for further clarification. The items requested in a tender had to be followed and the TEC is bound by this. The CV corroborates the submissions made and the position of the Authority is very clear.

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 17th May 2022.

Having noted the objection filed by Aequitas Legal (hereinafter referred to as the Appellant) on 25th March 2022, refers to the claims made by the same Appellant with regard to the tender of reference SPD7/2021/042 listed as case No. 1725 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Karl John Tanti

Appearing for the Contracting Authority: Mr Reuben Camilleri

Whereby, the Appellant contends that:

- a) The Appellant's bid was deemed as Not Technically Compliant by the MFSA Evaluation Committee. The Annex included with the Rejection Letter included the following as being the reason for the Evaluation Committee's decision:

“The TEC evaluated the Technical Submissions, and a rectification was required. The bidder was requested to present proof of equivalency with regards to Key Expert No. 1 (Mr Mark Bamber), as the proposed Key Expert does not hold a Bachelor of Law, or Master's in Financial Services, or Bachelor of Commerce (Banking and Finance). The bidder was also given the opportunity to change the Key Expert. The Economic Operator rectified by changing the Key Expert to Dr Karl John Tanti. However, the bidder did not provide the CV of said Key Expert. Therefore, the bidder was found to be Technically non-Compliant and offer cannot be considered further.”

The Appellant humbly submits that the Evaluation Committee's conclusion above is erroneous.

- b) Firstly, the Appellant's submission is technically compliant given that the two Key Experts proposed both possess a Doctor of Laws (LL. D) - a much higher qualification than the requested Bachelor of Laws. This is confirmed in the Appellant's re-submitted Experts Form attached with its Clarification Answer.
- c) The Evaluation Committee's reason for declaring the Appellant's bid as being technically not-compliant is not so much about the Appellant failing to satisfy the necessary technical criteria since it is clear that these are sufficiently satisfied. Rather, it seems that the main reason for this decision stems from the fact that the Appellant did not submit the Key Expert's CV with its Clarification Answer.
- d) The Appellant humbly submits that this is not a sufficient reason to disqualify the Appellant, given that:

- i. The Clarification Request invited the Appellant to either present proof of equivalency with regard to Mr Mark Bamber or to replace the proposed Key Expert with another that meets the stipulated criterion.
 - ii. In its answer, the Appellant stated that Mr Bamber will be replaced by Dr Karl John Tanti whilst confirming that the latter satisfies the academic qualification requirement asked for.
 - iii. In its Key Experts Form, it is clearly shown that Dr Karl John Tanti is in possession of a Doctor of Laws (LL. D) from the University of Malta.
- e) Furthermore, and without prejudice to the above, the Evaluation Committee had every opportunity to request the Key Expert's CV from the Appellant. The Key Expert's Form falls under Note 2, which therefore allows for rectifications as well as requests for any missing documents. In this situation, the Evaluation Committee ought to have requested an additional clarification from the Appellant if it requested further confirmation that Dr Karl John Tanti satisfied the criteria necessary to be a valid Key Expert in terms of the Tender. It did not do so in this case.
- f) Several decisions of this Board as well as judgments of the Court of Appeal have confirmed that, in their deliberations, all Evaluation Committees must abide by the basic principles of equal treatment, non- discrimination, transparency and - most important of all in this case proportionality. The Appellant humbly submits that the Evaluation Committee's reaction is not proportionate to any possible shortcoming existing in the Appellant's bid..

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 30th March 2022 and its verbal submission during the virtual hearing held on 17th May 2022, in that:

- a) The objector is incorrectly assuming that provision of the CV is not a necessary part of the technical submission for it to be deemed compliant. The objector had indeed presented his initial line-up of Key Experts (that being Mr Mark Bamber and Dr Kris Scicluna) with the necessary supporting documentation, namely the CVs, the duly filled in Key Expert table and the duly filled in Declarations forms. The TEC was requesting the objector to provide the above-mentioned documentation without omissions when given the option to rectify their position.
- b) Arguments brought forward:
 - i. Qualifications - The TEC hereby submits that it does not contest the qualifications presented by the objector in support of compliance requirements in terms of the Tender Document.
 - ii. Key Expert Form - The TEC refers to the Key Expert form that should show the clarity of its instructions and its willingness to help bidders to understand how to substantiate their claims. Given the absence of the Key Expert's CV, the TEC was not in a position to carry out this analysis. Furthermore, the Appellant continues to emphasise the fact that a duly filled in Key Expert table was provided and the TEC submits that the objector was

also diligent enough to provide the required declarations, but had failed to provide the necessary CV.

- iii. Clarification and Rectification requests - Such requests are made in compliance of the Tender Document and the guidance note. The TEC hereby submits that its actions were aligned to the terms of the guidance note:

Requests for Clarifications and/or Rectifications concerning a previous request dealing with the same shortcoming shall not be entertained. Therefore, it shall not be possible to re-send a Request for Clarification / Rectification to attain the originally requested clarification information and / or to rectify the same specific information/ documentation.

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 facts of the case are not contested.
- b) Reference is made to:
- i. Key Experts Form (Note 2) which states: "*Tenderers are to substantiate their claims, in respect to the proposed Key Expert/s, by complying with and submitting the following at tendering stage: 1. **Relevant up-to-date CVs***" (bold & underline emphasis added)
 - ii. Statement of Availability (Note 2) which states: "*I, the undersigned, hereby declare my availability in the above-mentioned tender procedure in case of award. I further declare that I am able and willing to work for the period(s) foreseen for the position, even if there are delays in the conclusion of contract beyond the validity of offers, **for which my CV has been included** in the event that this tender is successful.*" (bold & underline emphasis added)
- c) From point (b) above it is crystal clear that the CV was indeed needed and requested at tendering stage. This was not provided.
- d) This Board agrees with the arguments brought forward by the Appellant that the CV is not the best way to ascertain the qualifications of the key expert, however it is certainly useful in corroborating information within bids. Hence it does add value to the economic operator's bid. Moreover, it was a clear requirement of the tender dossier.

There was no contestation that the Evaluation Committee had indeed requested the economic operator, now Appellant, to rectify his position in regard to the Key Expert. Due to the fact that the submission still remained non-compliant, the Evaluation Committee's hands were tied in respect to further clarifications / rectifications as per "*Requests for Clarifications and/or Rectifications concerning a previous request dealing with the same shortcoming shall not be entertained. Therefore, it shall not be possible to re-send a Request for Clarification / Rectification to attain the originally requested clarification information and / or to rectify the same specific information/ documentation.*" Hence, this Board does not uphold Appellant's grievances.

The Board,

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

- a) Does not uphold Appellant's Letter of Objection and contentions,
- b) Upholds the Contracting Authority's decision in the recommendation for the award of the tender,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Dr Charles Cassar
Member

Ms Stephanie Scicluna Laiviera
Member