

PUBLIC CONTRACTS REVIEW BOARD

Case 1730 – LCA001/2022 – Service – Chief Co-Ordinator for the Maltese Delegation in the Committee of the Regions (CoR) in Brussels and Council of Europe (CoE) in Strasbourg

27th May 2022

The Board,

Having noted the letter of objection filed by Mr Joe Cordina acting for and on behalf of Apex Business Services Ltd, (hereinafter referred to as the appellant) filed on the 21st April 2022;

Having also noted the letter of reply filed by Dr Dustin Camilleri on behalf of Emmanuel Mallia and Associates Advocates acting for Association of Local Councils (hereinafter referred to as the Contracting Authority) filed on the 2nd May 2022;

Having heard and evaluated the testimony of the witness Mr Mario Fava (Chairperson of the Evaluation Committee) as summoned by Dr Jonathan Mintoff acting for Apex Business Services Ltd;

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 24th May 2022 hereunder-reproduced.

Minutes

Case 1730 – LCA001/2022 – Tender for Chief Co-ordinator for the Maltese Delegation in the Committee of the Regions (CoR) in Brussels and Council of Europe (CoE) in Strasbourg

The tender was issued on the 8th February 2022 and the closing date was the 28th February 2022. The value of the tender, excluding VAT, was € 46,500.

On the 21st April 2022 Apex Business Services Ltd filed an appeal against the Local Councils Association as the Contracting Authority objecting to the award of the tender on the grounds that the preferred bidder is deemed not to have the necessary experience demanded by the tender.

A deposit of € 400 was paid.

There were two (2) bids.

On the 24th May 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri 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 – Apex Business Services Ltd

Dr Jonathan Mintoff	Legal Representative
Mr Joseph Cordina	Representative

Contracting Authority – Local Councils Association

Dr Dustin Camilleri	Legal Representative
Mr Jesmond Aquilina	Member Evaluation Committee
Mr Mario Fava	Representative
Ms Lianne Cassar	Representative

Preferred Bidder – Yama Yami Ltd

Dr Daniel Calleja	Legal Representative
Mr Ryan Cefai Mercieca	Representative

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 Jonathan Mintoff Legal Representative for Apex Business Services Ltd referred the Board to the application he had submitted regarding the late submission of reasoned letter of reply of the preferred bidder.

The Chairman said that the letter had been submitted one day late and ordered it to be removed from the records of the Case but it was not contumacious as claimed by Dr Mintoff. The preferred bidder still had the right to make verbal submissions. As regards the second application by Dr Mintoff the Chairman noted that in this Case there was no evaluation grid and therefore the point did not arise.

Dr Mintoff said he still needed to be made 'au fait' with the technical specifications submitted by the preferred bidder in line with recent Court cases.

The Chairman said that the Board could not accept the application as the information requested was not in the public domain.

Dr Mintoff said that he will proceed with his submissions and requested that a witness be heard.

Mr Mario Fava (495472|M) called as a witness by the Appellant testified on oath that he was the Chairperson of the Evaluation Committee(TEC). He was referred to document LCA 1

submitted by the preferred bidder and confirmed that this document had been submitted as proof of his experience. No letters from third parties had been submitted confirming the said bidder's experience. The CV and bidder's previous experience confirmed that he had the ability to perform the required work. The mention of 'a reference letter' in the tender was quoted as a 'for example'. Both bidders in this tender submitted the same documents. The TEC was satisfied that the experience of the preferred bidder was suitable for the role.

Witness agreed that the Appellant had submitted a letter outlining several years' experience at the Committee of the Regions but stated that experience in that role was not suitable to fulfill the tender requirements and re-iterated that the TEC was satisfied with the preferred bidder's suitability.

Several time Dr Mintoff insisted that the CV of the preferred candidates should be made available to him but it was pointed out that this was confidential information.

Dr Daniel Calleja Legal Representative for Yama Yami said that this was nothing but a fishing expedition to enable Appellant to make his case.

Dr Mintoff then requested that it be recorded in the Minutes that:

"The legal counsel of the objector hereby registers his formal objection to the fact that witness summoned by the same objector is testifying on a critical document forming part of the preferred bidder's submission to which the objector is not privy, thus the objector cannot question the same witness on the same document and to examine the same. On this point the objector refers to a decree issued in the First Hall of the Civil Court presided by Judge Depasquale dated 9th December 2019 in case No 133/2018 whereby in a similar situation where a witness confirmed under oath that he relied on the conclusion and the contents which document was not accessible to the other party, the Court ordered the witness and the party to present such a document for it to be verified by the other party. For all intents and purposes the document in question was an evaluation report of a tendering process."

Dr Mintoff then went on to make further submissions. He stated that page 7 of the tender states that the XML structure shall prevail. The XML asks for proof of reference but no further documents except CLA1 and the CV were submitted with no external proof of experience. The Appellant provided proof from an outside source. Proof that the preferred bidder attended conferences is not sufficient proof of experience, and as an example the Euro Youth Forum quoted does not come within the ambit of the Council of Europe, and the same could be stated on several other points. Bidder was not adhering to the tender parameters, and as this was a Note 3 item no further information could be sought. The overall objectives stated in page 13 of the tender were not met.

Dr Calleja said that there was no obligation to provide a reference letter and it was up to the bidder how he provided proof of his experience. The TEC selected the preferred bidder on the basis of his experience which he demonstrated by the groups he worked in. The appeal should be dismissed.

Dr Dustin Camilleri Legal Representative for the Local Council's Association said that the Authority backed Dr Calleja' submissions which were sufficient to enable the TEC to reach a conclusion that the necessary experience was there.

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 24th May 2022.

Having noted the objection filed by Apex Business Services Ltd (hereinafter referred to as the Appellant) on 21st April 2022, refers to the claims made by the same Appellant with regard to the tender of reference LCA001/2022 listed as case No. 1730 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Jonathan Mintoff

Appearing for the Contracting Authority: Dr Dustin Camilleri

Appearing for the Preferred Bidder: Dr Daniel Calleja

The Board is also noting that there was a 'Reasoned Reply' filed on 3rd May 2022 by Dr Daniel Calleja on behalf of Carmelo Galea & Associates Advocates acting for Yama Yami Ltd. In this respect the Board has received an application from Dr Jonathan Mintoff acting for Apex Business Services Ltd for this reply to be deemed inadmissible. The Board upholds Dr Jonathan Mintoff's application and invites all interested parties to follow the procedures as set out in the Regulations. All parties within the hearing will still have their opportunity to submit their verbal submissions hence no party should feel aggrieved by not having the opportunity to a fair hearing.

Whereby, the Appellant contends that:

- a) Yama Yami Ltd haven't got the necessary experience requested by tender.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 2nd May 2022 and its verbal submission during the virtual hearing held on 24th May 2022, in that:

- a) The Contracting Authority conducted the evaluation in accordance with the relevant procurement rules, as established by Law, in fact, the winning bidder submitted a detailed explanation of his experience.

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 witness duly summoned, will consider Appellant's grievances as follows:

- a) Reference is made to the testimony under oath of Mr Mario Fava whereby "*the mention of 'a reference letter' in the tender was quoted as a 'for example'.*" Therefore, the Board agrees that the submission of a reference letter is not an absolute. Other acceptable 'proof of experience' could have been presented.
- b) Reference is now made to the Tender Dossier Section 1 paragraph 5 (C) (i) whereby it was requested; "*Minimum five years' experience in work related with CoR and/ or CoE*". The Board agrees with the argumentation as brought forward by the Appellant that, "*proof that the Proof that the preferred bidder attended conferences is not sufficient proof of experience, and as an example the Euro Youth Forum quoted does not come within the ambit of the Council of Europe, and the same could be stated on several other points. Bidder was not adhering to the tender parameters, and as this was a Note 3 item no further information could be sought.*". It is this Board's opinion that the attendance at conferences, forums, one-off meetings etc over a five year period is not tantamount to meeting the tender requirements of "*Minimum five years' experience in work related with CoR and/ or CoE*". (bold & underline emphasis added)

Hence, this Board upholds the Appellant's grievance.

The Board,

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

- a) To uphold the Appellant's concerns and grievances;
- b) To cancel the Letter of Acceptance dated 12th April 2022 sent to "Yama Yami Ltd";
- c) To cancel the Letter of Rejection dated 12th April 2022;
- d) To order the contracting authority to re-evaluate all the bids received in the tender through a newly constituted Evaluation Committee composed of members which were not involved in the original Evaluation Committee, whilst also taking into consideration this Board's findings;
- e) after taking all due consideration of the circumstances and outcome of this Letter of Objection, directs that the deposit be refunded to the Appellant.

Mr Kenneth Swain
Chairman

Mr Lawrence Ancilleri
Member

Ms Stephanie Scicluna Laiviera
Member