

PUBLIC CONTRACTS REVIEW BOARD

Case 1764 – CT2244/2021 – Tender for Professional Services of an Architect for General Consultancy, Concert Hall, Extension of Costume House and Restoration of Priory of Navarre Façade at Teatru Manoel (Lot 2)

20th September 2022

The Board,

Having noted the letter of objection filed by Dr Veronique Dalli, Dr Alessandro Lia and Dr Andrew Saliba on behalf of Dalli Advocates acting for and on behalf of AP Valletta, (hereinafter referred to as the appellant) filed on the 10th June 2022;

Having also noted the letter of reply filed by Dr Charlon Gouder on behalf of AGG Advocates acting for and on behalf of Manoel Theatre (hereinafter referred to as the Contracting Authority) filed on the 20th June 2022;

Having also noted the letter of reply filed by Dr Matthew Cutajar on behalf of BCGL Advocates acting for and on behalf of Openworkstudio (hereinafter referred to as the Preferred Bidder) filed on the 27th June 2022;

Having heard and evaluated the testimony of the witness Ms Ruth Agius (Secretary of the 1st Evaluation Committee) as summoned by Dr Alessandro Lia acting for AP Valletta;

Having heard and evaluated the testimony of the witness Ms Diane Degabriele (Chairperson of the 1st Evaluation Committee) as summoned by Dr Alessandro Lia acting for AP Valletta;

Having heard and evaluated the testimony of the witness Ms Penelope Ciangura (Member of the 1st Evaluation Committee) as summoned by Dr Alessandro Lia acting for AP Valletta;

Having heard and evaluated the testimony of the witness Ms Kate Field (Member of the 1st Evaluation Committee) as summoned by Dr Alessandro Lia acting for AP Valletta;

Having heard and evaluated the testimony of the witness Mr Brian Bonnici (Member of the 1st Evaluation Committee) as summoned by Dr Alessandro Lia acting for AP Valletta;

Having heard and evaluated the testimony of the witness Ms Antoinette Demanuele (Member of the 2nd Evaluation Committee) as summoned by Dr Alessandro Lia acting for AP Valletta;

Having heard and evaluated the testimony of the witness Ms Leondine Bartolo (Member of the 2nd Evaluation Committee) as summoned by Dr Alessandro Lia acting for AP Valletta;

Having heard and evaluated the testimony of the witness Ms Michael Mangion (Member of the 2nd Evaluation Committee) as summoned by Dr Alessandro Lia acting for AP Valletta;

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

Having noted and evaluated the minutes of the Board sittings of the 12th July 2022 and 15th September 2022 hereunder-reproduced;

Minutes

Case 1764 – CT 2224/2021 – Tender for Professional Services of an Architect for General Consultancy, Concert Hall, Extension of Costume House and Restoration of Navarre Façade at Teatru Manoel – LOT 2

The tender was issued on the 18th August 2021 and the closing date was the 5th October 2021. The value of LOT 2 of the tender, excluding VAT, was € 35,440.

On the 10th June 2022 AP Valletta filed an appeal against Teatru Manoel as the Contracting Authority objecting to their disqualification on the grounds that their offer was deemed not to be the best offer.

A deposit of € 400 was paid on Lot 2.

There were ten (10) bids.

On the 12th July 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Dr Vincent Micallef as members convened a virtual public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – AP Valletta

Dr Alessandro Lia	Legal Representative
Dr Veronique Dalli	Legal Representative
Dr Andrew Saliba	Representative
Mr David Felice	Representative
Ms Erica Giusta	Representative

Contracting Authority – Teatru Manoel

Dr Charlon Gouder	Legal Representative
Mr Warren Zammit	Chairperson Evaluation Committee

Preferred Bidder – Openworkstudio

Perit Alberto Miceli Farrugia	Representative
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Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions. Approval was given by all parties for all four appeals, which are based on the same grounds, to be heard together. He then expressed the Board's dissatisfaction that it was only advised at the last minute that members of the Evaluation Committee were not available.

Dr Alessandro Lia Legal Representative for AP Valletta said that this would create problems as he required certain evaluators to testify. He also requested a copy of the points awarded to all bidders.

Mr Warren Zammit Chairperson of the Evaluation Committee explained that one of the evaluators was on a course, one was on sick leave and two had left their employment at the Manoel Theatre.

Dr Charlon Gouder Legal Representative for Teatru Manoel said that the evaluation grid will be provided after consulting with his clients. He reminded the Board that the PCRB had only requested the re-integration of the AP Valletta offer.

Dr Lia pointed out that in the first evaluation AP Valletta was not one of the qualifiers, therefore it was only on re-evaluation points were only awarded to them. The situation now was different and therefore all scores were required.

Dr Gouder objected to this as it amounted to interfering with the first evaluation and this was not in line with the PCRB decision.

The Chairman said that the Board will recess for a few minutes to consider the submissions made.

On resumption the Chairman stated that the Board had considered the points raised and now directs that at the next hearing the following members of the evaluation committee will have to attend; namely the two persons who are still in employment at the Teatru Manoel and summons are to be issued to the other two persons Ms Antoinette Demanuele and Ms Ruth Agius .

The Board also meets the request of Dr Lia on behalf of the Appellant that the members of the previous evaluation committee should also be present at the next hearing to give their testimonies since the Board feels that such testimonies are material to the merits of this case.

Further, the Board has considered the request by Dr Lia, on behalf of the Appellant, to be provided with the evaluation grids of all bidders, and at this stage directs the Contracting Authority to provide Appellant with only the evaluation grids of the preferred bidders for Lots 1 to 4.

The Board will provide a copy of this directive to all parties and any information referred to in this directive is to be circulated by the 15th July 2022.

The hearing was then adjourned to the 15th September 2022 at 11.00am.

End of Minutes

SECOND HEARING

On the 15th September 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman. Mr Lawrence Ancilleri and Dr Vincent Micallef as members convened a virtual public hearing to consider further this appeal.

The attendance for this public hearing was as follows:

Appellant: AP Valletta

Dr Veronique Dalli	Legal Representative
Dr Alessandro Lia	Legal Representative
Mr David Felice	Representative

Contracting Authority – Teatru Manoel

Dr Charlon Gouder	Legal Representative
Mr Warren Zammit	Representative

Preferred Bidder – Openworkstudio

Dr Matthew Cutajar	Legal Representative
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Perit Alberto Miceli Farrugia

Representative

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and reminded them that approval was previously given for all appeals to be heard together. He then invited submissions.

Dr Alessandro Lia Legal Representative for AP Valletta requested that witnesses be heard.

Ms Ruth Agius (371593M) called as a witness by Appellant testified on oath that she was the Secretary of the first Evaluation Committee (EC). She was responsible for compilation of the tender but does not recall the source of the documentation. She stated that she has no competence on matters of an architectural or financial nature. The estimated tender value for each of the four lots came from outside consultants but due to the passage of time does not recall who those were. The EC consisted of Diana Degabriele (Senior Finance Manager), Brian Bonnici (Facilities Manager), Penelope Ciangura (Accounts Executive), and Kate Field (Education Projects) – all employees of the Manoel Theatre at the time. Witness stated that she was present at all the evaluation meetings and recalls that there were several clarifications issued on the tender. She does not recall the details of any technical clarifications.

Ms Diane Degabriele (266884M) called as a witness by Appellant testified on oath that she was the non-voting Chairperson of the first EC. Her role was to guide the evaluation process and compile the report based on the evaluators results. She works as a financial controller and has no knowledge in the architectural field.

Ms Penelope Ciangura (71873M) called as a witness by the Appellant testified on oath that she was one of the evaluators in the first evaluation. She is an Account Executive at the Manoel Theatre. She has no knowledge of architectural matters. She did not consult any professional expert on the tender but made sure that she compared the bids with the tender requirements. Witness confirmed that she has no knowledge of space requirements, safety, acoustic or restoration of theatres and is unable to judge market prices for this type of work – she merely compared prices offered with the estimated value of the tender. Witness stated that she does not recall the basis on which points in the evaluation grid were awarded.

In reply to a question from Dr Gouder Legal Representative for the Manoel Theatre, witness stated that the prices tendered were compared to the estimated value of the tender and the offers compared to the tender specifications.

Ms Kate Field (180668A) called to testify by the Appellant stated on oath that she was a member of the first EC. Her role at the Manoel Theatre covers Education and Learning. She stated that she is not competent in matters of Architecture or historical buildings. She was told what to look for in the bids and compare it to the tender documents and score accordingly. She does not have the knowledge to determine if the price offered was high or low for the work involved.

Mr Brian Bonnici (113375M) called as a witness by the Appellant testified on oath that he is the Facilities Manager at the Manoel Theatre. It was difficult to recall all details but as far as he can remember he had compared the tender requirements with the offers received. He has some technical knowledge in areas like acoustic, health and safety, space requirements etc. The financial bids were compared to the tender estimated value.

Questioned by Dr Gouder, witness said that there was a wide variety of prices offered some of which seemed to him to be exorbitant and he wanted to safeguard the finance of the Theatre.

Ms Antoinette Demanuele (397789M0) called to testify by the Appellant stated on oath that she was a member of the second EC. She is a former employee of the Manoel Theatre and is presently employed as a Senior Accounts Executive. She stated that she only evaluated the AP Valletta bids and that she is not knowledgeable on matters of planning or architecture. In the evaluation process she awarded marks according to the standard of submissions. She then listed the names of the members of the second EC and mentioned that the EC had not sought advice from any outside sources or consultants. The prices offered were generally in line with the tender estimate but she did not have the knowledge to judge if this level was correct. In reply to a question witness stated that she was not aware who had set the estimated value of the tender.

Ms Leondine Bartolo (195485M) called as a witness by the Appellant testified on oath that she was a member of the second EC and had only evaluated the AP Valletta bids. She mentioned that she had no architectural or planning experience and had not sought any external consultants views on the tender. She had confirmed the financial bids with the set tender value but had no idea who had set these values.

Mr Michael Mangion (259011L) also called to testify by the Appellant stated on oath that he formed part of the second EC. He was a Senior Manager at the Theatre responsible for Events and Productions but had no knowledge of architectural matters. He confirmed that no outside experts had been consulted and did not have the ability to decide if the estimated tender value was right for the work required.

This concluded the testimonies.

Dr Lia said that this case bore great similarity to PCRB Case 1046 where a very technical tender was evaluated by non-competent people on the EC. In this case this has happened twice and no member of either EC had any idea of the work involved in the various spheres required in the tenders and could therefore not evaluate it correctly. With no financial knowledge how could the members of the EC judge if the bids offered were correct or indeed if the estimated values were discretionary? *Ex admisis* this was not done. There was not even any consideration of abnormally low bids. Appellant had indicated how low were the bids and if the real value was not known how could the EC decide if the offers reflected the true value of the works involved. The only solution was to have the bids re-evaluated by a new board. As for the second grievance it is obvious that the BPQR assessment was not carried out correctly as the quality was not evaluated.

Dr Gauci stated that Appellant's allegation is that the offers were abnormally low. The EC justly compared the offers to the estimated value and it was not the role of the EC to investigate if the price given in the estimate was right or not and they could not be accused of failing in this regard. There is no point in now ridiculing the work of the EC since no objective proof has been provided that they marked the bids incorrectly. Just making sweeping judgements on the EC is no proof.

Dr Matthew Cutajar Legal Representative for Openwork Studio, the preferred bidder on Lot 2, said that he agreed with Dr Gauci's arguments. The exercise was carried out according to the tender document and there was no challenge on the estimated value. Regulation 243 on abnormally low tender was not applied which indicated that there were no doubts in this regard.

Dr Gouder stated that he agreed with the last two comments and referred the Board to the Authority's letter of reply. The appeal was on the re-evaluation of the AP Valletta's bids but they did not dispute

it at that stage but are trying to do it now. On the first grievance there is no indication that the price is abnormally low – on the other hand one price is abnormally high. On this point no concern had been expressed by Appellant before they put in their bid. The EC evaluated the documents submitted and had to be satisfied that the bids met the tender requirements.

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 sittings of the 12th July 2022 and 15th September 2022.

Having noted the objection filed by AP Valletta (hereinafter referred to as the Appellant) on 10th June 2022, refers to the claims made by the same Appellant with regards to the tender of reference CT2244/2021 (Lot 2) listed as case No. 1764 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Veronique Dalli, Dr Alessandro Lia &

Dr Andrew Saliba

Appearing for the Contracting Authority: Dr Charlon Gouder

Appearing for the Preferred Bidder: Dr Matthew Cutajar

Whereby, the Appellant, in their Letter of Objection, contends that:

a) **Abnormally Low –**

The recommended bidder's financial offer is 25% cheaper than the Estimated Contract Value listed in the tender dossier. The Estimated Contract Value has been set at Eur35,440, while Openworkstudio's offer stood at Eur22,700, therefore Eur12,740 less than the estimate set by the Contracting Authority.

This fact alone should have triggered regulation 243 of the Public Procurement Regulations.

In the view of the Appellant's either this mechanism was not implemented or else was not implemented correctly.

b) **BPQR procedure –**

From the rejection letter sent to the Appellant, it transpires that for most criteria, the Evaluation Committee either gave full marks or else a score of 0. This contrary to what the tender dossier provided. No grading exercise was performed by the Evaluation Committee.

This goes contrary to the procedure of BPQR, whereby by just meeting the minimum requirements you are not to obtain 'full marks'. The way that the evaluation committee proceeded with 'grading' the technical offers, converted the tender into one which is won by someone who offers the cheapest price.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 20th June 2022 and its verbal submission during the virtual hearings held on 12th July 2022 and 15th September 2022, in that:

a) **Abnormally Low –**

Section 1.3 of the Tender dossier lists the Estimated Procurement Value at €35,770. The offer of the Recommended Bidder is of €22,700, a mere €13,070 difference. On the other hand, the offer of the Appellant is of €46,225, in excess of the Estimated Procurement Value of €10,455.

It was only the Appellant's offer which exceeded the Estimated Procurement Value by a long shot. The Estimated Procurement Value is for indicative purposes and is not to be considered as final.

b) **BPQR procedure –**

The Evaluation Committee is entrusted with an element of 'leeway' in BPQR adjudicated tenders. This revisory board is not the adequate forum to assess the technical parameters of such tender.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 27th June 2022 and its verbal submission during the virtual hearings held on 12th July 2022 and 15th September 2022, in that:

a) **Abnormally Low –**

The Estimated Procurement Value is for indicative purposes and is not to be considered as final. The mere fact that an offer is below the Estimated Procurement Value does not in itself mean that an offer is Abnormally Low. The offer must be seen in tandem with the qualitative aspects it is offering.

b) **BPQR procedure –**

The Evaluation Committee is entrusted with an element of 'leeway' in BPQR adjudicated tenders. This revisory board is not the adequate forum to assess the technical parameters of such tender.

The preferred bidder finds it ironic that the Appellant is making this grievance when they obtained the full marks in all criteria except one.

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) **BPQR procedure -**

Section 6 of the tender dossier states "*The contract will be awarded to the tender submitting the offer with the Best Price / Quality Ratio (BPQR)*". It then goes on to describe that the ratio will be established at 70/30 for technical and financial characteristics respectively.

Therefore, this Board opines that in this tender, the technical aspect is being given a significant importance over the financial aspect.

This Board notes that contrary to the well-established principles of BPQR, the vast majority of criteria were scored as either a '0' or '100'. When this is compared and correlated to the testimonies under oath of all the members of the evaluation committee, whereby they all stated that they had no knowledge of the architectural field, restorations, acoustics etc (or very limited), strong doubts emerge as to how the technical evaluation process was carried out. It was also confirmed that no consultations with professional experts were sought during the evaluation process.

The most salient points of the testimonies under oath are hereby being re-produced:

Ms Penelope Ciangura – "*... no knowledge of architectural matters. I did not consult any professional expert on the tender..... no knowledge of space requirements, safety, acoustic or restoration of theatres.....*"

Ms Kate Field – "*... not competent in matters of Architecture or historical buildings.*"

Mr Brian Bonnici – "*... Some technical knowledge in areas like acoustics, health and safety, space requirements..*"

Ms Antoinette Demanuele – "*... Not knowledgeable on matters of planning or architecture. The evaluation committee had not sought advice from any outside sources or consultants.*"

Ms Leondine Bartolo – "*I have no architectural or planning experience and I had not sought any external consultants views on the tender.*"

Mr Michael Mangion – "*... no knowledge of architectural matters. No outside experts had been consulted.*"

When considering all of the above, this Board is not at all confident that the technical evaluation was carried out as per principles of BPQR. As a very minimum requirement, the evaluation committee should have within its ranks a person who is able to duly assess the technical matters of the tender procedure. This is not to say that all the members of the evaluation committee are to be architectural experts, as different fields of expertise may be required, such as financial, but as a very minimum, one person is to be knowledgeable on the technical side of things. This either through professional qualifications, direct experience in the field in question, or a mixture of both.

The BPQR method is to allow an element of leeway to the evaluation committee whereby any economic operator offering a better product / service to the contracting authority is to be afforded the highest marks in the specific criterion being evaluated. The other economic operators who 'just' meet the minimum criteria but do not offer any value added, are not to be given a '100' mark scoring (unless specifically stated in the tender dossier).

Therefore, this Board will uphold this grievance of the Appellant.

b) **Abnormally Low –**

Similar doubts emerge on the financial evaluation, as those encountered in the technical evaluation. No member of the evaluation committee gave reasonable views as to how they determined that the bids by the preferred bidders were not deemed to be abnormally low. As per regulation 243 (1) of the Public Procurement Regulations, bids lower than the estimated procurement value are not to be immediately deemed financially non-compliant, but were offers 'appear' to be abnormally low, contracting authorities shall require economic operators to explain the price or costs proposed.

This assessment of whether a price offered 'appears' to be abnormally low does not seem to have been performed. The evaluators confirmed under oath that they do not possess sufficient knowledge in the field to assess whether the prices offered are market prices and are reasonable or otherwise.

Proper assessment needs to be carried out, and if a bid appears to be abnormally low, the evaluation committee is to communicate with the respective economic operator for the necessary explanations as per regulation 243 (1) of the PPR. The provided explanation is to then be thoroughly assessed and the evaluation committee has within its remit the power to either accept or reject such explanation.

Therefore, this Board will uphold this grievance of the Appellant.

In conclusion this 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 'Notice of Award' letter dated 31st May 2022;
- c) To cancel the Letter of Rejection dated 31st May 2022 sent to AP Valletta;
- d) To order the contracting authority to re-evaluate all the bids received from all economic operators in the tender through a newly constituted Evaluation Committee composed of members which were not involved in the previous Evaluation Committees, whilst also taking into consideration this Board's findings;
- e) The evaluation committee is to be composed of persons who are technically and financially knowledgeable in the specific aspects of this tender procedure as per Board's findings above;
- f) 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

Dr Vincent Micallef
Member