

PUBLIC CONTRACTS REVIEW BOARD

Case 1798 – SPD7/2022/022 – Tender for the Development and Implementation of an IT System and Digital Tools to aid the Malta Competition and Consumer Affairs Authority (MCCAA) in Digital Investigations.

The tender was issued on the 8th April 2022 and the closing date was the 11th May 2022. The estimated value of the tender, excluding VAT, was € 95,000.

On the 10th September 2022 Red Skios Ltd filed an appeal against the Malta Competition and Consumer Affairs Authority (MCCAA) as the Contracting Authority objecting to their disqualification on the grounds that their bid was not technically compliant.

A deposit of € 475 was paid.

There were three (3) bids.

On the 13th October 2022 the Public Contracts Review Board composed of Dr Charles Cassar, 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 – Red Skios Ltd

Dr Matthew Paris	Legal Representative
Mr Roderick Bartolo	Representative

Contracting Authority – Malta Competition and Consumer Affairs Authority

Dr Carlos Bugeja	Legal Representative
Dr Mauro Magro	Legal Representative
Eng Francis Farrugia	Chairperson Evaluation Committee
Mr Gary Haber	Representative

Preferred Bidder – Seasus Ltd

Mr Kenneth Bone	Representative
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Department of Contracts

Dr Mark Anthony Debono	Legal Representative
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Dr Charles Cassar Deputy Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Matthew Paris Legal Representative for Red Skios Ltd detailed the reason given for Appellant's exclusion. There is no indication in the tender that certificates were mandatory and there was no mention of them in the rectification request letter sent.

Dr Carlos Bugeja Legal Representative for the Malta Competition and Consumer Affairs Authority said there was an obligation on a bidder to sustain all the requirements in the General Conditions in a tender.

Mr Mauro Magro Legal Representative for the Malta Competition and Consumer Affairs Authority said that the tender made it very clear that applicants at MFQ6 level were required. A CV, without backing confirmation, was not sufficient to confirm the requisites.

Engineer Francis Farrugia (262359M) called as a witness by the Appellant testified on oath that he is the Director General of the MCCA and was Chairperson of the Evaluation Committee (EC). He stated that there were three evaluators, all employees of the MCCA. The original submissions by Appellant did not include the key expert form which was requested in a rectification request.

At this stage Dr Mauro Magri (297291M) asked to testify to assist the witness with points in the tender with which he was not familiar. He stated that he was not involved with the evaluation but was familiar with the tender dossier. He explained that the key expert form was requested in the tender plus supporting documents.

Resuming his testimony Engineer Farrugia agreed that certificates were not specifically requested as the tender refers only to relevant documentation. Referring to the requirements for the key expert 2 in Article 6.1.2 witness said that the EC had to ensure that the nominee had to have the right qualification level namely, a CV backed by evidence through a certificate to ensure that he holds the actual qualification claimed. He confirmed that the key expert forms indicated that both key experts held qualifications equivalent to MQF 7 level. Witness also confirmed that he is aware that Malta forms part of the Bologna process to accept equivalence of qualifications. The EC did not refer the applications to the Malta Further & Higher Education Authority (MFHEA) but had to ensure that what was stated in the CVs was factual. Referred to certain sections of the tender document witness agreed that certificates were not requested.

Questioned by Dr Bugeja witness said that in the case of key expert 2 there was no evidence of qualifications except what was stated on the CV and the key expert form.

In reply to questions from Dr Magro witness confirmed that Clause 5 of the tender stipulated that economic operators had to provide evidence that they meet certain minimum criteria. This was to corroborate statements in the CVs. In the case of key expert 2 the EC did not feel comfortable with the lack of proof. Referred to Clause 6 of the tender witness said that on the strength of the wording of this section the EC felt obliged not to accept the bid of Appellant.

This concluded the testimonies.

Dr Paris said that the witness had just stated that the basis of Appellant's disqualification was that the requested certificate had not been produced and that the EC cannot rely solely on the CV and the key expert form. Nowhere does the tender state that a certificate is required and therefore it follows that Red Skios were excluded on the wrong grounds. That at least merits that the tender is re-evaluated. The point of equivalence is nowhere requested in the tender not even in the rectification requested. The two key experts both had level MQF 7 qualifications, but they were treated differently on qualifications obtained in both cases from institutions abroad. EU

Directives acknowledges a system of reciprocal qualifications through the EQF (Regulation 607.61). A Masters degree is equivalent to MQF7 and there was no need for the EC to seek further comfort, and on the principle of proportionality the EC should have sought to save the tender and increase competition. The scant details on a certificate would not have added any further information than was already available. The fact that the qualification was awarded by a foreign body does not wash as it applied to both key experts. Overall, the tender should be awarded to Appellant.

Dr Bugeja said one must not overlook the reason for the appeal decision. The EC cannot rely on mere unilateral statements of an individual's qualifications, and generally it is a good practice to have them checked. The reference to the MFHEA is a right not a choice. Up to this moment the EC is still not aware if the contested qualification is genuine nor if the mentioned university actually exists. It is the tenderers obligation to ascertain the facts they claim – it is only the degree plus the certificate that guarantees the qualification. One must bear in mind the risk of a later contract failing because the claimed qualifications were not checked. The role of the EC is to ascertain facts and remove any doubts. Considering all this there is no alternative but to reject the appeal.

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

End of Minutes

Decision

The Board refers to the Minutes of the Board meeting (above) held on 13th October 2022

Having noted this objection filed by Red Skios Ltd (herein after referred to as appellant), on 10th September 2022 refers to the claims made by the same appellant regarding the tender listed as case No. 1798 in the records of the Public Contracts Review Board.

Whereby, the appellant's arguments are the following:

A. That, there is no indication in the tender that certificates were mandatory

B. That, there was no mention of them in the rectification request letter sent.

The Board also noted the letter of reply by the contracting authority dated 17th September 2022, filed on the 19th September 2022, together with its verbal submissions during the hearing on 13th October 2022

Whereby, the Contracting Authority contends that:

- A. No relevant certificates regarding the key experts were submitted.
- B. No certificates were submitted supporting the qualifications of the key experts indicated in the submitted CVs even after a rectification had been sought.

The Board having considered the arguments and documentation from both parties namely the appellant and the contracting authority including the testimony of the witnesses duly summoned will now consider the Appellant's grievances. It also took note and refers to Page 5. Section 5 (c), (i) of the tender document which states:

“Tenderer’s Technical Offer in the response to specifications to be submitted online through the prescribed Tender Response Format and by using the Tender Preparation Tool provided. **Key Experts Form, the Statement of Availability Form, Self-declaration form for Key Experts (relating to public employees) and CVs “ (Note 2).**

The Board also noted that the two key experts put forward by the Appellant both had MQF 7 level qualifications but were treated differently on qualifications obtained in both cases from institutions abroad.

The Board on the basis of these findings concludes that:

- a) Certificates were not specifically requested.
- b) If the Contracting Authority was doubtful regarding the compliance of one key expert, it should have specifically requested for the required documents through a rectification.

The Board decides and directs, that

- a) The Appellant’s objection is upheld.
- b) A new Evaluation Committee, composed of different members is to re-evaluate the key expert 2’s compliance after having requested specifically, the documents required to carry out such a process.
- c) The deposit paid by the Appellant is to be reimbursed

Dr Charles Cassar
Chairman

Mr Lawrence Ancilleri
Member

Dr Vicent Micallef
Member

21st October 2022

