

PUBLIC CONTRACTS REVIEW BOARD

Case 1352 – CT 2048/2017 – Tender for the Provision of Environmentally Friendly Cleaning Services at the Ministry of Foreign Affairs and Trade Promotion (Lot 1)

The publication date of the tender was the 6th September 2018 whilst the closing date was the 9th October 2018. The estimated value of the tender (exclusive of VAT) was € 147,000 in the case of Lot 1.

On the 28th June 2019 Mr Melchior Dimech filed an appeal on both Lots against the Ministry for Foreign Affairs and Trade Promotion as the Contracting Authority contesting the decision to disqualify him as his bids were not technically compliant for a variety of reasons. Two deposits of € 735 each were paid.

There were six (6) bidders on each Lot.

On 17th September 2019 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellant – Mr Melchior Dimech

Dr Franco Galea	Legal Representative
Mr Melchior Dimech	Representative

Contracting Authority – Ministry for Foreign Affairs and Trade Promotion

Dr Abigail Caruana Vella	Legal Representative
Ms Cindy Abela	Secretary Evaluation Committee
Mr Christian Sgandurra	Member Evaluation Committee
Mr Vince Cassar	Representative

Department of Contracts

Dr Franco Agius	Legal Representative
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Dr Anthony Cassar, Chairman of the Public Contracts Review Board, welcomed the parties and informed them that the Board would be considering the appeals on both lots simultaneously due to the similarity of the tenders and the appeals.

Dr Franco Galea Legal Representative for Mr Melchior Dimech said that the tenders were both adjudged on the Best Price Quality Ratio basis. His client had earned higher ranking in the financial evaluations but lower ones in the technical section. If there were any doubts about Appellant's submissions the Contracting Authority should have sought clarifications and/or rectifications as the case may be. The wording in the tender document itself was unclear as to whether Note 3 or Note 2 applies which in turn dictated whether a clarification or a rectification was called for. A draft document (Doc 1) was at this stage tabled to support the claim that the draft Incident Report had been submitted contrary to the claim by the Authority. In their replies to the letters of objection the Contracting Authority claims that the Appellant did not understand the tender requirements correctly – all the more reason why they should have sought clarification.

Dealing with specific points Dr Galea mentioned that, for example under the Social Aspects: Equal Opportunity section, awarding Applicant only 1.5 points was totally out of proportion as he had submitted a certificate of compliance dated 2016 from the competent authority. Further points raised were as follows:

- Rostering/Timetable – only one point awarded although the requested detailed documents were submitted
- Back-up capacity (industrial actions) – only two out of four points awarded as the evaluation committee felt that there were not enough details in the submission-why was clarification not sought?
- Reporting requirements (draft incident report) – despite supplying a draft document (earlier referred to as Doc 1) only two of five points were awarded
- Dress Code (uniforms) – 1.5 points out of three was very low since Appellant had submitted photos indicating full details (tabled as Doc 4)

Dr Galea then went on to deal with a matter that was beyond the original appeal and which had come to his attention at the last minute. Mr Julian Micallef, a Ministry of Foreign Affairs official sat on the evaluation committee. This individual had been obstructing Appellant on the current contract and should have recused himself from the evaluation committee due to a conflict of interest since this created doubt as to the fairness of the evaluation. A bundle of related e-mails passing between Mr Micallef and Appellant was tabled as Doc 2.

The Chairman proposed a short recess to enable the representative of the Contracting Authority to peruse these e-mails.

On resumption of the hearing Dr Franco Agius Legal Representative of the Department of Contracts sought permission to call Mr Melchior Dimech as a witness.

Mr Melchior Dimech (119582M) called as a witness by the Contracting Authority testified on oath that he ran his own business under the trade name of Dimbros. He stated that he was not aware of who the members of the evaluating committee were. He had no personal problems with Mr Micallef but from around April his cleaning supervisor started having problems as indicated in the

e-mails. Witness confirmed that he was currently doing work at the Ministry on the current contract extension. He referred to an e-mail of the 31st July which was not tabled.

Mr Vincent Cassar (19072M) called as a witness by the Public Contracts Review Board (PCRB) testified on oath that he is the Assistant Director of Corporate Services at the Ministry of Foreign Affairs. His responsibilities include the cleaning contracts and Mr Micallef works under his direction. He was aware that disquiet and issues started to arise after the close of the tender process leading to the removal of certain cleaners and a security audit of the cleaners divulged certain shortcomings. Mr Micallef was the principal security officer at the Ministry so obviously he was involved in these matters. Under the terms of the current contract any changes of personnel must be notified and there were instances where unknown workers turned up for work without any security clearance.

The existing contract is a 'call for quotes' extended from year to year. Problems started to occur soon after the outcome of the tender results became known. Problems arose due to the non-notification of changes in personnel, including one instance where the public conduct of one of the cleaners was not acceptable for security reasons. Any changes had to be pre-notified due to the sensitivity of the Ministry's work.

Questioned by Dr Galea witness stated that the selection of the evaluation committee was done through the Director of Corporate Services and the selected personnel are then approved by the Permanent Secretary at the Ministry. He confirmed that the clashes started after the result of the tenders was known. A meeting had been held with Mr Dimech to discuss these problems and at that meeting it was pointed out that Dimbros was failing to claim certain costs to which it was entitled.

Dr Abigail Caruana Vella Legal Representative of the Ministry for Foreign Affairs stated that from the e-mails presented to the Board there was no indication that Mr Micallef should have been excluded from serving on the evaluation committee as there was no conflict of interest or antagonism towards Dimbros.

Dr Agius agreed that there was no logical reason to exclude Mr Micallef or any other person on the evaluation committee as nothing untoward took place. It was not right to exclude persons on the basis of working relationships.

Mr Christian Sgandurra (94378M) called as a witness by the PCRB testified on oath that he was a member of the evaluation committee and was a Senior Manager in the office of the Permanent Secretary of the Ministry.

Dealing with specific points in the tender submissions witness stated the following regarding the Appellant's submissions:

- Rostering – submission not as requested. No indication of the division of workers in different areas on different shifts – instead submitted a list of jobs schedule

- Back-up contingency plans (industrial actions) – document submitted did not indicate how work would proceed in the case of contingency – it simply listed procedures. Authority felt that the reply was not substantial enough as no indication was given as to how work would continue in case of industrial action.
- Back-up capacity (public transportation) - submissions did indicate how Appellant would deal with incidence of lack of public transport in urgent cases.
- Draft Incident Report – the document tabled (Doc 1) had not been submitted in the tender. What was submitted was a template of policy (tabled as Doc 3)
- Uniforms – the submissions was not as requested. T-shirts were offered when the Authority requested shirts with a collar; the shoes indicated were not non-slip safety footwear and same pictures supplied (Doc 4) for summer and winter uniforms without differentiating between male and female uniforms. Submissions do not appear to have made provision for long-sleeved winter tops.
- Social Aspects (equal opportunities) – Appellant submitted an application for Quality Mark recognition which has been outstanding since 2006, with no follow up since. It was not clear if quota regarding employment of persons with disability was met as the Jobsplus document is dated 2016.

Dr Caruana Vella said that BPQR was the sole criterion in deciding these tenders. Although his bids were the cheapest Dimbros was not awarded the contracts. His grievances regarding the points raised were dealt with in the testimony of the witness and the claim that clarification or rectification should have been sought conflicts with Note 3 of the tender documents. Only the literature lists are subject to rectification but there were only two items submitted in this section. The Authority is not obliged to seek clarifications – the onus is on the bidder if he feels that something is not clear. Reference was made to ECJ Case 599/10 confirming that a Contracting Authority is not obliged to seek clarifications. Appellant was not disqualified; he was simply awarded marks reflecting that his submissions were not up to standard expected. There was no bias in favour of the preferred bidder, only an allegation not proven.

Dr Agius dealt with the point regarding rectification which was only allowed in the case of missing information in literature. The uniforms submitted are technically non-compliant as they are not conforming to the requisites of the tender – there is no room here for either clarification or rectification. There is a local Court Case supporting this as well as EJC Case 6/15 which acknowledges that the Authority has certain discretion in deciding a case.

Dr Galea invited the PCRFB to distinguish between the grounds for clarification and those for rectification as, for example, in the case of the uniform shoes where witness admitted that it was not clear what was being offered and should therefore have sought clarification. Originally the tenderer was given only general reasons for disqualification; there were no obstacles why they could not have been given the full reasons at the start. If the evaluation committee found

shortcomings they should have sought clarification or rectification as appropriate and decided accordingly.

Dr Agius said that letters of objection have to adhere to regulation 242 of the Public Procurement Regulations.

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

End of Minutes

Decision

This Board,

Having noted this objection filed by Mr Melchior Dimech (herein after refeed to as the Appellant) on 28 June 2019, refers to the claims made by the same Appellants with regard to the tender of reference CT 2018/2017 (Lot 1) listed as Case no 1325 in the records of the Public Contracts Review Board, awarded by Ministry of Foreign Affairs (herein after referred to as the Contracting Authority).

Appearing for the Appellant: Dr Franco Galea

Appearing for the Contracting Authority: Dr Abigail Caruana Vella

Appearing for the Department of Contracts: Dr Franco Agius

Whereby, the Appellant contends that:

a) **The marks allotted to his offer in the technical section, were somewhat subjective and there existed circumstances where the Evaluation Committee should have sought clarifications with special reference to mandatory items namely, ‘Rostering/Timetable’, ‘Back-Up Capacity’, ‘Reporting Requirements’ and ‘Dress Code’, in this regard, Appellant maintains that had clarifications been requested by the Evaluation Committee, his offer would have obtained better marks.**

b) **He is not comfortable of the fact that a certain Mr Julian Micallef was one of the Evaluators, since the latter person showed discontent towards him during the execution of past services and in this respect, Appellant feels that the Evaluation of this offer was highly subjective due to the presence of Mr Micallef’s sitting on the Evaluation Committee.**

This Board also noted the Contracting Authority’s ‘Letter of Reply’ dated 5 July 2019 and its verbal submissions during the hearing held on 17 September 2019, in that:

a) **The Authority contends that, the evaluation process was carried out under the ‘Best Price Quality Ratio’ (BPQR) and the allocation of the**

marks were consistently allotted by comparing what was requested in the tender document with what was submitted by each tenderer. At the same instance, the Evaluation Committee, quite appropriately, did not identify any just cause as to why they should seek clarifications and the Authority insists that the Evaluation Committee abided by the principle of self-limitation and equal treatment.

b) With regard to the Appellant's contention in that, the inclusion of Mr Julian Micallef as an evaluator, prejudiced the overall allotted marks on the technical items mentioned by same, the Authority maintains that, there existed no justifiable cause as to why Mr Micallef should have been excluded from serving on the Evaluation Committee and there was no antagonism towards the Appellant.

This same Board also noted the testimony of the witnesses namely;

Mr Melchior Dimech, duly summoned by the Department of Contracts

Mr Vincent Cassar, duly summoned by the Public Contracts Review Board

Mr Christian Sgandurra, duly summoned by the Public Contracts Review Board.

This Board has also taken note of the documents submitted by Mr Melchior Dimech which consisted of:

Doc 1 – draft document of incident report,

Doc 2 – emails, relating to communications between Mr Julian Micallef and Mr Melchior Dimech,

Doc 3 – template of ‘Policy Brief and Purpose’

Doc 4 – Photos of uniforms offered by Mr Dimech.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by the parties concerned, including the testimony of the witnesses duly summoned, opines that the issues that merit consideration are three-fold namely;

- The allocation of marks on Appellant’s offer’**
- The participation of Mr Julian Micallef in the evaluation process and**
- The incidence of the clarifications.**

1. First and foremost, this Board would respectfully point out that the award criterion was carried out under the BPQR, as explicitly stipulated in clause 8 of the tender document. At the same instance, this Board, after having examined the relevant documentation, can justifiably confirm

that, the Evaluation Committee abided by such a criterion throughout the evaluation process and in no way whatsoever, Appellant’s offered price was ignored; in fact, Appellant was awarded full marks in the financial evaluation of his offer.

2. It must also be noted that the BPQR method is the most objective tool to arrive at the most advantageous offer in Public Procurement, as it suppresses, as much as possible, the subjectivity element through the allocation of marks on the various components of offers, after which the overall highest average score will represent the offer that merits the award.

3. With regard to Appellant’s contentions in that, his offer deserved more points on ‘Rostering/Timetable’, ‘Back-Up Capacity’, ‘Draft Incident Report’ and ‘Dress Code’, this Board noted shortcomings in each of the respective mentioned items, as follows:

<ul style="list-style-type: none"> • 2. Rostering/ Timetable 	<ul style="list-style-type: none"> - Show how the use of resources will ensure the timely delivery of The tasks (Proposed cleaners Working shifts) 	<ul style="list-style-type: none"> 10 points 	<ul style="list-style-type: none"> Mandatory
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Appellant submitted a list of jobs schedule, which is clearly not as duly requested in the tender document, however, he was awarded the minimum of 1 point.

<ul style="list-style-type: none"> 3. Back-up Capacity (contingency Plans): 	<p>The contingency plan is to include response time in the event of emergencies which may include provisions for the Following:</p> <ul style="list-style-type: none"> i) sick personnel ii) industrial actions effecting the Service Provider’s workforce iii) Breakdown of public transportation system that may affect the ability of the cleaning staff to arrive punctually to their place of work 	<p>4 points 4 points 2 points</p>	<p>Mandatory Mandatory Mandatory</p>
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Appellant’s submissions on this particular item did include how he will deal with incidence of lack of public transport, however, he did not indicate how the work would still proceed in case of an industrial action, so that the two points so awarded were truly justified.

<ul style="list-style-type: none"> 4 Reporting requirements 	i.: Draft Monthly reports including timetables to illustrate the number of hours rendered in cleaning services per location for the respective month	9 points	Mandatory
	ii. Draft Incident report in case of accidents	5 points	Mandatory

With regard to the requested draft incident report, it was clearly stipulated that what the Authority requested was a sample of a report, in case of accidents, drawn up by the employee involved in such instance. In this regard, Appellant submitted a ‘Policy Brief and Purpose’ template which does not contain the informative material as requested in item (ii) above. During the hearing Appellant tabled document, no 1 representing the expected sample report, however, this Board can confirm that such a documentation was not included in the original submissions.

<ul style="list-style-type: none"> 6. Dress Code 	Uniforms – cleaning officers attire	3 points
	i. Male uniform (winter)	3 points
	ii. Female uniform (winter)	3 points
	iii. Male uniform (summer)	3 points
	iv. Female uniform (summer)	

Appellant's submissions with regard to this mandatory request, did not include, shirt with collar, no provision for long sleeved winter tops and no difference was indicated between uniforms for male and female employees. In this respect, Appellant's offer was appropriately allotted 1.5 out of 3 points.

4. After having examined the evaluation report and the allocation of marks on the offers submitted, this Board is credibly convinced that, the Evaluation Committee carried out the evaluation process in a fair, just and transparent manner, having abided by the principles of equal treatment, level playing field and self-limitation, so that in this regard, this Board confirms that the allocation of marks on Appellant's offer was carried out in a correct and justified manner.

5. With regard to Appellant's second contention relating to the inclusion of Mr Justin Micallef, as an evaluator on the evaluation committee, this Board would respectfully refer to emails, which were presented to this Board during the hearing and which were reviewed by same after which the following conclusion had been arrived at.

- a) Such communication between the person in charge of the tendered services do not, in any particular way incite or indicate animosity towards Appellant.**

- b) It was the duty of Mr Micallef to ensure that security measures are strictly adhered to by Appellant.**

- c) From the evaluation report, there are no justifiable indications to prove that Mr Micallef was biased in his allocation of points on Appellant's offer.**

6. With regard to Appellant's claim that the Evaluation Committee was in duty bound to seek clarifications, this Board would point out that, clarifications are only sought for, on submissions made and not on missing information. At the same instance, clarifications should not be made to rectify or replace originally submitted documentation. In this particular case, the Evaluation Committee had to abide by the principles of equal treatment and self-limitation. This Board would also point out that had the Evaluation Committee sought clarifications on the

mentioned selected items, this incidence would have amounted to a rectification, which is in breach of the Public Procurement Regulations.

In conclusion, this Board opines that,

- a) After having reviewed the evaluation report and examined the marks so allotted on Appellant's offer, same Board is credibly convinced that, the points allocated on Appellant's offer were justified, proportional and does reflect an objective assessment of the Appellant's offer.**
- b) The inclusion of Mr Julian Micallef, as an evaluator on the Evaluation Committee did not, in any way, whatsoever, influence or effect the overall ranking of Appellant's offer.**
- c) The emails showing communications between Mr Julian Micallef and Appellant, do not indicate spite or malice but rather represented instructions given to Appellant to abide by the internal security regulations of the Contracting Authority.**
- d) It was the duty and obligation of the Appellant to ensure that all of the requested mandatory conditions be met prior to the submission of his**

offer and if, in doubt on certain aspects of the tender document, Appellant had the remedies to clarify or contest any of the clauses contained therein. In this regard, this Board notes that Appellant did not avail of such remedies.

e) There were no instances, during the evaluation process where the Committee was obliged to seek clarifications from the Appellant.

In view of the above, this Board,

i) Does not uphold Appellant's contentions

ii) upholds the Contracting Authority's decision in the award of the tender,

iii) directs that the deposit paid by Appellant should not be refunded.

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member

27 September 2019

