

## **PUBLIC CONTRACTS REVIEW BOARD**

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### **Case 1383 – CT 3010/2019 – Tender for the Supply and Delivery of Meals to Third Country Nationals in Open Centres and Detention Centres**

#### **Remedy before Closing Date of a Call for Competition**

The publication date of the call for tenders was the 28<sup>th</sup> August 2019 whilst the closing date was the 1<sup>st</sup> October 2019. The estimated value of the tender (exclusive of VAT) was € 6,953,695.20

On the 30<sup>th</sup> October 2019 James Caterers Ltd sought a Remedy against the Ministry for Home Affairs and National Security (Agency for the Welfare of Asylum Seekers) as the Contracting Authority because they felt aggrieved by the tender requirements.

On 14<sup>th</sup> November 2019 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman Dr Charles Cassar and Mr Carmel Esposito as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

#### **Appellants – James Caterers Ltd**

Dr Ronald Aquilina	Legal Representative
Mr Joseph Barbara	Representative
Mr Mark Zahra	Representative
Mr Mourad Suleiman	Representative

#### **Contracting Authority – Ministry for Home Affairs and National Security**

Ms Doreen Seracino	Representative
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#### **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 invited submissions.

Dr Ronald Aquilina Legal Representative for James Caterers Ltd said that the tender required the provision and delivery of Halal meals; however there was ambiguity in the wording of the tender which needs to be addressed. Having confirmed that all meals served in the current year were Halal the Contracting Authority was now requiring the submission of confirmation that the premises

providing the meals were certified. The Authority confirmed that meals have to be processed and stored to meet Halal requirements but no certification was requested. Under Maltese civil law there is enacted the Food Safety Act which requires that all food businesses and premises have to be registered and licensed by the Health Authorities. These premises are strictly regulated for use only for the purposes registered or licensed. The Food Safety Commission issues certificates for Halal food catering (tabled Doc 1- copies of Food Safety certificates for Halal outside catering and Outside Catering and Old People's Home). No economic operator can supply food unless covered by a licence so the State ensures that a certificate is required.

Halal is a complete system from sourcing of product to meal – it requires total separation from other foods and people of the Muslim faith need the assurance that the food is 'certified' as Halal – this is a tenet of faith and a religious concept. It is therefore essential that the tender includes such certification and the reason why this remedy is being sought.

Dr Franco Agius Legal Representative for the Department of Contracts stated that the request for certification of food as Halal does not come within the ambit of section 262 of the Public Procurement Regulations (PPR) and as such the Board cannot hear this case. There is no process of registration to certify Halal food – the Food Safety Commission does not provide such certification. The Contracting Authority requires wider dietary requirements than Halal as well as registration with the Food Safety Commission. Having a certificate as tabled by Appellants does not guarantee that a place producing Halal only provides that type of food, and the State cannot guarantee 'Halal'. It is a tenet of the PPR that a tender must not limit brands, standards, labels etc. The only body locally that can set standards is the Malta Competition and Consumer Affairs Authority (MCCAA) and those are the only standards to be adhered to. There is no Halal standard set and hence there is no yardstick to follow, which makes this appeal outside the terms of Section 262 of the PPR.

Dr Aquilina pointed out that since the Authority did not include any reference to section 262 in their reply they cannot now rely on it for their defence. According to the law one cannot produce Halal unless one has a certificate to operate the premises and it is then the World Islamic Call Society that certifies the food.

Mr Hadrian Bonello (592364M) called as a witness by the Public Contracts Review Board testified on oath that he is the Secretary of the Food Safety Commission and has been in that office since 2013. He was referred to the two certificates tabled by Appellants. He stated that the existing Legal Notice specifies that food businesses are registered according to the details supplied by applicant and registered exactly as submitted in that application. The Commission, and hence the certificates issued, only indicate that the premises are registered, not that they are registered as a Halal producer. It is not the onus of the Commission to visit the site – the registration usually triggers a visit to the premises by the Environment Health Directorate. The Commission is a registration authority not a certification one and a company can be registered under the same name but under

different categories. Witness re-iterated that the Food Safety Commission is involved only with the registration of a food business and do not query applications.

Mr Mourad Suleiman declared that since 1990 he has been a scientist with the World Islamic Call Society (WICS). He explained in some detail that Halal is as a legal way of life and the need of evidence of the process that is required from ‘farm to table’. Halal was not controlled or monitored in Malta previous to his involvement. The WICS certifies Halal in Malta now and they have to have complete evidence that the process is correct.

Dr Aquilina then raised the second point of the appeal namely the ambiguousness of the award criteria. As example he mentioned that the tender documents request proof of the capability to provide replacement of a large number of meals, generally and in emergencies, without giving any indication of what quantities of meals they are indicating.

Dr Agius said that one must look at the tender holistically. The selection and award criteria are set to establish the experience of the bidder by requesting proof that one is able to meet different contingencies and fulfill the needs of the tender globally. He referred to Court of Appeal cases which made reference to decisions of the Canadian Supreme Court ruling that tenders should not impose unwelcome uncertainties on bidders. Verification is still possible by the Contracting Authority, but any clarification at this stage would mean the cancellation of the tender.

The Chairman said that the contract conditions appear reasonable and in line with the Board’s wishes to see tenders as open as possible to encourage competition. He thanked the parties for their submissions and declared the hearing closed.

End of Minutes

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## **Decisions**

**This Board,**

**having noted this ‘Call for Remedy Prior to the Closing Date for Call Competition’ filed by James Caterers Limited (herein after referred to as the Appellants) on 30 October 2019, refers to the claims made by the same Appellants with regard to the tender of reference CT 3010/2019 listed as case No. 1383 in the records of the Public Contracts Review Board.**

**Appearing for the Appellants: Dr Ronald Aquilina**

**Appearing for the Contracting Authority: Ms Doreen Seracino**

**Appearing for the Department of Contracts: Dr Franco Agius**

**Whereby, the Appellants contend that:**

- a) The tender document specifies the requirement of proof of the capability of the economic operator without indicating the approximate quantity of meals to be catered for in emergency situations.**
  
- b) The tender document does not provide for the certification of halal food to be catered for nor does it provide stipulated regulations with regard to the premises where the food is processed under the halal requirements. In this regard, an economic operator can only supply food under the halal system if he is covered by a special licence and the tender does not stipulate such certification.**

**This Board also noted the Contracting Authority's 'Letter of Reply' dated 9 October 2019 and its verbal submissions during the hearing held on 14 November 2019, in that:**

**a) The Authority contends that the certification of halal foods is not within the ambit of the Public Procurement Regulations and the Food and Safety Commission does not provide certification of the procedure in the preparation of Halal Foods. In this respect, the tender conditions are set in accordance with the standards of the Malta Competition and Consumer Affairs Authority (MCCA).**

**b) The Authority contends that the selection and award criteria are formulated in such a manner so as to identify the capabilities and competence of the economic operator in the execution of the tender works. At the same instance, the Authority maintains that enough detailed information of what is being requested, is comprised in the tender document.**

**This same Board also noted the testimony of the witnesses namely:**

**Mr Hadrian Bonello, duly summoned by the Public Contracts Review Board**

**Mr Mourad Suleiman duly summoned by James Caterers Limited.**

**This Board, after having examined the relevant documentation to this ‘Call for Remedy’ and heard submissions made by the parties concerned, including the**

testimony of the witness duly summoned opines that, the issues that merit consideration are two-folded namely:

- a) Lack of information in the tender document to enable competent prospective bidders to participate.
- b) Regulations for the processing of Halal Foods.

a) Insufficient Information in Tender Document

1. with regard to Appellants first contention, this Board would respectfully refer to clause 4.2.3 of the tender document wherein details regarding ‘Meal Nutritional Value’, ‘Breakfast Menu’, weekly ‘Standard Menu’ and ‘Amount of Ingredients’ to be included in the meals, are specifically and clearly stipulated. At the same instance, the tender document denotes the locations where meals are to be provided and delivered.
2. Under the heading of ‘Dietary Requirements’, the document is also specifying special meals for special recipients such as, vegetarian, vegan, lactose free, diary free, gluten free, diabetes and halal. This Board notes that halal food is one of

**the many varieties of food processing mentioned in the tender requirements.**

**3. With regards to Appellants' claim that the tender document does not indicate the number of meals which might be catered for in emergencies, this Board would refer to clause 1.5 of section 4, wherein an indicated number of meals catered for in a particular month under normal circumstances. in this regard, this Board opines that an estimate of emergency supply food should be included with the statistics already provided in the tender document.**

**4. This Board, after having examined the contents of the tender dossier, opines that there exist sufficient information to enable potential bidders to participate and this Board could not identify any ambiguous clause or condition which might be of hindrance in the submission of offers.**

**b) Regulations for Processing of Halal Foods**

**5. With regard to Appellants’ second contention, this Board would, first and foremost refer to the fact that, halal certification is not a requirement in the tender document and there are no national requirement stipulation in this regard. What is a must in food processing, is the suitable certification of premises where the food is being processed and the tender document provides for such a requirement in clause 7 (b) a, as follows:**

*“(a) Suitability<sup>(Note 2A)</sup>*

*Membership of particular organisation needed: as established by the current legislation/regulation economic operators shall hold and submit a copy of the following certifications:*

- i. food hygiene,*
- ii. catering,*
- iii. certification of premises*
- iv. vehicles used for delivery of food”*

**6. With regard to the certification from the Food Safety Commission submitted by Appellants, this Board would refer to the credible testimony of Mr Hadrian Bonello who**



**confirmed that such certificates, issued by ‘The Food Safety Commission’, states that Appellants are registered with the Commission to manufacture and process foods and to provide outside catering. It does not certify, in any way whatsoever, that the Appellants are certified to process food in the halal system.**

**In this regard, this Board refers to an extract from Mr Bonello’s testimony, explaining the purpose for the issuance of such certificates from The Food and Safety Commission, viz:**

*“Xhud :*                    *Hemm legal notice specifika li kull tip ta’ food business, hu x’inhu, irid jirregistra mal-Food Safety Commission. Il-formola jrid jimlieha l-applikant u jirregistra kif jaghtihielna hu. Mhux kif ahna nghidulu. Jaghti l-informazzjoni hu. Hemm il-kategorija tal-manufacturing and processing. U min irid jaghmel xi haga extra jikteb u kiteb Outside Catering of Halal Food. U ahna nirregistrawh hekk kif jaghtihielna*

*Avukat :*                    *Dik ir-registration hija xi certifikazzjoni li qed jigi prodott xi ikel skont Halal process? Intom b’dik ic-certifikazzjoni qed ticcertifikaw li l-impjant in kwisjoni jista’ jipproduci ikel Halal?*

*Xhud :*

*Le ahna qed nirregistraw il-post li huwa food business. Hu qed jghid li huwa outside catering of Halal food. Mhux qed niccertifikaw ahna li tajnieh permess”*

**7. With regard to Appellants’ claim that the specific yearly turnover for the years 2016-2018, which is stipulated at €800,000, is too low for such an economic standing condition, this Board opines that, apart from the fact that, such a condition is proportional to the estimated value of the tender, such a stipulated amount will allow the participation of other bidders who can provide such a service, thus supressing any limitation to an open competition. In this regard, the Board upholds such a condition being stipulated in the tender dossier.**

**8. This Board would refer to clarification note No 2, answer to question No. 5, wherein it is stated that:**

*“Question 5 The tender estimates 32,400 lunches and 39,000 dinners each month, translating into more than 1,000 meals per serving. Tender also stipulates that selected the tenderer is to commence*

*serving meals on date of signing of contract (clause 18.1 of the Special Conditions). Can you please confirm that?*

*i) The proposed kitchen facilities must be available to the tenderer at the deadline for submission of tenders to allow immediate commencement of supplies on tender adjudication?*

*ii) The proposed kitchen facilities need to be adequate to cater for the estimated number of meals and any extra meals which may be required during the contract:*

*iii) The adjudication board will affect a site visit as part of its evaluation to ascertain the existence and adequacy of the facilities proposed by prospective tenderers?*

***Answer 5 The Contracting Authorities confirms point i) and ii) of the above. With regards to point iii) the Contracting authority confirms that No site visit will take place during the evaluation process. However, as indicated in Section 4 – Terms of Reference Article 4.2.1 (c) inspections may take place throughout the contracting period.”***

**Through such a reply to clarification note (iii), the Authority is confirming that there will be not site visits during the evaluation process, but such an event may take place during the contract period. In this regard, this Board opines that the tender document should stipulate that site visits to premises being denoted by the bidders, for food processing, is a mandatory condition, during the evaluation process, so that eligibility for further evaluation of an offer is quickly and firmly established.**

**In conclusion, this Board opines that:**

- a) The requirements as stipulated in the tender dossier are informative enough for any prospective bidder to submit an offer, save for the following recommendations.**
- b) The tender dossier should indicate, through known statistics, the number of meals which has to be catered for in emergency situations.**

- c) The tender document should include a provision to the effect that, ‘A site visit of the premises where the food is to be processed, is to be carried out by the Authority, during the evaluation process’.**
  
- d) The eligibility clause with regard to the minimum turnover of €800,000 for the period 2016 -2018 is proportional and should remain as such.**
  
- e) The technical mandatory specifications should reflect the above-mentioned specifications**

**In view of the above, this Board,**

- i. directs the Authority to cancel the tender,**
  
- ii. directs the Authority to issue a new tender and to include this Board’s findings and considerations,**
  
- iii. since the tendering services are of national importance, directs the Authority to issue the new tender as soon as possible.**

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Carmel Esposito  
Member

*28 November 2019*