

PUBLIC CONTRACTS REVIEW BOARD

Case 1447 – MJEG/MPU/54/2020 – Tender for the Provision of Evaluation, Consultancy and Public Consultation Coordination Services for the Development of Arts Council Malta’s Strategy 2021-2025 (Lot 2)

The tender was published on the 27th February 2020 and the closing date of the tender was the 20th March 2020. The estimated value of the tender (exclusive of VAT) was € 50,000.

On the 4th May 2020 EMCS Ltd filed an appeal against the Ministry for National Heritage, the Arts and Local Government as the Contracting Authority objecting to their disqualification on the grounds that their bid was not the best BPQR offer. A deposit of € 400 was paid.

There were six (6) bidders.

On 26th May 2020 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Carmel Esposito as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – EMCS Ltd

Dr Lorna Mifsud Cachia	Legal Representative
Dr Nicole Sultana	Legal Representative
Mr John Farrugia	Representative
Mr Silvan Mifsud	Representative

Preferred Bidder – Nocemuskata

Dr Jonathan Thompson	Legal Representative
Dr Natasha Planejovic	Legal Representative
Ms Sarah Lee Zammit	Representative
Mr Godfrey Kenely	Representative

Contracting Authority – Ministry for National Heritage, the Arts and Local Government

Dr Chris Mizzi	Legal Representative
Mr Etienne Bonello	Chairperson Evaluation Committee
Mr Neville Borg	Member Evaluation Committee
Mr Chris Spiteri	Member Evaluation Committee

Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties. He noted that since this was a virtual meeting all the parties had agreed to treat it as a normal meeting of the Board. He invited submissions.

Dr Lorna Mifsud Cachia Legal Representative for EMCS Ltd stated that her clients' appeal was based on two grievances – the first being a possible conflict of interest and secondly the incorrect evaluation of the offer submitted by them.

According to Dr Mifsud Cachia, the preferred bidder Ms Sarah Lee Zammit, a Director of Nocemuskata Ltd had extensive contacts and a close relationship with the Arts Council where she was employed till 2016 – bidder herself claimed that she was highly experienced in the Arts field. Ms Zammit is going to be heavily involved in carrying out the terms of the tender. Notwithstanding the juridical difference between the individual and legal entity one cannot ignore the close connection with the Arts Council. Fairness and justness must be features in the award of the tender – reference was made to the Smith Case which dealt with the familiarity of the bidder with the requirements of the tender. The decision in that Case referred especially to the bidder's previous knowledge of what the tender required and to the fact that that knowledge was not available to other bidders. The situation of Ms Zammit's proximity to the Arts Council was similar as it gave her certain knowledge not available to others. The lack of transparency, fairness and equality of treatment between these two parties militated against the concept of natural justice (Article 469A Chap 12 of the Laws of Malta). Over the last few years there was a whole list of her active involvement with the Arts Council including Facebook comments praising certain Council personnel by name and of friendships with key officials making available to her information not available to other tenderers. One could not but wonder at the 'cosiness' of this relationship.

The Chairman said that the Board wished to establish if Ms Zammit had any advantage in bidding for this tender through her previous employment or contacts with the Arts Council.

Dr Chris Mizzi Legal Representative for the Ministry for National Heritage the Arts and Local Government stated that a distinction must be made between a conflict of interest vis-vis the Arts Council and with the evaluation committee. The members of the evaluation committee had all signed a declaration that they acted impartially and had no conflict of interest. No proof has been provided that there is a conflict of interest except from quoting items of public information such as Facebook. The fact that the recommended bidder runs arts programmes does not amount to a conflict and the so-called friendships are public knowledge. . The Arts Council, by definition is a close knit circle of individuals who know each other – one cannot create a scenario where bidders have not had any prior contact with the Council. The role of the Public Contracts Review Board was limited to assess the workings of the evaluation committee. Allegations regarding a conflict of interest have been made without providing any proof which puts the Board in a difficult position.

Dr Jonathan Thompson Legal Representative for Nocemuskata said that the claim by Appellants that up to four years ago the successful bidder worked for the Arts Council should not deprive or exclude her from bidding. The alleged relationship with the Arts Council has not been explained but merely alleged. There are limited participants in the field of arts and culture and those participants are all likely to be known to each other. Merely praising Arts Council personnel for their good work does not constitute a

relationship or a conflict of interest. Serious allegations have been made which are totally unfounded and there is no parallel to the Pawla Hub case mentioned in the letter of objection. Nocemuskata is involved in the arts field and it is only natural that it is interested in tendering, and no proof has been put forward that this gave it any advantage in its bid.

Dr Mifsud Cachia said that she found it extremely worrying when she heard references to the arts scenario in Malta being a very closed circle. The chairperson of the evaluation committee is still employed by, and very involved with, the Arts Council and hence the effect this closed circle has on close relationships is important in this context. The television programme referred to is significant in that it is supported by the Arts Council thus giving an advantage as it makes the producer aware of what the Council wants and expects. There is no doubt that Ms Zammit is heavily involved in the arts world, and there is a conflict between the facts and what has been stated. Nocemuskata claims familiarity with past Arts Council activities over the years. The Chairperson of the evaluation committee holds a key position as the Director of Corporate Affairs on the Arts Council and the limited circle of the arts sphere does not allow room for leeway in a tender evaluation and raises doubts regarding the transparency of the process.

After a short recess the Board proceeded to hear witnesses.

Mr Etienne Bonello (402780M) called as a witness by the Public Contracts Review Board testified on oath that for the last two and a half years he has been the Director of Corporate Affairs at the Arts Council with extensive experience in procurement and BPQR tenders. In the present case he was the chairperson of the evaluation committee in which role he guided the evaluators in the correct procedures. At the start of the evaluation process it was noted that certain of the bidders were known to the committee. Witness stated that the way the tender was worded ensured that the key expert is precluded from bidding for Lot 1. There was no discussion on the Nocemuskata bid and there was no direct link between bidder and Contracting Authority. The programme Malta Arti, which has been referred to, is not an Arts Council programme but a Public Broadcasting Services contract. The Facebook reference was in relation to individuals rather than to programmes.

Questioned by Dr Mifsud Cachia witness confirmed that the members of the evaluation committee were Mr Etienne Bonello (Chairperson); Mr Neville Borg (Research Assistant Arts Council); Mr Chris Spiteri (fulltime employee of the Arts Council); Ms Marian Cauchi (fulltime employee of the Arts Council) and Mr Adrian Debattista (Secretary). Witness stated that he and Mr Debattista were responsible for writing the tender and that the programme Malta Arti was produced in collaboration with the Arts Council.

At this stage Mr Bonello was informed that he will be required to give further testimony after Ms Zammit gave her testimony.

Ms Sarah Lee Zammit (502787M) called as a witness by the Public Contracts Review Board testified on oath that she is a Director of Nocemuskata Ltd. Questioned by the Chairman she stated that the Arts Council supports her programme which is a platform for artists funded by the Council to make themselves known.

Questioned by Dr Mifsud Cachia about her involvement in the programme Malta Arti witness stated that she oversees the editorial content, keeps in touch with local artists, of whom only about 40% are funded by the Arts Council. The programme is funded by the Public Broadcasting Service but there is collaboration with the Arts Council as it issues the list of local artists but there is no reference to the said Council in the production of the programme. Witness stated that her last involvement with the Arts Council was in 2019.

Turning to Appellants second grievance Dr Mifsud Cachia said that this concerned the comments and the fairness of the committee in the evaluation grid. It has been established that all the evaluators work for the Arts Council and their comments make it clear that what they desired was not what was stated in the tender. In one instance where the tender asked for a 'review' the committee commented that they expected a 'detailed overview' which apart from being an oxymoron was also an unfair comment. The evaluation committee is not entitled to ask for more than the tender asks for.

Further specific points of grievance on submissions were raised as follows:

- Criterion 1.1a. What was requested was a clear delineation of the understanding of the contract to be reflected on the rationale to be adopted. The evaluation committee commented that Appellants did not explore the rationale to be adopted in any significant depth, hence the latter's objection is that what was requested was to 'delineate' not a 'deep understanding' and that they cannot be penalized because they followed the tender requirements. There are too many instances of negative comments similar to this.
- Criterion 1.1b. Appellants were penalised because they did not provide details on the 'deliverables' when the tender criteria never mentioned any deliverables – so why were these requested?
- Criterion 1.3a. The evaluation committee comment is that various other risks are not discussed. Appellant states that evaluation was unfair as the committee had in its mind risks which the tender did not ask for.
- Criterion 2.1a. The evaluation committee maintains that bidder did not make reference to cultural policy. Appellants maintain that in the tender there was no reference to the cultural policy and that consequently they were penalised incorrectly.
- Criterion 2.2ciii. Appellants claim that they were never asked to demonstrate any experience of stakeholders' management skills and hence any expectations in this respect fall outside the scope of the criterion and is ultra vires and therefore null and void.

Dr Mifsud Cachia said that there are many similar instances where the evaluation committee demanded items which were not requested in the tender. Subjectivity has its parameters at law but these must be in line with tender requirements – the committee had concepts in mind which were not in the tender and the fact that all the evaluators were Arts Council personnel led to them interpreting the tender through their own eyes. Bidder only had to follow tender terms but the closed circle of the arts world did not allow fair competition and led to discrepancies between the tender and what the evaluation committee expected.

Mr Etienne Bonello was recalled to proceed with giving further testimony.

On Criterion 1.1a witness stated that Appellants copied the tender wording which gave the evaluation committee cause for concern about the quality of the review.

On Criterion 1.1b the objective was identified and awarded a good mark (2.4 out of 3) but no fresh details were submitted above what was stated in the tender - the wording of the tender was merely repeated. Overall it was good but there was no elaboration.

Criterion 1.3a requested an analysis of risks. Submissions did not refer to scope of tender and there was no identification of the different options of risks.

With regard to Criterion 2.1a witness stated that this requested a good understanding of the cultural sector as cultural policy is an inherent part of the strategy. Points regarding the relationship with the Arts Council were not addressed and bidder was expected to expand on what was required by the Contracting Authority.

There were instances of plagiarism in certain sections which did not merit full marks as the replies were rather generic and did not apply to the tender. The evaluation committee expected more than the tender asked for.

At this stage there was a short discussion to make the Board aware of the marital relationship between Dr Mifsud Cachia and the next witness Mr Silvan Mifsud.

Mr Silvan Mifsud (214177M) called as a witness by EMCS Ltd testified on oath that he was the Director of Advisory Services at EMCS Ltd and dealt with tender submissions. He stated that Appellants dealt with the specific objectives of the tender and gave also an overview in 350 words of what they understood the tender required in general objectives. The specific objectives as listed in the tender covered both Lots 1 and 2 but Appellants were careful to break them down between the Lots. It certainly was not a copy and paste exercise but dealt with specific details according to the terms of the tender.

The risks and assumptions criterion was dealt with according to the experience of similar work undertaken in the past by listing what was requested in the tender but adding what they felt were other risks from past experience. As regards the cultural policy bidders had identified and matched the target groups mentioned by the Arts Council and a full stakeholders' analysis provided relationships tied to each target group.

Dr Mifsud Cachia said that Appellants had been penalised through deductions which were not justified as the evaluation committee had expected more than had been requested in the tender.

Dr Mizzi said that the element of subjectivity gives certain leeway in BPQR tenders so long as justification for reasons was given. The tender document allows the bidder to be creative and elaborate on the points required. The PCR must bear in mind that the arts sector is a small circle and this fact should not influence its thinking regarding the conflict of interest claim.

Dr Thompson agreed that the arts sector was very specific and featuring the same people regularly – this does not necessarily create a conflict of interest.

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 EMCS Ltd (hereinafter referred to as the Appellants) on 4th May 2020, refers to the claims made by the same Appellants with regard to the tender of reference MJEG/MPU/54/2020 Lot 2 listed as case No. 1447 in the records of the Public Contracts Review Board awarded by the Ministry for National Heritage, the Arts and Local Government (hereinafter referred to as the Contracting Authority).

Appearing for the Appellants: Dr Lorna Mifsud Cachia

Appearing for the Contracting Authority: Dr Chris Mizzi

Appearing for the Preferred Bidder: Dr Jonathan Thompson

Whereby, the Appellants contend that:

- a) There exists a conflict of interest between the preferred bidder and the Contracting Authority in that, there is close commercial relationship with the Arts Council and at the same instance, the Chairman of the Evaluation**

Committee holds a key position as a director of Corporate Affairs on the same Arts Council.

- b) From the majority of comments made by the Evaluation Committee, deduction of marks from Appellants' offer was based on assumed missing information which was not requested in the tender document, so that, although Appellants' offer was fully technically compliant, deduction of points was effected on the expectations of the Evaluation Committee and not on the actual requirements as stipulated in the tender dossier.**

This Board took also into consideration the preferred bidders' 'Letter of Reply' dated 22nd May 2020 and also noted the Contracting Authority's 'Letter of reply' dated 22nd May 2020 and its verbal submissions during the virtual hearing held on 26th May 2020, in that:

- a) The Authority insists that, Appellants are alleging that there exists a conflict of interest without submitting proof of such an eventuality. At the same instance, the Authority contends that, the persons composing the Evaluation Committee declared their confidentiality and impartiality, apart from the fact that there existed no close commercial relationship between the preferred bidder and the Chairman of the Evaluation Committee.**
- b) With regard to Appellants second grievance, the Authority maintains that, through the BPQR method of award, the Evaluation Committee had an**

element of leeway in the allocation of marks, however, in doing so, the Committee took into consideration justified issues in their deliberations.

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

Mr Etienne Bonello duly summoned by the Public Contracts Review Board

Ms Sarah Lee Zammit duly summoned by the Public Contracts Review Board

Mr Silvan Mifsud duly summoned by EMCS Ltd.

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 two-fold namely:

- a) Alleged Existence of Conflict of Interest and**
- b) Unfair Allocation of marks on Appellants' offer**

Conflict of Interest

- 1. Actual conflict of interest arises when, given one's personal or private interests, one is in a position to be influenced. At the same instance, potential conflict of interest exists when one's personal or private interests puts him in a position where he, himself, can be influenced. On the other hand, perceived conflict of interest exists when one's private and personal interest exposes him to being influenced in the exercise of one's public duty. In all such degrees of**

conflict of interest, the overriding factor is that the private interest threatens to compromise the public duties of a particular person or entity. In other words, a conflict of interest exists where, through personal interests or private relationship or obligations, a person, in the exercise of his public duties, favours or give an advantage or a disadvantage to a particular bidder.

- 2. In this particular case, Appellants are alleging that, there exists a conflict of interest between the Contracting Authority and the preferred bidder so that the latter was given an added benefit in the allocation of marks, under the BPQR method. At the same instance, Appellants are also claiming that the preferred bidder had a comparative advantage over the other bidders due to preferred bidders' previous employment with the Authority and the ongoing close commercial relationship with the Authority.**
- 3. With regard to the preferred bidder's previous employment with the Authority, this Board takes into consideration the fact that, the director of the successful bidders ceased employment with the Authority way back in 2016 so that her tenure of employment at that time, could not have reaped any added advantage in the selection of offer for the present requirements of the Authority.**
- 4. This Board also considered the present commercial relationship of the preferred bidder and the Arts Council and from the testimony of Mr Etienne Bonello and Ms Sarah Lee Zammit, this Board credibly established**

that, the alleged relationship link purely consisted of selecting promising artists from the data made available by the Authority, to feature in a programme funded by the Public Broadcasting Service, so that, there exists no direct link between the preferred bidders and the Authority in the former's present commercial activity.

- 5. This Board also identifies that the director of the preferred bidders, was neither involved in the formulation of the tender dossier nor participated in any form of influential discussions with the Authority prior to the publication of the tender document.**
- 6. This Board would respectfully point out that, Appellants did not provide justified and concrete claims to prove that there existed a conflict of interest which gave an added benefit to the successful bidder in the allocation of marks under the BPQR method.**

Allocation of Marks

- 7. First and foremost, this Board would point out that, the BPQR method of evaluating offers, has been proved to be the most objective system for the assessment offer, apart from the fact that, it suppresses, as much as possible, the subjectivity element during the adjudication process.**
- 8. One must also mention that, the members of the Evaluation Committee signed a declaration whereby they confirmed their confidentiality and impartiality in**

their assigned duty of the evaluation process. However, it must also be said that, there will always be a leeway for allotting marks under the BPQR method of award.

9. Appellants, in their second grievance, are claiming that, their offer was assessed in an unfair manner due to the fact that, they were penalised for non-submission of information which was not duly requested in the tender dossier. In this regard, Appellants quoted five typical cases where such an eventuality arose, as follows:

9.1. Criterion 1.1a. Under this article, a clear understanding of the contract was required. This Board, after having examined the evaluation report, notes that, the preferred bidders' submissions were more detailed and professionally presented than those of Appellants. In this regard, it considers that the marks allotted to the Appellants' offer, were, just and proportional.

9.2. Criterion 1.1b. Appellants' claim, in this regard, is that, marks were deducted for not submitting details about deliverables. After examining both Appellants' and preferred bidders' offers, this Board notes that, Appellants in their response, submitted what was really stated in the tender document whilst, the preferred bidder elaborated their submission to show a clear understanding of the objectives of the project. In this regard, this Board opines that when compared to what

has been submitted by other competing bidders, Appellants were awarded a just and proportional score of 2.4 out of 3.

9.3. Criterion 1.3a. Again, Appellants' claim in this respect refers to the fact that, the committee expected risks which the tender did not ask for. This Board notes that, marks were allotted on all the offers in a proportionate manner, so that, the offers which highlighted the most relevant risks to the project, were awarded the merited marks, and in this respect, this Board opines that the marks awarded to Appellants' offer were just and proportional to the submission made.

9.4. Criterion 2.1a. On this particular item, Appellants were penalised for not making reference to the cultural policy. However, there were other issues to account for the deduction of marks, namely the requirements of the Contracting Authority and the relationship with the Arts Council, neither issue of which was expanded upon. In this regard, from the review of submissions made on this particular item this Board notes that all the offers were deducted marks in a proportionate manner and in accordance with the contents of each submission made, so that a level playing field was maintained throughout the evaluation process.

9.5. Criterion 2.2c iii Regarding this issue, Appellants claim that the tender document did not ask for any experiences of stakeholders' management skills and yet a deduction of marks was effected for the non-submission

of such demonstration. In this respect, this Board examined the evaluation report and the other competing bids and credibly established that, the allocation of marks on this particular item was effected in a logical methodical procedure based on the basic principles of equal treatment and level playing field. In this regard, this Board would also point out that the reason given for such a deduction of marks was perhaps too scanty however, the marks so allotted were proportionate and reflected the state of affairs of such submissions.

In conclusion, this Board opines that:

- a) After having examined the relevant facts, it does not find any justifiable reason to establish that there existed an element of a conflict of interest.**
- b) It does not identify any influence on the award decision through the past employment of the director of the preferred bidder with the Authority.**
- c) Appellants did not present any evidence substantiating their claim in that there existed a conflict of interest.**
- d) With regard to Appellants contention that the Evaluation Committee acted unfairly in the allocation of marks, this Board, after having examined in detail the evaluation report and reviewed the competing bids, justifiably established that, the allocation of marks under the BPQR method of award, was**

conducted in a logical and just manner whilst abiding by the principles of equal treatment and level playing field throughout.

In view of the above, this Board,

- i. does not uphold Appellants' contentions,**
- ii. upholds the Contracting Authority's decision in the award of the tender,**
- iii. directs that the deposit paid by Appellants should not be reimbursed.**

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Carmel Esposito
Member

1st June 2020