

PUBLIC CONTRACTS REVIEW BOARD

Case 1475 – SM/75/2019/TEN – Concession for the Leasing of the Fitness Centre at tal-Qroqq National Pool Complex

The tender was published on the 15th April 2020 and the closing date of the tender was the 27th May 2020. The estimated value of the tender (exclusive of VAT) was € 133,167.46

On the 2nd July 2020 DEA Co Ltd filed an appeal against Sport Malta as the Contracting Authority objecting to their disqualification on the grounds that their bid was not the highest offer submitted.

A deposit of € 400 was paid.

There were five (5) bidders.

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

The attendance for this public hearing was as follows:

Appellant – DEA Co Ltd

Dr Alessandro Lia	Legal Representative
Dr Edward Cassar Delia	Representative

Contracting Authority – Sport Malta

Dr Peter Fenech	Legal Representative
Mr Sinclair Cassar	Chairperson Evaluation Committee
Ms Yanika Spiteri	Secretary Evaluation Committee
Mr William Galea	Member Evaluation Committee
Mr Alex Camilleri	Member Evaluation Committee
Mr Robert Portelli	Member Evaluation Committee
Mr Marcon Cassar	Representative
Ms Denise Sultana De Raffaele	Representative

Recommended Bidder – AM Fitness Ltd

Dr Carlos Bugeja	Legal Representative
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Department of Contracts

Mr Mark Mizzi

Representative

Dr Daniel Inguanez

Representative

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 agreed to treat it as a normal hearing of the Board. He then invited submissions.

Dr Alessandro Lia Legal Representative for DEA Co Ltd stated that he wished to start the hearing by requesting certain witnesses as there was the possibility that one of the parties would not meet the concession requirements.

Dr Peter Fenech said that the submissions must be limited to the points raised in the letter of objection.

Dr Lia said that Appellants' grievance was regarding the key experts not meeting the specifications of the tender in page 29 Requirement 6.1 (Manager and Instructor).

Dr Fenech reminded Dr Lia that the letter of objection was simply regarding Mr Antoine Micallef and he strongly objects to others being brought into this appeal.

Dr Lia said that Appellants were aware of only one person at the time of objecting – they are now requesting the opportunity to discover if the technical specifications have been met, and Appellants reserve their right if their request is not met.

Dr Carlos Bugeja Legal Representative for AM Fitness Ltd said that exclusion must be on grounds of an individual being blacklisted.

Dr Lia said that Appellants wish to ensure that no infringements have been committed by the head of the company by finding out if the key experts meet the requisite of Requirement 6.1.

The Chairman said that the Board accedes to the request to hear witnesses to prove this point.

Dr Fenech re-iterated that in the letter of objection there was no reference to key experts.

Dr Eunice Maria Fiorini (63880M) called as a witness by DEA Co Ltd testified on oath that she is the Registrar of the Criminal Courts. She stated that there are no pending Court cases against Mr Antoine Micallef or AM Fitness Ltd.

Dr Rose Anne Cuschieri (588759M) called as a witness by DEA Co Ltd testified on oath that she is the Chief Executive Officer of the National Commission for Further and Higher Education (NCFHE). She stated that she is unable to confirm the qualifications of any named individuals through their Identity Number as each individual was recorded by them only by a reference number.

In reply to a question witness stated that the NCFHE can register a foreign qualification but non-registration does not mean that the individual is not qualified.

In reply to further questions witness said that it is the accrediting body that decides the level of qualification but although it was not necessary to register such a qualification locally it was recommended. It was up to the entity concerned to decide if a qualification met their requirements. The MQF is a UNESCO set up with a set of regulations to control levels.

When Dr Lia requested Ms Melanie Mizzi to testify Dr Fenech pointed out that she was employed by the Appellant Company, apart from the fact that her testimony was irrelevant as there was no appeal regarding her. In any case Miss Mizzi had not been called.

Dr Lia requested an adjournment to enable him to call witnesses.

Dr Fenech pointed out that the usual procedure was for the Board to hear a case in one sitting and what Dr Lia was suggesting was tantamount to breaking the Public Procurement Regulations.

Dr Bugeja complained at these delaying tactics which were merely a ploy by Appellant to prolong the case until the opening of the University year to benefit from new enrolments.

Dr Lucienne Attard (585262M) called as a witness by DEA Co Ltd testified under oath that she is the Chairperson of The National Anti-Doping Organisation of Malta (NADO) and confirmed that there are no records of any reports about AM Fitness Ltd or Mr Antoine Micallef.

Mr Sinclair Cassar (279971M) called as a witness by the Public Contracts Review Board testified on oath that he was the Chairperson of the Evaluation Committee. He stated that the committee were satisfied that all parameters requested in the concession had been met by the recommended bidder. Miss Mizzi who was indicated in her c.v. as Gym Instructor has a Fitness EQF level 3 as requested in the tender but there was no requirement to submit certificates. The same parameters were applied in regard to other key experts and if the committee had any doubts it would have checked these with MCAST. Ultimately it was up to the bidder to ensure that he has the right personnel in place. With regard to the requirement of 6.1 it was up to the bidder to ensure that his staff were licensed and qualified.

The Chairman said that the Board will wish to see that the relevant certificates are supplied.

Mr Robert Portelli (41678M) called as a witness by the Public Contracts Review Board stated on oath that he was one of the evaluators of the tender. He said that in the fitness sector there is no rigid structure to classify qualifications or to compare them. The evaluators relied on the c.v. statements in respect of qualifications. Copies of the qualifications were not required to be submitted.

Dr Rose Anne Cuschieri was recalled to give further evidence and was shown copies of two certificates. According to the witness the one in the name of Miss Melanie Mizzi (doc 1) was a very generic one with no level stated – in such an instance the NCFHE would check level with the providers. In the case of Mr Ian Fenech (doc 2) the certificate clearly states that he is qualified at level 3 MQF equivalent.

Dr Fenech pointed out that Appellants' argument on this point was futile as the key experts could be changed at any stage.

Dr Lia said that no certificates were available when the evaluation was taking place. Although changes to key experts were possible the possibilities were limited as the tender is subject to Note 2. It is up to the Board to judge if the evaluation committee made the right decision. Paragraph 6.1a makes it obvious that presentation of certificates is expected, and the testimonies of Mr Ian Fenech and Ms Melanie Mizzi are still required to ascertain their qualifications. Conflictingly the key experts form requires certificates to be submitted but witness Mr Cassar confirmed that certificates were not submitted. The late production of certificates for these two individuals do not prove anything and do not fulfill tender requirements – Mizzi’s certificate is not specific whilst Fenech does not appear in the NCFHE records as testified by Ms Cuschieri

The Chairman stated that the Board is in a position to make a decision on the submissions made without needing to hear the testimonies of these individuals.

Dr Fenech said that this was a classic fishing expedition. The PCRB is a quasi-judicial body and cannot broaden the terms of what is in front of them. There has been no one single argument put forward on the points made in the letter of objection with no attempt to consider the claim made regarding Mr Antoine Micallef. Key experts can be replaced – even at the request of the Contracting Authority whose responsibility it is to decide on the validity of qualifications and certificates. The Authority did not find anything wrong in AM Fitness’ submissions and no proof has been put forward that they did anything wrong. The Appellant cannot put himself in the shoes of the evaluation committee and their decision must stand.

Dr Bugeja said that the concession document must take precedence over the key expert form which is a standard one. The technical specifications (page 6) use the words ‘equivalent or similar’ which gives bidders a wide margin. Ms Mizzi’s qualification is from a serious institute and the committee felt that it sufficed. None of the individuals whose names have been bandied around is black listed.

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

[A document submitted by Dr Carlos Bugeja subsequent to this hearing states that the NCFHE confirmed that Ms Melanie Mizzi’s qualification referred to in this hearing is comparable to an MQF Level 4]

End of Minutes

Decision

This Board,

having noted this objection filed by DEA Co Ltd (hereinafter referred to as the Appellants) on 2nd July 2020, refers to the claims made by the same Appellants with

regard to the tender of reference SM/75/2019/TEN listed as case No. 1475 in the records of the Public Contracts Review Board recommended for award by Sport Malta (hereinafter referred to as the Contracting Authority).

Appearing for the Appellants: Dr Alessandro Lia

Appearing for the Contracting Authority: Dr Peter Fenech

Appearing for the Preferred Bidder: Dr Carlos Bugeja

Appearing for the Department of Contracts: Mr Mark Mizzi

Dr Daniel Inguanez

Whereby, the Appellants contend that:

- a) One of the key experts namely, Mr Antoine Micallef, was investigated in connection with the provision and use of prohibited substances and in this respect, the Authority should have disqualified the preferred bidder's offer as it did not satisfy clause 6.1 of the 'Terms of Reference'.

This Board also noted the Contracting Authority's 'Letter of reply' dated 9th July 2020 and its verbal submissions during the virtual hearing held on 26th August 2020, in that:

- a) The Authority maintains that, Mr Antoine Micallef was not one of the Key Experts. In this regard, it must also be pointed out that, Mr Micallef is not

blacklisted, neither is he included in the list of Athletes which are currently serving a ban.

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

Dr Eunice Maria Fiorini duly summoned by DEA Co Ltd

Dr Rose Anne Cuschieri duly summoned by DEA Co Ltd

Dr Lucienne Attard duly summoned by DEA Co Ltd

Mr Sinclair Cassar duly summoned by the Public Contracts Review Board

Mr Robert Portelli duly summoned by the Public Contracts Review Board

This Board has also taken note of the documents submitted by Dr Carlos Bugeja on behalf of AM Fitness Ltd which consisted of confirmation from the NCFHE, that Ms Melanie Mizzi's qualification is equivalent to an MQF Level 4

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 several witnesses duly summoned opines that, the issues that merit consideration are as follows:

- 1. Whether Mr Antione Micallef, as an expert, is fit and proper to carry out the duties, as stipulated in the tender dossier.**
- 2. Although not mentioned in Appellants' 'Letter of Objection', for transparency's sake, this Board acceded to treat the issue as to whether**

Ms Melanie Mizzi was qualified enough to carry out the assignment of a 'Gym Instructor'.

3. Receipt of an application (Rikors) by AM Fitness Ltd, relating to the recognition of qualifications of Ms Melanie Mizzi by National Commission for Further and Higher Education (NCFHE)

1. With regard to Appellants' main and original concern, this Board has examined all the relative documentation and even went further to check the alleged claims made by Appellants on the suitability and conduct of Mr Antoine Micallef and this Board established the following facts:

- Mr Antoine Micallef is not one of the Key Experts.
- Mr Antoine Micallef, in his personal capacity, is not blacklisted from participating in Government Tenders.
- AM Fitness Ltd is not blacklisted to participate in Government Tenders.
- From the credible evidence of the Court Registrar, it was confirmed that, there is no litigation against Mr Antoine Micallef.
- From the testimony of Dr Lucienne Attard, Chairperson of the National Anti Doping Organisation (NADO), it was confirmed that, there exist no records of any reports about AM Fitness Ltd or Mr Antoine Micallef.

In view of all the above evidence, this Board does not uphold Appellants' contentions as duly mentioned in their 'Letter of Objection' dated 2nd July 2020.

2. For transparency's sake, this Board acceded to treat an issue raised by Appellants during the virtual hearing but not included in their 'Letter of Objection'; relating to the qualifications held by Ms Melanie Mizzi, who is designated as a 'Gym Instructor' in the preferred bidder's offer.

2.1. During the hearing, Appellants alleged that, Ms Mizzi does not have the necessary qualifications to act as a 'Gym Instructor'. This Board noted from the CV of Ms Mizzi that she holds an EQF Level 3 qualification in Fitness/Personal Trainer and at present she is employed as a Personal Trainer with Appellants (Incumbent Concessionaire).

2.2. This Board, would respectfully refer to clause 6 of section 4, (Terms of Reference) of the concession document, as follows:

"6. Requirements

6.1 – Personnel

Minimum requirements

(a) Manager and Instructor

The person performing the services must possess a valid MQF Level 3 Gym Instructor licence certificate in order to perform the services contemplated and assume all the responsibilities normally

expected and / or in terms of the legal obligations as arising under Maltese law. The key expert is also to submit a clean police certificate of conduct issued not earlier than the last six (6) months prior to submission offer.”

It is amply clear that, the concession document stipulated a minimum qualification of an MQF Level 3 and a Gym Instructor licence certificate.

2.3. From the testimony of Mr Robert Portelli, an Evaluator, it was also confirmed that, the Evaluation Committee relied on the CV's of the experts in respect of qualifications on all the offers and at evaluation stage, copies of the certificates were not required to be submitted. In this respect, from the CV of Ms Melanie Mizzi, and her previous employment record, this Board finds that Ms Mizzi's qualification satisfies the minimum requirement of the concession document.

3. With regard to the application received by this Board after the conclusion of the hearing from AM Fitness Ltd and the subsequent reply to this application from DEA Co Ltd, this Board does not accept such evidence, at this stage of this appeal. At the same instance, this Board would justifiably state that, enough detailed submissions and testimony were considered by this Board to enable same to arrive at its conclusions.

In conclusion, this Board, opines that,

- a. **With regard to Appellants' claim that Mr Antoine Micallef is not suitable to act as a Key Expert, this Board finds that Mr Micallef is neither a Key Expert nor blacklisted.**
- b. **This Board also confirms that, the preferred bidders are not blacklisted and can compete in any Government Tenders / Concessions.**
- c. **This Board finds that the qualifications held by Ms Melanie Mizzi are more than adequate to comply with the minimum requirements as stipulated in the Concession Document.**
- d. **The preferred bidders' offer is more advantageous to the Authority.**
- e. **The Evaluation Committee carried out their adjudication process in a fair and transparent manner.**

In view of the above, this Board,

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

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

4th September 2020