

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case No. 703**

**T/13/2013**

### **Tender for the Design and Printing of Weekly Newspaper Adverts (Planning Applications Received and Decided).**

The tender was published on the 20<sup>th</sup> December 2013. The closing date was the 23<sup>rd</sup> January 2014.

The estimated value of the Tender was €42,372.88 (Exclusive of VAT)

Six (6) offers have been received for this tender.

On the 28<sup>th</sup> February 2014 Media Today filed an objection against the disqualification of their offer and against the award of the tender to Allied Newspapers.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Thursday the 22<sup>nd</sup> May 2014 to discuss the objection.

Present for the hearing were:

#### **Media Today - Appellant**

Mr Saviour Balzan	Representative
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#### **Allied Newspapers - Preferred Bidder**

Mr Alex Galea	Representative
Dr Clinton Calleja	Representative
Dr Josette Grech	Legal Representative

#### **Malta Environment and Planning Authority - Contracting Authority**

Ms Marlene Attard	Chairperson Evaluation Board
Mr Keith Cappello	Secretary Evaluation Board
Ms Charmaine Muscat	Member Evaluation Board
Mr Peter Gingell	Member Evaluation Board
Ms Karen Vella	Representative
Dr Ian Borg	Legal Representative

The Chairman made a brief introduction and invited the appellant's representative to make his submissions.

Mr Saviour Balzan on behalf of the appellant said that for a period in excess of 10 years these adverts had been given, in spite of several protests, without the issuing of any tender to one paper only. Appellant had always asked for competition. After submitting this tender, appellant had demanded clarifications, raising certain issues about the tender requisites asking for the submission of an extract from Media House Survey. Appellant had indicated that this tender had been issued before, and was a cut and paste exercise from previous tenders. Appellants had for a long time been questioning the veracity of and the methodology used by Media Warehouse. Apart of the fact that one of the major shareholder of the company was also one of the bidders of the present tender. At one point after this request for clarification, a clarification was issued by MEPA whereby the requirement of submitting the survey was removed and replaced by a request to indicate the readership. Appellant had protested before that the readership should not be the onus on the bidders but had to be assessed through independent means taking into consideration the papers' audited accounts and the type of readership.

Mr Saviour Balzan continued that appellant's tender had been discarded because it failed to submit the way the adverts would appear. Appellant had filed an objection because this reason was considered to be of minor importance, since appellant had already shown its capability to produce this in several instances. He said that the objection was based on four points. One was that the readership should not be the onus on bidders but should be assessed through audited accounts. He claimed that readership of newspapers has gone down as an effect of portals. Appellant's tender had included an offer to set up, without cost, an archive on appellant's portal giving the contracting authority's data, but this fact was ignored. Appellant had also offered Google Analytics which gives the number of local IP addresses. Appellant had offered to keep these archives open enabling the public to access the data at any time.

Mr Saviour Balzan referred to the question of the Media Warehouse and insisted that in his view this was flawed. Appellant had ordered public surveys of its own for example, on public broadcasting, and these had given astoundingly different results. For the past fifteen years he said, that the adverts had been placed with a particular paper without any call and when appellant had submitted an offer for the present tender it was assumed that the facts stated above would have been taken into consideration.

The Chairman asked Mr Balzan to clarify the point of the letter of objection where it was alleged that the same person who scripted the tender was the same person who evaluated it.

Mr Saviour Balzan said that from his profession he obtained information about certain matters. Basing himself on past experience he knew who scripted the tender and he knew that there were internal decisions taken. He knew that there was resistance to the opening up of certain matters.

Dr Ian Borg on behalf of the contracting authority said if anything raised any serious doubts this was the way in which appellant obtained the information regarding who prepared the tender because the details of both the person who prepared the tender as well as of the evaluation committee are not accessible to the public. In any case the tender is not adjudicated by any one person but by three members from three different MEPA Directorates.

He invited the appellant to state in what way its tender was prejudiced through the presence of a member who was familiar with the substance and merit of the tender in question. He claimed that appellant had admitted omitting inadvertently to submit the required artwork. This omission was not rectifiable according to the tender, and the contracting authority could not allow any rectification because this would discriminate against the other bidders.

Regarding readership, Dr Borg continued, the contracting authority had to establish a benchmark of readership data from an independent source. The contracting authority had tried to obtain the information from the Communications Authority who however could not provide the data and referred the contracting authority to an independent source. It was also important when adjudicating, to be impartial and independent. He referred to the services that the appellant had offered to provide on its website. The tender however did not ask for this but the requisite was for publication in the local Press, and this was imposed by law emanating from Legal Notice 514/2010. These were the criteria on which the tender had to be evaluated. Dr Borg referred also to the clarification issued by the contracting authority which stated that expert analyses was not required to be produced by bidders but would be obtained by MEPA, thus effectively displacing the onus of proof on the authority.

Mr Keith Cappello for the contracting authority said that if the contracting authority had asked for the highest readership it would have been tantamount to issuing a direct order because it was common knowledge which paper had the highest readership. MEPA had consulted the Department of Contracts on how to evaluate tender. This was a MEAT tender without the pass mark hurdle. The evaluation was made by considering the price against the readership ratio. This meant that the deciding factor was the financial offer divided by the readership for all of the bidders, obtaining the cost per reader. Appellant's two options were both disqualified because no samples had been submitted and this item was not rectifiable. Appellant's tender was administratively non-compliant. Replying to a question by appellant's representative, he said that the preferred bidder's price was higher than the other bidders' but since its readership was the highest, the resulting ratio was better. A higher price was qualified by a larger readership.

Mr Saviour Balzan pointed out that there was no denial of the fact that the same person who drafted the tender formed part of the evaluation committee. Regarding the price-readership ratio he contended that the tender should have been awarded to the Malta Independent because its offer was so low. He contended that all bidders invented their readership figures. That is why appellant had insisted that the contracting authority should not rely on the Media Warehouse, but should rely on an independent body to assess readership. He insisted that audited accounts should be used to assess readership. The comment made earlier that it was common knowledge which paper had the most readership showed bias. He was questioning the whole outline of the tender. It is true that appellant's bid failed to submit a non rectifiable document but he considered this to be of minor importance.

Mr Keith Cappello explained that the evaluation was made by choosing the greatest readership, that of the Allied Newspapers, and assigning it 100 marks. The financial offer was then assessed and the Independent here obtained 100 marks. These scores were weighted according to the other bidders' submissions. The evaluation selected the most advantageous offer, and the process was done correctly according to Public Procurement Regulations. About readership figures the contracting authority had consulted the Malta Communications Authority who could not supply the figures and referred it an independent provider. MEPA searched for an independent source and came up with the Media Warehouse Survey. Originally the tender had asked that bidders submit an extract of this Survey themselves, to

prove readership. However later, since the Survey was expensive, the contracting authority offered, through a clarification, to obtain the survey itself and explained that the bidders did not need to submit copies of the survey. During the evaluation process the evaluation board had a copy of the survey in order to assess readership. The Board was at this point shown a copy of the extract of the survey used by the evaluation board. The tender itself was clear that the survey would be used to assess readership. The survey lists readership figures of all newspapers by day of week and these were used by the evaluation board. The contracting authority deemed this survey reliable and did not find any other means to assess readership in its stead.

Mr Saviour Balzan for the appellant claimed that one of the bidders, JP Advertising, is a shareholder of Media Warehouse. For this reason he is informed that Media Warehouse is no longer being used to assess readership because of this conflict of interest. In fact during the years several contracts have been awarded to JP Advertising based on information obtained from Media Warehouse. He insisted that the clarification had been issued for this same reason. He insisted that readership should be assessed from the audited accounts, not from one's perception. One should compare what Media Warehouse results show on several surveys and what is common knowledge. He reiterated that local press today included the papers' portals. People these days rely on the internet to obtain information and not on the printed paper.

Mr Keith Cappello for the contracting authority insisted that the law requires publishing in the local press and not through portals.

Dr Josette Grech on behalf of the preferred bidder said that the evaluation board had used a publication for assessment that had been indicated in the tender document, a research analysis document compiled over a number of years. This document has a reliability of 95%. Appellant is attacking the conditions of the present tender. The present objection was filed under Regulation 21 of the Public Procurement Regulations which state that anyone can object to an award. Therefore the tender conditions cannot be attacked at this stage. Appellant had accepted the tender conditions when submitting the tender. There were other remedies available to appellant if he did not agree with the conditions. The preferred bidder has no knowledge of either who prepared the tender or who adjudicated it. It was a fact that appellant's tender was administratively non-compliant. Article 4.2 of the tender document clearly indicated that the bidders were obliged to submit sample artworks and Article 1.1 of the Instructions to tenderers explained clearly that no rectification would be allowed for these samples. The tender itself indicated at page 14 how the assessment of bids would be made. This was a MEAT tender and would use the ratio of readership over price that would be used to assess the most favourable tender. It was readership what matters and not circulation and the audited accounts only give the circulation and not readership. The survey is the only document that exists to show readership.

Mr Saviour Balzan contended that there are other entities like MISCO who make surveys. Media Warehouse has an interest in the case.

At this point the hearing was closed.

**This Board,**

**Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 28<sup>th</sup> February 2014 and also through Appellant's verbal submissions during the hearing held on 22<sup>nd</sup> May 2014, had objected to the decision taken by the pertinent Authority, in that:**

- a) Appellant contends that the clarification issued by the Contracting Authority, did in fact shift the 'goal post, in so far as the 'Award criteria'. The Contracting Authority insisted that the 'Criteria Issue' should be based on the 'Readership issue'. Appellant insists that the Readership entity cannot be quantified but only through Audited Accounts can such a basis be formulated. The basis for assessing the readership issue can only be established through an independent survey.**
- b) Appellant alleged in his 'Letter of Objection' dated 28<sup>th</sup> February 2014, that the tender was scripted and evaluated by the same person. This raises suspicions on the adjudication procedure.**
- c) Appellant contended that the non submission of samples was of minor importance as the capabilities of the Appellant were very well know to the Contracting Authority.**
- d) Appellant had offered, in his bid to provide, free of charge, the following services:**
  - i) Set-Up of an archive on Appellant's portal, giving the Contracting Authority the required data.**
  - ii) Offer of 'Google Analytics' and including the access of such date to the Public at any time.**

**These free offered services were ignored by the Evaluation Board in their deliberations.**

**Having noted the Contracting Authority's verbal submissions during the hearing held on 22<sup>nd</sup> May 2014, in that:**

- a) The Contracting Authority had to establish a 'Bench Mark' to enable the Evaluation Board to adjudicate each tender in the most impartial and independent manner. In this regard, the Contracting Authority did, in fact acted so, in relying on an independent survey.**
- b) This Board, notes that the Evaluation Board is composed of three members, each member represent three different directorates, so that no single member can dictate the script of the tender document and adjudicate same.**

- c) **Appellant failed to submit the ‘samples’ as dictated in article 4.2 of the tender document. In this regard, the Evaluation Board could not proceed with the adjudication of Appellant’s offer.**
- d) **Appellant did in fact, offered additional free services, but this Board feels that same were not required in the tender document. This same Board also contends that an additional service offered by a tenderer does not constitute an advantage in the adjudicating process.**

**Reached the following conclusions;**

- 1. This Board opines, that the Contracting Authority had to establish a methodology of a ‘bench mark’, in that, the adjudication process will be carried out in the most just and transparent manner. In this respect, the Evaluation Board opted to rely on an independent survey to establish an indication of a ‘Readership’ volume. In this Board’s opinion, the Contracting Authority acted in a most diligent way to establish the principle of ‘Price–Readership’ ratio. This Board also notes that Bidders were aware of the methodology of the assessments of their bids.**
- 2. The composition of the Evaluation Board did not consist of a single member, so that this Board is well aware of the procedure adopted by the Evaluation committees with regards to the Public Procurement Regulations.**
- 3. In the absence of evidence, this Board cannot entertain Appellant’s allegation that ‘The script of the tender and the evaluation of the same tender’ were carried out by the same person.**
- 4 This Board, last but not least, notes that the Appellant did not address the importance and substance of submitting samples as stated in article 4.2 of the tender document. This clause clearly states that ‘ Tenderers are required to include samples of the artworks to be used for the two different artworks in their tender offer’. In this respect, Appellant did not comply.**
- 5. This Board upholds the fact that the Appellant’s offers for free, does not constitute any of the mandatory requirements as dictated in the tender document. In this regard, this Board opines that the Evaluation Board were correct in ignoring the additional free services offered by Appellant, which, in fact, were not being required in the tender document.**

**In View of the above, this Board finds against the Appellant and recommends that the deposit paid by Appellant should not be reimbursed.**

Dr. Anthony Cassar  
Chairman

Dr. Charles Cassar  
Member

Mr. Lawrence Ancilleri  
Member

*8 July 2014*