

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1004 – DH 1783/13 – Provision of Legal Services for the Setting Up of a Public – Private Partnership at Mount Carmel Hospital**

The Publication Date of the Call for Tenders was 3 May 2016 whilst the Closing Date for Call of Tenders was 17 June 2016. The Estimated Value of the Tender, (Exclusive of VAT) was € 17,000.

One (1) Bidder have submitted an offer for this Tender.

On 27 October 2016, Dr Juliette Galea and Dr Carina Nagiah filed an Objection against the decision of the Central Procurement and Supplies Unit to cancel the Tender against a deposit of € 400.

On 10 November 2016, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

#### **Appellant – Dr Juliette Galea & Dr Carina Nagiah**

Dr Juliette Galea	Representative
Dr Carina Nagiah	Representative

#### **Contracting Authority – Central Procurement and Supplies Unit**

Mr Shaun Camilleri	Chairperson, Evaluation Board
Ms Rita Zammit	Secretary, Evaluation Board
Ms Lilian Zahra	Member, Evaluation Board
Dr Stefan Zrinzo Azzopardi	Legal Representative

Following an introduction by The Public Contracts' Review Board Chairman, Dr Anthony Cassar, the Appellants were invited to make their submissions.

Dr Juliette Galea opened by stating that their objection was divided into two parts. The first part regarded the procedure of how their offer was rejected whilst the second part regarded the substance. This was not a Tender without deviations. She and Dr Nagiah were first called for a meeting which was then cancelled and then were called for a second meeting which required hours of study and preparations.

Dr Carina Nagiah continued by saying that on 17 October 2016, they received an email from Ms Rita Zammit from the Central Procurement and Supplies Unit wherein the Appellants were informed that their offer was being rejected. They felt that more information was needed and therefore on 18 October 2016, the Appellants replied by asking whether the results were published and whether they are in a position to furnish further details.

The next day, Ms Rita Zammit once again replied by saying that since the reasons were confidential, she couldn't submit any further information, hence leaving Dr Galea & Dr Nagiah no option but to file an Objection.

Article 4.1 of the Public Procurement Regulations talk about the transparency in treatment to all economic operators while article 20 say that the offers must be open in public and that all prices must be announced. Article 21 (2) explains more clearly the Contracting Authority's duties on how they are to publish the decisions taken when awarding Tenders.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board remarked that the issue discussed here is whether the Contracting Authority conducted the Tender transparently or not.

Dr Carina Nagiah continued by saying that on 24 October 2016, Dr Juliette Galea went to the Ministry for Health to file the Objection. Prior to this the latter communicated with Ms Rita Zammit wherein it was agreed that the five days allowed for the Objection period were to start when the Contracting Authority confirmed the Publication Date.

Dr Juliette Galea argued that they feel that this Objection had to be upheld on the grounds of how they were treated. Page 3 of the Request for Participation had indicated exactly how the interview was to be conducted and they prepared a lot for the interview. The pass mark for this Tender was 60% and they were the only Bidders for it. It was not acceptable for one to be treated in the way that the Appellants were treated following long hours of preparation.

Dr Anthony Cassar, Chairman of the Public Contracts Review Board asked how many members the Interviewing Board had for which Dr Juliette Galea replied that there were five members.

Dr Anthony Cassar, Chairman of the Public Contracts Review Board declared that this Board will see whether the Central Procurement and Supplies Unit conducted the Tender Award with the correct procedure.

Dr Juliette Galea continued by saying that they wanted the decision to be published and for reasons why their offer was rejected to be given so that they can avail of any other remedies

which might have been available to them. With regards to the procedure, the Appellants were requesting the deposit to be refunded.

Dr Stefan Zrinzo Azzopardi, the Legal Representative for the Central Procurement and Supplies Unit opened his submissions by saying that this was an Objection from a decision to a Request for Participation for Legal Services for the Setting up of a Public-Private Partnership at Mount Carmel Hospital.

There was a specific request wherein the criteria were established on which basis the Tender was awarded. The submissions were made in the traditional way, i.e. in writing. The Appellant's offer was the only one submitted and the Evaluation Board made their considerations on the basis of what was submitted and on the interview made. Effectively, the Central Procurement and Supplies Unit felt that the bid submitted was to be rejected.

Dr Zrinzo Azzopardi continued by saying that it was a statement of fact that the Contracting Authority was not obliged to accept the offer made if only one bid was submitted. The Evaluation Board included also a lawyer who was part of the Department of Health for some time; therefore the requirement for a Technical person to be present in the Evaluation Board was satisfied.

The Objection was made on a question of transparency. The communication between the Appellants and the Contracting Authority was made although the Notice of Award was subsequently published. In case of the Public Procurement, the procedure must be followed and applied in a way that no party would suffer prejudice.

The publishing of the results is important in order for one to know when the objection period was to start. This happened correctly; hence the parties were discussing the Objection in front of the Public Contracts Review Board. This meant that the Evaluation Board has abided by the procedures required and that the Appellants were given the right to file an Objection as per the Public Procurement Regulations.

With regards the Appellants' Objection, one has to consider what other remedies they had apart from the complaint. Dr Zrinzo Azzopardi was noticing that the Objection was made because the Appellants did not gather all the information which was requested from them.

At the same time, Dr Zrinzo Azzopardi also noticed that the Appellants' were contesting the way how the Contracting Authority was evaluating their position. With regards to the Evaluation, one has to say that if there was a call for Tenders, the Appellants would have been right in saying that the reasons for rejection were not clear but then one had to ask what remedies were there available for them.

If one was objecting from a decision of the Evaluation Board because the latter did not consider what a Bidder was offering in a correct way, one would have to expect that the Bidder should have sustain his position on why the Bidder should have given the pass mark of 60%.

The transparency point in the Public Procurement Regulations states that all economic operators were to be equally treated and that a fair chance was given to everyone. Nowadays not only bidders can object to award recommendations in front of the Public Contracts

Review Board but also they can object at Tender stage, hence raising a pre-contractual concern.

On the other hand, Dr Zrinzo Azzopardi understood why the marks were not given to the Appellants and noted that the praxis was that no marks were given to Bidders since the Evaluation made was an internal one.

At this point, Mr Shaun Camilleri, ID Card Number 449786 M, the Chairman of the Evaluation Board, was summoned to testify under oath. A copy of the transcript is available at a separate and attached document with the decision.

Following Mr Camilleri's testimony, Dr Stefan Zrinzo Azzopardi said that the questions made in the interview were conducted by someone Technical and the Evaluation Board had made its own conclusions. There was no reason why the discretion used by the latter is to be disturbed in one way or another since there was no evidence which showed that the Evaluation Board had acted incorrectly.

Dr Juliette Galea said that during the interview, they knew what they were saying more than the members present for it. She also noted that the Chairman of the Evaluation Board was presented to them only during this Public Hearing. The Appellants only wanted to know why their bid was discarded and they requested the report from the Contracting Authority as it took them a lot of work and time to prepare for the interview whilst insisting that the Law gives them the right to get a copy of the report.

Dr Anthony Cassar, Chairman of the Public Contracts Review Board asked the Appellants whether they were given any percentages for which Dr Juliette Galea replied in the negative.

The Chairman of the Public Contracts Review Board then asked whether they were given any reasons for which Dr Stefan Zrinzo Azzopardi, the Legal Representative for the Central Procurement and Supplies Unit replied that it was the praxis that these were not communicated.

Dr Anthony Cassar, Chairman of the Public Contracts Review Board then said that therefore, a specific reason for the refusal of the offer was not given.

Dr Juliette Galea concluded by saying that if there was a criterion, the reasons had to reflect the criteria. The Appellants have studied according to the criteria given and that they were treated unfairly.

At this stage, the Public Hearing was closed.

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**This Board,**

**Having noted this Objection filed by Dr Juliette Galea (herein after referred to as the Appellant) on 26 October 2016, refers to the Contentions made by the latter with regards to the award of Tender of Reference DH 1783/13 listed as Case No 1004 in the records of the Public Contracts Review Board, awarded by Central Procurement and Supplies Unit (herein after referred to as the Contracting Authority).**

**Appearing for the Appellant: Dr Juliette Galea & Dr Carina Nagiah**

**Appearing for the Contracting Authority: Dr Stefan Zrinzo Azzopardi**

**Whereby, it is being contended that:**

- a) According to the Appellant, the procedure adopted by the Evaluation Board was not proper and transparent. In this regard, the Appellant is referring to the lack of information given in the Contracting Authority's "*Notice of Rejection*", through an e-mail dated 17 October 2016.**

**This Board also noted the Contracting Authority’s “*Letter of Reply*” dated 7 November 2016 and its verbal submissions during the Public Hearing held on 10 November 2016, in that:**

- a) The Contracting Authority maintains that it had carried out the evaluation process in accordance with the necessary transparency. Certain information, which was confidential, could not be given to the Appellant, as per normal procedure.**

**The Evaluation Process was based on the submissions made by the Appellant and by an interview made by the Evaluation Board.**

**This same Board also noted the Testimonies of the witness namely, Mr Shaun Camilleri duly summoned by the Contracting Authority. The Transcript of the latter is herewith attached.**

**This Board, after having treated the merits of this case, arrived at the following conclusions:**

- 1. In this particular case, the two main issues which are to be treated by this Board are transparency and lack of information transmitted by**

**the Contracting Authority to the Appellant. These issues are being dealt with as follows:**

**i) Transparency**

**Transparency in Tender Evaluations might take many forms but the main principle is for the Evaluation Board to act in a proper manner so as not to give an advantage to any one Bidder over the others and to treat all Bidders on the same Level playing field. All Bidders should be treated equally.**

**In this particular case, the Evaluation Board, which included a Technical Person qualified to give her opinion on the subject matter, was properly composed and the fact that there was only one Bidder did not change the procedure of the Evaluation Process.**

**This Board notes that parameters were given in the Tender Document which enabled the Bidders to submit their offer based on these parameters. In this regard, the Evaluation Board acted on the submissions made by the Appellant and on the results achieved during the interview.**

**This Board, cannot in any way, contest or negate the Evaluation Board’s decision but can only assess whether the procedure adopted by the latter was transparent enough or not.**

**From the documentation and submissions made during the Hearing, this Board asserts the fact that the Evaluation Board acted in a transparent manner.**

**ii) Lack of Information**

**With regards to this issue, this Board justifiably notes that the “*Notice of Rejection*” via e-mail dated 17 October 2016 did not contain the reasons why the Appellant’s offer was being discarded and in this regard, this Board confirms that no information was relayed to the Appellant for the latter to base his Objection on.**

**The reasons which the Contracting Authority should have given did not necessarily reveal the confidential data contained in the Evaluation Report. In this regard, this Board upholds the Appellant’s contention while emphasizing once again the**



**importance of “*Reasons for Rejection*” of an offer and the responsibility and onus which the Contracting Authority has in this regard.**

## **2. General**

**From the Testimony of the Witness, it was clearly established that no form of records were kept with regards to the interview held. This Board does not accept this attitude. The Evaluation Board were in duty bound to keep records as to how marks were allotted.**

**In view of the above, this Board confirms the decision taken by the Contracting Authority to cancel the Tender. However, due to the reasons treated above, this same Board recommends that the deposit paid by the Appellant should be refunded.**

Dr Anthony Cassar  
Chairman

Mr Lawrence Ancilleri  
Member

Mr Carmel Esposito  
Member

*16 November 2016*

## **PUBLIC CONTRACTS REVIEW BOARD**

Today, Thursday 10 November 2016

PCRB Case 1004

Dr Juliette Galea & Dr Carina Nagiah

vs

Central Procurement and Supplies Unit

**Mr Shaun Camilleri, ID Card Number 449786 M, summoned to testify under oath by Dr Stefan Zrinzo Azzopardi, Legal Representative, Central Procurement and Supplies Unit who said:**

**Dr Anthony Cassar:** What was your role in the Tender?

**Witness:** Chairman.

**Dr Stefan Zrinzo Azzopardi:** The Board has asked you a question about your role, what was your exact role?

**Witness:** Chairman of Board.

**Dr Anthony Cassar:** Of the Evaluation Board, am I right?

**Witness:** Yes.

**Dr Stefan Zrinzo Azzopardi:** Can you please tell us who were the other Board members and who was present when the interview was conducted?

**Witness:** The Board members were Brian Zammit, Dr Bridget Sultana and Lilian Zahra whilst we also had Ms Rita Zammit as Secretary.

**Dr Anthony Cassar:** This means that there were three members.

**Witness:** Yes.

**Dr Juliette Galea:** There were five persons in the room.

**Mr Lawrence Ancilleri:** Who were exactly the Evaluators?

**Witness:** The evaluators were Dr Bridget Sultana, Brian Zammit and Lilian Zahra.

**Dr Stefan Zrinzo Azzopardi:** And he as a Chairman.

**Dr Anthony Cassar:** That's fine.

**Dr Stefan Zrinzo Azzopardi:** Can you please explain for us, this offer which was submitted from the two colleagues, how it was evaluated in the sense of what did you do to get to the conclusion which you had eventually made?

**Witness:** In the interview which was conducted by Dr Bridget Sultana who is the Technical Person. She asked questions which were in line with the marking scheme which is the interviewing criteria. Our colleagues here have answered her questions and then we gave them marks which were decided between ourselves as a Board.

**Dr Anthony Cassar:** Were the marks given individually at first? Every member gave his own marks on the subjects discussed during the interview? Please answer either yes or no.

**Witness:** The marks were given collectively.

**Dr Anthony Cassar:** Collectively and not individually.

**Witness:** No. I mean, we had once again discussed their answers and eventually gave the marks.

**Dr Stefan Zrinzo Azzopardi:** Do you remember whether there were any questions on, for example, the experience which the colleagues have regarding the formation of the PPP?

**Witness:** Yes.

**Dr Stefan Zrinzo Azzopardi:** Do you have an idea of what was the answer?

**Witness:** The answer was that the lawyers said that they did not have the necessary experience in the PPP; they have never made PPP before. They have researched what happened in other countries but they never had hands on experience.

**Dr Stefan Zrinzo Azzopardi:** You have told us that Dr Bridget Sultana have made a series of questions.

**Witness:** Yes.

**Dr Stefan Zrinzo Azzopardi:** And the questions were regarding the seven points in the interviewing criteria.

**Witness:** Yes.

**Dr Stefan Zrinzo Azzopardi:** Apart from the interviewing criteria did you have any other material or documents which you considered or which were presented with the offer?

**Witness:** I'm not 100% sure.

**Dr Anthony Cassar:** Did the Appellants present any documentation during the interview?

**Witness:** I don't recall so.

**Dr Juliette Galea:** Was the interview recorded in any way?

**Witness:** No.

**Dr Juliette Galea:** Were the replies for the questions made to us documented?

**Witness:** I did not document them, can I ask my secretary?

**Dr Anthony Cassar:** Is she here?

**Ms Rita Zammit:** Yes

**Dr Stefan Zrinzo Azzopardi:** In that case we can ask her.

**Dr Anthony Cassar:** Were these recorded?

**Dr Stefan Zrinzo Azzopardi:** No.

**Dr Anthony Cassar:** You may continue, Dr Galea.

**Dr Juliette Galea:** Do you remember whether I had a lot of documentation which I could have presented but you told me that there was no need to? Do you remember this or not?

**Witness:** Yes, I remember.

**Dr Juliette Galea:** Therefore you remember that you refused to accept the documentation because you said that there was no need to. It is important.

**Witness:** Yes that was the direction of Dr Sultana.

**Dr Juliette Galea:** Why you did not record what was discussed?

**Witness:** We were never in a situation where we needed to record what was discussed in the same meeting.

**Dr Juliette Galea:** When did you make the Evaluation? Was it made on the spot that is a few moments after we left the room? Two weeks later? Three weeks later? When did you made the Evaluation?

**Witness:** The Evaluation was made exactly afterwards.

**Dr Juliette Galea:** Then why did the reply arrived to us more than a month later when you informed us that you were under pressure to arrive at a decision immediately?

**Witness:** This was something which I did not enter in it but I left it in the Secretary's hands.

**Dr Juliette Galea:** Did you take any type of notes of the answers, even if they were not recorded?

**Witness:** No

This was the witness of Mr Shaun Camilleri before the Public Contracts Review Board.

Dr Anthony Cassar  
Chairman  
Public Contracts Review Board

I declare that I have transcribed the recording honestly and faithfully and to the best of my knowledge and abilities.

Antonello Abela  
Principal  
Public Contracts Review Board