

PUBLIC CONTRACTS REVIEW BOARD

Case 1946 – SPD3/2023/059 – Services - Framework Contract for the Delivery, Hiring, Setting Up and Dismantling of Marquees Tents to be utilised in various events in Gozo 2023-2024

5th December 2023

The Board,

Having noted the letter of objection filed by Dr Jonathan Mintoff acting for and on behalf of Mr Jean Paul Zerafa, (hereinafter referred to as the appellant) filed on the 11th September 2023;

Having also noted the letter of reply filed by Dr Tatiane Scicluna Cassar acting for the Ministry for Gozo (hereinafter referred to as the Contracting Authority) filed on the 19th September 2023;

Having heard and evaluated the testimony of the witness Ms Dorianne Borg (Chairperson of the Evaluation Committee) as summoned by Dr Jonathan Mintoff acting for Mr Jean Paul Zerafa;

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by representatives of the parties;

Having noted and evaluated the minutes of the Board sitting of the 27th November 2023 hereunder-reproduced.

Minutes

Case 1946 – SPD3/2023/059 – Services – Framework Contract for the Delivery, Hiring, Setting Up and Dismantling of Marquees Tents to be utilised in various events in Gozo 2023-2024

The tender was issued on the 27th June 2023 and the closing date was the 18th July 2023.

The estimated value of this tender, excluding VAT, was € 29,900.

On the 11th September 2023 Mr Jean Paul Zerafa filed an appeal against the Culture and Heritage Directorate, Ministry for Gozo as the Contracting Authority objecting to his disqualification on the grounds that his bid was deemed to be not technically compliant.

A deposit of € 400 was paid.

There were three bids.

On the 27th November 2023 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Ms Stephanie Scicluna Laiviera as members convened a virtual public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Mr Jean Paul Zerafa

Dr Jonathan Mintoff

Legal Representative

Mr Jean Paul Zerafa Representative

Contracting Authority – Ministry for Gozo

Dr Tatianne Scicluna Cassar	Legal Representative
Ms Dorianne Borg	Chairperson Evaluation Committee
Ms Rosabelle Pavia	Secretary Evaluation Committee
Mr George Camilleri	Evaluator
Mr Christopher Pisani	Evaluator
Mr Anthony Vella	Evaluator
Mr Marnol Sultana	Representative

Recommended Bidder – Yama Yami Ltd

Dr Daniel Calleja	Legal Representative
Mr Ryan Mercieca	Representative

Department of Contracts

Dr Mark Anthony Debono	Legal Representative
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Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Jonathan Mintoff Legal Representative for Mr Jean Paul Zerafa referred to the Contextual Application filed by the Appellant on 11th September 2023 and referred to Court of Appeal decision in the *South Lease* case and requested that all pertinent information related to the technical literature in the offer submitted by the preferred bidder be made available to him. The Contracting Authority claim that this information is confidential.

Ms Tatianne Scicluna Cassar Legal Representative for the Ministry for Gozo objected to the release of this information. Appellant was relying on Regulation 242 for his request; however this does not meet his requirements. If the information is not listed in the General Rules Governing Tenders then it cannot be released. The Ministry does not agree with the application.

Dr Mark Anthony Debono Legal Representative for the Department of Contracts said that both the PPR and Rule 19.2 of the GRGT limit the information that can be released such as sensitive information which might prejudice bidders. CJEU Case 450/2006 makes it clear that the rights have to be balanced whilst the *Polska* case likewise refers to protecting rights. PPR 48(8) refers to the integrity and confidentiality of tenders.

At this stage the Chairman said that the Board will have a short recess to consider the Application by the Appellant.

On resumption the Chairman said that the Board noted the Application filed on the 11th September by the Appellant seeking information under Regulation 242(2) of the Public Procurement Regulations. It is clear that the information that is the “subject matter” of this specific Regulation has already been made available to the Appellant. This Regulation makes no reference to technical literature or technical offers which are being requested.

Regulation 242 (2) mentions among others:

- a) The reasons for the rejection - which has been provided
- b) The reason for the rejection including cases referred to in regulation 53(9) and 53 (10) – which has been provided
- c) Relative advantages of the tender selected as well as the name of the successful tenderer – which has been provided
- d) Progress of negotiations which is irrelevant to today's case
- e) The right of appeal which has been granted.

As regards the *South Lease vs CPSU et al* case, this Board wishes to record and clarify that in paragraph 7 the Court of Appeal stated the following “I avversarju pero ghandu dritt jitlob mil parti l’ohra kull informazzjoni marbuta mal kaz u rilevanti ghal materja quddiem il Board”. This Board strongly emphasises the word “rilevanti”.

Despite the fact that the Appellant filed a grievance headed “Concerns regarding the preferred Bidder’s compliance” the Board notes that this grievance lacks the specific reasons mentioned in Regulation 270 of the PPR which states “may file an appeal by means of an objection before the PCRB which shall contain in a very clear manner the reasons for their complaints”. At this stage the Board also refers to the case *Varec SA vs Etat Belgie* where in paragraph 51 the following is stated:

“It follows that in the context of a review of a decision taken by a contracting authority in relation to a contract award procedure, the adversarial principle does not mean that the parties are entitled to unlimited and absolute access to all of the information relating to the award procedure concerned which has been filed with the body responsible for the review. On the contrary, that right of access must be balanced against the right of other economic operators to the protection of their confidential information and their business secrets.”

Finally reference is also made to Regulation 40(2) of the PPR which refers to information that is not considered of a confidential nature. At this stage the Board feels and directs that the information requested by the Appellant is of no relevance to his case and if given will be merely in answer to the quest of a fishing expedition and would be prejudicial to the preferred bidder.

The Board directs that it will now deal with the merits of the case.

Dr Mintoff requested that the following note be recorded verbatim:

“The legal counsel for the objector on behalf of his client reserves the right to appeal from the said interim decision of the Board at a later stage, this after a final decision on the entire merits of the case are decided.”

Dr Mintoff then requested that witnesses be heard.

Ms Dorianne Borg (256588M) called to testify by the Appellant stated on oath that she was the Chairperson of the Evaluation Committee and that the evaluators were Mr George Camilleri, Mr Anthony Vella and Mr Christopher Pisani. Clarifications were sent by the Chairperson. The reason why Mr Zerafa was not awarded the contract was that he was required to submit literature but instead submitted the Technical Questionnaire. Appellants offer was correct from a technical point of view – it merely lacked the literature list showing designs or drawings.

Witness was asked what documents the preferred bidder had provided but Ms Scicluna Cassar objected to this question. Dr Mintoff said that according to the *South Lease* case he had a right to this information.

The Chairman pointed out that *South Lease* dealt with the specific matter concerning vehicles. The rejection letter in this case refers to shortcomings in Appellant’s bid and to the subsequent rectification

submission. The technical offer is never released publicly. The role of the Board is not to re-evaluate bids and it expects Appellant to provide proof if he is claiming that the preferred bidder is not compliant.

Dr Mintoff said that Appellants request for the technical questionnaire and literature had been denied, but this was not sensitive information. The case *Adrian Delia vs Joseph Muscat* dealt precisely with the point of making documents accessible. The tender requested sketch or design but there was no mention of measurements and the technical questionnaire conformed to the tender. This was a case where ‘tick the boxes confirmation’ was sufficient and Appellant therefore is compliant since he adhered to this request. The request by the Authority was not correct as it did not follow the instructions of the Department of Contracts. Appellant was already compliant before the rectification request. The rejection letter was also incorrect. The literature list confirms that the Appellant’s bid is compliant and the request for a sketch or drawing was superficial as the tender did not request measurement.

Dr Daniel Calleja Legal Representative for Yama Yami Ltd said that once the Evaluation Committee decided what documents were required then any reference to the preferred bidder becomes a fishing expedition to try to get the tender evaluated. Appellant has the opportunity to correct the situation by submitting the requested documents which contrary to what has been claimed were not superfluous. The award in favour of the preferred bidder should be confirmed.

Dr Scicluna Cassar stated that Appellant was insisting that if the boxes were ticked it would be sufficient to be awarded the tender – this in itself is a clear admittance that sketches or drawings were not submitted. The tender requested technical offer and technical literature but Appellant failed to provide the latter and therefore was not compliant. Even a rectification failed to redress the situation. It is up to the Authority and not the economic operator to decide what documents are to be submitted. The Evaluation Committee required sketches or drawings not for measurement purposes but to find out the shape of the marquees. The preferred bidder had submitted everything correctly.

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

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 27th November 2023.

Having noted the objection filed by Mr Jean Paul Zerafa (hereinafter referred to as the Appellant) on 11th September 2023, refers to the claims made by the same Appellant with regard to the tender of reference SPD3/2023/059 listed as case No. 1946 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Jonathan Mintoff

Appearing for the Contracting Authority: Dr Tatiane Scicluna Cassar

Appearing for the Preferred Bidder: Dr Daniel Calleja

Whereby, the Appellant contends that:

a) ***1st grievance - The modus operation (sic) of the Contracting Authority during the Evaluation is in breach of the law and the relative framework -***

It is crucial to note that for requests concerning Technical Literature, PPN #40 articulates the following in footnote no. 12: "*Evaluation Committees may request the Submission/Resubmission of Technical Literature as per the pre-established Literature List in the Procurement/Concession Document. The scope of the Technical Literature is to corroborate, substantiate, and verify the Technical Compliance of an already fully compliant' Technical Offer.*"

This is in stark contrast to the rejection letter, which claims that the Objector's offer is technically non-compliant. Such a stance represents a mischaracterization of compliance. Footnote 12 explicitly indicates that Technical Literature serves to "*corroborate, substantiate, and verify the Technical Compliance of an already fully compliant Technical Offer.*" If the Objector's offer was indeed fully compliant, the absence of Technical Literature should not have resulted in a 'non-compliant' classification. Therefore, the Evaluation Committee's decision contradicts Footnote 12, which outlines the supplementary role of Technical Literature in verifying an already compliant offer. Moreover, concerning a Rectification Request for a missing document, PP #40 prescribes the specific wording that the Evaluation Committee should employ when issuing such a request. The wording used in the actual rectification request diverges significantly from the guidelines set forth in PPN #40. This failure by the Committee to adhere to the prescribed wording constitutes a procedural error that undermines the legitimacy of the rectification request. The Evaluation Committee is obliged to exercise 'due care in evaluation' and may have a positive duty to identify and correct errors in an appropriate manner. This is especially important given the potential for ambiguity created by the deviation from prescribed wording.

b) ***2nd grievance – The objector submitted comprehensive documentation -***

The Objector wishes to emphatically state that all necessary and pertinent documentation was submitted right from the outset, in full compliance with the requirements delineated in the Procurement Documents. It is misleading, therefore, to suggest that the Objector failed to provide any required documentation. In fact, the Objector took meticulous care to ensure that every document, form, and piece of information specified in the tender call was included in the submission. Any assertion to the contrary would be inaccurate and may misrepresent the Objector's diligent efforts to adhere to all procedural guidelines. Consequently, any rectification request concerning missing documentation appears to be unfounded and calls into question the Evaluation Committee's compliance with its own rules and guidelines. This as will be further outlined during the hearing of this case.

c) ***3rd grievance - Concerns regarding the preferred Bidder's Compliance -***

The Objector wishes to emphasize, based on a considered opinion, that the preferred bidder's offer lacks compliance for the following reasons:

- i. The bidder does not possess the required Marquees and/or Tents stipulated in the Tender, which raises questions about their ability to fulfill the contract obligations.
- ii. There are serious doubts as to whether subcontracting and/or reliance on third parties were appropriately declared, in accordance with applicable legislation.
- iii. As articulated in the Tender dossier, specifically in Article 18 of Section 2 (Special Conditions), "The performance of the contract shall commence upon the date of the last signature on the contract." These stipulations are vital for ensuring a level playing field and fair competition.
- iv. A previous decision by this Honourable Board articulated that "*A prospective bidder must be administratively and technically compliant at the time of submission of the tender and not only be 'fully compliant' should the tender be awarded to them.*" This principle is also highlighted in Procurement Policy Note ("PPN") #40, which states, "Economic Operators must initially possess all the requirements laid out in the Procurement/Concession Documents." This aligns with European Court of Justice (ECJ) case law.
- v. Additionally, there exist irregularities in the Preferred Bidder's offer and/or submission that compromise the integrity of the selection process.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 19th September 2023 and its verbal submission during the hearing held on 27th November 2023, in that:

- a) 1st grievance - In his first grievance, the Appellant is contending that since his technical offer was fully complaint (sic), the absence of Technical Literature should not have resulted in a 'non-complaint' (sic) classification. For this reason, the Evaluations Committee's decision contradicts footnote 12 which outlines the supplementary role of the Technical Literature in verifying an already complaint (sic) offer. In these regards, the Contracting Authority hereby submits that it seems that the Appellant has either misunderstood the tender as regards the technical compliance of the bidders or else has not yet identified and comprehended why he has failed to submit a tender that was technically non-complaint (sic). In fact, one has to draw a difference between the technical offer and technical literature. In this case, the Appellant was found to be technically complaint (sic) with respect to its technical offer but not to be technically complaint (sic) in respect to the technical literature. As the technical literature fell under 'Note 2', a rectification request was sent to the Appellant in order to ask him to send such documentation. However, notwithstanding such request, the Appellant submitted an attachment entitled 'Literature List' which when opened was entitled 'Technical Offer' and contained the same information as the technical offer that he had in fact already submitted. It follows that Appellant failed to submit the technical literature as per

literature list even after the rectification request. Instead he re-submitted the technical questionnaire and did not submit the design/drawings/sketches of the proposed Marquess for the three different tent sizes as requested in the literature list. Hence the Evaluation Committee rightly concluded that the Appellant was not technically compliant (sic).

- b) 2nd grievance - As regards the second grievance of the Appellant, the Contracting Authority confirms that as stated above, upon the submission of his tender and even after the rectification request was sent to him, the Appellant failed to provide all the necessary documentation and therefore it is not true that he has submitted right from the outset all necessary and pertinent documentation needed for this tender.
- c) 3rd grievance - The third grievance of the Appellant does not even hold water since it is based on various assumptions made on the offer submitted by the preferred bidder. In this respect, the Contracting Authority asserts that after the Evaluation Committee has meticulously carried out its evaluation on all the bidders, it has found the preferred bidder to be administratively and technically compliant (sic) and therefore the Appellant cannot carry out assumptions on such bidder when it does not have any information about it. Additionally, the Contracting Authority also submits that as per Article 40 of S.L 601.03, that is, the Public Procurement Regulations; the Contracting Authority, the Director or the Sectoral Procurement Directorate cannot disclose information forwarded to it by economic operators, except with certain exceptions. Apart from that, Article 19.2 of the General Conditions Governing Tendering provides an exhaustive list of the documents/information that can be passed over to the unsuccessful bidders and does not list the information requested by the Appellant. It follows that the Contracting Authority is outrightly objecting to the Appellant's request and application where it is requesting access to a number of documents pertaining to the preferred bidder.

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 witness duly summoned, will now consider Appellant's grievances.

- a) 1st and 2nd grievances –
 - i. Reference is made to the tender document Section 1, paragraph 5 (c)(ii) which clearly states that *“Literature as per Form marked ‘Literature List’ to be submitted with the technical offer at tendering stage. The scope of the literature is to corroborate a fully compliant technical offer (Note 2)”*.
 - ii. The Board notes that the Evaluation Committee, after realising that the appellant did not submit any technical literature with his initial submission, duly issued a request for rectification. This, in line with Note 2 of the tender document.
 - iii. The appellant again failed to submit the required technical literature.

- iv. Therefore, there is nothing more to add apart from fact that the Evaluation Committee exercised its rights and duties in an extremely diligent manner and it was the same appellant that failed to adhere to the tender requirements. This even after being provided with the opportunity to rectify his non-compliance.
 - v. Furthermore, being so obvious that the appellant failed to adhere to such limited tender requirements, arguments brought forward by him are nothing but frivolous and vexatious.
- b) 3rd grievance –
- i. This Board refers to its decree issued during the oral hearing. However, it would further emphasise that such a grievance falls short of the requirement imposed by regulation 270 of the Public Procurement Regulations which explicitly states that “.....*may file an appeal by means of an objection before the Public Contracts Review Board **which shall contain in a very clear manner the reasons for their complaints***” (bold emphasis added)
 - ii. By just jotting points without clearly explaining the reasons behind them makes this grievance null and void and nothing more than an attempt at a fishing expedition.

The Board,

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) Does not uphold Appellant’s Letter of Objection and contentions,
- b) Upholds the Contracting Authority’s decision in the recommendation for the award of the tender,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Mr Lawrence Ancilleri
Member

Ms Stephanie Scicluna Laiviera
Member