

# **PUBLIC CONTRACTS REVIEW BOARD**

## **Case 1973 – SPD2/2022/060 – Services - Tender for a Regeneration Plan for St Paul’s Bay, Bugibba, Qawra, Xemxija and Salina Aera - Tourism Zones Regeneration Agency**

**2<sup>nd</sup> April 2024**

The Board,

Having noted the letter of objection filed Mr Alberto Miceli-Farrugia acting for and on behalf of Openworkstudio Limited, (hereinafter referred to as the appellant) filed on the 18<sup>th</sup> December 2023;

Having also noted the letter of reply filed by Dr Alexander Scerri Herrera acting for Tourism Zones Regeneration Agency (hereinafter referred to as the Contracting Authority) filed on the 28<sup>th</sup> December 2023;

Having heard and evaluated the testimony of the witness Mr Paul Pace (Member of the Evaluation Committee) as summoned by Dr Alessandro Lia acting for Openworkstudio Limited;

Having heard and evaluated the testimony of the witness Mr Noel Mercieca (Member of the Evaluation Committee) as summoned by Dr Alessandro Lia acting for Openworkstudio Limited;

Having heard and evaluated the testimony of the witness Mr Dennis Vella (Chairperson of the Evaluation Committee) as summoned by Dr Alessandro Lia acting for Openworkstudio Limited;

Having heard and evaluated the testimony of the witness Mr Albert Spiteri (Member of the Evaluation Committee) as summoned by Dr Alexander Scerri Herrera acting for Tourism Zones Regeneration Agency;

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 7<sup>th</sup> March 2024 hereunder-reproduced.

### **Minutes**

#### **Case 1973 – SPD 2/2022/060 – Services Tender for a Regeneration Plan for the St Paul’s Bay, Bugibba, Qawra, Xemxija and Salina Area**

The tender was issued in on the 16<sup>th</sup> February 2023 and the closing date was the 26<sup>th</sup> April 2023

The estimated value of this tender, excluding VAT, was € 300,000.

On the 18<sup>th</sup> December 2023 OPENWORKSTUDIO filed an appeal against the Tourism Zones Regeneration Agency (Ministry for Tourism) objecting to their disqualification on the grounds that their offer was deemed to have failed to satisfy the criterion for award under the BPQR system.

A deposit of € 1,500 was paid.

There were five bids.

On the 7<sup>th</sup> March 2024 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Dr Vincent Micallef as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

**Appellant – OPENWORKSTUDIO Ltd**

Dr Veronique Dalli	Legal Representative
Dr Alessandro Lia	Legal Representative
Perit Alberto Miceli Farrugia	Representative

**Contracting Authority – Tourism Zones Regeneration Agency**

Dr Alexander Scerri Herrera	Legal Representative
Mr Dennis Vella	Chairperson Evaluation Committee
Mr Glenn Mifsud	Secretary Evaluation Committee
Mr Paul Joseph Pace	Evaluator
Perit Albert Spiteri	Evaluator
Mr Noel Mercieca	Evaluator
Mr John Attard	Representative

**Preferred Bidder – Adi Associates Environmental Consultants Ltd**

Dr Rachel Xuereb	Legal Representative
Dr Adrian Mallia	Legal 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 Alessandro Lia Legal Representative for the Appellant requested testimonies be heard first.

Mr Paul Pace (157561M) called to testify by the Appellant stated on oath that he was one of the Evaluators and is a Director in the Ministry for Tourism with a qualification in procurement and experience of working with local councils. He stated that the Tender Evaluation Committee (TEC) had followed the tender criteria in all the requested details; clarifications had been sought as required and the evaluation correctly carried out. Asked to comment on the submissions on the methodology request in the tender (page 10 item 3) witness stated that that the reports of the Appellant and the preferred bidder were 'like for like' and satisfied the evaluators - in reply to further questions on this point witness replied 'no comment'. Asked about the ecological sensitiveness and impact on urbanised areas concerned witness replied that the evaluators did not go into that aspect as they considered the overall replies offered on the concept of the tender. Witness confirmed that he was aware that the preferred bidder's offer was 40% cheaper and the TEC was satisfied that it was able to fulfill the contract having given a satisfactory reply to a clarification [clarification reply read out by witness]. He could not recall the individual marks he awarded and relied on the conclusions of the key experts.

Questioned by Dr Alexander Scerri Herrera Legal Representative for the Contracting Authority stated that on the technical report the only difference in the offers of the bidders was in the section on key experts with the reply of the preferred bidder being very clear and acceptable.

Mr Noel Mercieca (37069M) called to testify by the Appellant stated on oath that he has served for five years as a Development Officer at the Tourism Agency. He had no experience on ecological or urban matters but had carefully followed what the tender required and judged the area delineated by the tender as a whole and not as individual localities.

At this point Dr Scerri Herrera objected that the questions being asked were a witch hunt to which Dr Dalli replied that the Appellant was simply trying to establish if the individual points of the tender had been considered.

Dr Debono representing the Department of Contracts noted that what is essential is that the final overall result was based on the aggregate outcome.

The Chairman pointed out that each evaluator should be able, and is expected, to reply on their individual views on the evaluation.

Resuming his testimony, Mr Mercieca stated that marks were awarded according to the replies given in the grid – if perfect answers had been given then maximum marks were awarded. In this case both bidders had provided perfect answers with each individual evaluator giving individual marking and the Chairperson combining the results.

In reply to questions by Mr Adrian Mallia, Representative for Adi Associates Environmental Consultants Ltd, witness confirmed that all submissions followed the tender methodology requirements in the tender and all bidders had engaged technical people to fulfill these requirements.

In reply to a further question from Dr Lia, witness re-iterated that all requirements had been replied to correctly and marks awarded accordingly.

Mr Dennis Vella (198465M) called to testify by the Appellant, stated on oath that he was the Chief Executive Officer of the Agency and was the Chairperson of the TEC. He said the milestones requested in the tender had been followed. The tender was a guide for experts as to what was required. The Authority did not request a detailed blueprint but ideas as to how to address matters such as social and environmental problems and the analysis had been correct. The tender was merely a guide as to what was required and evaluation was on that basis with the milestones being a guide to the methodology. The BPQR allows individual ideas and both bids were good based on this formula. It was not part of the terms of the TEC to judge on what basis a bidder based his costs and the TEC recommendation was correct as full explanations had been given on the way points were awarded. Witness said that he saw his role of Chairperson as directing discussions of issues, seeking rectifications and as a point of reference. Bidders had to indicate an ability to deal with, handle and address the process and this applied to points like infrastructure, planning etc.

Perit Albert Spiteri (530596M) requested to testify by the Authority stated on oath that he was an Architect who had handled capital and infrastructural projects. The Authority was not expecting a regeneration plan but evidence of adequate knowledge to submit an overall plan. The tender requested a requirement analysis for the whole zone to enable a plan to be built thereon. Witness could not recall specific ecological or similar points raised.

This concluded the testimonies.

Dr Lia started his final submissions by stating that Appellant was not following up the claim regarding an abnormally low bid. As regards the award of points there was no indication that individual points on, for example, ecological matters had been taken into consideration. Key experts were only part of the evaluation. No explanation has been provided as to how the points were awarded and it is highly improbable that both bidders obtained 100% out of a possible 101 marks that could have been awarded. The *Qrendi Care Home* Case dealt precisely with the point that it was impossible to have a 100% award throughout. In PCRB Case 1046 the Board indicated that it was not convinced that individual evaluators were competent to judge all questions.

Dr Scerri Herrera said that in the end it was the price that decided the tender and the decision was that of the TEC as a whole and not of the individuals. No evaluator can be an expert in all areas but they all made a contribution to the full committee. There is nothing wrong in both bidders being awarded full marks provided the assessment was correctly carried out. The TEC provided a justified explanation on the technical points.

There being no further submissions, the Chairman thanked the parties and declared the hearing closed.

End of Minutes

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**Hereby resolves:**

The Board refers to the minutes of the Board sitting of the 7<sup>th</sup> March 2024.

Having noted the objection filed by Openworkstudio Limited (hereinafter referred to as the Appellant) on 18<sup>th</sup> December 2023, refers to the claims made by the same Appellant with regard to the tender of reference SPD2/2022/060 listed as case No. 1973 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Veronique Dalli & Dr Alessandro Lia

Appearing for the Contracting Authority: Dr Alexander Scerri Herrera

Appearing for the Preferred Bidder: Dr Adrian Mallia

Appearing for the Department of Contracts: Dr Mark Anthony Debono

Whereby, the Appellant contends that:

a) **1<sup>st</sup> grievance - Abnormally low –**

It is pointed out that the estimated procurement value was set at €300,000. The financial bid of the recommended bidder was listed as €184,000, hence a full €116,000 below the estimated procurement value.

The appellant maintains that regulation 243 of the Public Procurement Regulations need to be adhered to.

b) **2<sup>nd</sup> grievance - Wrongful evaluation –**

From the reading of the rejection letter, it results that the evaluation committee was mainly interested if the economic operators had “a good level of understanding as requested in the tender procurement document” and where it was the case they were afforded full marks. Therefore, no grading was performed against the basic principles of the BPQR procedure.

This Board also noted the Contracting Authority’s Reasoned Letter of Reply filed on 28<sup>th</sup> December 2023 and its verbal submission during the hearing held on 7<sup>th</sup> March 2024, in that:

a) **1<sup>st</sup> grievance - Abnormally low –**

The fact that an offer is below the estimated procurement value does not automatically make it non-compliant. In this specific case the evaluation committee made a request for clarification to the recommended bidder which after due consideration was deemed financially compliant.

b) **2<sup>nd</sup> grievance - Wrongful evaluation –**

The award criteria was based on the BPQR method of evaluation. This was duly done. In fact the appellant received a higher technical score but the financial discrepancy proved to be the deciding factor.

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 witnesses duly summoned, will now consider Appellant’s grievances.

a) **1<sup>st</sup> grievance - Abnormally low –**

- i. The Board notes that during final submissions the appellant did not wish to follow up on this specific claim.
- ii. The Board also notes that the evaluation committee duly requested a clarification from the preferred bidders in full compliance of Regulation 243(1) of the Public Procurement Regulations (“PPR”). This was duly analysed and found to be reasonable by the evaluation committee.
- iii. Therefore, this Board will not consider this grievance any further.

b) **2<sup>nd</sup> grievance - Wrongful evaluation –**

- i. Reference is made to the Tender Dossier Section 1 – Criteria for Award which clearly state that *“The contract will be awarded to the tenderer submitting the offer with the Best Price/Quality Ratio (BPQR) in accordance with the below .....*”
- ii. It further states that *“When evaluating technical offers, **each** evaluator awards for **each** criterion / sub-criterion a score out of a maximum of 100 in accordance with the technical criteria and any sub-criteria as outlined in the evaluation grid.”* (bold & underline emphasis added)
- iii. It is therefore clear, in the opinion of this Board, that when we are dealing with a BPQR method of evaluation, **each** evaluator must be able to award points / scores individually on **each** criterion / sub-criterion therein. This with a ‘gradation’ system of ‘0 to 100’ in accordance with the specific criteria set out in the tender document. A thorough analysis should be performed between the bid / submission being evaluated and the criteria set out in the evaluation grid.
- iv. When the Board is presented with replies from witnesses, such as *“no comment”* and *“evaluators did not go into that aspect as they considered the overall replies offered on the concept of the tender”*, the Board is not re-assured that a proper evaluation of bids would have taken place.
- v. It is important to point out that in this specific tender, the tender evaluation committee had no assistance from any technical expert, hence this Board is of the opinion that in such instances, members of the evaluation committee should at least have a basic understanding of the subject matter being evaluated. Another witness specifically confirmed that he had *“no experience on ecological or urban matters”*.
- vi. It is, therefore, the opinion of this Board, that in such circumstances a re-evaluation of the bids of the appellant and of the preferred bidder with a different composition of the evaluation committee having at least a basic understanding of the subject matter of the tender being evaluated is the best proportional course of action to achieve transparency and equality of arms between parties concerned.

Hence, this Board upholds the Appellant’s second grievance.

**The Board,**

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

- a) To uphold the Appellant's second grievance;
- b) To cancel the 'Notice of Award' letter dated 7<sup>th</sup> December 2023;
- c) To cancel the Letter of Rejection dated 7<sup>th</sup> December 2023 sent to Openworkstudio;
- d) To order the contracting authority to re-evaluate the bids submitted by the appellant and the preferred bidder in the tender procedure through a newly composed Evaluation Committee composed of members which were not involved in the original Evaluation Committee. Moreover, the newly appointed members of the Evaluation Committee are to have a basic understanding of the subject matter of the tender being evaluated;
- e) After taking all due consideration of the circumstances and outcome of this Letter of Objection, directs that the deposit be refunded to the Appellant.

**Mr Kenneth Swain**  
Chairman

**Dr Vincent Micallef**  
Member

**Mr Lawrence Ancilleri**  
Member