

PUBLIC CONTRACTS REVIEW BOARD

Case 2036 – MGP EQ 41/2024 – Services - EQuotation for the Hiring, Installation and Operation of a Public Address (PA) System for “Charles Buttigieg in Concert 2024” taking place at Santa Lucija, Kercem, Gozo

28th November 2024

The Board,

Having noted the letter of objection filed by Mr Antoine Debrincat acting for and on behalf of Pro Stage Sound, (hereinafter referred to as the appellant) filed on the 24th June 2024;

Having also noted the letter of reply filed by Dr Denise Pace acting for Ministry for Gozo and Planning (hereinafter referred to as the Contracting Authority) filed on the 25th June 2024;

Having also noted the letter of reply filed by Dr Jonathan Mintoff acting for Mr Ronnie Dimech trading as Power Sound (hereinafter referred to as the Preferred Bidder) filed on the 2nd July 2024;

Having heard and evaluated the testimony of the witness Mr Michael Piscopo (Member of the Evaluation Committee) as summoned by Dr Joshua Grech acting for Mr Antoine Debrincat;

Having heard and evaluated the testimony of the witness Mr Antoine Debrincat (Representative of the Appellant) as summoned by Dr Joshua Grech acting for Mr Antoine Debrincat;

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 19th November 2024 hereunder-reproduced.

Minutes

Case 2036 – MGP EQ 41/2024 – E-quotation for the hiring, installation and operation of a PA Address System for ‘Charles Buttigieg in Concert 2024’ taking place at St Lucija, Kercem, Gozo

The tender was issued on the 28th May 2024 and the closing date was the 11th June 2024

The estimated value of this tender, excluding VAT, was € 9,500.

On the 24th June 2024 Mr Antoine Debrincat on behalf of Pro Stage Sound filed an appeal against the Ministry for Gozo and Planning objecting to the award of the tender on the grounds that the preferred bidder did not have the necessary equipment to fulfil the contract.

A deposit of € 400 was paid.

There were two bids.

On the 19th November 2024 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Mr Keith Grech as members convened a virtual public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Pro Stage Sound

Dr Joshua Grech	Legal Representative
Mr Antoine Debrincat	Representative

Contracting Authority – Heritage Directorate within the Ministry for Gozo and Planning

Dr Tatiane Scicluna Cassar	Legal Representative
Mr Michael Piscopo	Evaluator
Mr Christopher Pisani	Secretary Evaluation Board
Mr John Xuereb	Representative
Mr Daniel Sultana	Representative

Preferred Bidder – Power Sound

Dr Jonathan Mintoff	Legal Representative
---------------------	----------------------

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Joshua Grech Legal Representative for Pro Stage Sound (Pro Stage) said that before hearing the appeal it must be recorded that the appellant had made a request to be provided with technical details. After a second request details of four items of equipment had been provided and he is now requesting further details of other equipment offered by the preferred bidder.

Dr Mintoff Legal Representative for Power Sound asked under which Public Procurement Regulations (PPR) the request was being made.

Dr Grech referred to the Court of Appeal *South Lease* case and said that appellant was only interested in the equipment offered and nothing else. Appellant maintains that the preferred bidders offer was not up to specifications and hence the need for this information.

Dr Tatiane Scicluna Cassar Legal Representative for the Ministry said that appellant's request was too wide ranging and there was no legal basis for it.

Dr Mintoff then pointed out that a preliminary point had been raised by the preferred bidder and this should be discussed first. The lack of detail in the appeal led one to believe that this was a fishing expedition and any further documents being requested were beyond the original grievance and were not justified.

The Chairman directed that the preliminary pleas be heard first and decided thereon together with appellant's request.

Dr Mintoff outlined the two pleas. The second is that the objection is very limited and restricted and referred to PCRB Case 1946 which held that the objection had to indicate clear and decisive grounds of appeal. The first plea is raised on a breach of Article 34 of the Commercial Code.

Dr Grech agreed that the appeal could have been worded in a more formal and detailed form – nonetheless the appeal still has to be dealt with on the basis made as the necessary elements are there. There was no infringement of commercial sensitivity in asking for the type of equipment offered.

Dr Scicluna Cassar said that the Contracting Authority maintains that the appeal is based on supposition and hypothesis. It is merely based on what the appellant thinks and there is no substance in the claim. The PPR limits what information can be provided and it would be prejudicial to the preferred bidder to go beyond that.

Dr Mintoff pointed out that the claim could have been made under Regulation 40 of the PPR if the appellant had any doubts. In any case the request was submitted late.

Dr Grech reiterated that the appellant was only requesting information on the equipment. The Court of Appeal decision supports such a request. The time period in the tender was insufficient to allow the proper process to be followed.

At this stage the Chairman said that the Board will recess to consider the points made.

On resumption the Chairman stated that having heard the arguments put forward by all the parties concerned, the Board would emphasise that its decision must take into consideration the form the appeal was tabled.

Regulation 270 is very clear in what is required both as to the time frame and the details that are necessary.

The Board also takes note of the request for information by the appellant. It is important to note that the appellant did not make a request for information during the ten days stipulated in Regulation 270. Therefore, as a starting point one must consider if appellant's request was tabled late. The grievances raised in the appeal also determine whether there is an entitlement to that information. At this stage the appellant cannot request information, even if not confidential, if this does not tally with the submitted grievances.

The Board feels that at this stage the information which the appellant is entitled to is the brand name and model number of the Wireless Microphone System, which is:

Brand – Sennheiser, Shure, AKG

Model – G4, Axient, WMS4500.

Notwithstanding this, the Board refers to the important point that information must be requested within the ten day term stipulated in Regulation 270. Additional information may only be provided in circumstances where, for example, appellant becomes aware of a new grievance which was not known during the statutory ten days.

Regarding the preliminary pleas raised by the preferred bidder, that is the breach of Article 34 of the Commercial Code and Regulation 270 of the Public Procurement Regulations, the Board is reserving its final decision until the entire case has been heard in line with the Court of Appeal (Superior Jurisdiction) decision in the case *Support Services vs Agenzija Sapport*.

The Chairman then directed that the merits of the case be heard.

Dr Grech requested the hearing of witnesses.

Mr Michael Piscopo (308398M) called to testify by the Appellant stated on oath that as one of the evaluators in this tender he had ascertained that the preferred bid was compliant with the tender terms. He had compared and checked the submissions against the data sheets which indicated that all items requested would be provided. All details on equipment inputs were as requested. The preferred bidder offered two mixers when the tender requested a professional mixing deck with an

input of 132 channels. Power Sound offered two mixers of 96 channels each and to meet the required 56 output busses it offered two by 48 busses. Instead of 24 output matrices Power Sound offered two by 16 matrices. The microphones provided were as detailed in items 97 to 100 on page 15 of the tender dossier. The preferred bidder provided the requested items throughout. The fibre connectivity offered was as requested and it was the view of the Evaluation Committee that the offer of more than one mixing deck was acceptable.

In reply to questions from Dr Mintoff, witness replied that he has a technical background with qualifications in electronics. Witness re-iterated that in the Evaluation Committee's view it was just as effective to have two instead of one mixers so long as the inputs and the outputs were met.

Mr Antoine Debrincat (18674M) called to testify by the appellant stated under oath that the reason for this appeal was that all his previous complaints on similar grounds had been ignored. The particular microphones required could not possibly be offered as the preferred bidder does not own such microphones. With regard to the fibre connectivity Power Sound offered it but the preferred bidder could not meet. Instead of a mixer of 132 channels the preferred bidder offered 96 with an eight output matrix. Even with the two units combined the output requirement could not be met. Output cannot be increased by using two inputs. Witness stated that he has been operating in this sector since 1996.

Replying to questions from Dr Mintoff witness stated that he was qualified in Sound Engineering with qualifications from the United Kingdom and Germany. The whole point of this appeal was that the offer of the preferred bidder did not meet the tender specifications with offers of two decks in one mixer and eight matrices when 24 were expected. Witness confirmed that he was a direct competitor of the preferred bidder.

In reply to a question from Dr Scicluna Cassar, witness said, with reference to the microphones, that he had followed the specifications in items 97 to 100 on page 15 of the tender document.

This concluded the testimonies.

Dr Grech said that witness Mr Debrincat had indicated clearly and in detail the difference between the two offers as for example in the mixers. The specifications in the tender were particular due to the type of event and the equipment offered by the preferred bidder does not give the results expected on an event of international standing. The requested specifications were not met by the offer of Power Sound. It is up to the PCRB to compare the offers as it has the full facts before it.

Dr Mintoff stated that the Board must examine the appeal points in the light of the objection. Mr Piscopo's testimony is vital as he confirmed that more than one mixer still met the objectives of the tender – the technical offer makes this clear and is perfectly acceptable as the PPR allows equivalent offers. Regulation 90 *et sequitur* of the PPR gives the power to the appellant to request the appointment of a technical expert but the appellant cannot act as the technical expert himself. The testimony of the appellant is not gospel. The Note 2 facility was available to the Evaluation Committee to ask for clarification but they did not feel the need to use it. This appeal is merely an attempt to change and widen the terms of the tender.

Dr Scicluna Cassar said that one must consider if everything was up to the specifications at the time of the event. Appellant seems to be certain of what the preferred bidder offered and based his grievance on this and on past events. The role of the Evaluation Committee was to verify that specifications offered were compliant. Article 6.1 in the tender requested the cheapest compliant offer and was correctly awarded. The appeal was wrongly formulated as it ignored the possibility of

equivalent equipment. It was confirmed that the fibre connection was provided and the matter stops there. The second grievance regarding the microphones was misguided as the tender specifications gave only a guide as to what was required – both bidders offered appropriate microphones. The appeal should be denied.

Dr Grech commented that the technical list in the tender is clear and is there for a purpose.

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

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 19th November 2024.

Having noted the objection filed by Pro Stage Sound (hereinafter referred to as the Appellant) on 24th June 2024, refers to the claims made by the same Appellant with regard to the tender of reference MGP EQ 41/2024 listed as case No. 2036 in the records of the Public Contracts Review Board.

Appearing for the Appellant:	Dr Joshua Grech
Appearing for the Contracting Authority:	Dr Tatiane Scicluna Cassar
Appearing for the Preferred Bidder:	Dr Jonathan Mintoff

Whereby, the Appellant contends that:

- a) The awarded contractor (namely Power Sound) does not have the requested fibre connection for the mixer and for the stage racks. Moreover, if he still acquires the requested fibre connection, he cannot connect all the racks with fibre thus the contractor should be ineligible to work the event.
- b) Second point, Power Sound does not have the requested microphones for the classical singers (Wireless W/RC Colette Stand & Wireless w/R2C KC Colette Stand) as requested on the quotation document.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 25th June 2024 and its verbal submission during the hearing held on 19th November 2024, in that:

- a) As regards to the first grievance presented by the Appellant, that is, that the awarded Contractor does not have the requested fibre connection for the mixer and for the stage racks, the Technical Evaluation Committee hereby submits that the said requisite is a general configuration detail that can be considered as a standard practice across the industry, with the equipment allowing for custom configurations, leading to solutions where the said mixers can be adapted to the Contracting Authority's requirements needs, including the use of the said fiber connection/configuration. Indeed, the specifications as drafted by the Contracting Authority and published in the open call for quotes allows for any alternative/open fiber solutions, depending on the type/model/features of the equipment quoted, with the intent to open the specifications to the wider market and not restrict the call to specific configurations/brands/types of sound systems. In view of the above, sustained also by the fact that the Contractor (through the Technical Questionnaire) has fully endorsed and confirmed its alignment to the administrative and technical terms and conditions, the Technical Evaluation Committee sustain its position/decision that with regards to this detail, the offer submitted by Recommended bidder is considered as fully technically compliant to the published specifications.
- b) As regards to the second grievance of the Appellant, the Contracting Authority contends that there is nothing in the tender document that requests the bidders to have microphones for classical singers. The Wireless w/RC Colette Stand and Wireless x/R2C KC Colette Stand that has been mentioned by the Appellant are just types of microphones that are limitedly being referred to in the tender document as part of the 'Input List'. This means that the system (mixers) requested, besides the other types of inputs, also needs to have an input possibility for such type of microphones and not in any way requesting the bidders to also provide Wireless w/RC Colette Stand and Wireless x/R2C KC Colette Stand.

In fact, page 12 of the Tender document, clearly states that as regards to the Microphones, the following specifications apply:

"Wireless Microphones / Instruments

- *Wireless Receiver Inputs listed must be setup with a dual antenna and a splitter feeding all receivers.*
- *Wireless Systems must operate in the range 470 - 862 MHz"*

Therefore, after the Technical Evaluation Committee took into consideration the above-mentioned technical requirements and the microphones submitted by the Recommended bidder, it considered the latter as being fully technically compliant to the published specifications.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 2nd July 2024 and its verbal submission during the hearing held on 19th November 2024, in that:

- a) Preliminary - Breach of Article 34 of the Commercial Code

- i. Reference is made to the grievances raised by the Objector. From the outset, the statements made by the Objector, who is a competitor in the same industry as Power Sound, are not only erroneous but also allegedly made in bad faith, rendering such statements in breach of inter alia Article 34 of the Commercial Code (Chapter 13) of the Laws of Malta. Furthermore, the statements put forward by the Objector are unfounded and manifestly incorrect.
 - ii. Following a thorough review, it is evident that the objection is based on unsubstantiated claims and lacks the necessary evidence to support its allegations. The Objector has failed to provide specific and credible evidence to substantiate their claims. According to Regulation 270 of the Public Procurement Regulations, objections "shall contain in a very clear manner the reasons for their complaints.", and factual. The absence of clear reasons and the relative evidence in the objection filed by the objector renders it baseless, speculative and unsubstantiated. So much so that the nature of the objection suggests an attempt to delay the procurement process without valid grounds. Such conduct does not reflect the law nor the spirit of the law.
- b) Alleged non-compliance of the Preferred Bidder's bid -

The main 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 Preferred Bidder 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 and therefore the Appellant cannot carry out assumptions on such bidder when it does not have any information about it. Additionally, the Preferred Bidder 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.
- c) Technical Bid - Changing of parameters -

Indirectly, through its Objection, the Objector is seeking for the Contracting Authority to divert from the established (Technical parameters) selection and award criteria at post-submission stage. The principle of equal treatment emanates from the EU legislative instruments and from CJEU case law. The Preferred Bidder must point out that if the Objector had any issues about the Selection and Award Criteria, it had the opportunity and remedy to either seek clarifications or submit a call for remedy prior the closing date of submission of offers, as per Regulation 262 of the PPR.
- d) Other issues raised by the Objector -

The Objector argues, and requests this Honourable Board to carry out further verifications over and above those carried out by the Evaluation Board, by alleging that the Preferred Bidder does not have "microphones for the classical singers". Nowhere in the quotation dossier, is there any

technical parameters for 'microphones for the classical singers'. It has to be stressed that the Preferred Bidder provided all the requested documentation, which documentation was fully compliant with the selection and award criteria.

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 as follows in their entirety.

a) **Preliminary pleas –**

As already stated in the oral decree, Regulation 270 of the Public Procurement Regulations ("PPR") clearly 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). Therefore, this Board is adamant that the only grievances it will consider and decide upon are those which were raised in the objection letter filed with the Public Contracts Review Board on 24th June 2024. In summary, these refer to the 'fibre connections' as well as the alleged lack of 'microphones for the classical singers'.

b) **Fibre Connections** – the preferred bidder duly included these in its offer. Once no proof was provided by the appellant to support his own claim that the preferred bidder 'does not have the requested fibre connection', this Board opines that it is not to consider this grievance any further.

c) **Microphones** – this Board notes that the preferred bidder duly submitted what was requested in this procurement procedure. Again, this Board also approved the circulation of details such as the brand and model of the microphone offered by the preferred bidder and no arguments were made to substantiate the claims made.

d) **Mixers (Output & Input)** – as stated during the hearing, Regulation 270 is adamant that clear reasons need to be listed for the complaints being made. In the letter of appeal, absolutely no reference is made to this issue of 'outputs & inputs' for the mixers offered. Hence, this Board opines that it should not delve any further on this 'new' grievance that the appellant tried to introduce post the stipulated ten day period to file an appeal.

Therefore, this Board does not uphold the grievances of the appellant.

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 Keith Victor Grech
Member

Mr Lawrence Ancilleri
Member