

PUBLIC CONTRACTS APPEALS BOARD

Case No. 192

CT/2184/2009; Advert CT269/2009.

ETC Service Tender for the Publicity and Marketing Campaign for the Employability Programme

The closing date for this call for tenders was 10 September 2009. The budget available for this tender was €289,600 excluding VAT.

Five (5) different tenderers submitted their offers.

On 21.12.2009 Outlook Coop filed an objection against the intended award of the tender in caption to JP Advertising Ltd.

A public hearing was convened at the Board Room of the Department of Contracts to hear evidence in the above case on Wednesday 14th April 2010. The Public Contracts Appeals Board (PCAB) was made up of Mr Anthony Pavia (Chairman) with Mr Edwin Muscat and Mr Carmel Esposito, respectively, acting as members.

Present for the hearing were:

Outlook Coop

Mr Godfrey Kenely	Managing Partner
Mr David Bezzina	Representative

JP Advertising Ltd

Mr Chris Bianco	Representative
Ms Audrey Abela	Representative

Employment and Training Corporation (ETC)

Dr Ivan Gatt	Legal Representative
Mr Willie Spiteri	Adviser (contracts) to ETC

Evaluation Board

Mr Louis Cuschieri	Chairman
Mr Felix Borg	Evaluator
Mr Joseph Cutajar	Evaluator
Mr Tonio Montebello	Evaluator
Mr Martin Casha	Secretary

Department of Contracts

Mr Francis Attard	Director General
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The Chairman PCAB explained that following the first hearing of this case, Mr. Alfred Triganza who had chaired the first meeting felt he should abstain from taking further cognizance of this appeal and consequently asked the administration to appoint a substitute in his stead to chair the fresh hearing of this case. Mr Pavia stated that he has been appointed chairman of the PCAB with the specific assignment to preside over this case.

Dr Ivan Gatt, legal representative obo of ETC, asked for the reason why the PCAB, as composed during the first hearing, felt that it should not decide on this case and that there should be a fresh hearing before another appeals board. Dr Gatt requested this information so as to ascertain that the circumstances and/or conditions that rendered the first hearing null did not prevail at this second hearing.

Mr Pavia reiterated that the Chairman of the PCAB had felt that he should not preside over this specific case and had asked to be temporarily replaced. Mr Pavia informed those present that there were no circumstances that precluded the PCAB in its present formation from considering this appeal.

Mr Pavia informed the parties concerned that whatever had been submitted during the first hearing was being entirely discarded and ignored and he therefore invited them to make fresh submissions on which the PCAB would base its decision.

Dr. Gatt expressed his reservations that since two members of the present board had already been present during the first hearing they could already be biased by what had been heard and discussed before.

Dr Gatt had nothing further to add but to request that his observations should be put on record.

The Chairman invited the appellant to explain the motives of the objection.

Mr Godfey Kenely, on behalf of Outlook Coop explained that they were basing their objection on two counts, namely on television advertising and on the allocation of a contingency provision.

Television Advertising: Mr Kenely explained that there were three main local television stations, namely Television Malta (TVM) with 32% audience share, One TV with 14.7% and NET TV with 5.6%. He added that given the net superiority of TVM in terms of audience share his firm had concentrated its television advertising proposal on TVM spots so as to reach out at the largest audience possible. Mr Kenely remarked that what mattered most was not the number of TV spots but rather their quality in terms of choice of TV stations and the time/s the spots were aired, i.e. prime time as against lean time.

Mr Kenely submitted that on comparing the number and quality of the spots proposed by his firm with those proposed by the recommended tenderer they found out that in terms of audience coverage the ratio worked out at 69:31 meaning that although the recommended tenderer included a larger number of TV spots the audience covered

was inferior to the TV spots presented by his firm. Mr Kenely claimed that although both bidders allocated about 50% of the budget, or about €100,000, towards TV promotion when one looked at the way the adjudication board awarded the points one would note that this did not reflect the importance given to TV promotion so much so that such items as ‘stationery’ and ‘newspapers’ were given the same weighting. Mr Kenely then quoted from page 50 of the tender document ‘Item 5 – Television Spots’:

TV spots shall be commissioned to promote the scope of the project on at least the three TV stations in Malta with the highest recorded viewing audience (as per Broadcasting Authority Survey)..... The contractor is to guide the Beneficiary accordingly as to the most suitable airing times, recommended duration of adverts and any other variables involved.

Mr Kenely maintained that in spite of the weightings as worked out by the adjudication board still his firm had quoted a price cheaper than that quoted by the recommended tenderer. He said that he got certain details on the tender submitted by the recommended tenderer from the information available on the website of the Contracts Department.

Contingency Provision: Mr Kenely remarked that the recommended tenderer included an amount of €7,000 for contingencies which, according to instructions they had received from the Department of Contracts in connection with other tenders, should not have been included in a service tender since provision for contingency was requested for works tenders. He added that in a service contract bidders had to cost all the items submitted in their offer and that there was no room for contingencies.

Dr Ivan Gatt, obo the ETC, said that he was going to leave the technical aspects of the contract to the technical members of the adjudicating board however from the legal and general points of view he submitted the following:

the appeal was inadmissible because the appellant was not complaining that he was treated unjustly or differently from the other bidders or that the criteria used were discriminatory in his regard but the appellant was lamenting because he felt that the adjudication board should have used a different set of criteria;

it was up to the contracting authority to establish the adjudication criteria and it was its duty to apply such criteria uniformly with all the participating tenderers;

the PCAB was not meant to substitute the contracting authority or the adjudicating board in the sense that the PCAB should dictate to the adjudication board the criteria that had to be applied;

the PCAB’s task was to ensure that the adjudication board conducted a fair and transparent adjudication process that was equitable to all the participating tenderers; and

the members of the adjudication board had carried out their evaluation independently and had submitted all the detailed workings that had led to the final recommendations indicated in the adjudication reports.

The Chairman PCAB, remarked that, if required, the PCAB had the right and the duty to go into the entire tendering process, including the criteria adopted and applied by the adjudication board and if it turned out that any criteria were defective then the PCAB was duty bound to submit its comments thereon stopping short of dictating its own criteria to the adjudication board. He added that this was more so if the criteria had not been published in the call for tenders. Mr Pavia agreed that the PCAB could not replace the adjudication board.

Mr Martin Casha, secretary to the evaluation board, explained that the evaluation grid formed part of the tender document and that the grid spelled out the following evaluation criteria, i.e. rationale carried 10% of the marks, strategy carried 40% and 'timetable and quality of activities' carried 50%. He added that the Contracts Department had vetted the tender document prior to publication. Mr Casha remarked that at its first meeting the adjudication board had sub-divided the three evaluation criteria in the grid into number of items and the adjudication board allocated marks to each and every item as demonstrated in the workings in the evaluation report. Mr Casha further explained that the three board members carried out their evaluation individually and the marks given were backed by an explanatory note and the final mark was the average of the marks given by the three evaluators. Mr Casha added that the contracting authority did not specify the airing times of the adverts but left it up to the bidders to guide it regarding the most suitable airing times to reach out to the categories specified in the tender, which included the unemployed, employers and the general public.

Mr Casha remarked that the contracting authority did not attach an estimate to the different advertising media indicated in the same call for tenders but indicated a global amount with the aim of leaving the bidders at liberty to design their publicity structure as they deemed most fit without the imposition of restrictions on the part of the contracting authority, i.e. a bidder could have allocated 50% of the budget to newspapers ads rather than TV spots. He reiterated that the criteria upon which the adjudication board had based their work had formed part of the Tender Document and were not formulated by the adjudication board at the time of evaluation.

As regards Mr. Kenely's remark that his company had quoted the cheapest bid Mr Casha commented that the points on this subject had been worked out according to a formula applicable to all bidders and that in fact the appellant company had been allocated the highest score in this respect.

Mr David Bezzini, on behalf of Outlook, remarked that their main contention was about the fact that TV spots represented 50% of the contract value but this did not reflect itself in the distribution of marks among the different evaluation items. Mr Bezzina opined that could have happened through an oversight on the part of the adjudication board or for some other reason.

Mr Kenely remarked that according to the regular research conducted by the Broadcasting Authority the viewing audience share was as follows: TVM with 32%, ONE TV with 14.7% and NET TV with 5.6%.

Mr Pavia observed that the appellant was claiming that he concentrated his TV spots at prime time on TVM, which had by far the highest viewership, and asked what weight was given to this aspect of the evaluation.

Mr Tonio Montebello, marketing manager at ETC and evaluator, under oath, gave the following information:

- Marketing was carried out with the aim of reaching out to the biggest audience that one intended to target and that was exactly what the five participating bidders set out to do in their submissions in response to this call for tenders;
- the evaluators found the strategies presented by both Outlook and JP Advertising very valid in content and the number of points awarded to these two bidders clearly showed this fact;
- the evaluation board had to find or to develop a method whereby to award points on the different media that had been proposed to transmit the message of this advertising campaign, such as newspapers, magazines, websites, radio, posters and TV;
- one of the criterion was the allocation of 12% of the 50% - assigned to the Publicity (and flexibility) Schedule - to TV spots which criterion was applied to all bids;
- the strategy of both JP Advertising and Outlook with regard to TV adverts covered the three main TV stations and the airing times chosen were such that they both adequately covered the audience that the contracting authority had in mind and hence, given that both strategies were deemed quite valid, the evaluation board had to establish a variable for the award of a number of points and the variable used across the board was the number of TV spots proposed;
- the two bidders proposed such a mix of TV stations and airing times - from prime time to lean time and from morning to afternoon to evening and late evening - that they would hit the different audiences that the contracting wanted to target, which included particular sectors, such as housewives, employers, unemployed besides the general public;
- If a tenderer had proposed all the TV spots at prime time or on one or two particular TV stations only, the evaluation board would have considered such a strategy as deficient because it would not have covered the full spectrum of the desired audiences and would have lost points with regard to strategy and implementation;
- A marketing campaign had to be evaluated not on one particular aspect – TV advertising was only one promotional medium - but in a holistic manner because different advertising media were directed at different audiences; and

- The evaluation board tried to be as objective as possible in its deliberations, for example, with regard to radio spots, the evaluation board awarded the same number of points for quality since the radio advert itself was not available for examination whereas it awarded different marks to JP Advertising which offered 2,994 spots and to Outlook which offered 2,520 spots. Mr Montebello remarked that the evaluation board could not go into minute details by examining each and every radio spot with regard to airing time, radio station and so forth considering the number of radio stations and the number of spots involved otherwise it would have been a never ending exercise. Likewise, both bidders offered different notepads and hence were not awarded the same number of points.

Mr Bezzina pointed out that notwithstanding the greater number of spots proposed by the recommended tenderer and that his firm had allocated more prime time TV spots the prices quoted were €80,000 by Outlook and €105,000 by JP Advertising, meaning that both were reaching out at more or less the same audiences with the recommended tenderer having to pay an additional €25,000. Mr Kenely remarked that this had to be seen in the light that 50% of the budget was earmarked for TV advertising.

With regard to price, Mr Casha remarked that the price quoted by the appellant was about €8,000 cheaper than that of the awarded tenderer and that reflected itself in the points awarded such that Outlook was given 16.91 and JP Advertising got 16.39.

Mr Casha stated that the recommended tenderer opted to quote a contingency provision of €7,000 which, in his view, was attached to the item marked 'others' where bidders were asked to propose items not contemplated in the tender document. He confirmed that the marks were awarded on the total price offered and not on the different items presented to which a specific cost had been attached. In fact, the total price offered by the recommended tenderer was €289,000 which included the contingency of €7,000 and therefore, if anything, JP Advertising was 'penalised' for including this contingency.

Mr Kenely remarked that under 'other items' one could have included innovative means of advertising not included in the tender but 'contingency' in itself was meaningless and without any value because it was not attached to any particular activity and one could have inserted any amount by way of 'contingency' and the penalty that a tenderer would have sustained was of a mere 0.5. He reiterated that according to procurement procedures no contingency should have been quoted in a service tender.

Mr Chris Bianco, on behalf of JP Advertising, under oath, gave the following evidence:

- This tender was to run for a duration of two years during which developments would take place in the marketing sector;

- This advertising campaign was intended to target the registered unemployed, the securely employed, the inactive (mostly housewives or persons of a certain age) and the employers;
- The contingency would be used to effect any adjustments to the campaign to render it more effective or focused should circumstances on the ground so indicate, which corrective or additional measure would be subject to approval by the contracting authority, in other words, no additional services and payment thereof could be effected on the basis of the contingency provision without clearance from the contracting authority and if the contingency was not put to use his company would not receive payment in this respect;
- Regarding 'item 5 TV spots', his firm allocated €35,000 for TVM, €23,000 for ONE TV and €21,000 for NET TV which in itself was proof that all three main local TV stations were included in their strategy and the difference in the number of TV spots on each station reflected the cost of each spot according to the TV station;
- The morning and afternoon adverts were intended to target the inactive and the unemployed with adverts specifically designed towards these two categories, the prime time adverts were to target the employed and the general public whereas the late evening adverts were to target the employers; and
- The appellant was saying that JP Advertising offered 533 TV spots whereas Outlook offered 392 such spots resulting in a difference of 111 spots and noted that the appellant had 52 spots that were to be aired after 11 p.m. when it was likely that these would not reach much viewership. Mr Bianco questioned how the appellant obtained certain information with regard to his bid, such as the airing time of the TV spots.

Mr Kenely responded that the late evening adverts were intended for employers and reiterated that he obtained the information with regard to the offer presented by the recommended tenderer from the website of the Department of Contracts.

Mr Joe Cutajar, project leader ETC and evaluator, under oath, explained that this advertising campaign was directed towards the unemployed, the securely employed, the inactive and the employers and covered a wide range in terms of age groups and level of education and skills. He added that one required a wide range of advertising media to reach all the various categories of the population as indicated in the tender document and hence the inclusion of all those items and the space reserved for bidders to propose their own ideas and to make their own input. Mr Cutajar stressed that the evaluation board carried out its adjudication in the light of all these considerations and in a holistic manner and not solely on TV spots or any other particular aspect of the tender.

Mr Francis Attard, Director General (Contracts), remarked that it was not against the procurement regulations for bidders in regard to services to make a provision for contingency in their offers.

In closing Dr Ivan Gatt concluded that (i) the tender document set out the evaluation criteria and hence bidders were aware of the rules of the game from the very start and (ii) the evaluation board carried out its work in an objective manner and gave an equal treatment to all the participating bidders.

The appellant company's representatives offered no closing remarks.

This Board –

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated 23 December 2009 and also through their verbal submissions presented during the public hearing held on the 14 April 2010, had objected to the decision taken by the General Contracts Committee;
- having taken note of the appellant's claims that –
 - a. on comparing the number and quality of the TV spots proposed by his firm with those proposed by the recommended tenderer they found out that in terms of audience coverage the ratio worked out at 69:31 meaning that although the recommended tenderer included a larger number of TV spots the audience covered was inferior to the TV spots presented by his firm, and that
 - b. although both bidders allocated about 50% of the budget, or about €100,000, towards TV promotion when one looked at the way the adjudication board awarded the points one would note that this did not reflect the importance given to TV promotion so much so such items as 'stationery' and 'newspapers' were given the same weighting. And
 - c. that the recommended tenderer included an amount of €7,000 for contingencies which, according to instructions they had received from the Department of Contracts in connection with other tenders, should not have been included in a service tender since provision for contingency was requested for works tenders.
- having also noted the reservations expressed by the legal representative of the contracting authority regarding the possibility that the circumstances that led to the previous chairman to forego taking further cognizance of the case might also apply to the Board as specifically appointed to investigate the case anew, and that there might already exist a bias in the Board's mind considering that what had already been heard and discussed between the previous Board's member cannot simply have been forgotten.
- the PACB also noted the legal representative's contention that it was not empowered to go into the criteria that the evaluation board had used to evaluate the case and also that it was not there to replace the adjudication board's discretion.
- Having taken note of Item 5 of the Tender Document which was mentioned by both sides and runs as follows- "*TV spots shall be commissioned to promote*

the scope of the project on at least the three TV stations in Malta with the highest recorded viewing audience (as per Broadcasting Authority Survey)..... The contractor is to guide the Beneficiary accordingly as to the most suitable airing times, recommended duration of adverts and any other variables involved;

- Having heard and taken note of the evidence of members and secretary of the Evaluation Board particularly as regards that -
 - i. the evaluation criteria had been published in the Tender Document itself,
 - ii. the modus operandi of the board, i.e. that marks had been given individually according to the grid as laid down in the Tender Document and later averaged out to create an objective mark,
 - iii. the contingency amount as offered by JP Advertising could be attached to the item 'others' as allowed in the Tender Document
- Having heard the representative of JP Advertising saying that his company had constructed the proposed TV coverage based on the three TV stations which attracted the highest viewership as laid down in item 5 of the Tender Document and also his remarks that the appellant's company proposal to channel a substantial amount of the budget to advertisements after 2300 hours might not make much sense.
- Having taken note of the Director General's statement that the item of contingency as offered in the bid by JP Advertising may be allowed:

reached the following conclusions, namely:

1. None of the circumstances that instigated the former Chairman to abstain from taking further cognizance of the case are applicable to the PCAB as specifically constituted to hear the case anew and that such PCAB does not carry forward any bias from the previous hearing particularly since the sentence had not even reached the drafting stage.
2. The PCAB feels it is very significant that the criteria of adjudication had been published in the Tender Document and that, while item 5 of the Document referred to the three TV stations with the highest viewership it did not oblige tenderers to focus on any one single channel but left it to the tenderers to guide the contracting authority as to how the TV campaign should be conducted.
3. Having examined the modus operandi of the Evaluation Board the PCAB is satisfied that the evaluation was carried out in a fair and transparent manner and that no strong evidence has been presented to show that the resulting recommendations were erroneous.
4. The PCAB is satisfied that the contingency amount as offered by the company that had been recommended for the award of tender and about which the

appellant company protested is allowable, particularly as it was established during the hearing that no extra marks were granted by the adjudication board for this contingency and that if anything, the amount inflated the company's bid and therefore worked against them.

As a consequence of (1) to (4) above this Board finds against the appellant Company and decides that the amount deposited in respect of this appeal with the Director General Contracts shall be forfeited to Government.

Anthony Pavia
Chairman

Edwin Muscat
Member

Carmelo Esposito
Member

23 April 2010