

PUBLIC CONTRACTS REVIEW BOARD

Case No. 426

Dept Ref: KMKA 37/11/3

KMKA 37/11/3 - Tender for the provision of lights for the Malta Arts Festival 2012

This call for tenders was published in the Government Gazette on the 24 April 2012. The closing date for this call with an estimated budget of €32,203 (Excl VAT) was the 14 May 2012.

Two (2) tenderers submitted their offers.

Light Sound Vision of ITC Ltd filed an objection on the 15th June 2012 against the decision of the Malta Council for Culture and the Arts with regard Lot 3 which has been recommended for award to Nexos Lighting Technology.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr. Carmel Esposito and Mr Joseph Croker as members convened a public hearing on Monday 25th June, 2012 to discuss this objection.

Present for the hearing were:

Light Sound Vision of ITC Ltd

Dr Malcolm Mifsud	Legal Representative
Mr Adrian Figallo	Representative
Mr Mario Camilleri	Representative

Nexos Lighting Technology

Mr Keith Chetcuti	Representative
Mr Silvio Scerri	Representative

Malta Council for Culture & the Arts

Dr Mark Bencini	Legal Representative
Dr Tania Sciberras Camilleri	Legal Representative
Mr Mario Frendo	Artistic Director

Evaluation Board

Ms Davinia Galea	Chairperson
Mr Noel D'Amato	Member
Mr Martin Gauci	Member
Mr Anton Miceli	Member
Ms Bernardette Glanville	Secretary

After the Chairman's brief introduction, the representatives of the appellant company were invited to explain the motives of their objections.

Dr Malcolm Mifsud, representing Light Sound Vision of ITC Ltd, the appellant company, submitted that:-

- i. their grievances dealt with the scorings given in this tender;
- ii. they failed to understand why, for the sake of transparency, the contracting authority did not provide the full scorings obtained by both tenderers considering the fact that these did not contain any sensitive information of a commercial nature;
- iii. this objection was filed in respect of Lot 3 only since his clients were awarded Lots 2 (Couvre Porte, Birgu) and 4 (St Lawrence Church, Vittoriosa) and Nexos was the recommended tenderer for Lots 1 (Argotti Gardens, Floriana) and 3 (Palazzo Depiro, Mdina) whilst Lot 5 (Castille Courtyard, Valletta) was cancelled;
- iv. the points given for different lots were inconsistent even though the work involved was the same;
- v. his client obtained the following points for *Organisation and Methodology* under Lot 3

<i>I Rationale</i>	<i>Points</i>
Demonstration of understanding of the work involved and understanding the contract	22
Demonstration that applicant and his staff have a good understanding of any problems that may arise and are in a position to solve them	21

It was argued that if they understood the work required for Lots 2 and 4 they should have understood also that for Lot 3 because although such work had to be carried out at different places the nature of work for each lot was the same. They were of the opinion that once his clients were recommended for other lots they should have the same understanding for Lot 3.

<i>II Strategy</i>	<i>Points</i>
Outline of approach which must be creative and technical according to the tender requirements	22
The provision of equipment, layout and design are according to the tender specifications and conducive to the nature of performance	19

It was claimed that they should have been given more points because every tenderer had to abide by the requirements of the tender because these were listed. Furthermore they had to provide the list of equipment indicated in the tender.

<i>III Timetable of activities</i>	<i>Points</i>
Schedule planning and timing is realistic	13

It was pointed out that tenderers were obliged to abide by the detailed schedule.

<i>IV Human Resources</i>	<i>Points</i>
Demonstration that the applicant is engaging a sufficient number riggers and operators to carry out the work tendered for.	12
Demonstration that the applicant's Key Experts enjoy sufficient qualification and experience to perform the role assigned to such Experts.	20

His clients had sufficient riggers to carry out such work. It was observed that once they had 'Key Experts' for the same job in other lots they should have been considered capable of performing the role assigned to them in this lot.

<i>IV Previous Conduct</i>	<i>Points</i>
Penalisation for total or partial non-performance in awards granted to applicant in the previous one (1) year.	34

It was sustained that his clients were always paid in full and they never received any written 'default notice' for works carried in the previous year. The only problem concerned a mixer which was solved immediately.

Dr Tania Sciberras Camilleri, legal representative of the Malta Council for Culture and the Arts, remarked that:-

- the appellant company tried to substantiate the ground of the appeal only today since in their letter of objection it was simply stated

"My clients submit that from the score sheet presented to them there are discrepancies on the scores given and the logic used by the adjudication board to arrive to its decision."

- the request by the appellant company to the Public Contracts Review Board to award the tender in caption to them was beyond the Board's remit with their only possibility being that, at least, they should have requested the said Board to cancel the tender
- the discrepancies on the scores given show that the appellant company did not understand that this tender consisted of different performances – Lots 1, 2 and 4 represented similar performances and the lighting requirement were the same but, as far as Lot 3 was concerned, this had a particular requirement because this consisted of a set of four short plays whereby attendees had to go from one room to another after each performance and each had its own lighting requirements as stipulated in the tender document
- during the evaluation process the adjudicators requested more information from tenderers with regard to the number of light operators that would be available for each performance – Light Sound Vision indicated one particular person while

Nexos indicated three persons (during the course of the hearing it was established that they had indicated two operators). She emphasised that they definitely required more than one person since during a performance another person was required to prepare for the next performance. It was claimed that the lighting requirements for each performance were different and this was reflected in the markings given.

Ms Davinia Galea, Chairperson of the Evaluation Committee and Executive Director of the Malta Council for Culture and the Arts claimed that :

1. unfortunately, it emerged that the appellant company did not understand the nature of what was required in the tender;
2. consideration was taken of the experience of the operator in a similar show held last year - the contracting authority had problems with a less complicated performance and this impinged on the marks given by the evaluators;
3. all equipment required had to be available in full capacity during rehearsals and performances;
4. although the appellant company won other tenders/ lots they had to deliver according to the nature of the performance;
5. in reply to a specific question by the Review Board, the Chairperson said that, apart from these two tenderers, there were other potential contractors who were in a position to render the service required in Lot 3.

Dr Mark Bencini, the other legal representative of the Malta Council for Culture and the Arts, said that:-

1. the reason why the appellant company obtained 13 points out of 15 under 'Timetable of Activities' was that it was not possible for any bidder to act in accordance with the timetable of activities if sufficient riggers or light operators were not provided because two of them had to be in different rooms, concurrently, as each play had to be performed sequentially;
2. they were not stating that the appellant company was not capable of carrying out this type of work but that the said company did not understand the scope and nature of the tender;
3. if the appellant company understood that there were four set ups they would not have indicated one operator but at least two;
4. if the appellant company's representatives did not understand something in the tender document these should have sought a clarification;
5. With regard to 'IV Human Resources', the reason why Light Sound Vision obtained 12 points out of 30 in respect of riggers and operators was that they did not propose sufficient number light operators. They obtained only 20 marks for 'Key Experts' because they proposed last year's same person whose performance was not satisfactory.

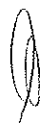
Dr Mifsud rebutted that, with all due respect, it was the contracting authority that did not understand the nature of the tender and not his clients because, although they indicated one light operator, this did not mean that they were going to send one person because for such events there was a whole set up behind the light operator. They were aware that, in view of the nature of the work involved, one light operator could not work by himself/herself. The appellant company's legal representative said that the appellant company had satisfied all the criteria of the tender document.

In reply to a specific question by the Public Contracts Review Board, Ms Galea said that the appellant company was compliant but she reiterated that they did not understand the nature of what was required.

Mr Adrian Figallo, Operations Manager, Light Sound Vision, remarked that:

- the technical fault referred to by the contracting authority's representatives was solved immediately;
- last year's responsible operator of the Malta Council of Culture and the Arts was a foreign lady who was young and inexperienced;
- the technical consultant of the Culture Department was Mr Gerald Agius Ordway who previously worked in the background with Nexos (Following this claim made during the public hearing the Public Contracts Review Board drew the attention of Mr Figallo that if the appellant company had any reservations it should have raised the issue before the closing date of the tender and not at this stage. It was also pointed out that, on the basis of the fact that the Public Contracts Review Board had no concrete evidence of what was stated, the said Board was not going to take cognizance of such statements);
- they had to ask questions of a technical nature to understand the tender since there was lack of information about the performances and relative requirements;
- technically speaking, it did not make sense to have one stand-by generator for each of the four rooms and that was the reason why they offered one generator because this was sufficient to cater for all the rooms;
- he categorically denied that they did not understand the tender;
- their 'Key Expert' had vast experience since he was involved in past performances;
- there were other similar occasions in the past wherein they had carried out the required work with one operator and various technicians

Dr Bencini explained that they had asked bidders to indicate the light operator for each stage or set up so that the Malta Council of Culture and the Arts would know who was responsible for each event. He said that they started this praxis with the *Notte Bianca*. Ms Galea intervened to add that they had to ensure that the provider could operate and do the job within the schedule. She said that they definitely required more than one operator for Lot 3.



When the Public Contracts Review Board asked the contracting authority's representatives to state whether in their clarification it was specified that they needed more than one operator for this particular lot the reply given was in the negative. However, Dr Sciberras Camilleri explained that there was a requirement for the generator and operator per performance. It was confirmed that it was physically impossible for one operator to carry out the work in respect of all performances.

At this stage Mr Mario Frendo, the Malta Council of Culture and the Arts's Artistic Director, was called to take the witness stand to give his testimony. He signed a solemn declaration.

On cross examination by the Public Contracts Review Board, the witness testified that whilst he was responsible for the technical specification and not on the logistical requirements of the tender, yet he said that for this lot it was indispensable to have at least two light operators since the performances were to be delivered in sequence.

The Public Contracts Review Board referred to the clarification sought from Light Sound Vision wherein in the Evaluation Report it was stated that the '*Bidder was requested to indicate the operators of each specific individual lot, after approval was sought from DCC. Contractor complied with this request.*'

Mr Martin Gauci, the Project Manager of the Arts Festival and member of the Adjudication Board, under oath, gave the following evidence:

- a. he explained that they were going to have four different places and in each of the four schedules under the heading Schedule B – Lights at Palazzo de Piro, Mdina they indicated that they required a Stand by Technical/ Programmer, that is, four in all
- b. he said that, ideally, they required four light operators but two were sufficient
- c. he clarified that last year the problems persisted during the performance and, artistically speaking, the event was negatively affected

Mr Silvio Scerri, Nexos Lighting Technology, submitted that:

- whoever read the tender and indicated one operator for each room signified that they had understood the tender but if only one operator was provided this implied that the bidder did not understand the tender since it was logistically and humanly impossible for one to deliver the required service with one light operator;
- they requested a programmer/ technician to avoid what was experienced last year when one of the controllers malfunctioned;
- in order to be in a position to provide a high quality service they needed to engage at least four operators – one in each room

Dr Sciberras Camilleri Sciberras insisted that in the tender document it was specified that they required a 'Stand by Technical/ Programmer as per schedule' for each performance.



Dr Mifsud claimed the tender should have been clear for everyone and should have specified the number of operators required by the contracting authority.

The Public Contracts Review Board sustained that the specifications should be clear enough to ensure that the contracting authority's requirements were met. The attention of Mr Gauci was drawn to the fact that whilst it was stated that the tender required four operators it was clearly stated that two were acceptable.

Mr Scerri intervened to claim that the tender document was so clear that if it were to be examined by a lighting designer a tenderer would have provided four operators. He alleged that the appellant company provided one operator because it had one only. The recommended tenderer's representative contended that Light Sound Vision could not carry out the work tendered for this lot and if they tried to do so they would surely make a mistake. He maintained that perfection was not a detail but a detail made perfection.

Mr Figallo rebutted that it was the recommended tenderer that did not understand the tender because although it was established that the contracting authority required four operators they only indicated two persons which, incidentally, the witness said that two would have been sufficient.

In his concluding remarks Dr Mifsud said that they had spent a whole sitting to determine what was required by the tender. The Public Contracts Review Board needed to establish whether (a) the tender was, in actual fact, clear or (b) based on what the Artistic Director implied, namely that, irrespective of what was submitted, the decision was taken before the adjudication process of the Tender started because it was based on last year's incident.

In reply to a specific question by the Public Contracts Review Board, Mr Gauci said that it was only that part dealing with 'Stand by Technical/ Programmer' that affected his decision because the indicated person was the same operator who was involved in last year's incident.

Dr Sciberras Camilleri denied that the decision was taken *a priori* because it was during the evaluation process that the Adjudication Board noted that the Stand by Technical/ Programmers for every performance was not indicated. However, she contended that they could have satisfied the requirement of the tender with a minimum of two operators. She pointed out that when the tenderers were requested to provide a list of the light operators these were told that

"This information which you should have submitted were mandatory and an integral part of the tender as indicated in the General Instructions to Tender".

Furthermore, Dr Sciberras Camilleri also stated that the operator indicated by the appellant company was the same individual who had been involved in last year's incident. She said that the markings reflected all considerations, that is, the fact that performances were different and the requirements were different for every performance. It was clear that the appellant company did not understand what was required in the tender document. She said that they were prepared to present a copy of the report with regard to the operator, namely Mr John Dougall.

Dr Mifsud objected to this proposal because they were never informed of such a report and, as a consequence, it was not fair for any party to present any such report at this



stage because this was not the appropriate forum. Ms Galea confirmed that it was Mr Gerald Agius Ordway who had drawn up this report.

The Public Contracts Review Board was of the opinion that, for transparency's sake, such a report should have been forwarded to all parties concerned so that they would be in a position to rebut it if they so wished, more so that the contents thereof could negatively affect the scoring in subsequent evaluation of tenders.

Mr Camilleri said that the mixer provided had 48 channels and only half of these were used and, as a result, the Artistic Director could have easily used others. He emphasised that this incident happened during rehearsals and not during the actual performance.

When Dr Sciberras Camilleri remarked that the rehearsals were going to start next week, the Public Contracts Review Board drew her attention that the closing date of the tender was the 14th May 2012 and, as a result, it was highly unfair for anyone to put pressure on this Board forcing its members to feel conditioned as to the decision that needed to be taken. The Public Contracts Review Board argues that the contracting authority should have planned the issue of the tender in advance after taking into consideration the possibility of an appeal.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' filed on the 15th June 2012 and also through their verbal submissions presented during the hearing held on the 25th June, 2012, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant company's representatives' claims and observations, particularly, the references made to the fact that (a) their grievances dealt with the scorings given in this tender, (b) they failed to understand why, for the sake of transparency, the contracting authority did not provide the full scorings obtained by both tenderers considering the fact that these did not contain any sensitive information of a commercial nature, (c) this objection was filed in respect of Lot 3 only since the appellant company was awarded Lots 2 (Couvre Porte, Birgu) and 4 (St Lawrence Church, Vittoriosa) and Nexos was the recommended tenderer for Lots 1 (Argotti Gardens, Floriana) and 3 (Palazzo Depiro, Mdina) whilst Lot 5 (Castille Courtyard, Valletta) was cancelled, (d) the points given for different lots were inconsistent even though the work involved was the same, (e) it is claimed that if the appellant company understood the scope behind Lots 2 and 4 then it was only natural that it fully understood that whilst the work in Lot 3 had to be carried out at different places the nature of work for each lot was the same, (f) the appellant company should have been given more points because every tenderer had to abide by the requirements of the tender because these were listed, (g) the appellant company had sufficient riggers to carry out such work, (h) the appellant company had 'Key Experts' for the same job in other lots it should have been considered capable of performing the role assigned to it in this lot, (i) the appellant company had always been paid in full and it never received any written 'default notice' for works carried in the previous year, (j) although the appellant company indicated one light operator, this did not mean that they were going to send one person because for such events there was a whole set up behind the light operator,

(k) they were aware that, in view of the nature of the work involved, one light operator could not work by himself/herself, (l) they had to ask questions of a technical nature to understand the tender since there was lack of information about the performances and relative requirements, (m) technically speaking, it did not make sense to have one stand-by generator for each of the four rooms and that was the reason why they offered one generator because this was sufficient to cater for all the rooms, (n) there were other similar occasions in the past wherein the appellant company had carried out the required work with one operator and various technicians, (o) the tender should have been clear for everyone and should have specified the number of operators required by the contracting authority, (p) it was the recommended tenderer that did not understand the tender because although it was established that the contracting authority required four operators they only indicated two persons which, incidentally, the witness said that two would have been sufficient and (q) based on what the Artistic Director implied, namely that, irrespective of what was submitted, the decision was taken before the tender was drafted because it was based on last year's incident;

- having considered the contracting authority's representatives' reference to the fact that (a) the request by the appellant company to the Public Contracts Review Board to award the tender in caption to them was beyond the Board's remit with their only possibility being that, at least, they should have requested the said Board to cancel the tender, (b) the discrepancies on the scores given show that the appellant company did not understand that this tender consisted of different performances – Lots 1, 2 and 4 represented similar performances and the lighting requirement were the same but, as far as Lot 3 was concerned, this had a particular requirement because this consisted of a set of four short plays whereby attendees had to go from one room to another after each performance and each had its own lighting requirements as stipulated in the tender document, (c) during the evaluation process the adjudicators requested more information from tenderers with regard to the number of light operators that would be available for each performance – Light Sound Vision indicated one particular person while Nexos indicated three persons (during the course of the hearing it was established that they had indicated two operators), (d) they definitely required more than one light operator since during a performance another person was required to prepare for the next performance, (e) unfortunately, it emerged that the appellant company did not understand the nature of what was required in the tender, (f) consideration was taken of the experience of the operator in a similar show held last year - the contracting authority had problems with a less complicated performance and this impinged on the marks given by the evaluators, (g) all equipment required had to be available in full capacity during rehearsals and performances, (h) although the appellant company won other tenders/ lots they had to deliver according to the nature of the performance, (i) apart from these two tenderers, there were other potential contractors who were in a position to render the service required in Lot 3, (j) the reason why the appellant company obtained 13 points out of 15 under 'Timetable of Activities' was that it was not possible for any bidder to act in accordance with the timetable of activities if sufficient riggers or light operators were not provided because two of them had to be in different rooms, concurrently, as each play had to be performed sequentially, (k) if the appellant company understood that there were four set ups they would not have indicated one operator but at least two, (l) if the appellant company's representatives did not understand something in the tender document these should have sought a clarification, (m) with regard to 'IV Human Resources', the reason why Light Sound Vision obtained 12 points out of 30 in respect of riggers and



operators was that they did not propose sufficient number light operators – they obtained only 20 marks for ‘Key Experts’ because they proposed last year’s same person whose performance was not satisfactory, (n) there was a requirement for the generator and operator per performance, (o) according to Mr Frendo for this lot it was indispensable to have at least two light operators since the performances were to be delivered in sequence and according to Mr Gauci, ideally, they required four light operators but two were sufficient and (p) last year the problems persisted during the performance and, artistically speaking, the event was negatively affected,

- having considered the recommended tenderer’s representatives’ reference to the fact that (a) whoever read the tender and indicated one operator for each room signified that they had understood the tender but if only one operator was provided this implied that the bidder did not understand the tender since it was logistically and humanly impossible for one to deliver the required service with one light operator, (b) in order to be in a position to provide a high quality service they needed to engage at least four operators – one in each room and (c) the appellant company provided one operator because it had one only,

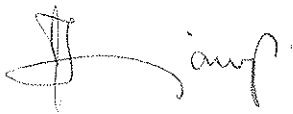
reached the following conclusions, namely:

1. The Public Contracts Review Board argues that if one were to consider the fact that the tender document was supposed to be interpreted in a way that whoever read the tender and indicated one operator for each room would have signified that one would have understood the tender, then it finds it rather difficult to comprehend that, despite this mandatory requirement, the recommended tenderer itself did not seemingly fully understand this requirement as, during the evaluation process, following a request by the adjudicators for more information, the same recommended tenderer indicated three persons albeit the fact that, during the course of the hearing, it was established that they had indicated two operators. Undoubtedly, this has to be also interpreted as the recommended tenderer not having fully understood the scope of this tender.
2. This Board would be inclined to acknowledge the fact that one could argue that it would be logistically and humanly impossible for one to deliver the required service with one light operator, yet the question remains that the tender specifications are not stated for one and sundry to alter them in a way as to fit expediency. The Public Contracts Review Board places emphasis on the fact that a contracting authority cannot change its parameters at deliberation stage but it should strictly adhere to its own initial specifications which, ultimately, would have been those upon which all submissions would have been based in the first place. This Board argues that the tender should have been clear for everyone and should have specified the number of operators required by the contracting authority.
3. This Board accepts the fact that one light operator would not have sufficed in these circumstances and, albeit the appellant company stated during the hearing that although in their submission they had indicated one light operator this did not mean that they were going to send one person because for such events there was a whole set up behind the light operator, yet this Board acknowledges the fact that (a) details should have been part of the submission and not at hearing stage and (b) it is clear that one light operator was not sufficient even though four may have ended up being too much.



4. This Board opines that the fact that consideration was taken by the evaluation board of the experience of the operator in a similar show held last year - the contracting authority had problems with a less complicated performance – made it amply clear that this impinged on the marks given by the evaluators so much so that this ended up depriving the appellant company of a fair evaluation process. Furthermore, the fact that it transpired that a report highlighting certain pitfalls - a copy of which was never referred to or, at least, discussed with the appellant company’s representative/s by the contracting authority in order to allow the latter to record a reply on claims made by the author of the said report – would have adversely contributed towards a less transparent evaluation process than one would normally believe to be acceptable.
5. The Public Contracts Review Board feels that, in view of the inconsistent approach demonstrated by the contracting authority (e.g. deciding that one light operator was not acceptable, deciding that two light operators were acceptable and this when the specifications aimed at four light operators), it is evident that the scoring adversely affected the appellant company’s bid.
6. Nevertheless, the Public Contracts Review Board contends that, all things being equal, both bids failed to match the tender specifications.

In view of the above, this Board recommends that this tender should be cancelled but also recommends that the appellant company should be reimbursed with the deposit paid for the appeal to be lodged.



Alfred R Triganza
Chairman



Carmel Esposito
Member



Joseph Croker
Member

2nd July 2012