

PUBLIC CONTRACTS REVIEW BOARD

Case No. 598

CT 3120/2012

Services Tender for the Design, Preparation, Implementation, Delivery and Evaluation of Training Courses related to the Film Servicing Industry.

The tender was published on the 12th February 2013. The closing date was the 9th April 2013.

The estimated value of the Tender was €156,893.98 (Inclusive of VAT).

One Bidder (1) bidder submitted an offer.

On the 12th July 2013, Malta Film Academy joint venture filed an objection against the rejection of their bid as being administratively non-compliant and the decision to cancel the tender.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Thursday 26th September 2013 to discuss the appeal.

Present for the hearing:

Malta Film Academy joint venture - Appellants

Mrs. Phyllis Muscat	Representative
Dr Aron Mifsud Bonnici	Legal Representative

Malta Film Commission - Contracting Authority

Mr Claude Cuschieri	Chairperson Evaluation Board
Ms Susan Ronald	Secretary Evaluation Board
Mr Bjorn Callus	Member Evaluation Board
Ms Helen Sciberras Brownrich	Member Evaluation Board
Ms Audrey Callus Randich	Member Evaluation Board
Ms Martha Criado	Project Co-ordinator

The Chairman made a brief introduction and asked the appellants' representative to make his submissions on the objection.

Dr Aaron Mifsud Bonnici on behalf of the appellants stated that his clients wanted to air two grievances in their objection, one regarding their disqualification, and the other regarding the cancellation of the tender. These two grievances arise from the principle that any interaction between two parties has to be done in bona fide. His clients were disqualified because it was stated that their offer was administratively non-compliant because they failed to submit a signed copy of a protocol between them and the Malta Qualifications Framework. When his clients had contacted the relevant authority, who had to sign this protocol, it resulted that this was not possible at that stage. The signing could only be done following the establishment of certain criteria that the contracting authority itself had to set together with the contractor who was awarded the tender. As the contracting authority itself had not yet established the parameters on which the certifying authority would eventually issue certificates, appellants found it impossible to abide by this requirement. It is clear that if and when the tender was awarded, the contractor would then have to finalize in detail the course requirements with the contracting authority and then apply for the signing of the protocol.

Clients, whose course was based on the City of Glasgow College course, had communicated with the said College and made them aware of the situation. The College had confirmed that the course was recognized and certified by the corresponding authority in the United Kingdom. Being certified by a member state of the European Union meant that clients could have produced this certification. However any customisation that would be made to the course would subsequently have to be certified by the MQA as well. The fact that clients' bid was deemed administratively non compliant because of something that was impossible to provide really means that it was the contracting authority itself that was administratively non-compliant to other parties who were acting in bona fide. Clients submitted all the above with their bid to the contracting authority.

He then continued that the contracting authority cancelled the tender referring to Article 33.3 (a) which states that a tender may be cancelled when there were no bids that were qualitatively or financially not worthwhile. It is being assumed that this was in reference to clients bid. It is not justified to say that there were no bids. Neither can it be stated that clients' bid was qualitatively not worthwhile, nor that it was financially not worthwhile. Thus tender should not have been cancelled. This cancellation is prejudicial to appellants since should the Board decide favourably the objection, the cancellation would remain.

Mr Claude Cuschieri, Chairman Evaluation Board, for the contracting authority stated that when the evaluation board met to adjudicate the tender the normal procedure was followed. When the criteria were checked it was discovered that seven out of eight submissions of the appellants' bid were correct. However one criterion out of seven was not abided with. The signed copy of the protocol, that had to be submitted with the tender, was missing. At this stage therefore, the evaluation of the bid had to stop because the bid was then administratively non compliant. The evaluation process had to be carried out on the available, submitted documentation, and could not thus be continued. The evaluation board had received no communication about any correspondence between appellants and the Malta Qualifications Framework. The board was not informed that the signed protocol would be produced later. The evaluation board was aware that this would result in wasted resources, and wished to award the tender, but had no other option but to discard appellants' offer. It transpired later that the contracting authority had contacted the Department of Contracts on the matter on the 7th May 2013 seeking clarification on this missing document. However on the 23rd May 2013 the Department of Contracts said that although the appellants were asked

to rectify the matter, up to that date no reply was received from the same appellants. It was then, on the 4th June 2013 that the evaluation board had to decide to formally find appellants non-compliant.

Replying to a question by the Board, Mr Cuschieri stated that as far as he was aware, there had been some contact between the appellants and the Department of Contracts, but the rectification requested by the latter was not produced by the appellants.

Dr Aaron Mifsud Bonnici, replying to a Board question stated that the Contracting Authority wanted a signed agreement between appellants and the certification local authority. Appellants were informed that such an agreement could not be signed before the details and requirements of the course were known, and these details could not be established until the tender is awarded. There could not be any signed agreement on a hypothetical course. The tender document did not provide enough information on which the protocol could be signed. It was for this reason that appellants produced the next best solution, certification for the City of Glasgow College, certification by a European Member State that would be considered as equivalent. These facts were submitted to the Department of Contracts and not to the evaluation board. The only reply appellants received was the notice informing them that their bid was disqualified.

Ms Susan Ronald, secretary evaluation board stated that the tender obliged bidders to establish course content and have it recognized by the relevant authority. The bidder had to propose the course curriculum himself, and again have it recognized by the Qualifications Authorities.

Dr Aaron Mifsud Bonnici stated that he wished to file a letter which unfortunately he did not have at the moment and asked that the appellants be allowed to submit it later on. Appellants had no issue with the evaluation board. Dr Mifsud Bonnici promised to produce correspondence with Glasgow, letter and email exchanges from appellants to Department of Contract and appellants' correspondence with the certification authority.

The hearing was here brought to a close.

Second Hearing

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members reconvened a hearing on Tuesday 22nd October 2013 to continue hearing the appeal.

Present for the hearing:

Malta Film Academy joint venture - Appellants

Mrs. Phyllis Muscat	Representative
Dr Aron Mifsud Bonnici	Legal Representative

Malta Film Commission - Contracting Authority

Ms Susan Ronald	Secretary Evaluation Board
Mr Bjorn Callus	Member evaluation board
Ms Helen Sciberras Brownrich	Member evaluation board
Ms Martha Criado	Project Co-ordinator

Department of Contracts

Mr Jonathan Barbara

Witnesses:

Dr Philip von Brockdorff	Former NCHFE Representative
Mr Peter Busuttil	Commissioner, Malta Film Commission

The Chairman explained that this additional hearing was required because the Board wished to hear the evidence of Dr Philip von Brockdorff as the appellant's bid was disqualified because a signed protocol was not submitted with the offer. In the Board's opinion, such a protocol entailed detailed discussions, during which, the points where the protocol would be adopted be identified. Thus to ask bidders to submit such a protocol within a short time is deemed unfeasible.

Dr Philip von Brockdorff under oath stated that when the tender was being processed, he was the Chief Executive of the National Commission for Further and Higher Education. This is the regulatory body that issues licences to institutions that offer tertiary and advanced levels of education. The Commission also regulates new programmes accredited to it under a legal framework that came into force last year. He defined protocol as a process where the Commission, always according to the Malta Qualifications Framework, evaluates programmes and issues their evaluation. There are several levels for example level 5 is equivalent to a diploma. After this, certificates are issued by the accredited entity, according to the level. Thus a certificate for a course held by the accredited entity becomes recognized both in Malta and the European Union. Thus protocol means a process of accreditation following evaluation according to the Qualifications Framework.

On being asked by the Chairman about the length of the process, Dr von Brockdorff said that the Commission had the services of a lawyer to examine the process according to a legal framework, but this was a lengthy process because the evaluators had to examine the application in great detail. Learning outcomes have to be gone into with great detail. Furthermore the Commission uses evaluators who are specialists in the specific subjects, and these evaluators are difficult to find. It is because of this that a length of time is required. However this process has to be conducted very carefully because a course certified by the Commission would be recognized in any European Union country.

On being asked by Dr Aaron Mifsud Bonnici, witness stated that he is aware that there were communications between the appellant and the Commission about the protocol. He agreed that this was the first course of the kind. This was not a run of the mill course and specialist evaluators had to be engaged, some of these from overseas. A normal run of the mill protocol needs around two months to be concluded. In the present case, meetings were held between Commission official and the entity proposing the course, who filed the application. It was important for the presentation to be good, and in the present case there were no problems encountered. However there was the need for the specialists to examine the programme and outcomes. As a programme, appellants' protocol was acceptable and compliant. In fact the protocol was eventually approved. It was given priority.

Dr Aaron Mifsud Bonnici asked witness if he agreed that there was the possibility that, after the tender was awarded, the contents of the course could be changed. He said that if there was a need to change anything, the Commission was ready to re-evaluate the programme, following a request by the provider. A programme that has been accepted is always liable to be changed, it is not cast in stone, Dr von Brockdorff continued.

Dr Philip von Brockdorff said that when a protocol is recognized by the NCHFE, then automatically it becomes recognized in other European Union States. If an accreditation issued by the Scottish Authority is submitted, the Commission contacts its counterpart in the other country, and after verification, the accreditation is issued.

Replying to a question by the Chairman, Dr Aaron Mifsud Bonnici said that the original tender bid contained the information that the course was developed in Glasgow. Appellants were also in communication with the National Commission for Further and Higher Education and informed them that this process was ongoing. In fact the accreditation was issued during the appeal period. He insisted that the deadline was too short to provide the protocol. Appellants continued to pursue the signing of the protocol even after having been disqualified. In fact the protocol has now been obtained. Appellants are now in position to provide the service requested by the tender, and Dr Aaron Mifsud Bonnici therefore asked that this Board revoke the decision taken by the contracting authority to disqualify their bid.

The hearing was brought to an end.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 12th July 2013 and also through the verbal submissions presented by same during the hearing held on 26th August 2013, had objected to the decision taken by the pertinent Authority, in that:

- a) The Appellant's bid was disqualified on the 'Non Administratively Compliance' basis, due to the fact that Appellant failed to submit a signed copy of a protocol within the stipulated period of time.**
- b) The signed protocol could only be submitted to the Contracting Authority, once all criterias to be included in the same protocol were established.**
- c) The Contracting Authority itself did not identify the basis and parameters of the required protocol. Nor did the same Authority give an indication of such parameters.**
- d) The Evaluation Board of the Contracting Authority was made aware of this deficiency.**
- e) In Fact, the Appellant submitted all the information as requested in the tender document. To this effect the Appellant strongly feels that the cancellation of the tender was unjust.**
- f) The Appellant did in fact inform the Evaluation Board that such a protocol could not be provided unless and until the specific details and requirements were identified**
- g) In fact, the Appellant produced an equivalent documentation wherein it was stated that the 'City of Glasgow College' will produce a European Certification**

by a Member state that should suffice this requirement. This documentation was in fact submitted to the Contracting Authority.

- h) On the other hand, the Appellant pledged to produce the required correspondence to attest that there was ongoing correspondence regarding certification.

Having considered the Contracting Authority's verbal submissions presented by same during the hearing held on 26th August 2013, in that:

- a) The Appellant did follow the normal procedure and in fact he met seven out of eight of the requirements as stipulated in the tender document. The missing requirement was the submission of the signed protocol.
- b) At this stage, the Evaluation Board could not proceed as the Appellant's Bid was deemed as 'Administratively non Compliant).
- c) The Evaluation Board of the Contracting Authority was not aware that the required protocol would be signed and could be presented later on. Thus, the same Board had no other option but to discard the Appellant's bid.
- d) The fact that The Evaluation Board did not have any information from the Appellant regarding the missing information, the Appellant's bid was considered as 'Administrative non Compliant'.
- e) The Bidders were obliged to establish the network of the courses themselves and same were to be recognised by a relevant Authority.

This Board opted that more technical evidence was necessary, in order to ensure a fair hearing.

The second hearing was held on 22nd October 2013 wherein the main witness was questioned both by the Appellant and the Chairman of the Public Contracts Review Board in that the following facts were revealed:

- a) Under oath, the expert, summoned by the Appellant, explained in detail his role in the Commission for Further and Higher Education.
- b) The witness also explained in detail what a protocol represent.
- c) The same witness confirmed that the process of establishing a protocol was a lengthy one. In fact, in this particular case, it would usually take from 2 to 3 months to finalise a protocol, all things being equal.

Reached the following conclusions:

- 1. After having heard and examined all the submissions of the Appellant, the Contracting Authority and the witness, this Board finds that the Appellant,s failure to submit a signed protocol within the stipulated time was not only unreasonable but really impossible.**
- 2. From the evidence presented during the hearing held on 22nd October 2013 and also through the verbal submissions presented by the witness, it was evidently clear that:**
 - i) The requirement stipulated by the Evaluation Board was not possible.**
 - ii) The Appellant's Bid was fully compliant as confirmed by the witness who is an expert in this field.**

In View of the above, This Board finds in favour of the Appellant and recommends the following:

- a) The Appellant be immediately integrated in the next evaluation process of the tender.**
- b) The deposit paid by the Appellant is to be reimbursed.**

Dr. Anthony Cassar
Chairman

Dr. Charles Cassar
Member

Mr. Lawrence Ancillieri
Member

29 October 2013