

PUBLIC CONTRACTS REVIEW BOARD

Case No. 638

PU/010/2013

Expression of Interest – Request for Proposal (RFP) for the Provision of Legal Services.

The tender was published on the 18th October 2013. The closing date was the 29th October 2013.

The estimated value of the Tender was €30,000 (Exclusive of VAT).

Sixteen (16) bidders had submitted an offer.

On the 19th November 2013, Formosa Formosa Grech Advocates filed an objection against the decision taken to reject its offer on grounds of being non-compliant.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Wednesday 4th December 2013 to discuss the appeal.

Present for the hearing were:

Formosa Formosa Grech Advocates - Appellant

Dr Alfred Grech	Representative
Dr Larry Formosa	Representative

Deguarra Farrugia Advocates - Preferred Bidder

Dr Kevin Deguarra	Representative
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Privatisation Unit at MEIB on behalf of MFSS (Parliamentary Secretary for the Elderly and Active Ageing) - Contracting Authority

Dr Emanuel Camilleri	Chairman Evaluation Board
Dr Lilian Cremona	Member Evaluation Board
Mr Philip Rizzo	Member Evaluation Board
Mr John Degiorgio	Member Evaluation Board

The Chairman made a brief introduction and the appellant's representative was invited to make his submissions on the objection.

Dr Larry Formosa on behalf of the appellant said that appellant had asked for further details and submitted the requested documents. He said that still, the appellant's offer had been rejected on two grounds, that of not providing a detailed explanation substantiating how the legal services will be carried out; and for not providing a proposed draft agreement and a standard confidentiality agreement as was requested. He claimed that all the necessary documents had in fact been submitted by the appellant, except for the confidentiality agreement. He contended that since the appellant is a firm of advocates and was offering its legal services, the confidentiality agreement was superfluous and there was not need to submit it. Lawyers are bound by the law provisions regarding the confidentiality with clients. He referred to a recent decision by the Court of Appeal where it was decided that substance should take precedence over form. He insisted that therefore appellant's bid should not have been rejected.

Dr Emanuel Camilleri, Chairman Evaluation Board on behalf of the contracting authority said that the evaluation board examined all documents submitted by all bidders in reply to the process letter. All the information submitted was set down in tabular format to enable evaluation. Three items had been requested. 1. A detailed explanation from bidders how they proposed to provide the service; 2 a draft agreement and 3 the standard confidentiality agreement. Appellant's bid did not contain a detailed explanation and did not explain how the appellant firm would provide the service from Gozo. The process letter had made it clear that the service had to be provided on demand and according to the need and time table schedules established. The service had to be provided at all hours and on demand. This was because of the needs of the contracting authority. It was not made clear to the evaluation board how the work would be allotted and how the duties of the two advocates would be distributed. The requested draft agreement submitted by appellant was not satisfactory and was not professional in content. No examples of contractual services were given. The draft showed lack of experience in formulating contractual agreements. Furthermore this draft agreement submitted by appellant was designed to solicit the evaluation board to change the terms and conditions. It renders the tender invalid because it suggested to; "renegotiate or amend this agreement on request". The tender could in fact have been disqualified because of this.

Dr Emanuel Camilleri continued that the contracting authority had a right to insist for a confidentiality agreement that goes beyond just the normal client confidentiality. And the contracting authority always requested such confidentiality agreements, and legal firms always complied.

The Chairman asked if there was any valid reason why the confidentiality agreement was not submitted when it was specifically requested.

Dr Larry Formosa on behalf of the appellant said that probably it was not sent through an oversight.

Dr Alfred Grech on behalf of the appellant stated that any confidentiality agreement is irrelevant because all lawyers are bound at law on confidentiality. Lawyers, more than other professions, are bound because even if someone divulges to a lawyer any information, even not seriously, the lawyer is still bound. Regarding the other reasons for disqualifications Dr

Grech asked rhetorically if appellant gave a Maltese address, would its bid have been accepted. He claimed that the evaluation board discriminated against Gozitan lawyers. He insisted that appellant could have given a Malta address and that the logistics of the provision of the service was appellant's problem as long as the service was provided. The transport between the Islands was available and is used regularly even by members of parliament.

Dr Larry Formosa for the appellant said that once appellant has offered to provide the service, on being given the contract, the firm would ensure that the service is provided. He contended that the lack of details in the CV did not form part of the rejection letter and cannot be raised now at this stage. Furthermore, he explained that draft agreement means just that, a draft. And drafts can be changed, that is why the appellant suggested changes, and offered to re-negotiate. It was normal practice for draft contracts to be submitted by the contracting authority to the bidders who then made their offers. Appellant had asked to be provided with the pricing but this was denied. The price offers had not even been published on the notice board.

Dr Alfred Grech queried if in fact the ability of the bidders to draft agreements was being assessed through this requirement of submitting a draft agreement.

Mr John Degiorgio on behalf of the contracting authority said that the contracting authority required a detailed proposal. Appellant had submitted a proposal that was acceptable, but when comparing this with those submitted by the other bidders the difference was very great. Appellant's bid was cheaper but the contracting authority was after experience more than pricing.

Dr Lilian Cremona on behalf of the contracting authority stated that both the subsidiary legislation LN 296/2010 and the EU Directive 204/18EC exclude the publication of the awards of legal services. The contracting authority had the right not to publish, and it was published only to enable an objection to be made.

Dr Emanuel Camilleri for the contracting authority said that it is not the policy of the Privatisation Unit to publish prices. In fact on the notice board the contracting authority published the awarded price.

Dr Alfred Grech objected to the hearing of the submissions by the preferred bidder as he had no right at law to do so.

Dr Kevin Deguara on behalf of the preferred bidder said that price was not the criterion on which the award of the present tender was based. Legal services are specifically excluded both by the Procurement regulations and the EU Directive. Finally he raised the matter of the appellant influencing the evaluation board.

Philip Rizzo on behalf of the contracting authority explained the importance given to the documents the tender insisted upon. This contract would bind the government for 15 years and the Privatisation Unit needs absolute confidentiality.

Dr Alfred Grech here stated that if the Board finds against appellant in this case, he would have to have recourse to the Court of Appeal. Appellant had to go through the motions of filing this objection and could not accede the Court of Appeal directly. He insisted that tenders are issued because of competition and the price determines whether offers are

competitive or not. He raised the matter of proportionality and submitted a copy of the judgement of the Court of Appeal.
The hearing was at this point brought to an end.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 18th November 2013 and also through the Appellant's submissions during the hearing held on 4th December 2013, had objected to the decision taken by the pertinent Authority, in that:

- a) The Appellant's bid was unfairly discarded on the following grounds:**
 - i) The Contracting Authority stated that the Appellant did not submit a detailed description of how the Legal services were to be provided. The Appellant insists that the necessary explanation was given in the draft agreement submitted by same with the tender document.**
 - ii) Although the Appellant did not submit a standard confidentiality agreement, it is a known fact that the Legal profession is bound by Professional Secrecy. The Appellant insists that this requirement has no substance for refuting the Appellant's bid.**
- b) The Appellant felt discriminated due to the fact that his Law Firm is based in Gozo. The Appellant insists that he can provide the same services as those rendered by Maltese Law firms.**
- c) The Appellant also contends that once he signed the tender document he was in duty bound to provide the required legal services to the Contracting Authority, at all costs.**

Having considered the Contracting Authority's verbal submissions during the hearing held on 4th December 2013, in that:

- a) The Appellant's bid did not contain a detailed description of how the Professional Legal services were to be provided. This was stipulated in the tender document.**
- b) The draft agreement submitted by the Appellant was not up to the required standard.**
- c) The Appellant did not submit the 'Confidentiality Agreement' as stipulated in the tender document.**

Reached the following conclusions:

- 1. Prior to the Appellant's submissions during the hearing held on 4th December 2013, the Appellant made a declaration that " Should this Board decides against the Appellant the latter would refer the same decision to the Court of Appeal". In this respect, this Board would like to state firmly that the final decision being taken by this Board is not in any way whatsoever influenced by the above mentioned Appellant's declaration.**
- 2. From the Legal submissions of the Evaluation Board, it was vividly exposed that the Appellant failed to submit the requested detailed information of how the Appellant would render the Professional Services as required in the tender document. The Fact that the Appellant Firm was Gozo based had nothing to do with the decision taken by the Evaluation Board. In related Professions, when a service is required across another border of the same Country, it is pertinent to quote a substitute correspondent/affiliate to ensure continuity in case of uncontrollable situations. The Appellant failed to provide the necessary information. In this regard, the Contracting Authority had the duty to examine and identify the substitute corresponding support to avoid interruption of the required Legal services as stipulated in the tender document. At the same time this Board opines that there was no discrimination due to the fact that the Appellant was Gozo based.**
- 3. The Draft Agreement submitted by the Appellant was not up to the expected professional standard. This document was a basic and essential requirement in view of the fact that the duration of the tender was for a very long period of time.**
- 4. The Appellant did not submit the 'Confidentiality Agreement' as was requested in the tender document. Although it is a known fact that Lawyers/Law Firms are bound by Professional Secrecy, this Board cannot understand why such a mandatory document was not submitted by the Appellant.**

In view of the above, this Board finds against the Appellant and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar
Chairman

Dr. Charles Cassar
Member

Mr. Lawrence Ancillieri
Member

30 December 2013