

PUBLIC CONTRACTS REVIEW BOARD

Case No. 674

MCAST Exp. 02/2013

Provision of Professional Catering Services.

The tender was published on the 4th October 2013. The closing date was the 25th October 2013.

Three (3) bids had been received for this tender.

On the 21st January 2014 JM Operations filed an objection against the award of the tender to Malta Healthcare Caterers Ltd.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Thursday the 27th February 2014 to discuss the objection.

Present for the hearing were:

JM Operations - Appellant

Mr Joseph Micallef	Representative
Dr Noel Camilleri	Legal Representative

Malta Healthcare Caterers Limited - Preferred Bidder

Mr Mark Zahra	Representative
Dr Ronald Aquilina	Legal Representative

Malta College of Arts, Science and Technology - Contracting Authority

Mr Stephen Cachia	Chairman Evaluation Board
Mr Mario Attard	Representative
Dr Marycien Vassallo	Legal Representative
Dr Peter Fenech	Legal Representative

Witness

Ms Ninette Gatt	Department of Contracts Representative
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After making a brief introduction the Chairman referred to workings of the evaluation report that could possibly contain an error since the weightings of the financial ranking were reversed.

Dr Peter Fenech said the Public Procurement Regulations refer to the purchase of supply and services but in this case the contracting authority is not purchasing but hiring out space. No payment of public funds is involved and in fact the contracting authority receives funds from the contractor. This was a concession tender. The financial ranking has therefore to be reversed since the contracting authority would be obtaining more funds from the highest price bidder. More marks are assigned to the highest bidder. He said that according to Regulation 17 this Board does not have jurisdiction to decide on concession tenders.

Dr Noel Camilleri on behalf of the appellant said that the letter of objection was sent to the contracting authority; it was the latter that had referred the matter to this Board. If the case was wrongly referred to this Board it was not through the appellant's fault.

Dr Peter Fenech said that the contracting authority is bound to refer objections to the Public Contracts Review Board; it cannot decide the validity or not of the objection.

Dr Noel Camilleri enquired who will be dealing with his client's objection. Had his client any right to object?

Dr Peter Fenech explained that the contracting authority has to abide with the law, the civil code, or the Public Contracts Review Board. Certain circumstances are decided by this Board to facilitate the procurement process. The present circumstances are such that the Public Contracts Review Board does not have any jurisdiction to decide the objection. He explained that Regulation 17 (2) is clear that the regulations (of the Public Procurement Regulations) shall not apply to public service concession contracts.

Dr Noel Camilleri for appellant was given one week within which he was to file a note of submissions on the matter of the jurisdiction of the Public Contracts Review Board to hear this objection. Dr Victor Scerri on behalf of the contracting authority was given the right of reply by the submission of another note within another week from the service (even by email) of the first note.

At this point the hearing was brought to a close.

On the 13th March 2014 the contracting authority filed a note wherein it stated that in order to expedite matters it was withdrawing the preliminary plea contesting the jurisdiction of the Board to hear the present objection and decide on it.

Second Hearing:

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Mr Richard A Matrenza and Mr Lawrence Ancilleri as members reconvened a hearing on Tuesday the 8th April 2014 to continue discussing the objection.

Present were:

JM Operations - Appellant

Mr Joseph Micallef	Representative
Dr Noel Camilleri	Legal Representative

Malta Healthcare Caterers Limited - Preferred Bidder

Mr Mark Zahra	Representative
Dr Ronald Aquilina	Legal Representative

Malta College of Arts, Science and Technology - Contracting Authority

Mr Stephen Cachia	Chairman Evaluation Board
Mr Mario Attard	Representative
Dr Peter Fenech	Legal Representative

Witness

Ms Ninette Gatt	Department of Contracts Representative
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The Chairman made a brief introduction wherein he explained that the contracting authority Malta College of Arts, Science and Technology had withdrawn its preliminary plea and accepted the jurisdiction of the Public Contracts Review Board. The appellant's representative was then asked to make his submissions on the objection.

Dr Noel Camilleri on behalf of the appellant said that the objection was that the deadline for the submission of tenders had been extended just 1 day before it was due to close. When the tender was published it showed the timeframes for the submitting of tenders and the closing date was the 18th October 2013. It had been made clear that late bids would not be accepted. However a clarification note had been issued on the 16th October 2013, in reply to a query by a bidder, extending the deadline for the submission of bids. It later resulted that the preferred bidder had made the request for extension and an extension had been given. He contended that the request for an extension was not and could not be deemed as a clarification. In fact appellant had formerly objected immediately but the reply to his objection was received on the 22nd October 2013, that is, after the original closing date. Dr Noel Camilleri continued that on the 18th October 2013 the tender box had not been available.

Mr Joseph Micallef on behalf of the appellant, under oath testified that when on the 18th October 2013 he had gone with the tender to submit it the tender box was unavailable and he was informed that the closing date had been extended up to the 25th October 2013. He confirmed that he had known that the extension had been given because he had received the clarification on the 16th October 2013 and he had objected in writing immediately. This was because appellant had worked according to the set time frame given when the tender was issued. When asked by the Chairman how the giving of this extension affected his bid he replied that because of the extension he had lost the tender award.

Dr Noel Camilleri for appellant contended that no justification had been given for the extension of the tender submission period, and this fact raised certain doubts.

Mr Stephen Cachia the Chairman of the Evaluation Board under oath testified that the contracting authority had felt that it should give every chance to all bidders to submit a

tender. The decision for an extension had made no difference to bidders and had been an administrative decision taken by the contracting authority itself. The tender was for an expression of interest. The appellant's tender had been given more marks in most of the items and therefore appellant did not suffer from any consequences as a result of the extension. It had been marks given to the financial offer that had made the difference and decided the award. Replying to a remark by Dr Camilleri, that the issuing of clarifications was not the responsibility of the evaluation board he said that during a clarification meeting one of the bidders made the request for extension. It was a Mr Oscar Borg that had replied to appellant when the latter objected to the extension and informed him that his objection had been rejected. The evaluation board had not yet been set up. The appellant had not made any reservation in his tender bid regarding the extension.

Dr Ronald Aquilina on behalf of the preferred bidder asked Mr Stephen Cachia whether he knows when the request for extension had been made the witness replied that the request had been made on the 10th October 2013 by a Mr Mark De Grey on behalf of Flight Catering Limited, Luqa Airport who finally did not submit a tender. The request had not been made by the preferred bidder. All potential bidders who paid for the tender document could ask for clarifications.

Dr Noel Camilleri for the appellant reiterated that whoever picked up tender documents should have submitted a tender bid. He insisted that clarification meetings should only be used for clarifications and not to give extensions.

Dr Peter Fenech for the contracting authority explained that the preferred bidder Malta Healthcare Caterers Limited is a subsidiary of James Caterers Group who had retrieved the tender document and this is well documented. The main point here was whether the granting of an extension had affected the result. He contended that no bidder had been adversely affected.

Dr Noel Camilleri for appellant said the point is if appellant suffered any consequences as a result of the extension. He insisted that such an extension should not have been issued through a clarification.

At this point the hearing came to a close.

This Board,

Having noted the Appellant's objection , in terms of the 'Reasoned Letter of Objection' dated 25th January 2014 and also through Appellant's verbal submissions during the hearings held on 27th January and 8th April 2014, had objected to the decision taken by the pertinent Authority, in that:

- a) Appellant had objected to the extension of the closing date of the tender. In this regard, Appellant received a reply to his objection after the closing date of the tender.**
- b) Appellant contends that this extension prejudiced the adjudicating process of his tender.**

Having considered the Contracting Authority's verbal submissions during the hearings held on 27th February and 8th April 2014, in that:

- a) The fact that the Contracting Authority extended the closing date of the tender by one day did not in any way inflict a disadvantage on any of the prospective bidders.**
- b) The requested extension was not requested by the Preferred Bidder, but by a prospective tenderer who incidentally did not submit an offer.**

Reached the following conclusions:

- 1. This Board opines that the Contracting Authority has the right to extend the closing date of a tender document.**
- 2. The Extension of the closing date of the tender document was in fact by one day, and this Board feels that this short period of extension should not have made any differences to the submissions of the potential bidders.**
- 3. From the submissions heard by both the Appellant and the Contracting Authority, it became evidently clear that this extension of the closing date of the tender did in no way effect the decision taken by the Evaluation Board.**
- 4. The Preferred Bidder's offer was the most advantageous to the Contracting Authority.**

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

Dr. Anthony Cassar
Chairman

Dr. Charles Cassar
Member

Mr. Richard A. Matrenza
Member

Mr. Laurence Ancilleri
Member

29 April 2014