

PUBLIC CONTRACTS REVIEW BOARD

Case No. 678

T 073/2013

Call for Expression of Interest for the Provision of Insurance Broking Services.

The tender was published on the 8th October 2013. The closing date was the 18th November 2013.

The estimated value of the tender was €270,000 Excluding Document Duty.

Seven (7) bidders had submitted their offer.

On the 31st January 2014 Mediterranean Insurances Brokers (Malta) Limited filed an objection against the ranking assigned in the adjudication and against the award of the tender to Allcare Insurance Brokers Limited.

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 Tuesday 4th March 2014 to discuss these concerns.

Present for the hearing were:

Mediterranean Insurance Brokers (Malta) Limited - Appellant

Ms Fiona Borg	Representative
Mr Mario Briffa	Representative
Mr Joe Cutajar	Representative
Dr Franco Galea	Legal Representative
Dr Michael Sciriha	Legal Representative

Allcare Insurance Brokers Limited - Preferred Bidder

Mr Malcolm Cachia	Representative
Mr Ramon Mizzi	Representative
Dr Simon Schembri	Legal Representative
Dr Simon Cachia	Legal Representative

Malta Information Technology Agency - Contracting Authority

Mr Ivan Alessandro	Member Evaluation Board
Mr Carmelo Formosa	Member Evaluation Board
Mr Pierre Vella	Member Evaluation Board
Mr Victor Camilleri	Representative
Dr Pauline Debono	Representative
Dr Marouska Cilia Barbara	Legal Representative

Witnesses:

Dr Marisa Attard
Mr Mark Spiteri
Mr Jean Portelli

Director Insurance and Pensions Unit
Manager Island Insurance Brokers
First United Insurance Brokers

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

Dr Franco Galea on behalf of his client Mediterranean Insurance Brokers (Malta) Limited, the appellant firm, said that there were four (4) evaluation criteria established for this procedure. Twenty five marks had been assigned to each criterion. Appellant had obtained a higher mark than the preferred bidder in two of the criteria. For another criterion appellant had been awarded the same marks as the preferred bidder. However for the remaining criterion, appellant had been awarded 18 marks while the preferred bidder had obtained 25 marks, the maximum.

His client the appellant had been awarded 18 marks because of a previous infringement. This was a deduction of 8 marks and it is contended that it was a too great a deduction. Appellant was being penalized twice for the same infringement, for which a fine was already paid. The infringement in question was in 2009, with the MFSA deciding the penalty to be paid in 2012.

Dr Marouska Cilia Barbara on behalf of the contracting authority agreed that there had been four evaluation criteria and that the objection is about one of these, "*An established and demonstrable standing as an insurance broker including compliance with the relative legislation.*" The appellant does not contest the contracting authority's right to evaluate on this criterion. This criterion was added because it was important for MITA that the chosen bidder had abided with legislation. The sector is not regulated by any code of ethics or special subsidiary legislation. The evaluation board during adjudication discovered that there had been an administrative penalty imposed on the appellant in 2012 and thus could not assign more marks to appellant. Bidders had to satisfy the evaluation criteria. The evaluation board decided that appellant did not have complete compliance with the relative legislation. This decision was not another penalty but a question of choosing the best possible. The evaluation board could not assign full marks to the appellant on this criterion.

The Chairman asked if appellant was compliant at the time of adjudication since whenever anyone was fined for an infringement, the infringement was considered closed when the fine was paid.

Dr Marisa Attard, Director MFSA under oath said that the appellant is registered as a broker with the MFSA and this means that it conforms to the legal requirements according to the law provisions. Appellant had a case of infringement; an administrative penalty had been imposed. This was not a criminal penalty but an administrative penalty. There are several types of penalties for various infringements and these are stipulated by law.

Replying to questions by Dr Marouska Cilia Barbara, Dr Marisa Attard stated that on 11th

April 2012 MFSA had imposed an administrative penalty on appellant of €50,582.34 as can be seen from the MFSA web page. She explained that according to Art 46.2 of the Insurance Intermediaries Act, she is bound by confidentiality and thus can only mention general details and not particular details. It results that there had been a breach of the Insurance Intermediaries Act for not keeping in a separate account monies held in a fiduciary capacity. According to Art 20 of the Act, a broker had to keep any monies received in the fiduciary capacity in a separate bank account. Rule 13 of 2007 explains this in more detail. According to the records, appellant had breached this rule. MFSA had imposed a penalty level 3 that is the highest level possible. There had been no appeal lodged. Replying to questions by Dr Franco Galea on behalf of the appellant, Dr Attard explained that the fine had been paid. Another penalty imposed on Mr Cutajar in March 2013 was in connection with the same infringement.

Mr Mark Spiteri, General Manager Island Insurance Brokers, produced by appellant under oath confirmed that his firm had participated in the present tender. For the first category, his firm had obtained 22 marks; for the second category 25 marks, for the third 6 marks and for the fourth 20 marks. Regarding the first category, resources, he explained that his firm had offered seven employees. Regarding category three, the reason given to his firm was that not enough details had been given. The firm has been in operation for twenty five years.

Mr Jean Portelli on behalf of the First United Insurance Brokers, called by appellant, under oath confirmed that his firm had participated in the present tender. The marks obtained by his firm were as follows: Category one – 25 marks; Category two – 25 marks; Category 3 – 10 Marks and Category four – 25 marks. His firm had tendered jointly with Willis Italia. Willis is the third largest broker in the world, and can be considered as an authority on brokerage. Regarding Category three the explanation given by *the evaluation committee was that “Risk assessment: indicated that risk assessment will be done on a high level. Market Assessment: They will use Willis online market security system to assess the market. Claims and Handling: Claims handling briefly explained, no service levels indicated.”*

Replying to a question by Dr Simon Schembri on behalf of the preferred bidder Mre Jean Portelli said that his joint venture did not file an objection to the evaluation board decision.

Mr Ivan Alessandro, the Chairman of the Evaluation Board, for the contracting authority under oath said that the board was composed of him, Charles Formosa and Pierre Vella. He himself was the CFO and had a CPA warrant. Mr Pierre Vella, who has a diploma in IT, represented MITA and Mr Charles Formosa, Masters in Business Administration, was the project manager. Replying to questions set by Dr Michael Sciriha, Mr Alessandro said that the contracting authority’s insurance needs fell under two branches, the HR insurance regarding health and safety and the general administrative insurance. The administration manager was involved in the preparation of the tender. There was no person directly qualified in insurance brokerage on the evaluation board but the members did not see this as a handicap since we could have recourse to advisors. But no advisors had been consulted during the evaluation.

At this point Dr Marouska Cilia Barbara objected that the letter of objection was based on one grievance only and not on the other categories. The Chairman explained that the board would only take cognizance on facts emerging from the letter of objection.

Mr Ivan Alessandro continued replying to questions by Dr Sciriha said that regarding experience, there were other criteria involved – the appropriate professional expertise,

experience and adequate staffing. The evaluation board took into consideration all these aspects. Replying to a specific question by Dr Franco Galea he confirmed that Allcare, the preferred bidder would be allocating four employees to this project. Mr Alessandro continued that Allcare was established in May 2002, Island Brokers was established in 1989 and MIB, the appellant was established in 1976. Regarding expertise he stated that there was conformity in the evaluating board's evaluation of the bidders' expertise. He said that from the submissions given with the tenders the board were compliant but could not give the breakdown of the points assigned to MIB, Allcare and Island. He promised to send a copy of the breakdown of the marks given.

Replying to questions by Dr Franco Galea about the second category (criterion) – “Compliance with Legislation”, what verification method did the evaluation board use when assessing all the bidders? Mr Alessandro said that the board had checked with the MFSA website for the past three years. This was done for all bidders. The board in the case of Willis Italia only checked the MFSA website and MFSA was not consulted. He was not aware that Willis had been penalized over seven million euro. Bidders had been obliged to list all infringements. Replying to questions by Dr Michael Sciriha he said that he was aware that the contracting authority's bank the BOV had been penalized for infringements. He said that the appellant firm had been providing services to the contracting authority for a number of years and that as far as he was aware no problems had been encountered.

Dr Simon Cachia for the preferred bidder said that Regulation 50 of the Public Procurement Regulations stated that bidders may be excluded when declared guilty of any misconduct. He said that the tender contained an obligation for bidders to declare any infringements they may have been found guilty of, page 15 Article 6. He therefore asked the witness Mr Alessandro if the appellant had declared the infringement.

Mr Ivan Alessandro for the contracting authority said that the appellant did not declare any infringement. The appellant had not been disqualified for this because it had been placed in the second place and so this fact was deemed irrelevant by the evaluation board.

Ms Fiona Borg on behalf of the appellant under oath said that following the infringement penalty the appellant had held a meeting with all its clients, including MITA regarding the penalty imposed on it. In the case of MITA the meeting was held in July 2013 and present was the present Chairman Mr Tony Sultana. Also present were Mr Joe Cutajar, and Mr Robert Galea. Replying to Dr Simon Schembri, she said that she was involved in the preparation of the tender and confirmed that the tender of appellant failed to state that there had been a penalty imposed, since it was felt that it was public knowledge.

The hearing was brought to a close at this point.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 29th January 2014 and also through Appellant's verbal submissions during the hearing held on 4th March 2014, had objected to the decision taken by the pertinent Authority, in that:

- a. **Appellant Company was penalised with an ‘Administrative Fine’ by Malta Financial Services Authority. In this regard the Evaluation Board deducted 7 points when referring to ‘Established and Demonstrative standing as an Insurance Broker, including Compliance with the relative Legislation’. Appellant contends that the deduction of these points in assessing the standing of same was unfairly assessed by the Evaluation Board.**
- b. **Appellant Company has been providing Brokerage Services for the past ten years to the same Contracting Authority without any issues having arisen.**

Having considered the Contracting Authority’s verbal submissions during the hearing held on 4th March 2014, in that:

- a) **The Contracting Authority noted that Appellant had been in default of an ‘Administrative’ misconduct by the Malta Financial Services Authority.**
- b) **The Contracting Authority also noted that the Senior Official of the Appellant Company was found in failure to comply with the registration of the Brokers Register.**

Having reached the following conclusions:

1. **This Board opines that the fact that the Appellant Company was found in default in its trading activities, due to an ‘Administrative Nature’ is not to be construed as being a default due to other serious reasons.**
2. **From submissions, it was vividly clear that the ‘Impeachment’ imposed by the Malta Financial Services Authority was purely of an ‘Administrative ‘nature and it was only temporary until the fine was settled.**
3. **From representations made by the Malta Financial Services Authority’s authorised representative, , it was confirmed that the Appellant Company was listed as an Authorised Insurance Broker Company, fulfilling all obligations with local legislation.**
4. **The Official Legal and Financial Authority to regulate such Institutions is the ‘Malta Financial Services Authority’ and the fact that the Appellant Company is still listed as an authorised Insurance Broker Company, satisfies the norm that the Appellant Company is regularised and in conformity with the regulations of the Malta Financial Services Authority’s, the governing monitoring Body of such Institutions.**

In view of the above, this Board finds in favour of the Appellant Company and recommends that:

- i) The deposit paid by the Appellant Company be reimbursed.**
- ii) The Appellant's Bid be integrated in the tendering process.**

Dr. Anthony Cassar
Chairman

Dr. Charles Cassar
Member

Mr. Richard A. Matrenza
Member

7 April 2014