

PUBLIC CONTRACTS REVIEW BOARD

Case No. 699

MTA 862/2014

Concession for the Hiring of Umbrellas and Deckchairs at Blue Lagoon Comino (Area 2).

The tender was published on the 28th February 2014. The closing date was the 20th March 2014.

Three (3) offers have been received for this tender.

On the 2nd May 2014 Mr Alfred Refalo filed an objection against the award of the tender to Al-Nibras for Science & Technology Limited.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Tuesday the 20th May 2014 to discuss the objection.

Present for the hearing were:

Mr Alfred Refalo - Appellant

Mr Alfred Refalo	Representative
Mr Daniel Refalo	Representative
Dr Mark Refalo	Legal Representative
Profs. Ian Refalo	Legal Representative

Al-Nibras for Science & Technology Limited - Preferred Bidder

Mr Roderick Abela	Managing Director
Mr Paul Grima	Representative
Mr Paul Zammit	Representative
Dr Alex Sciberras	Legal Representative

Malta Tourism Authority - Contracting Authority

Ms Nancy Caruana	Chairperson Evaluation Board
Mr Patrick Attard	Secretary Evaluation Board
Ms Stephanie Attard	Member Evaluation Board
Mr Raymond Azzopardi	Member Evaluation Board
Dr Frank Testa	Legal Representative

The Chairman made a brief introduction and asked appellant's representative to make his submissions.

Dr Mark Refalo on behalf of the appellant said that the tender suffered from a contradiction between Clause 3.1 (Selection Criteria) and 3.3 (Award Criteria) in that only the experience of the bidders could pass for selection criterion and not the other points. His client's bid had been rejected because it was not the highest offer. This was incorrect because according to Clause 3.1(d) of the selection criteria, the preferred bidder should have been found non-compliant since it did not have any previous experience. He said that appellant made some research, and it resulted that the owner and sole shareholder of the preferred bidder – Al-Nibras for Science and Technology Limited - was a certain Mr Sandro Ciliberti. He said that his client wanted to know what role has Mr Roderick Abela, who was present for the hearing, had in the preferred bidder's company. He claimed that at present there are no licences being issued for this kind of operation and that the preferred bidder did not have a trading licence. His client the appellant has the necessary licence. He could not envisage how the preferred bidder would be operating this tender. Since the preferred bidder did not possess any licence it follows that it also does not have any necessary experience as required by the tender. Finally, Dr Mark Refalo alleged that the preferred bidder is already working at the site and had photographs to prove it. These show the concession area with the preferred bidder's employees working. These photographs were formally filed.

Mr Daniel Refalo, Id number 77G, on behalf of the appellant under oath said the photos show that from the 22nd March 2014 they (sic!) started working in concession area one and later in area two. These were the employees of Coronato Portelli and Al-Nibras working together. He said that he knew this because he saw for himself, and took photographs. He also knew from facebook. There are photos from facebook together with the dates. One shows "first day of work". This work was still going on up to a few days ago. He stated that appellant has the necessary licences. He had made some research to see if the preferred bidder was in possession of a licence and it resulted that it did not. Asked by a Board member how he had identified the employees as working for the preferred bidder, witness replied that it was from hearing people talking and Ciliberti himself saying that he would be working the concession. He said that appellant has six years experience in providing deckchairs.

Replying to a cross-examination by Dr Alex Sciberras on behalf of the preferred bidder, witness said that appellant's licence, category 3 registration was dated from the 1st January 2012 and valid up to 31st December 2012. He said that when appellant tried to have it renewed the authorities did not accept payment and still have the documents. He admitted that the appellant's licence had lapsed and no new licence has been issued. On being asked by Dr Sciberras to identify one person from the photos he indicated Anton Portelli who had written on it "you have to see it to believe it". Anton Portelli is the son of Coronato Portelli.

Dr Frank Testa on behalf of the contracting authority insisted that it was not right for a bidder to submit a tender and when he is not awarded, to raise up the matter of inconsistencies in the tender. The law provides enough remedies in such matters and these concerns should be raised before the closing date. He claimed that the appellant made contradictory statements – first it was claimed that preferred bidder did not have any employees, now it is being claimed that the preferred bidder's employees were operating the concession. He said that it is not for the evaluation board to see if there were any illegal operations going on. The recommended bidder's tender contained a declaration that 'personnel engaged for this operation' have experience in such an operation. The evaluation board had considered this

declaration when assessing tenders; and once the preferred bidder and the appellant both satisfied the selection criteria then only the financial offer was the deciding factor for the award of the tender. This tender was offering a concession and was not a procurement of services, and was after all for the placing of deckchairs on the beach. He stated that he did not agree with appellant's interpretation of clause 3.5.6. He contended that no bidder should have been precluded from tendering if not in possession of a licence because the clause states that "the award of the permit should not exonerate the successful tenderer from the obligation of obtaining any permit". This meant that a bidder awarded the tender had to obtain the relevant licences and permits. Regarding the appellant's fourth grievance Dr Testa remarked that this was just an assumption that preferred bidder was subcontracting. The preferred bidder had declared that it was employing persons who had experience in the sector.

Dr Alex Sciberras on behalf of the preferred bidder said that regarding the first grievance appellant should have acted under a different regulation. However the selection criteria were there to assess whether tenders were administratively and technically compliant and once having been found so, the award would be based solely on the price of the tenders selected. The experience demanded in the tender requisites was relatively vague because after all, the tender did not involve any onerous task – just placing deckchairs, bidders had to be familiar. The successful bidder has shown that it will be using experienced persons employed by it. Here Dr Sciberras filed copies of ETC certificates of a scheme for employment by the ETC. Appellant also stated that the authorities had stopped issuing licences and cited a lack of licence by the preferred bidder to be a reason for disqualification. With appellant's reasoning it meant that no bidder could be awarded the tender since the authorities are not issuing licences. The tender imposed a condition on awardees to obtain the necessary licences. However the possession of a licence was not an award condition. He insisted that the preferred bidder would not be subcontracting but was employing personnel. Dr Sciberras declared formally that his client did not start providing the service at the concession. The person mentioned – Anton Portelli who is not involved in this tender.

Raymond Azzopardi said that the Lands Department would, after consultation with the contracting authority, issue a permit to the awardees which would cover the period from May to October.

Profs Ian Refalo said that to operate the concession two permits were needed one from the Lands Department and a licence from the Trade Department to operate. The Lands permit by itself was not sufficient. The tender required previous experience and while appellant could show 6 years experience the preferred bidder could not. This experience involves also managerial experience in running the concession and not just of the employees. The fact that the contracting authority was ignoring this meant that it was just after obtaining payment.

Dr Alex Sciberras on behalf of the preferred bidder insisted that the employees it would be using had on site experience.

Profs Ian Refalo pointed out that in fact three permits are necessary to run the concession. These replace the former police permit. The tender did not ask for proof of employing persons with experience but required proof of experience.

At this point the hearing was closed.

This Board,

Having noted the Appellant's objection , in terms of the 'Reasoned Letter of Objection' dated 2nd May 2014 and also through Appellant's verbal submissions during the hearing held on 20th May 2014, had objected to the decision taken by the pertinent Authority, in that:

- a) The 'selection criteria' was based on the experience factor. In this regard the Preferred Bidder did not possess the necessary experience in this genre of service. So that the Preferred Bidder's offer should have been discarded, in the first place.**
- b) The preferred Bidder is not in possession of the necessary permit to operate the service under this concession.**
- c) Appellant also alleges that the Preferred Bidder has already commenced the operation of services in the same area of concession under this tender.**

Having considered the Contracting Authority's verbal submissions during the hearing held on 20th May 2014, in that:

- a) The Contracting Authority contends that it is not the opportune moment to raise issues of 'inconsistencies' of clauses in the tender document. Appellant had other legal remedies to address his concerns prior to the closing date of the tender.**
- b) Both the Preferred Bidder and the Appellant satisfied the 'selection criteria' and the only deciding factor for awarding the tender was the price offered for the concession.**

Reached the following conclusions:

- 1. First of all, this Board opines that it should enter or rather deal with 'allegations', which the same Board deems irrelevant to this Appeal. If the Appellant feels aggrieved in any way, same has other legal remedies.**
- 2. From submissions and documentation provided during the hearing, this Board feels that there was enough evidence that the Preferred Bidder will be employing a workforce with experience in this field. And in this regard, this same Board deem that the Preferred Bidder satisfied the 'experience clause' as dictated in the tender document.**
- 3. The Evaluation Board confirmed that both the Appellant and the Preferred Bidder satisfied the 'selection criteria'. So that there remained the price offered for the concession, to award the tender. In this respect, the Preferred Bidder's offer was more advantageous to the Contracting Authority.**

- 4. The Contracting Authority, on the other hand, must ensure that the Preferred Bidder will be in possession of all the necessary permits prior to commencement of the tendered services.**

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 Ancilleri
Member

26 May 2014