

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case No. 711**

**MTA/865/2014**

**Tender for the Provision of Life Guard Services for Summer 2014 at Ghadira Bay and Golden Bay.**

The tender was published on the 9<sup>th</sup> May 2014. The closing date was the 20<sup>th</sup> May 2014.

The estimated value of the Tender was €70,000 (Exclusive of VAT).

Five (5) bids had been received for this tender.

On the 29<sup>th</sup> May 2014 Malta Red Cross Society filed an objection asking that the tender be declared null.

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 the 10<sup>th</sup> June 2014 to discuss the objection.

Present for the hearing were:

### **Malta Red Cross Society - Appellant**

Ms Giovanna Tanti	Representative
Dr Annalise Caruana	Legal Representative
Dr Antoine Cremona	Legal Representative

### **Socjeta` Nazzjonali tas-Salvatagg - Preferred Bidder**

Mr Orazio Zahra	Representative
Ms Maris Zahra	Representative
Dr Joe Sammut	Legal Representative

### **Malta Tourism Authority - Contracting Authority**

Mr David Mifsud	Chairman Evaluation Board
Mr Patrick Attard	Secretary Evaluation Board
Ms Stephanie Attard	Member Evaluation Board
Ms Pauline Dingli	Member Evaluation Board
Mr Roderick Zammit	Member Evaluation Board
Dr Frank Testa	Legal Representative

Following a brief introduction by the Chairman, the appellant's representative was invited to make his submissions.

Dr Antoine Cremona on behalf of the appellant Malta Red Cross Society explained that the tender in question had already been issued before, in February 2014 but had been however cancelled and replaced by the present tender. None of the bidders had objected to the cancellation.

Dr Cremona continued saying that tenders are normally structured having the first phase examining the selection criteria and whoever qualifies under these criteria passes on to the next phase – the award phase using the award criteria. Selection criteria in the present tender are found at clause 6.1 while the award criteria are found in clauses 32.1 et seq. of the specifications. The tender is then awarded to the cheapest bid of those who complied with the criteria. In the present tender, the selection criteria contain no objective criterion. There are a series of tables that have to be filled-in, like equipment, field equipment, key experts and experience and there is no benchmark indicated against which the bidders would be compared. While asking for experience, the tender does not specify what experience was expected from the bidders, or what qualifications were required for life guards. The contracting authority just asked bidders to offer these and would accept whatever what was offered. By law, the technical specifications should assign benchmarks against which bids are assessed. This results from European Directive 18/2004 article 23.2 that is transposed to the local Public Procurement Regulations regulation 46.2. This regulation explains in detail how the technical specifications should be objectively established. Those bidders who did not reach the benchmark would be disqualified.

The present tender, Dr Antoine Cremona continued, just asked bidders to state what equipment they had and what their key experts were qualified in, but did not specify who would be compliant by fixing benchmarks. This was in breach of regulation 46.2 because no benchmark was fixed. He submitted that the adjudication process could not be carried out objectively but subjectively.

The Chairman remarked that these grievances could have been raised before the closing date of the tender.

Dr Antoine Cremona said that this was done by his client in the previous tender that had been cancelled. He contended that that tender had in fact been cancelled because of the constraints raised on the matter. In the present tender, he contended that the pre-award remedy could have been demanded, but this action is optional and not mandatory.

Dr Frank Testa on behalf of the contracting authority submitted that bidders knew of the rules before they submitted their bids. It is not correct to have bidders participating in a tender, accepting all the rules and then contest the same rules if they are not awarded the tender. He asked whether the appellant would have still objected had his offer been awarded the tender. If the tender was intrinsically defective as it is being alleged by the appellant, why did appellant choose to participate in a defective tender. At the very least, if appellant had some difficulty with the selection criteria, then appellant should have asked for clarification. He agreed with the appellant's contention that recourse to Regulation 85 was optional. However, when a bidder, having discovered defects in the tender document, chose not to object under Regulation 85, he could not object about the same defects after the award was made and he discovered that his offer was not successful.

Dr Joe Sammut on behalf of the preferred bidder did not agree that the tender had any defects. A recent circular explained that in cases of tenders below €500,000 there was no need to ask for experience. The equipment that was needed was also indicated. Appellant had all the time to raise the matter before and ask for clarifications and yet he failed to do so.

Dr Antoine Cremona on behalf of the appellant pointed out that the tender was issued on the 9<sup>th</sup> May 2014 closed on the 20<sup>th</sup> May 2014 and the period allowed for clarifications closed on the 14<sup>th</sup> May 2014. Thus there were only 5 days available for clarifications. He insisted that the law allows two remedies, and at this stage, Regulation 82 (sic!) gives the appellant the right to have a full review of the process. Since the process was intrinsically defective, whether appellant chose to raise an objection or not did not matter, and did not affect the defective tender.

At this point the hearing was closed.

**This Board,**

**Having noted Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 29<sup>th</sup> mat 2014 and also through Appellant's verbal submissions during the hearing held on 10<sup>th</sup> June 2014, had objected to the decision taken by the pertinent Authority, in that:**

- a) The tender document failed in detail to dictate the 'Selection Criteria' requirements. In this regard, there existed no objective criteria on which the Evaluation Board could assess fairly the Appellant's offer.**
- b) The tender document did not specify the minimum mandatory requirements for issues with regards to experience, key experts, equipment specifications and quality assurance systems.**

**Having considered the Contracting Authority's verbal submissions during the hearing held on 10<sup>th</sup> June 2014, in that:**

- a) The Appellant was well aware of the conditions laid out in the tender document, to which same Appellant agreed to these same conditions by submitting his offer.**
- b) Appellant could have asked for clarifications, in case of difficulty, but prior to the submission of his offer.**

**Reached the following conclusions:**

- 1. This Board is somewhat surprised as to why all the grievances presented by the Appellant in front of this Board were not all clarified by same, prior to submission of his tender document. When a Tenderer submits his offer he is consenting to all the conditions and specifications as laid out in the same tender document. The Appellant had all the remedies to clarify, where in doubt or in**

**difficulty all the issues mentioned by same with the Contracting Authority and matters regarding to experience, key experts, equipment specifications and quality assurance systems, would have been clarified in the first place, prior to the submission of the tender document.**

- 2. This Board opines that the Appellant Society failed to utilise the remedies available to it to clarify any difficulty which same encountered when filling in the tender document. It was the Appellant's responsibility to ask for clarification and not for this Board to create a remedy for the Appellant. Clarifications can only be availed of prior to the submission of the tender document.**
- 3. The fact that Appellant Society had at its disposal only 5 days to seek any clarifications, does not in any way justify Appellant's claims.**
- 4. This Board also notes that the Preferred Bidder's offer was the cheapest 'compliant' bid.**

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

Dr. Anthony Cassar  
Chairman

Dr. Charles Cassar  
Member

Mr. Richard A. Matrenza  
Member

*17 June 2014*