

PUBLIC CONTRACTS REVIEW BOARD

Case No. 716

MG 101/2014

Tender for a Socio-Economic Assessment for the Development of a Rural Airfield in Gozo

The tender was published on the 4th April 2014. The closing date was the 25th April 2014.

The estimated value of the Tender was €47,000 (Excluding VAT)

Six (6) offers have been received for this tender.

On the 26th June 2014 AE-Gozo JV filed an objection against the disqualification of their offer.

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 8th July 2014 to discuss the objection.

Present for the hearing were:

AE-Gozo JV - Appellant

Dr Gordon Cordina	Representative
Ms Rachel Xuereb	Representative

PricewaterhouseCoopers - Preferred Bidder

Ms Nadia Demarco	Representative
Mr Michael Ganado	Representative

Ministry for Gozo - Contracting Authority

Mr Aldo Formosa	Chairman Evaluation Board
Mr Philip Mifsud	Member Evaluation Board
Mr Joseph Theuma	Member Evaluation Board
Ms Carmen Ogilvie Galea	Director
Dr Tatianne Scicluna Cassar	Legal Representative

After a brief introduction by the Chairman, the appellants' representative was invited to make his submissions on the objection.

Dr Gordon Cordina on behalf of the appellant Joint Venture explained that his clients' offer had been rejected because it was considered to be technically non compliant since *“Team Leader cannot be considered eligible as respective CV states that she is a part-time lecturer at UoM thus considered as a public officer.*

Economic Expert cannot be considered eligible as respective CV states that she is a part-time lecturer at UoM thus considered as a public officer.

It was concluded that AE-Gozo JV is not technically compliant with Volume 1 as per 6.1.2 of Instructions to Tenderers.” He said that appellants were objecting to this since a clarification by the Department of Contracts issued on the 21st December 2012 clarified that “prospective bidders cannot propose key experts which have a full time employment in an organization which is largely financed by the Central Government.” Neither the Team leader nor the economic expert proposed by appellants is employed full time by the University of Malta. Therefore appellants contend that the decision taken by the contracting authority to disqualify their offer was incorrect. Dr Cordina also pointed out that a previous communication by the same Department of Contracts issued in March 2011 had stated that employees of the University of Malta are not public officers and should not be considered as such.

The Chairman pointed out that lecturers at the University of Malta are not public officers. This point has already been decided by the Public Contracts Review Board in March 2011.

Dr Tatianne Scicluna Cassar on behalf of the contracting authority said that appellants had asked for a clarification in this tender, note 6 of the clarifications. The contracting authority had asked for advice from the Department of Contracts on this point and the latter had supplied the contracting authority with the attorney general's advice that stated that the University is a public entity and its lecturers, both full time and part time are to be considered as public officers. The reply to their request for clarification was communicated to appellants who did not contest the same. They could have raised the matter in a pre-contractual concern before submitting their tender, but they did not. She claimed that the decisions handed down by the PCRFB did not constitute judicial precedents like the decisions given by the courts. Jurisprudence does not apply in PCRFB decisions. Since appellants submitted their bid after the clarification they accepted all the tender conditions. The tender award criterion was the cheapest price. The compliant cheapest bid would be awarded. She contended that apart from appellants' tender being non-compliant, it was also not the cheapest offer.

The Chairman remarked that the Board considers the University of Malta to be an autonomous institution.

Dr Gordon Cordina for the appellants said that appellants were not aware of the fact that they themselves had asked for clarification, they did not in fact ask for any such clarification.

Dr Tatianne Scicluna Cassar for the contracting authority corrected herself in that the clarification had not been sought by the appellants but by another bidder. However the reply to the clarification had been notified to all bidders including the appellants, and had been published and uploaded on the internet.

Ms Carmen Ogilvie Galea on behalf of the contracting authority pointed out that the situation

is such that the PCRB has a certain opinion, on this point of University employees, while the Department of Contracts affirms an opposing view. The adjudication boards are finding themselves in a difficult situation and the point should thus be decided once and for all.

Ms Rachel Xuereb on behalf of the appellants stated that the price issue is not part of the appellants' objection. The appellants' objection was about the matter of University lecturers. She claimed that she and Dr Gordon Cordina have been working as key experts on a number of Government projects and they have never met any difficulties before. This was the first time that the issue had been raised.

At this point the hearing was closed.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 24th June 2014 and also through Appellant's verbal submissions during the hearing held on 8th July 2014, had objected to the decision taken by the pertinent Authority, in that:

- a) Appellant contends that his offer was considered as being 'technically non compliant', due to the fact that the 'team leader' was not considered as eligible, due to the simple fact that same was a University Lecturer and in this regard she was considered as a public officer, which in accordance with the conditions laid out in the tender document, such posts could not be considered as acceptable.**
- b) Appellant also claims that the 'Key Experts' were also considered as 'technically non compliant', due to the fact that same were lecturers at the University of Malta.**

Having considered the Contracting Authority's verbal submissions during the hearing held on 8th June 2014, in that:

- a) The Contracting Authority sought advice from the Department of Contracts and were advised that the University of Malta is a Public Entity and that its Lecturers were to be considered as 'Public Officers'.**
- b) When asked for clarifications by one of the Bidders, the reply from the Contracting Authority was circulated to all tenderers. So that, Appellant was aware of such notice.**

Reached the following conclusions:

- 1. This Board, strongly upholds the decision taken by same on the 7th March 2011, in that the University of Malta is an Autonomous Educational Constituted Body, and in no way falls under the regulations of the Public Service Commission. In this regard, this Board does not accept the Contracting Authority's argument that employees or further more Lecturers are to be deemed as Public officers.**

2. This Board also notes that the fact that this clarification was notified to all prospective Bidders, the latter had the right to express their objections to this clarification prior to the submission of the tender.
3. This Board also confirms that, since the University of Malta regulates itself through its Council, including such areas as recruitment, promotion and discipline, the same University of Malta does not fall within the authoritative parameters of the Public Service Commission. This Board upholds this principle.
4. This Board would also opt to point out, that its jurisdiction is to assess the process and adjudicating procedure adopted by the Evaluation Board was in the most just and transparent manner. In this regard, this Board affirms that, although the interpretation of University Lecturers, were interpreted as being Public Officers, on the advice of higher Authority's, this Board opines that the Evaluation Board acted in a diligent and transparent mode in arriving at the award of the tender decision. In this regard, the advisory Authority should have been aware of the Public Contracts Review Board's decision taken on 7th March 2011 (Case No 263).
5. This Board also notes that in view of the fact that all bidders were notified through clarification notice, issued by the Department of Contracts dated 21st December 2012, Appellant had the opportunity to clarify the eligibility of a Lecturer at the University of Malta.
6. The Preferred Bidder's Offer was fully compliant and the cheapest.

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

Dr. Anthony Cassar
Chairman

Dr. Charles Cassar
Member

Mr. Lawrence Ancilleri
Member

17 July 2014