

PUBLIC CONTRACTS REVIEW BOARD

Case No. 735

OPM 2131/2014: Management Agreement of Pjazza Teatru Rjal.

The tender was published on the 4th July 2014. The closing date was the 1st August 2014. The estimated value of the Tender was €2,000,000.

On the 31st July 2014 POS Catering Limited filed an objection raising pre-contractual concerns regarding the tender in terms of Regulation 85 of the Public Contracts Procurement Regulations.

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 9th September 2014 to discuss the objection.

Present for the hearing were:

POS Catering Limited - Appellant

Dr Adrian Delia	Legal Representative
Ms Danica Caruana	Representative
Mr Andrea Calleja	Representative

Office of the Prime Minister - Contracting Authority

Mr Mario Borg Olivier	Assistant Director
Dr Susan Sciberras	Legal Representative
Mr Charles Vella	Director Finance & Administration

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

Dr Adrian Delia on behalf of the appellant firm explained that this tender had been issued months earlier by Pjazza Teatru Rjal, and his client had been informed that it had been awarded the tender. He filed copies of correspondence stating this dated 18th and 20th March 2014 and 3rd April, all attesting to this award. However on the 2nd May 2014 appellant had received another letter stating that the tender had been cancelled giving no reasons for such cancellation. That tender is now the subject of legal proceedings since appellant had immediately filed a Judicial Protest against the cancellation.

The present tender had then been issued but with changed parameters including more stringent selection criteria. The new tender gives the impression of being tailor-made to be awarded only to certain other firms. The tender is for catering services and in this sphere no great specialization is needed. He contended that tenders should be designed to be more open, allowing more bidders to participate. Appellant has years of experience in the business but the requirements as a whole give rise to suspicions. The bidders are asked to prove experience that is totally not related to the case, for example to show sales of more than one and half million euros. This is contrary to the stated public policy which is for the opening of the tender process. There is absolutely no need for these requirements when dealing with catering concessions.

Dr Susan Sciberras on behalf of the contracting authority admitted the fact that appellant had been awarded the first tender and the fact that no reason for the cancellation had been offered. However she stated that the first tender was a concession of just a small part of the arches around Teatru Rjal to be used as a bar. Before the contract was signed, Government decided to open the concession process and now the whole area of the theatre is being offered. The new concession is for a period of thirty years. This made the need of financial stability a necessity for bidders, with a wider perspective. She remarked that, being a public service concession, in terms of Regulation 17.2 of the Public Procurement Regulations, the said regulations do not apply. The contracting authority chose to accede to the Public Contracts Review Board. She categorically denied that the specifications were tailor-made to suit anyone. The contracting authority wanted to use the whole area of the premises and the tendering process was open to all participants. She contended that appellant has other remedies regarding the first tender and is in fact taking them.

Dr Adrian Delia for the appellant said that it was not enough for his client to have the award cancelled without being given a reason but now the new tender has restrictions that prohibit appellant's participation. The management fee for the present tender is €45,000 while the fee for the previous tender was €27,000. Thus there was no need to raise the entry requirements. There was no need to prove a turnover of 1.5 million during the previous 3 years, since what was needed was for bidders to guarantee €45,000 per annum. This was not proportional to the €45,000 fee. There are several catering firms that are competent and have been in business for many years yet fall short of showing a turnover of 1.5 million euros during the past three years. There was no need for such a filter when the government's expectation is just €45,000.

Mr Charles Vella on behalf of the contracting authority explained that the €45,000 had to be considered for thirty years and it was this fact that led the contracting authority to choose 1.5 million, in order to have peace of mind.

Dr Delia reiterated that the figure of 1.5 million was for the turnover and not profit. It makes more sense to base it on profits. The government needed reassurance that it would be paid the fee. Someone could have a turnover of millions without making a profit and thus not be able to pay the fee.

At this point the hearing was brought to a close.

This Board,

Having noted Appellant's Pre-Contractual Concern, in terms of the 'Reasoned Letter of Objection' dated 31st July 2014 and also through Appellant's verbal submissions during the hearing held on 9th September 2014, had objected to the condition stipulated in the tender regarding the mandatory obligation of a turnover of Euros 1.5 million over the last three years, in that:

- a) The turnover condition as laid out in the tender document does in actual fact limit the scope of fair competition and transparency. Appellant has the necessary experience in the catering field to fulfil the tendered obligations however, the stipulated turnover figure over the last three years, will serve as a detriment to a sector of Bidders;**
- b) If the Contracting Authority wanted to secure the annual payment for the 'Concession', the latter should not have based this safeguard on the turnover of the last three years achieved by the prospective tenderer.**

Having considered the Contracting Authority's verbal submissions during the hearing held on 9th September 2014, in that:

- a) The Contracting Authority contends that it was never its intention to limit the scope of fair competition, but, at the same time, it had to be assured that the successful tenderer would be able to meet the annual payment for the concession. Hence a minimum turnover amount was stipulated.**

Reached the following conclusions:

- 1. This Board notes that since this was a 'Public Concession' tender, in accordance with Regulation 17.2 of the Public Procurement Regulations, the latter should not fall within the jurisdiction of same Regulations; but since the Contracting Authority acceded to these Regulations, this Board conceded to hear Appellant's concern;**
- 2. This Board opines that the Contracting Authority has the right to impose conditions in a tender document to safeguard its own interests. However, in doing so, the conditions being stipulated must not create an advantage to a sector of the tenderers. In this particular case, the dictated condition that the Tenderer**

has to prove a turnover figure of Euros 1.5 million over the last three years, does in fact limit the parameters of the ‘choice’ of the bidders. This Board strongly feels that there are other remedies available for the Contracting Authority, to ensure and safeguard the annual payment for the concession. In this regard, this Board recommends that a more generic and practical safeguard should be dictated in the tender document to ensure that all tenderers will have the opportunity to compete under fair and transparent principles.

In view of the above, this Board finds in favour of the Appellant company since its pre-contractual concerns were justified, and recommends that the stipulated condition of having a minimum of Euro 1.5 million in turnover over the last three years be substituted by a more practical and secure module, to ensure that default in the annual payment by the successful bidder will be remote.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancillieri
Member

6 October 2014