

PUBLIC CONTRACTS REVIEW BOARD

Case No. 789

CT 3218/2014

Tender for the Provision of a Fully Fledged Digital Promotion Campaign for Gozo.

The call was published on the 12th September 2014. The closing date for the call was on the 23rd October 2014. The estimated value of tender was €247,800.00.

Two (2) offers had been received for this tender.

On the 16th February 2015 MPS & Anchovy filed a letter of objection against the decision of the contracting authority to award the tender to Tiki Taka Marketing for the amount of €183,490.00.

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 10th March 2015 to discuss the objection.

Present for the hearing were:

MPS & Anchovy - Appellant

Mr Zak Borg	Representative
Mr Christian Mifsud	Representative
Ms Danica Caruana	Legal Representative
Dr Adrian Delia	Legal Representative

Tiki-Taka Marketing - Preferred Bidder

Mr George Larry Zammit	Chartered Marketer
Dr Georgine Schembri	Legal Representative

Ministry for Gozo - Contracting Authority

Mr Daniel Borg	Chairperson Evaluation Board
Mr Johann Attard	Member Evaluation Board
Mr Christian Galea	Member Evaluation Board
Ms Darlene Inguanez	Member Evaluation Board
Mr Oliver Saliba	Member Evaluation Board
Mr Joseph Farrugia	Project Leader
Dr Tatiane Scicluna Cassar	Legal Representative

Department of Contracts

Mfr George Vella	Procurement Manager
Mr Kevin D'Ugo	Procurement Manager
Mr Vincent Dougall	Representative

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

Dr Adrian Delia on behalf of the appellant explained that it was clearly essential for bidders in this tender to have had great experience and a sufficient number of employees to enable them to provide the service as required. The appellants individually, had found it difficult and nearly impossible to provide this and therefore they had chosen to form a Joint Venture, pooling their available resources. He said that the appellants contended that the preferred bidder did not have the technical capacity or the resources necessary to provide the service. In fact the preferred bidder had admitted in his letter of reply of not having the resources at the time the tender was submitted. This results from paragraph 7 of the letter of reply wherein it was stated that "these persons were subsequently formally employed with my client and so registered with the required authorities, when my client was given an indication that the tender was awarded to him."

Dr Delia contended that according to law, a bidder had to be compliant at the time he submits his tender; and referred to a previous decision of the Public Contracts Review Board in the Aurelia case where his then client, not having the required number of persons employed with him at the time of the submission of the tender, had had his tender rejected by the same Board.

The Chairman asked whether appellants are maintaining that the preferred bidder did not have enough resources at the time of submission of the tender.

Dr Adrian Delia replied that appellants are claiming, and are going to prove, that the preferred bidder was a one man company and has no employees. This was admitted by the preferred bidder in his letter of reply. He continued and referred to criminal procedures in course at present against two Companies where the bidder in a tender had given wrong information about his capacity to provide for disabled students when signing the tender declaration. It later resulted that he had no such capacity and thus he had made a false declaration. In that case the bidder involved had stated that he would have made the necessary alterations to the premises once the tender was awarded to him. He is now being criminally indicted for giving a false declaration in a tender bid.

Dr Tatiane Scicluna Cassar on behalf of the contracting authority submitted that the appellant Joint Venture did not provide any proof in the letter of objection. They made only hypothetical allegations and did not give any proof. In this tender both bidders were administratively and technically compliant and this was the reason of the wording in the letter of rejection sent to appellants. This was an e tender and the letter was automatically generated when bidders were found compliant. The evaluation board had deemed that the preferred bidder's offer was clear that he had the technical capacity from his declaration and from the information given. The preferred bidder had enclosed a list of experts that was deemed sufficient.

Dr Georgine Schembri on behalf of the preferred bidder admitted that at the time of the tender submission the persons involved were not registered with the ETC, but contended that in her opinion there was no need for them to be registered at that time. She explained that her client Mr Zammit was the sole trader who exercised commerce under a name. He is not a limited liability company. He had submitted the tender in his own name George Zammit. Dr Georgine Schembri continued that the preferred bidder, when the tender was opened, saw that

his offer was the cheapest and took action regarding the employees. She said that these had not been registered at the time the offer was submitted. In the Aurelia case cited by appellants she claimed that in that tender there were no employees available for employment when the tender was filed and so the bidder could not provide the necessary comfort to the then contracting authority. In the present case however, the persons involved had signed a declaration of commitment and gave exclusivity to the preferred bidder. The preferred bidder therefore had offered sufficient comfort to the contracting authority. The persons were registered as employees of the preferred bidder with the ETC. At this point Dr Schembri filed a copy of an acknowledgement from the Employment & Training Corporation showing the registration of 5 persons as employees with Tiki-Taka Marketing. Dr Schembri said that there is agreement that these employees had not been registered at the time of the tender submission. She reiterated that her client Mr George Zammit was a sole trader.

At this point Dr Adrian Delia for the appellants pointed out that the name George Zammit does not result anywhere in the tender documents. He said that the bidder had been Tiki-Taka Marketing and not George Zammit. Even the contracting authority always referred to Tiki-Taka Marketing and not to Mr George Zammit. He made a declaration that in view of both the tender document and the contracting authority's letter of reply as well as the tender "prices and recommendations" and the ETC documents all show clearly "Tiki-Taka Marketing" which is not a company and nor a registered entity, and therefore has no juridical standing, the contracting authority had to see if it wanted to regulate matters. Otherwise the contracting authority would be awarding a tender of importance and substance to a non-existent entity.

Dr Tatiane Scicluna Cassar for the contracting authority said that it was an undeniable fact that the tender was submitted by Tiki-Taka Marketing and her client contracting authority would remit to and accept this Board's decision on the matter.

Dr Georgine Schembri on behalf of the preferred bidder insisted that the preferred bidder was a sole trader trading under the name Tiki-Taka Marketing. She claimed that when registering for the e tendering process he had clearly indicated that he Mr Zammit was registering as a sole trader under Tiki-Taka Marketing, and filed a copy of the e registration form.

Dr Adrian Delia explained that this tender for Digital Marketing was something for a considerable service. To provide the service a bidder needs at least 12 full time employees. He claimed that after the award, the preferred bidder registered 5 fictitious persons as part-timers. He said that he could not understand how the contracting authority was going to award such a huge tender to someone without examining his memorandum and articles. The contracting authority was proposing to award the €200,000 tender to a non-existent entity that had no employees, was not registered, and had submitted a tender under a fictitious name that later resulted to have a physical person behind it. After the award this entity registered five part-time employees. He contended that tenders should not be awarded this way.

At this point the hearing was closed.

This Board,

Having noted the Appellant's Objection, in terms of the "Reasoned Letter of Objection" dated 13th February 2015 and also through the Appellant's verbal submissions during the Public Hearing held on the 10th March 2015, had objected to the decision taken by the Pertinent Authority, in that:

- a) The Appellant contends that, according to the Tender Requirements, the Preferred Bidder did not possess the necessary resources in so far as work force is concerned at the time of submission of his Tender. In this regard, the Preferred Bidder would not be in a position to carry out the tendered works;**
- b) The Appellant also maintains that the submitted Tender Document by the Preferred Bidder was in the name of "Tiki-Taka Marketing", a non-existent entity.**

Having considered the Contracting Authority's "Letter of Reply" and also the verbal submissions during the Public Hearing held on the 10th March 2015, in that:

- a) The Contracting Authority maintains that the Evaluation Committee, after having examined all the Documentation submitted by the Preferred Bidder, arrived at the Conclusion that the Preferred Bidder was fully compliant and the cheapest. In this regard, the Evaluation Process was fair and transparent;**
- b) The Contracting Authority rebuts the allegations made by the Appellant as ones without any foundation or proof. The Evaluation Committee carried out its duties in the most just and transparent matter;**

Reached the Following Conclusions:

- 1. This Board, after having heard verbal submissions made by both the Appellant and the Contracting Authority justifiably notes that it was credibly proven that at the time of the submission of the Tender Document, the preferred bidder Tiki-Taka Marketing did not have the necessary work force to carry out the works as dictated in the Tender Document. It is the Board's opinion that a prospective Tenderer should be compliant at the time of tendering and not at a future date. In this regard it has been credibly proved that the preferred bidder did not possess the necessary work force to carry out the tendered works;**

A prospective bidder must be administratively and technically compliant at the time of submission of the tender and not be "fully compliant" should the tender be awarded to him. In this respect, this Board upholds the Appellant's first contention;

- 2. With regards to the Appellant's second contention, this Board credibly notes that the Preferred Bidder was neither a registered company nor a registered Trade name nor a registered legal entity. It has been established and confirmed by the Contracting Authority that the Preferred Bidder submitted his tender in the name of "Tiki-Taka Marketing" which has no legal status. In this regard, this Board re-affirms the fact that a prospective tenderer should have a legal status**

and that “Tiki-Taka Marketing” is just a name, not registered and does not have any legal recognition. In this respect, this Board upholds the Appellant’s second contention.

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

- a) The Appellant’s Offer be re-integrated in the Evaluation Process;**
- b) More careful assessment of the Preferred Bidder’s offer be instigated to ensure that there was “Full Compliance” at the time of submission of the Tender;**
- c) The deposit paid by the Appellant is to be reimbursed.**

Dr. Anthony Cassar
Chairman

Dr. Charles Cassar
Member

Mr. Lawrence Ancillieri
Member

2 April 2015