

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case No. 806**

**TM 061/ 2014**

### **Tender for the Provision of Training Courses Related to People within the Organisation.**

The tender was published on the 26<sup>th</sup> September 2014. The closing date was the 17<sup>th</sup> October 2014. The estimated value of tender is €35,423.73(Exclusive of VAT).

Ten (10) offers had been received for this tender.

On the 30<sup>th</sup> March 2015 Domain Academy filed an objection against the decision of the contracting authority finding their tender to be technically non-compliant.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Thursday 7<sup>th</sup> May 2015 to discuss the objection.

Present for the hearing were:

#### **Domain Academy:**

Mr Nick Callus	Chairman
Dr Clint Tabone	Legal Representative

#### **EMD Management Limited:**

Mr Malcolm Pace Debono	Director
Ms Petra Sant	Representative

#### **Transport Malta:**

Mr Silvio Agius	Chairman
Ms Mariella Abela	Secretary
Mr Konrad Muscat	Evaluator
Mr Ray Stafrace	Representative
Dr Franco Vassallo	Legal Representative

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

Dr Clint Tabone on behalf of Domain Academy, the appellant said that his client's tender had been discarded because it did not attain the necessary 75 points in the technical evaluation. The appellant objects to the way the marks were assigned. Some marks are contradictory between themselves. For example, in the criterion organization and methodology, for the first item under the Rationale, the appellant was assigned 9 out of 10 marks for the scope submitted. The Bidder's profile, in the same page, appellant was assigned 3 out of 5 marks for the capacity to reach the scope. For the next item about licensing accreditation etc, appellant was assigned 6 out of 10. This is not understood, since the company had over 20 years experience and had all the necessary licences and accreditations and quality assurance and all these had been submitted with the tender. For the qualifications of the trainers to be used by appellant, the marks assigned were 15 out of 20. This means that the evaluators acted subjectively and not objectively when assigning marks. Appellant has no information how the points were arrived at. This was all subjective and not objective. There were no pre-determined marks set for levels of trainers, just subjective decisions depending on the evaluators.

Dr Franco Vassallo for the contracting authority stated that the Public Contracts Review Board cannot assume the responsibility of the evaluation committee when discretion is used. The Board has to ensure that the law was adhered to when the awarding was carried out, that there was a level playing field for all bidders. Clause 30.4 of the tender documents is very clear in explaining how the marks would have been assigned. This stated that *"At this step of the evaluation process, the evaluation committee will analyse the administratively-compliant tenders' technical conformity in relation to the Terms of Reference and the documentation requested by the contracting authority as per sub-clause 16 (e). When evaluating technical offers, each evaluator awards each offer a score out of a maximum of 100 points with the technical criteria and any sub-criteria as outlined below. The aggregate final score is arrived at by calculating the arithmetical average of the individual final score of each evaluator;"* this means that although the assessment has elements of subjectivity, the contracting authority would render it more objective by having the assessment done by several evaluators individually. The points would then be averaged. Furthermore the matter should have been raised at a pre-contractual stage. It was clear that only those obtaining more than 75 marks would be allowed to continue for the financial evaluation.

About the appellant's marks for licensing and accreditation, Dr Franco Vassallo continued that the contracting authority expected bidders to prove their statements by submitting licences and other evidence. It was not enough to state that one has over 20 years experience. The appellant did not produce any certification. Finally he enquired who or what was Domain Academy.

It resulted that the appellant is registered with C44723 and is a Limited Liability Company.

Dr Clint Tabone for the appellant contended that in order to ensure a level playing field the information submitted by each bidder would have to be published in order to ensure that each was treated the same. The evaluators would have to give justification for the marks assigned.

Dr Charles Cassar asked the appellant why the matter of subjectivity was not raised pre-contractually since the tender was clear about the way adjudication would be done.

Mr Nick Callus on behalf of the appellant explained that certain criteria should be on the basis of 'yes' or 'no'. This means that for most of the requirements you either have them or not. If the bidder has them he would be assigned marks; if he did not, no marks would be

assigned. As a company, appellant has all the licences required and these were mentioned. He claimed that with the tender appellant had included a CD with the copies of these licences.

Dr Franco Vassallo for the contracting authority insisted that no certificates or licences were submitted by the appellant.

At this point a CD was found attached to the appellant's tender and a Board's employee was instructed to see what the CD contained. It later resulted that the CD was just a copy of the tender document submitted by appellant and no certificates were on it.

Mr Silvio Agius, chairman of the evaluation committee under oath explaining how the appellant obtained 15 out of 20 marks for the CVs of proposed experts, said that the evaluators assessed the marks for each individual according to the academic qualifications of the key experts, checking them with the actual relevance for the tender. A clarification issued on the 10<sup>th</sup> October explained that points shall be awarded if the courses are accredited by NCFE according to relevance. The evaluators had to assign marks on what was submitted and the appellant had submitted most documents but no evidence of certification. This was the reason for the marks assigned to appellant. The evaluation report shows all the marks assigned and clearly shows that each evaluator assigned the marks individually and independently from each other and they did not consult between themselves on what marks to assign. The marks were later compiled and averaged. The evaluators also checked each bidder's submitted certificates and also with the NCFE website. The preferred bidder had produced evidence of his qualification.

Dr Franco Vassallo for the contracting authority insisted that the contracting authority was over generous with the appellant who had failed to produce certificates. It is the onus of bidders to submit all the relevant documents.

Dr Clint Tabone for the appellant claimed that he had searched the website to see if the preferred bidder was licensed but did not find it listed.

Mr Malcolm Pace Debono for the preferred bidder said that he had not received any document showing the points assigned to other bidders. He claimed that appellant is in possession of the licence that was issued in 2014 and is valid for 5 years.

At this point the hearing was closed.

**This Board,**

**Having noted the Appellant's objection, in terms of the "Reasoned Letter of Objection" dated 27<sup>th</sup> March 2015 and also through the Appellant's verbal submissions during the Public Hearing held on 7<sup>th</sup> May 2015, had objected to the decision taken by the pertinent authority, in that:**

- a) The Appellant Company contends that the methodical system of allocating points by the Evaluation Committee of the Contracting Authority is highly subjective. So much so that the Appellant feels aggrieved as to how points were allocated for grades which were compatible to the Tender requirements, and yet at the same time, different grades were given by the members of the Evaluation Committee;**
- b) The appellant maintains that he was fully compliant and could not foresee any logical reason why his offer was discarded. The appellant contends that he had**

submitted all the necessary information regarding the requested licences and these could be confirmed in the accompanying CD which was submitted together with the Tender Document;

Having considered the Contracting Authority's verbal submissions during the Public Hearing held on 7<sup>th</sup> May 2015, in that:

- a) The Contracting Authority maintains that although the Evaluation System does have an element of subjectivity, the allotments of points/marks are done by the Evaluators on an individual basis. At the final stage, the allotted points by the individual evaluators are then averaged to arrive at a faithful result;
- b) The Contracting Authority contends that one of the requisites in the Tender Document was that prospective bidders were to submit, "Licences" with the proper certification. The Appellant failed to do so, in this regard.

Reached the following conclusions:

1. With regards to the Appellant's First Contention, this Board after hearing credible submissions by the Contracting Authority and after reviewing the Evaluation Procedure adopted by the Evaluation Committee, is justifiably convinced that the formula adopted by the Evaluation Board is fair and transparent. Although there might be an element of "subjectivity", this Board is satisfied that the same formulation was adopted for all the bidders so that there is a level playing field for all. The fact that each member allocated points individually does ensure that the overall net marks are as accurate as one can be. In this regard, this Board opines that the methodology applied by the Evaluation Board in assessing the tenders was fair, just and transparent. This Board does not uphold the Appellant's first grievance;
2. With regards to the Appellant's second grievance, this Board, after verifying whether in the CD attached to the Tender, the requested "Licences and relative certificates", as stipulated in the Tender document were present, this Board is justifiably convinced that the Appellant did not submit the requested licence and certificate. In this regard, this Board does not uphold the appellant's second contention.

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

Dr. Anthony Cassar  
Chairman

Dr. Charles Cassar  
Member

Mr. Lawrence Ancillieri  
Member

*18 May 2015*