

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case No. 863**

**OPM 2131/2014**

### **Request for Participation for a Management Agreement at Pjazza Teatru Rjal.**

The Tender was published on the 4<sup>th</sup> July 2014. The closing date was the 4<sup>th</sup> November 2014. The estimated value of Tender is €45,500 per annum for 30 years (inclusive of VAT).

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

On the 15<sup>th</sup> October 2015 Art Cafe` Limited filed an objection against the decision of the Contracting Authority to cancel the request for participation.

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 27<sup>th</sup> October 2015 to discuss the objection.

Present for the hearing were:

#### **Art Cafe` Limited:**

|                  |                      |
|------------------|----------------------|
| Mr Hugh Anastasi | Director             |
| Mr Robert Napier | Representative       |
| Dr John Bonello  | Legal Representative |

#### **Office of the Prime Minister:**

|                    |                              |
|--------------------|------------------------------|
| Mr Charles Vella   | Chairperson Evaluation Board |
| Mr Matthew Borg    | Member Evaluation Board      |
| Mr Charles Gatt    | Member Evaluation Board      |
| Mr Alex Magro      | Representative               |
| Ms Marica Saliba   | Representative               |
| Dr Abigail Caruana | Legal Representative         |

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

Dr John Bonello on behalf of the Appellant complained that the reasons for the proposed cancellation of the Tender were only supplied to his client at the last minute before the closing date allowed for the filing of an objection. He claimed that his client's offer was both technically and administratively compliant and had qualified for award. But that later had been rejected for some reason and therefore he wished to hear the testimony of the members of the Evaluation Board first.

Dr Abigail Caruana on behalf of the Contracting Authority stated that there was already an admission of the fact that Appellant's bid was compliant in the Contracting Authority's Letter of Reply.

Mr Charles Vella, Chairman Evaluation Board ID No. 434067M under oath testified that there had been two offers for this Tender, one of which was not technically compliant and the Appellant's offer which had been compliant. The evaluation had to be based on 80% for the technical criteria and 20% for the financial aspect of the Tender. If a bidder failed the technical compliance, his offer would not be considered for the financial evaluation. Appellant's offer had attained 87% of the technical criteria marks. He confirmed under oath the contents of the Contracting Authority's Letter of Reply.

Dr John Bonello for the Appellant explained that this was a MEAT Tender. The same Tender dossier had shown that the expected revenue (foreseen) for the Contracting Authority was €45,500 per annum as could be seen from clause 15. This amount therefore had to be the benchmark for evaluating the financial aspect. The Appellant's offer had been the only technically compliant offer and therefore the financial offer had to decide the award of the Tender. The focus of the Contracting Authority was not on the price however since 80% of the marks were assigned for the technical contents of the offers and only 20% were assigned to the financial offer.

The Tender had specified the foreseen amount that would be reasonable to expect, and fixed this amount at €45,500. The Appellant's offer had exceeded this base line amount. The other bidder, whatever his offer was, should not influence the Appellant's offer because the latter offer had been found to be non-compliant. Yet when the reasons for the proposed cancellation were given, these included that "there were no economically worthwhile proposals had been received".

Appellant had offered more than the expected amount yet the Contracting Authority had incorrectly compared Appellant's offer with that of the other bidder who had been considered non-compliant. The Contracting Authority had contended that over a thirty year period, the difference between the two offers would exceed one million euro. He contended that the premises should not be assigned to someone incapable just to obtain 1 million more over 30 years.

Dr John Bonello continued that the Tender Document had provided for the possibility of the Contracting Authority to start negotiations with the bidder who obtained the highest score. This meant that the Contracting Authority should have contacted the Appellant, who had the highest score, with the aim of making negotiations as per clause 26 of the Tender Document.

The Contracting Authority is now making reference to a clause, claiming that it could refuse any offer. This contention is not right. The Tender Document listed four conditions where the cancellation could be made and the reason given to Appellant was not one of these listed.

Dr Abigail Caruana for the Contracting Authority explained that this was not a Tender procedure but a call for participation. The wording “expected to be €45,500” did not mean that this amount would be acceptable as this was not a threshold. She insisted that clause 27.i was clear that any proposal could be rejected. The Contracting Authority had asked bidders for proposals in order that it could decide what was deemed best. The technical offer carried 80% marks but this did not mean that the financial aspect had to be ignored; the financial offer was left open. The Tender had made it clear that negotiations could be made with the best bidder, but negotiations had to be to fine tune the offers. This fine tuning did not allow for the offer made by the Appellant to be doubled.

Dr John Bonello said that the call, although not a Tender had included the right of objection. The Contracting Authority had to abide with the Tender requirements. Any discretion to decide to cancel had to be in context with the Tender dossier, and this had listed the expected revenue to be €45,500. The Contracting Authority cannot at this stage claim that this amount was not viable. Once the Appellant had surpassed the amount expected by the authority in terms of the dossier, negotiations should have at least been started with the latter. They were not asking the Board to award the Tender to the Appellant but to revoke the decision of the Evaluation Board and to cancel the Tender. The Appellant has legitimate expectation that the Government acts fairly with all bidders.

Dr Abigail Caruana insisted that the Contracting Authority had followed the Tender dossier and had a right to reject any offer. The €45,500 was in no way the minimum amount to be offered in order to be awarded the Tender.

The hearing was closed at this point.

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**This Board,**

**Having noted the Appellant’s objection, in terms of the “Reasoned Letter of Objection” dated 15 October 2015 and also through their verbal submissions during the Public Hearing held on 27 October 2015, had objected to the decision taken by the Contracting Authority to cancel the Tender, in that:**

- a) **The Appellant contends that he was only notified of the reasons for cancelling the Tender at the last minute. Therefore, the latter was not fully aware of the reasons for disqualification of his offer;**
  
- b) **The Appellant also maintains that since his bid was technically compliant, with the later carrying an awarding context of 80% and that the same bid abided by the benchmarked lease of € 45,500, the award should have been given to them as the only bidder who was Technically compliant;**
  
- c) **The Appellant also claims that since the Tender Document also provided for negotiations and that their offer was fully compliant, the Contracting Authority should have asked for negotiation, as per Clause 26 of the Tender Document.**
  
- d) **The Appellant maintains that any decision by the Contracting Authority had to fulfil the conditions as dictated in the Tender Document. In this regard, the Appellant contends that the Contracting Authority did not follow this procedure.**

**Having considered the Contracting Authority's "Letter of Reply" dated 23 October 2015 and also their verbal submissions during the Public Hearing**

held on 27 October 2015, in that:

- a) **The Contracting Authority maintains that in accordance with the mandatory conditions of the Tender Document, “*The Contracting Authority reserves the right to accept or reject any proposal etc*”. The Tender Document also provides for the right of the Contracting Authority to issue new proposals;**
  
- b) **The Contracting Authority maintains that Article 27 (i) and Article 27 (iii) are separate and distinct from each other;**
  
- c) **The fact that the Contracting Authority stipulated a minimum “Lease Threshold” of € 45,500 does not mean in any way that Tenderers quoting this amount will be eligible, as the “Lease Amount” depends upon the market price prevailing for similar premises at the same sites.**

**Reached the following conclusions:**

1. **With regards to the Appellant’s first grievance, this Board justifiably notes that although the Appellant was informed of the Contracting Authority’s decision at the last minute prior to the closing date of**

submissions of objections, this did not, in any way, preclude the Appellant from filing an objection within the stipulated period. In fact, the Appellant filed his objection which is being treated in this Appeal. In this regard, this Board opines that the Appellant suffered no handicap in this respect;

2. With regards to the Appellant's second grievance, this Board would justifiably refer to Article 27 (i) and Article 27 (iii) whereby;

- Article 27 (i) clearly states that *“The Contracting Authority reserves the right to accept or reject and/or to cancel the whole RFP procedure and reject all proposals.”* This Board is of the opinion that the Contracting Authority stated clearly in the dossier that the latter can cancel the said procedure.
- At the same instance, Article 27 (iii) states that a cancellation can occur if the offers submitted are not *“Economically”* worthwhile. If the Contracting Authority considered the Appellant's offer not to be *“Economically”* worthwhile, the latter had all the rights to cancel the Tender, despite the Appellant being Technically Compliant.

**Article 27 (i), should also be taken into consideration, and this states that the Contracting Authority had the right to accept or reject any offer;**

- **This Board justifiably points out that the fact that the Appellant’s bid was Technically Compliant does not necessary imply that his offer was also economically worthwhile for the Contracting Authority;**
- **With regards to the Threshold of € 45, 500 per annum, this Board notes that Article 15 of the Tender Document does not list the Recommended Threshold and that the amount stated in the dossier was only an indicative amount at which the lease for such a property was indicated at the time of issue of the *“Request for Participation”*.**

**Given that the Threshold was indicated in 2014 and given that the marketed “Lease” for such a concession was found to be much more than the indicative value stated in the Tender Document in 2015, the Contracting Authority acted in a proper and transparent manner when cancelling the “RFP”.**

3. With regards to the Appellant's Third Grievance, this Board opines that the Tender Document clearly states that when an agreement has been reached to the satisfaction of both parties etc. *"The Interested party that obtains the highest score shall be chosen for further discussion/fine tuning of the proposal submitted,"*

This clause clearly defines that *"Further discussion/fine tuning will only be made after agreement has been reached."* This Board opines that such an agreement had not been reached and in this regard there could not be discussions or fine tuning as being contested by the Appellant. In this regard, this Board does not uphold the Appellant's Third Grievance.

4. With regards to the Appellant's Fourth Grievance, this Board credibly notes Article 27 (i) and Article 27 (iii) where these have been treated already. The Contracting Authority had all the rights to cancel the "RFP" hence abiding by the conditions in the dossier. In this regard, this Board upholds the Contracting Authority's decision to cancel the *"Request for Participation."*

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

Dr. Anthony Cassar  
Chairman

Dr. Charles Cassar  
Member

Mr. Lawrence Ancillieri  
Member

*2 November 2015*