

PUBLIC CONTRACTS REVIEW BOARD

Case 1011 – CT 2252/2015 – Framework Agreement for the Provision of Outside Catering and Ancillary Services During Malta’s Presidency of the Council of the European Union 2017

The Publication Date of the Call for Tenders was 10 May 2016 whilst the Closing Date for Call of Tenders was 21 June 2016. The Estimated Value of the Tender, (Exclusive of VAT) was € 1,300,000.

Nineteen (19) Bidders have submitted one-hundred and fourteen (114) offers for this Tender which was divided into eight (8) lots.

On 15 November 2016, Villa Arrigo Limited filed an Objection against the decision of the Ministry of the European Affairs and Implementation of the Electoral Manifesto to award Lot 7 of this Tender to Montekristo for the price of € 122,500 (Exclusive of VAT) against a deposit of € 1,355.

On 7 December 2016, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

Appellant – Villa Arrigo Limited

Ms Veronica Zammit Tabona	Representative
Dr Frank Testa	Legal Representative

Recommended Bidder – Montekristo

Mr Reuben Vella Bray	Representative
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Contracting Authority – Ministry of the European Affairs and Implementation of the Electoral Manifesto

Ing Anthony Camilleri	Chairperson, Evaluation Board
Mr Mark Muscat	Secretary, Evaluation Board
Mr Arnold Farrugia	Member, Evaluation Board
Mr Paul Mifsud	Member, Evaluation Board
Mr Duncan Pulis	Member, Evaluation Board

Department of Contracts

Ms Christine Friggieri	Procurement Manager
Dr Christopher Mizzi	Legal Representative

Following an introduction by The Public Contracts' Review Board Chairman, Dr Anthony Cassar, the Appellants were invited to make their submissions.

Dr Frank Testa, the Legal Representative for Villa Arrigo Limited opened by submitting that in his client's humble opinion, they were being sanctioned for something which was not precisely indicated in the Tender. Category 55.52 has appeared only at Adjudication stage, in the Letter of Rejection. The Tender Document did not indicate this.

In reality although the contended licence was not requested, the Contracting Authority requested a valid trading licence to hold weddings and other receptions for those who wanted to bid on Lots 7 and 8. Villa Arrigo Limited, for the last thirty years had a licence that covers places of public entertainment and in their licence there is clearly indicated the words Wedding Hall.

Dr Testa admitted that this was not the identical licence which there was in the Tender but there was a logical explanation behind it. If the licence was requested at the time when the Appellants started to do this job, it would have been compliant. He could not understand the fact that the licence owned by his clients lost its weighting when it was supposed that by time, the weighting and importance should have been increased.

The Appellants were making arguments here which regarded the form and the substance and they were wondering how come they were sanctioned on 55.52 when this was never requested since they had the necessary licence quite some time before this Tender was drafted.

If one could take Villa Arrigo Limited as technically compliant, they offered the cheapest bid, continued Dr Testa who also noted that the name of the awarded bidder was written wrongly as Montekrito but he was being practical and accepted that that might have been a typing error. Despite this, the practicability cannot be one way only.

Dr Frank Testa, the Legal Representative for Villa Arrigo Limited concluded by saying that one cannot ignore that his clients already have an licence for the wedding hall. Here, the principle of substance over form was being ignored.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts, replied that the Contracting Authority requested two licences which prove the bidders' Technical Capacity. The first one was a general licence which everybody should have and which was issued by the Commerce Department.

Dr Mizzi agreed with Dr Testa that this licence was not mentioned as Category 55.52 as indicated eventually in the Letter of Rejection following the pinpointing of it by the Commerce Department but on the other hand at that point in time, the Contracting Authority did not want to limit itself to a particular licence but was requesting a Tender licence issued by the Commerce Department which was to be valid and relevant with the Terms of Reference.

When one saw what did the Tender requested, there was the preparation of food etc, which the licence submitted had to reflect. It was then that the Commerce Department pinpointed to the Contracting Authority that the licence in question was called 55.52.

Dr Anthony Cassar, Chairman of the Public Contracts Review Board, asked whether there was somebody present from the Commerce Department for which Dr Christopher Mizzi, the Legal Representative for the Department of Contracts replied that they have brought a witness.

On the other hand, the Appellant submitted the second requested licence as per point number 6 wherein an additional licence was requested to those bidders who had to bid for Lot 7 and Lot 8. This additional licence, which was not excluding the other one, allowed the eventual holders to hold weddings and receptions in it.

Dr Christopher Mizzi continued by saying that one licence neither does cover nor exclude the other. The Appellant got the Wedding Hall licence but the licence as requested in point number 1 was not submitted, hence being non-compliant to the Tender Requirements.

At this point, Ing Anthony Camilleri, holding ID Card 90165 M who was the Chairperson of the Evaluation Board was summoned by Dr Mizzi to testify under oath.

Following Ing Camilleri's testimony, another witness was summoned by the Ministry for European Affairs and the Implementation of the Electoral Manifesto together with the Department of Contracts to testify under oath, Mr Ray Montebello, Director of the Commercial Services within the Commerce Department holding ID Card 460865 M.

At the end of Mr Montebello's testimony, Dr Frank Testa for Villa Arrigo Ltd said that he doesn't have a problem with the latter but still neither in the Tender Document, nor in the Reasoned Reply and nor in the two testimonies did the 55.52 was mentioned and this was worrying him.

The terms of reference have to be limited and specific. Dr Testa's experience was of clients who appeared in front of the Public Contracts Review Board because they did not submit all the necessary documentation and not the opposite.

Dr Testa continued arguing that the Tender was telling you that you have to have a valid Trading Licence to hold weddings and other receptions without specifying which one while he had to check all the licences to see which one was really needed. If the Contracting Authority requested the 55.52 they should have specified it in the Tender Document.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts and the Ministry for European Affairs and Implementation of the Electoral Manifesto countered that at the moment when the Tender was drafted, the Contracting Authority did not have the aim in its mind to pinpoint a particular licence because it was not the competent Authority to individuate the right licence. That means that different bidders could have submitted different licences which had the same aim.

It was following the indication of the Commerce Department that the relevant licence was requested, therefore there was no motivation for the Contracting Authority to keep hiding in the Letter of Rejection.

Dr Mizzi stressed that the Contracting Authority requested two licences and the Appellant have submitted only one licence so it was not a question of the 55.52 not being requested but

for the Contracting Authority it was a question that one licence and not two were submitted, hence the Evaluation Board being unable to award the bid to the Appellant.

With regards to the name of the Awarded Tender, Dr Mizzi referred the Public Contracts Review Board to Case Number 824 decided on 28 July 2015 wherein there was a similar case of a bid submitted by a particular Joint Venture but the profile name of who submitted the bid was a different one. This was the case with the award of this current bid.

Dr Frank Testa, the Legal Representative for Villa Arrigo Ltd argued that he was conceding the latter point raised by Dr Mizzi but that he was taking a point from it to enhance his previous point. The focal point in the Letter of Rejection issued to the Appellants was the 55.52. The Appellants cannot understand how a process can be fair when during the race there was never a mention of this licence but then it is mentioned on disqualification.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board remarked that one had to note that two licences were requested for which Dr Frank Testa for the Appellants countered that his clients' were arguing that the licence which they submitted incorporated everything.

Dr Christopher Mizzi for the Contracting Authority said that the Evaluation Board could not decide on things outside the submission.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board noted that it was important for everybody to agree that the Tender Documents requested both licences and that they were specified for services.

Dr Frank Testa for Villa Arrigo Limited concluded by agreeing with Dr Cassar's final statement and insisting that they have submitted the licences required.

At this stage, the Public Hearing was closed.

This Board,

Having noted this Objection filed by Villa Arrigo Ltd (herein after referred to as the Appellant) on 25 November 2016, refers to the Contentions made by the latter with regards to the award of Tender of Reference CT 2252/2015 listed as Case No 1011 in the records of the Public Contracts Review Board, awarded by the Ministry of European Affairs and

Implementation of the European Manifesto (herein after referred to as the Contracting Authority).

Appearing for the Appellant: Dr Frank Testa

Appearing for the Contracting Authority: Dr Christopher Mizzi

Whereby, the Appellant contends that:

- a) **Its offer was being discarded due to the fact that the Contracting Authority is alleging that the Appellant does not hold a valid Trading Licence and that the Licence submitted by Villa Arrigo Ltd did not satisfy the requirements of Category 55.52 relating to the provision of catering services.**

In this regard, the Appellant is maintaining that it is not fair and proper to quote Category 55.52 at Evaluation Stage when one takes into account that such a category of licence was not mentioned in the Tender Document.

This Board also noted the Contracting Authority's "*Letter of Reply*" dated 2 December 2016 and its verbal submissions during the Public Hearing held on 7 December, in that:

a) The Contracting Authority is contending that although during the drafting of the Tender Document, they had no specific licence in mind, as long as the objective of the Tender was achieved, the Ministry of European Affairs and Implementation of the Electoral Manifesto did specify the nature of Licences which the Bidders had to submit. In this regard, the Appellant did not fully comply with the requirements.

This same Board also noted the Testimonies of the witness namely, Ing Anthony Camilleri and Mr Ray Montebello duly summoned by the Ministry of European Affairs and Implementation of the Electoral Manifesto.

This Board, after having treated the merits of this case, arrived at the following conclusions:

- 1. With regards to Villa Arrigo Limited's contentions, this Board, after having examined the relative documentation and heard the submissions made by all parties concerned, opines that, it is a known fact that the Appellant has vast experience in the catering industry,**

however, this particular case deals with outside catering and ancillary services.

The Tender Document requested licences under Clause 7.1 b (i) and this Board credibly notes that the Trading Licences had to be valid and relevant. This same Board, after having heard the testimony of the Director for Commercial Services within the Commerce Department, affirms the fact that the Trading Licence in this particular case had to indicate authorisation to carry out the specific trading activity.

At the same instance, it is an established fact that the Trading Licence submitted by the Appellant did not incorporate the commercial activity as requested in the Tender Document. In fact, the Appellant satisfied only one of the two requisites.

In this regard, the Evaluation Board had to assess the Appellant's offer on the documentation submitted by the same and in this case Villa Arrigo Limited did not satisfy all the requirements with regards to the Trading Licence.

The Evaluation Board had to apply the principle of self-limitation which was the appropriate procedure to adopt. This Board also acknowledges the fact that from the credible testimony of Mr Ray Montebello during this Public Hearing, the Appellant does not hold a valid Licence for the Tendered services.

With regards to the inclusion and mention of Category 55.52, this Board credibly notes that this category came about after the Evaluation Board, quite correctly, enquired with the Department of Commerce whether the Appellant's Trading Licence was adequate.

It is quite obvious that the Latter Department quoted this category to indicate the type of activities which can be carried out under this category and which included the requisites of "*Outside Catering and Ancillary Services*".

This Board opines that due to the fact that the Appellant's offer was discarded for the non submission of a valid Trading Licence, the Contracting Authority had to mention Category 55.52 which should also be familiar to the catering industry.

In this regard, the mention of Category 55.52 of the Trading Licence has no bearing on the non possession of the necessary Licence to carry out the Tendered works/services.

Villa Arrigo Ltd should have been aware that the Tender Document requested the Trading Licences and it was their onus to ensure that the proper valid Trading Licenses are in possession for submission.

In this particular case there was no incidence of either submitting the incorrect licence or inadvertently failing to submit the Licence. This is a case whereby the Appellant did not possess the required adequate licence to carry out the activities as dictated in the Tender Document so that the principle of “*substance over form*” does not apply.

The Licence type submitted by the Appellant was for “*Places of Public Entertainment*” with additional remarks of “*Wedding Hall*”. This type of Licence does not provide for “*Supply of Food and Drink and Provide Outside Catering and Ancillary Services at a pre-determined venue*” as requested in the Tender Document.

With regards to the incorrect name of the Recommended Bidder, this Board would respectfully refer to case 824 “*Firetech Cross TLS JV vs Transport Malta*” wherein it was decided by this Board that “*A difference between EPPS profile name and the actual Bidder was not a material breach and could be easily corrected*”.

In this particular case, it is quite obvious that the name of “*Montekrito*” should refer to “*Montekristo*”, although such misspellings should be avoided.

In view of the above, this Board finds against Villa Arrigo Limited and recommends that the deposit paid by the latter should not be refunded.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

9 December 2016