

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 994 – MSDEC 83/2016 – Quotation for Classified Professional High Quality Digital Photos of All Maltese Species of Both Flora and Fauna**

The Publication Date of the Call for Tenders was 19 July 2016 whilst the Closing Date for Call of Tenders was 2 August 2016. The Estimated Value of the Tender, (Exclusive of VAT) was € 13,000.

Two (2) Bidders have submitted offers for this Tender.

On 7 September 2016, Mediatoday Ltd filed an Objection against the decision of the Ministry for Sustainable Development, the Environment and Climate Change to award the Tender to AIS Environment Ltd for the price of € 37,480 (Exclusive of VAT) against a deposit of € 400.

On 18 October 2016, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Carmel Esposito as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

#### **Appellant – Mediatoday Ltd**

Ms Elaine Cassar	Representative
Mr Mark Sultana	Representative

#### **Recommended Bidder – AIS Environment Ltd**

Ms Ruth Debrincat Tabone	Representative
Ms Vivienne Farrugia	Representative

#### **Contracting Authority – Ministry for Sustainable Development, the Environment and Climate Change**

Mr Pietro Caschetto	Chairperson, Evaluation Board
Mr Valhmo Mercieca	Secretary, Evaluation Board
Mr Noel Marshall	Member, Evaluation Board

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

Mr Mark Sultana for Mediatoday Ltd said that they were disqualified because the full list requested. When referring to the organisation and methodology, the second point says that the Bidders had to produce an exhausting list which was not clear. Mr Sultana noted that the difference between their Bid and the offer submitted by AIS Environmental Ltd was of € 21, 000.

Mr Pietro Caschetto, the Chairperson of the Evaluation Board, said that the Appellants were disqualified because under Page 11 Section 2 of the Tender Document, the Bidders had to submit, "*An exhaustive list containing the genus and species of the flora and fauna to be found in the Maltese Archipelago clearly showing the 25% and 75% as per Section 2 Clause 18*". These requirements fell under note 3 which specifically says that the Contracting Authority could neither ask for a clarification nor for a rectification. The argument which Mediatoday Ltd was stating that the list was not clear cannot hold.

Dr Anthony Cassar, Chairman Public Contracts Review Board, explained that the word exhaustive meant that one had to list as much items as possible at their own pace.

Mr Pietro Caschetto, the Chairperson of the Evaluation Board, said that the Bidders had to provide a list of species they had and which they had to offer to the Ministry.

Mr Carmel Esposito, Member Public Contracts Review Board, queried whether Mediatoday Ltd had produced any particular list for which Mr Pietro Caschetto for the Ministry for Sustainable Development, the Environment and Climate Change replied that they provided an Excel File which they provided to be filled and some pictures but not the actual exhaustive list requested.

Mr Mark Sultana for Mediatoday Ltd, argued that their point remained on who was going to judge what was exhaustive and what was not exhaustive.

Ms Ruth Debrincat Tabone for AIS Environmental Ltd said that apart from the Tender Document, a clarification was issued specifying the number of species which were to enter in each category and that they submitted the information as requested by this clarification.

Mr Mark Sultana for Mediatoday Ltd said that this clarification related to whether the marine species were to be included or not. The list requested in the clarifications was not an exhaustive one and thus the Appellants felt that they were misguided by the Contracting Authority.

Dr Anthony Cassar, Chairman Public Contracts Review Board, commented that the clarification does give an indication of what was requested. Mr Mark Sultana for Mediatoday Ltd replied that this was not clearly asked for. Dr Cassar then declared that it was the onus of the bidder to ensure that the list was made. This was confirmed by the Chairperson of the Evaluation Board, Mr Pietro Caschetto.

Mr Mark Sultana for Mediatoday Ltd said that the clarification gives you an idea on how the list should be divided. When you submit photos, you can't give only photos regarding flora.

Mr Pietro Caschetto for the Contracting Authority said that the Appellants did not provide any sort of list, hence making an incomplete submission. On the other hand, like the other bidder, the Appellants could have sought beforehand for a clarification if something like eligibility criteria was not clear

Mr Mark Sultana for Mediatoday Ltd concluded that a full list of all the species required should have been written down in the Tender.

At this stage, the Public Hearing was closed.

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**This Board,**

**Having noted the Appellant’s Objection, in terms of the “*Reasoned Letter of Objection*”, dated 7 September 2016 and also their verbal submissions during the Public Hearing held on 18 October 2016 had objected to the decision taken by the Pertinent Authority, in that:**

- a) Mediatoday Ltd contends that their offer was discarded due to the alleged fact that he did not submit an “*exhaustive list of genus and species of the flora and fauna*”. In this regard, the Appellants maintain that “*exhaustive list*” was confusing and not clear enough.

**Having considered the Contracting Authority’s “*Letter of Reply*” and their verbal submissions during the Public Hearing held on 18 October 2016, in that:**

- a) **The Ministry for Sustainable Development, the Environment and Climate Change maintains that Bidders had to submit a list of species they had and which they could offer them. In this regard, the Appellants had failed to do so.**

**Reached the following conclusions:**

- 1. This Board, having examined the relative documentation and heard submissions of the parties concerned justifiably opines that the Tender Document dictated, “*an exhaustive list*” of Fauna etc which the Bidders had to offer.**

**By “*exhaustive list*”, it is being indicated and meant a “*full list*” of Fauna etc which the same Bidders had to offer. At the same instance, although Clarification 1 did not indicate the full contents of the list, same did, in fact, denote the species that should be included. If one had to follow the Clarifications made, a deduction of how and what the list should contain was possible.**

**This Board also notes the fact that if the wording “*Exhaustive List*” was not clear enough for Mediatoday Ltd, the latter should have asked for a clarification prior to the submission of its offer. There**

existed also the option of a Pre-Contractual Remedy whereby the Appellant would have had the required interpretation of the wording “*Exhaustive List*”. In this regard, the Appellant did not resort to such measures.

2. This Board also notes that the requisite of the List fell under Note 3 wherein the Ministry for Sustainable Development, the Environment and Climate Change could neither ask for a clarification nor a rectification.

On this issue, this Board would like to credibly emphasize the fact, that the onus is on the Bidder to ensure that he has submitted all the information as dictated in the Tender Document.

At the same instance, it is not proper for a Bidder to appeal on matters which could have been avoided through other remedies allowed at Law. In this particular case, this Board strongly feels that the Mediatoday Ltd’s Objection reacted to matters which could have been clarified before and not by this Board. In this regard, this Board does not uphold the Appellant’s Contention.

**In view of the above, this Board finds against Mediatoday Ltd and recommends that the deposit paid by the latter should not be refunded.**

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Carmel Esposito  
Member

*20 October 2016*