

PUBLIC CONTRACTS REVIEW BOARD

Case 1046 – RFP 009/2016 – Request for Proposals for the Design, Supply, Installation and Maintenance of Bus Shelters in Malta and Gozo and Maintenance of Existing Bus Shelters Canopies

The Publication Date of the Call for Tenders was 28 October 2016 whilst the Closing Date for Call of Tenders was 23 January 2017.

Five (5) Bidders have submitted offers for this Tender.

On 17 March 2017, Mediterranean Research and Solutions filed an Objection against the decision of Transport Malta to award the Tender to 356 Holdings Ltd against a deposit of € 1,200.

On 9 May 2017, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

Appellant – Mediterranean Research and Solutions Ltd

Ms Luminita Naca	Representative
Mr Daniel Orsini	Representative
Mr Justin Schembri	Representative
Dr Alessandro Lia	Legal Representative

Recommended Bidder – 356 Holdings Ltd

Mr Antoine Portelli	Representative
Mr Nicholas Spiteri	Representative
Dr Ron Galea Cavallazzi	Legal Representative

Contracting Authority – Transport Malta

Mr Mark Sammut	Chairperson, Evaluation Board
Mr Stanley Agius	Member, Evaluation Board
Mr Luke Genuis	Member, Evaluation Board
Mr Ray Stafrace	Representative
Dr Joseph Camilleri	Legal Representative

The Chairman of the Public Contracts Review Board, Dr Anthony Cassar opened by stating that he wanted to clarify three issues prior to the Appellants' Submissions. Dr Cassar asked Transport Malta what did the words, "*ad hoc board*" in the E-Mail of Rejection issued by the latter to Mediterranean Research and Solutions Ltd on 7 March 2017 refer to.

Dr Joseph Camilleri, the Legal Representative for Transport Malta replied that this was a call for proposals and the latter procedure justified the use of the words "*ad hoc*".

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board referred then to Clause 12 of the Tender Document which clearly indicated that the Tender fell under the Public Procurement Regulations; hence any Review Procedure should only be addressed to the Public Contracts Review Board.

Dr Joseph Camilleri, the Legal Representative for Transport Malta agreed with Dr Cassar's statement and added that once the procedure was regulated with the Public Procurement Regulations, therefore any Appeals for this Tender must be addressed to the Public Contracts Review Board.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board then asked on what basis was the Appellant asked to pay € 1,200 deposit when there was no Estimated Value for the Tender.

Dr Joseph Camilleri, the Legal Representative for Transport Malta replied that when the call was drafted, the New Public Procurement Regulations were not yet into effect as amended on 28 October 2016. Therefore, the calculation for the deposit in case on any Objections was a discretionary one.

Following these queries, the Chairman of the Public Contracts Review Board invited the Appellants to state their case.

Dr Alessandro Lia, the Legal Representative for Mediterranean Research and Solutions Ltd opened by saying that on 7 March 2017 they were notified that their proposal was rejected. He then quoted the E-Mail of Rejection received which *inter alia* stated that,

"Kindly be advised that following the Evaluation process, the Recommended Bidder for the above request for proposal is 356 Holdings Limited. The Evaluation process was conducted in accordance with Article 11 of the Request for Proposal Document".

Dr Lia then continued by saying that neither he nor his clients had never received the Annex TM 2 which should have been attached to the Reasoned Letter of Reply issued by Transport Malta on 29 March 2017 and it was only sent to them on the eve of the Public Hearing by the Secretariat of the Public Contracts Review Board.

This changes a lot of things since one of their Grievances was that they had no information on why their proposal was rejected prior to Objection stage and hence, Mediterranean Research & Solutions Ltd were requesting the Public Contracts Review Board to defer the Public Hearing since he might need the Evaluators to testify before the latter under oath.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board admitted that this was an oversight by the Secretariat of this same Board and accepted Dr Lia's request for a deferment on the basis that a base of argument can be found.

Dr Joseph Camilleri, the Legal Representative for Transport Malta said that he was not going to oppose to Dr Lia's request in order for the procedure to be as transparent as possible. On

the other hand, Dr Camilleri felt that the Review Exercise does not need to evaluate what each and every Evaluator gave marks to all Bidders.

The exercise which the Public Contracts Review Board had to take was to see whether the procedure was held in a transparent way within the parameters of the Technical Evaluation Board.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board said that this was not going to happen.

Dr Alessandro Lia, the Legal Representative for Mediterranean Research and Solutions Ltd added that there was not going to be a technical inquest.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board said that the latter Board had to see whether the procedure was held transparently

At this stage, the Public Hearing was adjourned to Thursday 18 May at 09:00.

Second Public Hearing

On 18 May 2017, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

Appellant – Mediterranean Research and Solutions Ltd

Mr Daniel Orsini	Representative
Dr Alessandro Lia	Legal Representative

Recommended Bidder – 356 Holdings Ltd

Mr Antoine Portelli	Representative
Dr Ron Galea Cavallazzi	Legal Representative

Contracting Authority – Transport Malta

Mr Mark Sammut	Chairperson, Evaluation Board
Ms Mary Grace Pisani	Secretary, Evaluation Board
Mr Stanley Agius	Member, Evaluation Board
Mr Luke Genuis	Member, Evaluation Board
Mr Keith Tanti	Member, Evaluation Board
Ms Liz Markham	Representative
Mr Ray Stafrace	Representative
Dr Joseph Camilleri	Legal Representative

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

Dr Alessandro Lia, the Legal Representative for Mediterranean Research and Solutions Ltd requested the three members which formed part of the Evaluation Board to testify under oath so that he can understand how they arrived to their conclusions. Dr Lia requested that during the first Testimony, the two other members are to remain out and so forth.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board pointed out that the latter was not entering into the technical details.

Dr Alessandro Lia, the Legal Representative for the Appellants agreed and added that his questioning would be strictly on a mathematical basis.

Dr Joseph Camilleri, the Legal Representative for Transport Malta found no Objection to Dr Lia's request.

At this point, the first member of the Evaluation Board, Mr Keith Tanti, an Accountant within Transport Malta holding ID Card number 159284 M was summoned by Mediterranean Research and Solutions Ltd to testify under oath before the Public Contracts Review Board.

Following Mr Tanti's testimony, the second Evaluation Board member, Mr Luke Genuis, a manager at Transport Malta holding ID Card Number 108684 M was summoned by Mediterranean Research and Solutions Ltd to testify under oath before the Public Contracts Review Board.

At the end of Mr Genuis' testimony, the final Evaluation Board member, Mr Stanley Agius, a Marketing Manger within Transport Malta holding ID Card Number 10782 M was summoned by Mediterranean Research and Solutions Ltd to testify under oath before the Public Contracts Review Board.

At the end of Mr Agius' testimony, a fourth Witness, Mr Justin Schembri, an architect holding ID Card number 547089 M was summoned by Mediterranean Research and Solutions Ltd to testify under oath before the Public Contracts Review Board.

Following Mr Schembri's testimony, Dr Alessandro Lia, the Legal Representative for Mediterranean Solutions and Reasearch Ltd argued that here there is an unfortunate situation because the Evaluation Board who saw these technical and mathematical issues were incompetent on the subject since they could not evaluate correctly. The parameters requested by the Tender Document had to be followed and one could not assume according to the conscience. An architect could not understand in molecular energy.

With regards to point one, two of the three Evaluators followed the Tender Document and gave five points while the other one, since he felt that the offer submitted by the Appellants was not credible enough for him gave three points. This was not a MEAT Tender and even if it was, there were parameters. This was a procedural mistake which this RFP had.

Dr Lia wondered how come in such a Tender which involves a lot of money and a long term project, Transport Malta did not choose one of their many architects who are sub contracted with them, consultants or technical people to form part of the Evaluation Board.

With regards Glare Mitigation, the Technical Witness explained correctly that in the way the text was postulated, the Tender Document was incorrect. A technical person would have understood this. Mediterranean Research and Solutions Ltd gave a product which is used in

museums but the Evaluation Board, formed by an Accountant, a Manager and a Marketing Manager, did not give any points to their offer.

Dr Alessandro Lia continued by saying that the cardinal mistake made in the point of departure was that nobody in the Evaluation Board was able to make the correct calculations. The latter, due to their incompetency, should have referred to somebody with the Technical Expertise to give the correct advice and this is the mistake which the Public Contracts Review Board had to correct.

The same thing happened with regards to the Glare. The Evaluation Board did not give any marks since they did not see the word Glare in any of the Appellant's offer. The truth is that the Evaluation Board was not a Technical One.

With regards to the durability, the Tender clearly establishes the way with which the Evaluation Board had to conduct its evaluation and not according to their conscience. The Appellants picked only half the points since they gave fifty years durability and not hundred. Dr Alessandro Lia concluded that his clients requested that the Evaluation for this Tender is to be made by competent people.

Dr Joseph Camilleri, the Legal Representative for Transport Malta countered that Dr Lia had to decide whether the Evaluation was to be made in a mathematical or a technical way. The truth was that as admitted by the Appellants, one had to compare the offers submitted and come to a conclusion of who is giving the best offer from them.

The Appellants were emphasising on the mitigation since in all the points which the Contracting Authority was mentioning, glare was one thing which was purely technical since where there are other complaints such as in the uniformity of designs, Dr Lia himself was saying that his clients' offer deserved more than they got.

Dr Joseph Camilleri continued by saying that with regards the question of price, the Appellants were arguing why they got seven points and not fifteen since they were giving the bus shelters free of charge. If one had to look only on their offer, it seems to be good but another evaluator pointed out that there was one Bidder who requested a fee for every bus shelter, others who gave the first few free of charge and the rest against a fee and there were others who gave the bus shelters free of charge. This was a clear example that one could see that an offer was good but when compared with others it does not offer enough guarantees.

The Contracting Authority's Legal Representative continued by saying that as Dr Lia pointed out, certain issues are mathematical with the only issue being the monthly bus shelter issue. Two Bidders gave five points and the other gave three with a difference of 0.7%.

If one had to compare the points given, one had to see that the Mediterranean Research and Solutions Ltd was not one of the leading candidates. If there was a technical expert in the Evaluation Board who gave five points for glare mitigation, the Appellants would still be way behind.

With regards the competence of the Evaluation Board, Dr Camilleri replied that there weren't technical questions which required the Expert's intervention. The discussion was about bus shelters which were to become part of the Transport Malta brand so it was important for a Marketing Manager to be present in the Evaluation Board.

It was also important to have a manager in the Transport sector since this contract was part of Transport Malta's branding with regards Public Transport. The incompetency issue can be turned around in many ways.

Dr Camilleri was assured that the procedure used was the correct one. It was not a question of collusion since there were correct comparisons of the offers and individual points according to each Evaluator's conscience which then drew conclusions on which was the best offer. There was a Board which was formed and a Chairman which was a Technical Person. There were members from Transport Malta who provided the mix of different experiences and there was also a secretary. Nobody alleged that the procedure was not made correctly. Those were the points given and the Contracting Authority was wondering why the Appellants were making all these Objections.

Dr Alessandro Lia, the Legal Representative for Mediterranean Research and Solutions Ltd replied that certain issues were mathematical but these were not subsequent. Certain things were technical. Nobody in the Evaluation Board understood about glare or UV numbers. There were mathematical issues but there were also technical issues and lack of revision which comes from lack of expertise.

Dr Lia was content to know that Dr Camilleri admitted that Mr Tanti was strict in his Evaluations and because of these few mistakes amongst others, doubts were raised on the procedure used. In view of these, the Public Contracts Review Board was obliged to order a re-evaluation of the Tender.

Dr Ron Galea Cavallazzi, for 356 Holdings Ltd, the Recommended Bidders, submitted that in their interventions, the Appellants did not mention a crucial point, which was the price. The Appellants had eight points deducted for the price. With regards Glare Mitigation, if the Appellant felt that he had doubts regarding the material to be given, they should have sought a clarification.

Dr Galea Cavallazzi continued by saying that it was not fair to attack individually the Evaluators. The three Evaluators discussed between them and despite the fact that they were not Technical, they were given the advice which was needed. With regards the performance, his clients submitted a certificate from a company in the United Kingdom which was helping 356 Holdings Ltd in their offer.

Dr Ron Galea Cavallazzi concluded his submission by saying that the Tender was evaluated correctly and there was no reason why the Tender was awarded to the wrong persons.

At this stage, the Public Hearing was adjourned to Tuesday 23 May 2017 at 09:00 wherein the Public Contracts Review Board will transmit the decision taken for this Objection verbally and then distribute a hard copy of the same to all parties concerned.

This Board,

Having noted this Objection filed by Mediterranean Research and Solutions Ltd (herein after referred to as the Appellant) on 17 March 2017, refers to the Contentions made by the latter with regards to the award of

Tender of Reference RFP 009/2016 listed as Case No 1046 in the records of the Public Contracts Review Board, awarded by Transport Malta (herein after referred to as the Contracting Authority).

Appearing for the Appellant: Dr Alessandro Lia

Appearing for the Contracting Authority: Dr Joseph Camilleri

Whereby, the Appellant contends that:

- a) The mode of how the points were allocated under the adopted Evaluation process was totally incorrect, as no regard was taken to the Technical Features of their offer.**

At the same instance, the Appellant maintains that the Evaluation Board was not composed of, or included at least one Technical person, such as an architect, to enable the latter to assess methodically and professionally the Technical Features of their offer.

In this regard, Mediterranean Research and Solutions Ltd are also insisting that the composition of the Evaluation Board was not technical enough to arrive at a true and fair evaluation of the offers submitted.

This Board also noted the Contracting Authority’s “*Letter of Reply*” dated 29 March 2017 and its verbal submissions during the Public Hearing held on 9 May 2017, in that:

- a) Transport Malta contend that in the evaluation process, there was no need for any Technical Clarification which required a Technical Expert’s intervention, so that, the Evaluation Board was properly composed of members having vast experience in various fields within Transport Malta.**

In this regard, the Contracting Authority maintains that the composition of the Evaluation Board was competent enough to arrive at a just and fair conclusion

This same Board also noted the Testimonies of the witness namely:

- 1. Mr Keith Tanti, summoned by Mediterranean Research and Holdings Ltd;**
- 2. Mr Luke Genuis, summoned by Mediterranean Research and Holdings Ltd;**

3. Mr Stanley Agius, summoned by Mediterranean Research and Holdings Ltd;

4. Mr Justin Schembri summoned by Mediterranean Research and Holdings Ltd.

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

1. This Board would like to, first and foremost, point out that it will not delve into the Technical issues of the Appeal, but rather determine whether the Evaluation Process and the procedure adopted therein was a just and transparent Adjudication. At the same instance, this Board has arrived at various conclusions, after hearing lengthy submissions and testimonies.

2. With regards to the Appellant's Grievance, this Board opines that the key issues in this Appeal were the mode of allocation of points relating to certain Technical Features of their offer and also the credibility of the Evaluation Board's Final Verdict.

The Tender Document dictated specific features which were mandatory and on which specific marks were to be awarded. It also

dictated the scale of points relating to the compliancy of these features.

One has to bear in mind that although this was not a MEAT Tender, the dictated scale of points, as shown on pages 19 and 20 of the Tender Document were a fair and equitable procedure of how to assess the offers being Tendered for.

Each member of the Evaluation Board had to allocate marks individually for the mentioned features on Pages 19 and 20, for every offer so that a level playing field was maintained throughout. In this regard, this Board acknowledges the fact that the allocation of some points is subjective, however it has been proved that the general outcome from this system should have been an objective conclusion.

In this particular case, on examining the allotted points and their relative scale, one would justifiably note that certain individual allocation of points relating to the same feature were not awarded the same number of points, in an objective manner, as dictated in the scale of points schedule.

This refers to features where no subjective opinions are required to allot points. This deficiency was not proven otherwise through the Testimony of all witnesses who represented the Evaluation Board.

In this regard, this Board also noted that the features which had to be gauged by the allocation of marks consisted, to a major extent, of Technical Material so that, in this respect, one would have expected that at least, one member of the Evaluation Board would possess a Technical Background in the field of the Tendered Works.

In this regard, from the Testimony of the witnesses it could be seen that none of the members of the Evaluation Board was technical enough to adjudicate fairly and allocate the points accordingly, on the technical aspect of this Tender.

Again, from the submissions, it had become evidently clear that the allocation of marks on technical issues of this Tender was not carried out on technical grounds but rather on a generic and subjective opinions or impressions which do not, in actual fact, refer to the Technical Aspect of the issue under review.

This Board opines that the Evaluation Board has to evaluate an offer on the basis of its compliancy with regards to the administrative,

technical and financial aspects. From the submissions made, this Board is not convinced that the Technical Aspect of all the offers made in this Tender were properly assessed and backed by the relevant technical justifications. In other words, due to a deficiency in the Technical Knowledge, this Board is not credibly assured that the allocation of marks on the Technical Aspect of this Tender does, in fact, reflect the merited grading that should have been allocated.

This Board would like to respectfully point out that the composition of the Evaluation Board plays a very important role in selecting fairly, the most competitive offer for the Contracting Authority in question. It is at the stage of evaluation that the selection for award is carried out so that it is of the utmost importance for the Evaluation Board to be composed of members who have the right qualifications.

In cases where the composite of the Tender necessitate the Technical Background of the subject under review, the Contracting Authority in question is obliged to appoint the appropriate Technical person to form part of the Evaluation Board.

The least that could be expected in such circumstances is for the Evaluation Board to seek technical advice from outside sources. In this regard, this Board noted that the Evaluation Board did not feel

the need to seek any technical advice as the latter regard the evaluation of the offers, as an arithmetical exercise.

In this regard, this Board would like to justifiably advice and recommend that the Evaluation of the offers should only be carried out on the substance of facts and documentation duly submitted by the Bidder and not on assumptions, impressions or points of view of the members of the Evaluation Board.

In this regard, this Board would like to respectfully note that from the submissions made, no justifications were presented, as to how the allocation of marks on the Technical issues as denoted on pages 19 and 20 of the Tender Document, depended upon.

In this respect, this Board is not comfortably convinced that the Evaluation procedure was carried out properly to establish the merited points to be allocated on the Technical Features of this Tender.

In view of the above, this Board finds in favour of Mediterranean Research and Solutions Ltd and recommends that:

- i) The award of the Tender is to be cancelled;**

- ii) The Appellant's offer is to be reintegrated in the Evaluation Process;**

- iii) The deposit paid by Mediterranean Research and Solutions Ltd is to be fully refunded;**

- iv) A re-evaluation process is to be carried out by an Evaluation Board duly composed of new members, one of whom should possess the necessary Technical Knowledge on the subject matter.**

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member

23 May 2017