

PUBLIC CONTRACTS REVIEW BOARD

Case 1061 – MSDEC/AGRIC 162/2016 – Tender for the Promotion Campaign of the Products of Quality National Scheme

The Publication Date of the Call for Tenders was 3 January 2017 whilst the Closing Date for Call of Tenders was 24 January 2017. The Estimated Value of the Tender, (Exclusive of VAT) was € 34,000.

Ten (10) Bidders have submitted offers for this Tender.

On 22 May 2017, Communique Ltd filed an Objection against the decision of the Ministry for the Sustainable Development, the Environment and Climate Change to award the Tender to Outlook Coop for the price of € 41,220 (Exclusive of VAT) against a deposit of € 400.

On 6 July 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 – Communique Ltd

Mr Sean Borg	Representative
Mrs Bernice Micallef	Representative
Dr Alexander Schembri	Legal Representative

Recommended Bidder – Outlook Coop

No representative was present for the Public Hearing

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

Mr Saviour Debono Grech	Chairperson, Evaluation Board
Mr Frank Caruana Catania	Member, Evaluation Board
Mr Kriss Debono	Member, Evaluation Board
Mr Marco Dimech	Member, Evaluation Board

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

Dr Alexander Schembri, the Legal Representative for Communique Ltd opened by saying that this was a contract for a Promotion Campaign regarding food products. Their offer was deemed to be technically non-compliant by the Ministry for Sustainable Development, the Environment and Climate Change and that both reasons given by the latter were related to information which was present in the Tender.

Dr Schembri then continued by quoting the Letter of Rejection issued by the Contracting Authority on 12 May 2017 which *inter alia* stated,

“The proposal did not comply with Para 2 (Strategy of the Tenderer’s Technical Offer (Organisation & Methodology) within Section 4 (Technical Specifications/Terms of Reference) since no details were provided on the deliverables as requested under bullet 3”.

The Appellants' Legal Representative argued that when one was talking about details, in their opinion this was a bit vague since no specific information was given by the Contracting Authority. The Tender was not requesting any particular information. This can lead to the Ministry for Sustainable Development, the Environment and Climate Change the discretion to make its choices on a case to case basis. Communique Ltd has presented a brochure with its past history and other information regarding management with their Appeal.

Dr Alexander Schembri continued by saying with regards the second point on why their bid was rejected; the Contracting Authority was saying that there were three bullets which state that the Appellants had some missing information in their submission. In their offer, Communique Ltd has presented a Gannt Chart illustrating how they will work out the Tender.

Dr Schembri then submitted that the Reasoned Letter of Reply issued by the Ministry for Sustainable Development, the Environment and Climate Change on 26 May 2017 was a repetition on why his client's offer was deemed to be technically non compliant. He then cited the final part of this said Letter which said,

“Whilst acknowledging that the tenderer did submit some information, the tenderer failed to provide time frames for the proposed delivery of the two TV interviews that have to be negotiated with the TV station.”

All this information, continued Dr Alexander Schembri, was submitted both in their brochure and in their chart submitted. Whilst the Contracting Authority had a wide discretion on how to draft the Tender Specifications, Communique Ltd could still not understand where their offer lacked.

Mr Marco Dimech, a member of the Evaluation Board, opened the Contracting Authority's defence by submitting that this Tender was a promotional campaign for a food scheme. The Evaluation Board's role was that to follow the Tender Document requirements. The Contracting Authority disagreed with the Appellant's statement that they have submitted all the required information because as Point 3 under the subheading Strategy of the Tender Document state, the prospective Bidder had to,

“Demonstrate how through the use of resources, expertise, knowledge and capacity to work in different fields, quality of deliverables is assured”.

Mr Dimech continued by saying that the Evaluation Board felt that the offer submitted by Communique Ltd did not have the list of resources and people available and how these were to work on this specific Tender.

With regards the Appellant’s Second Grievance, the Contracting Authority’s representative said that the Evaluation Board acknowledged the submitted information but there were two interviews which had to be negotiated on how these will be conducted with the local Television stations.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether the information on the Television interviews was present in the Appellant’s offer for which Mr Marco Dimech for the Ministry for Sustainable Development, the Environment and Climate Change replied that this information was not present in the Gantt Chart.

Dr Alexander Schembri, the Legal Representative for Communique Ltd argued that with regards their First Grievance, he felt that the Public Contracts Review Board realised that the Evaluation Board requested information regarding resources but was wondering what these type of resources were.

Mr Marco Dimech, a member of the Evaluation Board countered that the latter had to be assured that the targets which they were requesting were going to be reached.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board said that by resources, the Contracting Authority had to specify what it was because it might refer to many things. Everybody had different resources.

Mr Marco Dimech, for the Contracting Authority added that there were four criteria in the Tender Document which had to explain how the deliveries will be made.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board said that the resources were not general. This was agreed by the Contracting Authority’s representative.

Dr Alexander Schembri, the Legal Representative for Communique Ltd said that they had indicated a Key Expert in their offer and they have also submitted his CV. Besides the brochure, his clients also submitted their history and work record. In the text, there was more information on how the required targets were going to be delivered.

According to the Appellants, the Public Contracts Review Board understood that the Ministry for Sustainable Development, the Environment and Climate Change’s request was a vague one. Information was required on the expertise, knowledge and capacity to work and that this information was submitted to the satisfaction of the Evaluation Board. Communique Ltd could not understand what did wrong in this submission.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board queried whether the Evaluation Board felt that there was enough information submitted by Communique Ltd regarding the resources for which Mr Saviour Debono Grech, the Chairperson of the

Evaluation Board replied that it was not specific with regards to how their resources were going to work out this Tender.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether the Tender Document has required this for which Mr Saviour Debono Grech for the Contracting Authority replied by referring to the above mentioned point in the Tender Document regarding Strategy.

The Evaluation Board, continued Mr Debono Grech, felt that the prospective Bidders had to explain and identify in detail their resources. The same Board, when examining the Appellant's offer felt that some things might be present while others not, hence concluding that Communique Ltd.'s offer was too generic.

Mr Marco Dimech, another member of the Evaluation Board added that they did not find a relationship, as required by the Tender Specifications, between the resources which the Appellants had available and what was going to be actuated.

Dr Alexander Schembri, the Legal Representative for Communique Ltd said that if one had to see the offer which his clients submitted and their Letter of Objection dated 19 May 2017, it was cited *inter alia* that,

“All employees of Communique Ltd that will be working on this project (project management team) will be aware of the scope of the project, its objectives and the guidelines to ensure relevance, best practice and deliverance of the resultant objectives of this project”

The information, continued Dr Schembri, was present. The Tender provided the specifications and then they are either here or not. It was not fair to give vague Tender Specifications and then compare the bids with each other.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, asked the Appellants whether they did submit detailed methodology for which Dr Alexander Schembri, the Legal Representative for Communique Ltd replied in the affirmative.

Dr Schembri added that his clients have submitted a team organisation chart where they have explained in detail how will they work out the project. If the Contracting Authority requested a list of employees this would have been given but when they mentioned expertise and knowledge, they have mentioned such a vast argument that one did not know from where to start.

Mr Saviour Debono Grech for the Ministry for Sustainable Development, the Environment and Climate Change said that as an Evaluation Board, they had to take a stand regarding what to expect and they used the same meter across the Board when evaluating bids.

With regards to Communique Ltd.'s Second Grievance, Dr Alexander Schembri, their Legal Representative referred once again to the Letter of Rejection issued by the Ministry for Sustainable Development, the Environment and Climate Change on 12 May 2017 which *inter alia* said,

“The proposal did not also comply with Para 3 (Timetable of Activities) of the Tenderer's Technical Offer (Organisation & Methodology) within Section 4 (Technical

Specifications/Terms of Reference) since no information was submitted as requested in bullets 1, 2 and 3”.

These bullets, continued Dr Schembri, indicate the type of project and its timing. This was all indicated in their Letter of Objection dated 22 May 2017. With regards the interviews mentioned by the Contracting Authority, these were free interviews which in order to be negotiated, the Contract must be signed and an agreement was present with the local Television Stations. Nobody should have submitted this information since the details will only be known once the Tender was awarded. The only thing that the bidders could have done is to bind themselves contractually that the interviews were going to be held.

Mr Marco Dimech, a member of the Evaluation Board, said that this was mentioned in their Reasoned Letter of Reply dated 26 May 2017 and was also in the Tender Document. The latter never said that a contractual agreement was to be made since the Ministry for Sustainable Development, the Environment and Climate Change knew that the Tender Procedure was a long process but they wanted an indication through a time frame which had to be eventually discussed between them and the eventual Recommended Bidder.

Dr Alexander Schembri, the Legal Representative for Communique Ltd said that the Tender Document did not say that one had to provide the details regarding the interviews but referred to Point 2.3 in Section 4 of the latter which *inter alia* stated,

“The successful Tenderer must negotiate a minimum of two free interviews and/or informative features on each TV station so as to elaborate on the key aspects of the Quality Policy National scheme in a more informative and educational measure”.

Communique Ltd has obliged itself to negotiate these interviews which were the only thing which Bidders can do, continued Dr Alexander Schembri. The Gantt Chart was specific but the interviews could not be included in the latter since there weren't any deals available with the TV stations on Tender submission. This information could not be given.

Mr Marco Dimech, a member of the Evaluation Board said that Section 4.2 of the Tender Document had the list of activities which had to be done and it had to be the Appellant's intention to present them in a form of a Gantt Chart except for the interviews. If this was forgotten, one assumed that it was not going to be presented as part of the offer.

Ms Bernice Micallef for Communique Ltd insisted that it was clear in the Tender Document that the free interviews were present and had to be negotiated once the advert slots were booked. The Appellants have submitted their time frames in the Gantt Chart. The interviews must be negotiated with the local Television stations once the slots are booked and these had to depend eventually from the Television schedule of the time. These would have to be done also once the Contracting Authority indicated on which programmes they wanted their advert to be scheduled.

Dr Alexander Schembri, the Legal Representative for Communique Ltd added that it was clear that the Ministry for Sustainable Development, the Environment and Climate Change was saying that these interviews did not feature in the Gantt chart. The latter was specific but the interviews featured in the text of their submission.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked the Contracting Authority representatives whether they agreed that this was mentioned in Communique Ltd's offer text for which Mr Marco Dimech, a member of the Evaluation Board replied in the affirmative.

At this stage, the Public Hearing was adjourned to Thursday 13 July 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 Communique Ltd (herein after referred to as the Appellant) on 22 May 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference MSDEC/AGRIC 162/2016 listed as Case No 1061 in the records of the Public Contracts Review Board, awarded by the Ministry for Sustainable Development, the Environment and Climate Change (herein after referred to as the Contracting Authority).

Appearing for the Appellant: Dr Alexander Schembri

Appearing for the Contracting Authority: Mr Saviour Debono Grech

Mr Marco Dimech

Whereby, the Appellant contends that:

a) There were two reasons why his bid was discarded. The first reason was due to the alleged fact that his bid did not include the requested information related to “*Organisation & Methodology*” with special reference to bullet point 3 of the Technical Specifications and the alleged reason was that Communique Ltd’s offer did not specify the “*Time Frame*” with regards to the delivery of two interviews which have to be negotiated with the local TV stations.

In this regard, the Appellant maintain that such alleged missing information was indeed submitted and contained in the “*Organisation Chart*”, “*Gantt Chart*” and brochure, all duly submitted.

This Board also noted the Contracting Authority’s “*Letter of Reply*” dated 26 May 2017 and its verbal submissions during the Public Hearing held on 6 July 2017, in that:

a) The Ministry for Sustainable Development, the Environment and Climate Change contends that the Appellant’s Offer did not include the list of resources and people available and how the latter were going to be included in the works of this Tender. At the same

instance, the Appellant did not submit information regarding two interviews which had to be negotiated with local TV stations.

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

- 1. From the submissions made by both parties during the Public Hearing and from the examination of related documentation, this Board opines that the main issue at stake is whether Communique Ltd submitted enough information with regards to the resources and the negotiated interviews with the Local TV Stations.**

In this respect, this Board will consider the merits of this case under two aspects, namely “*Resources and their Application*” and “*Negotiated interview with Local TV Stations*” as follows:

i) Resources and their Application

The Tender Document dictated that the Bidders had to demonstrate how through the use of resources, expertise, knowledge and capacity will work in different fields, quality and deliverables. In other words, the Ministry for Sustainable

Development, the Environment and Climate Change is requesting assurances that with the resources available, the prospective Bidder can carry out the task to the satisfaction of the Authority.

In this particular case, this Board justifiably notes that through the “*Organisation Chart*”, “*Gannt Chart*” and Brochure, Communique Ltd did submit the relevant information, in that the resources, expertise and past experience could be identified to the extent that the Evaluation Board could extract the requested information.

This Board would also like to refer to extracts from details submitted by the Appellant in this regard, under the heading of “*Methodology and Sound Environmental Management*” stating that the Bidder,

“declared that he has the necessary experience, infrastructure, set up, technical and professional capacity to carry out the tasks outlined”

Through this declaration, Communique Ltd is hereby stating that he has all the resources, expertise and experience to execute the

Tendered assignment and in this regard, this Board feels that enough information was submitted by the latter to merit his bid for further evaluation.

This Board is also considering the fact that the details requested, in the way they were drafted, were very generic and in this respect, this same Board would respectfully refer to Clause 4.2 of the Tender Document wherein it is stated that:

“It is up to Tenderers to prepare their own detailed methodology and Technical proposals such that they fulfil the general requirements described in the Terms of Reference”.

In this regard, this Board opines that the Ministry for Sustainable Development, the Environment and Climate Change did not dictate any specific format of how the information is to be presented but rather gave a “free hand” as to the presentation of the latter as long as the Tendered Assignment is achieved. In this respect, this Board also noted extracts from Communique Ltd’s submissions wherein it was *inter alia* stated that,

“All employees of Communique Ltd that will be working on this project will be aware of the scope of the project, its objectives and the guidelines to ensure relevance, best practice and deliverance of the resultant objectives of this project”.

This Board opines that the mode of presentation of the information was very subjective and this consideration had to be taken into account by the Evaluation Board. In this regard, this Board opines that the principle of “*substance over form*” should prevail.

From the submissions made during the Public Hearing and the information which Communique Ltd submitted, this Board opines that this was enough for the latter’s Bid to merit further consideration.

ii) Negotiated Interviews with Local TV Stations

The Tender Document, under point 2.3 of Section 4, dictated that,

“The successful Bidder must negotiate a minimum of two free interviews and/or informative features on each TV station so as to

elaborate on key aspects of the “Quality Policy National Scheme” in a more informative and Educational measure”

In this regard, this Board would respectfully interpret the above mentioned Clause to mean that the negotiated procedure can only be carried out once the Bidder is aware that he has been successful, so that a declaration of some sort by the Bidder would have been enough as it is logically understood that one cannot give details on a Negotiated Procedure at this particular stage of the Tender Process.

In this respect, this Board would justifiably refer to Communique Ltd’s text, under the heading of “*List of Proposed Activities*”, wherein it is clearly stated that:

“The Contractor shall assume the responsibility for broadcasting 60 20 second spots on the top three most viewed TV stations in Malta. The successful Tenderer will be responsible for purchasing air time for the broadcasting of these spots during the prime time just before the evening news and supplying each TV station with a copy of the relevant spot in the necessary format.”

In this regard, this Board opines that enough information and details were given by Communique Ltd in this respect.

This Board, in arriving at its deliberations, is also comforted by the fact that, during the hearing of this Appeal, the Ministry for Sustainable Development, the Environment and the Climate Change confirmed that the information in this regard was, in fact, mentioned in the Appellant's offer text.

In view of the above, this Board upholds Communique Ltd's grievances and recommends that:

- a) The award decision of the 12th May 2017 be temporarily revoked, and the evaluation process be continued;**
- b) The Appellants' offer is to be reintegrated in the Evaluation Process;**
- c) The deposit paid by the Appellant is to be fully refunded.**

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member

13 July 2017