

## **PUBLIC CONTRACTS REVIEW BOARD**

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### **Case 1063 – VPRD 34/2016 – Tender for the Provision of Legal, Translation and Proofreading Services to the Veterinary and Phytosanitary Regulation Department (VPRD)**

The Publication Date of the Call for Tenders was 3 January 2017 whilst the Closing Date for Call of Tenders was 31 January 2017. The Estimated Value of the Tender, (Exclusive of VAT) was € 27,000.

Six (6) Bidders have submitted Ten (10) offers for this Tender.

On 15 May 2017, Global Translation Solutions Ltd filed an Objection against the decision of the Veterinary and Phytosanitary Regulation Department to award the Tender to Outlook Coop for the price of € 27,000 (Exclusive of VAT) against a deposit of € 400.

On 11 July 2017, 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 – Global Translation Solutions Ltd**

Ms Dorothy Scerri	Representative
Dr Clement Mifsud Bonnici	Legal Representative

#### **Recommended Bidder – Outlook Coop**

No representatives from Outlook Coop were present for this Public Hearing

#### **Contracting Authority – Veterinary and Phytosanitary Regulation Department**

Mr Joseph John Vella	Chairperson, Evaluation Board
Ms Rita Calleja	Member, Evaluation Board
Mr Emanuel Cortis	Member, Evaluation Board
Ms Elaine Deguara	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 Clement Mifsud Bonnici, the Legal Representative for Global Translation Solutions Ltd opened by saying that this Tender was divided into two lots, one for Legal Services and the other one for Global Translations. The Appeal was made on Lot 2. There was another Bid made by Outlook Coop.

Global Translation Solutions Ltd had their Bid rejected for three particular reasons according to the Letter of Rejection issued by the Ministry for Sustainable Development, the Environment and Climate Change on 5 May 2017. The first reason why their Bid was rejected was because the unit rate submitted was to three decimal places which do not exist in any currency. The other reason was that the Appellant's Bid was not compliant with the Procurement Policy Note 10 issued by the Department of Contracts on 20 October 2014.

Dr Clement Mifsud Bonnici raised an issue with regards to the Reasoned Letter of Reply dated 15 May 2017 since this was signed by the Chairperson of the Evaluation Board, Mr Joseph John Vella. He felt that the Reasoned Letter of Reply should not be written by a member of the Evaluation Board. Every member of the latter signs a Declaration of Impartiality and Confidentiality prior to the commencement of Evaluation and this could raise a conflict with the Principle of Justice.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, countered that the Chairperson of the Evaluation Board can sign the Reasoned Letter of Reply. He also added that whoever replied to the Letter of Objection had to have enough knowledge about the subject which was being discussed

Dr Clement Mifsud Bonnici, the Legal Representative for Global Translation Solutions Ltd added that there was a reason why there were officials and Procurement Managers available but that he wasn't insisting about it.

As a first point, Dr Mifsud Bonnici referred to the Letter of Rejection dated 5 May 2017 which *inter alia* said,

*"As per footnote 3 within the Financial Offer form, since three decimal places do not exist as currency therefore such offers cannot be accepted."*

The reasoning behind this was a particular EU Regulation which says,

*"The currency unit shall be One Euro. One Euro shall be than divided into One Hundred Cents."*

Therefore, the rate submitted must be in two decimal places.

In his opinion though, the Appellant's Legal Representative argued that the interpretation given in the Letter of Rejection is ridiculous because it is a known quantity that the decimal places are continuous even in the Exchange Rates. The European Central Bank Rates keep going until four decimal places and therefore the Appellants were wondering whether the same bank was quoting an inexistent currency or not.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board replied that it was according to what are you using the currency for because € 0.058 does not exist and cannot be accepted because the Tender says that the rates must be up to two decimal places.

Dr Clement Mifsud Bonnici, the Appellant's Legal Representatives contended that as a point of principle, three decimal places exist as a currency.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board countered that it does exist as a computation to help arriving at a currency.

Dr Clement Mifsud Bonnici, the Legal Representative for Global Translations Solutions Ltd referred to Point 4 of the Procurement Policy Note 10 issued on 20 October 2014 by the Department of Contracts which *inter alia* said,

*“One may also note that the Electronic Public Procurement System (ePPS) does not accept three digits and therefore automatically rounds up to two decimal places”.*

Dr Mifsud Bonnici also insisted that one of the principles of the Public Procurement Regulations was the Principle of Proportionality. His clients were the more competitive since they have submitted a Bid which was more convenient economically. The Appellant's argument was that if their Bid was to three decimal places it should have been rounded up and it would have remained the cheapest anyway.

If the Contracting Authority was in doubt about the rate, a Clarification should have been issued to clarify any doubts. The whole point was that Global Translations Solutions Ltd's offer should not have been excluded that easily especially if the Public Procurement Regulations say that one could have rounded up the rates.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board pointed out that the Tender Document clearly indicates that no rounding up can be allowed for this Tender.

Dr Clement Mifsud Bonnici, the Appellant's Legal Representative countered that the Tender Conditions had to follow the guidance which the Department of Contracts was giving especially when in the Letter of Rejection issued by the Ministry for Sustainable Development, the Environment and Climate Change on 5 May 2017 refers to them.

Dr Mifsud Bonnici continued by saying that the arguments which he was presenting had also to be taken in the context of the industry. These offers had to be made on the amount of number of words. Global Translation Solutions Ltd have quoted for 50,000 words and they were so used to make Bids for similar Tenders that they were not finding it fair to be penalized because they were being competitive.

The Appellant's Legal Representative continued by saying that he did not agree with the submission made by the Contracting Authority that if they rounded up the figures there would have been an imbalance because the Procurement Note counts for everybody. Everyone knew about this ruling and this was the Principle of Equal Treatment.

Dr Clement Mifsud Bonnici questioned whether an opportunity to award a bid at € 9,000 against a bid of € 15,000 was going to be lost in the name of rigidity and formality where there are no breaches of rights.

Mr Joseph John Vella, the Chairperson of the Evaluation Board submitted that this Tender was a Field Base Contract. The Contracting Authority was expecting that when the opening staff opened the Tenders in the system, the correct fee per word had to be inputted as requested in the Tender Document.

Mr Vella then referred to the Procurement Policy Note 10 issued by the Department of Contracts on 14 October 2014 which applied Article 2 of the European Council Regulation 974/98 issued on 3 May 1998. One should already know that any Regulation issued by the European Union is directly applicable.

When the Tender Document was issued, there was a clear note saying that the rates had to be to two decimal places. Another point issued by the Appellant was that when multiplied, the Global Price came within two decimal places. This was though a matter of chance because the multiple was made by an even number.

One had to understand how the payment system is made. Firstly, an interim payment is made to the Contractor. The Accounting System available can only accept until two decimal places.

Mr Joseph John Vella referred then to the Letter of Objection filed by Global Translations Solutions Ltd on 12 May 2017 which *inter alia* said,

*“Indeed, since we are speaking of a substantial number of words, (specifically 150,000 words) differences in the unit rate by three, four and even five decimal points can make a significant difference for the Contracting Authority and it is customary in the translation services market for unit rates to be quoted using three and four decimal points”*

The Contracting Authority’s representative explained that prior to the issuing of this Tender, they had made some market research through the internet where they have found out about thirty-three operators who can make this service, a copy of the list of these operators was given to all parties concerned. All rates given were to two decimal places.

Mr Joseph John Vella continued by saying that prior to taking their final decision, the Veterinary and Phytosanitary Regulation Department have consulted the Department of Contracts and the latter advised the former to ensure that the rates are in two decimal places.

Dr Clement Mifsud Bonnici, the Legal Representative for Global Translations Solutions Ltd, submitted with regards to the odd and even number issue that his clients worked on the amounts given by the Tender Document which was 150,000, an even number.

With regards the argument raised by the Contracting Authority on payments, these come at a later stage and that if the rounding up was done beforehand as it should have been, these problems would have been avoided.

Dr Mifsud Bonnici then referred to the list of operators which was forwarded by the Contracting Authority. He noted that these were all freelancers who usually are interested in big contracts where the competition is even more intense. One cannot make comparison with these freelancers besides that there are other competitors in the market. This was another principle of Public Procurement which favours a free competition.

The distinction between the two Bidders is irrelevant. At this point, one had to simply focus on the fact that one had to be proportional. The Appellant's Legal Representative continued by saying that the Public Contracts Review Board had the opportunity to pass a message that the way that a Tender is interpreted and evaluated had to be a proportionate one. If there are too many formalities, injustices might be created. The Veterinary and Phytosanitary Regulation Department should have either sought clarification or rounded up the unit price themselves.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, remarked that the Tender does not allow for Clarifications to be sought. The Tender Document was the basis on which the Evaluation Board had to work on when evaluating the Bids.

Dr Clement Mifsud Bonnici, the Legal Representative for Global Translations Solutions Ltd, replied by saying that an overarching principle of all this were the principles of the Public Procurement Regulations. The Tender Document could not be taken by itself but it had to also be taken into consideration with the General Rules Governing Tenders and also, in this case, with the Public Procurement Note. These were aware to everybody and the Evaluation Board would not have created an imbalance if they either sought clarifications or rounded up the unit price.

Mr Joseph John Vella for the Veterinary and Phytosanitary Department countered that the Tender Document was the cardinal point of this Tender. If this Document somewhat comes out viciously, the whole process would be eventually vicious. In this case, there were different scenarios which fall under Notes 1, 2 and 3 and therefore, no clarifications can be sought in order to rectify an arithmetic error in unit rate cases.

Mr Vella continued by saying that if the Economic Operator was still submitting the document and in the box at the Electronic Public Procurement System he had inserted a unit rate, a rounding up of the rate would have been made automatically but this did not happen. The numbers of words or hours are requested in order for the Contracting Authority to see whether any offer falls over Budget, so that if this happens, extra funds are requested.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether the service requested was for translation of words for which both parties' representatives replied in the Affirmative.

Dr Cassar, then continued by explaining that therefore one needed to know the number of words for this Tender and therefore a rate was to be given. This was confirmed once again by both the Appellant and the Contracting Authority.

Dr Clement Mifsud Bonnici, the Legal Representative for Global Translations Solutions Ltd concluded that this was to indicate whether the Tender was field based or not. One had to see the substance and not the form of the Contract. The number of words was important because this was a Global Based Contract.

Dr Mifsud Bonnici then referred to Case 1013 issued by the Public Contracts Review Board as diversely composed on 17 January 2017 which was based on a Global Price Contract. One couldn't see only what was indicated in the Tender but had to see what the substance of the Contract was.

At this stage, the Public Hearing was adjourned to Monday 17 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.

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**This Board,**

**Having noted this Objection filed by Global Translation Solutions Ltd (herein after referred to as the Appellant) on 15 May 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference VPRD 34/2016 listed as Case No 1063 in the records of the Public Contracts Review Board, awarded by the Veterinary and Phytosanitary Regulation Department (herein after referred to as the Contracting Authority).**

**Appearing for the Appellant: Dr Clement Mifsud Bonnici**

**Appearing for the Contracting Authority: Mr Joseph John Vella**

**Whereby, the Appellant contends that:**

- a) In the first instance, the “*Letter of Reply*” should not be signed by the Chairman of the Evaluation Board, as the latter should be**

**independent from the Contracting Authority, to whom the Objection is addressed.**

- b) The alleged reason given, in the Letter of Rejection, in that three decimal places do not exist as currency, is incorrect. In this regard, Global Translations Solutions Ltd maintains that the decimal places are not restricted to any number, as for example, the European Central Bank Rates which are up to four decimal places.**

**The appellant insists that one should also refer to the Procurement Policy Note 10 issued by the Department of Contracts on 20 October 2014.**

- c) The Appellant contends that since his offer was the cheapest, the Evaluation Board could have rounded up the submitted rate to two decimal points, as his offer would have still remained the cheapest. On the other hand, Global Translations Solutions Ltd maintains that the Evaluation Board could have asked for a Clarification.**

**This Board also noted the Contracting Authority's "*Letter of Reply*" dated 15 May 2017 and its verbal submissions during the Public Hearing held on 11 July 2017, in that:**

**a) The Veterinary and Phytosanitary Regulation Department maintains that the Tender Document clearly denoted that the rates to be quoted by prospective Bidders had to be up to two decimal places. In this respect, the Appellant was well aware that rates quoted with more than two decimal places will be rejected;**

**b) The Veterinary and Phytosanitary Regulation Department also insists that no Clarification was possible as this would have amounted to a Rectification in the rate, which is not allowable.**

**This Board has also taken note of the documents submitted by the Veterinary and Phytosanitary Regulation Department which consisted of:**

**1. The Procurement Policy Note issued by the Department of Contracts on 24 October 2014;**

**This Board, after having heard the submissions made by both parties and having examined the relative documentation, would respectfully like to consider the merits of this case according to the Appellant's Grievances in the following order:**

- 1. With regards to Global Translation Solution Ltd's First Contention, this Board finds no Objection and cannot detect any deficiency in the Evaluation Procedure by having the "*Reasoned Letter of Reply*" signed by the Chairman of the Evaluation Board.**

**In this respect, this Board, at the same instance, acknowledges the fact that the Evaluation Board is a separate entity from the Contracting Authority. However, it is a safe and accepted practice that members of the Evaluation Board participate during the Public Hearings and it is also a known fact that this Board emphasize the presence of such important members so that questions, clarifications and enquires can be addressed during the sitting in order to avoid time wasting in treating Appeals.**

**In this regard, this Board does not uphold Global Translation Solution Ltd's First Contention and finds no evidence that Members of the Evaluation board signing the "*Reasoned Letter of Reply*" do in fact, influence the deliberations arrived at by this Board.**

- 2. With regards to the Appellants' Second Contention, this Board would like to justifiably, in the first place, refer to the Tender**

Document itself, in particular to the “*Financial Offer*”, Footnote (c) wherein, it was clearly dictated that,

*“Three Decimal Points do not exist as currency therefore such offers cannot be accepted. Offers are to be submitted up to two decimal points”.*

Through this footnote, the Appellant was vividly made aware that rates had to be quoted up to two decimal places. In this regard, this Board is fully aware that Global Translation Solutions Ltd failed to abide by this cardinal condition in his bid.

At the same instance, this Board cannot find any logical reason or explanation for the Appellant to justify his quoted rate with three decimal places.

This Board, as had on many occasions, would like to emphasize the importance which should be given in submitting an offer in accordance with the dictated conditions in the Tender. It is futile for a prospective Bidder to justify non-compliance with a mandatory condition, the latter of which is clearly advised to all Bidders.

**This Board justifiably notes that this was “a unit rate” Tender and in this particular case the rate quoted was “a rate per word”. This board does not see the significance of a Total Amount being requested by the Veterinary and Phytosanitary Regulation Department, as the volume of words to be translated cannot be ascertained, so that the “Rate per word” is the price to be assessed. This Board also acknowledges that the Contracting Authority had to estimate the number of words to arrive at an Estimated Value of the Tender but the deciding factor of this Tender is the rate and not the Global Amount.**

**With regards to the Procurement Policy Note 10 issued by the Department of Contracts on 24 October 2014, this Board would like to refer to Paragraph 4 which states that:**

***“As per Article 2 of the Council Regulation (EC) No 974/98 of 3/5/98 on the introduction of the Euro, the Currency Unit shall be One Euro. One Euro shall be then divided into One Hundred Cents.”***

**Therefore, since three decimal points in a Euro, do not exist as Currency such offers cannot be accepted and Tender Documents are**

**to clearly indicate that offers are to be submitted up to two decimal points.**

**One may also note that the Electronic Public Procurement System (ePPs) does not accept three digits and therefore automatically rounds up to two decimal places.”**

**This Board credibly opines that the Procurement Policy Note 10, Paragraph 4, has to be read and construed throughout, in that it is giving clear instructions that all rates being quoted in any offer must be up to two decimal points.**

**The same note is instructing the Authorities that they must indicate such policy in the Tender Document. In this particular case, the Veterinary and Phytosanitary Regulation Department in the Financial Offer of the Tender clearly denotes such policy in Footnote (c) and in this regard, the latter has, quite rightly, followed the Policy as instructed. At the same instance, this Board justifiably notes that the Contracting Authority applied the Principles of Fair Competition and Transparency in the proper manner.**

**In this regard, this Board credibly finds that a rate for Euro expressing cents up to Three Decimal Places does not make tangible sense. This Board also notes that Global Translation Solutions Ltd was well aware that it had to quote up to two decimal places and was also reminded that any quoted rates exceeding two decimal places will be automatically disqualified.**

**This Board finds that the Global Translation Solutions Ltd did not abide by the clear conditions laid out in the Tender and in this regard, this Board does not uphold the Appellant's Second Contention.**

**3. With regards to Global Translation Solutions Ltd's Third Contention, this Board would like to first and foremost, emphasize that the fact that the Appellant's rate was the cheapest, does not in any way justify breaches to the conditions as laid out in the Tender Document.**

**The price is not above the Public Procurement Regulations, but is one of the factors that determine the selection criteria. In this particular case, the Evaluation Board could never ask for a clarification as any changes to the Appellant's quoted rate would**

**have been a rectification, which is not allowable. At the same instance, the same Evaluation Board had to deliberate on the documentation submitted by the Appellant, whose rate was in three decimal places and not up to two places.**

**This Board justifiably points out that the Global Translation Solutions Ltd had every opportunity to clarify any doubts prior to the submission of their offer through a Pre-Contractual Concern and in this respect, they did not avail themselves of this remedy. In this regard, this Board does not uphold the Appellant's Third Contention.**

**In view of the above, this Board finds against Global Translation Solutions Ltd 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

*17 July 2017*