

PUBLIC CONTRACTS REVIEW BOARD

Case 1067 – TM 003/2017 – Tender for a Service Agreement for the Cleanup of Contaminated and Uncontaminated Flotsam and Oil Spills of Up to Tier 2

The Publication Date of the Call for Tenders was 24 February 2017 whilst the Closing Date for Call of Tenders was 21 March 2017. The Estimated Value of the Tender, (Exclusive of VAT) was € 130,000.

Three (3) Bidders have submitted offers for this Tender.

On 23 June 2017, AOST Technology Ltd filed an Objection against the decision of Transport Malta to award the Tender to Cassar Ship Repair for the price of € 93,945 (Exclusive of VAT) against a deposit of € 975.

On 17 July 2017, 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 – AOST Technology Ltd

Mr Sandro Sammut	Representative
Dr Adrian Mallia	Legal Representative

Recommended Bidder – Cassar Ship Repair

Mr Anthony Cassar	Representative
Ms Oriana Galea Mallia	Representative
Dr Alessandro Lia	Legal Representative

Contracting Authority – Transport Malta

Capt Fritz Farrugia	Chairperson, Evaluation Board
Mr Raymond Orland	Secretary, Evaluation Board
Mr David Borg	Member, Evaluation Board
Mr Chris Schembri	Member, Evaluation Board
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 Adrian Mallia, the Legal Representative for AOST Technology Ltd opened by submitting his clients have filed an Objection to the Tender Award on two separate contentions.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board remarked that their First Contention was settled.

Dr Adrian Mallia, the Legal Representative for AOST Technology Ltd added to the latter statement that there was an oversight by the Evaluation Board, hence saying that the Appellants did nothing wrong regarding the matter.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board said that it was a genuine mistake made by the Contracting Authority.

Dr Adrian Mallia, the Legal Representative for the Appellants then referred to his clients' Second Contention wherein he noted that if one had to see Section 1.5 of the Tender Document, there is clearly noted that this Tender was being issued so that Malta can honour the agreement which has signed with the International Maritime Organization in 1990 regarding the Oil Pollution Preparedness, Response and Co-Operation. Part of this aforementioned Section says,

“Malta should be in a position to “mitigate the consequences of major oil pollution incidents involving, in particular, ships, offshore units, sea ports and oil handling facilities”.

Dr Adrian Mallia then referred to Article 6.1.1 of Section 4 of the Tender Document which *inter alia* states,

“The Contractor will be responsible to ensure that all employees forming part of the response team are adequately trained on pollution response techniques”.

The Appellants here were saying that it had to be evident that since the Tender is being issued to adhere to international obligations, the staff should be trained in terms of the International Convention Agreement. Resolution 7 of the latter says that member states are to appoint an Authority which ensures that training on oil response is made.

Dr Mallia continued that his clients, AOST Technology Ltd, have staff that was trained at a nautical institute and in accordance with the Convention Agreement. One had to be certain that whoever will be awarded the Tender has to have staff that is trained in accordance with the same.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether the issue was if Cassar Ship Repair had enough personnel trained or not for which Dr Adrian Mallia, the Legal Representative for AOST Technology Ltd replied in the affirmative.

Dr Joseph Camilleri, the Legal Representative for Transport Malta, said that one had to make a distinction between what Article 1.5 of the Tender Document said and what was really requested by the Tender. The latter article gave a Background on how the Tender was eventually produced and it was not true that it made a request from the Bidders. Likewise,

there was nowhere in the Tender which requests a form of criteria or technical requirement which the Bidder had to reach in order to be chosen as a Recommended Bidder.

Dr Camilleri then proceeded by quoting Article 6.1.1 of the Tender Document which *inter alia* said,

“Key expert/s and staff of the selected service provider will be required to participate in the annual Pollution Response exercise organised by Transport Malta at the Contractor’s expense”.

This was a requisite which was to be requested by them in the future since the eventual Recommended Bidder’s experts had to be trained appropriately. One had also to see what the Bidders were offering for this Tender and in order to do so, one had to look at the Tender’s Technical Offers requirements which there were in Section 5 Article 1 of the Tender Document which said,

“Bidders are being requested to illustrate in their Technical Offer their understanding of the Terms of Reference and provide a full explanation of how the Bidder intends to organise his operations and resources to reach the scope, objectives and deliverables outlined in the Terms of Reference.”

Dr Joseph Camilleri continued by saying that in other words, the Evaluation Board had to take all offers submitted and checks whether these were compliant with the Tender Document. Transport Malta can confirm that both bids reached this objective. With regards training, Cassar Ship Repairs have submitted a declaration saying that their staff is appropriately trained.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, remarked that about a year and a half ago, the European Union has issued a directive wherein Bidders can attach a declaration to the Tender Document and the Contracting Authority had the right to request the certificates from the eventual Recommended Bidder. At this point, the Public Contracts Review Board had to see that the Evaluation was based on the Bids submitted by all Bidders.

Following this, Captain Fritz Farrugia, a Deputy Harbour Master within Transport Malta, who was also the Chairperson of the Evaluation Board for this Tender, holding ID Card Number 154173 M was summoned by the Chairman of the Public Contracts Review Board to testify under oath before this same Board.

At the end of Capt Farrugia’s testimony, Dr Alessandro Lia, the Legal Representative for Cassar Ship Repair stated that he agreed with what Dr Joseph Camilleri has said and wanted to add two things. First and foremost the Appellant did not know until the testimony what did his clients offer and secondly that an Appeal was made and despite the fact that the First Contention was a genuine oversight by the Contracting Authority, AOST Technology Ltd never knew what his clients have offered for this Tender.

Dr Alessandro Lia then added that there is nowhere in the Tender Document which stipulates either Note 3 or something which requires certificates to be submitted. He then referred to Case 89/2014/1 issued by the Hon Court of Appeal on 27 June 2014 which *inter alia* stated,

“La darba r-raguni tal-iskwalifika indikata mill-kumpanija appellant ma toħrgħx mill-kundizzjonijiet tas-sejħa għall-offerti, l-aggravju tagħha qed jiġi miċħud”. This was self explanatory. At this point Dr Lia has presented the said decision to the Public Contracts Review Board.

Dr Adrian Mallia, the Legal Representative for AOST Technology Ltd raised an issue with regards to the deposit and said that the Public Procurement Regulations said that the deposit will not be refunded if the Appeal was to be found to be a frivolous one which was not the case.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, replied that this was at the discretion of this same Board whether the Appeal was a frivolous one or not.

Dr Joseph Camilleri, the Legal Representative for Transport Malta concluded by saying that his clients will remit to the eventual decision issued by the Public Contracts Review Board regarding this case.

At this stage, the Public Hearing was adjourned to Friday 21 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 AOST Technology Ltd (herein after referred to as the Appellant) on 23 June 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference TM 003/2017 listed as Case No 1067 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 Adrian Mallia

Appearing for the Contracting Authority: Dr Joseph Camilleri

Whereby, the Appellant contends that:

- a) In Accordance with Article 6.1.1 of Section 4 of the Tender Document, Transport Malta dictated that,**

“The Contractor will be responsible to ensure that all employees forming part of the response team are adequately trained on pollution response techniques”

In this respect, AOST Technology Ltd has reservations as to whether Cassar Ship Repair meets this condition.

This Board also noted the Contracting Authority’s “Letter of Reply” dated 6 July 2017 and its verbal submissions during the Public Hearing held on 17 July 2017, in that:

- a) Transport Malta maintains that Cassar Ship Repair’s offer was technically compliant and that the necessary confirmations and qualifications with regards to trained staff being deployed on this assignment were submitted by the same.**

This same Board also noted the Testimonies of the witness namely, Captain Fritz Farrugia duly summoned by the Chairman of the Public Contracts Review Board.

This Board has also taken note of the documents submitted by Cassar Ship Repair which consisted of the decision issued by the Hon Court of Appeal with regards Case 89/2014/1 decided on 27 June 2014

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

- 1. In the first place, this Board would like to refer to the Appellant's Grievance regarding Transport Malta's inadvertent mistake in quoting, as one of the reasons for AOST Technology Ltd's offer rejection as that of not replying to clarification dated 15 May 2017. In this regard, this Board noted the Contracting Authority's apology was accepted by the Appellant so that this issue is no longer being contested or objected to.**
- 2. With regards to AOST Technology Ltd's Contention, this Board, after having examined the relative documentation and heard credible submissions from the Contracting Authority and the technical**

witness duly summoned by the Chairman of this same Board, would like to respectfully opine that the whole issue is the Appellant's alleged contention that Cassar Ship Repair does not possess the necessary trained personnel to carry out the Tendered Assignment.

This Board justifiably notes that the Tender Document itself did not ask for proof that the personnel being deployed on this assignment is trained for this purpose but rather stated that,

“The Contractor will be responsible to ensure that all employees forming part of the response team are adequately trained on pollution response techniques.”

At the same instance, article 6.1.1 states that,

“Key Expert/s and staff of the selected service provider will be required to participate in the annual pollution response exercise organised by Transport Malta at the Contractor's expense”.

Through the mentioned clauses, the onus is on the Provider to assign trained staff in this field and in this respect, this Board notes that

Cassar Ship Repair submitted the necessary declaration that he will abide by such a condition.

At the same instance, this Board noted, from documentation submitted by the latter, that they have also submitted the necessary qualifications of the staff being deployed on this assignment, which, in the technical opinion of the witness, are of the standard required.

On the other hand, this Board was not presented with proof or evidence supporting the Appellant's alleged claim that Cassar Ship Repair does not have the necessary trained and qualified staff to carry out the assignment but based his contentions on assumptions without sound or proven basis.

At the same instance, this Board would like to justifiably point out that apart from the submitted documentation which confirm that the Recommended Bidder is technically compliant and the cheapest. Transport Malta on the other hand, has all the remedies at law should the Recommended Bidder does not deliver in accordance with all the conditions laid out in the Tender Document.

In view of the above, this Board finds against AOST Technology Ltd and also

- i) Does not uphold the Appellant's Contention that Cassar Ship Repair does not possess the necessary trained workforce to carry out the Tended Assignment;**

- ii) Confirms the decision taken by Transport Malta to award the Tender to Cassar Ship Repair;**

- iii) In view of Note 1 above and Transport Malta's inadvertent error, this Board recommends that the deposit paid by AOST Technology Ltd should be fully refunded.**

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Carmel Esposito
Member

21 July 2017