

Case 1083 – CFT 010-6024/2017 – Tender for the Analysis and Provision of Business and Technical Consultancy Related to the Planning and Implementation of the EESSI Project

The Publication Date of the Call for Tenders was 30 May 2017 whilst the Closing Date for Call of Tenders was 30 June 2017. The Estimated Value of the Tender, (Exclusive of VAT) was € 90,000.

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

On 28 August 2017, RSM Malta filed an Objection against the decision of the Central Procurement and Supplies Unit to award the Tender to Auxillium Consultancy Limited for the price of € 70,000 (Exclusive of VAT) against a deposit of € 400.

On 19 September 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 – RSM Malta

Mr Gordon Micallef	Representative
Ms Maria Micallef	Representative
Dr Adrian Mallia	Legal Representative

Recommended Bidder – Auxillium Consultancy Limited

No representative from Auxillium Consultancy Limited was present for the Public Hearing

Contracting Authority – Central Procurement and Supplies Unit

Ms Ruth Spiteri	Secretary, Evaluation Board
Mr Samuel Attard	Member, Evaluation Board
Ms Eliza Busuttil	Member, Evaluation Board
Dr Stefan Zrinzo Azzopardi	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 RSM Malta opened by saying that they were appealing on the procedure with which their Bid was discarded and on its merit. The Central Procurement and Supplies Unit was duty bound to give the Appellants the reasons on why their offer was discarded as per Clause 242 of the Public Procurement Regulations which states,

“The Authority responsible for the Tendering Process shall inform each candidate and tenderer of decisions reached concerning the conclusion of a framework agreement, the award of the contract or admittance to a dynamic purchasing system, including the grounds for any decision not to conclude a framework agreement, not to award a contract for which there has been a call for competition, to recommence the procedure or not to implement a dynamic purchasing system.”

The legal basis for this Appeal was a clear one, continued the Appellant's Legal Representative. Any Bidder has the right to seek the appropriate remedies and see why he was eliminated from the Tender Process.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board added that this Board has emphasised the fact that the Contracting Authorities must give reasons why Bids were being discarded, countless times.

Dr Adrian Mallia, the Legal Representative for RSM Malta, added that from the correspondence annexed with their Appeal, his clients made reasonable requests which were the common practice for Contracting Authorities. When a Tender is awarded with the MEAT process and a Bidder requests an extract of the Evaluation Report, this is usually given as it helps the latter understand better how he was evaluated. So far, as clearly illustrated by the correspondence annexed, all these requests by the Appellants were requested by the Contracting Authority.

Dr Mallia continued by saying that their second point of Appeal was about its substance. From the few things which RSM Malta has learnt, their offer has been discarded for two reasons. First and foremost the Central Procurement and Supplies Unit said that in the Appellant's Bid there was a clause which regarded a six month delay. Secondly, according to the Contracting Authority, there was no correlation between the templates submitted and the latter's needs.

There was nowhere in the Tender Document which requires any type of correlation or that the template should be tailor made for the Central Procurement and Supplies Unit's requirements since the Bidder did not have any intimate knowledge of how the latter operates. Despite this, the Contracting Authority was saying that there was no correlation between the latter's needs and RSM Malta's offer.

Dr Stefan Zrinzo Azzopardi, the Legal Representative for the Central Procurement and Supplies Unit said that at this stage, instead of making his submissions, it would be wiser to summon a member of the Evaluation Board to be brought to witness and give his explanations.

At this point, Mr Samuel Attard, an Officer in Scale 5 in Health and Funding within the Ministry for Health, who was also a member in the Evaluation Board, holding ID Card Number 312470 M was summoned by the Central Procurement and Supplies Unit to testify under oath before the Public Contracts Review Board.

Following Mr Attard's Testimony, Ms Ruth Spiteri, a Procurement Officer within the Central Procurement and Supplies Unit, holding ID Card Number 382180 M was summoned by RSM Malta to testify under oath before the Public Contracts Review Board.

At the end of Ms Spiteri's Testimony, Dr Anthony Cassar, the Chairman of the Public Contracts Review Board remarked that the formula system can show that an offer can be technically compliant, can be the cheapest but when it is evaluated under the points system, it might not be ranked first.

Dr Anthony Cassar then asked where RSM Malta was ranked when it comes to the Financial Score for which Mr Samuel Attard, on behalf of the Central Procurement and Supplies Unit replied that he got full marks.

The Chairman of the Public Contracts Review Board then asked whether the second one was almost the cheapest for which Ms Ruth Spiteri, for the Central Procurement and Supplies Unit, replied that the Electronic Public Procurement System does not allow the Contracting Authorities to mark-up offers. This was an issue which has to be dealt with the Department of Contracts.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board said that this anomaly must be sorted out.

Ms Ruth Spiteri, on behalf of the Central Procurement and Supplies Unit said that they were requesting that this issue must be arranged from when the system was launched.

Dr Stefan Zrinzo Azzopardi, the Legal Representative for the Central Procurement and Supplies Unit said that one of the difficulties which his clients were finding was that there was no direction regarding the matter.

Dr Adrian Mallia, the Legal Representative for RSM Malta said that his clients were only requesting to get their scores in order for them to see how they were evaluated since they had the right to request them.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, said that this Board will make a request to the Director General (Contracts) so that the Department of Contracts can sort out this problem which is found in the Electronic Public Procurement System.

Ms Ruth Spiteri, on behalf of the Central Procurement and Supplies Unit, remarked that they have pointed out this error to the Department of Contracts many times before.

Dr Adrian Mallia, the Legal Representative for RSM Malta said that the reasons which the Central Procurement and Supplies Unit gave for the non-compliance of his clients offer were without any basis. It was established that although the reasons given in the Letter of Rejection issued by the Central Procurement and Supplies Unit dated 18 August 2017 show that the Appellant's offer was not compliant, not only this was incorrect, but also that the latter was classified in second place, hence being a compliant offer.

Dr Mallia continued by saying that the Appellants have filed an Objection without having an idea of how they were evaluated and despite the fact that the Contracting Authority was obliged to send them the required information, in order for RSM Malta to see why they were eliminated, this information was never passed on.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked why the Contracting Authority have not given RSM Malta the extracts from the Evaluation Report which concerns them for which Mr Samuel Attard, on behalf of the Central Procurement and Supplies Unit replied that the reason can be found in the correspondence which there was between the Appellants and the Contracting Authority.

Dr Adrian Mallia, the Legal Representative for the Appellants then quoted from an e-mail which was sent to them on 24 August 2017 by the Contracting Authority which said,

“Thanks for your e-mail, however, we regret to inform you that no part of the Evaluation can be divulged. The reasons for rejection of offer were included in the Rejection Letter. No further information can be provided.”

Mr Carmel Esposito, a member of the Public Contracts Review Board asked how many marks the Bidders got for which Mr Samuel Attard for the Contracting Authority replied that the Appellants got 40 marks whilst the others got 35 and 30.

Dr Stefan Zrinzo Azzopardi, the Legal Representative for the Central Procurement and Supplies Unit remarked that one has to be careful what type of pressure can exert on the Evaluation Board. Every member of the latter has to give up his own marks.

Mr Carmel Esposito, a member of the Public Contracts Review Board noted that whoever had the cheapest offer should get the higher score.

Ms Ruth Spiteri for the Central Procurement and Supplies Unit said that Electronic Public Procurement System does not allow the Evaluators to do so.

Dr Adrian Mallia, the Legal Representative for RSM Malta said that the Public Procurement Regulations insist that the Contracting Authorities should give the reasons for exclusions to every Bidder in order for the latter to exercise their rights.

Dr Stefan Zrinzo Azzopardi, the Legal Representative for the Central Procurement and Supplies Unit concluded that the fact that the Letter of Rejection is saying that there was no compliance and the Witness is saying that there was puts everybody in a difficult situation. It was now up to the Public Contracts Review Board to give a direction regarding the matter.

At this stage, the Public Hearing was adjourned to Tuesday 26 September 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 RSM Malta, (herein after referred to as the Appellant), on 28 August 2017 refers to the contentions made by the same Appellant with regards to the award of Tender of Reference CFT

010-6024/2017 listed as Case NO 1083 in the records of the Public Contracts Review Board, awarded by the Central Procurement and Supplies Unit, (herein after referred to as the Contracting Authority).

Appearing for the Appellant: Dr Adrian Mallia

Appearing for the Contracting Authority: Dr Stefan Zrinzo Azzopardi

Whereby, the Appellant contends that:

- a) **The Contracting Authority had failed to submit the specific reasons as to why his offer was discarded. In this regard the latter was in duty bound to indicate specifically the grounds for the decision to reject the Appellant's Bid. RSM Malta are therefore insisting that they had the right to seek the appropriate remedies and to be well informed of their offer's failings so that they could address the same in this Appeal;**

- b) **The Appellants also contend that, from the indications which they were given by the Contracting Authority, the alleged reasons were twofold;**
 - i) **Due to the *"offer for a six-month extension period"*;**

ii) The “*non-correlation of the submitted template with the dictated criteria*” in the Tender Document.

In this regard, RSM Malta insists that the decision taken regarding these issues were unfounded.

This Board also noted the Contracting Authority’s “*Letter of Reply*” dated 15 September 2017 and also its verbal submissions during the Public Hearing held on 19 September 2017, in that:

a) The Central Procurement and Supplies Unit maintain that the Evaluation Board had acted within the parameters of the Public Procurement Regulations and had indicated, in their “*Letter of Rejection*”, the reasons why the Appellant’s offer was discarded.

This same Board also noted the testimonies of the witnesses, namely

1. Mr Samuel Attard duly summoned by the Central Procurement and Supplies Unit;
2. Ms Ruth Spiteri duly summoned by RSM Malta.

This Board, after having considered the merits of this case and after having examined the relative documentation and heard submissions made by all parties concerned, including the witnesses:

- 1. Opines that the issue of this Appeal is the “*Lack of Specific Reasons*”, given by the Central Procurement and Supplies Unit for discarding RSM Malta’s offer, in its “*Letter of Rejection*”.**

This Board would like to justifiably affirm that the Contracting Authority is in duty bound to give the specific reasons to justify its decision in discarding the Appellant’s offer. The reasons are to be in a clear and distinctive manner to allow RSM Malta to object and seek remedial action objectively on the alleged particular deficiencies in his bid.

In this particular case, this Board notes that the Appellant had requested an extract of the Evaluation Report to be aware of the points earned on the items listed in the Tender Document, however no such information was made available to the latter.

This Board acknowledges the fact that the Contracting Authority is not allowed to give a copy of the full Evaluation Report, yet, in all respects, the Appellant had the right to obtain an extract showing the

points earned on his offer. In this regard, this Board notes that had this information been given to the Appellant, his Appeal on the specific reasons for his offer’s rejection would have been more direct and objective while at the same instance, this Board would have been in a more transparent position in arriving at its adjudication.

This Board notes that the reasons given by the Central Procurement and Supplies Unit in its “*Letter of Rejection*” dated 18 August 2017 were:

“Sample templates provided without any correlation to the Entitlement Directorate although the Bidder stated the templates will be discussed and tailored to the specific needs of the engagements. The Bidder proposed a six month project deadline extension.”

Regarding the template, this Board would like to respectfully refer to Mr Attard’s testimony wherein, he confirmed that the Appellant’s template did not contain enough information, in that, as explained by the witness:

“In this regard, when we assessed the Appellant’s offer, it was compliant but for the “operations and detail”, there was only a general template and in a very brief form”.

Therefore, this Board justifiably notes that such an explanation was not included in the reasons for RSM Malta's rejected offer and had the Appellant been made aware of such an alleged deficiency, he would have formulated his Objection in a different and more objective manner.

With regards to the proposed six-month extension deadline, this Board notes that the Tender Document did not dictate any deadline in this respect and this was duly confirmed by the witness. At the same instance, this Board cannot acknowledge the fact that such an issue was mentioned as one of the reasons for rejecting the Appellant's offer.

This Board would also like to point out that, in this case, RSM Malta is proposing and not imposing a condition which is not included in the Tender Document.

- 2. On a general note, this Board regrettably notes that there were inconsistencies between the testimonies given by the witnesses duly summoned and the reasons given by the Central Procurement and Supplies Unit for the Appellant's offer refusal in its "*Letter of Rejection*".**

This Board is also concerned as to the mode of the allocation of points carried out and although credible explanations were given by the Contracting Authority, in that the Electronic Public Procurement System is not allowing a fair apportionment of points under the Most Economic Advantageous Tender system, to the effect that the end result of the Evaluation Process could be misleading and unfair.

This Board was also informed that the Central Procurement and Supplies Unit has been complaining about this deficiency and no action was taken by the relevant Authority. In this regard, the Department of Contracts is being advised of such an anomaly.

In view of the above, this Board finds in favour of RSM Malta and recommends that:

- i) The Evaluation Board should submit a revised “*Letter of Rejection*” to the Appellant, stating therein sufficient information to enable the same to be aware on what issues his offer had failed. This Board would like to emphasize the fact that RSM Malta has the right of access to the points earned on his offer so that the latter can file his **Objection in a more objective manner;****

- ii) The deposit paid by the Appellant is to be fully refunded;**

iii) The Central Procurement and Supplies Unit should ensure that the Electronic Public Procurement System does not hinder the allocation of points procedure so as to be fair and just;

iv) RSM Malta is to submit the Letter of Objection within ten Calendar Days from the date of the revised, “*Letter of Refusal*” if he avails himself of such remedy.

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member

26 September 2017