

**Case 1087 – T 004/2017 – Provision of Cleaning Services**

The Publication Date of the Call for Tenders was 14 March 2017 whilst the Closing Date for Call of Tenders was 21 April 2017. The Estimated Value of the Tender, (Exclusive of VAT) was € 345,000.

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

On 7 September 2017, JF Services Limited filed an Objection against the decision of the Malta Information Technology Agency to award the Tender to Floorpul Company Limited for the price of € 333,138 (Exclusive of VAT) against a deposit of € 1,725.

On 3 October 2017, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Richard A Matrenza as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

**Appellant – JF Services Limited**

Mr Matthew Formosa	Representative
Dr Matthew Paris	Legal Representative

**Recommended Bidder – Floorpul Company Limited**

Ms Paulette Gafa'	Representative
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**Contracting Authority – Malta Information Technology Agency**

Dr Caroline Schembri de Marco	Chairperson, Evaluation Board
Ms Joslyn Mifsud	Member, Evaluation Board
Mr Mark Scicluna	Member, Evaluation Board
Mr Robert Sultana	Member, Evaluation Board
Ms Vanessa Calleja	Representative
Ms Charlene Debono	Representative
Mr Robert Grixti	Representative
Ms Danielle Mercieca	Representative
Mr Wayne Valentine	Representative
Dr Pauline Debono	Legal Representative

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

Dr Matthew Paris, the Legal Representative for JF Services Limited opened by saying that this Tender was adjudicated on the basis of the Best Price Quality Ratio criteria. The latter looks upon two particular things, one the price and the other the Evaluation Grid which was included in the Tender Document, in Clause 9.3.

With regards to the price, the Appellants submitted the cheapest price and therefore they felt they should have been given the maximum marks allocated. JF Services were appealing in order to remove any form of subjectivity in the way it was adjudicated.

Dr Matthew Paris, the Legal Representative for JF Services Limited continued by saying that the Tender Document has complied with the current Local and European Laws wherein every element of subjectivity had to be avoided, but in the end, it was evident that this element was present.

Dr Paris continued by saying that the Reasoned Letter of Reply issued by the Malta Information Technology Agency dated 14 September 2017, showed that the criteria selected to adjudicate the Tender was a subjective one. This occurred, when giving the marks to the Appellants, when the Contracting Authority compared the latter's bid with other bids submitted in this tender, prior to giving the marks.

Dr Matthew Paris then quoted from the attachment of JF 2 in the Letter of Objection dated 7 September 2017, where he illustrated a different criterion requested for this Tender, together with the marks given to each bidder. He felt that, the Evaluation Board made its considerations in a wrong manner. Wherein the Best Price Quality Ratio regulations, showed that, points were given altogether, while assessing other bids.

In this respect the Appellant, was humbly requesting the Public Contracts Review Board to suspend the Award and let and that the Evaluation Board will re-assess all Bids. The Appellants expected to be given the marks which they deserve.

Dr Pauline Debono, the Legal Representative for the Malta Information Technology Agency acknowledged what Dr Paris said. She continued by explaining that the Evaluation Board had to make their evaluations by using these three principles:

1. The criteria which were published in the Tender Document;
2. The fact that the weighting between the Price and the Technical Aspect of the Tender was 70:30;
3. The Scoring Scale as per Page 8 of the Tender Document.

JF Services Limited was awarded 75% of the marks allocated because they did not exceed the requirements which the Contracting Authority requested, despite giving an added value to their requests.

According to Dr Debono, the main point of contention was in the Equality Mark Certification, for which the Appellants were only awarded 40%, this was the maximum of the second benchmark in the Scoring Scale. The low score was given due to the fact that, although JF Services Limited submitted a proof that they applied for the Equality Mark Certification, which they did not submit it in time.

In this context, it was given that the Evaluation had to be objective in its assessment. Meanwhile when evaluating the Tender with the Best Price Quality Ratio criteria, the Contracting Authority had to assess Appellant's Bid with a certain bracketing in scoring. The Malta Information and Technology Agency showed its objectivity by publishing the criteria and explained how the scoring was given to each Bid.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, remarked that the comments given to the Appellants were not clear in that; although they submitted incomplete information, the whole Bid did not reach the standards requested by the Contracting Authority.

Dr Matthew Paris, the Legal Representative for JF Services Limited approved to what the Public Contracts Review Board said but disagreed completely with the Contracting Authority, for the reason that; in the Attachment of JF 2 with the Letter of Objection it stated that. There were still discrepancies in the Appellant's offer when compared to what was requested in the Tender Document.

Dr Pauline Debono, the Legal Representative for the Contracting Authority replied that every criterion had its weight and when the calculations were made, the marks had to be rounded up to two decimal places.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board commented that this had to be done because the figures had to be added, multiplied and divided.

Dr Pauline Debono, the Legal Representative for the Malta Information and Technology Agency said that all votes were given by the three members of the Evaluation Board individually and then summed up to get an average. The assessment was made through a normal procedure.

Dr Matthew Paris, the Legal Representative for JF Services Limited felt that, any decimal point between a mark and another could result in paying more for the service, while his client's bid was the cheapest. Dr Paris was mystified why his clients were given the minimum of the benchmark, despite having exceeded the Tender Document requirements.

The Appellant then quoted from the Tender Document which stated that:

*“The Tenderer is to state if the employees have any restrictions to join a trade union”.*

The Malta Information Technology Agency gave JF Services Limited 80% and according to Dr Matthew Paris, not only his clients' employees were not restricted from joining a trade union, but that all employees were all members of the trade union due to a collective agreement which was just signed.

Dr Pauline Debono, the Legal Representative for the Malta Information Technology Agency said that the criteria were whether there were any restrictions for the Bidder's employees to join a trade union at any time.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether, the Bidder had to make sure, that all the employees were in a trade Union, in order to get the maximum points. The Contracting Authority replied that no collective agreement was submitted by Appellant. The Legal Representative for JF Services Limited replied that, the latter were obliged to declare that the Appellant's employees were free to join any trade union of their choice without any restriction.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board then asked how many points the members of the Evaluation Board gave to the Appellants for this criteria. Dr Pauline Debono, the Legal Representative for the Malta Information and Technology Agency replied that all Bidders got 80%.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board then asked why the Bidders were not given the full marks. Dr Pauline Debono, the Legal Representative for the Malta Information and Technology Agency replied that, not all employees were members of a Trade Union.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board said that this Board always favoured the Most Economic Advantageous Tender system because it reduces subjectivity. The Contracting Authority wanted a declaration on whether the Appellant's employees were restricted from entering a trade union. Dr Cassar asked why JF Services Limited was given 80% score and not 90% score.

Dr Pauline Debono, the Legal Representative for the Malta Information Technology Agency replied that, when referring to the scoring scale, JF Security Limited did not exceed the Tender Document Requirements.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board countered that the Tender Document needed only a confirmation and nothing more.

Dr Pauline Debono, the Legal Representative for the Malta Information Technology Agency replied that, the only way that the Trade Union criteria was to be exceeded was, if a proof had been submitted showing all members were part of a trade union.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board replied that the Bidders were already aware of this condition.

Dr Pauline Debono, the Legal Representative for the Malta Information Technology Agency countered that, all Bidders were aware of the metric system which the Evaluation Board used for this Tender; in fact, all Bidders were awarded with the same mark. If all the employees were affiliated with a Trade Union, the Evaluation Board would have awarded a score between 81 and 100.

Dr Matthew Paris, the Legal Representative of JF Services Limited said that, with regards to the trade union issue; the Malta Information Technology Agency couldn't judge them twice for the same criteria since another condition of the Award Criteria required in that:

*"The Tenderer is to provide a copy of the collective agreement if applicable. This is not mandatory and therefore an economic operator will get marks as part of the award criteria if this is presented."*

With regards to this criteria, JF Services Limited were given only 13.33%, the Appellants were not going to contest the scoring, since at submission time the Collective Agreement was not available.

Dr Matthew Paris, the Legal Representative for JF Services Limited argued that the matter was if there were any restrictions in joining a trade union or not. It was the employee's decision continued the Appellant, whether they wanted to join a trade union or not, the Appellants would not stand in their way. The Contracting Authority could not penalise JF Services Limited if their employees did not wish to join trade unions.

The Appellants were not reassured, that there was no subjectivity in the award of Tender and it was something which the Public Contracts Review Board had to deliberate.

Dr Pauline Debono, the Legal Representative for the Malta Information Technology Agency said that for these types of services, the Best Price Quality Ratio had to be used as a Criteria Award which was a good system and could complicate the process.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, said that if the Bidder had satisfied the requested principles, therefore he had to be awarded an objective mark.

Dr Pauline Debono, the Legal Representative for the Malta Information Technology Agency said that the scoring sheet has been published and that the same meter had been used with all Bidders. For all intents and purposes, the Evaluation Board was present for any questioning which was needed.

Mr Mark Scicluna, holding ID Card Number 215584 (M) Manager in the Administration Department of the Malta Information Technology Agency, also a member of the Evaluation Board, had been summoned by the Contracting Authority to testify under oath before the Public Contracts Review Board.

After Mr Scicluna's testimony, Dr Matthew Paris, the Legal Representative for JF Services Limited said that in no way he was alleging a lack of level playing field but he was contesting the method with which the Tender was awarded.

The witness, confirmed, in a clear way, that they did not follow the Scoring Sheet when awarding the marks. If one had to see the scoring sheet, the response said that JF Limited's offer exceeded requirements. The witness has confirmed under oath and in an absolute way that the Appellants gave the Malta Information Technology Agency more than what the Tender Document required despite being awarded 75% of the marks.

Dr Pauline Debono, the Legal Representative for the Contracting Authority invited the Public Contracts Review Board to consider carefully what the witness testified. He never said that the Bidder exceeded the requirements but he confirmed several times, that the Appellants submitted an added value apart from what was requested by him in the Tender Document.

Dr Debono concluded by saying that the marks given were subjective and reasonable, and requested the Public Contracts Review Board to confirm the decision taken by the Malta Information Technology Agency.

At this stage, the Public Hearing was adjourned to Tuesday 24 October 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 JF Services Limited (herein after referred to as the Appellant) on 7 September 2017, refers to the**

**Contentions made by the latter with regards to the award of Tender of Reference T 004/2017 listed as Case No 1087 in the records of the Public Contracts Review Board, awarded by the Malta Information Technology Agency (herein after referred to as the Contracting Authority).**

**Appearing for the Appellant: Dr Matthew Paris**

**Appearing for the Contracting Authority: Dr Pauline Debono**

**Whereby, the Appellant contends that:**

- a) **His main contention referred to the alleged subjective allocation of points adopted by the Evaluation Board in assessing his offer. Although the Tender Dossier assured, as much as possible, the mode of objective criteria for Award, JF Services Limited feel that, from the points earned on their offer, such intended objectivity was missing.**

**This Board also noted the Contracting Authority's "*Letter of Reply*" dated 14 September 2017 and its verbal submissions during the Public Hearing held on 3 October 2017, in that:**

- a) **The Malta Information Technology Agency insist that the allocation of points was carried out under the dictated criteria of “*Best Price Quality Ratio*” and in accordance with the guidelines as shown in the schedule of scoring scale on the Tender Document. Such criteria was applied to all Bidders on a Level Playing Field.**

**This same Board also noted the Testimonies of the witness namely, Mr Mark Scicluna duly summoned by the Malta Information Technology Agency.**

**This Board, after having examined the relative documentation, in particular, the full Evaluation Report and heard the submissions made by both parties to this Appeal, including the testimony of the witness duly summoned by the Contracting Authority arrived at the following conclusions:**

- 1. First and foremost, this Board opines that the issue at stake in this Appeal is whether the allocation of points on JF Services Limited’s offer was carried out in a subjective manner or not and in this regard, this Board will consider the merits of this Objection.**

**The Appellant's Grievance relates to the extract of the Evaluation Report and the points allocated for various items in his offer. In this respect, this Board considered the Appellant's alleged claim that there existed a "*subjectivity element*", during the Evaluation of his offer by the Evaluation Board as the latter compared his offer to other Bidders when allotting points.**

**From the testimony of the witness and contents in the full Evaluation Report, this Board is comfortably assured that the allocation of points was carried out by the members of the same Evaluation Board, on an individual basis and the final allocated points represent the weighted average points earned. In this regard, the mode of allocation was carried out in an objective manner and from the Evaluation Report, it is clear that there was no comparison carried out by members of the Evaluation Board prior to their individual assessment.**

**One must point out that the Evaluation Criteria under the "*Best Price Quality Ratio*" is the most fair method of the allocation of points, on an offer. However, this does not mean that the same system is "*subjectively proof*", but this same system suppresses the element of subjectivity.**

**In this particular case, the Appellant refers to particular items, in his offer, where he was fully compliant with the requirements and yet he was awarded 80%, such as in the case where JF Services Limited had to confirm that the employees had no restrictions to join a union.**

**In this regard, this Board noted that the Evaluation Board followed the guidelines as dictated in the Scoring Scale Schedule on page 8 of the Tender Document wherein the Appellant was awarded the maximum mark of 80% and rated as,**

***“Requirement is fully addressed, possibly with some added value.”***

**From the same scoring scale table, this Board noted that the Appellant or other Bidders could not attain more than this mark unless the particular offer exceeded the requirements, which, in this case, did not.**

**In this regard, this Board opines that the allocation of points was fairly carried out in accordance with the dictated mode of allocation as indicated in the Tender Document and the same procedure was applied to all offers so that there was a Level Playing Field throughout the whole process.**

**With regards to the Appellant's Contention in that, although he had submitted the contingency plan, as requested, he was only awarded 75%, this Board would like to justifiably point out that although the Appellant abided by this mandatory condition of the Tender, his submitted plan had some minor deficiencies through which the Appellant did not deserve the full marks of 80% of the scoring scale. At the same instance, this Board finds that appropriate diligence was applied by the Evaluation Board in allocating such a score.**

**This Board would like to credibly point out that, from the Evaluation Report and the allocated workings therein, the Evaluation Board has carried out its duties in a diligent, transparent and fair manner. As stated earlier on, there always exists an element of subjectivity in the assessment of offers but in this particular case, this same Board is comfortably satisfied that the allocation of points was carried out in a logical and methodical way while abiding by the Evaluation Criteria as dictated in the Tender Document.**

**In view of the above, this Board finds against JF Services Limited and:**

- i) Upholds the Contracting Authority's decision and procedure adopted in the Evaluation Process;**

**ii) Due to the fact that, in the opinion of this Board, more information should have been indicated in the “*Letter of Rejection*” dated 28 August 2017, with regards to the reasons why the Appellant’s bid was rejected, the deposit paid by JF Services Limited should be fully refunded.**

Dr Anthony Cassar  
Chairman

Mr Lawrence Ancilleri  
Member

Mr Richard A Matrenza  
Member

*24 October 2017*