

PUBLIC CONTRACTS REVIEW BOARD

Case 1100 – CT 3036/2016 – Tender for the Implementation of a Cloud-Hosted College Management

The Publication Date of the Call for Tenders was 12 May 2017 whilst the Closing Date for Call of Tenders was 22 June 2017. The Estimated Value of the Tender, (Exclusive of VAT) was € 1,192,372.88.

Four (4) Bidders have submitted offers for this Tender.

On 13 October 2017, Pixel Inx Consortium filed an Objection against the decision of the Malta College of Arts, Science and Technology to award the Tender to Vertitech SA for the price of € 885,000 (Exclusive of VAT) against a deposit of € 5,962.

On 7 November 2017, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Mr Carmel Esposito 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 – Pixel Inx Consortium

Mr James Abela	Representative
Mr Matthew Castillo	Representative
Dr Joseph Camilleri	Legal Representative

Recommended Bidder – Vertitech SA

Mr Nikou Nikolaos	Representative
Mr David Rizzo	Representative

Contracting Authority – Malta College of Arts, Science and Technology

Mr Ronald Curmi	Chairperson, Evaluation Board
Mr Stephen Cachia	Representative
Mr Jane Schembri	Representative
Dr Mark Portelli	Legal Representative

Department of Contracts

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

Dr Joseph Camilleri, the Legal Representative for Pixel Inx Consortium, opened by saying that the discussion was about a call for Tenders issued by the Malta College of Arts, Science and Technology for the Implementation of a Cloud Hosted College Management Information System. The main issue regarded the Bid Bond since this was presented by Quattro Labs Limited and not by the Consortium.

The Appellants were disagreeing with the decision taken by the Department of Contracts and the Contracting Authority on two grounds. First and foremost, the Bid Bond as presented was still effective should the need arise. One had to look at the aim of the Bid Bond which was that the Contracting Authority had the right to take the guarantee money should the Bidder be awarded the Tender.

Dr Camilleri continued by saying that since the matter regarded consortia, one must remember that at Bidding Stage the name Pixel Inx Consortium was a convenient name used for two companies who were making a joint offer. In case of any shortcomings, the Department of Contracts can turn to one of the consortium members.

Quattro Labs was a company based in Malta and that was the reason why the Bid Bond was issued in their name. If Quattro Labs withdrew from their offer, the Bid Bond could have been exercised anyway since the Department of Contracts had the right to turn to either of the two Bidders. Dr Camilleri had a Witness who was to testify at a later stage about situations where he was involved with similar offers who were accepted.

With regards their Second Grievance, Dr Joseph Camilleri said that this comes from a legal point of view. Previously, it was common practice for the Department of Contracts to request a Bid Bond extension in case that of a lengthened period of Evaluation Stage. This led to complaints by certain elements which eventually led to the Department of Contracts deciding to take the risk and not requesting a Bid Bond extension as it happened in this case. The Appellants were requesting not to be disqualified from competing in the Technical Evaluation because of an irrelevant reason.

Dr Camilleri continued by saying that in the Reasoned Letter of Reply issued by the Malta College for Arts, Science and Technology on 20 October 2017, the Contracting Authority has referred to the case Power Cables Malaysia SDN BHD vs Enemalta Corporation decided by the Hon Court of Appeal on 13 July 2015. Not only this reference was irrelevant but it also sustains their arguments since here there was a Bidder who was excluded because of a shortage in the Bid Bond.

With regards Pixel Inx Consortium's Third Grievance, Bidders were asked to provide a list of principal deliveries which include projects done between 2014 and 2016 with one of the requisites being that Bidders had to show that they took part in three projects of not less than € 1 million.

Dr Camilleri explained that although there was an element of confidentiality in the Bids presented, from the research that the Appellants have made, it resulted that it was not sure whether Vertitech SA was operating in 2014. In 2015 it generated € 167,095 in revenue while the 2016 Audit Accounts were still not filed with the Greek Authorities.

Pixel Inx Consortium's Legal Representative continued that there were two arguments which were put forward in the replies issued by the Contracting Authority and the Department of Contracts. The first argument was that the Appellants had no right to raise issues on the Recommended Bidders. Dr Joseph Camilleri countered this argument by saying that at this stage he cannot close doors and if he had any Objections, he was going to address them. The second point raised by the Appellants was that they had every right to ensure that the procedure was followed correctly as per Public Procurement Regulations.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, remarked that first and foremost, one had to establish whether the procedure was applied correctly.

Dr Joseph Camilleri, the Legal Representative of Pixel Inx Consortium said that he understood that there was an element of confidentiality but that his clients got all this information regarding the Recommended Bidders from available information which was made public. It was up to the Evaluation Board now to put the Appellant's minds at rest that the Evaluation was made correctly. Dr Camilleri proceeded by exhibiting documents regarding the Balance Sheets of Vertitech SA and concluded that he would like to bring in the Witness to testify about the Bid Bonds.

At this point, Mr Matthew Castillo, a Consultant, holding ID Card Number 337284 M, was summoned to testify under oath before the Public Contracts Review Board.

Following Mr Castillo's testimony, Dr Mark Portelli, the Legal Representative for the Malta College for Arts, Science and Technology said with regards to the Appellant's First Grievance, his clients have observed the Tender Requirements and that the only rectifications which can be done in a Bid Bond were if the value or the validity date were incorrect. Any further changes will cause complains from the other bidders. The choice of the bank was in the hands of the prospective Bidder. If one had to rest on the Witness' words, the Appellants should have chosen a Bank which abides by the Tender Requirements.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board pointed out that the latter has already issued a number of decisions regarding the matter and that there was no need for him to elaborate. Dr Cassar remarked also that it is the Bidder who make the conditions to the Bank when formulating a Bid Bond and not vice versa.

Dr Mark Portelli, the Legal Representative for the Malta College for Arts, Science and Technology countered that in this particular case, the document was mandatory and since there were things which went against Clause 8.1 of the Tender Document, the respective Bid had to be disqualified. One has to ensure that the Evaluation Board has acted within the required parameters.

The relevant date for submission of the Bid Bond was 20 June 2017 and it had to be valid until 1 September 2017. The Hon Court of Appeal case which the Appellant have referred to previously also said that the Bid Bond had to be submitted until a particular date.

With regards the Appellant's Last Grievance, Dr Mark Portelli said that the allegations which Pixel Inx Consortium put forward were incorrect. Dr Portelli asked against whom did Pixel Inx Consortium objected whether it was against the Contracting Authority or the

Recommended Bidder. The Tender Document requested information about the projects which involved the respective Bidders and did not request any accounts.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board noted that the Appellants have pointed out an element of experience in the offer.

Dr Mark Portelli, the Legal Representative for the Malta College of Arts, Science and Technology commented that the Contracting Authority checked only the projects and whether these rounded up to € 1 million within three years.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether any one from the Evaluation Board was present for questioning.

At this point, Mr Ronald Curmi, the Chairperson of the Evaluation Board, holding ID Card Number 47673 M was summoned by the Public Contracts Review Board to testify under oath before the same.

Following Mr Curmi's testimony, Dr Joseph Camilleri, the Legal Representative for Pixel Inx Consortium argued that there was too much emphasis on the Bid Bond and the fact that it was submitted by Quattro Labs Limited. As Mr Castillo has testified, Quattro Labs Limited was involved in a Tender wherein it had made an offer with another company and therefore there was no room for confusion. The Appellant's argument was that the Malta College of Arts, Science and Technology could not exclude them on an irrelevant Bid Bond.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board pointed out that at that stage all the offers were on the table.

Dr Joseph Camilleri, the Legal Representative for Pixel Inx Consortium said that the Appellants were not notified immediately of their exclusion. They were only notified that their Bid was rejected in October.

Dr Mark Portelli, the Legal Representative for the Malta College of Arts, Science and Technology asked Dr Camilleri to which letter he was referring for which the latter replied that he was referring to the Letter of Rejection issued by the Department of Contracts on 3 October 2017.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether the offers had to be submitted by June for which Dr Mark Portelli, the Legal Representative for the Malta College of Arts, Science and Technology replied that the Bid Bond had to be submitted by 20 June 2017.

Dr Joseph Camilleri, the Legal Representative for Pixel Inx Consortium said that at Evaluation Stage there was no difference between Bidders having a Bid Bond and others who hadn't. One cannot be penalised for something which at the end of the day was irrelevant and was wondering why this happened to the appellant.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts said that he was resting on previous decisions issued by the Public Contracts Review Board regarding the Bid Bonds. The latter's intention was to keep the prices stable for 90 days. The fact that the Appellant did not receive a Letter of Rejection once he was eliminated does not count since

first and foremost, the procedure followed was not the Three Package Procedure and secondly all Letters are issued at the end of the recommendations made by the General Contracts' Committee.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board remarked that the Bid Bond requirement was removed in order to help small industries participate.

At this stage, the Public Hearing was adjourned to Thursday 16 November 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 Pixel Inx Consortium (herein after referred to as the Appellant) on 13 October 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference CT 3036/2016 listed as Case No 1100 in the records of the Public Contracts Review Board, awarded by the Malta College of Arts, Science and Technology (herein after referred to as the Contracting Authority).

Appearing for the Appellant: Dr Joseph Camilleri

Appearing for the Contracting Authority: Dr Christopher Mizzi

Dr Mark Portelli

Whereby, the Appellant contends that:

- a) His offer was discarded due to the fact that the Bid Bond was issued by one of the members of the Consortium itself. In this regard, Pixel Inx Consortium insists that, although such a Bid Bond was issued by a party to the Consortium, it was issued in favour of the Malta College of Arts, Science and Technology relating to the particular Tender and which could be enforced by the same, should the need arises;
- b) The Appellant also insists that since the date of the award recommendation was after the expiry date of the Bid Bond, all offers were on equal footing in respect of expired guarantees and in this regard, the Appellant feels that he was discriminated by having his offer rejected on the grounds of alleged incorrect Bank Guarantee;
- c) From information gathered by Pixel Inx Consortium, the latter maintains that there exist doubts as to whether Vertitech SA's offer meets the "*Experience*" criteria as stipulated in the Tender Document.

This Board also noted the "*Letters of Reply*" dated 19 October 2017 by the Department of Contracts and dated 20 October 2017 by the Malta College

of Arts, Science and Technology and their verbal submissions during the Public Hearing held on 7 November 2017, in that:

- a) The Contracting Authority maintains that the Appellant's Bid Bond was not issued by the Bidder namely, Pixel Inx Consortium, but by one of the members forming the Consortium and in this respect, the Evaluation Board had no other option but to reject the Appellant's offer;**

- b) The Malta College of Arts, Science and Technology also maintains that the relevant date on which the valid Bid Bond, complying with the Tender Specifications, was 20 June 2017 and the Evaluation Board assessed the Appellant's Bid Bond validity prior to the date of award stage;**

- c) The Contracting Authority insist that if the Appellant has any doubts or suspicions as to whether the Recommended Bidder's offer meets the "*Experience*" criteria, Pixel Inx Consortium, should produce the evidence to prove his alleged doubts.**

This same Board also noted the Testimonies of the witness namely:

1. Mr Matthew Castillo, duly summoned by Pixel Inx Consortium;
2. Mr Ronald Curmi, duly summoned by this same Board.

This Board has also taken note of the documents submitted by Dr Joseph Camilleri which consisted of:

1. The Financial Statements by Vertitech SA as at 31 December 2015;
2. Screenshots from the Vertitech SA Website

This Board, after having examined the relative documentation and heard submissions made by the parties concerned, including the testimonies of the witnesses, opines that the Three Grievances raised by Pixel Inx Consortium should be considered in the following order:

i) **Bid Bond**

This Board refers to Clause 8.1 of the *“Instructions to Tenderers”*, wherein it was stated that:

“The Tender Guarantee must be an original and valid guarantee presented in the format available to peruse from www.etenders.gov.mt”

From the specimen guarantee form, it is clearly denoted that the form itself requested the name of the actual Bidder to be given on the Bond and in this regard, this Board notes that such important information on the Bid Bond was not made available by the Appellant.

On the other hand, it must be pointed out that the actual Bidder is the Consortium which is not referred to in the guarantee. As had been decided in similar cases, this Board acknowledges the fact that Banks, in general, do not issue a guarantee unless the issues of such guarantee is well known to the Banking Institution.

In cases where consortiums or joint ventures are specifically formed for the sole purpose of participating in a Tender, it is also acknowledged that one of the members of the Consortium or Joint Venture, issues such a guarantee. However, in such cases, the issued guarantee by whoever, must denote clearly that such a Bond is being issued on behalf of the Actual Bidder, in this case, on behalf of “*Pixel Inx Consortium*” and specifying also the Tender Reference. This is the only acceptable and justifiable way that such an issued Bond can be correlated directly to the particular actual Bidder and Tender. In this particular case, this Board credibly notes that the specimen Bid

Bond provided sufficient information to enable the submitted Guarantee to be in accordance with Clause 8.1 of the “*Instructions to Tenderers*”. This Board would emphasize that the conditions laid out in the Tender Document must be strictly adhered to and respected, so that any deviation therefore will constitute a breach of the Public Procurement Regulations.

In this particular case, the actual Bidder who submitted the offer was the Consortium, that is, Pixel Inx Consortium and the Evaluation Board, quite appropriately, deemed that the Bond so submitted did not in any way, denote that the latter was made on behalf of the Consortium, irrespective of the fact that the same guarantee was issued in favour of the Malta College of Arts, Science and Technology and that it could be realised by the latter, should the need arises. The role and duty of the Evaluation Board is to ensure that all the conditions dictated in the Tender Document are strictly adhered to and not to make compromises.

One must also point out that if the Appellant’s Bid was successful, the award agreement would have been drawn up between Pixel Inx Consortium and the Malta College of Arts, Science and Technology and this Board justifiably opines that the real and actual Bidder is

Pixel Inx Consortium, so that the submitted Bid Bond should have been issued “*on behalf of Pixel Inx Consortium*” and not otherwise. In this regard, this Board does not uphold the Appellant’s First Contention.

ii) Date of Award

With regards to the Appellant’s Second Grievance, this Board notes that the Bidders had to submit their Bid Bond by the 20th June 2017 and by that date the submitted Bid Bonds had to be valid and in adherence with Clauses 7 (a) and 8.1 of the instructions to Tenderers. In this respect, this Board notes that although the Appellant submitted the Bid Bond within the dictated time frame, he failed to submit the same in the dictated format whereby the name of the actual Bidder was not referred to in the same Bond.

It is a known established fact that the Evaluation Board can only assess the offers on the information submitted by the Bidders, so that during the adjudicating process it was correctly noted by the Evaluation Board that Pixel Inx Consortium’s Bid Bond was not compliant. At this stage of the Tendering Process, at adjudication

stage, the Appellant's offer was already deemed not eligible for further consideration.

The fact that on the date of the Award, all Bid Bonds had expired, does not, in any credible way, justify a change in the decision taken, during the Evaluation Process. It should be reminded that the non-renewal of Bid Bonds is a concessionary measure to ease financial burden on Bidders and not to exonerate the Bidder from his obligations.

In this regard, this Board opines that the date of award, in this context, and the fact that as at that date all Bid Bonds had expired, does not provide a credible and justifiable reason why the decision taken at Evaluation stage should be changed at award stage. In this regard, this Board does not uphold Pixel Inx Consortium's Second Grievance.

iii) Vertitech SA's Compliance

With regards to the Appellant's Third Contention, this Board would refer to the conditions set out in Clause 7 (b) (vi) (c) of the Tender Document, wherein the Malta College of Arts, Science and

Technology is requesting information of deliveries of similar services/advice over the years 2014 to 2016. Such information consists of minimum value of projects and other complimentary details to enable the Contracting Authority to identify each project and related value.

This clause clearly requested information and not certifications and in this respect, this Board would like to point out that the mentioned clause, quite appropriately adopted the principle of the “*European Single Tender Document*” whereby at this stage of submission, the Bidder is only requested to declare and submit details of past experience or qualifications without the obligation to send related documentation to prove such declarations.

In this particular case, Vertitech SA submitted the relative information as duly requested in Clause 7 (b) (vi) (v) of the Tender Document and it is up to the Contracting Authority to request further proof and certifications supporting the Recommended Bidder’s declaration.

Pixel Inx Consortium’s alleged claim that it is doubtful whether the Preferred Bidder’s offer does not possess the requested experience,

was not credibly substantiated and in this regard, this Board does not uphold the Appellant's Third Grievance.

In view of the above, this Board:

- a) Does not uphold Pixel Inx Consortium's Grievances;**

- b) Confirms the decision taken by the Evaluation Board in its adjudication of Pixel Inx Consortium's offer and at the same instance affirms that the same carried out the evaluation process in a just, fair and transparent manner;**

- c) The deposit paid by Pixel Inx Consortium is not to be refunded.**

Dr Anthony Cassar
Chairman

Mr Carmel Esposito
Member

Mr Richard A Matrenza
Member

16 November 2017