

PUBLIC CONTRACTS REVIEW BOARD

Case 1191 – CT 2046/2017 – Tender for Provision of Destination Representation of the Malta Tourism Authority for a Period of 36 months.

The publication date of the call for tenders was the 16th May 2017 whilst the closing date of the call for tenders was the 4th July 2017. The estimated value of the tender (exclusive of VAT) was € 288,000.

Aviareps AG filed an appeal on 14th June 2018 against the Malta Tourism Authority on the grounds that they were excluded for failure to confirm their financial bid. A deposit of € 1440 was paid.

On 19th July 2018 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Carmel Esposito as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – Aviareps AG

Dr Deo Falzon	Legal Representative
Dr Sarah Grech	Legal Representative

Recommended Bidder – Action Global Communications

Dr Steve Decesare	Legal Representative
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Contracting Authority – Malta Tourism Authority

Dr Frank B Testa	Legal Representative
Dr Roseanne Cortis	Legal Representative
Mr Carlo Micallef	Chairperson Evaluation Board
Mr Patrick Attard	Secretary Evaluation Board
Mr Bryan Azzopardi	Member Evaluation Board
Mr Arthur Grima	Member Evaluation Board

Department of Contracts

Dr Christopher Mizzi	Procurement Manager
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The Chairman of the Public Contracts Review Board, Dr Anthony Cassar, welcomed the parties and invited submissions.

Dr Christopher Mizzi, Legal Representative of the Department of Contracts as a preliminary point said that the Contracting Authority acknowledges that erroneously the original clarification sent to the bidder was done by e-mail instead of through the ePPS system.

Dr Deo Falzon, Legal Representative of Aviareps AG, said that the main reason for his clients' objection was the confusion caused on the part of the Contracting Authority which prejudiced his clients who had obtained a technical score of 89.6% in their favour and was the cheapest bid. Following their submission, they were contacted directly on the 8th March 2018 by Malta Tourism Authority (MTA) by e-mail and asked for a clarification on their financial bid form, as they had indicated the unit price rather than the global total over three years.

Dr Christopher Mizzi pointed out that at that stage the evaluation was already at an advanced stage and the ePPS system could not be used as it was 'locked'. The Evaluation Committee rather misguidedly communicated through email instead of reopening the ePPS system.

Dr Falzon said that his clients had replied by the same means and they considered this as a valid clarification exercise as the MTA had acknowledged receipt, also by e-mail on the 14th March. The MTA repeated this same clarification sent this time through the ePPS system, and which his clients did not act upon as they felt the matter had already been dealt with by them. Knowing the Appellants had replied immediately to the first clarification note it was strange that the Evaluation Committee did not chase them to find out why the ePPS clarification was disregarded, especially bearing in mind that his was the cheapest and most favourable offer.

Dr Frank Testa, Legal Representative for the Malta Tourism Authority, said that the Authority admits that their first communication was not done properly; however the initial issue was that there was a mistake in the bid (which Applicants accept) and within the evaluation process the Contracting Authority and the Director of Contracts had remedied. The Authority was not convinced of the Appellant's argument in trying to justify their lack of reply which was probably a simple oversight. (At this stage Dr Testa made a reference to the Appellant stating that the second clarification may have got lost amongst the junk mail. There is no record that such a statement was made by Dr Falzon during the hearing although it appears in the written submissions).

Dr Christopher Mizzi asked to Board to consider the contradiction in the Appellants argument – they either knew about the second clarification or they did not.

Dr Decesare, Legal Representative for Action Global Communications stated that the procedure in law and in the tender regulations had to be observed. There was a requirement to put a global price in the ePPS submission and when the wrong price is submitted all bidders assume that this is a definite price. He referred to Case 2138/2014 where it was deemed that putting in a price inclusive of VAT, when the tender asked otherwise, was incorrect. In this bid the price given was not the global total and therefore it was incorrect. As far as communication with the Evaluation

Committee was concerned it was up to each bidder to follow the correct channel of communication.

The Chairman thanked the parties for their submissions and declared the hearing closed.

This Board,

Having noted this Objection filed by Aviareps AG, (hereinafter referred to as the Appellants), on 14 June 2018, refers to the contentions made by the same Appellants with regards to the award of Tender of Reference CT 2046/2017 listed as Case No 1191 in the records of the Public Contracts Review Board, awarded by the Malta Tourism Authority, (hereinafter referred to as the Contracting Authority).

Appearing for the Appellant: Dr Deo Falzon

Appearing for the Contracting Authority: Dr Frank B Testa

Appearing for the Department of Contracts: Dr Christopher Mizzi.

Whereby, the Appellant contends that:

- a) Their offer was rejected due to the alleged non reply to a clarification sent through the Electronic Public Procurement System. In this regard,**

Aviareps AG maintain that they had replied to the same clarification through an e-mail dated 14 March 2018 and duly acknowledged as requested by the Contracting Authority.

This Board also noted the Contracting Authority’s “*Reasoned Letter of Reply*” dated 3 July 2018 and its verbal submissions during the Public Hearing held on 19 July 2018, in that:

- a) The Malta Tourism Authority maintains that although the Appellants replied to the clarification via e-mail, the same Authority had to remedy the procedure by sending the same clarification to the Appellants via the Electronic Public Procurement System and in this regard, the Appellants failed to reply.**

This Board, after having examined the relevant documentation pertaining to this Appeal and heard submissions made by the parties concerned, opines that the issue to be considered is the non-reply to the clarification request through the Electronic Public Procurement System, by the Appellants.

First and foremost it is being established that the Appellants’ offer failed to include the proper total value of the Financial Bid and the Tender response format, so that a clarification was required by the Contracting Authority.

Totally misguided, the Evaluation Board sent the Clarification request through an e-mail, which was the incorrect procedure, in the first place. Secondly, the Evaluation Committee acknowledged the receipt of the reply, again, via e-mail. However, the Evaluation Committee noted the irregular procedure adopted and remedied the situation by re-sending the Clarification Request through the Electronic Public Procurement System, as it should be.

This Board would refer to Article 15 of the General Rules Governing Tenders wherein, it is specifically dictated that any permitted Clarifications should be carried out through the Electronic platform.

This Board opines that the fact that the Appellants replied to the Clarification request via e-mail, and thereafter the Evaluation Committee acknowledged receipt, does not imply that the Clarification reply was remitted in the proper way. At the same instance, this Board does not find any justifiable reason as to why such a request, which was sent through the proper channels, was not attended to by Aviareps AG, even if such a request, through the electronic platform, was not processed correctly by the latter's server, it is not a deficiency on the part of the Evaluation Committee but rather, it is the responsibility of the Appellants to ensure that correspondence through the electronic platform is accessed by the same. At the same instance, this Board confirms that such clarification request, via the Electronic Public

Procurement System was sent by the Contracting Authority for which no reply was acknowledged.

This Board was also made aware that the Appellants assumed that by replying to the first request via e-mail, there was no need to reply to the same Clarification Request sent via the Electronic Public Procurement System. It is respectfully being pointed out that prospective Bidders should be well aware of the fact that they are to abide by the General Rules Governing Tenders in all respects, and the dictated mode of correspondence between a Bidder and the Evaluation Committee, is one of the requisites.

At the same instance, this Board confirms that, upon realising that communication was inadvertently sent through e-mail, the Evaluation Committee remedied the situation by resending the clarification request through the Electronic Public Procurement System; was the correct and proper way. On the other hand, the Appellants were obliged to reply to such a request and in this respect, this Board also confirms that Aviareps AG did not reply to the second request for Clarification via the Electronic Public Procurement system platform.

In view of the above, this Board

- a) Upholds the decision taken by the Malta Tourism Authority in the award of the Tender;**

- b) Does not uphold the contentions made by Aviareps AG;**

- c) Recommends that the deposit paid by the Appellants should not be refunded.**

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Carmel Esposito
Member

26th July 2018