

PUBLIC CONTRACTS REVIEW BOARD

Case 1215 – CT 3000/2018 – Service Tender for the Design, Development and Implementation of a Natural Water Conservation Campaign for the Maltese Islands

The publication date of the call for tenders was the 15th April 2018 whilst the closing date of the call for tenders was 19th June 2018. The estimated value (exclusive of VAT) was € 10 million.

On the 14th September 2018, MPS Ltd filed an appeal against the Energy & Water Agency as Contracting Authority on the grounds that they were disqualified since they failed to satisfy the criterion for the award. A deposit of € 50,000 was paid

There were two (2) bidders.

On 2nd October 2018 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Carmel Esposito and Mr Lawrence Ancilleri as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellant – MPS Ltd

Dr Reuben Farrugia	Legal Representative
Mr Christopher Mifsud	Representative
Mr Robert Farrugia	Representative
Mr Andrew Muscat	Representative

Recommended Bidder – Outlook Coop

Dr Mario Demarco	Legal Representative
Dr Joseph Bugeja	Legal Representative
Mr David Bezzina	Representative
Ms Mary Ann Vella	Representative
Ms Hilary Caruana	Representative

Contracting Authority – The Energy and Water Agency

Dr Steve Decesare	Legal Representative
Dr Rya Gatt	Legal Representative
Dr Katya Gatt	Legal Representative
Mr Manuel Sapaino	Chairperson Evaluation Board
Ms Stephania Baldacchino	Member Evaluation Board

Department of Contracts

Dr Franco Agius

Legal Representative

Dr Anthony Cassar, Chairman of the Public Contracts Review Board, welcomed the parties and invited submissions.

Dr Decesare, Legal Representative of the Water and Energy Agency, entered a preliminary plea. He stated that the Board had to decide first if this appeal was valid. There were three requisites for an appeal to be valid in law. Regulation 270 stated that the objector must state very clearly the grounds for the objections; the presentation of the objections must be within ten days of notification and there must be a deposit. In this Case the appeal stated that evidence will be presented at the hearing instead of being raised in their objection letter.

Dr Decesare referred to PCRB Case 1119/2017 where it was held that the objection submitted did not conform with Article 229 of the PPR as it did not state the reason for the objection, and the allegations raised were regarded as a 'fishing expedition'. In Case 928/2015 the precontractual remedy was filed half-an-hour beyond the closing date for the Appeal and the PCRB held that due to that reason it was precluded from dealing with the appeal. All three reasons in Regulation 270 have to be looked at in total.

The Chairman adjourned the hearing for a few minutes to enable the Board to consider this preliminary plea.

The Chairman said that the Board considered the plea but felt that from the available documents there was enough substance to proceed with the hearing, and invited Dr Farrugia to make his submissions.

Dr Reuben Farrugia, Legal Representative of MPS Ltd invited the first witness to give his testimony.

Mr Manuel Sapiano (37473M) testified on oath that he was the Chairperson of the Adjudication Board. In reply to a question from the Chairman, witness stated that there was an error in the table of calculations in the papers presented to the Board and the correct formula had been used in the tender calculations.

On being questioned by Dr Farrugia, witness stated that he was the Executive Head of the Water Authority. The Adjudication Committee consisted of himself as Chairman and three other persons. Witness had experience of formulating tenders and was therefore conversant with the tendering process. He had undertaken internal training in procurement but had not attended any

specific course on PPR and could not recall who had delivered the courses he had attended. The Director of Contracts runs courses covering PPR but only Ms Baldacchino (one of the evaluators) had attended such courses. Witness stated that he had no experience in advertising and marketing, but others of the evaluators did – Miss Vella had a Masters in Integrated Marketing Communications, Ms Mizzi had a degree in Communication Studies and Ms Baldacchino was qualified in environmental matters. The three evaluators had each to give their individual assessment immaterial of whether they had any experience in advertising.

In reply to further questioning, witness said that he was aware of the quality and award criteria as well as the financial standing and technical proficiency of Outlook Coop. He was aware that the tender stipulated a turnover of € 3 million between 2015 and 2017 and a credit facility of € 1 million for the duration of the project. He tabled a bank guarantee from HSBC indicating that Coop had in fact a credit facility of € 2 million.

It transpired through further questioning that the bank guarantee had in fact been issued to Outlook Management & Communications Co-Operative Limited (a company) and not to Outlook Coop (a co-operative joint venture) who are the bidders in this tender.

The Chairman pointed out that the identity and entity of Outlook Coop was totally different to that of Coop Outlook Management Ltd.

Witness confirmed that he had not checked the difference in legislation between a joint venture and a limited liability company - he had treated them (Outlook Coop) as any other bidder and had made no juridical distinction. The Adjudication Board had not entered into or researched the entity or constitution of the bidders – they had relied on the ESPD and if there were no issues with that, there was no further investigation at the administrative vetting stage. Coop submitted details of advertising and marketing of a similar nature as required by the tender and all items in the ESPD indicating bidders experience in previous contracts had been checked from a website as to whether it constituted advertising and marketing components.

The Chairman, referring to the highest value contract on the bidders ESPD asked the witness to explain to the Board what elements of advertising and marketing there was in the ‘Learning Outcomes Framework’ contract as it seemed that the marketing element, if not also the advertising, was minute. Witness replied that the whole contract (value € 2 million) had been treated as advertising as all contracts listed in the ESPD had an element of advertising and marketing. The Coop had in the period 2015 to 2017 completed 14 tenders, of which 3 were private and one for a European Agency.

Dr Farrugia pointed out to the witness that in the contract above referred to by the Chairman, according to the Common Procurement Vocabulary Code, there was simply no element of advertising or marketing and it was difficult to understand how it could have been accepted as such.

The Chairman pointed out that since there was no reference to contract numbers in the ESPD it was therefore difficult to check the validity of bidders claim – it was an obligation not ‘a maybe’ to furnish this information. He asked witness to explain how it was possible to check the details on the ESPD if it was missing such basic information, and therefore what checks had been carried out.

Dr Farrugia complained that the other side had all the information which they were not willing to provide to Appellant. This put his client at a disadvantage as there was ‘no equality of arms’. The PPR regulations do not allow the holding back of information.

The witness, Mr Sapiano, stated that no checks had been carried out – no past contracts or contract values had been checked. Similarly no CPVs had been checked and no verification at all had taken place. No verification that the previous contracts involved advertising and marketing had taken place.

The Chairman stated that the Board seriously feels that it had heard enough to reach a decision and proceedings need not go any further. Unless the Director of Contracts can rebut Mr Sapiano’s testimony there is no point in going on.

After a short adjournment, Dr Franco Agius, Legal Representative of the Director of Contracts, said that the economic operator submits information to meet the criteria of the tender through the ESPD, and an adjudication committee can rest on the information supplied to remove the need of additional documentation. According to Regulation 225 (1) of the PPR an adjudication committee must not ignore the other points which meet the criteria they relied on and they are not obliged to seek further information In this case the Adjudication Committee made their decisions on what was in the ESPD.

Dr Mario Demarco, Legal Representative of Outlook Coop, said that the ESPD is a self declaration instrument which is eminently sensible. If there are inconsistencies it does not mean that the Adjudication Board did not meet their obligations – if they sensed that anything was wrong they should seek clarification.

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

This Board,

having noted this Objection filed by MPS Limited, (hereinafter referred to as the Appellants), on 14th September 2018, refers to the contentions which were made by the same Appellants with regards to the award of the Tender of Reference CT 3000/2018 awarded by the Energy and Water Agency, (hereinafter referred to as the Contracting Authority) and listed as Case No 1215 in the records of the Public Contracts Review Board.

Appearing for the Appellants: Dr Reuben Farrugia

Appearing for the Contracting Authority: Dr Steve Decesare

Appearing for the Department of Contracts: Dr Franco Agius.

Whereby,

- a) the Appellants contend that since the Preferred Bidder is a cooperative the latter is governed by Article 21 (2) of Chapter 442 of the Laws of Malta and in this respect, such cooperative must fall within the extent of the possible commercial activities in which such a cooperative can**

participate, so that the Evaluation Committee has to establish whether the Preferred Bidder is allowed to tender for such services/works as dictated in the tender document. At the same instance, the Appellants maintain that the Contracting Authority should verify whether the cooperative's statute permits such a commercial activity;

b) in view of the above mentioned contention, the Appellants maintain that the Preferred Bidder, being a co-operative has its financial limitations so that Outlook Coop cannot satisfy the “award criteria” with regards to the “*Economic and Financial Standing.*”

c) the Appellants insist that the Preferred Bidder does not possess the technical and professional ability to meet the requirements with regards to the experience in similar works, that is, that of advertising and marketing campaign carried out during the three years 2015 to 2017;

d) the Appellants also maintain that the offer submitted by the Preferred Bidder should have been deemed to be an abnormally low offer.

This Board has also considered the Contracting Authority’s “*Letter of Reply*” dated 20 September 2018 and its verbal submissions during the Public Hearing held on 2 October 2018, in that:

- a) On a preliminary note, the Authority contends that the Appellants’ objection should be completely disregarded as it is unfounded in fact and at law. In this regard, the same Contracting Authority maintains that the Appellants’ objection is purely a fishing expedition without any proof or evidence to justify their alleged claims so that the Public Contracts Review Board should reject outright the Appellants’ objection;**

- b) With regard to the Appellants’ alleged assertion that the Preferred Bidder cannot satisfy the award criteria relating to its economic and financial standing, the Contracting Authority insists that it has obtained the necessary verification from the Bank, which confirms the requested economic and financial standing of the Preferred Bidder;**

- c) With regards to the Appellants’ alleged claim that the Preferred Bidder does not possess the necessary experience in similar works carried out between 2015 and 2017, the Energy & Water Agency maintains that**

Outlook Coop submitted an extensive list of similar works carried out between 2015 and 2017 and if one had to include all the contracts carried out by the Preferred Bidder, the latter would attain the required experience as dictated in the Tender Document;

d) With regards to the Appellants' alleged claim that the Preferred Bidders' offer should have been considered as abnormally low, the Contracting Authority insists that the Appellants did not provide any evidence to justify such a claim.

This same Board also noted the testimony of the witness, namely, Mr Manuel Sapiano, duly summoned by MPS Limited.

This Board has also taken note of the documentation submitted by Outlook Coop which consisted of:

- 1. Bid Bond;**
- 2. Educators' Guide for Pedagogy and Assessment; Textiles and Fashion.**

On a preliminary note, the Authority requested that the Appellants' objection should be totally disregarded as the allegations presented by the latter are

unfounded in fact and at law. At the same instance, the Contracting Authority maintains that, MPS Limited, in their Appeal, did not substantiate any of the claims mentioned in the Letter of Objection.

In this regard, this Board, after considering the Energy and Water Agency's preliminary plea, was conscious, that, from documentation in its possession, the hearing of the Appeal should continue and that the merits of the Appellants' alleged grievances should be considered further.

This Board, after having examined in detail the relevant documentation to this Appeal and heard submissions made by the interested parties, including the testimony of the witness, would consider the merits of MPS Limited's grievances as follows:

- 1. With regards to the Appellants' first contention, in that, the Preferred Bidder should be assessed as to whether he is "*intra vires*" to execute such a commercial activity, this Board opines that it is the statute of the bidder which governs what areas of commercial activities the latter can enter into and in this regard, it is the duty and obligation of the Evaluation Committee to ensure that the Preferred Bidder, being a co-operative is compliant with its own objects of the statutes. In this**

regard, from the testimony of the witness namely, Mr Manuel Sapiano, Chairman of the Evaluation Committee, it resulted that no such verification was carried out by the latter.

2. With regards to MPS Limited's Second Contention regarding the status of Outlook Coop's financial standing, this Board refers to article 7b of the Tender Document wherein it is stipulated that:

“The minimum credit facility required for the duration of the project is one million Euro, (€ 1,000,000). The tenderer must submit a statement from a recognised bank certifying such credit facilities. In the case of a consortium/joint venture the aforementioned statement must cover all members/companies forming the consortium/joint venture. This information is to be submitted on line with the ESPD as per question reference number 4b.6.”

Through the above mentioned article, the Authority quite appropriately, wants to ensure that the successful candidate will be capable to carry out the tendered project, during which period he will have available sufficient working capital so as to complete the assigned project without any financial hindrance. At the same instance, one has

to acknowledge the fact that such a tendered project represents a substantial financial outlay on the part of the Authority, so that the latter has to ensure that the successful candidate can deliver.

Through the examination of documentation pertaining to this Tender, this Board would refer to a letter issued by HSBC, dated 14 June 2018, whereby the said bank is confirming that “*Outlook Management & Communications Co-Operative Limited bearing Registration No COOP33*”, has available a credit facility in excess of € 2,000,000 for working capital purposes. In this regard, this Board would respectfully point out that the Preferred Bidder is Outlook Coop and not the entity so denoted in the bank’s letter and at the same instance, this Board notes that “*Outlook Management & Communications Co-Operative Limited*”, is nowhere mentioned in the Preferred Bidder’s offer and in this respect, for all intents and purposes, the official Bidder is “*Outlook Coop*”. This Board opines that, in this scenario, the entity mentioned in the bank’s letter is not a party to this tender. Such a discrepancy in the name of the entity enjoying a credit facility of the sum of € 2,000,000, should have been detected by the Evaluation Committee on submission of such documentation, the latter being quite knowledgeable as to who the official bidder is. In this regard, this Board would also refer to an

extract from the testimony of Mr Manuel Sapiano, Chairman of the Evaluation Committee, as follows:

“Avukat: Jigifieri jfisser li kellu jkollhom dikjarazzjoni mill-bank li ghandhom a one million euro credit facility for the entire duration of the project.

Xhud: Iva.

Avukat: Din giet pprovdata?

Xhud: Iva u qeghda fil-file. Fil-fatt qeghda ta'zewg miljuni.

Avukat: Il-bidder f'dan il-każ ahna nghidulha il-Coop.

Xhud: Nista' niçcekja mal-file?

Avukat: Tista tghidilna fir-rigward ta'min inharget din il-bankers' letter?

Xhud: It-tieni paragrafu. Outlook Management and Communications Cooperative Limited.

Avukat: Din hija l-istess bidder? Outlook Coop? Jew xi sussidjarja?

Chairman: Din ko-operattiva jew limited company?

Avukat: Ghidilna hix Management Communications jew Outlook Coop?

Xhud: Li ċċekjajna.

Avukat: Le mhux li ċċekkjajt. Jien staqsejtek domanda sempliċi. Il-bidder Outlook Coop kienet?

Xhud: Il-bidder huwa Outlook Coop.

Avukat: L-ittra hija b'referenza lil Outlook Management and Communications Cooperative Limited. Naqblu li huma żewġ ismijiet totalment differenti? Irrispondini!! L-ismijiet ma jaqblux.

Xhud: ***L-ismijiet ma jaqblux.***

Avukat: ***Wahda hija cooperative u l-oħra hija limited, naqblu?***

Xhud: ***Wahda hawn miktub Outllok Coop u l-oħra hawn miktub Outlook Management Limited***

Chairman: ***Outlook Coop mhix Outlook Management and Communications Cooperative Limited***

Avukat: ***Outlook Management and Communicaitons Cooperative Limited hija l-istess isem tal-bidder? Iva jew le?***

Xhud: ***Il-bidder huwa Outlook Coop.***

Avukat: ***Intom bhala Evaluation Committee, tivverifikaw jekk bhala kooperattiva li hija differenti from a limited liability company, għandek xi regoli differenti dwar l-istat finanzjarju tagħha?***

Xhud: Le.

Avukat: Għalikom a Coop you treat it on the same footing as a Limited Liability Company?

Xhud: We treat it as any other bidder.

Avukat: Ma taghmilx distinzjoni il-persuna ġuridika li qed toffri.

Xhud: Ma ssirx distinzjoni.”

From the above testimony, this Board opines that it is evidently clear that the Evaluation Committee, at the recommendation of award stage, did not carry out the necessary and obligatory verifications of the Preferred Bidders' submissions to arrive at an objective conclusion and assessment of the financial standing of the successful candidate.

This Board would respectfully point out that the main objective of the implementation of the ESPD is to suppress, as much as possible, excessive bureaucracy at tendering stage but, once a Preferred Bidder is selected by the Evaluation Committee, it is the latter's responsibility and obligation to verify in detail and to obtain the necessary

confirmations to attest what has been declared in the ESPD of the respectful successful bidder. In this regard and from the testimony of Mr Sapiano, such mandatory verifications were not carried out by the Evaluation Committee and, in this regard, this Board would have expected a more diligent approach by the Evaluation Committee in their deliberations, especially in a tender of such magnitude.

- 3. With regards to MPS Limited's third contention, this Board would refer to article 7(b) (c) of the Tender Dossier which states:**

“Technical and Professional Ability

A list of principal services, (as per ESPD Question reference 4C.1.2), of a similar nature being advertising and marketing campaign to substantiate the below.

State the value of services of a similar nature as described above effected during the last 3 years, (being 2015-2017) (cannot be more than the last 3 years): the minimum value of which must not be less than € 3,000,000 in total for the quoted period.

State the number of services of a similar nature as described above effected during the last 3 years (being 2015-2018): the minimum number of which must not be less than 2 public engagement, advertising and marketing campaigns undertaken in any EU member State for the quoted period.”

The above mentioned clause clearly denotes that, as part of the eligibility criteria, the Bidder must have had undertaken services of a similar nature, during the years 2015 and 2017, which amounts to at least € 3,000,000. At this point in time, one has to acknowledge that similar works refer to advertising and marketing campaign.

This tender, in particular looks at the design, development and implementation of the National Water Conservation Campaign for the Maltese Islands and some of the communicating methods to be used include:

- *“Develop a campaign Branding Identity;*
- *Advertising on conventional media;*
- *Education through non-conventional media sources;*
- *Organization of large events;*

- *Organization of technical working groups;*
- *Create public access to information;*
- *Distribution of Water Conservation gift packs;*
- *Distribution of Water Conservation kits;*
- *Undertake pilot actions at demonstrative sites; and*
- *Develop an interactive Website.”*

Apart from the above descriptive indications of involvement, the tender document goes even further to indicate the activities which are mandatory for the execution of the tendered assignment, as follows:

“In order to achieve the objectives of the Contract, the contractor shall undertake the following tasks:

Activity 1A: Development of the National Water Conservation Campaign Strategy

Activity 1B: Branding Identity Guidelines for the National Water Conservation Campaign

Activity 1C: Assessment of Consumer Characteristics

Activity 2A: Broadcast Media Programming

Activity 2B: Broadcast Media Marketing

- Activity 2C: Radio Media Marketing***
- Activity 3A: Social Media Marketing***
- Activity 3B: Google Digital Network Advertising***
- Activity 4A: Printed Media Advertising***
- Activity 4B: Online Media Advertising***
- Activity 5: Public Engagement Activities***
- Activity 5A: Development of Public Information Stand***
- Activity 5B: Participation in Fairs, National and Local Events***
- Activity 5C: Water Conservation Outreach Programme***
- Activity 5D: National Water Conservation Info-Point***
- Activity 6: Stakeholder Engagement Activities***
- Activity 7: Development and Management of Demonstration Sites***
- Activity 8: Promotional Material***
- Activity 9: Printed Project Material***
- Activity 10: Technical Workshops***
- Activity 11: Public Relations Activities***
- Activity 12: Development and Management of Campaign Website”***

At this particular stage of consideration, this Board is convinced that the objectives and the descriptive duties are well defined in the tender dossier and provide a proper guideline of what is required to be assessed by the

Evaluation Committee and in this regard, this Board opines that the latter should have adhered to the principle of self-limitation and not adjudicated without obtaining the proper verifications and confirmations, which functions, form part of the obligation and duties of the Evaluation Committee.

From the testimony of the Chairman of the Evaluation Committee, which was highly descriptive of the procedure that was adopted by the latter, this Board notes that basic verifications and confirmations which should have been obtained to verify and assert the Bidders' eligibility with regards to “*financial standing*” and “*technical ability*”, were lacking. In this regard, this Board would refer to extracts from the testimony of Mr Sapiano which highlights such a deficiency, as follows:

“*Avukat: It-technical and professional ability. A list of principal services of a similar nature being advertising and marketing campaign to substantiate the below. Naqblu li s-services of a similar nature ifissru advertising and marketing campaigns?*”

Xhud: Iva

Avukat: *Imbagħad jgħidlek x'jirrikjedi b'mod partikolari. Services of a similar nature, mela jridu jkunu advertising and marketing, naqblu?*

Xhud: *Naqblu.*

Avukat: *As described above effected during the last 3 years, being 2015 and 2017, the minimum value of which must not be less than three million in total for the quoted deal. Issa l-Outlook Coop ipprovditilkom informazzjoni li huma compliant. Tista' tghidilna x'informazzjoni pprovdiet il-Coop biex tissodisfa dan ir-rekwiżit.*

Chairman: *Sa dan l-istadju, l-ESPD kien hemm l-esperjenza dwar dan tajjeb qed ngħid?*

Xhud: *Iva.*

Chairman: *Ghamiltu verification tagħha?*

Xhud: Iva, kull item li daħal fil-lista tal-Outlook Coop u tal-bidder l-ieħor, rajna through a web search, ir-riżultati u x-xogħol x'kien u kien hemm diskussjoni fuq kull wieħed jekk dan effettivament jikkostitwixxix a marketing and advertising component.

Avukat: X'kienu effettivament il-kuntratti?

Xhud: L-ewwel wieħed huwa public. It-tieni u t-tielet u r-raba' huma private. Issa l-hames huwa public. Ta'wara huma kollha pubblici. Hemm sebgha. Fit-tielet faċċata hemm Aġenzija Ewropea u l-aħħar wieħed huwa pubbliku.

Chairman: Pero' d-deskrizzjoni ta'dawn ix-xogħlijiet huma similar...

Xhud: X'hin analiżżajna s-servizzi x'inhuma, ha ngħid x'nifhmu b'advertising and marketing ahna. Advertising and marketing huwa li tiġi żviluppata l-idea ta' prodott innovattiv jew le u dak il-prodott imbagħad jiġi ppreżentat lill-udjenza, lill-istakeholders li huma dawk li ser jiehdu benefiċċju jew ser jużaw dak il-prodott. Hija definizzjoni minn dizżjunarji. Pero' x'hin niehdu dawn is-submissions kollha, kollha kemm

huma kellhom element ta'design, ta'reklamar, ta'online media. Jigifieri dawn dhalna fihom wiehed wiehed u kollha kellhom daww l-elementi fihom.

Chairman: *Learning Outcomes Frameworks jaqa' taht din id-deskrizzjoni ta'marketing and advertising?*

Xhud: *Meta' ddiskutejna l-proġett kif kien, kien fih l-iżvilupp tal-curriculum u mbaghad id-design tal-prodotti u l-prezentazzjoni tal-prodott lill-istakeholders fil-fatt sibna wkoll.*

Avukat: *Dak il-proġett taf x'kien. Kellhom jiddiżinjaw a tool biex l-iskejjel ikunu jistgħu jagħmlu il-curriculum. Fejn hu l-advertising and marketing campaign?*

Xhud: *Aħna sibna dokumenti li fihom element ta'design li kienu mahruġin mill-Ministeru tal-Edukazzjoni u kellhom miktub design....*

Chairman: *Li qed ngħidu huwa dan, jekk il-kuntratt kien ta'two million, l-element ta'marketing and advertising ma kienx hemm fejn*

qed nitkellmu fuq Learning Outcomes Framework hemm two million... taqbel?

Xhud: Iva.

Chairman: Intom that two million jirrappreżenta l-element li kien fih dan il-kuntratt ta'marketing and advertising jew inkella huwa l-kuntratt kollu?

Xhud: Huwa l-kuntratt kollu.

Chairman: Jiġifieri intom ma ħadtux dan il-portion, l-element t'advertising and marketing?

Xhud: Ahna ħadna l-kuntratt kollu.

Chairman: Bhala obligazzjoni tal-kuntratti hija li tivverifika dak li qal fl-ESPD. Huwa obbligu. Sar dan jew ma sarx? Hawnhekk hawn din il-lista. Fiha l-ammonti u x-xoghol li sar etc etc. Bhala verifika assoluta, lanqas għandek reference number hawn... rajtu l-kuntratti?

Xhud: Ma rajniex il-kuntratti.

Chairman: Intom xi vverifikajtu fuq dawn l-ammonti li kitbu fuq l-ESPD?

Xhud: Fuq ix-xogħol ivverifikajna li verament kien hemm xogħol through.

Chairman: Imma meta tghidli xogħol, spjegali x-xogħol.

Xhud: Mela jekk kien hemm sitt service tenders for publicity organised by xi hadd, pubblika nista' ngħidu?

Chairman: Li sar dak ix-xogħol.

Xhud: Rajna li f'dan id-Dipartiment veru kien hemm xogħol mill-Coop. Jekk tghidli vverifikajniex l-ammont eżatt, dak le.

Avukat: Sur Sapiano, mill-informazzjoni tal-ESPD li jissodisfa r-rekwiżit ta'tlett miljuni, liema minnhom rajtu l-kuntratti? U

vverifikajtux il-valuri jekk ix-xoghol kienx jinvolvi advertising and marketing?

Xhud: Kuntratti ma rajna l-ebda wiehed minnhom.

Avukat: U allura ma ċċekkajtu l-ebda wiehed minnhom. So valuri ma ċċekkajtu xejn minnhom. U l-element t'advertising and marketing u CPV codes ma vverifikajtu xejn.

Xhud: Kuntratti ma vverifikajna xejn. Ammonti ma vverifikajna xejn. Ovjament ma vverifikajniex is-CPV codes.

Avukati: Ok.”

The tender document specifically makes a provision so that the Evaluation Committee, in its evaluation process, can contact direct the Bidder's clients to verify the works/services carried out by the Bidder as duly declared in his ESPD. The tender dossier even allows the Evaluation Committee to request additional information regarding the works carried out by the Bidder so that, the Committee had the tools to enable it to make all the necessary verifications to adjudicate the technical eligibility of all the

offers; however it has been established and confirmed through the testimony of the witness that such actions were not taken by the Evaluation Committee and, in this respect, the latter strayed from the principle of self-limitation.

This Board is convinced that the very basic verifications of the “*financial standing*” and “*technical eligibility*” of the offers were not carried out in a diligent and professional manner by the Evaluation Committee and thus the hearing of further evidence and submissions would be unnecessary.

4. With regards the Appellants’ fourth contention, this Board opines that, it would be futile to consider the issue of an alleged abnormally low offer, since this same Board established that a new evaluation process is to take effect.

In view of the above, this Board:

i) does not uphold the Energy and Water Agency’s decision in the award of the tender;

- ii) orders the Contracting Authority to reintegrate MPS Limited's offer in the evaluation process;**

- iii) orders the Agency to appoint a new Evaluation Committee to assess and adjudicate afresh the offers submitted by the present Bidders;**

- iv) orders the new Evaluation Committee to take all the necessary measures to take into consideration this Board's findings in their evaluation process;**

- v) recommends that the deposit paid by MPS Limited is to be fully refunded;**

- vi) instructs the Energy and Water Agency to implement this decision of this Board as soon as possible.**

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member

18th October 2018