

PUBLIC CONTRACTS REVIEW BOARD

Case 1347 – MEAE/40/2019 – Leasing of Premises to House Departments and Entities within the Ministry for European Affairs and Equality

The publication date of the tender was the 12th March 2019 whilst the closing date was 11th April 2019. The estimated value of the tender (exclusive of VAT) was € 540,000 per annum.

On the 5th August 2019 Santal Properties Ltd filed an appeal against the Ministry for European Affairs and Equality as the Contracting Authority contesting the decision to disqualify them as their bid was not the cheapest offer. A deposit of € 20,000 was paid.

There were two (2) bidders.

On 27th August 2019 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 – Santal Properties Ltd

Dr Reuben Farrugia	Legal Representative
Mr Albert Sant	Representative
Mr Kenneth Vella	Representative
Mr Vincent Muscat	Representative
Mr Vittorio Bonavia	Representative

Recommended Bidder – Toncam Properties Ltd

Dr Massimo Vella	Legal Representative
Mr Anton Camilleri	Representative

Contracting Authority – Ministry for European Affairs and Equality

Dr Fiorella Fenech Vella	Legal Representative
Mr Adrian Dalli	Chairperson Evaluation Committee
Eng Anthony Camilleri	Member Evaluation Committee
Ms Christine Zammit	Member Evaluation Committee
Ms Claire Zammit	Member Evaluation Committee
Arch Clive Borg Bonaci	Member Evaluation Committee
Ms Bernadette Ellul Felice	Representative

Dr Anthony Cassar, Chairman of the Public Contracts Review Board (PCRB), welcomed the parties and invited them to make their submissions.

Dr Reuben Farrugia Legal Representative for Santal Properties Ltd (hereinafter referred to as Santal) said that in their reply to the letter of objection the Contracting Authority had confirmed that the premises in question were located in Hamrun which was not part of the Central Region as defined by law.

The Chairman said that the Board wished to deal primarily with this point and specifically the terminology ‘the Central Region Area’ used in the tender. The Board would require proof that the property referred to was in the defined area. He called witnesses to testify on this point.

Mr Adrian Dalli (480479M) called as a witness by the PCRB testified on oath that he was the Chairperson of the evaluation committee. He confirmed that the property of the preferred bidder was located in Hamrun.

Dr Daniel Saliba (207691M) called as a witness by the PCRB testified on oath that he was a Junior Legal Officer in the Local Government Department. In his testimony he stated that Hamrun did not form part of the Central Region Area. He tabled a copy of the Eleventh Schedule of the Local Government Act (Chapter 363) (marked as Doc 1) in support of his statement. He explained that Regional Councils have different council areas within them and Hamrun came within the South Region. For Governmental administration purposes the country was divided into regions, and this goes back perhaps twenty five years.

Dr Farrugia stated that Section 1 paragraph 6 of the tender stipulated the technical specifications which had to be in conformity with Appendix V. The Contracting Authority seemed to ignore this Appendix by introducing the concept of ‘Regional Area’. Basic procurement regulations and European Union guidelines dictate that the procurement documents must be clear and precise and the key document is the tender specifications which have to prevail. The tender states ‘the Central Region’ – it is a very specific requirement and the Regions are defined by law for Local Government and Electoral purposes. Hamrun is not part of the Central Region and should have been excluded.

The Contracting Authority and the Office of the Attorney General claim that the location had to be somewhere near Valletta. The idea that both bodies can put their own interpretation of where the premises are located is tantamount to treating the Public Procurement Regulations (PPR) as a joke and is also in violation of EU laws. This abuse of power and of the law is dangerous coming from the Attorney General’s Office. The tender document uses clear and unequivocal terminology and no interpretation is allowed. The definition of regions is found in the laws of Malta and the laws of the land apply whether a specific Chapter of the law is mentioned or not and it is ingenious of the Office of the Attorney General to state that Chapter 363 does not apply because it is not mentioned in the tender.

It is nonsensical to criticise the Appellants for not asking which areas the tender covered since the tender documents are clear and unequivocal as to where the property had to be located. It is now being claimed that the locality was not a determining factor in the choice of bidder - what has become clear is that the preferred bidder should have been excluded and there should not have been an issue on the location. Appendix V in the tender is crucial as it defines the areas under consideration. Hamrun does not qualify as it is not part of the Central Area and no interpretation is necessary or required.

Arch Clive Borg Bonaci (100691M) called as a witness by the PCRb testified on oath that he was the Technical Expert member on the Evaluation Committee. He testified that Hamrun was part of the areas covered by the Central Malta Local Plan issued by the Planning Authority (tabled Doc 2). In their decision the Contracting Authority considered these Local Plans which include Hamrun as part of the central areas.

In reply to a question witness stated that he was not aware if the Local Plan had been approved by Parliament – what he was aware of was that these were prepared by the Planning Authority to cover local development.

Dr Farrugia challenged the presentation at the 11th hour of a document that did not deal with Local Government regions but with building development.

Dr Fiorella Fenech Vella Legal Representative of the Ministry for European Affairs and Equality said that Malta was never split up into regions - these were merely tools to assist Local Government administration. The Contracting Authority has the discretion of deciding where to choose the property it wanted. Logistically the Local Council's Regions do not make sense as Hamrun is in the central part of Malta. Does the present grouping of towns and villages make sense?

Dr Massimo Vella Legal Representative of Toncam Properties Ltd said that in the tender documents there is no reference to the Local Government Act – only to the Central Region Area but this was not linked to Chapter 363. The tender documents specify logistical requirements and Hamrun is logistically central and in line with the tender requirements. Regional Areas are there only for the benefit of Local Councils. The Local Plans which are approved by Parliament place Hamrun in the central area. The Board must consider whether the Contracting Authority was right to decide that Hamrun was central for logistical purposes.

Dr Farrugia said that the Authority was being totally disloyal to the words of the tender. The only argument that they had put forward was regarding the splitting of regional areas. That point was not up to the Authority to contest as that is the law. The Local Plans introduced at the last minute refer to areas not regions. The only decisions the Government takes with regard to those areas is what happens within them regarding development, building, traffic and which has nothing to do with the terminology of the tender. Only Chapter 363 defines regions and that is what we have to go by as that is what is '*in vigore*'. In the preparation of the tender the Ministry chose a definition which is clear and unambiguous and it is not up to the Board to define. All the Contracting

Authority was trying to do was to dismantle the technical specifications to make them fit in with their intentions regardless of what the tender states. The evaluation committee had no discretion to decide the location – all they had to do was follow the PPR. The Central Region is defined and regulated by law and no one is entitled to ignore the law of the land.

At this stage the Chairman proposed a short recess to enable the members of the Board to consider the submissions made.

On resumption of the hearing the Chairman stated that the Board had discussed the issues raised and the merits of the points discussed and was in a position to reach a decision. He thanked the parties for their submissions and declared the hearing closed.

This Board,

having noted this objection filed by Santal Properties Ltd (herein after referred to as the Appellants) on 5 August 2019, refers to the claims made by the same Appellants with regard to the tender of reference MEAE/40/2019 listed as case no 1347 in the records of the Public Contracts Review Board, awarded by Ministry for European Affairs and Equality (herein after referred to as the Contracting Authority).

Appearing for the Appellants: Dr Reuben Farrugia

Appearing for the Contracting Authority: Dr Fiorella Fenech Vella

Whereby, the Appellants contend that:

- a) The property being offered by the preferred bidder is not situated in the Central Region of Malta, as duly stipulated in the tender document, so**

that such an offer should have been rejected by the Evaluation Committee.

- b) It is doubtful as to whether the preferred bidder's property has the necessary parking area as duly stipulated in the tender and yet conforms to the current planning policy.**
- c) In accordance with the applicable EU Directive, the award criteria should not be the cheapest offer but rather the most economically advantageous offer, in other words, value for money.**

This Board also noted the Contracting Authority's 'Letter of Reply' dated 13 August 2019 and its verbal submissions during the hearing held on 27 August 2019, in that:

- a) The Authority contends that, by Central Region area, for logistic purposes, the building had to be located in the Valletta, Floriana or the Central Regional area, meaning that the building should be close to the Valletta area, since the Ministry's main office is located in Valletta.**

- b) The Authority maintains that the preferred bidder has all the necessary Planning Authority permits, so that the parking area being offered by the bidder conforms with the policy of the Planning Authority.**
- c) Although the award criterion was the cheapest price, the Evaluation Committee took into consideration the aspects of the most advantageous offer, in their deliberations.**

This same Board also noted the testimony of the witnesses namely;

Mr Adrian Dalli, duly summoned by the Public Contracts Review Board

Dr Daniel Saliba, duly summoned by the Public Contracts Review Board

Arch Clive Borg Bonaci duly summoned by the Public Contracts Review Board.

This same Board has also taken note of the documents submitted by the witness Dr Saliba which consisted of Doc 1 – an extract from the ‘Eleventh Schedule of the Local Government Act (Chapter 363).-This Board, after having examined the relevant documentation to this appeal and heard submissions made by the parties concerned, including the testimony of the witnesses, opines that the first issue which must be considered prior to the treatment of other grievances raised by Appellants, refers to the Authority’s requirements with regard to the location of the premises and the actual location of the property being offered by the preferred bidder.

- 1. This issue has been raised by Appellants in the first place, and this Board opines that, it is the important issue to be considered and decided upon, prior to the treatment of the other two Appellants' claims.**
- 2. This Board would respectfully refer to appendix V (Tenderer's Technical Offer). Wherein it is being stipulated that:**

“Due to logistical considerations, the building must be located in the Valletta, Floriana or the Central Region area in Malta.”

First and foremost, the tender document, quite explicitly, denoted ‘The Central Region Area in Malta’. In this respect, this Board has no doubt in interpreting such a statement, to mean, the ‘Central Region of Malta’, so that one has to establish which areas are included in the ‘Central Region of Malta’.

- 3. This Board has been made aware that Malta is divided into five regions which are; the North, the South, the South East, the Central Region and Gozo. Such a division of regions are clearly denoted in the ‘Eleventh**

Schedule of the Local Government Act (chapter 363)' and for ease of reference, it is being listed hereunder:

Miżjuda:
XVI. 2009.50.
Emendata:
A.L. 231 tal-2011;
A.L. 313 tal-2011.

IL-ĦDAX-IL SKEDA
 (Artikolu 37)
 Reġjuni

Reġjun Ghawdex	Reġjun Tramuntana	Reġjun Ċentrali	Reġjun Xlokk	Reġjun Nofsinhar
Ir-Rabat (Città Victoria)	L-Imdina (Città Notabile)	Ħ'Attard	Il-Belt Valletta (Città Umilissima)	Ħal Qormi (Città Pinto)
Il-Fontana	Ħad-Dingli	Ħal Balzan	Il-Birgu (Città Vittoriosa)	Ħaż-Żebbuġ (Città Rohan)
Għajnsielem	Ħal-Għarghur	Birkirkara	L-Isla (Città Invicta)	Is-Siġġiewi (Città Ferdinand)
L-Għarb	Il-Mellieħa	Il-Gżira	Bormla (Città Cospicua)	Birżebbuġa
L-Għasri	L-Imġarr	L-Iklin	Ħaż-Żabbar (Città Hompesch)	Il-Gudja
Ta' Kerċem	Il-Mosta	Ħal Lija	Iż-Żejtun (Città Beland)	Ħal Ghaxaq
Il-Munxar	In-Naxxar	L-Imsida	Il-Fgura	Il-Ħamrun
In-Nadur	Pembroke	Tal-Pietà	Floriana	Ħal Kirkop
Il-Qala	Ir-Rabat	San Ġiljan	Il-Kalkara	Ħal Luqa
San Lawrenz	San Pawl il-Baħar	San Ġwann	Il-Marsa	L-Imqabba
Ta' Sannat	Is-Swieqi	Santa Venera	Marsaskala	Il-Qrendi
Ix-Xagħra	L-Imtarfa	Tas-Sliema	Marsaxlokk	Ħal Safi
Ix-Xewkija		Ta' Xbiex	Raħal Ġdid	Santa Luċija
Iż-Żebbuġ			Ħal Tarxien	Iż-Żurrieq
			Ix-Xgħajra	

From the above schedule, it is clearly deduced that location 'Hamrun' is not in the 'Central Region' in Malta but rather in the 'Southern Region'.

In this respect, this Board would also refer to extracts from the testimony of Dr Daniel Saliba, as follows:

“Xhud : Jien ghandi hawn hekk mieghi l-iskeda, 11th schedule. Il-Hamrun ma tiffurmax parti mir-Regjun Centrali le. Tiffurma parti mir-Regjun Nofsinhar.

Avukat : Tista tipprezenta kopja tal-iskeda

Xhud : Mela le.

Avukat : Jigifieri l-Hamrun ma tiffurmax parti mis-Central Region?

Xhud : Ghall-finijiet tal-Att 363, ma tiffurmax parti mir-Regjun Centrali le

Chairman : meta tghidli ghall-finijiet, x'finijiet huma?

Xhud : ghal- ligi taghna tal-att dwar il-Gvern Lokali. Jigifieri jien qed ninterpretata din l-iskeda f'dan li ghandu x'jaqsam il-Gvern Lokali biss

Chairman : Meta tghid il-Gvern, mhux il-Gvern Lokali, iqis il-Hamrun outside the Central Region?

Xhud : Again ghall-finijiet tal-Kunsilli Lokali u l-Kunsilli Regjonali li jiffurmaw

Chairman : Dan huwa għall-finijiet tal-kunsilli hux vera

Xhud : Iva

Avukat : Din il-ligi giet promulgata mil-legislatur

Xhud : Process normali

Avukat : Meta nġhidu għall-finijiet tal-Gvern Lokali, legislatur, qasam lil Malta f'diversi regjuni għall-finijiet ta' Governanza Lokali

Xhud : Ghax jekk nista nispejga ftit, jezistu l-Kunsilli Regjonali li johorgu minn Article 37 tal-Att li fil-fatt l-Iskeda tagħmel referenza għaliha. Dawn il-Kunsilli Regjonali taħthom għandu numru ta' kunsilli. Kull kunsill jidhol taħt wiehed minnhom. Huma maqsumin għall-finijiet ta' dawn il-Kunsilli Regjonali

Chairman : Jigifieri kemm hemm regjuni?

Xhud : Hemm 5 regjuni. North, South, East, West u Ghawdex

Chairman : U tas-Central kif gie stabbilit?

Xhud : Jigifieri liema lokalitajiet jidhlu taħt ir-Regjun Centrali? Xi haga storika ta' 25 sena ilu. Il-Kunsilli Lokali ilhom jezistu 25

sena. Wiehed irid imur lura 25 sena biex jara x'kienet ir-raguni ghalfejn certu lokalitajiet dahlu taht dak ir-regjun u ohra

Chairman : U l-Hamrun ma jigix

Xhud : Le jaqa' that ir-Regjun Nofsinhar

Avukat : Xejn iktar”

- 4. On the other hand, the Authority is claiming that Appellants’ argument is based upon an Act which specifically divides Malta into Regions, for the sole purpose of identifying Local Councils. At the same instance, the Authority is insisting that in accordance with the ‘Central Malta Local Plan’, ‘Hamrun’ is included therein. An extract from the testimony of Arch Clive Borg Bonaci is being referred to:**

“Avukat : Bhala lokazzjoni f’Malta, il-Hamrun kif jitqies fil-local plans mahrugin mill-Awtorita tal-Ippjanar?

Xhud : Il-Hamrun jitqies bhala parti mis-Central Area Local Plan

Avukat : Ahna printjajna l-ewwel pagna ta’ dan il-Local Plan sabiex nuru li s-Central Malta Local Plan meta l-Contracting Authority giet biex tiddeciedi u taghmel l-ispecifications tal-post, hadet in

consideration dan il-Local Plan ukoll. Dan is-Central Malta Local Plan covers the central areas of u jsemmilek il- postijiet. Fil-fatt il-Hamrun huwa mnizzel ukoll bhala parti mir-Regjun Centrali ta' Malta

Chairman : Mela allura ser ikollna zewg dokumenti li ma jaqblux ma xulxin hawn hekk

Avukat : Lanqas xejn. Dak huwa id-definition ta' Central Region u dak qiegħed fil-ligi u dawn huma building policies. Height limitations and so on so forth. Hemm hekk dik hija d-definition ta' Central Region area. Dik hija d-definition tal-istess terminologija uzata fit-tender. Dan huwa l-pjan lokali ta' x'jista jigi zviluppat f'zona jew ohra. Din issa hargu biha in the eleventh hour ghax fir-risposta ma ssemma xejn

Chairman : Document number 2. Allura B'Kara taqa wkoll taht Central region?

Xhud : Iva

Avukat : Central Malta mhux Central Region. Central Malta Local Plan. Dik mhix is-Central Region. Ma nhawwdux it-terminologiji.

Chairman : Din is-schedule ghalkemm qed jghidlek hawn hekk il-Gvern Lokali, din is-schedule fejn qed jghidlek ir-regjuni, hija l-ligi. Enacted u ghaddiet mill-Parlament

Avukat : Iva dak huwa Kap 363.

Chairman : Allura Gharghur tigi central area wkoll?

Xhud : Fil-Local Plan innizzla bhala Central Area

Avukat : Pero bhala local plans, naqblu li hemm iktar minn wiehed? Kif inhuma mqassmin il-local plans f'Malta?

Xhud : Hemm in-Northern Area, hemm is-South u hemm il-Grand Harbour Area wkoll

Avukat : Bhala Local Plans, naqblu li dawn jigu approvati mill-Parlament?

Xhud : Jiddispijaci imma minix l-ahjar wiehed li naghti risposta ghal dik il-mistoqsija. Pero li nista nghid zgur, jigu prezentati mill-Planning Authority. Il-procedura ezatt ma nafhiex pero jghaddu through a legal system

Avukat : Bhala Local Plans ghalfejn saru?

Xhud : Saru biex ikun hemm policies li jkunu ovjament abbonati ma' kull area u saru minghajr ma tigi eskluza l-ebda lokalita fin-nofs. Jigifieri jekk qed nghidlu li forsi huwa diskutibbli jekk il-Gharghur hux parti mil-local plan, pero l-areas tal-madwar bhal

ma huma Hal Lija, Birkirkara u n-Naxxar, huma parti mill-area. Jigifieri dan kien hemm delineation line li gewwa minn dak il-line tigi l-lokalita kollha

Chairman : Imma that is for planning purposes. Ghax ahna jinteressana xi haga regjun li huwa ufficjali. L-ufficjali hija din. What you are talking about is an area. There is a difference between an area and a region

Xhud : Jien ir-remit tieghi huwa fl-ippjanar. Jigifieri jekk ser issem mili ligi ta' governanza, zgur mhux l-ahjar wiehed li nwiegeb

Chairman : Imma you are covering an area

Xhud : Hekk hu

Chairman : Grazzi”

From the above testimony, this Board establishes that the mentioned ‘Central Plan’ was published for the purposes of identifying building zones and planning areas. Such a plan does not provide a faithful geographical representation of areas, whilst on the other hand, the Eleventh Schedule (Article 37) chapter 363, denotes clearly which zones are situated in the North, South, South East and Central Region in Malta. In this regard, this

Board opines that the regions, as denoted in the Eleventh Schedule, are logically and geographically established and at the same instance, it should be noted that, such Local Government Act has been legally established for the last 25 years.

5. It has been argued that, the intention of the Authority, for logistical purposes, was to have the property situated in Valletta, Floriana or a nearby area so that ‘Hamrun’ would fit in the desired area, as it was near Valletta and Floriana. In this respect, this Board is not concerned on what the authority intended, but rather considers what the tender document stipulated, wherein, reference is clearly and explicitly being made to ‘The Central Region in Malta’, which in fact, represents the actual geographical regions, as duly denoted in the Eleventh Schedule (Article 37), so that ‘Hamrun’ is not situated in the Central Region in Malta.

6. It has also been claimed by the Authority that intentions do overrule what is written and with all due respects, this Board opines that, such a maxim applies in a situation where dispute on the interpretation of a contract condition is being considered. In this particular case, the tender document is stipulating conditions to prospective bidders prior to any

contractual obligations, so that such conditions bind the Authority and the bidder and this Board is justifiably convinced that, had the Authority wished to express its intentions, it should have stipulated exactly what is being meant by ‘The Central Region’, so that all prospective bidders would be aware of the exact locations where the property had to be situated.

7. With regard to the claim made, in that, for logistical purposes ‘Hamrun’ is more beneficial to the Authority than other areas more distinct from Valletta, this Board opines that, it could also be argued that ‘The Central Region in Malta’, can also be beneficial to the Authority, for other logistical reasons. In this respect, this Board opines that such an argument would not justify the fact that, although ‘Hamrun’ is not in ‘The Central Region’ in Malta, the logistical element would supersede what is being dictated in the tender document.

8. This Board would emphasize that the technical specifications and stipulated conditions in a tender must be:

- Unambiguous**
- Verifiable**

- **Concise, simple and precise**
- **Understandable**
- **Feasible**

In this particular case, this Board does not identify any deficiency in the stipulated specifications of the tender document and confirms that the latter were clear, unambiguous, feasible and understandable.

- 9. This Board would refer to correspondence received from the Authority, after the hearing of this Appeal, whereby issues which were not treated and considered, were raised. In this regard, this Board would point out that, such correspondence is unethical and is being ignored as the issues considered by this Board, do not pertain to the claims mentioned therein.**

In conclusion, this Board opines that:

- a) The specifications so stipulated in the tender document, with regard to the location of property, were clear enough for prospective bidders to identify the requested location.**

- b) The Eleventh Schedule of the Local Government Act (Chapter 363) gives a reliable and faithful geographical direction of the towns and villages in Malta and the division into the five Regions clearly identifies that, the town of ‘Hamrun’ is situated in the Southern Region of Malta.**
- c) If the Authority’s intentions were to limit the location of property as much as possible, close to Valletta, it should have denoted such a requisite in the first place and this Board confirms that ‘The Central Region in Malta’ does not include ‘Hamrun’ whilst at the same instance the Evaluation Committee ignored such an important stipulated condition in the tender document, in their deliberations.**

In view of the above, this Board,

- i) does not uphold the Authority’s decision in the award of the tender,**
- ii) directs the Authority to re-integrate Appellants’ offer in the evaluation process,**
- iii) directs the Authority to appoint a new Evaluation Committee,**

iv) directs the new Evaluation Committee, in their deliberation, to take into consideration this Boards' findings,

v) directs the new Evaluation Committee to resume the evaluation process of both offers received,

vi) directs that the deposit paid by Appellants should be fully refunded.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Carmel Esposito
Member

12 September 2019