

PUBLIC CONTRACTS REVIEW BOARD

Case 1280 – MJCL/MPU/135/2018 – Tender for the Provision of Live Sound Mixing Equipment for Pjazza Teatru Rjal within Arts Council Malta

Call for Remedies before the Closing Date for Competition

The publication date of the call for tenders was the 3rd December 2018 whilst the closing date of the call for tenders was 21st January 2019. The estimated value of the tender (exclusive of VAT) was € 100,000.

On the 16th January 2019, DAB Electronica Co Ltd filed a Call for Remedy against the Ministry for Justice, Culture and Local Government as Contracting Authority claiming that the tender was pointing to a single particular brand of product.

On 14th March 2019 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:

Appellants – DAB Electronica Co Ltd

Mr Alan Gatt	Representative
Ms Sandra Vella Valletta	Representative
Mr Joseph Vella	Representative

Contracting Authority – Ministry for Justice, Culture and Local Government (Arts Council)

Dr Christopher Mizzi	Legal Representative
Mr Etienne Bonello	Representative
Mr Christopher Muscat	Representative
Ms Claudette Farrugia	Representative

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

Mr Joseph Vella Representative of DAB Electronica Co Ltd (DAB) said that the tender as drafted limited competition – this was compounded by the clarification issued which further limited competition and shut the door on alternative offers. He went on to explain the audio system specified and the communication between the stage box and the console which was at the crux of the remedy being sought. The Dante protocol specified in the tender was super ceded and different firms offered superior technology and most major brands of digital audio do not use

Dante which pointed directly to Yamaha brand of equipment. It was also significant that the tender referred to dip switches which were still in use only by Yamaha.

Mr Alan Gatt Representative of DAB Electronica Co Ltd stated that with the Dante protocol there were delays in communications and in fact that system was ten times slower than modern systems.

Dr Christopher Mizzi Legal Representative of the Ministry for Justice, Culture and Local Government stated that what was being contested is the Dante protocol specification, which can be used by other systems. There are no barriers to it communicating with other systems.

Mr Avarino Cirrina, called as witness by the Contracting Authority testified on oath that he was the technical advisor in the preparation of the tender and had prepared the technical specifications. The object of the tender was the provision of a recording system at Teatru Rjal. Dante is the top brand in the world for this type of equipment and is what the Contracting Authority wanted. Any bidder can use it in conjunction with the top brands of equipment.

Witness said that he was not an expert but in his view Dante 'is the language that everybody is going to use'. It was possible to use Dante with different systems, but in reply to a question by the Chairman witness said that Dante will work with 'almost any system' in the world.

The Chairman said that from what it has heard the Board was not convinced that the system advocated allows communication with alternative systems.

Dr Mizzi said that the specification for the Dante system opened the tender to any bidder because it was easily available to anyone.

Mr Etienne Bonello Director of Corporate Affairs at the Arts Council said that the tender is going to be re-issued in line with any recommendations made by the Public Contracts Review Board.

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

This Board,

having noted this Call for Remedies filed before the Closing Date of Competition by DAB Electronica Company Limited, (herein after referred to as the Appellants) on 16 January 2019, refers to the claims made by the same

Appellants with regard to the Tender of Reference MJCL/MPU/135/2018 listed as Case No 1280 in the records of the Public Contracts Review Board and issued by the Arts Council within the Ministry for Justice, Culture and Local Government (herein after referred to as the Contracting Authority).

Appearing for the Appellants: Mr Alan Gatt

Mr Joseph Vella

Appearing for the Contracting Authority: Dr Christopher Mizzi

Whereby, the Appellants contend that:

- a) their main concern refers to the fact that apart from the incidence of limiting competition, the technical specifications stipulated that the “*Dante*” protocol, which is somewhat outdated, limits the communication between the stage box and the console.**

This Board also noted the Contracting Authority’s ‘Letter of Reply’ dated 28 January 2019 and its verbal submissions during the hearing held on 14 March 2019, in that:

- a) the Contracting Authority insists that the “*Dante*” protocol specifications can be used by other systems and therefore there are no restrictions to its communications with other applications.**

This same Board also noted the testimony of Mr Avarino Cirrina, Technical Advisor on the Tender, who was duly summoned by the Ministry for Justice, Culture and Local Government.

This Board, having examined the relevant documentation to this “*Call for Remedy*” and heard submissions made by the parties concerned, including the testimony of the technical witness, opines that the issue which merits consideration is the way in which the technical specifications are formulated.

1. First and foremost, this Board would assert the fact that, the Contracting Authority has the right to dictate or impose certain conditions and specifications which it deems proper in order to achieve its objectives, however, such conditions and specifications must:

- be precise in the way they describe the requirements;**
- be easily understood by the prospective Bidders;**
- have clearly defined, achievable and measurable objectives;**
- not mention any brand names or requirements which limit competition;**
- provide sufficient detailed information that allows bidders to submit realistic offers.**

In this particular case, the Appellants are maintaining that the specifications, as formulated, through the “*Dante*” protocol, offered a

slow and outdated system, apart from the fact that such specifications offered an advantage to one particular brand of equipment, namely, Yamaha. In this regard, being a technical issue, this Board had to rely substantially on the testimony of the technical witness who advised the Ministry and drafted the technical specifications. During his submissions, Mr Cirrina confirmed that “*Dante*” works with almost any system in the world. However, when the same witness was asked directly whether the “*Dante*” protocol will work also with alternative equipment, the reply was not very convincing.

In this respect, this Board acknowledges the fact that the Contracting Authority, quite appropriately, must rely on technical experts in the formulation of the technical specifications and from the submissions made, this Board was not presented with justifiable evidence to prove that, the technical specifications as dictated in the Tender Document allow for open competition for alternative equipment which will achieve the objectives of the Tender.

2. This Board was also made aware that the real limitation in the technical specifications refers to the communications between the stage box and the console. The Appellants’ contention in this regard, is that there are more advanced and efficient systems which, at the same instance, do not limit competition.

In this respect, this Board had to rely on the testimony of the technical witness, who did not present justifiable evidence to substantiate the fact that, the technical specifications, with regards to the communication between the stage box and the console, allow an open competition. This same Board, however, would acknowledge that the Contracting Authority has the right to stipulate a particular protocol in the Tender, as long as the specifications will allow competition among the various brands of equipment on the market.

- 3. Having heard the submissions and the testimony of the technical witness, this Board opines that the Contracting Authority should examine and consult the market on the availability of other more updated and efficient protocols which would not create a limitation of competition, in the supply of communication equipment between the stage box and the console.**

In view of the above, this Board,

- i) upholds the contentions made by DAB Electronica Limited, in that the technical specifications as formulated, create a limitation for various other prospective Bidders;**
- ii) directs the Arts Council within the Ministry for Justice, Culture and Local Government to sound the market with regards to “*Live Sound*”**

Mixing Equipment”, which would not limit various brands of equipment to participate, as long as the same will render the intended objectives of the Contracting Authority. In this regard, this Board would recommend that specialists in this field are to be consulted, prior to the issue of new technical specifications;

iii) directs that the Tender is to be cancelled and a new one is to be issued taking into consideration this Board’s recommendations and directions.

Dr Anthony Cassar
Chairman

Mr Carmel Esposito
Member

Mr Lawrence Ancilleri
Member

25th March 2019