

PUBLIC CONTRACTS REVIEW BOARD

Case 1320 – MEDE/MPU/JOBSPLUS/019/2018 – Tender for the Provision of ICT Summer Courses 2019

The publication date of the call for tenders was the 27th December 2018 whilst the closing date of the call for tenders was 15th February 2019. The estimated value of the tender (exclusive of VAT) was € 70,000.

On the 3rd May 2019 The Computer Training Course Ltd filed an appeal against Jobsplus (Ministry for Education and Employment) as the Contracting Authority due to being disqualified on the grounds that it failed to satisfy the necessary criteria for award. A deposit of € 400 was paid.

There were two (2) bidders.

On 5th June 2019 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Richard Matrenza as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – The Computer Training Course Ltd

Dr Stefan Zrinzo Azzopardi	Legal Representative
Mr Ray Abela	Representative

Recommended Bidder – Domain Academy Ltd

Dr Clint Tabone	Legal Representative
Mr Jonathan Mallia	Representative
Mr Robert Darmanin	Representative

Contracting Authority – Jobsplus

Dr Jonathan C Spiteri	Legal Representative
Ms Amber Darmanin	Chairperson Evaluation Committee
Ms Joan Sillato	Secretary Evaluation Committee
Mr Paul Zammit	Member Evaluation Committee
Ms Loredana Calleja Pandolfino	Member Evaluation Committee
Ms Graziella Cauchi	Member Evaluation Committee
Ms Sylvana Turchett	Representative

Mr David Bonello

Representative

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

Dr Stefan Zrinzo Azzopardi Legal Representative for The Computer Training Centre Ltd (TCTC) stated that this appeal was based on the points awarded to his clients, which to say the least, had been very irregularly carried out. The Public Contracts Review Board (PCRB) had already heard this case as a call for remedy before closing date and had indicated the correct procedure to be followed. Despite this the evaluation committee's concept of the award is totally wrong. There are two aspects of the award where the points awarded were irregular. These are the mitigation strategies to increase commitment to courses and the valid ways to keep course participants motivated to achieve success. On the former point Appellants offered more solutions than the tender requested but anomalously in the evaluation process some of the offered solutions were considered and others ignored – reflected in the points awarded. On the latter point certain offered solutions were again ignored – bidder offered more than the five solutions requested in the tender. Moreover it is obvious from the replies submitted by the Authority that a comparison was made between the bids submitted instead of treating each bid on its own merits.

Dr Jonathan Spiteri Legal Representative of Jobsplus said that both bidders had made good proposals and offered very close bids and therefore the evaluators had to seek qualitative differences between the offers. This is clearly explained in the rejection letter. This appeal must not be used to reduce the PCRB to be another evaluation committee. The Appellants conceded that their bid included proposals defined in the tender document which was prohibited according to the criteria set out in the instructions to tenderers.

The Chairman said that the PCRB believes in the principle of self-limitation in line with the tender requisites compared to what was offered by the bidders.

Mr Ray Abela (433067M) called as a witness by Appellants testified on oath that he was the Managing Director of TCTC. He tabled two documents, listed as (Doc A1) and (Doc B1). Referring to Doc B1 headed 'Ways to mitigate these challenges' witness stated that his company provided eight solutions under this requisite, Six of these were considered by the evaluation committee but only three were deemed as valid and points awarded only thereon. Support throughout the learning process should have been seriously considered, whilst streaming was completely ignored and not accepted as a solution. On the item 'Support through Learning Support Assistants' TCTC offered eight solutions against the three requested, and which should all have been fully considered. Eight different centres for training had been offered to increase participation, and additional opportunities were offered to enable participants to reach an 80% grade. The additional incentives offered were not considered as valid and only the heading of the document was taken into account with the solutions offered in the sub-headings ignored completely. With regard to Doc A1 witness said that the evaluation committee had disregarded

the solutions offered such as the re-sit opportunities, free re-sits and mock tests. TCTC offer should have earned full marks on the basis that it was offering more than asked for.

Ms Amber Darmanin (43288M) called as a witness by the PCRБ testified on oath that she was the Chairperson of the evaluation committee. She stated that all subsections of the main headings of Appellants' submissions had been considered where their answers were valid. Streaming offered by Appellants was not considered as the tender required students to be profiled. 'Trainees personal circumstances' were considered but although three solutions were offered only one point was awarded as the other solutions were repeating items identified in the tender dossier. Section 9.3.1a made it clear that proposals had to be over and above those identified in the tender document.

Questioned on this point by Dr Zrinzo Azzopardi witness said that in her view the clause regarding submissions over and above those identified in the tender covered the whole of the tender documents and not merely section 1.5 to which it made a specific reference.

Mr Paul Zammit (127786M) called as a witness by Appellant testified on oath that he was the technical member of the evaluation committee. He said that TCTC offered three out of four training modules out of a possible ten – in his view one of the modules offered was not very beneficial to the trainees. The options offered were not valid and offered quantity rather than the quality that Jobsplus was looking for. Any marks deducted from Appellants' bid were in respect of optional rather than base modules.

Dr Zrinzo Azzopardi stated that from the evidence heard it results that the most important point to consider is the interpretation of the phrase 'over and above'. If it refers only to section 1.5 which appears to be the case then the arguments about the other sections are not valid. If as the evaluation committee claim that the phrase referred to the whole tender then there was no need to identify a particular section. This is the determinant factor – what to consider over and above and what not to take into consideration. Over and above is taken to mean in excess of that already requested.

Dr Spiteri said that the appeal was about factors totally different than the phrase over and above. The Contracting Authority had made it clear why certain points were not taken into consideration - the members of that Authority had autonomy in the way they awarded the points and their decision should be upheld.

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

This Board,

having noted this objection filed by the Computer Training Course Limited (herein after referred to as the Appellants) on 3 May 2019, refers to the claims made by the same Appellants with regard to the tender of reference MEDE/MPU/JOBSPLUS/019/2018 listed as case no 1320 in the records of the Public Contracts Review Board, awarded by Jobsplus (herein after referred to as the Contracting Authority).

Appearing for the Appellants: Dr Stefan Zrinzo Azzopardi

Appearing for the Contracting Authority: Jonathan C. Spiteri

Whereby, the Appellants contended that:

- a) their main contention refers to the fact that, the way the points were allocated by the Evaluation Committee, was irregular. In this regard, Appellants maintain that, they had offered more than requested especially, in the two aspects namely ‘Mitigation Strategies’ and ‘ways to motivate participants towards success’.**

This Board also noted the contracting Authority’s ‘Letter of Reply’ dated 10 May 2019 and its verbal submissions during the hearing held on 5 June 2019, in that:

- a) the Authority insists that the evaluation process was carried out in a just and fair manner and Appellants' offer failed to include valid options which were beneficial to the trainees. In this regard, the Authority contends that deduction of marks was only affected in respect of optional items and not on basic modules.

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

Mr Ray Abela – duly summoned by the Computer Training Course Limited

Ms Amber Darmanin - duly summoned by the Public Contracts Review Board

Mr Paul Zammit – duly summoned by the Public Contracts Review Board.

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 duly summoned, opines that, the issues that merit consideration are two-fold namely:

- a) the mode of the allocation of marks and
- b) the interpretation of the phrase 'Over and Above'.

1. Allocation of Marks

With regards to Appellants' contention that, the marks awarded in their offer were irregular, this Board would first and foremost, point out that,

each evaluator, independently, allocated points on the merit of each technical item, submitted by each Bidder, so that the subjectivity element has been suppressed. At the same instance, this Board noted that the allocation of marks on the two items being contested by Appellants, was carried out on the basis that, proposals submitted by the latter, were not considered as valid, as such submissions were not ‘Over and Above’ as those stipulated in the tender document.

2. With regards to the ‘Mitigation Strategies’ issue, Appellants were awarded three (3) points due to the fact that out of six (6) proposals submitted, only three (3) were considered to be ‘Over and Above’ those already stipulated in the tender dossier. Whilst, the preferred Bidder submitted eight (8) strategies and the Evaluation Committee considered only five (5) to be ‘Over and Above’ the stipulated ones. In this respect, this Board notes that the mode in which the points were allotted, was quite appropriate and the issue that really deserve due consideration is the interpretation of what is ‘Over and Above’, as such consideration formed the basic assessment measuring tool.

3. This Board would also respectfully point out that, during the allocation of points, some form of comparison of offers must also be considered by the Evaluation Committee, whilst abiding by the principle of self-limitation and in the particular case, this Board opines that, the Evaluation Committee, by comparing the offers, same endeavoured to select the most advantageous offer and had allocated the points accordingly.

The allocation of points on the items being contested can be summarised, as follows:

Item	Max Points	Prop. Submitted	Valid Proposals	Points Allocated
<u>Appellants</u> Mitigation Strategies (1Aii)	5	6	3	3
<u>Preferred Bidder</u> Mitigation Strategies (1Aii)	5	5	5	5
<u>Appellants</u> Motivation (1Ab)	5	6	6	4.7
<u>Preferred Bidder</u> Motivation (1Ab)	5	7	7	5

In this respect, this Board opines that the allocation of points on the submissions made by both tenderers was justifiably carried out.

4. 'Over and Above' Phrase

This Board would respectfully refer to clauses 9.3a and 9.3b (evaluation grid), which clearly refers to technical items on which Appellants are claiming that the awarded marks, were irregular, as follows:

“Criteria/Sub Criteria

A) Rationale

- 1. A review of the terms of reference demonstrating the knowledge and understanding of the context of the eligible local, cohort of participants.**
 - a. Understanding of the challenges of the cohort of eligible participants over and above those identified in this Tender document. (Refer to section 1.5 – Current state of Affairs of the Terms of Reference).**
 - i. Challenges of the cohort of eligible participants (One mark will be allocated per valid way provided up to a maximum of five (5) marks)**
 - ii. Ways to mitigate these challenges (One mark will be allocated per valid way provided up to a maximum of five (5) marks)**

b. Valid ways to keep this cohort of eligible participants, interested and this attending the courses offered to him/her. One mark will be allocated per valid way provided u to a maximum of five (5) marks.”

From the above-mentioned clause, the Authority is requesting proposals which are to be ‘over and above’ those already identified in the tender document, so that, any proposals which are already listed, are to be treated as invalid proposals.

In this particular case, Appellants did submit proposals which were ‘Over and Above’ those stipulated, however, the other competing Bidder submitted more valid proposals regarding motivation, than the Appellants and quite appropriately, they were awarded more points.

This Board opines that the above-mentioned clause referred to all the requirements, as stipulated in the tender dossier, and such a condition had to be taken in consideration as per terms of reference, as stated in section 1.5. At the same instance, this Board would also confirm that although both Bidders exceeded the minimum requirements, the Evaluation Committee had to assess which offer was the most advantageous and, in this regard, this Board notes that the preferred

Bidder submitted more valid proposals with regards to ‘Motivation’ so that, quite appropriately, some obtained a better average mark.

- 5. This Board would also point out that, the fact that one evaluator did not award full marks to Appellants’ particular item, does not imply that the evaluation process was carried out in an irregular manner, but rather assert the fact that, the PBQR system’s end result is the most objective method of assessing an offer.**

In conclusion, this Board opines that:

- a) the allocation of points on each offer was carried out in a fair, just and transparent manner,**
- b) the reference to clause 1.5 in clause 9.3 (evaluation grid) does not imply that the phrase ‘Over and Above’ should only apply to clause 1.5, but rather that ‘Over and Above’ implies all proposals so identified and listed in the tender dossier.**

c) Clause 1.5 is a descriptive reference of what is being requested by the Authority and the objectives to be achieved throughout the tendering process.

In view of the above, this Board,

i) Does not uphold Appellants' contentions,

ii) Upholds the Contracting Authority' decision in the award of the tender,

iii) Directs that the deposit paid by Appellants should not be refunded.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Richard A. Matrenza
Member

June 2019