

PUBLIC CONTRACTS REVIEW BOARD

Case 1322 – MJCL/MPU/60/2019 – Tender for the Marketing and Documentation Services (in an Environmentally Friendly Manner) for Ziguzajg Arts Festival for Children and Young People 2019.

Remedy before Closing Date of a Call for Competition

The publication date of the call for tenders was the 22nd April 2019 whilst the closing date was the 13th May 2019. The estimated value of the tender (exclusive of VAT) was € 32,203.38.

On the 14th May 2019 Outlook Coop sought a Remedy against St James Cavalier on behalf of the Ministry of Justice, Culture and Local Government as the Contracting Authority demanding the setting aside of the date for submissions of tenders.

On 18th June 2019 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – Outlook Coop

Dr Joseph Bugeja	Legal Representative
Dr Ryan Bezzina	Legal Representative
Mr David Bezzina	Representative
Ms Mary Ann Vella	Representative

Contracting Authority – Ministry of Justice, Culture and Local Government

Dr Christopher Mizzi	Legal Representative
Mr Wayne Caruana	Representative
Mr Daniel Azzopardi	Representative

Dr Anthony Cassar, Chairman of the Public Contracts Review Board, welcomed the parties and before inviting submissions asked if it could be made clear whether a clarification note was issued changing the date of submissions from the 13th to the 14th May 2019.

Dr Christopher Mizzi Legal Representative of the Ministry for Justice, Culture and Local Government said that he could state categorically that no clarification was issued changing the closing date of the tender. The electronic system showed the closing date as the 13th May whilst the tender documents (PDF form) showed the date as the 14th May. The ePPS was paramount and

several reminders had been sent prior to the closing date notifying prospective bidders that the closing date was the 13th May.

Dr Joseph Bugeja Legal Representative of Outlook Coop said that Public Procurement Law stated that the tender document prevails – the ePPS is merely a vehicle to enable a tender to be submitted. The clash of dates has created a problem due to the lack of legal certainty. Appellants were asking for cancellation of the tender due to this uncertainty.

Dr Mizzi said that the Contracting Authority was in favour of cancellation since all the prospective bidders' bids had exceeded the budget allocated for this tender.

The Chairman commented that it was unfortunate that these mistakes occurred as it was unfair on the bidders who incurred costs in mounting a bid. He then thanked the parties for their submissions and declared the hearing closed.

This Board,

having noted this 'Call for Remedy Prior to the Closing date for Competition' filed by Outlook Coop (herein after referred to as the Appellants) on 14 May 2019, refers to the claims made by the same Appellants with regard to the tender of reference MJCL/MPU/60/2019 listed as Case no 1322 in the records of the Public Contracts Review Board.

Appearing for the Appellants: Dr Joseph Bugeja

Appearing for the Contracting Authority: Dr Christopher Mizzi

Whereby, the Appellants contend that:

- a) their concern is that the tender document stipulates the closing date as the 14 May 2019, whilst, the Electronic Public Procurement System**

denoted the date as 13 May 2019. In this regard, Appellants maintain that, upon submitting their offer on the 13 May 2019, they were not allowed to do so, as the electronic system for this particular tender was closed and, in this respect, Appellants insist that the conditions, as stated in the tender dossier, should prevail so that, the effective closing date for submissions should be 14 May 2019.

This Board also noted the Contracting Authority's 'Letter of Reply' dated 27 May 2019 and its verbal submissions during the hearing held on 18 June 2019, in that:

- a) the Authority contends that, although no clarification was issued to denote a change in the closing date of the tender, the Electronic Public Procurement System did show that the closing date was 13 May 2019, and all Bidders were electronically informed of such a change in date.**

This Board, after having examined the relevant documentation on this concern and heard submissions made by the parties concerned, opines that the issue that merits consideration is the manner in which the closing date for the submission of offers, was changed from the 14 May 2019, to the 13 May 2019.

1. First and foremost, this Board would respectfully point out that, on paper, such a concern cannot be treated as a ‘Call for Remedy’, as the application was on the 14 May 2019, whilst the closing date for submissions of offers was a day earlier, however, this Board notes that the closing date for the submission of offers, as duly stipulated in the tender document, was 14 May 2019 and in view of the fact that the conditions of the tender document override any other conditions, unless properly amended through a clarification note, this Board affirms that the closing date as duly stipulated in the tender document can only be changed or amended through a clarification note, the latter of which, will form part of the tender conditions. In this regard, this Board accepts Appellants’ pleas, as a ‘Call for Remedy’

2. This Board noted that the treatment of the change of the closing date of submissions, was somewhat confusing, as this Board opines that the electronic system should be regarded as a tool to facilitate the tendering process and not to alter any of the conditions as duly stated in the tender document. In this particular instance, it is an obvious case, on the part of the Authority, of not following the proper procedures of the Public Procurement Regulations as such amendments for changes in a condition so stipulated in a tender document, must be communicated to Bidders by

way of clarification note so that, in the end, such clarification note will form an integrated part of the tender document.

In conclusion, this Board opines that;

- a) any amendment to the closing date for submissions of offers, should be communicated to the Bidders by way of a clarification note, the latter of which will then form part of the tender document;**
- b) the Electronic Public Procurement System should not override the tender document conditions, as it is a tool for the submission of offers and cannot replace or add information or conditions to those already stipulated in the tender document except through a clarification note;**
- c) this Board notes that Appellants were not allowed to submit their offer through the Electronic Public Procurement System and in this regard, since other bids were already submitted, and this Board was informed by the Authority that those bids submitted would not qualify, as they exceed the budgeted funds, the only equitable solution is to cancel the tender;**

d) would also point out that, tender conditions should be clear in what is being requested by the Authority and changes to the original conditions in a tender document should also be properly communicated through the proper procedural channel.

In view of the above, this Board,

a) Upholds Appellants' contention in that the conditions as stipulated in the tender document prevail;

b) Directs that the tender be cancelled.

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member

2 July 2019