

PUBLIC CONTRACTS REVIEW BOARD

Case 1312 – CT 5000/2018 – Negotiated Procedure for the Procurement of Training Service Providers for ‘Ab Initio’ Course for new Fixed Wing Pilots

The publication date of the call for negotiated procedure was the 19th November 2018 whilst the closing date was 21st December 2018. The estimated value of the service (exclusive of VAT) was € 425,000.

On the 8th April 2019 European Pilot Academy - Malta filed an appeal against the Armed Forces of Malta as the Contracting Authority demanding a review of the latter’s decision. A deposit of € 2,125 was paid.

There were two (2) participants.

On 16th May 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 – European Pilot Academy - Malta

Dr Franco Galea	Legal Representative
Dr Lucio Sciriha	Legal Representative
Mr Matthew Rota	Representative
Captain Ray Zarb	Representative

Recommended Bidder – Malta School of Flying

Mr Patrick Fenech	Representative
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Contracting Authority – Armed Forces of Malta

Capt Kimberley Zarb	Legal Representative
Colonel Melvin Haber	Representative
Major Jason Ebejer	President Negotiated Board
Captain Nicholas Grech	Member Negotiated Board
Captain Christian Grech	Member Negotiated Board
WO 1 Johan Miruzzi	Representative
WO 1 Darren Roe	Member Negotiated 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 Franco Galea Legal Representative of European Pilot Academy – Malta said that the grounds of his clients’ appeal was that in the terms of reference in the negotiated procedure and in the adjudicating process no criteria for the award were set. The terms of reference did not indicate any criteria and therefore, by default the Contracting Authority had to accept the most economically advantageous offer. If the winner was chosen on price the Authority was in duty bound to carry out a like-with-like exercise. The award criteria should have been laid out at the beginning not at the stage when the Authority was advising the cheapest compliant party of the outcome. No consideration was given to what the Appellants had to offer because they were not approached. In terms of the regulations covering public procurement this process was faulty and null and void.

Captain Kimberley Zarb Legal Representative of the Armed Forces of Malta (AFM) said that Appellants in their letter of objection claim that the approval of the Director of Contracts was not obtained – this was incorrect as all necessary approvals were in place. They also claim that they were not aware that this was a negotiated procedure when this was clearly stated in the original invitation to participate. When asked for their ‘best and final offer’ Appellants merely repeated their original offer with no attempt to negotiate.

Major Jason Ebejer President of the Negotiated Board said that the Authority had laid down a set of standards of the European Union Agency for Safety in Aviation (EASA) which had to be met. Offers from both participants had met these standards but between their offers there was a difference of nearly € 50,000. The award standard did not have to be stated as this was based on price.

Captain Zarb emphasised that the set of standards applied to both parties and the award was based on price not on the more advantageous economic offer – the Authority was bound by legislation to go for the cheapest offer.

Dr Galea said that according to the Public Procurement Regulations (PPR) if no indication of the award criteria was given then by default the best economically compliant offer should prevail. No effort was made to see what the two companies were offering or if one party had the better equipment. There were many variables and many different details to consider, as for example, the type of aircraft to be used.

Captain Zarb re-iterated that all necessary details to submit an offer had been supplied, and time was given for the parties to seek clarifications if they felt something was not clear; the Authority

had set clear standards for a negotiated procedure. It was up to the Armed Forces Board to decide what was best for them.

Dr Galea said that the Contracting Authority had failed to take up the offer to view the Appellants' facilities. Negotiations by its very definition meant a two-way process of communications to establish what the complete offer was, but if price was the criterion then it would have been essential to carry out a like-with-like exercise.

Dr Franco Agius Legal Representative of the Department of Contracts said that the most advantageous offer does not mean the cheapest price. A negotiated procedure process was not defined at law; it had to be flexible and not bound by procedure. There was no stipulation how negotiations were carried out – the object of the exercise was to get the best offer.

Dr Galea again stated that negotiating does not mean submitting clarifications but actually consulting between the parties – the award criteria were not stated and a like-with-like exercise had not been carried out.

Mr Patrick Fenech Representative of Malta School of Flying said that he would not claim that his school was better but it was a fact that they were offering better aircraft; the simulator which was a crucial part of training was far superior with advanced equipment which matched that of the aircraft which the Armed Forces were using; they were licensed for multi-crew operation and configured to AFM requirements. In a like-with-like exercise the facts would favour the preferred bidder.

Major Jason Ebejer (131772M) called as a witness by the Board testified on oath that he was the President of the Negotiated Board who had considered all aspects of the submitted offers with the assistance of two qualified pilots. They had ensured that all the terms laid out in the documents had been met and both parties had been treated alike. Even though they were given the opportunity Appellants had not asked any questions or sought any clarifications. The members of his board did not feel the need to consult as both parties reached the EASA standards – since they both reached that standard the decision in the end turned on price. Witness referred to Annex 'G' in the documents submitted in their letter of reply which clearly indicated that Appellants had been given the opportunity of re-considering their offer. In reply to a question from Dr Galea witness stated that the decision to go for a negotiated procedure was made by the Logistics Board of the AFM.

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

This Board,

having noted this objection filed by European Pilot Academy-Malta (herein after referred to as the Appellants) on 8 April 2019, refers to the claims made by the same Appellants with regard to the tender of reference CT 5000/2018, listed as case no. 1312 in the records of the Public Contracts Review Board, awarded by Armed Forces of Malta (herein after referred to as the Contracting Authority).

Appearing for the Appellants:

Dr Franco Galea

Dr Lucio Sciriha

Appearing for the Contracting Authority: Capt. Kimberly Zarb

Whereby, the Appellants contend that:

- a) the Authority did not obtain the approval of the Director General of the Contracts Department prior to the issue of the negotiated procedure for this tender;**
- b) they were not given details with regard to right of appeal;**

- c) the Authority did not provide information with regard to the award procedure and criteria;**
- d) no negotiations took place so that, the whole objective of the offer under the negotiated procedure was not adhered to by the Authority.**

This Board also noted the Contracting Authority's 'Letter of Reply' dated 17 April 2019, and its verbal submissions during the hearing held on 16 May 2019, in that:

- a) the Authority insists that it had all the necessary approvals for the issue of a negotiated procedure for this tender;**
- b) Appellants were given all the information with regard to right of appeal, so much so that, same Appellants filed an objection to the appropriate Authority;**
- c) The Authority contends that, had the Appellants any problem in identifying the award criteria and procedure, same had the opportunity to seek clarification prior to submitting their offer;**

d) The Authority also maintains that, Appellants were given the opportunity to adjust their price, however, they just confirmed their original offer. In this regard, the Authority would emphasize that the two submitted offers were compliant and the deciding factor was the price.

This same Board also noted the testimony of the witness namely, Major Jason Ebejer – President of the Negotiated Board, 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 witness, would treat the merits of Appellants' grievances as follows:

- 1. with regard to Appellants' first contention in that, the Authority did not obtain the approval of the Director of Contracts for the issue of the negotiated procedure, this Board would respectfully refer to an email dated 11 October 2018, wherein the necessary authorisation to enter into a negotiated procedure was granted by the Department of Contracts, as follows:**

*“CT 5000/2018
Colonel C Attard AFM
Col Capabilities and Training
Headquarters AFM*

***Negotiated Procedure with Training Service Providers for ‘AB Initio’
Course to Form New Fixed Wing Pilots***

*Reference is made to your email dated 9 October 2018, regarding the subject
in caption.*

*The General Contracts Committee has discussed your request. Approval is
hereby being given to enter into a negotiated procedure with:*

- a) European Pilot Academy*
- b) Malta Flying*

*to provide training for ‘AB Initio’ course to form new Fixed Wing Pilots at
the estimated cost of €425,000 excl VAT.*

*This approval has been granted in terms of Regulation 154 (c) of the Public
Procurement Regulations LN 352/2016 under the following conditions:*

- a) these services are absolutely necessary;*
- b) the most cost effective (value for money) basis was taken into
consideration when submitting your request;*
- c) funds are available;*
- d) the Contracting Authority is to revert for definite approval once the
actual economic operator and costs are known.*

Thanks and regards

**The above correspondence clearly shows that the Authority had the
necessary authorisation to enter into a negotiated procedure for this
particular tender and in this regard, this Board does not uphold
Appellants’ first contention;**

2. with regard to Appellants' second contention, this Board would refer to the notice of rejection dated 4 April 2019, wherein details with regard to deadline of appeal and deposit to be made, were given. It is a fact that, the Public Contracts Review Board was not mentioned in the said rejection letter, however, Appellants were well aware that, such appeals are heard by the Public Contracts Review Board and in fact, this Board notes that, after only four days of receipt of the rejection letter, Appellants filed their objection to the correct Review Board. In this regard, this Board opines that enough details were given by the Authority to enable Appellants to appeal without any undue difficulty and in this respect, does not uphold Appellants' second contention;

3. with regard to Appellants' third contention in that, they were not served with details and information regarding the award criteria and procedure, this Board would refer to the 'Terms of Reference' which Appellants were well aware of and such terms formed the basis of the negotiated procedure. At the same instance, one must point out that Appellants' contentions, in this regard and at this particular stage are not justified, as Appellants had the opportunity and remedy to either seek

clarifications or submit a call for remedy prior the closing date of submission of offers. This Board would refer to an email dated 10 December 2018 whereby the terms of reference were submitted by the Authority, as follows:

*“From: Vassallo Ryan at AFM
Sent: 10 December 2018 21:47
To: Matthew Rota
Cc: Ebejer Jason at AFM; Capt. Ray Zarb; Roe Darren at AFM; Abdilla Jean-Carl at AFM
Subject: RE: Terms of Reference AB INITIO FIXED WINGS*

Dear European Pilot Academy,

Attached please find the Terms of Reference, which shall form the basis of this Negotiated procedure.

Kindly note that any queries must be forward to undersigned by email, until Wednesday, 19th December 2018 and offers until Friday 21st December 2018.

*Regards
Ryan”*

Through the above correspondence, Appellants had the opportunity to seek any necessary clarifications which they deemed necessary and yet, no request for any clarifications was sent.

At the same instance, this Board notes that Appellants submitted their offer on 21 December 2018, without any particular concern to the terms of reference, as follows:

“You replied on 21/12/2018 11:25

To whom it may concern,

Kindly find attached quote as per the AFM requirement.

Please acknowledge that you have received our offer.

Feel free to contact us should you require any further clarifications

Regards

Matthew Rota

Business Development”

From the documentation made available to this Board, same opines that Appellants were availed of the necessary remedies to request the information which they claim to be missing from the terms of reference and which are being contested now and, in this respect, Appellants did not ask for any clarifications. This Board, as it has on numerous occasions, would not accept appeals based on claims for which the Public Procurement Regulations provide remedies prior to resorting to an

objection and this particular case is a perfect example of such an instance. This Board would also refer to Appellants' claim that the 'Terms of Reference' did not contain information on the award criteria and procedure to be applied during the evaluation process and in this regard, same Board would point out that a negotiated procedure is applied in certain cases and the object of such a procedure is to obtain the best offer for the Authority, so that it could either be the cheapest or the most advantageous offer. On the other hand, this Board also notes that if Appellants had any concerns regarding the award criteria, they could have requested the necessary explanation or clarifications at the time of receipt of the 'Terms of Reference' and this Board notes that, again, Appellants are bringing forward a complaint for which they should have sought remedy prior to the submission of their offer. In this regard, this Board does not uphold Appellants' third grievance;

- 4. with regard to Appellants fourth grievance in that, the Authority did not carry out negotiations, this Board would, first and foremost, state that the Public Procurement Regulations do not stipulate how negotiations take place. Negotiations can take the form of correspondence as long as the subject matter is contained. In this particular case, this Board took note of the various correspondence and requests for clarifications that**

took place between the Authority and Appellants and from the contents of such correspondence, the Authority, quite appropriately enquired about certain aspects of Appellants' offer so that it will consider same on the correct assertions.

This Board opines that such correspondence served as a substitute for discussions which normally occur during a negotiated process and reaped the expected results for the Evaluation Committee to form a fair and just opinion.

In this respect, there were two offers, and both were fully compliant and it is prudent that when such a situation arises, the Evaluation Committee can only recommend the cheaper offer and in this particular case, Appellants' offer was not the cheaper one.

One must also point out that the Evaluation Committee did not find it necessary to consult the Bidders further, as the information and clarifications sought by same were sufficient for the Committee to reach a fair, just and transparent decision. In this regard, this Board does not uphold Appellants fourth contention.

In conclusion, this Board opines that,

- a) the Authority did obtain the necessary Authority to enter into a negotiated procedure for this procurement;**

- b) adequate details were given to Appellants for the right of appeal;**

- c) Appellants were notified more than once that this was a negotiated procedure tender;**

- d) There was no requirement to state the award criteria and procedure to be adopted in this tender as the Authority's main objective was to procure the best offer, whether it be the price or the most advantageous offer. One has to take into account that, in this particular case, both submitted offers were compliant and the deciding factor was the price, and, in this case, it was the more advantageous offer;**

- e) negotiation did take place through various correspondence between the Bidders and the Evaluation Committee and were sufficient enough for the Authority to reach a decision;**

f) all the Appellants' claims could have been resolved and clarified through either a request for clarification or through a 'call for remedies' prior to the closing date of submissions of offers, however Appellants' chose not to avail themselves of such remedies.

In view of the above, this Board:

- i. does not uphold Appellants' contentions;**
- ii. upholds the Contracting Authority's decision in the award of the tender;**
- iii. directs that the deposit paid by Appellants should not be reimbursed.**

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member

28 May 2019