

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1441 – MJCL/MPU/38/2019 – Expression of Interest for the Leasing of Office Space for the Ministry for Justice, Culture and Local Government**

The tender was published on the 8<sup>th</sup> November 2019 and the closing date of the call was 3<sup>rd</sup> December 2019. The estimated value of the call (exclusive of VAT) was € 225,000 per annum.

On the 16<sup>th</sup> March 2020 Mr Raymond Gauci on behalf of Y & P Ltd filed an appeal against The Ministry for Justice, Culture and Local Government as the Contracting Authority objecting to their disqualification despite their offer being the best financial package. A deposit of € 1,075 was paid.

There were eight (8) bidders.

On 7<sup>th</sup> May 2020 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

#### **Appellants – Y & P Ltd**

Dr Ryan Pace	Legal Representative
Mr Raymond Gauci	Representative

#### **Preferred Bidder – Ms Lorraine Bonnici**

Ms Lorraine Bonnici	Representative
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#### **Contracting Authority – Ministry for Justice, Culture and Local Government**

Dr Chris Mizzi	Legal Representative
Mr David Mizzi	Representative

Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties and invited submissions. He noted that since this was a virtual meeting all the parties had agreed to treat this as a normal meeting of the Board.

Dr Ryan Pace Legal Representative of Y & P Ltd outlined the reasons which had led to this appeal on the Expression of Interest. Appellant was notified that his bid had failed as there was a lower offer on the requested ‘annual price per m<sup>2</sup>’ basis. The table supplied by the Contracting Authority indicating their decision showed Appellants in second place but the additional columns in that table indicated that the offer of the preferred bidder was half-a-million Euro higher than that of the Appellants. On a rate per m<sup>2</sup> basis Appellants rate was € 175 whilst that of the preferred bidder was € 155. The evaluation

committee had adjudicated the tender solely by isolating the annual rate per m<sup>2</sup> basis and ignoring all other component figures.

Dr Chris Mizzi Legal Representative for the Ministry of Justice, Culture and Local Government said that the tender clearly stated that the award will be made on the offered price for the annual rate per m<sup>2</sup>. No other parameters were allowed to be taken into consideration. The primary criterion was set at law and the price per m<sup>2</sup> was sacrosanct. The secondary parameter was the size of the premises required which was set between certain limits and although the global price of the offers was also published it had no effect on the award and it simply reflected a higher price by the preferred bidder as it offered larger premises. Both offers were compliant but the square metre price of the preferred bidder was lower – the Appellant failed on this criterion and the global price was irrelevant on the final decision.

Dr Pace stated that the tender award hinged on the interpretation of what the annual price per m<sup>2</sup> means but there are doubts on how it was interpreted. Apart from this point the Board also had firstly to decide on the locus standi of Y & P Ltd and/or Mr Raymond Gauci since the Contracting Authority had raised this point. The bid was made by Y & P and the Contracting Authority had corresponded with them. Mr Gauci was a Director of the Company and as such there was no scope in filing a power of attorney for him to act. Reference was made to Public Procurement Regulation 90.6 which gives the Board equivalence to a Court of Law which had rules that minor formalities like this are ignored. Court of Appeal Case Attard vs Galea (1998) was cited in support.

Dr Mizzi claimed that from the submitted documents it was not clear who bidder was as both names of Y & P and Mr Gauci appear in the various documents.

The Chairman stated that it is clear that there is a undoubted connection between Y & P Ltd and Mr Gauci and the Board will hear the case.

Mr David Gauci (194998M) called as a witness by Appellants testified on oath that he dealt with the Administrative side of Y & P Ltd business. He is the son of Mr Raymond Gauci a Director of the firm. He outlined the procedure followed in bidding for this tender and the offer of an area of 694m<sup>2</sup> based on one floor of an office block with interconnected optional parking for 6 cars. The criteria of the offer included rent increments over ten years, insurance, and a list of maintenance costs which globally totalled to an offer for these obligatory components of € 1,358,000 for the ten years. The price for the complete package worked out to € 175 per m<sup>2</sup>. Certain clarification e-mails were exchanged with the Contracting Authority regarding the rates offered and the rate of increments followed by a request to view the premises which were considered as adequate. Y & P offer worked out at being half a million Euro cheaper than that of the preferred bidder but Appellants were not made aware of size of the area their competitors had offered.

Questioned by Dr Mizzi witness agreed that the award criterion was based on a price per square metre per year and that Y & P's offer was € 175 plus three Euro per square metre increase per year.

Ms Laura Desira (153388M) called as a witness by the Public Contracts Review Board testified on oath that she had been employed as a Civil Servant for seven years and had four years experience in a procurement role and was the Chairperson of the evaluation committee on this tender. She said that the tender had been awarded in line with criteria 9.1 in the tender which was the annual price per square metre of net usable area. The financial bid of Mr Raymond Gauci offered a rate of € 175 per m<sup>2</sup> for 694 m<sup>2</sup> whilst Ms Bonnici offered € 155 per m<sup>2</sup> for an area of 979m<sup>2</sup>. Gauci offered an annual increment of € 3 per m<sup>2</sup> every year which totalled € 18,738 over ten years whilst Bonnici offered a 4% increase giving an overall increase of € 304,416. Insurance costs proposed by Gauci were € 10,000 and by Bonnici € 19,677 whilst maintenance figures were €115,000 and € 130,109 respectively, totalling over ten years €1,358,238 in the case of Gauci and € 1,971,653 in the case of Bonnici. As regards car parking Gauci offered an optional 6 spaces whilst Bonnici included 15 spaces in her offer without indicating a separate cost for them.

The Chairman commented that since Bonnici included car parking in her offer and the cost of that factor was not known it follows that the offers therefore were not made on a like for like basis.

Questioned by Dr Pace witness agreed that the award was based on annual price per m<sup>2</sup> but the financial offer refers to costs per m<sup>2</sup> - hence the wording is different. She also agreed that the annual increments had to be included but that the evaluation committee had based their decision only on the first year's figure which however when averaged over ten years still came out at a higher figure for Y &P over Bonnici. Witness further agreed that the terms of the tender required bidders to include rent increments, maintenance and insurance costs in their offer and according to section 5.10 of the tender the figures for above costs had to be included by all bidders – however the offers were adjudged solely on the stated cost per square metre and no other costs were included.

Questioned by Dr Mizzi witness confirmed that the criterion for award was according to article 9.1 of the tender specifications.

The Chairman asked the witness if her committee had considered how much the Authority would have to pay over ten years and commented that the true cost of the rental should be inclusive of all costs.

Dr Pace said that what had transpired at this hearing had confirmed the point of the appeal as clearly shown by the testimony of the chairperson of the evaluation committee. The wording of section 9 of the specifications and the financial offer do not agree – one refers to rent the other to total cost. One must consider all five components to get to the total cost as the true yardstick of what the Authority would be paying not the price per m<sup>2</sup>. Witness confirmed that the tender was evaluated incorrectly as only the price per m<sup>2</sup> was considered and all the related obligatory components were completely ignored. Other components which were not obligatory, as for example finishes, were specifically excluded in section 3 of the specifications, but the obligatory components should have been included and not deemed to be irrelevant as the evaluation committee had wrongly decided.

The Appellants offer was obviously administratively, technically and financially compliant and offered the best financial package and the Contracting Authority had abjured their own self limitation and ignored the principles of level playing field and transparency. The tender document is correct – it was the interpretation of its terms that was incorrect.

Dr Mizzi re-iterated that the sole award criterion was the annual price per m<sup>2</sup> and that is the only factor that applies in the award and the evaluators cannot go beyond that. The offer must be limited to the rate of net usable area. The argument that other components had to be included is not backed by the tender terms as they are over and above what the tender required. The only applicable parameter is the price per m<sup>2</sup> and it would have been a breach of the Public Procurement Regulations if the evaluation committee had gone beyond the terms of the tender and would have prejudiced other bidders.

Dr Pace concluded by saying that there is no issue with the tender as it is clear but it was not interpreted correctly in the evaluation process, and if that decision is accepted as correct then it will make a travesty of the interpretation of future tenders.

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

End of Minutes

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## **Decision**

**This Board,**

**having noted this objection filed by Y&P Ltd (hereinafter referred to as the Appellants) on 16 March 2020, refers to the claims made by the same Appellants with regard to the tender of reference MJCL/MPU/38/2019 listed as case No.1441 in the records of the Public Contracts Review Board awarded by Ministry for Justice, Culture and Local Government (hereinafter referred to as the Contracting Authority).**

**Appearing for the Appellants: Dr Ryan Pace**

**Appearing for the Contracting Authority: Dr Chris Mizzi**

**Whereby, the Appellants claim that:**

- a) **Their main contention refers to the fact that, the ‘Award Criteria’ was the annual price per square metre and in their deliberations, the Evaluation Committee did not take into account, other accompanying mandatory costs directly affiliated to the annual cost of leasing the premises.**

**This Board also noted the Contracting Authority’s ‘Letter of reply’ dated 30 March 2020 and its verbal submissions during the virtual hearing held on 7 May 2020, in that:**

- a) **The Authority contends that the ‘Award Criteria’ was the price for the annual rate per square metre. In this regard, the price per square metre quoted by Appellants was higher than that quoted by the preferred bidder so that the global price was irrelevant on the final decision.**

**This same Board also noted the testimony of the witnesses namely:**

**Mr David Gauci duly summoned by Y&P Ltd**

**Ms Laura Desira duly summoned by the Public Contracts Review Board**

**On a preliminary note, the Authority claimed that, it was not clear as to the identity of the bidder, since both names of Y&P Ltd and Mr Gauci appear in various documentation. In this regard, this Board notes that both names refer to the same entity and would respectfully refer to the ‘Letter of Rejection’ dated 6 March 2020, wherein, the same Authority recognised such a relationship between Mr Raymond Gauci and Y&P Ltd and in this regard, this Board is not preoccupied with such a trivial assumed claim by the Authority, so that, same Board proceeded with the hearing of the appeal.**

**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 issue that merits consideration is the interpretation of the ‘Award Criteria’, as laid out in the tender dossier.**

- 1. The ‘Award Criteria’ as stipulated in the tender document clearly states that, it shall be the annual price per square metre of the net usable area for the offered property.**
- 2. At this stage of consideration, one has to establish what constitutes the annual price per square metre and in this respect, one has to point out that, the price being quoted by each bidder will represent the cost to the Authority. At the same instance, this Board would refer to appendix (vi) of the financial offer, as follows:**

**“Appendix VI: Financial Offer**

*Financial Offer*

			<i>Proposed Area in Square Metres (m<sup>2</sup>)</i>	<i>Rate per Square metre PER Year (€)</i>	<i>Total Cost Excluding VAT FOR 10 Years (€)</i>
<i>Item</i>	<i>Description of Service</i>	<i>Years</i>			
<i>A</i>	<i>Cost per square Metre of the net usable area of the Office Space</i>	<i>10 years</i>			
	<i>Annual increments (if applicable)</i>				
<i>B</i>	<i>Cost for common areas (if applicable)</i>	<i>Included</i>	<i>Included</i>	<i>Included</i>	<i>Included</i>
<i>C</i>	<i>Insurance</i>	<i>10 Years</i>	<i>-N/A-</i>	<i>-N/A-</i>	
<i>D</i>	<i>Maintenance Rate for all the total space including common areas etc. as per article K 10 of Section 5</i>	<i>10 Years</i>	<i>-N/A-</i>	<i>-N/A-</i>	

***GRAND TOTAL Excluding Vat but including all other charges”***

**The financial offer had to be composed of the mentioned items A,B,C and D to arrive at the global annual cost of such a lease, so that items B, C and D had to be taken into consideration when establishing the total cost to the Authority**

per square metre of lease. At the same instance, the 'Award Criteria' stipulated an 'Annual rate per Square Metre', so that, the Authority has to determine the annual global costs per square metre for ten years, taking into account the increments and other related annual costs contained in the offers.

2.1. This Board noted the testimony of the witness, namely Ms Laura Desira, Chairperson of the Evaluation Committee, who confirmed that, the Evaluation Committee had based their decision on item A only and did not take into consideration the other costs such as increments, insurance and maintenance.

3. This Board would also point out that, Appendix (vi) correctly included, as mandatory items, annual increments, insurance and maintenance, as these items, apart from the rent, have to be borne as costs by the Authority and these must also be taken into consideration to establish the annual global price per square metre. In this regard, this Board opines that, the Evaluation Committee, in their adjudication of the offers, ignored completely other costs namely, increments, insurance and maintenance which, at the end of the day, must be borne by the Authority and which will, in actual fact, reflect the true cost to the Authority.

**In conclusion, this Board opines that:**

- a) **The ‘Award Criteria’ in the tender document is vividly clear in denoting the basis on which the adjudicating process should be conducted,**
- b) **Appendix (vi) of the financial offer dictated what should be mandatorily included in the price per square metre and in this respect, the Evaluation Committee did not adhere to the principle of self-limitation.**
- c) **The adjudication process should be carried out, in line with the ‘Award Criteria’ as stipulated in the tender dossier and to include all the annual costs, as shown in Appendix (vi) of the financial offer and to reflect the real cost to the Authority in leasing the chosen property. After taking into consideration, the mandatory items so included in Appendix (vi), it is then appropriate to arrive at the real price per square metre.**

**In view of the above, this Board,**

- i. **does not uphold the Contracting Authority’s decision in the award of the tender,**
- ii. **upholds Appellants’ contentions,**
- iii. **directs that Appellants’ offer be reintegrated in the evaluation process,**

- iv. directs that a revaluation process of the compliant offers be carried out, taking into consideration this Board's findings,**
- v. directs that the deposit paid by appellants be fully refunded.**

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Lawrence Ancilleri  
Member

*15<sup>th</sup> May 2020*