

PUBLIC CONTRACTS REVIEW BOARD

Case 1492 – MF 014/2020 – Expression of Interest for the Provision of Legal Services to the Commissioner for Revenue

The Expression of Interest (EOI) was published on the 15th May 2020 and the closing date for submissions was the 12th June 2020. The estimated value of the EOI (exclusive of VAT) was not stated.

On the 20th August 2020 Novolegal filed an appeal against the Commissioner for Revenue as the Contracting Authority objecting to their disqualification on the grounds that their bid was not technically compliant.

A deposit of € 400 was paid.

There were nine (9) bidders.

On 23rd September 2020 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – Novolegal

Dr Stephanie Abela	Legal Representative
Dr Beverley Tonna	Representative
Dr Patrick Gatt	Representative

Contracting Authority – Commissioner for Revenue

Dr Vincienne Vella	Legal Representative
Mr Marvin Gaerty	Representative
Ms Mary Anne Schembri	Representative
Mr Frank Borg	Representative
Mr Manfred Barbara	Representative
Mr Sergio Ebeyer	Representative

Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties. He noted that since this was a virtual meeting all the parties agreed to treat it as a normal hearing of the Board. He then dealt with a point raised by the Contracting Authority regarding the use of language. He stated that

the Board accepts submissions in both Maltese and English but due to certain technicalities in legal terms in Maltese the use of English is preferred. All hearings are held in Maltese.

Dr Stephanie Abela Legal Representative for Novolegal dealt with a preliminary point raised by the Contracting Authority in their letter of reply where they claim that under reg. 7(1) (j)(k) and (n) of the Public Procurement Regulations (PPR) the Public Contracts Review Board has no jurisdiction to hear this Case. No Contracting Authority, said Dr Abela, can refuse to be bound by the PCRFB once it has issued a tender based on PPR as this deprives the bidders of a right of remedy, and it is incongruous that the Board's terminology is used in the EOI (such as bidder, tender ID number) whilst conflictingly claiming that the PCRFB was not eligible to hear the Case. The right of appeal was not mentioned in the first rejection letter.

The Chairman stated that as a clarification note on this point the rule is that if public funds are involved then the PPR apply, and this decision has the backing of the Court of Appeal. On the latter point raised, the Board agrees that the letter of rejection must state the right of appeal.

Dr Vincienne Vella Legal Representative for the Commissioner for Revenue reiterated that for the reasons stated in their letter of reply the PCRFB has no jurisdiction in, or competence to hear this case. The Maltese language is used in the Law Courts and should similarly be used in correspondence.

The Chairman repeated that the execution of submissions and Board hearings were held in Maltese, except if foreigners were involved, and objections were accepted and dealt with in either language.

Dr Abela dealing with the main submissions said that in the EOI documentation there was no indication that group of lawyers or law firms were not legible to compete – in fact it was easier for a group with broad disciplines to fulfil the requirements. It was erroneous to claim that Appellants bid was not compliant. Article 10 of the EOI dealing with the eligibility criteria indicates interchangeability in the terms used and this is a crucial point of the appeal. This is interpreted such that there is no need for five years legal experience if key experts with the required experience are used. Dr Beverley Tonna and Dr Patrick Gatt, both with less than the necessary experience, were not listed as key experts and this complies fully with the EOI terms which did not ask for all bidders to have the requisite experience. This leads one to believe that there was bad faith and prejudice in eliminating this bid at evaluation stage since the scope of the EOI is broad and was meant to offer a wide scope of expertise to the Contracting Authority.

Dr Vella said that the bid in the EOI was in the name of Dr Tonna who did not have the necessary length of experience – straightaway therefore the most important requirement of the EOI was missing. Dr Vincent Micallef and Dr Stephanie Abela are a totally separate legal entity from Novolegal and neither one of them was part of the latter firm - another failure to meet the EOI terms, particularly so since Dr Micallef had no experience in the tax field which was a other requisite of the EOI. Appendix 3.3 makes it clear that Dr Micallef and Dr Abela belong to a different distinct law firm and if Novolegal had been awarded the work they would have had to delegate the work to Dr Micallef's firm – thus infringing another term of the EOI and which would have tendered a subsequent contract null and void.

When Appellants speak of a lack of clarity they seem to be ignoring article 5 of the EOI which gives the facility to seek clarifications but which seems not to have been availed of. Drs Tonna and Gatt do not fulfil the five year requirement and are not eligible to bid and confusion has been created through the dual role of using two firms. Bad faith in the evaluation process has been alleged but not proven and there certainly is no bad faith in excluding Appellants who were not eligible in the first place. As a final point the appeal was submitted by Dr Micallef's firm on their own letterhead with no reference at all that the appellant was Novolegal. The Board should not uphold this appeal and confirm the Authority's decision.

Dr Abela said that the lack of clarity Appellants were objecting to referred to the rejection letter. The EOI made it very clear that the five year eligibility did not apply to all parties in the group. The Authority was aware that there were key experts who met the EOI terms and of the existence of a service agreement between the two firms and it should have been made clear if that was not acceptable.

In reply to a question by the Chairman, the Board was informed that Novolegal is a law firm owned by Dr Beverley Tonna which in the case of the EOI had a collaboration agreement with Dr Micallef's law firm, and that there were no restrictions in the EOI from bids by joint firms.

Dr Vella pointed out that the two distinct entities were not the same law firm and the EOI did not envisage this.

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

End of Minutes

Decision

This Board,

having noted this objection filed by Novolegal (hereinafter referred to as the Appellants) on 20th August 2020, refers to the claims made by the same Appellants with regard to the Expression of Interest (EOI) of reference MF 014/2020 listed as case No. 1492 in the records of the Public Contracts Review Board recommended for award by the Commissioner for Revenue (hereinafter referred to as the Contracting Authority).

Appearing for the Appellants:

Dr Stephanie Abela

Appearing for the Contracting Authority: Dr Vincienne Vella

Whereby, the Appellants contend that:

- a) It was erroneous, on the part of the Authority, to claim that, Appellants' offer was not compliant. In this respect, Appellants maintain that, through a cooperation agreement with legal firm Vincent Micallef and Associates, they can render the tendered legal and Tax Advisory Services.**
- b) They also contend that, their key experts had the requested level of experience which complies with the 'Expression of Interest' (EOI). At the same instance, Appellants maintain that, the five-year eligibility issue did not need to apply to all the members in bidders' technical team.**

This Board also noted the Contracting Authority's 'Letter of reply' dated 31st August 2020 and its verbal submissions during the virtual hearing held on 23rd September 2020, in that:

- a) The Authority insists that, the economic operator Novolegal, which submitted the offer, did not possess the stipulated minimum of five years' experience.**
- b) The Authority also maintains that, Dr Vincent Micallef, one of the key experts, had no experience in taxation matters, apart from the fact that, the said Dr Micallef did not form part of Novolegal.**

This Board would treat two preliminary issues raised by the Contracting Authority, in their ‘Reasoned letter of Reply’ dated 31st August 2020, with regard to:

a) Language used in proceedings

b) Jurisdiction of this Board

(i) With regard to the issue of ‘Language used in Proceedings’, this Board would respectfully point out that, it accepts ‘Letters of Objections’ written either in the Maltese or English language.

(ii) It must also be pointed out that, the hearings are always held in Maltese with the exception of occurrences involving foreign participants when these are held in the English language only.

(iii) With regard to the issue of ‘Jurisdiction’ of this Board, the Authority would do well to refer to articles 80 to 94 of the Public Procurement Regulations, so that, the Authority’s doubts are clarified.

(iv) The Authority should also refer to article 90 (2) which clearly and explicitly states that:

“(2) It shall also have the power to determine the procedure for the hearing of all complaints lodged before it and shall ensure that during the public hearing all interested parties are given the opportunity to make their case.”

This Board respectfully trusts that, the Authority’s perception regarding these two preliminary claims is now amply clarified for future reference. At the same instance, the Authority should have been aware, from the very start, that

all procurements which are financed through Public Funds are subject to the Public Procurement Regulations, wherein remedies are stipulated for any bidder wishing to contest a Contracting Authority's decision in the recommendation of award. In this regard, both preliminary issues are not upheld.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by the parties concerned opines that, the issues that merit consideration are three-fold namely:

- a. Appellants' offer,**
- b. Lack of clarity of the EOI and**
- c. Bad faith in the evaluation process**

1. Appellants' Offer

1.1. First and foremost, it must be pointed out that, the bidder is Novolegal, the latter firm being composed of Dr Beverly Tonna and Dr Patrick Gatt. The key experts submitted in Novolegal's offer include Dr Vincent Micallef and Dr Stephanie Abela, the latter two lawyers pertaining to the legal firm ' Vincent Micallef & Associates'.

1.2. This Board would refer to clause 10.1 and 10.1 (c) wherein, the following stipulated conditions are clearly defined viz:

"Eligibility Requirements

10.1 In order to be considered eligible for the award of the contract, economic operators must provide evidence that they meet or exceed certain minimum criteria described hereunder.

c) Technical and Professional Ability

Economic Operators (applicable for firms/companies) are to provide data concerning key experts. This information shall be included in the Key Experts Form (Note 2) as available in Section 05.

Any key expert proposed and disclosed at this stage shall be evaluated in line with the Criteria detailed in this Expression of Interest.”

The above articles amplify the fact that, the Economic Operator must satisfy the minimum criteria.

1.3. This Board notes that, the EOI document prohibits the possibility of sub-contracting, obviously as the nature of tendered professional service does not function through a delegation of professional legal services. In this respect, this Board would respectfully point out that, since the professional members, composing the legal firm Novolegal (the bidder) do not have the requested minimum experience of five years, then Novolegal does not satisfy the EOI requirements.

1.4. With regard to key experts presented by Novolegal, this Board acknowledge the fact that, both Dr Micallef and Dr Abela possess more than the minimum practical experience, however, although not

specifically denoted in the EOI document, the key experts should form part of the organisation of the economic operator.

2. Lack of Clarity in the EOI document

2.1. It is a known and established fact that, there exist no document which can be considered perfect and without any form of some lack of clarity. However, this Board notes that the EOI document could have denoted, in more precise terms, the following issues, viz:

- **Relationship of key experts to economic operator**
- **Whether joint ventures were allowed to participate**
- **Whether reliance on third party expertise was permissible**

2.2. In this particular case, Appellants had the remedies to clarify any doubts or misunderstanding on any clause of the EOI, through either clarifications or a ‘Call for Remedy’. In this regard, this Board notes that none of these remedies were availed of by Appellants.

3. Bad Faith in the Evaluation Process

3.1. With regard to Appellants’ claim that the evaluation process of Appellants’ offer was carried out in bad faith, this Board examined in detail the evaluation report and comments thereon and could not identify any indication of incorrect conclusions on Appellants’ offer which could be considered as a decision carried out in bad faith. The Evaluation Committee strictly adhered to the principle of ‘Self-Limitation’.

4. **On a general note, this Board noted the lack of utilisation of the remedies available, to Appellants prior to submission of their offer. The issues which were contested before this Board would have been easily ironed out through clarifications at that stage.**

In conclusion, this Board opines that:

- a) **The EOI document clearly stipulated the economic operator had to be compliant in the required minimum experience of 5 years; however, Novolegal's members did not possess such minimum.**
- b) **Although not clearly denoted in the EOI document, the key experts were to be composed of staff of the economic operator. In this regard, the key experts presented by Appellants belonged to a separate and distinct law firm which did not participate in the EOI.**
- c) **The EOI document could have catered for provisions mentioned above in paragraph 2.1, so that, certain issues could have been easily identified by Appellants.**
- d) **This Board could not identify any indication of bad faith in regard to Appellants' offer, during the evaluation process.**
- e) **Appellants had the remedies to clarify any misinterpretation on clauses in the EOI document, however, such remedies were not availed of by Novolegal.**

In view of the above, this Board,

- i. does not uphold Appellants' contentions,**
- ii. upholds the Contracting Authority's decision in the recommendation of awards,**
- iii. in view of paragraph (c) above, directs that an amount of €200 from the deposit paid by Appellants, be refunded.**

Dr Anthony Cassar
Chairman
28th September 2020

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member