

Documents in support were provided in time including the partnership agreement and there was no basis for the claim that the goalposts had been changed and the appeal should be upheld.

Mr Marnol Sultana Representative for the Ministry for Gozo said that the Contracting Authority accepts that a genuine mistake was made regarding the original refusal and their request for a re-evaluation. Clause 9.3 of the Rules Governing Tenders confirms that Appellants used the correct account on the EPPS but contrary to the claim by the preferred bidder it was not the remit of the Authority to check Appellants' VAT number, usually done at contract stage.

Dr Jonathan Mintoff Legal Representative for Mr Jean Paul Zerafa referred to a spate of documents submitted by Appellants by means of an e-mail. This indicates that the E-tenders account is in the name of a sole trader whilst the Appellants are claiming that they are a partnership. A sole traders' account can only be used by a sole trader and hence the dichotomy. The VAT registration is in the name of two individuals and not in that of the Appellants – moreover contrary to the Civil Code regulations the partnership has no juridical personality as it is not registered in the Malta Business Registry. No reference is made to the type of partnership in this tender in Public Procurement Regulations Article 56. Moreover all documents submitted by Appellants to justify their claim are dated later than the date of the tender or the evaluation date.

Mr Sultana pointed out that the EPPS account indicates that it is in the name of the Appellants as partnership and that it is not the remit of the evaluation committee to check how a firm is registered.

Dr Grech said that it stands to reason that the VAT authorities had made the necessary verifications before issuing a certificate. The partnership agreement was done in 2019 as can be easily verified and once the eventual contract is signed by the two individuals as partners it would meet juridical requirements.

Mr Jason Grech (184071M) called as a witness by Appellants testified on oath that he is an Assistant Director in the Procurement System Division of the Department of Contracts. He said that there was no checking by the Department of either the VAT registration or the juridical personality. Witness confirmed that the VAT registration could be in a trade name and that the trade name could be that of a sole trader.

Questioned by Dr Mintoff, witness said that the system has the option of accepting the offer of a sole trader in the name of a partnership. Caruana Tech Trading was originally registered as a sole trader but is now changed to a partnership and if the VAT registration certificate is in two names there is an option to register the account in the name of a partnership.

Dr Grech stated that at the EPPS account did not change although at the time of the offer Caruana was a sole trader. The fundamental point is who will be signing the contract.

The Chairman said that the Board will await confirmation on the EPPS registration of Appellants from the Department of Contract and advise all parties accordingly.

Dr Grech asked that the following declaration be recorded verbatim:

“Dr Jean Paul Grech for the Appellants, the brothers Caruana in the name of Caruana Tech Trading declares that the designation regarding the EPPS Account from sole trader to partnership was changed after the closing terms of the tenders in this appeal, signifies that the Appellants declare that the EPPS system permits the set change and it is to be noted however that the account proper which was used to submit the offer subject of this appeal remained the same.”

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 Caruana Tech Trading (hereinafter referred to as the Appellants) on 25th September 2020, refers to the claims made by the same Appellants with regard to the tender of reference MGOZ/MPU/T 37/2020 (Lot 5) listed as case No. 1504 in the records of the Public Contracts Review Board recommended for award by Ministry for Gozo (hereinafter referred to as the Contracting Authority).

Appearing for the Appellants: Dr Jean Paul Grech

Appearing for the Contracting Authority: Mr Marnol Sultana

Appearing for the Preferred Bidder: Dr Jonathan Mintoff

Whereby, the Appellants contend that:

- a) **Their offer was unjustly rejected due to the fact that, it was deemed non-compliant due to the fact that, the Evaluation Committee failed to take into consideration that the dimensions of the tent may vary +/- 5%. In this respect, the offered product's dimension of 7.3m is fully compliant.**
- b) **Appellants also refer to the preferred bidder's alleged claim, that they, as bidders, had no juridical personality, so that their offer should be discarded. In this regard, Appellants maintain that, they trade under the name of 'Caruana Tech Trading' which is a partnership between Jason Caruana and Joe Louis Caruana, and their offer was also submitted in the name of 'Caruana Tech Trading', which is easily identified and properly constituted.**

This Board also noted the Contracting Authority's 'Letter of reply' dated 28th September 2020 and its verbal submissions during the virtual hearing held on 19th October 2020, in that:

- a) **After having reviewed the literature submitted by Appellants (under note 2), the Authority confirms that, Appellants' product dimensions of 7.3m does, in fact complies with clause 3 of section 3 of the tender document.**
- b) **With regard to the preferred bidders' claim that Appellants do not have a legal identity, the Authority confirms that, 'Caruana Tech Trading' is a partnership, properly constituted, having a VAT number. Their offer was properly given an TID number thus can be identified as Mr Jason Caruana**

and Mr Joe Louis Caruana, trading under the name of ‘Caruana Tech Trading’.

This same Board also noted the testimony of the witness namely:

Mr Jason Grech, Assistant Director, Department of Contracts duly summoned by the Public Contracts Review Board

This Board, after having examined, in detail, the relevant documentation to this appeal and heard submissions made by all the interested parties, including the testimony of the witness duly summoned opines that, the issues that merit consideration are two-fold namely:

- a) Appellants’ product compliance**
- b) Appellants’ legal identity –an issue raised by the preferred bidder.**

1. Appellants product was Rejected due to the following reasons:

“Kindly note that:

- your offer for Lot 5 was considered as Technically Non-Compliant because the height of mid-point requested was 7.2m while that offered was 7.3m;*
- your offer for Lot 6 was considered as Technically Non-Compliant because the height of mid-point requested as 7.2m while that offered was 7.3m.”*

2. This Board would respectfully refer to clause 3 of the technical specifications which clearly states that:

“3. Sizes of tent may vary by +/- 5% for Lot 2 to Lot5. Sizes of tent for Lot 1 and for Lot 6, width shall be between 34 meters and length shall be between 14 and 15 meters and height shall be minimum 4 meters at the sides for Lot 1 and minimum of 5.2 m at the sides of Lot 6.”

This Board would also confirm that, the dimensions of Appellants’ product does , in fact, comply with the dimensions’ parameters, as per clause 3 above and it must be mentioned that, the Authority, in their ‘Reasoned Letter of Reply’, confirmed such a fact.

- 3. The preferred bidders, in their ‘Letter of Reply’ to Appellants’ objection, raised the issue of the legal identity of Appellants in that, their e-tender is in the name of a sole trader whist Appellants are claiming that they are a partnership.**
- 4. In this regard, this Board has examined closely the documentation, in its possession and noted the testimony of Mr Jason Grech, the latter confirming that, the system has the option of accepting the offer of a sole trader or in the name of the partnership. In this particular case, Appellants were registered as a sole trader but later on, changed to a partnership. This Board also noted the fact that, the EPPS system allows such a facility provided, the TID number remains the same and in this particular case, the TID number remained unchanged.**

- 5. With regard to the VAT registration of Appellant, this Board carried out the necessary enquiries with the relevant Authority and can confirm that, the VAT number can be registered in the name of a sole trader or a partnership and in the case of a partnership, such registration can also be made in the name of either the partnership's name or the partners jointly. In this respect, this Board cannot identify any irregularity with regards to Appellant's VAT registration.**
- 6. With regard to Appellants' juridical identity, this Board would summarise the situation as follows:**
- Appellants' offer was submitted under the trade name 'Caruana Tech Trading'**
 - 'Caruana Tech Trading' is a trade name under which a partnership between Messrs**
 - Jason and Joe Louis Caruana carry out their commercial activity.**
 - The VAT number of Appellants is registered in the name of the Caruana brothers forming the partnership.**
 - The TID number of Appellants' offer remained unchanged throughout the tendering process.**

In this regard, this Board opines that, Appellants do have an identity with the Contracting Authority and the VAT Department. It must also be stated that,

prior to the allocation of a VAT number, the relative department carries out the necessary checks to verify that the entity or person registering, is in fact identifiable and has a juridical personality.

In conclusion, this Board opines that:

- a) Appellants' offer is compliant with clause 3 of the technical specifications.**
- b) Appellants' identity is regular and properly constituted to participate in the Public Tenders.**

In view of the above, this Board,

- i. does not uphold the Contracting Authority's in the decision for the recommendation of award,**
- ii. upholds Appellants' contention,**
- iii. confirms that Appellants' identity is properly indicated,**
- iv. directs the Authority to carry out a re-evaluation process,**
- v. directs that Appellants; offer be re-integrated in the Evaluation Process,**
- vi. directs that the deposit paid by Appellants be fully refunded.**

Dr Anthony Cassar
Chairman
27th October 2020

Dr Charles Cassar
Member

Mr Carmel Esposito
Member