

PUBLIC CONTRACTS REVIEW BOARD

Case 1578 – TM 026/2020. Tender for the Provision of Services of an Insurance Broker for Transport Malta (TM)

9th July 2021

This Board,

Having seen the letter of objection filed by Ramon Mizzi on behalf of AIB Insurance Brokers, hereinafter referred to as the appellant, on the 15th March 2021;

Having noted the letter of reply filed on the 16th March 2021 by Suzanne Chambers on behalf of Osprey Insurance Brokers Co. Ltd, hereinafter referred to as the preferred bidder;

Having noted the letter of reply filed on the 22nd March 2021 by Drs Lucio Sciriha and Franco Galea on behalf of Transport Malta and the Director General Contracts, hereinafter referred to as the Contracting Authority;

Having examined all the documentation produced and having heard the testimonies of the witnesses produced and having considered the submissions made by the counsels during the three virtual hearings held;

Having examined and noted the minutes of these three hearings held respectively on the 3rd June, 24th June and the 1st July 2021, which minutes are being hereunder incorporated;

Minutes 3rd June 2021:

The tender was published on the 12th January 2021 and the closing date was the 19th February 2021. The value of the tender was € 135,000 divided into 3 Lots of € 45,000 each.

On the 15th March 2021 AIB Insurance Brokers Ltd filed an appeal against Transport Malta as the Contracting Authority objecting to their disqualification on the grounds that their offer was not technically compliant.

A deposit of € 675 was paid.

There were four (4) bidders.

On 3rd June 2021 the Public Contracts Review Board (PCRB) composed of Dr Charles Cassar as Chairman, Mr Carmel Esposito and Mr Richard Matrenza as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellant – AIB Insurance Brokers Ltd

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| Dr Josette Grech | Legal Representative |
| Mr Ramon Mizzi | Representative |

Contracting Authority – Transport Malta

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| Dr Franco Galea | Legal Representative |
| Ms Amanda Delmar | Member Evaluation Committee |
| Ms Gianella Bugeja | Member Evaluation Committee |
| Ms Maryrose Pace | Representative |
| Mr Donald Gouder | Representative |
| Mr Larson Pisani | Representative |

Preferred Bidder – Osprey Insurance Brokers

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| Ms Sanchia Demanuele | Representative |
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Dr Charles Cassar Substitute 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 in line with Article 89 of the Public Procurement Regulations. He then stated that it has been brought to the attention of the Board that certain witnesses would not have their cameras switched on and could therefore not be properly identified. This situation is not acceptable as the Board members must at all time be able to identify visibly any one appearing in front of the Board. He therefore deferred the case until such time as witnesses are prepared to make themselves visible on camera, and declared the hearing adjourned.

End of Minutes

SECOND HEARING

On the 24th June 2021 the Public Contracts Review Board (PCRB) composed of Dr Charles Cassar as Chairman, Mr Carmel Esposito and Mr Richard Matrenza as members convened a public virtual hearing to discuss further the objections.

The attendance for this public hearing was as follows:

Appellant – AIB Insurance Brokers Ltd (AIB)

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| Dr Josette Grech | Legal Representative |
| Mr Ramon Mizzi | Representative |

Contracting Authority – Transport Malta

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| Dr Franco Galea | Legal Representative |
| Ms Amanda Delmar | Member Evaluation Committee |
| Ms Gianella Bugeja | Member Evaluation Committee |
| Ms Yvette Camilleri | Member Evaluation Committee |
| Mr Donald Gouder | Representative |
| Mr Larson Pisani | Representative |

Preferred Bidder – Osprey Insurance Brokers

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| Ms Sanchia Demanuele | Representative |
| Ms Suzanne Chambers | Representative |
| Mr Martin Azzopardi | Representative |

Dr Charles Cassar Substitute 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 in line with Article 89 of the Public Procurement Regulations. He then requested submissions.

Dr Josette Grech Legal Representative for AIB Insurance Brokers Ltd requested examination of witnesses before proceeding with her submissions.

Ms Ethel Demicoli (3889M) called as a witness by the Appellant testified on oath that she is a Procurement Manager at Transport Malta (TM) and stated that she was not involved in the drafting of the tender but simply in publishing it. Mr Larson Pisani was the individual responsible for the tender preparation.

Dr Michelle Mizzi Buontempo (407470M) called as a witness by the Appellant stated that she is Chief Officer Enforcement at the MFSA and as such was exempted from her duty of confidentiality in her replies. She stated that Osprey Insurance Brokers were licensed in January 2000 and were regulated by the law regulating insurance distribution activity. On 7th May 2020 MFSA imposed a penalty fine of € 29,675 on Osprey for breaching Article 24 of the Act namely the failure to file audited financial statements. Despite granted extensions the accounts were not submitted till January 2021. The figure of the penalty was based on the minimum fixed amount plus a daily penalty for failure to comply. Although allowed this penalty was not appealed against. The outcome of penalty proceedings are generally published on the MFSA website and the record retained for ten years as a matter of policy, in line with the concept that financial commitments are to be complied with.

Questioned by Dr Franco Galea Legal Representative for AIB Insurance Brokers Ltd witness agreed that the penalty was the minimum figure allowed by law and was in breach of the filing of audited accounts and that no action was taken against individuals of the insurance brokers concerned. Witness stated that the obligation to publish is a legal requirement under both MFSA and Insurance Distribution Activity Acts.

Mr Larson Pisani (51892M) called as a witness by the Appellant testified on oath that he is Senior Manager Procurement at Transport Malta. He confirmed that he was responsible for the drafting of the tender and ensuing clarifications. He stated that after clarification certain annual premia increased for all bidders, while the premia ranges were changed with an indication that they could be changed further during the period of the contract. This latter point was not included in the original tender. Clarifications were triggered through requests made by economic operators. Reply 3 to clarification 3 was in reply to a request made by an economic operator and after further consideration by the Authority on the tender requirements, while clarification 4 was inserted following a decision of the Authority. Witness agreed that in clarification 1 the original range of 120,000 was increased to 150,000 and another clarification changed the range from 150,000 to 400,000. Witness stated that he could not account for the reason for these changes as those decisions had been taken by the Project Manager who could not be in attendance today.

Dr Galea pointed out that it did not need the testimony of an expert witness to verify the differences between the tender and the clarifications.

Dr Grech replied that it was necessary to seek transparency for the changes in the tender as this was related to Appellants grievances.

After a short recess the Chairman said that it had been established that the Project Manager Ms Maryrose Pace was unavoidably unable to attend and therefore the hearing had to be deferred to a date when she will be able to appear to testify.

Note was taken of the request by Dr Galea that this appeal be dealt with expeditiously.

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

End of Minutes

THIRD HEARING

On the 1st July 2021 the Public Contracts Review Board (PCRB) composed of Dr Charles Cassar as Chairman, Mr Carmel Esposito and Mr Richard Matrenza as members convened a public virtual hearing to discuss further the objections.

The attendance for this public hearing was as follows:

Appellant – AIB Insurance Brokers Ltd (AIB)

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| Dr Josette Grech | Legal Representative |
| Mr Ramon Mizzi | Representative |

Contracting Authority – Transport Malta

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| Dr Franco Galea | Legal Representative |
| Ms Maryrose Pace | Chairperson Evaluation Committee |
| Ms Amanda Delmar | Member Evaluation Committee |
| Ms Gianella Bugeja | Member Evaluation Committee |
| Ms Yvette Camilleri | Member Evaluation Committee |
| Mr Donald Gouder | Representative |
| Mr Larson Pisani | Representative |

Preferred Bidder – Osprey Insurance Brokers

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| Mr Martin Azzopardi | Representative |
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Dr Charles Cassar Substitute 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 in line with Article 89 of the Public Procurement Regulations. He then noted that this further hearing was called to hear the testimony of the Chairperson of the Evaluation Committee.

Ms Maryrose Pace (462469M) called as a witness by the Appellant testified on oath that she is the Chief Officer, Corporate Services at Transport Malta and was the Chairperson of the Evaluation Committee. She was responsible for compiling the tender and the subsequent clarifications. She confirmed that the range of premia was not requested in the original issue of the tender – it simply requested a quotation for a fixed fee for three years. Witness confirmed that the subsequent clarifications requested a range of premia, and stated that the increased parameters in the ranges in Lot 3 was due to increases in between the time that the tender was issued in 2019 and the time of the clarifications while the higher percentage increase in Lot 3 was due to the increase in general policies.

Dr Grech in her submissions stated that the information given by Ms Pace confirmed that the tender requested only a fixed fee. An absolute principle of procurement is that of transparency on both sides. It is the responsibility of the Contracting Authority to give clear instructions to enable exact quotations.

The first clarifications give ranges based on 2019 data which was already in the Authority's hands when the tender was issued. It is significant that the base line in Clarification 4 is the maximum in the range in Clarification 1 with the percentage difference being extreme. This lack of transparency prevented the bidder from making a proper offer. The Authority suggested that bidder's complaint was more suited to a precontractual remedy – however there is nothing to prevent a bidder from contesting an award at a later stage. Besides Article 262 of the PPR stipulates that the time for recourse is $\frac{2}{3}$ of the time allocated for call and by the time the last clarification was issued the time for seeking a remedy action had already passed. A point was raised by the Authority regarding the lack of submission of the technical declaration form – missing this form does not have a draconian effect on the bid. Reference was made to Court of Appeal Case *Cassar vs Gozo Channel* where it was held that a missing document does not alter the principles of transparency and level playing field and one must also bear proportionality in mind. The declaration submitted by Appellant already gave full details and the information requested so the technical offer was merely a repetition of what was already stated and indicated that Appellant fully accepted the terms of the tender. The third grievance revolved on the fact that there was no indication of the penalty imposed on the preferred bidder by the MFSA. Insurance brokers are regulated by the Insurance Distribution Act which regulates the splitting of funds between clients' money and the firm's own funds and which makes timely financial reporting imperative.

Dr Galea dealing first with the point regarding the financial penalty stated that this was charged at the minimum level and due to the late filing of accounts and was not a case of professional misconduct – there was no inference that the firm had not acted professionally as a broker. As regard the missing declaration it was self-admitted by Appellant that they felt that it was not necessary to submit it. The Appellant is the present incumbent of the insurance contract and therefore are fully aware of the premia and the ranges involved in the clarifications which were clear and which extended the period of recourse when issued. The Authority's actions were fully transparent as every change was openly declared for all economic operators. There was a remedy available both for the tender and the clarifications if anything was not clear to the Appellant.

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

End of Minutes

Hereby resolves:

That the reason given to appellant by the contracting authority for the non-acceptance of its tender was that appellant failed to upload the Technical Declaration Form as per Clause 5(c) 1 of the tender.

Appellant, in the letter of objection raised three grievances.

- (i) Information submitted to bidders: Appellant alleges that the tender, as published, provided inaccurate and inadequate information, thus precluding prospective bidders from making

accurate assessment of the volume of work required to provide the requested services. Therefore appellant requested the cancellation of the said tender.

- (ii) Non-submission of Technical Declaration: Appellant claims that the wording in the tender document was misleading and that the same Technical Declaration form was superfluous since bidders were also required to confirm that they “*would provide in accordance with the tender document and the conditions and time limits laid down without reservation or restriction, the requirements of this Call for Tender.*”
- (iii) The recommended bidder: Appellant claims that the preferred bidder’s tender should have been disqualified since it failed to disclose a fine imposed on it by the MFSA for professional misconduct.

This Board shall now consider each of these grievances.

Information submitted to Bidders: In support of his claim, appellant produced several witnesses from whose testimonies it results that the tender as published, just requested bidders to provide fixed price quotation for three years. Four clarifications had been issued with clarification number 4 actually giving the premium ranges for the three Lots. This clarification also extended the closing date of the tender to the 19th February 2021.

This Board finds it unacceptable for any bidder who is not certain of some aspects of the tender, to submit a tender accepting all conditions without first having recourse to clarifications and ultimately seeking remedy from this Board about the doubtful aspects before the closing date and only raising the matter through an appeal after the tender has been adjudicated and his offer rejected. Thus appellant’s first grievance is being rejected

If the appellant was convinced that the information given in the tender document was not clear or sufficient, he was obliged to ask for clarifications. If such clarifications did not satisfy his doubts he then was obliged to seek remedy before this Board as per Article 262 of the Public Procurement Regulations. In the present case, the Board feels that appellant should have asked for remedies to clear any doubts before submitting his offer. Appellant did not do so. Appellant cannot now, once his offer was rejected, object claiming the tender document was flawed and prevented bidders from making appropriate offers. Appellant had enough time to do this since clarification number four also extended the tender closing date to the 19th February 2021.

Non-Submission of Technical Declaration Form: This Board does not see any ambiguity in the tender document regarding the submission of this Declaration. The tender document states: “**Tenderer’s Technical Offer – Declaration**” and clearly shown to be Note 3. This means that if it was not submitted, the omission could not be rectified later. Appellant’s claim that this is superfluous should not have been taken assumed by appellant, and if it was not clear, then a clarification was in order. Therefore this grievance is also being rejected.

The Recommended Bidder: Appellant in support of this grievance produced the testimony of

Dr Michelle Mizzi Buontempo the Chief Officer Enforcement at the MFSA. From this witness's testimony it resulted that the preferred bidder Osprey Insurance Brokers Ltd. had been fined €29,675 in 2020 for breaching Article 24, for failure to file audited financial statements in time. This was the minimum fine payable and the fine had been paid. The tender document had asked bidders to declare if they had ever been found guilty of professional misconduct. Appellant claims that the preferred bidder failed to inform the Contracting Authority of this fine and that the preferred offer should have been discarded. It is this Board's opinion that late filing of audited financial statements does not constitute "professional misconduct" but administrative non-compliance. Therefore, this third grievance is also being rejected.

In view of the above, this Board is rejecting appellant's claims and declares that the decision by the Contracting Authority to discard appellant's tender was justified. The deposit paid by appellant should not be reimbursed.

Dr Charles Cassar
Chairperson

Mr Richard A. Matrenza
Member

Mr Carmel Esposito
Member