

# PUBLIC CONTRACTS REVIEW BOARD

## Case 1619 – MFSA 09-21 – Tender for the Provision of External Auditing Services for the Malta Financial Services Authority

19<sup>th</sup> August 2021

The Board,

Having noted the letter of objection filed by Dr Matthew Brincat on behalf of B & C Advocates acting for and on behalf of Borg Galea Audit Ltd, (hereinafter referred to as the appellant) filed on the 10<sup>th</sup> June 2021;

Having also noted the letter of reply filed by the Evaluation Committee of the tender in caption acting for the Malta Financial Services Authority (hereinafter referred to as the Contracting Authority) filed on the 21<sup>st</sup> June 2021;

Having heard and evaluated the testimony of the witness Mr Nathaniel Borg (Representative of Borg Galea Audit Ltd) as summoned by Dr Matthew Brincat acting for Borg Galea Audit Ltd;

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by representatives of the parties;

Having noted and evaluated the minutes of the Board sitting of the 10<sup>th</sup> August 2021 hereunder-reproduced;

### Minutes

#### **Case 1619 – MFSA-09-21. Tender for the Provision of External Auditing Services for the Malta Financial Services Authority**

The tender was published on the 3<sup>rd</sup> February 2021 and the closing date was the 5<sup>th</sup> March 2021. The estimated value of the tender was € 110,000.

On the 10th June 2021 Borg Galea Audit Ltd filed an appeal against the Malta Financial Services Authority as the Contracting Authority objecting to their disqualification on the grounds that their offer was deemed not compliant.

A deposit of € 550 was paid.

There were seven (7) bidders.

On 10th August 2021 the Public Contracts Review Board (PCRB) composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri 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 – Borg Galea Audit Ltd**

Dr Matthew Brincat	Legal Representative
Mr Nathaniel Borg	Representative
Mr Roderick Galea	Representative

**Contracting Authority – Malta Financial Services Authority (MFSA)**

Mr Gilbert Camilleri	Chairperson Evaluation Committee
Mr Reuben Camilleri	Secretary Evaluation Committee
Ms Roberta Gauci	Member Evaluation Committee
Dr Kristina Pavia	Member Evaluation Committee
Ms Patricia Attard Darmanin	Representative
Mr Charlo Bianco	Representative

Mr Kenneth Swain 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 asked Appellant's representative to make his submissions.

Dr Matthew Brincat Legal Representative for Borg Galea Audit Ltd said that the main reason for the appeal was the price of the tender since Appellant had submitted the cheapest bid but which was considered as an abnormally low one. The firm previously doing the audit work for the MFSA was Pricewaterhouse Coopers (PwC) that was paid € 7,000 in 2019 for this work and hence the € 5,000 bid by Appellant was reasonable. It was the other bids that were abnormally high. The clarification sought by the Contracting Authority was replied to but then they requested a breakdown of man hours. The auditors' only role is to review figures already prepared by the MFSA personnel; a matter of some four pages or so for the Annual Report. Appellant was committed to adhere to all International Accounting Standards.

Mr Reuben Camilleri Representative for the Malta Financial Services Authority said that Appellant's portrayal of the audit work involved regarding the Annual Report was not realistic. The bids received were generally all on the higher side than Appellant's offer and the actual figure paid to PwC was an assumption which in any case goes back some six years – since then the MFSA has a much larger staff and more responsibilities. The main contention regarding the price was not dealt with by Appellant and no account or breakdown was given to explain how the price was arrived at. In the case of a low offer the Authority was obliged to seek explanation but no attempt was made by bidder to avoid the claim that it was a low offer.

Mr Nathaniel Borg (485589M) called as a witness by the Appellant testified on oath that the offer was based on the salary costs of three members of staff as the two professional members of the firm costs had been excluded. The four pages referred to was the end result of all the background work on templates. The International Audit Standards is to provide confidence on the MFSA's work; hence it was only necessary to concentrate on those four pages and Appellant's standards were similar to other firms as they all held the same warrant. ACCA standards ensure high ethics and independence and claim that fees were independent of the service given and not relevant.

Mr Brincat said that Appellant's position is in line with the tender whilst the terms of reference were not. The clarification sought by the evaluation committee was correctly dealt with and there is only disagreement regarding the low bid. Price is independent of service.

Mr Camilleri summed up by saying that other bidders had no problem with supplying figures to justify price. Failure by the Appellant to reply to the clarification left the evaluation committee with no option, when even a short reply regarding the man hours would have sufficed.

Dr Brincat concluded by stating that there is no mention in the tender of man hours figures having to be supplied.

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

End of Minutes

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**Hereby resolves:**

The Board refers to the minutes of the Board sitting of the 10<sup>th</sup> August 2021.

Having noted the objection filed by Borg Galea Audit Ltd (hereinafter referred to as the Appellant) on 10<sup>th</sup> June 2021, refers to the claims made by the same Appellant with regards to the tender of reference MFSA 09-21 listed as case No. 1619 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Matthew Brincat

Appearing for the Contracting Authority: Mr Reuben Camilleri

Whereby, the Appellant contends that:

- a) The disqualification of a tender cannot be for a reason that is not envisaged as a requirement under the tender dossier that is the terms of reference set by the Authority.
- b) Had this requirement of producing a breakdown of man hours, weeks or hours been a requirement it would have been set in the tender dossier with a table set to include the works, rates and man hours.
- c) Due to the lack of such a requirement the tendering Audit firm cannot be penalised and disqualified because it has agreed to render the service to the Malta Financial Services Authority in full awareness and without giving relevance to economise on man hours and budgets. The fact that the audit firm was and is not intended to seek saving on man hours as long as it gives

a service to the contracting authority was turned against it rather than considered a factor in its favour.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 21<sup>st</sup> June 2021 and its verbal submission during the virtual hearing held on 10<sup>th</sup> August 2021, in that:

- a) The appellant is not acknowledging regulation 243 of the Public Procurement Regulations, more specifically regulation 243(2)(a) which states *"the explanations may in particular relate to: a) the economics of the manufacturing process, of the services provided or of the construction method"*.
- b) Considering the above regulation the Evaluation Committee requested amongst other lines of enquiry to "substantiate as to how the Economic Operator arrived at such a low price point". This was done in the spirit of the original regulation mentioned above, whereby the "economics of the services provided" was to be substantiated or otherwise explained. Unlike other economic operators, the appellant failed to provide any reasoned position as to why and how they arrived at such a low price when replying to the "abnormally low" clarification. In contrast, other economic operators were confident in their budgetary costings and gave a breakdown / summary of their financial submissions without hesitation.
- c) The argument by appellant, in that the Contracting Authority's request to "substantiate as to how the economic operation arrived at such a low price point" was nowhere to be found in the original tender documentation is incorrect. As part of the tender dossier, the economic operator must account for the General Conditions for Service Contracts where article 7.1 states *"the Contractor shall respect and abide by all laws and regulations in force in the beneficiary country including but not limited to obligations .....*". The Evaluation Committee is legally bound to abide by the Law and so is the Economic Operator.
- d) The evaluation committee expected the appellant to present a reasoned explanation as to how they knowingly submitted an abnormally low price to acquire the MFSA as a client. More evidence pertaining to the 'economics' of such a price point was expected.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties including the testimony of the witness duly summoned, will consider Appellant's grievances, as follows:

- a) This Board has on numerous occasions given its opinion on what factors ought to be considered when an analysis of what appears to be an 'Abnormally Low' tender is to be undertaken by the Evaluation Committee.

- b) Two such factors are:
- i. the comparison of the bid under analyses against the Estimate Value of the Tender. The Appellant's proposed bid amounts to 18% of the Estimate Value of the Tender.
  - ii. the comparison of the bid under analyses against the average of the other bids received by the rest of the prospective bidders. The Appellant's proposed bid amounts to 34% of the average of these offers.
- c) Hence, this Board opines that the Evaluation Committee correctly abided by its obligations emanating from Regulation 243 (1) of S.L. 601.03 whereby *"Contracting authorities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services."*
- d) Regulation 243 (2)(a) of S.L. 601.03 states that *"The explanations may in particular relate to the economics of the manufacturing process, of the services provided or of the construction method"*.
- e) Points (c) and (d) above resulted in the Clarification Note sent by the Contracting Authority to the Appellant of 2<sup>nd</sup> June 2021. Particular reference is made to point (3) of this Clarification Note whereby *"Moreover, please **substantiate** as to how your firm arrived at such a low price point"*.
- f) This Board opines that the reply by the Appellant to the Contracting Authority sufficiently provided comfort to points (1), (2) and (4) of the Clarification Note but fails to **substantiate** what was requested in point (3). It did provide confirmations but did not **substantiate**.

Hence the Board does not uphold Appellant's grievances.

### **The Board,**

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) Does not uphold Appellant's Letter of Objection and contentions,
- b) Upholds the Contracting Authority's decision in the recommendation for the award of the tender,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

**Mr Kenneth Swain**  
Chairman

**Mr Lawrence Ancilleri**  
Member

**Mr Richard Matrenza**  
Member