

## PUBLIC CONTRACTS REVIEW BOARD

### Case 1546 – CT 5000/2020 – Negotiated Procedure for the 1200 Hour Inspection of the AW 139 AS 1630 S/N 3162

Date: 6<sup>th</sup> April 2021

This Board,

Having noted the letter of objection filed on the 11<sup>th</sup> January 2021 by Dr Joseph Camilleri on behalf of Gulf Med Aviation Services Limited, hereinafter referred to as the appellant;

Having noted also the letter of reply filed on the 19<sup>th</sup> January 2021 by Major Nicholas Grech on behalf of the Armed Forces of Malta, hereinafter referred to as the Contracting Authority;

Having taken cognizance of all the documentation filed, as well as the submissions made by the legal representatives of the parties and having examined and considered the testimony given by the witnesses produced;

Having noted and evaluated the minutes of the Board's sitting held on the 17<sup>th</sup> March 2021 hereunder reproduced.

#### **Minutes:**

The call was issued on the 16<sup>th</sup> November 2020 and the closing date was the 20<sup>th</sup> November 2020. The recommended value of the contract was € 274,482.32 (exclusive of VAT).

On the 11<sup>th</sup> January 2021 Gulf Med Aviation Services Ltd (Gulf Med) filed an appeal against the Armed Forces of Malta (AFM) as the Contracting Authority objecting to their disqualification on the grounds that their bid was rejected solely on price rather than on the basis of price/quality ratio.

A deposit of € 1372.41 was paid.

There were two (2) bidders.

On 17<sup>th</sup> March 2021 the Public Contracts Review Board (PCRB) composed of Dr Charles 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 – Gulf Med Aviation Services Ltd**

Dr Joseph Camilleri	Legal Representative
Mr Simon J Camilleri	Representative

#### **Contracting Authority – Armed Forces of Malta**

Lt Charlton Falzon Cascun	Legal Representative
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Major Nicholas Grech  
Capt Charlo Attard  
Lt Darren Roe  
Lt Mark Philip Borg

Chairperson Evaluation Committee  
Member Evaluation Committee  
Member Evaluation Committee  
Member Evaluation Committee

### **Preferred Bidder – Harrods Aviation Ltd**

The preferred bidder waived the right to attend the hearing.

Dr Cassar 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 invited submissions.

Dr Joseph Camilleri stated that the contract was outlined as a negotiated procedure justifying this due to the likelihood that there might be several parties involved – in the end there was not one potential provider but two parties. Once the AFM opted to negotiate with two parties they had to show transparency, a level playing field and ensure equal terms. Documentation exhibited in this Case indicated that Gulf Med were first approached in June 2020 with a request in November 2020 to submit an offer whilst at the same time informing them that the offer had to be submitted via the EPPS. Nothing further was heard till the 23<sup>rd</sup> December 2020 when they received an e-mail which did not contain full details of their disqualification as required by law. After Gulf Med requested further details a full clarification was received on the 30<sup>th</sup> December 2020. That was the total information available up to the time of Appellants' objection.

Documents submitted with the letter of reply from the AFM show a string of e-mails showing communications ongoing between Harrods Aviation Ltd (Harrods) and the AFM. An e-mail dated 2<sup>nd</sup> December, for instance, asks for the removal of the parking fees which could have had an effect on the award which was based solely on price where the price difference between the bids was negligible.

The approach of the Contracting Authority is that although there were two bidders they were negotiating only with one party, clearly reflected by the fact of their e-mail of the 28<sup>th</sup> December that the AFM failed to consider several factors – other than price - in the offers. The Authority's procedure was a sham as they were negotiating only with Harrods as evidenced by the exchange of e-mails.

Lt Charlton Falzon Cascun Legal Advisor to the Armed Forces of Malta said that the AFM set up a board to negotiate this contract on the 1<sup>st</sup> November 2020 and any documents dated prior to that date do not form part of this appeal. On the 24<sup>th</sup> November 2020 AFM obtained approval to proceed with a negotiated procedure and from then on negotiated with both parties. The reference to the parking fees was misleading as these fees were never mentioned in the first place so there was no need to remove their cost. All communications have been submitted in this appeal and full transparency has been observed.

Major Nicholas Grech (505584M) called as a witness by Appellants testified on oath that he was the President of the negotiating board. He stated that the first approach to both parties was from the 1<sup>st</sup> November onwards and there had been no prior approaches to any party. The AFM opted for a

negotiated procedure on the instructions of their 'higher authority' that had become aware that Gulf Med had recently obtained the necessary licence to carry out this type of work.

In reply to further questions from Dr Camilleri witness stated that he was not aware that there are other companies who could compete in this tender. Witness confirmed that the e-mail sent on 2<sup>nd</sup> December to Harrods (regarding change to use of ePPS) had not similarly been sent to Gulf Med and that a draft contract had been sent on 14<sup>th</sup> December 2020 to Harrods but not to Gulf Med.

Asked about the incomplete disqualification letter sent to Appellants on the 23<sup>rd</sup> December 2020 witness stated that once that recommendation had been forwarded to AFM Head Quarters queries were raised and they subsequently sent an accurate reply on the 30<sup>th</sup> December.

To a series of question from Dr Camilleri asking whether the AFM had taken into consideration the additional costs of flying the helicopter to the United Kingdom (stated by witness as taking 3½ to 4 days) and back with all ancillary costs such as flights and maintenance for crew members, fuel and other such costs witness replied that they had not been costed in the tender as these costs were beyond the remit of the call. Finally asked what was the reduction offered by Harrods on the parking fees witness stated that these were never included in the offer.

Dr Camilleri said that the thrust of the questions leads one to the conclusion that there are a number of serious anomalies in the evaluation process. If Harrods is chosen as the preferred bid the helicopter in question has to be flown to the UK; however it is ingenious how all the associated costs of the journey have been ignored. These costs may not be payable by the economic operator but they still have to be paid and they still add to the cost of the contract. The added downtime in sending the helicopter abroad adds to the costs but the AFM did not consider these as they claim they are irrelevant. The downtime and the added costs make the present offer less advantageous. The timeline is indicative of the AFM's approach – Harrods were sent a draft contract on the 14<sup>th</sup> December 2020 but Gulf Med were kept in the dark till the 23<sup>rd</sup> December – this is obviously a direct order not a negotiated procedure.

Major Grech said that communications with Harrods were merely to clarify matters hence the reason why they were communicating with them earlier than with Gulf Med. The ancillary costs were not considered by the board and were not factored in since the board was only responsible for the maintenance aspect whilst downtime is taken as a matter of fact and catered for similar to occasional problems with spare parts. The difference in price, however much it may be, is material in a contract.

Dr Camilleri concluded by stating that any factor however small can tip the offer when the difference in price is not extensive. The Gulf Med offer did not need to take into consideration all the extraneous costs as they do not apply with a Malta based operator. The costs of flights, travel maintenance and such other costs are relevant to the contract.

Major Grech said that factoring in the extraneous costs would have created anomalies between local and foreign competitors and were beyond the remit of the adjudicating board.

End of Minutes

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**Hereby resolves:**

That appellant's appeal is based on three contentions: i) the contracting authority failed to indicate the selection criteria; ii) the contracting authority calculated the preferred bidder's offer erroneously and iii) it should have also considered other factors in addition to the price. This Board shall consider these three grievances separately.

**i) The contracting authority failed to indicate the selection criteria.** This contention was not pursued further and was not mentioned in the submissions made during the hearing and no evidence on this point was produced by the appellant. The contracting authority states in the present case the "price quality ratio" cannot be applied since both contacted bidders have the same standard of quality regarding technical compliance; hence the only criteria should be the cheapest price.

The Board agrees with this more so since this was a negotiated procedure where both bidders were asked to submit cost estimates for the scheduled works. It was thus clear that the adjudication would be price based and not "price – quality ratio".

It is therefore the Board's opinion that the appellant's first grievance does not merit to be accepted.

**ii) The contracting authority failed to consider hidden costs which make the chosen bid more expensive.** The appellant pointed out that since the helicopter on which the service would be provided is based in Malta, to enable the service to be provided, the helicopter would have to be flown or ferried to the UK. This at an additional cost which the contracting authority should have taken into consideration when choosing the best priced offer. However, no evidence was produced by appellant to quantify what these additional costs might be. The Contracting Authority on this point insists that both economic operators had been asked to submit the basic price for the helicopter's inspections, adding that if following inspection, some parts resulted to need replacement then negotiations would be held with the chosen bidder on the acquisition and changing of these parts.

This Board notes that while it was taken for granted that the chosen bidder would carry out the inspection in the UK; no evidence was produced on this fact. It also is of the opinion that what the prospective bidders were asked to submit was the basic costs of the helicopter's inspection and it was this that the evaluation committee had to take into consideration. Thus even the second grievance does not merit to be accepted.

**iii) The Contracting Authority should have considered other factors into consideration other than the price.** Appellant contended that the Contracting Authority should have considered Malta's defence and security when awarding the tender to an overseas operator because of the additional downtime when the helicopter would not be available for service in Malta and also the question of warranties after the work was finished. The contracting authority insists that downtime could also result from waiting for the delivery of spares and in any case it had a fleet of aircraft to deal with operations and downtime is already factored in into the schedules.

The Board is also of the opinion that the appellant's third grievance was a bit vague and again no evidence to sustain it was provided. Satisfied with the contracting authority's reply that contingencies are catered for, this Board is of the opinion that it should also be rejected.

During the hearing, when submissions were being made, appellant alleged that there were serious anomalies in the evaluation process and that this was a direct order masked as a negotiated procedure.

The Board notes that from the documents submitted and from the minutes of the **Negotiating Board Recommendations (the Evaluation Report)** dated 3 December 2020, it can be seen during the said Negotiating Board's meeting held on the 27<sup>th</sup> November 2020 a decision selecting Harrods for negotiations had been taken since it had provided the cheapest offer. Up to that date the board had had regular correspondence with both bidders who had both been found to be administratively, technically and financially compliant. The emails sent to both parties tally, day for day, up to the 25<sup>th</sup> November 2020.

The evaluation board also recommended that from that moment onward all negotiations were to be carried out with Harrods Aviation. This would explain why from the 2<sup>nd</sup> December onwards, communications were held only with the preferred bidder, including the submission of a draft contract on the 14<sup>th</sup> December 2020. This Board opines that the contracting authority should have been clearer in stating that the tender was being awarded to Harrods Aviation Ltd in their commutation with appellant dated 23<sup>rd</sup> December 2020.

In view of all the above considerations the Board rejects appellant's contentions and the request to cancel the award of the negotiated procedure. The deposit paid for the filing of this appeal should not be refunded.

Charles Cassar  
Chairman

Lawrence Ancilleri  
Member

Carmel Esposito  
Member