

# **PUBLIC CONTRACTS REVIEW BOARD**

## **Case 1616 – CT 2292/2020 – Tender for the Provision and Distribution of Meals to Eligible Persons living within the Community – Meals on Wheels**

**22<sup>nd</sup> September 2021**

The Board,

Having noted the letter of objection filed by Dr Ronald Aquilina acting for and on behalf of James Caterers Ltd, (hereinafter referred to as the appellant) filed on the 24<sup>th</sup> May 2021;

Having also noted the letter of reply filed by Dr Daniel Inguanez acting for and on behalf of Department of Contracts and the Ministry for the Family and Social Solidarity (hereinafter referred to as the Contracting Authority) filed on the 2<sup>nd</sup> June 2021;

Having heard and evaluated the testimony of the witness Mr Jonathan Bugeja (Procurement Manager at the Department of Contracts) as summoned by Dr Noel Bezzina acting for the Ministry for the Family and Social Solidarity.

Having heard and evaluated the testimony of the witness Mr Joseph Delicata (Chairperson of the Evaluation Committee) as summoned by Dr Adrian Delia acting for James Caterers 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 sittings of the 5<sup>th</sup> August 2021 and 16<sup>th</sup> September 2021 hereunder-reproduced;

### **Minutes**

#### **Case 1616 – CT 2292/2020. Provision and Distribution of Meals to Eligible Persons living within the Community – Meals on Wheels Service**

The tender was published on the 13<sup>th</sup> January 2021 and the closing date was the 23<sup>rd</sup> February 2021. The estimated value of the tender was € 7,817,400.

On the 24<sup>th</sup> May 2021 James Caterers Ltd filed an appeal against the Active Ageing and Community Care (AACC) within the Ministry for the Family, Children's Rights and Social Solidarity as the Contracting Authority in regard to their disqualification on the grounds that their bid failed to satisfy the award criterion.

A deposit of € 39,087 was paid.

There were three (3) bidders.

On 5th August 2021 the Public Contracts Review Board (PCRB) composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

**Appellant – James Caterers Ltd**

Dr Adrian Delia	Legal Representative
Dr Ronald Aquilina	Legal Representative
Mr Joseph Barbara	Representative
Mr Mark Zahra	Representative

**Contracting Authority – Active Ageing and Community Care**

Dr Noel Bezzina	Legal Representative
Mr Joseph Delicata	Chairperson Evaluation Committee
Ms Marisa Cassar	Secretary Evaluation Committee
Ms Grace Anne Buhagiar	Member Evaluation Committee
Mr Alexander Vella	Member Evaluation Committee
Mr Joe Micallef	Member Evaluation Committee

**Preferred Bidder – Neriku Confectionery Ltd**

Ms Anne Marie Zammit	Legal Representative
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**Department of Contracts**

Dr Lara Attard	Legal Representative
Mr Nicholas Aquilina	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 Adrian Delia Legal Representative for James Caterers Ltd said that two submissions had been received in reply to the letter of objection – one jointly from the Department of Contracts and the Ministry for the Family, Children’s Rights and Social Solidarity and one from the Agency for Active Ageing and Community Care (hereinafter referred to as AACC). In page 20 of the tender document, article 1.3 AACC is shown as the Contracting Authority but nowhere could he trace any record that it is registered as an Agency.

Dr Noel Bezzina Legal Representative for Active Ageing and Community Care said that the letter from the Agency was to clarify the reply from the Ministry.

Ms Marisa Cassar Secretary of the Evaluation Board said that the AACC was a Unit within the Ministry not an Agency.

Dr Delia said since that is the case then the AACC is not a juridical person as that entity does not exist.

Dr Bezzina said that the evaluation had been carried out by AACC.

The Chairman proposed that since a joint reply from the Department of Contracts and the Ministry had also been filed perhaps the Department could reply on behalf of AACC.

Dr Delia stated that the reply from the Ministry indicated that it was considering itself to be the Contracting Authority and therefore the AACC could not be the Authority. He requested that the letter from AACC should be ignored.

After a short recess the Chairman said that after deliberating the Board had agreed to the request by Dr Delia to remove from the records the letter filed on the 2<sup>nd</sup> June 2021 by AACC.

Dr Bezzina said that he was not aware of the joint letter from the Ministry and the Department of Contracts and he requested a deferment of the case to enable him to take instructions.

The Board deferred the Case to the 16<sup>th</sup> September 2021 at 11.00am.

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

End of Minutes

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## **SECOND HEARING**

On 16th September 2021 the Public Contracts Review Board (PCRB) composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

### **Appellant – James Caterers Ltd**

Dr Ronald Aquilina	Legal Representative
Dr Adrian Delia	Legal Representative
Mr Joseph Barbara	Representative

### **Contracting Authority – Active Ageing and Community Care**

Dr Noel Bezzina	Legal Representative
Mr Joseph Delicata	Chairperson Evaluation Committee
Ms Marisa Cassar	Secretary Evaluation Committee
Ms Grace Anne Buhagiar	Member Evaluation Committee
Mr Alexander Vella	Member Evaluation Committee

### **Department of Contracts**

Dr Christina Busuttil  
Mr Nicholas Aquilina  
Mr Jonathan Bugeja

Legal Representative  
Representative  
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 Ronald Aquilina Legal Representative for James Caterers Ltd recalled that there are two reasons for the appeal. The tender stated that 30% of the marks were to be allocated on the financial submission but the award letter stated that preferred bidder was awarded the figure of 40% - Appellant has since been advised that this was a typing error by the Contracting Authority.

The second grievance concerned the method the tender was evaluated. A tender can be awarded either on the cheapest price or on the Best Price Quality Ratio (BPQR) basis – in the latter case the Contracting Authority must consider the respective quality of the offers and not if the minimum requirements of the tender are met. There are several Court cases dealing with the comparative analysis of tenders. The letter of reply from the Authority confirms the doubts Appellant has on the award since it confirms that the tender documents state that it was sufficient to meet the minimum requirements totally contrary to the BPQR concept. Dr Aquilina referred to the ultimate paragraph in page 13 of the tender dossier which confirms this point, but which is out of context as the entire tender was to be awarded on BPQR basis (page 7). The Evaluation Grid on page 8 indicates that there is a spectrum of points that could be awarded (0% to 100%) and hence it was essential to do a comparative evaluation to meet this requirement – this applied also to other parts of the grid. In other sections, starting from page 10, set marks were to be allotted.

Dr Noel Bezzina Legal Representative for Active Ageing and Community Care said that on the first grievance it has been made clear that this was a clerical error in the disqualification letter and that the correct percentage had been applied in the award of the tender and the points awarded – the error did not change the outcome of the tender and only occurred once the evaluation had been closed.

With regard to the second grievance the Authority rested its case on the clause in the tender stating that if the required criteria were met then full marks will be awarded. Here the evaluators were following the tender criteria. Appellant was presupposing that the Evaluation Committee was incorrect in awarding equal technical points. There was always the opportunity for the Appellant to have sought a precontract remedy if they were not happy with the tender terms.

Mr Jonathan Bugeja (464986M) called as a witness by the Authority testified on oath that he is a procurement manager at the Department of Contracts. He confirmed that the award was based on a 70/30 ratio and that in error the figure of 40%, (instead of 30%) had been used in the letter sent to Appellant which also clearly stated that the adjudication had been on a 70/30 basis. Calculations of the tender result indicates that the assessment was correctly done on the proper basis.

Questioned by Dr Delia witness stated that his role was to receive the complete Evaluation Report and notify the parties of the result. It is the Authority that decides on the ratio of the split up of marks and he has no say in that matter but did agree that in this instance the higher ratio on the technical award indicated the importance attached to the technical offer. He re-iterated that the error in the letter

had no bearing on the evaluation or on its outcome as by the time that the letter was written the evaluation had been closed. The error could be contested as indeed was being done presently. The Department of Contracts could not alter the ratio of percentages awarded in the evaluation as these followed the tender specifications – if the bidder reached the minimum requirements, then full points were awarded. The role of the evaluators is to decide on the basis of submissions made not to compare the various bids; neither is the Contracts Department interested in comparative exercises.

Mr Joseph Delicata (207569M) called as a witness by the Appellant testified on oath that he was the Chairperson of the Evaluation Committee and that the members of the adjudication were Marisa Cassar (Secretary), Grace Anne Buhagiar, Alexander Vella and Joe Micallef. His experience included being in charge of catering at Mater Dei Hospital and as Assistant Director of Corporate Services at AACC; the other members of the evaluation committee all had experience in this sector and hence in deciding on the requirements of the tender. Witness confirmed that he is fully '*au fait*' of the difference between a price only tender and a BPQR one; he agreed that the technical aspect was given more importance in this tender. Witness explained that the evaluation committee worked on the basis that if the minimum requested was attained then full points were awarded – if all the information requested was met then the committee was obliged to award full marks.

In reply to further questions witness said that the evaluators had not considered what type of plates were offered as this was not included in the tender which merely indicated 'single use' without detailing whether the plates offered were plastic or otherwise. In any case the view of the witness was that these questions were a fishing expedition to find out what had been offered by others. Witness confirmed that the preferred bidder had complied with the law as the 'single use' plates offered fulfilled the tender requirements.

Questioned by Dr Bezzina, witness stated that none of the food containers offered were illegal but complied with the law. Both bidders were compliant with the tender terms and hence awarded full marks. The evaluators had gone through the offers clause by clause and ensured that the requirements were met. Additional or extra offers were not awarded extra marks.

In reply to further questions from Dr Delia witness said that the marks were allocated separately by each evaluator, and they had not gone into the type and quality of containers as that was not specified in the tender – both bidders had offered food grade containers and thus met the requirements.

That concluded the testimonies.

Dr Delia said that on the first grievance the Authority had admitted that they made a mistake, and it was up to the Board to decide if this had affected the tender outcome. The Evaluation Committee had no idea what the law demands and worked on the basis that if the minimum was provided then the bidder met the requirements; no comparative effort was made to differentiate between the offers. The whole point of having a 70% technical ratio was precisely because the offer had to be superior, and the committee had abdicated themselves of the duty to differentiate. Tender offered the possibility of marks between 0% and 100% but bidders were both awarded 100%. This was a case of breaking the law and a disservice to the country. The Board was fully aware of jurisprudence on the evaluation of tenders and should decide accordingly.

Dr Bezzina said that the 40% error had no effect at all on the outcome of the evaluation and did not affect the award of points. As regard the second point it is clear from the tender terms that if a bid

was compliant the maximum points should be awarded. Dr Delia is presupposing that his client provided a better offer without any basis and tries to achieve this by shaming the Evaluation Committee when all they did was follow the criteria and evaluate accordingly.

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

End of Minutes

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**Hereby resolves:**

The Board refers to the minutes of the Board sittings of the 5<sup>th</sup> August 2021 and 16<sup>th</sup> September 2021.

Having noted the objection filed by James Caterers Ltd (hereinafter referred to as the Appellant) on 24<sup>th</sup> May 2021, refers to the claims made by the same Appellant with regards to the tender of reference CT 2292/2020 listed as case No. 1616 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Ronald Aquilina & Dr Adrian Delia

Appearing for the Contracting Authority: Dr Noel Bezzina

Whereby, the Appellant contends that:

a) **Financial Score –**

- i. Notwithstanding the tender document clearly lays down that the best financial offer could secure a maximum of thirty (30) points, inexplicably Neriku were awarded nothing less than forty (40) points, a whole 10 points more than the maximum available. This anomaly renders the decision to recommend award of tender to Neriku null and void.

b) **Technical Score –**

- i. The decision to award an equal points technical score to the Appellant and Preferred Bidder is incorrect and betrays a flawed adjudication which should not be allowed to stand by the PCRB. This especially so when one considers that the Appellant was allotted full marks in respect of each and every one of the evaluation criteria and therefore, presumably, so was the Preferred Bidder.
- ii. An examination of the Appellant's tender submission would show that on a number of items, the Appellant's submission exceeds and is technically superior to the minimum requirements set out in the tender document. Yet, surprisingly, the Appellant was allocated

the same technical score as the Preferred Bidder even in respect of those items where the Appellant's offer exceeded the minimum technical specifications.

- iii. The only logical explanation to the full marks being granted to both the Appellant and the Preferred Bidder is that the adjudication committee did not in fact carry out the individual, comparative exercise, in respect of each of the evaluation criteria to determine, in respect of each criterion, which offer / submission is the superior one and instead proceeded to allocate full marks to those tenders which met the minimum criteria set out in the tender document.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 2<sup>nd</sup> June 2021 and its verbal submission during the virtual hearings held on 5<sup>th</sup> August 2021 and 16<sup>th</sup> September 2021, in that:

a) **Financial Score –**

- i. The typographical error is merely clerical and was not committed in bad faith, is self-evident and clear to all participants in the tender.
- ii. The said error had no bearing whatsoever on the Overall Score or on the final ranking.
- iii. Given the clerical nature of the error in the award grid and given the fact that the said error did not affect the ranking of bidders, then it could not have prejudiced the tender procedure nor any tenderer. To cancel the recommendation of award decision for such an insignificant and harmless mistake, as the Appellant is requesting, would be contrary to the principle of proportionality which underlies public procurement law, as provided for in regulation 39 of the Public Procurement Regulations.

b) **Technical Score –**

- i. The Contracting Authority may exercise a degree of discretion in setting out the tender criteria to include qualitative aspects, once these criteria have been set they restrict the Contracting Authority's evaluation. The scores of the BPQR cannot be given subjectively but strictly as allowed by the tender document, specifically in accordance with the evaluation grid which is provided under section 1 of the tender document. In particular, page 13 of the tender document specifies that: *"For Mandatory requirements, unless otherwise specified in each criterion, is not provided or else it is not in line with the specified requirements, automatically a score of '0' shall be allotted and the bidder shall be disqualified. Full marks will be given if the required information is submitted and it provides all the minimum requirements."*
- ii. This tender condition which the evaluation committee was bound by, explains the allocation of points and why the Preferred Bidder and Appellant obtained the same technical score even if, as the Appellant claims, the Appellant's offer exceeded the minimum criteria.

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 witnesses duly summoned, will consider Appellant's grievances, as follows:

- a) **Financial Score** – with regards to the first grievance of the Appellant, this Board notes that the rejection letter sent to the Appellant on 14<sup>th</sup> May 2021, does in fact have a typographical error within the results section of Neriku Confectionery Ltd (“Neriku”). However, the overall score of Neriku was still computed in a correct arithmetical manner. Moreover, the proportional Financial Score of the Appellant was also worked out arithmetically correct, whereby a weighting of 30% was attributed to the Financial Score in proportion to the bid of Neriku, i.e. the Preferred Bidder. This Board opines that no prejudice was suffered due to this typographical error.

Even though this Board does not uphold the Appellant's first grievance, it will again emphasise to the Contracting Authorities the importance of issuing correct letters of award, rejection and acceptance to all parties within the tendering procedure. Issues both pertaining to technical and arithmetical matters are crucial to having an efficient tendering process.

- b) **Technical Score** – with regards to the second grievance of the Appellant, this Board makes reference to the following:
  - i. Section 1 of Tender Dossier, para 6.1, page 7, states that the Criteria for Award is the Best Price / Quality Ratio (BPQR)
  - ii. Section 1 of Tender Dossier, Evaluation Grid, page 13, there is included within the following reference *“For MANDATORY requirements, unless otherwise specified in each criterion, is not provided or else it is not in line with the specified requirements, automatically a score of ‘0’ shall be allotted, and the bidder shall be disqualified. Full marks will be given if the required information is submitted and it provided all the minimum requirements”*
  - iii. Section 1 of Tender Dossier, Evaluation Grid, pages 8 to 13 – The Evaluation Grid lists different Criteria and Sub-Criteria. This Board notes that some are listed as Mandatory, such as all of Criteria B “Quality Assurance” including its sub-criterias (vide page 10). Hence, this Board opines that where the term ‘Mandatory’ is used, the Evaluation Committee's hands were tied whereby they could only give a points value of 0 or else allocate the full marks within that specific sub-criteria. On the other hand, there were a number of sub-criteria which were NOT listed as Mandatory. In fact, the following was stated in these sub-criteria which were not listed as Mandatory, *“The points shall be allotted within a spectrum from 0% to 100%. If a ‘0’ is allotted to any of the criteria, the offer shall be disqualified.”*
  - iv. Reference is made to the testimony under oath by Mr Joseph Delicata whereby he stated *“the evaluation committee worked on the basis that if the minimum requested was attained then full points*

*were awarded – if all the information requested was met then the committee was obliged to award full marks.”*

- v. The Board opines that the statement by Mr Joseph Delicata goes contrary to what the tender dossier expected out of the Evaluation Committee. This statement would have been factual and correct should ALL the Criteria / Sub-Criteria have been marked as Mandatory. In that case the tender would not have been a BPQR tender but one where the cheapest compliant bidder would be awarded such a tender. The ‘Evaluation Grid’ in the Tender Dossier expected the Evaluation Committee to perform a thorough evaluation of different bids received and allocate a SPECTRUM of point (this is valid where sub-criteria were not listed as mandatory). The term spectrum can be defined as *“a condition that is not limited to a specific set of values but can vary”*

Finally, this Board opines that the Evaluation Committee did not perform its duties as to what was expected of them. The clause *“For MANDATORY requirements, unless otherwise specified in each criterion, is not provided or else it is not in line with the specified requirements, automatically a score of ‘0’ shall be allotted, and the bidder shall be disqualified. Full marks will be given if the required information is submitted and it provided all the minimum requirements”* was misconstrued and applied to all the sub-criteria, when evidently it did not apply to all. Hence the evaluation of ALL the bids in this tendering procedure is flawed and need to be re-evaluated.

This Board upholds the Appellant’s second grievance.

### **The Board,**

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

- a) To uphold the Appellant’s concerns and grievance relating to the ‘Technical Score’
- b) To cancel the ‘Notice of Award’ letter dated 14<sup>th</sup> May 2021;
- c) To cancel the Letters of Rejection dated 14<sup>th</sup> May 2021 sent to James Caterers Limited;
- d) To order the contracting authority to re-evaluate all the bids received for this tender through a newly constituted Evaluation Committee composed of members which were not involved in the original Evaluation Committee.
- e) after taking all due consideration of the circumstances and outcome of this Letter of Objection, directs that the deposit be refunded to the Appellant.

**Mr Kenneth Swain**  
Chairman

**Dr Charles Cassar**  
Member

**Mr Lawrence Ancilleri**  
Member