

# **PUBLIC CONTRACTS REVIEW BOARD**

## **Case 1646 – MLC 2/2021 – CfQ-Creation of Mobile App for the Promotion of Places of Interest within the Locality of Mellieha - Malta**

**1<sup>st</sup> November 2021**

The Board,

Having noted the letter of objection filed by Mr Gorg Borg D’Anastasi acting for and on behalf of App-Raiser Digital, (hereinafter referred to as the appellant) filed on the 12<sup>th</sup> August 2021;

Having also noted the letter of reply filed by Dr Carlos Bugeja on behalf of Pro Legal Advocates acting for the Mellieha Local Council (hereinafter referred to as the Contracting Authority) filed on the 23<sup>rd</sup> August 2021;

Having heard and evaluated the testimony of the witness Mr George Borg D’Anastasi (Owner of App-Raiser Digital) as summoned by Dr Axl Camilleri acting for the Appellant.

Having heard and evaluated the testimony of the witness Mr James Gauci (Technical Consultant to the Evaluation Committee) as summoned by Dr Axl Camilleri acting for the Appellant.

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 28<sup>th</sup> October 2021 hereunder-reproduced;

### **Minutes**

#### **Case 1646–MLC 2/2021. Call for Quotations for the Creation of Mobile App for the Promotion of Places of Interest within the Locality of Mellieha**

The tender was published on the 6<sup>th</sup> April 2021 and the closing date was the 27<sup>th</sup> April 2020. The value of the tender excluding VAT was € 9,950.

On the 12<sup>th</sup> August 2021 App-Raiser Digital filed an appeal against the Mellieha Local Council as the Contracting Authority objecting to their disqualification on the grounds that their bid was rejected on financial grounds.

A deposit of € 400 was paid.

There were four (4) bidders.

On 28<sup>th</sup> October 2021 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

**Appellant – App-Raiser Digital**

Dr Axl Camilleri	Legal Representative
Mr George Borg D’Anastasi	Representative

**Contracting Authority – Mellieha Local Council**

Dr Jurgen Micallef	Legal Representative
Mr Dario Vella	Member Evaluation Committee
Mr Emvin Bartolo	Member Evaluation Committee
Mr Carmel Debono	Representative

**Preferred Bidder – Weebee Ltd**

Mr Calvin Briffa	Representative
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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 invited submissions.

Dr Axl Camilleri Legal Representative for App-Raiser Digital stated that the appeal revolved on two points - if the offer conforms to the tender and if the appointed technical expert had the competence to judge if the offer was up to standard since this is a matter of a technical nature. Did the expert know the difference between 360° tours and 3D tours? This was not a question of ticking of boxes but of technical knowledge and the certainty that bidders knew the difference. If the expert was not competent then the award is invalid. The offer of Appellant to give a demonstration of his work to the Council was spurned.

Appellant is requesting sight of preferred bidder’s offer which he claims is allowed by Article 40 2(c) which in fact states that documentation submitted by economic operators attesting that they comply with selection criteria shall not be considered as confidential and Article 87 which deals with the functions of the Board to deal with complaints. There are Freedom of Information requirements otherwise how can the Appellant know how the Authority reached its decision.

Dr Jurgen Micallef Legal Representative for Mellieha Local Council said that every party knew the terms of the tender and the appointed expert was obviously competent to judge on the merits of the bids. The technical expert saw all the offers and there was therefore a level playing field and the offer by Appellant to give a demonstration after the tender had been decided was unusual.

Mr George Borg D’Anastasi (469756M) owner of App-Raiser Digital called as a witness by the Appellant testified on oath said that he has appealed as the 360° and the 3D concepts were different and he wanted to ascertain the validity of what others had presented as this new technology was new for Malta. He had no reason to doubt the expert’s opinion but was being sceptical after ten to fifteen years experience in this field. One has to actually see the product to visualise the difference between the two concepts.

Questioned by Dr Micallef, witness said that 3D, which does not work in daylight, is intended for internal views whilst 360° could be for both internal and external work, and confirmed that no samples were requested by the Authority.

Mr James Gauci (8294M) called as a witness by the Appellant testified on oath that he was requested by the Council to assess the tender offers. He explained that he had 20 years experience of providing these types of reports on the difference between 3D and 360° creations and detailed the difference in the processes. He evaluated the submissions in regard to competence and compliance and recommended the best bid – he was satisfied that the preferred bidder could reach the required standard.

In reply to a question by Dr Micallef, witness said that all bidders were compliant and he had made no assumptions but judged the bids on facts.

This was the end of the testimonies.

Dr Camilleri re-iterated that Article 40 2(c) of the Public Procurement Regulations allowed the divulging of documents. He was not confident that there was any difference between the offers.

Dr Micallef concluded by saying that it was clear that the principles of a level playing field and self limitation had been observed by the evaluators.

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 28<sup>th</sup> October 2021.

Having noted the objection filed by App-Raiser Digital (hereinafter referred to as the Appellant) on 12<sup>th</sup> August 2021, refers to the claims made by the same Appellant with regards to the tender of reference MLC 2/2021 as case No. 1646 in the records of the Public Contracts Review Board.

Appearing for the Appellant:

Dr Axl Camilleri

Appearing for the Contracting Authority:

Dr Jurgen Micallef

Whereby, the Appellant contends that:

- a) Because the Evaluation Board are not experienced in this field, a third party company was used to assess the quotations received. The Appellant does not know who the third party company is and furthermore, the Appellant holds no knowledge if the same company used has any experience at all in the creation of 3D Walk Through Virtual Tours in contrast to 360° Panoramic Virtual Tours. It is a common perception that most people think that 3D Photogrammetry and 360° Imaging are the same. In substance they are not. If the third party company assessed that 360° tours are the same as 3D tours, it must be realised that cost for 360° is much lower than that for 3D tours, which is what the CFQ specifications requested. In this case, the Appellant requests that he be allowed to re-quote for simply 360° tours.
- b) The Appellant requested to be allowed to make a presentation of their proposal to the evaluation board, done via email to Mr. Carmel Debono, the Executive Secretary. Mr. Debono responded by email that the request will be presented to the evaluation board and he would respond. The Appellant did not receive a further response to this. Hence there is no knowledge if the Appellant's request was accepted or rejected by the evaluation board. This request was made simply to make sure that the Evaluation Board would be able to fully understand the concept of the proposal the Appellant made. Especially the difference between 3D and 360°, among the other requested features.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 23<sup>rd</sup> August 2021 and its verbal submission during the virtual hearing held on 28<sup>th</sup> October 2021, in that:

- a) On the 11<sup>th</sup> of August 2021, Gorg Borg D'Anastasi on behalf of APP-Raiser Digital lodged an official objection and appeal, basing his grievance on the fact that he was not awarded the tender because the 3rd party company specifically appointed to carry out the technical evaluation of the offers assessed the 360° tours as being identical to the 3D tours. Yet at the same time, the complainant claims that the CfQ specifications requested a quotation only for the 3D tours. In fact, the complainant requested permission to be allowed to submit a re-quote for the 360° tours only. However, the Local Council respectfully submits that the CFQ specification were clear and intelligible: *"3.2.1. Create a total of 11 (eleven) digital virtual tours, to be 3-dimensional walk-through when internal and 360° panorama when external....."*
- b) Although the CfQ specification were indeed clear and understandable, the evaluation board appointed a third-party company to carry out a technical evaluation. Following the technical evaluation stage, the Tender was awarded to the lowest technically compliant bid, on account that the Tender Document (CfQ) clearly states that: "The award criteria for this Call for Quotations is the Price", The purpose of the Best Price-Quality Ratio is to objectively identify the best value for

- money. All bidders were presented with the same Tender documents; hence the chances of success in being awarded the tender simply depends on the information submitted by the respectful bidder;
- c) The Local Council also humbly submits that had the Tender Document been unclear and ambiguous or if the third-party company lacks experience (as claimed by the complainant in his objection), it would have been unclear and ambiguous to all bidders and the third-party's alleged lack of experience would nevertheless have no bearing on the outcome since all bidders were presented with the same CfQ specifications;
  - d) Finally, every bidder had the opportunity to request further clarification or raise any concerns before the closure of the Tender, in accordance with Article 87(a) of Subsidiary Legislation 607.03. Hence, the complainant's requests to provide a re-quotation and to carry out a presentation to provide further clarification is not only untimely but also runs contrary to Subsidiary Legislation 607.03;

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 now consider the Appellant's grievances.

This Board notes that there are two main areas which need to be analysed.

a) **Technical Expert –**

- i. This Board takes note of the Appellant's letter of objection and also its verbal initial submissions whereby questions are being asked whether the technical expert appointed by the Evaluation Committee is competent in subject matter and whether the expert is aware of the differences between 360° Panoramic Tours and 3D Tours.
- ii. Reference is thereby made to the testimony under oath of Mr George Borg D'Anasatasi, being the owner / representative of the Appellant, whereby he stated that he *"has no reason to doubt the expert's opinion but was being sceptical after ten to fifteen years experience in this field. One has to actually see the product to visualise the difference between the two concepts"*.
- iii. Reference is also made to the testimony under oath of Mr James Gauci, being the Technical Consultant appointed by the Evaluation Committee who testified that he has 20 years experience of providing these types of reports on the difference between 3D and 360° creations. He evaluated all 4 bids received from the participants in the tender, hence a level playing field was ascertained.

- iv. This Board opines that no proof was brought forward to ascertain that the Technical Consultant is not competent in the subject matter. Moreover, it was the same Appellant who stated that has no reason to doubt the expert’s competence.

Finally, this Board does not uphold this grievance of the Appellant.

b) **Preferred Bidder offer – Regulation 40 (2)(c) of the Public Procurement Regulations –**

- i. Regulation 40 (1) of the Public Procurement Regulations states “*Subject to the obligations established under these regulations and, or any other law obliging the Director, the contracting authority and the Ministerial Procurement Unit to disclose information, a contracting authority, the Director or the Sectoral Procurement Directorate **shall not disclose information forwarded to it by economic operators which they have designated as confidential**, including, but not limited to, technical or trade secrets and the confidential aspects of tenders.* (bold & underline emphasise added)
- ii. Regulation 40 (2)(c) of the Public Procurement Regulations states “Without prejudice to the other provisions of these regulations, the following information shall not be considered as confidential: documentation submitted by economic operators attesting that they comply with selection criteria;”
- iii. This Board opines that point (ii) above is not wide enough to encapsulate the whole bid, including all technical and financial matters of the preferred bidder’s bid. On the other hand it refers to ‘attestations’ (i.e. confirmations) that there is compliance to the selection criteria.

Finally, this Board does not uphold this grievance of the Appellant.

**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

**Dr Charles Cassar**  
Member

**Mr Lawrence Ancilleri**  
Member