

PUBLIC CONTRACTS REVIEW BOARD

Case 1649 – SPD3/2021/034 – Tender for the supply of ‘Be Active’ Services for the Elderly for the Ministry for Gozo

8th November 2021

The Board,

Having noted the letter of objection filed by Dr Joshua Grech acting for and on behalf of Kercem Ajax F.C., (hereinafter referred to as the appellant) filed on the 6th September 2021;

Having also noted the letter of reply filed by Dr Francelle Saliba and Ms Joyce Farrugia acting for the Ministry for Gozo – Ministerial Procurement Unit (hereinafter referred to as the Contracting Authority) filed on the 13th September 2021;

Having heard and evaluated the testimony of the witness Ms Christabelle Farrugia Grech (Chairperson of the Evaluation Committee) as summoned by Dr Francelle Saliba acting for the Contracting Authority;

Having heard and evaluated the testimony of the witness Mr Pierre Galea (Secretary of the Evaluation Committee) as summoned by Dr Joshua Grech acting for Kercem Ajax F.C.;

Having heard and evaluated the testimony of the witness Mr Anthony Briffa (Member of the Evaluation Committee) as summoned by Dr Joshua Grech acting for Kercem Ajax F.C.;

Having heard and evaluated the testimony of the witness Mr Teddy Bajada (Member of the Evaluation Committee) as summoned by Dr Kevin Mompalao acting for Sannat Lions Football Club.;

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 4th November 2021 hereunder-reproduced;

Minutes

Case 1649–SPD3/2021/034. Tender for the Supply of ‘Be Active’ Services for the Elderly for the Ministry for Gozo

The tender was published on the 17th June 2021 and the closing date was the 8th July 2021. The value of the tender excluding VAT was € 33,480.

On the 6th September 2021 Kercem Ajax F.C. filed an appeal against the Ministry for Gozo as the Contracting Authority objecting to their disqualification on the grounds that their bid was deemed not to be the cheaper offer.

A deposit of € 400 was paid.

There were four (4) bidders.

On 4th November 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 – Kercem Ajax F.C.

Dr Joshua Grech	Legal Representative
Mr Albert Camilleri	Representative

Contracting Authority – Ministry for Gozo

Dr Francelle Saliba	Legal Representative
Ms Christabelle Farrugia Grech	Chairperson Evaluation Committee
Mr Anthony Briffa	Member Evaluation Committee
Mr Pierre Galea	Member Evaluation Committee
Ms Joyce Farrugia	Representative
Mr Marnol Sultana	Representative

Preferred Bidder – Sannat Lions Football Club

Dr Kevin Mompalao	Legal Representative
Mr Teddy Bajada	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 invited the parties to make their submissions.

Dr Joshua Grech Legal Representative for Kercem Ajax F.C. said that the appeal was based on the fact that Appellant had submitted the most advantageous offer and should have been awarded the contract since Sannat Lions who were awarded the contract did not have the facilities requested and the Authority did not make a site visit to check on this point.

Dr Francelle Saliba Legal Representative for the Ministry for Gozo said that Appellant seemed to argue that Appellant was the only club that had the necessary facilities. The tender did not stipulate a site visit, as claimed by Appellant, but it was only compulsory to declare that the facilities will be provided.

Dr Kevin Mompalao Legal Representative for Sannat Lions Football Club said that this appeal was merely a 'spoke in the wheel' as Appellant had not claimed that the winning bid was not technically compliant. The equipment required is available for use and the necessary literature had been supplied.

Ms Christabelle Farrugia Grech (9785G) called as a witness by the Contracting Authority testified on oath that she was the Chairperson of the Evaluation Committee and that the purpose of the tender was to have certain equipment and the necessary instructors to fulfil the tender requirements. Clarifications had been requested on all four bids, two of which turned out to be non-compliant and

the contract was awarded to the cheaper bid. The technical declaration bound the bidder to abide by the tender conditions one of which was that the bidders had to submit a plan of the area to be used.

Questioned by Dr Grech witness stated that the premises footprint requirement in the specifications was fulfilled through the map submitted.

At this stage Dr Grech requested that the plan submitted by the preferred bidder should be made available to the Appellant.

The Chairman said that the request by Appellant went against Regulation 40 of the Public Procurement Regulations which did not allow disclosure of technical information and which limited disclosure to very few documents not considered confidential. It is the Board's view that the document requested by Dr Grech is of a confidential nature and his request cannot be met.

Dr Saliba pointed out that documents cannot be added to the tender document after evaluation, whilst Dr Mompalao stated that the Board can only consider the documents presented in the bid and no extraneous documents can be considered.

Dr Grech requested a deferment to enable him to obtain a copy of the map from other outside sources.

The Chairman said that the role of the PCRB is to expedite hearings, not necessarily limited in number and to make sure that the hearings are fair. The disclosure of the plan is an issue of confidentiality but to be fair the Appellant had an opportunity to present documents at an earlier stage when the objection was raised. The Board therefore denies the request for a deferment since their procedure is that fresh evidence has to be presented at least three days before the hearing.

Mr Pierre Galea (161367M) called as a witness by the Appellant testified on oath that he was the Secretary of the Evaluation Committee and stated that the Committee had held two evaluation meetings at the completion of which they decided to award the tender to the better bid.

Mr Anthony Briffa (126996M) called as a witness by the Appellant testified on oath that he was a member of the Evaluation Committee. He detailed the process the Committee went through in selecting the winning bid. The literature list required a plan which was compliant whilst the technical offer confirmed that all the requirements were met. The tender did not specify a site visit.

In reply to a question from Dr Saliba witness confirmed that the tender requested a plan which was submitted, checked and found to conform to tender. The tender did not require a site visit.

Mr Teddy Bajada (43956G) called as a witness by the preferred bidder said that the photos that he had seen of the site indicated that work was in progress on the site offered in the tender with some rooms still being built.

Questioned by Dr Grech, witness said that the site was in regular use for other purposes including use by young people.

This concluded the testimonies.

Dr Grech said that the declarations in the winning bid should have been verified as it was very easy to see that work was taking place on the site, as confirmed by Mr Bajada. It was not in the public interest to rely on the declarations even though the preferred bidder was bound by them. The award should be cancelled.

Dr Mompalao said that the photos referred to can be interpreted any way one wishes. Work on the complex has been in progress for three years and was just finishing. The area offered in the tender was outside the area where the works were going on and what has been offered in the plan is fully functional.

Dr Saliba said both parties agreed that a plan had been submitted thus meeting the tender requirements. The site was currently being used by youngsters and was therefore safe. The Authority followed the tender exactly and the technical declaration is acceptable. If it turns out not to be in order then legal measures can be taken.

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

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 4th November 2021.

Having noted the objection filed by Kercem Ajax F.C. (hereinafter referred to as the Appellant) on 6th September 2021, refers to the claims made by the same Appellant with regard to the tender of reference SPD3/2021/034 as case No. 1649 in the records of the Public Contracts Review Board.

Appearing for the Appellant:	Dr Joshua Grech
Appearing for the Contracting Authority:	Dr Francelle Saliba
Appearing for the Preferred Bidder:	Dr Kevin Mompalao

Whereby, the Appellant contends that:

- a) The Criteria for Award was based solely on the price and the contract is to be awarded to the bidder submitting the cheapest priced offer satisfying the administrative and technical criteria.
- b) No site visits were conducted in connection with the said call for tenders. It should be noted that the Specifications listed under Section 3 of the Tender Documents requires that: *“Premises and equipment used during the sessions are to be provided by the Service Provider. There should be a minimum total footprint of 3,000 square metres consisting of an indoor and outdoor area. The gym equipment should at a minimum include treadmills, air walkers, gym weight benches, balance balls and mats. The premises should also have male, female and gender-free dressing rooms with shower facilities.”*

- c) That as part of the evaluation process, no site visits have been conducted and therefore, no verification as to the adherence to the specific requirements has been made. In view of such specific requirements, the evaluation board should have made the necessary verifications prior to the award. This is being said since the other tenderers were not technically compliant as per tender's requirements. In line with this the objector submits that the other tenderers do not possess the necessary facilities in order to provide the service requested.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 13th September 2021 and its verbal submission during the virtual hearing held on 4th November 2021, in that:

- a) The appellant in his objection states that 'no site visits were conducted in connection with the said call for tenders' and that no verification as to compliance with tender specific requirements was made and that therefore this means that the other tenderers were not compliant. Defendant makes it clear that the Tender Document does not stipulate for a site visit for the evaluation of this tender. However, the tender makes it compulsory for bidders to sign the Technical Declaration in the Technical Offer Form that was part of the Tender Document. The Technical Declaration states that: *"I/ We declare that as part of our technical offer, I/ we confirm that the provision of 'Be Active' Services for the elderly for the Ministry for Gozo being requested in this document will be carried out in accordance with the Technical specifications and all conditions and standards indicated in the Terms of Refence, and as detailed in the Financial Bid form."*
- b) Therefore, it stands to reason that when signing this declaration the bidders are confirming that they will abide by the technical specifications as per Tender Document, including those listed by the Appellant in the Letter of Objection. Both Kerzem Ajax F.C and Sannat Lions Football Club were compliant in this area.
- c) Furthermore, the Tender Document included a Literature List to be submitted for the Plans of the Premises the tenderer is proposing and as detailed in Point 1.1 (f) in Section 3 – Technical Specifications.

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) ***Site visit*** – The Board notes:
 - i. That the tender document did not require any site visit as part of its technical compliance aspect;

- ii. That both Kercem Ajax F.C. (Appellant) and Sannat Lions Football Club (Preferred Bidder) submitted all the documentation necessary for a proper evaluation to be conducted;
 - iii. That both Appellant and Preferred Bidder replied to clarification requests within the duly allotted timeframes as per Public Procurement Regulations;
 - iv. That the Evaluation Committee is bound by the principle of Self Limitation and no instances / proof has been brought forward to attest that this has not been done.
- b) ***Requested information by Appellant during the hearing*** – The Board makes reference to the request by Dr Grech, i.e. that the plan submitted by the preferred bidder as part of its bid, to be provided to the Appellant for further scrutiny. The Board declines this request on two (2) grounds.
- i. Reference is made to case number 1646 in the records of the Public Contract Review Board. Such a similar request had also been declined whereby:
 - ii. 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)
 - iii. 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;”*
 - iv. This Board opines that point (iii) 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.
 - v. Regulation 40 (2)(d) of the Public Procurement Regulations states *“Without prejudice to the other provisions of these regulations, the following information shall not be considered as confidential: technical information which is already made available in public;”*
 - vi. The Board opines that even if this information that is being requested by the Appellant is publicly available, and could therefore be disseminated, then the Appellant had every opportunity to present this himself during the Letter of Objection stage, during the virtual hearing or even in the interim.

Finally, this Board does not uphold the grievances 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

Mr Lawrence Ancilleri
Member

Dr Charles Cassar
Member