

PUBLIC CONTRACTS REVIEW BOARD

Case 1111 – CT 2039/2017 – Refurbishment and Upgrading Works (Phase 2) at Deep Water Quay, Marsa.

The Publication Date of the Call for Tenders was 9 May 2017 whilst the Closing Date for Call of Tenders was 11 July 2017. The Estimated Value of the Tender, (Exclusive of VAT) was € 20,500,000.00.

Three (3) Bidders have submitted offers for this Tender.

On 1 December 2017, Bezzina Maritime Service Limited filed an Objection against the decision of Transport Malta to cancel the Tender against a deposit of € 50,000.

On 6 December 2017, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Carmel Esposito as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

Appellant – Bezzina Maritime Services Limited

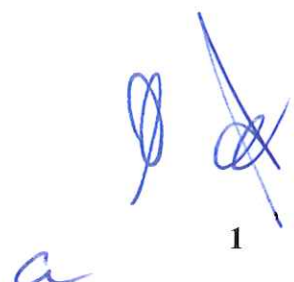
Mr Anthony Bezzina	Representative
Mr Ranier Bezzina	Representative
Mr Patrick Griscti Soler	Representative
Dr Steve Decesare	Legal Representative

Contracting Authority – Transport Malta

Mr Clifton Borg	Chairperson, Evaluation Board
Ms Mary Grace Pisani	Secretary, Evaluation Board
Mr John Demicoli	Member, Evaluation Board
Ms Elaine Farrugia	Member, Evaluation Board
Mr Ludwig Xuereb	Member, Evaluation Board
Ms Liz Markham	Representative
Ms Ray Stafrace	Representative
Dr Joseph Camilleri	Legal Representative

Department of Contracts

Dr Franco Agius	Legal Representative
Dr Christopher Mizzi	Legal Representative


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Following an introduction by The Public Contracts' Review Board Chairman, Dr Anthony Cassar, the Appellants were invited to make their submissions.

Dr Steve Decesare, the Legal Representative for Bezzina Maritime Services Limited opened by saying that their offer was rejected because the Tender Document required a certain list of works and experience which had to be submitted in order for the Bids to qualify for consideration. There were four types of projects and three types of references which were requested by the Tender Document.

The Department of Contracts contacted the three companies which Bezzina Maritime Services Limited has referred to in the European Single Procurement Document submitted to check whether the information submitted was the correct one. Two of these three have replied back their feedback to the Contracting Authority. Bezzina Maritime Services Limited wanted to clarify that they never said that the Evaluation Board has acted in an incorrect way.

Dr Decesare continued by saying that his clients have filed their Objection on the basis of the Letter of Rejection. The Tender Document has requested each Bidder to fill in Clause 4 (c) 1.1 of the European Single Procurement Document and refer to any information which could have been electronically available. This information was quoted in the Letter of Objection dated 1 December 2017 wherein it was stated that if there was any information which was available online, the Bidders had to refer the referee's website and give some related information.

The Bidder had the obligation to inform Transport Malta where they can find the information. Since they had no information available regarding JP Avax S.A, the Appellants have only listed that this information was not available in the European Single Document Procedure submitted.

In the Reasoned Letter of Reply issued by the Department of Contracts and Transport Malta submitted on 6 December 2017, the Contracting Authority attached three e-mails of three read receipts from three different persons from JP Avax S.A which Bezzina Maritime Services Limited had no contact with since the works referred to in the offer were made in Malta.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether there was enough contact information in the Appellant's offer for which Dr Steve Decesare, the Legal Representative for the latter replied that the Tender Document just requested a list of works.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board then asked how the referees sent their confirmations to Transport Malta for which Dr Steve Decesare, the Legal Representative for Bezzina Maritime Services Limited replied that the Tender Documents just required the Bidders to mention the companies. On the other hand, Dr Decesare acknowledged that the Department of Contracts had every right to ask for confirmations.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board then asked whether Transport Malta had enough information to get a confirmation of what the Tender asked for which Dr Steve Decesare, the Legal Representative for Bezzina Maritime Services Limited replied that there were the names of the relevant persons whom the Contracting Authority could have asked.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board commented that he wanted to see whether the Contracting Authority had enough details to confirm the Appellant's Work Experience for which Dr Joseph Camilleri, the Legal Representative for Transport Malta replied by referring to Clarification 1 issued by the Department of Contracts on 8 August 2017, where it was requested,

"It was noted that the figures submitted in Clause 4B in the main contractor's ESPD Form are substantially lower than what was requested in the Tender Document, Section 1, Clause 7 (B) "Economic and Financial Standing" (i). Kindly rectify your position by submitting ESPD as per clause mentioned and supported documents requested in Note to same clause."

Dr Joseph Camilleri continued by saying that the Bidder only sent a reference to JP Avax S.A but there were no further details. Transport Malta, therefore sent a request on a general address of JP Avax S.A and from the delivery and read receipts sent, it resulted that this e-mail was sent to three different people who, from their side, did not sent any reply.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked how much time did Transport Malta gave JP Avax S.A to answer for which Dr Joseph Camilleri replied that they were given seven days time. He added that this can be confirmed under oath by members of the Evaluation Board present for this Public Hearing.

Dr Steve Decesare, the Legal Representative for Bezzina Maritime Services Limited, referred to Point 2 of the Letter of Rectification issued by Transport Malta on 8 August 2017 where *inter alia* it was stated,

"Please rectify your position by adhering to quoted clause and submit information requested"

Dr Decesare continued by saying that Clause 7 (c) of the Tender Document requested only the list of works and the names of the people or companies who made these works. No contact details where requested otherwise these would have been given. Bezzina Maritime Services Limited has confirmations from JP Avax SA that these were never contacted by neither the Department of Contracts nor Transport Malta. The Second European Single Procurement Document submitted had all the needed information as requested by the Tender Document.

Dr Steve Decesare continued by saying that given the fact that JP Avax SA was an international company, he would be surprised if JP Avax SA replied to the e-mail sent by the Contracting Authority to their generic e-mail. Transport Malta should have contacted the person nominated by the Appellant in the original European Single Procurement Document submitted: Mr Giorgios Rusupolos, who was the Project Manager in charge of the Maltese Projects.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board wanted to confirm Dr Decesare's latter statements with the Contracting Authority since from the documents and the Evaluation Report available it resulted that the Appellant has replied in time for the Rectification. He also asked whether Bezzina Maritime Services Limited was compliant following the reply to the rectification.

Dr Joseph Camilleri, the Legal Representative for Transport Malta replied that this was a matter for a member of the Evaluation Board to reply to these questions under oath.

At this point, Mr Clifton Borg, a Senior Operations Officer within Transport Malta who was also the Chairperson of the Evaluation Board, holding ID Card Number 59875 M, was summoned by the same Contracting Authority to testify under oath before the Public Contracts Review Board.

Following Mr Borg's testimony, Dr Steve Decesare, the Legal Representative for Bezzina Maritime Services Limited said that his clients were requesting a clear ruling since it was not fair for a Bidder who submitted a substantial offer to be disqualified if one of the nominated companies by the same do not respond as there was nothing which show that the Appellant was lying in his submission.

Dr Joseph Camilleri, the Legal Representative for Transport Malta said that if one had to see the Letter of Objection filed by the Appellants, one would get the impression that his clients contacted the third party directly without communicating with Bezzina Maritime Services Limited beforehand.

In the meantime, one should not forget that Transport Malta sent a request for Clarifications with regards to the list of projects mentioned by the Appellants whose reply, as testified by the Witness, did not convince the Contracting Authority.

Dr Joseph Camilleri continued by saying that Transport Malta wanted to understand whether the projects which were being quoted fall within the parameters of the particular clause in question. Besides, the same Contracting Authority has requested what type of project the Bidders worked on.

Following the replies received in the Rectification from the Appellants, Transport Malta felt the need to contact the Third Party to confirm whether the works mentioned by Bezzina Maritime Services Limited were really made. There was no misinterpretation but the Contracting Authority wanted to ensure that the projects were really done and that is why this issue was important.

Dr Joseph Camilleri continued by saying that one had to be careful since all parties agreed that despite the fact that at this point the Principle of Proportionality could have been used, the Contracting Authority cannot keep chasing the Bidder until he is compliant with the Tender. In view of the fact that JP Avax SA did not reply and the fact that the reply given by the Appellants was not satisfied, the Contracting Authority had no other option but to deem the latter's offer as non compliant.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked how many times the Contracting Authority sought clarifications from the Third Party for which Dr Joseph Camilleri, the Legal Representative for Transport Malta replied that this e-mail was sent to three people.

Dr Steve Decesare, the Legal Representative for Bezzina Maritime Services Limited, said that he did not mention the original European Single Procurement Document since it was not relevant with the reasons for his client's disqualification. The Request sent by Transport

Malta did not mention JP Avax SA but only requested the European Single Procurement Document and the list of works.

The reply which was sent by JP Avax SA specifies that the works done required a structural concrete project according to what was requested in the Tender. This was clearly referred to in the same letter.

Dr Christopher Mizzi, a Legal Representative for the Department of Contracts said that they wanted to confirm that the Clarification and Rectification sent with regards to the European Single Procurement Document might show that Bezzina Maritime Services Limited was compliant but Transport Malta reserved the right to speak to the Third Party in order to confirm that the works specified were done. The Evaluation Board felt that they were not satisfied with the feedback received.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board reiterated that this Board does not find any relevant Objection since the issue was not in that regard.

Dr Steve Decesare, the Legal Representative for Bezzina Maritime Services Limited said that the question was whether the reply was made in the negative or not.

Dr Franco Agius, a Legal Representative for the Department of Contracts insisted that the Tender Document was clear. He then proceeded to quote Clause 7 (6) from the Tender Document which said,

“As per ESPD Question reference 4c.10 – Provide data concerning subcontractors and the percentage to be subcontracted.

Bidders are to provide the following data concerning sub contractors:



- 1. Name and details of sub-contractors*
- 2. Details of the work intended to be sub-contracted*
- 3. Relevant experience of the proposed sub-contractor*
- 4. Value of sub-contracting as percentage of the total cost.*

The maximum amount of sub-contracting must not exceed 40% of the total contract value.

The main contractor must have the ability to carry out at least 60% of the contract works by his own means.

Concluding Statements to be submitted by filling Part VI of the European Single Procurement Document (ESPD).”

This means that by the closing date, all the information had to be in the Contracting Authority's hands. It was true that a Rectification was requested but the onus had to still be on the Bidder who had to decide which information was relevant. The fact that Transport Malta had to search the internet to find a way to communicate with a Third Party shows that the Contracting Authority has went beyond its remit since the Bidder did not give the requested information, hence being deemed as non compliant.

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Dr Agius continued by saying that the Economic Operator had to submit this information in the European Single Procurement Document. The Public Procurement Regulations was clear in this regard. The Rectification was only requested once and in this regard there is a specific Article in the Public Procurement Regulations. At the end of the day, it was up to the Bidder to submit a compliant offer. The fact that Bezzina Maritime Services Limited did not submit a contact address was at their own risk.

Transport Malta made their job by finding the info e-mail address and communicated with them. The e-mail was received and circulated to three particular people. The Appellants were aware of this.

Dr Steve Decesare, the Legal Representative for Bezzina Maritime Services Limited countered that there was no request for the Reference Letter in the Tender Document. The latter only requested a web address, the issuing Authority and any further references.

Dr Franco Agius, a Legal Representative for the Department of Contracts, said that the European Single Procurement Document was a standard formula. The requirements come out from the Tender Document which at the end of the day binds all parties. Transport Malta wanted to know the quality of the works done and whether these were done correctly.

Dr Steve Decesare, the Legal Representative for Bezzina Maritime Services Limited concluded that the European Single Procurement Document requested some specific documents which his clients submitted. The Bidder was giving his consent so that if the Contracting Authority can contact its clients to gather the information from Third Parties and that was the reason why there was the European Single Procurement Document.

At this stage, the Public Hearing was adjourned to Thursday 14 December 2017 at 09:00 wherein the Public Contracts Review Board will transmit the decision taken for this Objection verbally and then distribute a hard copy of the same to all parties concerned.

This Board,

Having noted this Objection filed by Bezzina Maritime Services Limited (herein after referred to as the Appellant) on 1 December 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference CT 2039/2017 listed as Case No 1111 in the records of the Public Contracts Review Board, issued by Transport Malta (herein after referred to as the Contracting Authority).

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Appearing for the Appellant: Dr Steve Decesare

Appearing for the Contracting Authority: Dr Franco Agius

Dr Joseph Camilleri

Dr Christopher Mizzi

Whereby, the Appellant:

- a) Refers to the letter dated 21 November 2017, sent by the Contracting Authority, wherein he was informed that the Tender is being cancelled and stating also that his offer was technically non-compliant.

Bezzina Maritime Services Limited also refer to a subsequent letter dated 22 November 2017, again sent by Transport Malta, informing him of the specific reason as to why his offer was rejected, in that, the Appellant's experience and ability failed to be totally confirmed, as one of the clients so declared by him, did not reply to the request for confirmation of executed works carried out.



In this regard, Bezzina Maritime Services Limited maintain that in a Tender of such magnitude, the Contracting Authority did not take the necessary measures, in other forms, to obtain the information necessary from this particular client and in this case, did not apply the principle of proportionality.

This Board also noted the Contracting Authority's "*Letter of Reply*" dated 6 December 2017 and its verbal submissions during the Public Hearing held on the same date, in that:

- a) Transport Malta maintains that it had carried out the Evaluation Process in a diligent and transparent manner and, in this particular case, the Evaluation Board felt the justifiable need to verify the experience as duly declared by the Appellant in his offer.**

In this regard, the Contracting Authority requested confirmation of the execution of such declared works and out of three requested confirmations, only two were confirmed and received, so that the Appellant was deemed to be technically non-compliant.

This same Board also noted the Testimonies of the witness namely, Mr Clifton Borg duly summoned by Transport Malta.

This Board, after having examined the relevant documentation in connection with this Appeal and heard submissions made by both parties concerned, including the testimony of the Witness duly summoned by the Contracting Authority, opines that the issue under consideration of this Appeal is the non-receipt of the confirmation that previous works were carried out by the Appellant, from one of his previous clients. In this regard, this Board will consider this issue only, at this particular stage of the Evaluation process.

- This Board would refer to the Evaluation Report and for the sake of clarity, notes that Bezzina Maritime Services Limited's offer was considered to be administratively non-compliant and not as stated in the "*Letter of Rejection*", wherein the Appellant's offer was deemed to be technically non-compliant.

The Evaluation Report, in this respect, compliments this assertion by stating that the reason that the Appellant's offer was not administratively compliant was due to a deficiency in confirmation of his experience, so that, at this particular stage of the Evaluation Process, Bezzina Maritime Services Limited's Bid lacked some confirmation for previous works carried out only by the same.



- During the submissions made, this Board was made aware that, quite appropriately, the Evaluation Board requested confirmation of the executed Works from three clients, duly denoted in the Appellant's offer. After the stipulated period of seven days, Transport Malta received only two confirmations out of three requests.

At this stage of consideration, one must point out that, under the ESPD Formula, the Appellant is required to declare his experience and it is only after his offer is deemed favourable that such confirmations are obliged to be verified, however, through this action, Transport Malta felt the justifiable need to obtain such confirmation prior to the continuation of the Evaluation Process.

In this regard, from submissions made by the Appellant, this Board was also informed that the missing confirmation pertained to works carried out to an international company, so that this Board considers the fact that, under normal circumstances, a reply within seven days is highly unlikely.

However, later on in this process, the Appellant is claiming that he has proof that such a request was not received by his clients, so that no response could be forthcoming. At the same instance, this Board was



informed by the Contracting Authority that it had obtained the address of the Appellant's clients from other media sources.

- After having considered the sequence of events, this Board opines that the Evaluation Board could have taken into consideration that this Tender is of a substantial magnitude and the non-receipt of a reply to its requested information should have been further followed up through other means of communication and confirmation of the address, if need be, through the Appellant. In this regard, this Board justifiably notes that after the seven days elapsed, no further action was taken by the Evaluation Board by applying the principle of proportionality.

This Board respectfully refers to the directive issued by the European Union in respect of the implementation of the "*Principle of Proportionality*", in that the same directive calls for the award of contracts to comply with this principle, especially when:

The necessity for attaining the Objective exists

In this particular case, from the Evaluation Report and the Testimony of the Witness duly summoned by Transport Malta, it was confirmed that, at this particular stage of evaluation, Bezzina Maritime Services Limited



would have qualified for the next stage of Evaluation, if it was not for this confirmation deficiency.

One must also note that the deficiency consisted of one missing confirmation out of three requests. One should also consider that, in such circumstances, the Evaluation Board should do their utmost to save the Tender and when faced with such occurrences and the same Board acknowledges that there is an objective, which, in actual fact, exists in this particular case, every effort should be made, without breaching the Public Procurement Regulations, to implement the necessary tools to achieve such objectives.

In this regard, this Board opines that the Evaluation Board had the objective to receive the confirmation of the Appellant's executed works so that, at this particular stage of Evaluation, this requested information was vital for the continuation of the Appellant's offer and this requirement created a necessity to obtain the information through other possible means prior to discarding the offer.

In view of the above, this Board finds in favour of Bezzina Maritime Services Limited and recommends that:

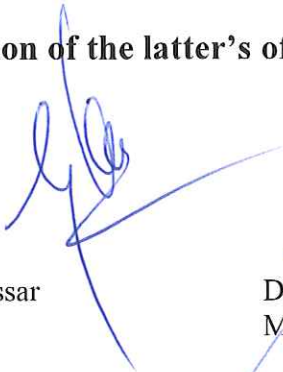


- i) The decision to Cancel the Tender is to be Revised;**

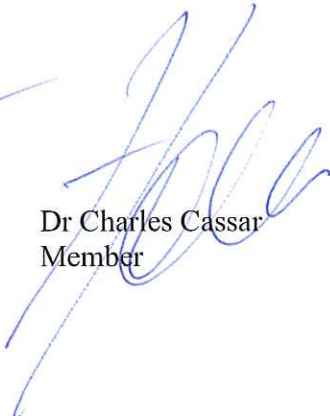
- ii) The Appellant's offer is to be reintegrated in the Evaluation Process;**

- iii) The deposit paid by Bezzina Maritime Services Limited is to be fully refunded;**

- iv) The Evaluation Board is to apply the Principle of Proportionality, in obtaining the requested information regarding the Appellant's past execution of works and ability, through more practical means of communicating with the Appellant's Previous Client, prior to the rejection of the latter's offer.**



Dr Anthony Cassar
Chairman



Dr Charles Cassar
Member



Mr Carmel Esposito
Member

14 December 2017