

PUBLIC CONTRACTS APPEALS BOARD

Case No. 52

RE: CT 2752/2004 – Advert No 37/2005
Consultancy Service for the project “Establishing Civic Amenity and Bring-In Sites, a Separation Waste Collection and an Integrated Communications Strategy in the Maltese Islands”

This call for tenders, published in the Maltese Government Gazette and the Official Journal of the European Communities respectively on the 15.02.2005, was issued by the Contracts Department following a request transmitted to the latter by WasteServ Malta Ltd.

The closing date for this call for offers was 29.03.2005.

Messrs WasteServ Malta Ltd appointed an Evaluation Board consisting of Messrs.

Mr Joe Degiorgio	Chairperson
Mr Kevin Mizzi	Secretary
Ms Margaret Fenech	Member
Ms Mary Grace Micallef	Member
Dr Ing Christopher Ciantar	Member

to analyse a total of five (5) offers submitted by different tenderers.

The global estimated value of the contract in question was Lm 100,855.

Following recommendations made by the Evaluation Board to the Contracts Committee for the latter to award the tender to Messrs Danwaste Consult A/s (Lm 85,000), Messrs SLR Consulting Ltd filed an objection on 13.09.2005.

The Public Contracts Appeals Board (PCAB) made up of Mr. Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr. Maurice Caruana, respectively acting as members, convened a public hearing on 07.11.2005 to discuss this objection.

Present for the hearings were:

SLR Consulting Ltd

Mr Andrew Street
Ing Mario Schembri – AIS Environmental Ltd
Dr John Refalo – Legal Advisor

Danwaste Consult A/S

Mr Jens Kallesoe – Senior Consultant and Partner in Danwaste Consult

WasteServ Malta Ltd

Dr Victor Scerri LL.D.

Evaluation Committee

Mr Joe Degiorgio - Chairperson
Mr Kevin Mizzi - Secretary
Ms Margaret Fenech – Member
Ms Mary Grace Micallef – Member
Dr Ing Christopher Ciantar - Member

At the beginning of the hearing, Dr John Refalo (SLR Consulting Ltd's legal representative) formally asked for the evaluation grid of all the tenderers and a copy of the adjudication board's report because his clients were only furnished with a copy of the SLR Consulting Ltd's evaluation grid. He explained that this was considered insufficient because they wanted to know the basis on which the whole assessment was made and also because they felt that the points awarded to them were too low.

Dr Victor Scerri claimed that SLR Consulting Ltd never asked for such information and that it was the General Contracts Committee which had to decide whether to give such information or not.

The PCAB pointed out that it had to be ascertained that such documents did not contain information that was of a commercial nature and, as a consequence, it was agreed to proceed with the hearing to see how things developed. It was also made clear that the Board would not allow 'fishing expeditions'.

At this stage the Chairman, PCAB, invited the representatives of SLR Consulting Ltd to explain the motive leading to their objection.

Dr Refalo started by stating that the results given on the evaluation grid in respect of his clients were ridiculously low because the persons involved in this project, apart from being widely recognized in the UK, had practiced in various parts of the world and were considered to be leaders in their fields. In the tender document they had shown that the company had been involved in a large number of waste related projects and had an excellent track record.

Ms Margaret Fenech, representing WasteServ Malta Ltd, declared that during the evaluation process they examined the CVs of both key experts indicated by SLR Consulting Ltd, namely, Messrs Jamieson Diarmid and Harris John. She said that the first expert had joined the company only two years ago and his previous experience was not in waste management but was more related to compiling assessments and evaluating documents. The CV was very briefly described and they could not even conclude what his role was. The other expert was more experienced in waste management operations. However, although in his CV he mentioned training, he did not specify what type of training he did. Moreover, Ms Fenech said that this expert was qualified in Chemistry and not in Environmental Engineering or in a related field. In the tender it was indicated that the evaluators would give preference to someone with a post-graduate degree.

Ms Fenech was cross-examined by Dr Refalo on various issues relating to SLR Consulting Ltd and South West Regional Assessment Centre (SWRAC) as shown hereunder:

The witness testified that only SLR Consulting Ltd had a sub-contractor, namely AIS Environmental Ltd (AIS). She explained that in the tender document, under para (f) of the sub-heading '*In case of sub-contracting*', it was only specified that the total value of the sub-contracted part of services must not exceed 20% of the contract value.

Ms Fenech proceeded by explaining that the main aim of the *rationale* was to see how the contractor could support WasteServ Malta Ltd in this tender. However, although in their proposal SLR Consulting Ltd gave extensive description of the things stated in the terms of reference, they did not specify what their role would be. Apart from this, continued Ms Fenech, the stakeholder management, which was mostly needed in case of disagreement, was very confusing.

WasteServ Malta Ltd's representative also stated that in their tender proposal the appellants only gave information in respect of *strategy* but did not guide WasteServ about the actual approach of how they were going to implement those activities mentioned in the rationale.

As regards the *timetable* issue, Ms Fenech said that the tasks described by appellants in the timetable were very limited and so it was insufficient for their purpose. Dr Refalo intervened by stating that, in the timetable, his clients gave a detailed description of what they intended to perform month by month.

The witness proceeded by confirming that in their evaluation they also took into account the *track record* of the companies involved and the relevance of their experience to the requirements of the tender document.

When Dr Refalo asked Ms Fenech to pronounce the number of points that were awarded to South West Regional Assessment Centre (SWRAC), Dr Scerri intervened by stating that the purpose of these proceedings was not to discuss the merits and demerits of the other companies but to establish why SLR Consulting Ltd did not obtain enough points to qualify. However, Dr Refalo insisted that they wanted to know how SWRAC were awarded a higher score, alleging that this company had never worked in this field and that the basis on which the points were awarded was, as a consequence, flawed. Dr Scerri pointed out that the criteria on which the points were based were established beforehand and their concern would have been justified if the evaluation committee would have used different criteria for each tender.

After the PCAB ruling that, for the sake of transparency, in this particular instance, it was giving its consent to the appellant's request, Ms Fenech confirmed that SWRAC obtained 79 points which was higher than those obtained by SLR Consulting Ltd, namely, 60.62 points. The reason given was that this company had a very good timetable, it presented a clear and detailed input and output table and their experts had extensive experience.

When asked to comment on SWRAC's *track record*, Ms Fenech said that the company was involved in waste management operations. Dr Refalo said that the same Company website indicated that they were mainly involved in training.

The witness also testified that SLR Consulting Ltd were awarded an average of 12.66 points on *rationale* while SWRAC were given 16 points. It was stated that the difference was mainly due to operational management.

On the issue of *expertise* SLR Consulting Ltd and SWRAC were awarded 27.96 and 37 points respectively for Key Experts. Ms Fenech said that, although the application of the latter did not include the participation of local professional skills, in their evaluation they took into consideration the fact that the Engineer Ms Toft Helen had previous experience in Malta (liaison with Maltese Government officials to share experiences on waste legislation and on the promotion of Maltese Institutions).

Dr Refalo intervened in order to remind this Board that that the terms of reference specified that *'The Consultant should pay attention to the need to ensure the active participation of local professional skills where available, and a suitable mix of international and local staff in the project teams.'*

In so far as Danwaste Consult A/S is concerned, Ms Fenech declared that although these did not have any local expertise, yet their experience was very extensive in what was demanded in the tender offer, that is, operational management experience in waste management, civic amenity sites and bring-in sites. She confirmed that they had considered the engineer's experience, namely Mr Ole Vennicke Christiansen, in this region when compared to Malta, that is, Italy, Turkey, Crete, Spain and Gibraltar.

At this stage the PCAB intervened to point out that, as far as *'Specific professional experience'* was concerned, the tender document specified that:

'Direct experience in the design and carrying out of training modules, in order to, provide the necessary competence in the area of waste management is an essential prerequisite. Furthermore, knowledge in the overall management of waste, the material flow associated with it particularly the collection of statistical information to record appropriately these flows will be considered an asset. Additionally, direct experience in the management projects similar to this and in stakeholder communication directly involved in the project will be considered an asset.'

Mr Andrew Street, Director, SLR Consulting Ltd, took the stand and was cross-examined by Dr Refalo,

The same witness commenced his testimony by providing general background information on the Company. He said that SLR Consulting Ltd was a leading waste management consultancy company in the UK, employing 200 technical staff members, mostly employed in waste management related projects. Furthermore, according to the same witness, the Company is not only involved in providing consultancy services in the UK but also in advising some of the major international waste contractors in Europe. Also, they had been involved in providing consultancy services on a continuous basis over the past 10 years to various clients in Malta, including the Government of Malta.

SLR Consulting Ltd are not only involved in landfills. Mr Street drew the attention of those present that as stated on page 3 of their tender document they included a range of waste management services offered by the Company which covered all aspects of waste management.

Mr Street referred to the issue of key experts and said that Engineer Jamieson Diarmid was erroneously described as having only two years experience, but this only referred

to his experience gained with SLR Consulting Ltd. In the CVs they specified his overseas exposure and that between 1997 and 2002 he was engaged with Enviros Consulting as a Project Manager/Director of waste management projects. As a matter of fact, Eng. Diarmid was recognized as one of the leading experts in this sector. The second expert was Mr John Harris, a previous Director with Shanks Waste Services Ltd which was one of the leading waste management companies in UK, had over 20 years experience in waste management. Also, he was directly involved in directing the management of all operations in Scotland including civic amenity sites and waste collecting schemes.

In view of the above Mr Street stated that he was surprised with the points awarded to these experts.

He declared that AIS Environmental Ltd was their local representative with whom they had a close working relationship. Mr Street added that he was of the opinion that international and local experience was essential to ensuring a balanced approach so much so that during these last ten years they had developed a considerable amount of local experience.

The same witness proceeded by saying that under Section 3, '*Organization and Methodology*' SLR Consulting Ltd identified the precise requirements and the key issues that needed to be addressed as set out in Annex III of the tender document. The first issue addressed under Rationale was '*Understanding of the Contract and Terms of Reference*' wherein the Company gave a clear statement of what was required. SLR Consulting Ltd continued by specifying the four key issues that needed to be addressed in accordance with the terms of reference, namely (i) civic amenity sites, (ii) bring-in sites, (iii) a separate collection scheme and (iv) a communications campaign. As regards the second part they dealt with the '*Key Issues Related to Achieving Objectives*'. Also, in accordance with the requirements of the terms of reference, they highlighted the assumptions that had been made and the risks involved. Mr Street declared that local councils were going to play a key role in the stake-holding management process. Finally, the witness stated that SLR Consulting Ltd set out the strategy wherein they outlined the approach that they were going to take in order to meet the six tasks mentioned in their offer. These were supported by a timetable.

In the circumstances, Mr Street contended that they had provided all information as set out in the terms of reference and, contrary to what was stated by the previous witness, everything was very clear and nothing was confusing.

SLR Consulting Ltd's Director alleged that SWRAC was not a company but an advisory body which was not involved in consultancy and training or indeed had any operational experience whatsoever. With regard to Ms Helen Toft, Mr Street said that she had very limited working experience in Malta and during these last years she was not involved in any operational or consultancy work related to waste management.

With regards to South Herts Waste Management Ltd, another tenderer, the witness claimed that it was a very small waste management company that operated civic amenity sites.

As far as Danwaste Consult A/S was concerned, Mr Street claimed that his understanding was that it was a small group of professionals, who were associated with the city of Copenhagen's Waste Management Operation.

Mr Street explained that in SLR Consulting Ltd's proposal, it was '*inter alia*' pointed out that '*there is a need to ensure that the equipment and machinery procured through this contract is appropriate and fit for the purpose. The specifications of equipment and machinery will need to take account of the proposed size and layout of proposed civic amenity facilities and also will need to take account of local (Maltese) conditions*'. He declared that they would be able to bring the experience gained by their expertise in all types of locations and apply their proposal according to the local situation.

The same witness contended that, taking into account SLR Consulting Ltd's track record and the fact that it was one of the largest waste consultancy company in Europe with extensive experience in Malta, the Company should have scored more than the 79 points obtained by SWRAC.

Mr Street concluded his testimony by stating that, once the assumption of those reviewing this tender was wrong then the whole process was flawed.

On cross-examination by Dr Scerri, Dr Ing Chris Ciantar, a Member of the Evaluation Committee, testified that, although he did not draft the tender document himself, he had reviewed the documentation prior to its publication. One of his responsibilities was that of paying personal visits to a number of EU member states to see how such facilities operated and to establish the level of expertise that was required. He said that none of the people who were managing the facilities in Malta had ever seen a civic amenity in operation. Dr Ciantar explained that when they toured a number of EU member states, they were impressed by the level of operational efficiency of such civic amenity sites, as well as the way they were designed, managed and operated.

During cross-examination by Dr Refalo, Dr Ciantar confirmed that the terms of reference were drafted in such a way to ensure that they would acquire the services and expertise and be well equipped as other member states, such as Scandinavia. At this stage, Dr Refalo intervened by stating that once they had something specific or, precisely, Scandinavia in mind, they should have stated this in the tender's terms of reference. Dr Ciantar replied that under EU funding they could not be exclusive and this tender had to satisfy the criteria of EU procurement. He insisted that everybody had the opportunity to submit a tender according to the terms of reference. Each proposal received was evaluated according to the established criteria and was assessed and marked individually. Then they worked the average score of the three evaluators as shown in the report.

In reply to the PCAB's questions, Dr Ciantar declared that Danwaste Consult A/S had never been consulted and that no member of the Evaluation Committee had in fact visited Denmark in connection with these civic amenities. Dr Ciantar testified that they only received pre-accession technical assistance from the local authority of Copenhagen. At this point, Dr Refalo quoting from Danwaste's web-page, said that it was an independent limited company founded in 1991 with the purpose of providing consultancy services within solid waste management with the waste management system of the city of Copenhagen as the point of departure. He recapitulated that they

had received technical assistance from the local council of Copenhagen and awarded this tender to a company that worked closely with the local council of Copenhagen on a tender that was designed specifically for a Scandinavian country. Dr Ciantar declared that they were not influenced by this technical expert who was not a member of the evaluation board. Danwaste Consult A/S were chosen because they had satisfied all the tender's criteria and terms of reference.

As regards local expertise, Dr Ciantar testified that this was not an exclusive requirement. He claimed that there was no one in Malta who was an expert in civic amenity sites.

Mr Jens Kallesoe, a partner of Danwaste Consult A/S, declared that he had no particular experience in so far as Malta is concerned and that he had never been contacted by any local council in Denmark or any one from Malta with regard to this tender. With regard to the organisation's capabilities, Mr Kallesoe stated that they had four senior consultants and that they would draw expertise from the city of Copenhagen to implement this project. The same witness testified that it was important to note that it was stated that the system which had been adopted in Denmark was a point of departure because, they took into account the local situation of that particular country before embarking on a system and adopting it according to the local circumstances.

In his concluding remarks, Dr Refalo said that from Ing Ciantar's testimony, it was clear that there was a certain bias towards the Scandinavian system. As a matter of fact Ing Ciantar even went as far as to claim that, for example, the British standard left very much to be desired. Dr Refalo questioned whether it was correct to award a tender under these circumstances. He argued that it did not make sense to transpose a Scandinavian system to a Maltese system because the mentality of the people in Malta was not the same as that of Denmark. He contended that any system that would be adopted would have to depend on the collaboration of all stakeholders. Furthermore, the appellants' legal representative reiterated that had WasteServ Malta Ltd desired a particular system they should have indicated this in the tender document and not during the adjudication process.

Dr Refalo insisted that the decision taken was not an objective one because, if one were to analyse SLR Consulting Ltd's proposal, the company's track record and expertise, the score given was not justified. Furthermore, he pointed out that his clients had complied in all aspects of the tender's requirements. Dr Refalo said that consideration should also have been given to the size of the companies because SLR Consulting Ltd was a company that employed over 200 technical staff and had all the necessary resources whilst Danwaste Consult A/S employed only four people and it needed to borrow the resources of other companies.

On his part, Dr Scerri wanted to conclude by stating that it was very unjust that the appellants made certain allegations without substantiating them. He insisted that in spite of the fact that SLR Consulting Ltd had some tenders with WasteServ Malta Ltd, they should not pretend to have some kind of monopoly.

Dr Scerri said that when WasteServ Malta Ltd drafted the tender document, the only thing they had in mind was trying to find the best available option in Europe which it wanted to adopt for Malta.

Dr Scerri said that, if something was wrong in the process, the EU would have stopped the tendering process and would have asked WasteServ Malta Ltd to reissue the tender. On listening to this, Dr Refalo intervened and replied that had Ing Ciantar given such evidence in front of the EU Commission, he had no doubt whatsoever that the same Commission would have not accepted such award.

Dr Scerri proceeded by pointing out that the tender was judged and decided upon according to the terms of reference. He contended that WasteServ Malta Ltd had every right to define the system which best suited Malta's needs and to choose according to the criteria which were issued with the tender. He concluded by stating that the Evaluation Board took into consideration everything that was presented to it with the offers and that the PCAB had to rely on the technical experts' decisions.

At this stage, the public hearing was concluded and the PCAB proceeded with its deliberations before reaching its decision.

The Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated 20th September, 2005, and also through their verbal submissions presented during the public hearing held on the 7th November, 2005, had objected to the decision taken by the General Contracts Committee communicated to them in terms of the letter dated 24th August, 2005, informing them that the tender submitted by them was not successful since their tender "*.....did not obtain the necessary minimum requirement of 80 points as indicated in the published tender document under Annex VI (Evaluation Grid)*"
- having established that appellants' 'failure' was the result of their overall (final) score awarded through the 'Evaluation of technical offers' conducted in terms of Clause 12.1 of the tender documents and also reflected in the evaluation grid established by Annex VI of the said tender documents;
- having heard and examined appellants' arguments that SLR Consulting Ltd, both in terms of its track record in the UK and also in Malta, as well as its "*wealth of experience across all aspects of the required study*" (as referred to in *The Reasoned Letter of Objection*), fully met all expectations specified in the 'Terms of reference' listed in the tender documents and, consequently, failed to understand why their tender was technically disqualified from final consideration, having obtained a score (60.62points) which was lower than the established minimum requirement (80 points);
- having, for the purpose of establishing whether the evaluation (adjudication) exercise was conducted under conditions which guaranteed an acceptable level of fair play and impartiality, heard the evidence obtained under oath from the technical evaluators, including the declarations made to the effect that, in the preparation of the tender documents, the Scandinavian models represented *a priori* the preferred solutions whilst, in contrast, the UK systems were considered to be by far inferior;

- having also noted that, in two particular assessment areas, namely, (a) the evaluation of the competence of the proposed Waste Management Operational Expert (Key expert 2) and (b) the evaluation of the presentation made regarding local experience requirements, sampled by the Board for the purpose of checking whether the respective information submitted by the appellants had in fact been correctly interpreted, the evaluators had clearly failed to interpret correctly the proposals submitted and, consequently, evaluated wrongly the respective proposals;
- having also observed that there was only one tender which surpassed the '*minimum requirement of 80 points*', namely the Danish (Scandinavian) firm Danwaste Consult A/S which was awarded the contract. The next closest tender from a UK bidder was awarded just one point less than the minimum required (79 points), thereby resulting in its disqualification;

reached the following conclusions:

1. The decision to award only failing points to the appellants was essentially based on an evaluation process and procedure which has resulted to the Board to be lacking in the proper and valid interpretation of the information supplied;
2. The contracting authority's expectations from prospective bidders, from the early preparation of the tender documents, were already biased in favour of a particular model applied in a particular geographical region leading to the *de facto* exclusion of other solutions;
3. If the contracting authority had required a particular model, such as the Scandinavian model, the specifications in the tender document should have reflected this 'a priori';
4. In view of these findings, the Board seriously questions the validity and also the result of the adjudication exercise and recommends that the tender be re-issued with such terms of reference as would ensure that all potential bidders are treated equally and transparently;
5. In consequence to 1, 2 and 3, appellants' objection to the decision reached by the General Contracts Committee to award the contract to the Danish firm Danwaste Consult A/S., is upheld by this Board.

The Board also decided that the appellants should be refunded in full the deposit paid in conjunction with this appeal.

Alfred R. Triganza
Chairman

Anthony Pavia
Member

Maurice Caruana
Member