

PUBLIC CONTRACTS APPEALS BOARD

Case 93

CT 2568/2005; Advert Notice CT 60/2006 - Detailed Investigations and Feasibility Studies on Land Reclamation at Two Indicated Searches Areas, Malta

This call for tenders, published in the Maltese Government Gazette and the EU Official Journal on 3.03.2006, was issued by the Contracts Department following a request transmitted to the latter by the Malta Environment & Planning Authority (MEPA) on 20.10.2005.

The closing date for this call for offers was 25.04.2006 and the global estimated value of the total contract was Lm 174,000.

Five (5) different tenderers submitted their offers.

Following the publication of the *Notification of Recommended Tenderers*, Messrs *AIS Environmental Ltd* filed an objection on 07.08.2006 against the intended award of the said tender to Messrs *Scott Wilson Ltd* (Lm 182,000).

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Edwin Muscat, respectively, acting as members, convened a public hearing on 04.10.2006 to discuss this objection.

Present for the hearing were:

AIS Environmental Ltd

Dr John Refalo
Ing Mario Schembri
Ms Liz Curmi

Legal Advisor

Scott Wilson Ltd

Mr David Dales
Mr Russel Foxwell
Mr Kevin Morris
Ms Krista Falzon

Malta Environment and Planning Authority (MEPA)

Mr Vincent Gauci
Mr Michael J Sant

Chairperson (Evaluation Committee)
Member (Evaluation Committee)

After the Chairman's brief introduction, AIS Environmental Ltd's legal representative was invited to explain the motive leading to their objection.

Dr John Refalo, commenced his intervention by stating that his clients decided to file their objection because there were certain differences between the comments made by the Evaluation Committee in the *Summary of Compliant Tenders* and the documents filed by his clients. As a consequence, the appellants believed that the Evaluation Committee must have made some wrong considerations in its conclusions.

The appellants' lawyer claimed that it was not an easy task for them to file the appeal because they were not allowed to see the detailed reply that was given in respect of the other party. However, he pointed out their objection was not made in relation to the other party. Dr Refalo contended that they were contesting the methodology used in the adjudication process because the results obtained by his clients did not reflect what was presented in their bid. In addition, he contended that AIS Environmental Ltd's offer was fully compliant with the requirements of the tender specifications and therefore should have been given more points. Furthermore, he requested an explanation on the price of the recommended tenderer because he alleged that the one published by the Contracts Department was different from that indicated in Evaluation Committee's report.

Mr Vincent Gauci, Chairman of the Evaluation Committee, responded by stating that the evaluation of the tender under examination was carried out in accordance with *Article 6 (Award Criteria)* and *Article 7 (Choice of the tender document)* respectively, wherein the former stipulated that

'The quality of each technical offer will be evaluated in accordance with the award criteria and the associated weighting as detailed in the evaluation grid of this tender dossier. No other award criteria will be used'

whilst, in the latter, it was specified that

'The most economically advantageous tender is established by weighting technical quality against price on an 80/20 basis.'

He claimed that the methodology that was used followed the methodology applied in similar tenders and followed the Community's guidelines. Mr Gauci explained that the Evaluation Committee compared the tenders that met the basic requirements of the tender and it resulted that Messrs Scott Wilson Ltd (referred to as *Tenderer 4*) scored better than Messrs AIS Environmental Ltd (referred to as *Tenderer No 5*) both in terms of the (i) Organisation & Methodology and the (ii) Experts.

Mr Michael Sant, another member of the Evaluation Committee, explained that each member of the Committee first made an independent assessment and, subsequent to this, Committee members met and exchanged their opinions. Finally, the Committee proceeded to award points collectively.

In reply to a specific question by the PCAB, Mr Gauci stated that, in their assessment, Committee members followed the same evaluation criteria that were published with the tender document. At this point Dr Refalo intervened to state that they were concerned about the methodology used because the criteria that were used in

awarding the points on particular items in the ‘Comparative Table of Compliant Tenders’ were not very clear.

On being cross-examined by Dr Refalo, Mr Sant confirmed that AIS Environmental Ltd’s proposal was evaluated according to the tender’s terms of reference and that the criteria for awarding points was according to the grid published in the tender document.

When the appellants’ lawyer referred the witness to the comments made in the Evaluation Committee’s summary report wherein it was stated that *‘the proposed team has a good blend of local and overseas experts having considerable experience in their specific fields’* and that, *‘however, the team does not seem to have extensive experience in marine engineering works especially large scale land reclamation projects’*, Mr Sant pointed out that the tender bid was issued under the 80/20 rule which meant that they were making emphasis on quality. Also, the witness said that their statement confirmed that the appellants’ experts were of the required calibre and passed the basic benchmark which defined the minimum that was expected. However, he explained that the evaluation was made according to the various experiences that the individual experts had with respect to their specific proposal and therefore experts who worked extensively on similar land reclamation projects were given higher marks than others who had less experience.

Dr Refalo proceeded by asking various questions on (a) the points awarded to the individual experts and (b) other issues related to waste disposal and local expertise.

The same witness explained that AIS Environmental Ltd’s *Key Expert 1: Team Leader/ Environmental management expert* was awarded 5 points out of a maximum 5 for *Qualifications and Skills* because he had fulfilled the tender requirements of the terms of reference.

With regard to the points awarded in respect of *Professional Experience*, Dr Refalo said that they interpreted the 10 out of 20 points to mean that their ‘Team Leader’ did not have the requisite experience. The appellants’ legal representative drew the attention of those present that their expert fully satisfied the requirements of the tender because, according to the terms of reference, the *Key Expert 1* needed to have at least *‘ten years working experience in managing related multi-disciplinary projects, including marine environmental, waste management, technical, legal and financial issues’* and *‘experience in preparing feasibility studies and environmental impact studies’*.

Mr Sant replied that if he did not have the requisite experience they would have disqualified him *‘ab initio’*. He also clarified that the *Expert* proposed by the appellants was awarded 2/5 and 8/15 for *General and Specific Professional Experiences* respectively because his experience was more oriented towards his capability in *Integrated Coastal Zone Management and Environmental Monitoring* rather than on *land reclamation*. The witness said that the ‘Leader’ proposed by Scott Wilson Ltd was given more points because he worked specifically on *land reclamation* projects.

In reply to Dr Refalo’s claim that in spite of the fact that in their comments it was reported that *‘the proposed local supporting biologist does not have sufficient*

experience', the Evaluation Committee still gave their Marine Biologist 9 out of 9 points under *Specific professional experience*, Mr Sant clarified that this was due to the fact that the proposed biologist had fulfilled the Tender's specific requirements as far as (a) methodology, (b) know-how and (c) analysis were concerned. The witness also explained that under *General Professional Experience* the appellants' Expert achieved 2 out of 4 points because they generally wanted an Expert who had experience in local habitat. On this particular issue, the PCAB commented that it was of the opinion that, in future, a requisite which is something expressly requested should be included under a 'Specific' condition / requisite and something of a generic nature should be included under 'General' conditions / requisites.

In reply to Dr Refalo's question regarding the difference in the points awarded for *Specific professional experience* as far as the 'Marine Construction Specialist' is concerned, Mr Sant said that this was due to the fact that the experience of the *Expert* proposed by appellants was not as extensive as they might have desired while, on the contrary, Scott Wilson Ltd's *Expert* had actively participated in the completion of similar projects all over the world.

With regard to the points awarded in respect of the *Solid Waste Management Specialist*, Mr Sant said that, AIS Environmental Ltd's proposed *Expert*, had very extensive experience related to 'landfills' and 'landfill technology' while Scott Wilson Ltd's *Expert* had experience in both 'solid waste management' and in 'land reclamation'.

Mr Sant said that AIS Environmental Ltd's *Environmental Economist* obtained more points because appellants proposed a consultant who possessed more experience when compared with the one suggested by their competitors.

Dr Refalo said that *Section 1.15.2 – Other experts* specified that

'In addition to the above experts, a pool of experts with specific local knowledge in the following areas must be included in the team.'

When Dr Refalo asked whether the use of local expertise was an issue, the witness replied that this was important because for the purpose of the *Marine Survey* they requested experts who had experience in local habitat. Mr Sant confirmed that a couple of local geologists, namely, Mr Aaron Micallef, proposed by the recommended tenderer, and Dr Saviour Scerri, suggested by appellants, were taken into consideration by the Evaluation Committee.

The appellants' legal representative said that they failed to understand how it was stated that *'in effect the proposed rationale for this part of the project is too focussed on locally produced construction & demolition waste without considering other options'* because the terms of reference themselves made specific reference to the waste generated from the construction industry.

Mr Sant pointed out that this tender was the result of a study carried out by *Carl Bro* on land reclamation and that they even made reference thereto in the terms of reference of the tender under consideration, wherein it was stated that *'In 2004, MEPA initiated phase 1 of the Land reclamation project by commissioning a Project Identification Study. This study resulted in an overall Project Identification Report.'*

This Report among others, reviewed current practices in the coastal area, and environmental and other constraints related to land reclamation.'

The witness claimed that during this tender's evaluation process, they expected to find as part of the deliverables, some analysis of the different possibilities as to how waste management and land reclamation could be done together. Mr Sant emphasised that tenderers had to indicate how they were going to use the land that was going to be reclaimed and, in the Committee's opinion, Scott Wilson Ltd had (a) demonstrated a good overall understanding of the purpose of the study, as well as (b) amply explained how they were going to apply their previous experience in order to comply with the requirements of the tender. Furthermore, Mr Sant stated that the recommended tenderers had referred to various case studies and projects that had been successfully implemented in other parts of the world. The key witness claimed that all these factors had a significant bearing on the evaluation process as well as the score obtained by participants under the section entitled 'Organisation and Methodology'.

Dr Refalo responded by stating that if they wanted a certain solution they should have indicated it clearly in the tender document.

With regard to the prices quoted in Scott Wilson Ltd's offer, Mr Sant clarified that the fee of Lm 172,000 had been increased by Lm 10,000 due to sampling surveys. He explained that although this amount was calculated separately as an additional option, the Evaluation Committee was of the opinion that such sampling surveys were necessary and therefore decided to include it for the purpose of evaluating the financial score. He declared that the contract price would be awarded for Lm 182,000.

Mr Gauci declared that the witness's (Mr Sant's) testimony reflected the Committee's opinion and that the decision was taken unanimously.

At this stage, the public hearing was brought to a close and the PCAB proceeded with its deliberations before reaching its decision.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated 14.08.2006, and also through their verbal submissions presented during the public hearing held on 4.10.2006, had objected to the decision taken by the General Contracts Committee, formally communicated via a letter, informing them that the tender submitted by them was not successful;
- having considered the issues raised by the appellants;
- having also noted the explanations given by the Chairman of the Evaluation Committee as well as Mr Sant with regards to the methodology applied in this tender;

reached the following conclusions:-

This Board

1. feels that the Evaluation Board acted in a reasoned, objective and effective operational manner and perfectly in line with normal praxis;
2. considers the decision reached by the Contracts Committee as justified;

Pursuant to (1) to (2) above, this Board does not uphold the appeal lodged by the appellants.

The Board strongly feels that the whole exercise undertaken by the appellants was frivolous and in terms of the Public Contracts Regulations, 2005, recommends that the deposit submitted by the appellants should not be refunded.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

23 October 2006