

PUBLIC CONTRACTS APPEALS BOARD

Case No. 153

Adv. No. 224/2008; CT/2430/2008; HM.20.08

Service Tender for the 3D Documentation of the Hal-Saflieni Hypogeum Underground Complex

This call for tenders was, for a contracted value of € 70,000 (excluding VAT) was published in the Government Gazette on 17.10.2008. The closing date for this call for offers was 09.12.2008.

Six (6) different tenderers submitted their offers.

On 17.04.2009 *klf consulting Ltd* filed an objection against the intended award of the tender in caption to *DMT GmbH & Co. KG*.

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Carmel Esposito, respectively, acting as members convened a public hearing on 18.05.2009 to discuss this objection.

Present for the hearing were:

klf consulting Ltd

Dr Simon Schembri
Mr Keith Fearné

Legal Representative
Representative

Heritage Malta

Dr Patrick Valentino

Legal Representative

Evaluation Committee:

Mr Anton Catania
Ms Joanne Mallia
Mr David Zahra
Ms Nicolette Debono

Chairperson
Member
Member
Secretary

DMT GmbH & Co. KG (DMT)

Mr Rainer Kuchenbecker

Representative

Department of Contracts

Mr Francis Attard
Mr Bernard Bartolo

Director General
Assistant Director

After the Chairman's brief introduction the appellant Company's representative was invited to explain the motives of the objection.

Dr Simon Schembri, legal representative of klf consulting Ltd, explained that when his clients submitted the tender they did not indicate anywhere in its documentation that it was going to subcontract services from Archeometra SRL. Yet, continued Dr Schembri, in the documentation submitted by his clients, it was clearly laid down that Mr Riccardo Stocco was part of the consortium, so much so, that the Mr Stocco had signed the *Statement of Exclusivity and Availability*.

Deleted: documentenation

Dr Schembri also mentioned that Mr Stocco was referred to as the 'Chief Executive Officer' of Archeometra SRL and the purpose for doing so was that Archeometra SRL had a high profile in this line of work and, as a consequence, klf consulting Ltd wanted to stress the point that the person identified as one of the key experts was a competent person in the field.

The appellants' legal advisor also acknowledged that the tender conditions made it amply clear that the tenderer could not resort to subcontracting as far as the key experts were concerned and he reiterated that Mr Stocco formed part of the consortium represented by his client.

With regard to subcontracting in general, Dr Schembri stated that Article 4 Annex I of the 'General Conditions', which prevailed over any other provision, laid down that the successful tenderer could subcontract. Dr Schembri argued that his client could, thus, subcontract Archeometra SRL on other services but not to provide key expert services. Dr Schembri insisted that in no part of the tender documentation submitted by his client was there any reference that Archeometra SRL was going to be subcontracted to provide key expert services.

To the question put forward by the Chairman PCAB to indicate where in the tender document it emerged that Mr Ricardo Stocco formed part of the consortium, Dr Schembri referred, once again, to the *Statement of Exclusivity and Availability* which was a declaration signed on the 4th December 2008 by Mr Ricardo Stocco in his private capacity and printed on the letter-head of klf consulting Ltd and ITABC, which stood for one of the institutes of the National Research Council of Italy and which statement formed part of the tender documentation submitted by his client.

Dr Patrick Valentino, legal representative of *Heritage Malta*, contended that the tender conditions were quite clear and could not be misrepresented. Dr Valentino referred the PCAB to the appellants' tender submission where, in page 1, it was clearly indicated that, on the part of the appellant Company, the tender was submitted by the consortium made up of klf consulting Ltd and ITABC and that Archeometra SRL was going to be engaged as a subcontractor.

Dr Valentino added that on page 2 of the same submission, Mr Ricardo Stocco was referred to as *no less than the CEO of Archeometra*.

Dr Valentino contended that, from the tender documentation, it emerged that Mr Stocco was not involved, neither with ITABC nor with klf consulting Ltd.

The contracting authority's lawyer also made reference to page 3, 'Tender Submission Form' and to the 'Details of Bidder' which, similarly, referred to klf consulting Ltd and ITABC. Dr Valentino declared that there was no reference whatsoever in the tender documentation that associated Mr Stocco with the consortium represented by the appellant Company.

Dr Valentino stated that the appellant Company was basing its arguments solely on the *Statement of Exclusivity and Availability*.

At this point Dr Valentino referred to the CV of Mr Ricardo Stocco which indicated that Mr Stocco was the CEO of Archeometra SRL.

Dr Valentino explained that in page 63 clause 1.1.20.1, under the heading 'Key Expert', the tender conditions specified that "*Sub-contracting is NOT allowed for the purposes of this contract.*"

With regard to subcontracting, Dr Valentino stated that, according to Section 4 (2), the subcontractor must seek prior written authority from the contracting authority before entering into a subcontract. He remarked that, as a result, subcontracting was allowed but not with regard to the services of the key experts.

The Chairman PCAB quoted from the *Statement of Exclusivity and Availability* of Mr Stocco:

I, the undersigned, hereby declare that I agree to participate exclusively with the tenderer 'klf consulting and CNR'....

and asked if that 'participation' meant that Mr Stocco was part of the consortium because, in his view, one could participate in something without being part of it.

Dr Valentino insisted that no part of the tender documentation demonstrated that the Mr Stocco was part of the consortium.

Dr Schembri quoted from page 1 of his clients' tender submission:

Archeometra, a private company based in Italy, will be also engaged as a subcontractor, and will provide one of the key experts.

Dr Schembri added that the consortium was made up of ITABC, klf consulting Ltd, Paolo Salonia and Ricardo Stocco, and that in the case of Mr Stocco, his clients mentioned the association with Archeometra SRL because that firm had a name in that particular line of work. Dr Schembri argued that ITABC was not a private company but an institute of the National Research Council of Italy and that Mr Ricardo Stocco belonged to it.

Dr Valentino insisted that there was no document that stated that Mr Stocco was part of ITABC but what the documents showed was that Mr Stocco was the CEO of Archeometra SRL.

The Chairman PCAB remarked that it appeared that the entities involved were ITABC, represented by Mr Paolo Salonia, and klf consulting Ltd, and that, whilst there appeared to be no link between Mr Stocco and klf consulting Ltd, yet, there was an association between Mr Stocco and Archeometra SRL.

Once again, at this point, Dr Schembri explained that Mr Stocco did not feature in this tender documentation as the representative of Archeomtra SRL but his association with this firm was added on to give more weight to his expertise in this sector.

Mr Keith Fearn, representing klf consulting Ltd, explained that the Centro Nazionale di Ricerca (CNR) of Italy was made up of a number of institutes and that the ITABC was one of these institutes and, like any other university or *academia*, these institutes would have a number of persons engaged with them to do research. Furthermore, apart from this, they would also engage in other business activities otherwise such centres would not survive. Mr Fearn added that Mr Stocco was one of such persons engaged by ITABC but who also had other commercial interests, including Archeometra SRL.

Deleted: Ricerca

When asked to produce written evidence to prove that Mr Stocco was part of ITABC, which was one of the entities of this consortium, and which would therefore exclude Mr Stocco from being a subcontractor, Dr Schembri declared that the only document that his client had was the *Statement of Exclusivity and Availability*, which amounted to a declaration by Mr Stocco. Dr Schembri also made reference to page 2 of his clients' submission where Mr Stocco was referred to not as the CEO of Archeometra SRL but as 'no less than the CEO of Archeometra'. Dr Schembri conceded that the insertion of Archeometra SRL could have cast some doubt in the mind of the adjudicating committee.

Dr Schembri pointed out that, from the documentation, it emerged that the responsibility for these works was going to be shouldered by klf consulting Ltd, ITABC, Mr Salonia and Mr Stocco. He also explained that a clear distinction had to be made between general subcontracting which was allowed under Article 4, and the 'key experts', who were Mr Stocco and Mr Salonia.

Dr Valentino insisted that in the absence of a document submitted with regard to this tender that clearly indicated that Mr Stocco was part of ITABC, one could not assume that, perhaps, Mr Stocco was or could be part of ITABC. Dr Valentino added that from the *Statement of Exclusivity and Availability* one could not conclude that Mr Stocco was part of ITABC.

Dr Valentino concluded that the tender document was very clear stating that the 'key experts' could not be subcontracted. Also, the contracting authority's legal advisor further contended that the absence of written proof that Mr Stocco was part of the consortium rendered him a subcontractor. Dr Valentino remarked that Mr Stocco was described as the CEO of Archeometra SRL which firm did not form part of the consortium.

At this stage the public hearing was brought to a close and the PCAB proceed with the deliberation before reaching its decision.

This Board,

- having noted that the appellants, in terms of their ‘motivated letter of objection’ dated 17.04.2009 and also through their verbal submissions presented during the public hearing held on the 18.05.2009, had objected to the decision taken by the General Contracts Committee;
- having taken note of the appellant Company’s exposition of his claims, particularly the issues relating to the fact that, according to their legal representative, Dr Schembri:
 - in the documentation submitted by his clients, it was clearly laid down that Mr Riccardo Stocco was part of the consortium, so much so, that Mr Stocco had signed the *Statement of Exclusivity and Availability* in a declaration signed / dated 4th December 2008 by himself in his private capacity and printed on the letter-head of klf consulting Ltd and ITABC;
 - in the documentation submitted by his clients, Mr Stocco was referred to as the ‘Chief Executive Officer’ of Archeometra SRL with the purpose for doing so being that Archeometra SRL had a high profile in this line of work and, as a consequence, klf consulting Ltd, the appellant Company, wanted to stress the point that the person identified as one of the key experts was a competent person in the field;
 - Mr Stocco formed part of the consortium represented by his client and was not being subcontracted claiming that in no part of the tender documentation submitted by his client was there any reference that Archeometra SRL was going to be subcontracted to provide key expert services;
 - Article 4 Annex I of the ‘General Conditions’, which prevailed over any other provision, laid down that the successful tenderer could subcontract with Dr Schembri arguing that his client could, thus, subcontract Archeometra SRL on other services but not to provide key expert services;
- having also taken note of the contracting authority’s legal advisor’s counter argument which placed emphasis on the fact that (a) page 63 clause 1.1.20.1, under the heading ‘Key Expert’, the tender conditions specifically specified that “*Sub-contracting is NOT allowed for the purposes of this contract.*”, (b) the appellant Company was basing its arguments solely on the *Statement of Exclusivity and Availability* and (c) in the appellants’ tender submission (page 1) it was clearly indicated that, on the part of the appellant Company, the tender was submitted by the consortium made up of klf consulting Ltd and ITABC and that Archeometra SRL was going to be engaged as a subcontractor with Mr Ricardo Stocco being referred to as “*no less than the CEO of Archeometra*” in page 2 of the same submission;

- having also noted that in the ‘Tender Submission Form’ and to the ‘Details of Bidder’ (Page 3) which, similarly, referred to klf consulting Ltd and ITABC no reference was made to the effect that Mr Stocco was associated, in one way or another, with the consortium represented by the appellant Company despite of the fact that during the hearing it was being verbally stated (by the appellant Company) that the consortium was made up of ITABC, klf consulting Ltd, Paolo Salonia and Ricardo Stocco;
- having also taken note of the fact that the appellants’ legal advisor claimed that in page 1 of his clients’ tender submission “*Archeometra, a private company based in Italy, will be also engaged as a subcontractor, and will provide one of the key experts*”;
- having taken cognizance of Mr Fearn’s explanation as regards Italy’s Centro Nazionale di Ricerka (CNR) and Mr Stocco’s role within it;
- having acknowledged Dr Valentino’s argument that in the absence of (a) a document submitted with regard to this tender that clearly indicated that Mr Stocco was part of ITABC, one could not assume that, perhaps, Mr Stocco was or could be part of ITABC, adding that, from the *Statement of Exclusivity and Availability*, one could not conclude that Mr Stocco was part of ITABC and that (b) written proof that Mr Stocco was part of the consortium this, automatically, rendered him a ‘subcontractor’;

reached the following conclusions, namely:

1. The PCAB is of the opinion that, whilst it is a fact that the consortium in question is made up of ITABC and *klf consulting Ltd*, yet, the lack of evidence produced in regard by the same appellant Company, makes the role that Mr Stocco has within *klf consulting Ltd* far from clear, especially in view of his declared association and executive role status within *Archeometra SRL*.
2. The PCAB feels that, from all the written and verbal evidence submitted, there is little doubt that Mr Stocco’s involvement in this consortium, generally, vitiates the overall spirit and scope of the terms and conditions governing this particular tender.

As a consequence of (1) to (2) above this Board finds against appellants.

In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the appellants should be forfeited.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Carmelo J Esposito
Member

26 May20 09