

PUBLIC CONTRACTS APPEALS BOARD

Case No. 210

GHRC/001/2010

Request for Proposals for Insurance Brokerage Services for the Grand Harbour Regeneration Corporation plc and any of its subsidiaries and associated companies

This call for tenders was published in the Government Gazette on 20 January 2010. The closing date for this call for offers was 5 February 2010.

Five (5) tenderers had originally submitted their offers

Mediterranean Insurance Brokers Ltd filed an objection on 15 April 2010 following the decision taken by the Contracts Department to award the tender in question to First United Insurance Brokers Ltd (FUIBL).

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Anthony Pavia and Mr. Carmel J Esposito as members convened a public hearing on Wednesday, 21 July 2010 to discuss this objection.

Present for the hearing were:

Mediterranean Insurance Brokers (MIB)

Dr. Ron Galea Cavallazzi	Legal Representative
Dr. Stephen Decesare	Legal Representative
Dr. Henri Mizzi	Legal Representative
Mr. Joseph G Cutajar	Managing Director
Mr. Tonio Briffa	Executive Director
Mr. Ivan Muscat	Executive Director
Ms. Fiona Borg	Divisional Director

First United Insurance Brokers Ltd (FUIBL)

Dr Roderick Zammit Pace	Legal Representative
Dr Mark Refalo	Legal Representative
Mr Kevin Galea Pace	Representative

Grand Harbour Regeneration Corporation

Dr John Bonello	Legal Representative
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Adjudicating Board

Mr Antoine Portelli	Member
Ms Charmaine Monseigneur	Member
Mr Ray Azzopardi	Secretary

Department of Contracts

Mr Francis Attard	Director General
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After the Chairman's brief introduction, the legal representative of the contracting authority requested the opportunity to make certain preliminary clarifications that would have a bearing on the proceedings of the hearing. Furthermore, the PCAB was informed that Mr Chris Paris and Perit Damian Vella Linecker, chairman and member of the adjudication board, respectively could not be present for the hearing.

Dr John Bonello, legal representative of the contracting authority, GHRC, made the following submissions:

- this was a Request for Proposal (RFP) and although, admittedly, the document contained the usual section that dealt with the right of tenderers to lodge an appeal, he contended that it was not within the competence of the PCAB to preside over this hearing;
- the PCAB was charged to deal with appeals lodged in respect of calls for tenders for supply of goods, services or works as defined in the Public Contracts Regulations whereas bidders for Public Service Concession Contracts did not have an automatic right to appeal but an 'ad hoc' arrangement had to be made;
- even if, for the sake of the argument, in this case there was the right of appeal, if one were to refer to clause 15 'Appeals' sub-clause (3) at page 6 of the RFP, one would find that:

"Complaints in terms of this Part may only be submitted in respect of public contracts awarded by Authorities listed in Schedule I whose value exceeds €47,000."

- this RFP did not have a value attached to it and hence bidders were not entitled to appeal anyway;
- although one could say that the RFP was meant to lead to a kind of selection process, Regulation 16 (1) of the Public Contracts Regulations provided that:

"These regulations shall not apply to:

(i) public service contracts for financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, in particular transactions by the contracting authorities to raise money or capital, and central bank services;"

- as far as he was aware insurance qualified under financial services and, as a consequence, the Public Contracts Regulations were not applicable; and
- the party lodging the appeal could have been misled since the RFP included a section which dealt with appeals and, as a result, Dr Bonello asked the PCAB to consider this aspect in view of the deposit paid by the appellant.

The Chairman PCAB held the view that since the RFP was in itself a selection process then bidders were entitled to the opportunity to appeal.

When requested to state his views by the PCAB, Mr Francis Attard, Director General (Contracts), remarked that one had to establish whether this was the beginning of a process that eventually would lead to the award of a contract and, if that were to be the case, then the right to appeal had to be granted to participating bidders. Mr Attard continued that, on the other hand, if this RFP simply represented an expression of interest and, as such, was only meant to gather information, which process would then be followed by a separate tendering procedure to purchase a service, then it could be that the need for an appeal would not arise.

Mr Antoine Portelli, a member of the adjudicating board, remarked that, considering the extensive nature of the Grand Harbour Regeneration Project (GHRC), the need would eventually certainly arise to undertake a number of insurance covers and, hence, GHRC felt that it should have an insurance broker to manage a number of insurance policies. Mr Portelli declared that the adjudicating board recommended the preferred bidder on the basis on competence according to the scoring sheet and he conceded that, following the outcome of the RFP, the GHRC would avail itself of the services of the selected insurance broker, i.e. FUIBL.

The Chairman PCAB questioned what the contracting authority was going to gain or to establish through this RFP because it was certainly not purchasing a service and, moreover, the GHRC was not getting any inkling of the prices/premiums that were going to be charged by the insurance companies that the selected insurance broker would eventually engage/recommend.

Dr John Galea Cavalazzi, legal representative of the Mediterranean Insurance Brokers Ltd (MIB), the appellant Company, remarked that this was a public service contract so much so that if one were to refer to page 7 of the RFP under ‘Terms of Reference’ – Introduction – one would find the following:

“GHRC intends to appoint a firm as the sole and exclusive insurance broker for GHRC itself, as well as any of its subsidiaries or associated companies, for a period of three years.”

Dr Galea Cavalazzi stressed that GHRC’s intentions could not have been expressed clearer in the sense that a contract was going to be awarded. Dr Galea Cavalazzi stated that Reg. 16 (1) (i) referred to financial services and even specified those financial services and he pointed out that insurance was not considered as a financial service.

The Chairman PCAB remarked that he could not understand the purpose of the RFP because the GHRC should have acted differently in the sense that when the need for insurance cover/s will arise the GHRC would then invite insurance brokers to submit complete and concrete proposals incorporating insurance policies and the relative premiums so that GHRC would be in a position to make a decision based on competence and competitive prices. He added that the futility of this exercise was clearly illustrated in the last paragraph at page 9 of the RFP which stated that:

“This RFP does not constitute an offer and is not binding on the Company. The terms and conditions referred to in the RFP may be amended at any time

hereafter and no liability of any nature will attach to the Company as a result of any such amendment, whether with or without notice, or if this RFP is not acted upon or if the process is otherwise terminated at any stage.”

Mr Joseph Cutajar, managing director of MIB, pointed out that both the notice published in the Government Gazette and the RFP itself referred in very clear terms that this was a tender/contract.

Dr Roderick Zammit Pace, representing First United Insurance Brokers Ltd (FUIBL), contended that the main point was that this RFP did not refer to a contract of a value that exceeded €47,000 and hence, according to clause 15 of the RFP, which in turn reflected Reg. 83 (3) of the Public Contracts Regulations, no complaints could be lodged in such a case. He explained that the purpose of the RFP was to line up an insurance broker to provide insurance covers as and when the needs would arise in connection with this on-going project. Dr Zammit Pace added that, usually, the insurance broker was paid by the insurance company.

Mr Portelli intervened and remarked that, as far as he was aware, insurance brokers would normally be paid on a commission basis by the insurance companies and not by the client, in this case the GHRC, and that was why no value was attached to the RFP.

On his part Mr Cutajar pointed out that at page 8 of the RFP under ‘Objectives’ it was stated that on being awarded the agreement, the insurance broker was expected to, *inter alia*:

“(d) clearly indicate the brokerage or fee structure that will be used by the broker for the provision of such services.”

Mr Cutajar argued that it was clear that GHRC was going to pay the broker and, in fact, that has always been the case in the insurance market since it was the client that ultimately paid the insurance premium, part of which represented the brokerage fee.

Dr Bonello concluded that although this RFP was issued with good intentions it has turned out that the proposed arrangement was not workable. Therefore, with the benefit of hindsight, Dr Bonello submitted that the GHRC was going to activate the provisions in the last paragraph of the RFP, namely to terminate the RFP process.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 26 April 2010 and also through their verbal submissions presented during the hearing held on 21.07.2010, had objected to the decision taken by the pertinent authorities;
- having taken particular note of the contracting authority’s change of heart to pursue with the adjudication process, when, publicly, through its legal advisor, the said authority acknowledged that the initial scope behind the publication of

this RFP was no more relevant, so much so that it was thus cancelling the process,

reached the following conclusions, namely:

1. The PCAB acknowledges that during the same hearing the contracting authority informed those present that it was cancelling this Request for Proposals (RFP) in view that the original premise for it deciding to issue the call in the first place was no longer applicable.
2. As a consequence to (1) above, the PCAB considers futile any further deliberation, specifically on this particular appeal and generally on this tender's adjudication process in general.

In view of the above this Board also recommends that the deposit paid by the appellants should be reimbursed.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Carmel J Esposito
Member

30 July 2010