

PUBLIC CONTRACTS APPEALS BOARD

Case No. 214

Adv. CT 438/2009; CT/2636/2009

Service Tender for Project Management (Outsourced) for Bulebel Industrial Estate Phase 2

This call for tenders was published in the Government Gazette on 24.11.2009. The closing date for this call for offers was 19.01.2010.

The estimated budget for this tender was € 60,000 (excluding VAT).

Ten (10) tenderers had originally submitted their offers

Design and Technical Resources Ltd filed an objection on the 09.04.2010 following notification received from the Contracts Department wherein the tenderer was informed that its offer was found to be administratively non-compliant since they had “provided Work Schedule but failed to submit times and duties of employees” in accordance with Art. 4.2 (2) of the ‘*Instructions to Tenderers*’

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Carmel J Esposito as members convened a public hearing on Wednesday, 4 August 2010 to discuss this objection.

Present for the hearing were:

Design and Technical Resources Ltd

Dr Norval Desira	Legal Representative
Mr Steve Gambin	Representative
Mr Daniel Camilleri	Representative

Bezzina & Cole Architects & Civil Engineers

Perit Alex Bezzina	Representative
Perit Keith Cole	Representative
Perit Sandro Soler	Representative

Malta Industrial Parks (MIP)

Perit George Cilia	Adviser to the Adjudicating Board
Mr Vincent Rizzo	Observer

Adjudicating Board

Dr Katrina Borg Cardona	Member
Mr Marco Abela	Member
Ms Rita Caruana	Secretary

Department of Contracts

Mr Francis Attard	Director General (Contracts)
-------------------	------------------------------

After the Chairman's brief introduction as to how the hearing was going to be conducted, the appellant was invited to explain the motive/s of the objection.

Dr Norval Desira, legal representative of Design and Technical Resources Ltd, the appellant Company, informed the PCAB that four similar calls for tenders had been issued by Malta Industrial Parks and that, apart from this objection, his client had also lodged an identical objection in respect of another similar tender. At this point he, therefore, asked the PCAB to consider if it were possible for it to deal with the two cases during this hearing so as not to take up more time than necessary of the PCAB and of the contracting authority.

Architect Alex Bezzina, representing the recommended tenderer, objected to the proposal put forward by Dr Desira claiming that the other case concerned a different project.

Dr Desira explained that by letter dated 30th March 2010, the Department of Contracts informed his client that his tender was disqualified as administratively non-compliant because "tenderer provided Work Schedule but failed to submit times and duties of employees" in accordance with Art. 4.2 (2) of the 'Instructions to Tenderers' (page 4 of the evaluation report dated 22nd March 2010 also refers). Dr Desira remarked that, throughout the tender submission, his client maintained that the work contemplated in the tender was going to be performed by the key expert, even though reference was made to two non-key experts who would only be deployed in case the need arose so much so that they were allocated no specific tasks. Dr Desira contended that there was no point in presenting an outline of the times and duties allocated for employees for this contract since the works were going to be carried out entirely by one person, namely the key expert/project manager, who would dedicate all the time necessary to carry out the duties required for the execution of this contract.

Dr Katrina Borg Cardona, a member of the adjudicating board, explained that the remit of the board was to evaluate the tender according to the criteria set out in the tender document. She added that at Annex III 'Organisation and Methodology' – Timetable of Activities (page 43 of tender doc.) - the tenderer was requested to submit, apart from a draft work programme, a graphic work schedule (bar chart) which was to indicate the allocation of resources and the times to each employee engaged on this contract who, in the appellant Company's case, was the project manager. Dr Borg Cardona remarked that section 4 – Content of Tenders – of page 4 of the tender document stipulated in bold print that:

"Failure to respect the requirements in clauses 4.1, 4.2, 4.3 and 8 will result in the rejection of the tender."

She added that sub-clause (2) of clause 4.3 read as follows:

'Organisation and methodology (To become Annex III of the contract) to be drawn up by the tenderer using the format in Annex III of the draft contract'

Dr Borg Cardona contended that, once the provisions of clause 4.2 were not satisfied, then the adjudicating board, acting in accordance with its remit, had to recommend the rejection of the tender on grounds of administrative non-compliance. Dr Borg

Cardona explained that the importance of Annex III was evident as (i) it was going to form part of the contract and (ii) it was required for a very specific purpose, namely to assist the adjudicating board to arrive at the '*Most Economically Advantageous Tender*' (MEAT) by comparing how the tenderers were proposing to carry out the contract in terms of time and resource allocation.

Mr Marco Abela, a member of the adjudicating board, remarked that, whereas the tenderer had an option to either submit a draft work programme or a Gantt chart, the tenderer had no option but to submit the graphic work schedule (bar chart). He added that Malta Industrial Parks issued seven project management contracts and that with regard to two of these calls for tenders none of the tenderers were found administratively compliant. Mr Abela explained that, with regard to administrative compliance, the adjudicating board had no discretion but to deliberate simply and decisively on whether a document was submitted or not.

Dr Desira stated that his client had submitted a bid with regard to all the calls for tenders referred to by Mr Abela and he claimed that his client had made an identical submission in respect of each of these calls for tenders with the result that his client was awarded one of the contracts (CT 2655/2009) in respect of Hal Far Industrial Estate whereas, in this case, his client's identical bid was rejected.

Both Dr Borg Cardona and Mr Abela stated that they could not tell if they formed part of the adjudicating board that awarded the tender to the appellant Company because they did not have the records of all these service contracts with them at the hearing. However, they said that these tenders were adjudicated by the same pool of officers even though the composition of the adjudicating board was not the same for each one of them. Mr Abela recalled that, at one stage, the tender document was slightly amended and, hence, they were not all identical. Yet, he continued, he could not remember the exact changes effected to the tender document. Dr Borg Cardona maintained that, as far as she was aware, the adjudicating boards she sat on applied the same set of evaluation criteria.

Architect Bezzina drew the attention of the PCAB that one could not assume that all the seven tenders were identical in terms of documentation and in terms of the members sitting on respective adjudicating board.

Dr Desira claimed that his client did provide the bar chart together with the times and duties but, instead of apportioning them among the employees engaged on the contract, his client allocated them all to the key expert, i.e. to the sole person who was going to do all the work. Dr Desira remarked that the adjudicating board should have asked for a clarification on this point and his client would have informed it that all the works were to be undertaken by the key expert and that the non-key experts were going to be on stand-by and that their services would only be utilised in case the need arose. Dr Desira considered that the works contemplated in this tender could be handled by one experienced architect, as was the key expert proposed by his client. Dr Desira could not understand why his client's submission was dismissed by the adjudicating board and he expressed strong reservations as to whether the adjudicating board acted correctly in disqualifying his client's bid on the basis of the reason communicated to him. Dr Desira insisted that, if anything, the adjudicating

board should have reduced points on this particular aspect if it felt more comfortable with tender submissions that provided a team of employees to carry out these works.

Dr Borg Cardona insisted that the appellant Company was not excluded because it had proposed that the works were going to be carried out solely by the key expert but it was excluded because it only submitted the draft work programme which was totally different from the graphic work schedule (bar chart) showing the times and duties. Mr Abela confirmed that the document submitted by the appellant Company referred to the draft work programme and not to the graphic work schedule.

Dr Desira stated that his client's submission clearly indicated that the project manager would ensure that the works (as defined in the tender and draft contract) would be completed in a timely and safe manner and within the specified budget, standards and conditions. He conceded that his client in fact submitted only the Gantt chart.

Mr Abela pointed out that the tenderer had to submit also a graphic work schedule which was totally different from the draft work programme. Mr Abela questioned whether the key expert was in fact going to do all the duties, including those normally assigned to, for example, a quantity surveyor or a draughtsman. Mr Abela even stated that the project manager needed not be an architect because the main task of the project manager was to coordinate the various works/duties required to execute this contract. Mr Abela remarked that the contracting authority was expecting the project manager to indicate the various tasks and the respective personnel required to carry them out and the time required. He added that the contracting authority had to monitor the execution of the contract against the graphic work schedule.

The PCAB was informed that the key expert proposed by the appellant Company was not present at the hearing and so could not give evidence.

Mr Edwin Muscat, a PCAB member, remarked that to the contracting authority it was not enough for the tenderer to indicate that the key expert was going to do all that it took to execute this contract but it also required to know how the contractor was going to do it, i.e. what resources were going to be applied and the time taken to carry out the tasks.

Dr Desira contended that it was almost useless for the project manager to give certain details regarding the execution of his supervisory role because the actual works that he would be required to supervise had to be actually carried out by another contractor selected by Malta Industrial Parks for the purpose. He added that this was a modest project compared to the regional road bridge project which was supervised by the key expert proposed by his client.

Mr Abela explained that this project included ducting works, paving, roads, lights and the like and that the value of the works was estimated at €1.2 million whereas the estimated value of the service contract was € 60,000. Mr Abela remarked that the project manager was not meant to simply act as a supervisor but his duties were quite onerous as indicated in section 2.1 – 'Overall objectives' – at page 47 which stated, among other things, that:

“The Project Manager is to initiate, plan, execute, monitor and control, and closes the processes. The Project Manager is to integrate all inputs by the various actors in project time management, project cost management, project quality control management, project human resources management ... in order to achieve the execution and completion of the upgrading of Bulebel Industrial Estate project phase 2.”

Mr Abela argued that the graphic work schedule would indicate, among other things, the key experts required, the time required and the kind of interventions required by the staff to manage the project and all this was critical in ascertaining whether the project management would be capable to match the work programme with the allocation of resources required to implement it.

Dr Borg Cardona stressed that the reason for exclusion was the non-submission of the graphic work schedule which was a mandatory requirement and that for the adjudicating board it was not a question of reducing points as this was solely a question of whether the tenderer complied with the request or not. She further pointed out that the remit of the adjudicating board was to follow the evaluation criteria and, in this case the tender document, stipulated that the non-submission of the document in question would lead to disqualification. Dr Borg Cardona argued that had the appellant submitted the graphic work schedule even featuring one employee, i.e. the project manager, the appellant Company would have been found administratively compliant and then it would have been at the subsequent technical stage that the adjudicating board would have evaluated whether the project manager could perform efficiently and effectively all the tasks by himself or if those tasks could be performed better by a team of employees in which case points would have been deducted accordingly. Dr Borg Cardona added that, at administrative compliance stage, the adjudicating board did not and could not go into the merits as to whether the project manager could undertake all the tasks by himself.

Dr Desira stated that the graphic work schedule was not submitted because the work was going to be performed by one single employee, i.e. the project manager, and, as a result, all the duties were going to be assigned to him and he was going to take all the time necessary to perform the tasks requested in the tender and hence no duties were going to be assigned to other employees. Dr Desira claimed that his client was also undertaking that the project manager was going to execute the contract within the period of time requested in the tender and that there was no need to go into such details as the number of hours required, especially, when it hardly ever happened that a contract was completed within the time stipulated in the tender document.

Mr Muscat interjected to remark that a bidder could not take it upon himself to decide what to submit and what not to submit, especially, without giving any explanation and, all the more, when the information was a mandatory requirement.

Dr Desira agreed with that broad statement but he contended that, in his client's case, the document that was not submitted was of little or of no relevance at all since the project manager was going to be the sole employee deployed on the contract. He claimed that if his client were to submit the graphic work schedule it would be a photocopy of the Gantt chart.

Mr Abela recollected that out of the ten tenders submitted, nine were excluded at administrative compliance stage and the reasons for exclusion varied from missing signatures to missing documentation as outlined in the evaluation report. He added that administrative compliance was about whether the documentation requested had been submitted or not and that it did not require the adjudicating board to go into the merits of the validity of the documents submitted.

Dr Desira pointed out that the reason for exclusion communicated by the Contracts Department boiled down to his client having 'failed to submit times and duties of employees'. He insisted that since there were no other employees involved, apart from the project manager, there was no point in submitting times and duties of non-existent employees which, therefore, meant that, effectively, no document of relevance was omitted by his client and hence the question of administrative non-compliance should not have occurred. He added that if one were to consider all the documents that his client submitted with regard to Annex III one would find clear and repeated references that the project manager was going to handle his contract by himself.

Dr Borg Cardona reiterated that once the adjudicating board noted that the appellant Company did not submit the graphic work schedule, his offer was not considered any further.

Mr Abela confirmed that the recommended tenderer was found fully compliant in all respects and, on checking with the evaluation grid, it was noted that the recommended tenderer was awarded an average of 14 out of 15 points under 'Timetable of activities' which included the submission of the graphic work schedule.

Dr Borg Cardona stressed that, in the absence of administrative compliance, the adjudicating board could not move on to the MEAT evaluation process and that was the crux of the matter.

Architect Bezzina, representing the recommended tenderer, made reference to various provisions of the tender document, such as page 3 (d. ii second bullet) which requested a list of the staff proposed for the execution of the contract with the CVs of key staff; Annex I sections 16.1, 16.4, 16.5 and Annex II sections 6.1.1, 6.1.2 and 6.3 which all made reference to staff and other experts. Professionally, he agreed with the view expressed by members of the adjudicating board that this contract could not be carried out by one person and that was why the tender requested the list of staff. Architect Bezzina explained that a Gantt chart showed the physical works that were actually going to be carried out by the 'other' contractor along with the time that it would take to implement them whereas the graphic work schedule represented the resource allocation along with the time involved on the part of the project manager.

Mr Abela remarked that, at administrative compliance stage, the board did not question why the list of staff indicated by the appellant Company was made up of one staff member so long as the list was somehow submitted and he added that the appellant Company's submission was administratively compliant except for the non submission of the graphic work schedule.

Dr Desira remarked that, apart from the project manager, his client did refer to two non-key experts, even though no specific duties were assigned to them. He even shared the distinction made between the *Gantt chart* and the *graphic work schedule* but he still insisted that the latter was not necessary in his client's case and that *Annex III* had to be considered in a holistic manner. Dr Desira even mentioned that this was a lump sum contract.

Mr Abela exclaimed that, at administrative compliance stage, the adjudicating board should not be expected to go through all the tender documentation in an effort to ascertain whether the information that should have been submitted in a particular document but that the tenderer chose not to submit in the format requested and that could perhaps be found scattered here and there in the tender submission. Mr Abela insisted that tenderers were not asked to decide if they deemed the graphic work schedule necessary or not but they were simply required to submit it.

In reply to the appellant Company's legal representative's query, the Chairman PCAB remarked that one could not ask for a clarification on a document that was not submitted but a clarification could be requested on information already submitted but which perhaps was not communicated in clear or appropriate terms. He added that the bone of contention was not who was going to perform the contract but how the contract was going to be executed.

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 09.04.2010 and also through their verbal submissions presented during the public hearing held on 04.08.2010, had objected to the decision taken by the General Contracts Committee;
- having taken note of Dr Desira's (a) explanation regarding the fact that his client's tender was disqualified as considered administratively non-compliant because the same entity "provided Work Schedule but failed to submit times and duties of employees" in accordance with Art. 4.2 (2) of the 'Instructions to Tenderers', (b) emphasis on the fact that his client maintained that the work contemplated in the tender was going to be performed by the key expert, even though reference was made to two non-key experts who would only be deployed in case the need arose so much so that they were allocated no specific tasks, (c) contention that his client saw no point in presenting an outline of the times and duties allocated for employees for this contract since the works were going to be carried out entirely by one person, namely the key expert/project manager, who would dedicate all the time necessary to carry out the duties required for the execution of this contract, (d) claim that his client did provide the bar chart together with the times and duties but, instead of apportioning them among the employees engaged on the contract, his client allocated them all to the key expert, i.e. to the sole person who was going to do all the work, (e) remark that, had the adjudicating board asked for a clarification on this point, his client would have informed the adjudicating board that all the works were to be undertaken by the key expert and that the

non-key experts were going to be on stand-by and that their services would only be utilised in case the need arose, (f) opinion relating to the fact that, as far as he is concerned, the adjudicating board should have reduced points on this particular aspect if it felt more comfortable with tender submissions that provided a team of employees to carry out these works, (g) admission that his client in fact submitted only the Gantt chart, (h) contention that it was almost useless for the project manager to give certain details regarding the execution of his supervisory role because the actual works that he would be required to supervise had to be actually carried out by another contractor selected by Malta Industrial Parks for the purpose, (i) claim on the fact that his client was also undertaking that the project manager was going to execute the contract within the period of time requested in the tender and that there was no need to go into such details as the number of hours required, especially, when it hardly ever happened that a contract was completed within the time stipulated in the tender document, (j) contention that, in his client's case, the document that was not submitted was of little or of no relevance at all since the project manager was going to be the sole employee deployed on the contract and since there were no other employees involved, apart from the project manager, there was no point in submitting times and duties of non-existent employees which, therefore, meant that, effectively, no document of relevance was omitted by his client and hence the question of administrative non-compliance should not have occurred and (k) that if his client were to submit the graphic work schedule it would be a photocopy of the Gantt chart;

- having also taken note of the contracting authority's representatives' (a) reference to the fact that the remit of the adjudication board was to evaluate the tender according to the criteria set out in the tender document, (b) claim that the tenderer was requested to submit, apart from a draft work programme, a graphic work schedule (bar chart) which was to indicate the allocation of resources and the times to each employee engaged on this contract who, in the appellant Company's case, was the project manager, (c) reference to the fact that, once the provisions of clause 4.2 were not satisfied, then the adjudicating board, acting in accordance with its remit, had to recommend the rejection of the tender on grounds of administrative non-compliance, (d) emphasis on the fact that Annex III was required for a very specific purpose, namely to assist the adjudicating board to arrive at the '*Most Economically Advantageous Tender*' (MEAT) by comparing how the tenderers were proposing to carry out the contract in terms of time and resource allocation, (e) claim that whereas the tenderer had an option to either submit a draft work programme or a Gantt chart, the tenderer had no option but to submit the graphic work schedule (bar chart) which was totally different from the draft work programme, (f) statement that the appellant Company was not excluded because it had proposed that the works were going to be carried out solely by the key expert but it was excluded because it only submitted the draft work programme which was totally different from the graphic work schedule (bar chart) showing the times and duties, (g) emphasis on the fact that the contracting authority had to monitor the execution of the contract against the graphic work schedule, (h) emphasis on the fact that the project manager was not meant to simply act as a supervisor but his duties were quite onerous as indicated in section 2.1, (i) emphasis on the fact that the reason for exclusion was the non-

submission of the graphic work schedule which was a mandatory requirement and that for the adjudicating board it was not a question of reducing points as this was solely a question of whether the tenderer complied with the request or not, (j) reference to the fact that the remit of the adjudicating board was to follow the evaluation criteria and, in this case the tender document, stipulated that the non-submission of the document in question would lead to disqualification, (k) claim that , at administrative compliance stage, the adjudicating board did not and could not go into the merits as to whether the project manager could undertake all the tasks by himself, (l) remark that administrative compliance was about whether the documentation requested had been submitted or not and that it did not require the adjudicating board to go into the merits of the validity of the documents submitted and (m) remark that , at administrative compliance stage, the board did not question why the list of staff indicated by the appellant Company was made up of one staff member so long as the list was somehow submitted adding that the appellant Company's submission was administratively compliant except for the non submission of the graphic work schedule;

reached the following conclusions, namely:

1. The PCAB opines that for the contracting authority it was not enough for the tenderer to indicate that the key expert was going to do all that it took to execute this contract but it also required to know how the contractor was going to do it, i.e. what resources were going to be applied and the time taken to carry out the tasks.
2. The PCAB agrees with the contracting authority's view, namely that the submission of the graphic works schedule, apart from being mandatory, was indispensable to enable the contracting authority to take full cognizance of the key experts required, the time required and the kind of interventions required by the staff to manage the project and all this was critical in ascertaining whether the project management would be capable to match the work programme with the allocation of resources required to implement it.
3. The PCAB also opines that a bidder cannot take it upon himself to decide what to submit and what not to submit, especially, without giving any explanation and, all the more, when such information is a mandatory requirement. In this instance, tenderers were not asked to decide if they deemed the 'graphic work schedule' necessary or not but they were simply required to submit it.
4. The PCAB also agrees with the contracting authority when the latter claims that, at administrative compliance stage, the adjudicating board should not be expected to go through all the tender documentation in an effort to ascertain whether the information that should have been submitted in a particular document was either (a) actually submitted by the tenderer in some other format than the one requested or (b) found scattered here and there in the tender submission.
5. The PCAB stands by what it stated during the same hearing, namely, that one could not ask for a clarification on a document that was not submitted but a

clarification could be requested on information already submitted but which perhaps was not communicated in a clear or appropriate manner.

As a consequence of (1) to (5) above this Board finds against the appellant Company.

In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the said appellants should not be reimbursed.

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmel J Esposito
Member

13 August 2010