

PUBLIC CONTRACTS REVIEW BOARD

Case No. 292

GN/DPS/T/6/2010

Tender for the Appointment of Consultant Monitor for Delimara Power Station

This call for tenders was published in the Government Gazette on 20th August 2010. The closing date for this call with an estimated budget of €120000 (excl. VAT) was 15th September 2010.

Seven (7) bidders had submitted their offers.

S&A Quality Assurance Surveyors Ltd filed an objection on the 9th February 2011 against the decision taken by Enemalta Corporation (Enemalta) to recommend the award of the tender to AIS Environmental Ltd (AIS Ltd) for the price of €117,820.90 (incl. VAT) citing conflict of interest.

The Public Contracts Review Board composed of Mr Edwin Muscat as Acting Chairman, Mr. Carmel Esposito and Mr Joseph Croker as members convened a public hearing on Wednesday, 25th May 2011 to discuss this objection.

Present for the hearing were:

S&A Quality Assurance Surveyors Ltd (S&A Ltd)

Dr Paul Lia	Legal Representative
Ing. Emmanuel Scerri	Representative

AIS Environmental Ltd (AIS Ltd)

Ing. Mario Schembri	Representative
Ms Ruth Debrincat	Representative

Enemalta Corporation (Enemalta)

Dr Antoine Cremona	Legal Representative
Dr Juliana Portelli Demajo	Legal Representative

Evaluation Board:

Ing. Ivan Bonello	Chairman
Perit Joseph Cassar	Member
Perit Aronne Farrugia	Member
Perit Gail Woods	Member
Ms Rodianne Caligari	Secretary

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

Dr Paul Lia, on behalf of S&A Ltd, the appellant, made the following initial submission:

- i. his client's complaint did not concern the technical aspect of the tender submissions once the evaluation board had found six tenderers technically compliant;
- ii. AIS Ltd should have been considered ineligible to participate in the tendering procedure citing conflict of interest since AIS Ltd was the firm that carried out the Environment Impact Assessment (EIA) with regard to the Delimara Power Station Project;
- iii. the recommendation to undertake the kind of monitoring contemplated in this tender emerged from the EIA drawn up by AIS Ltd and so it followed that if this contract were to be awarded to AIS Ltd, that would effectively mean that the same firm that recommended this monitoring was going to carry out the monitoring itself. That did not reflect well on the tendering process as far as transparency was concerned;
- iv. the fact that AIS Ltd had conducted the EIA meant that it was already in possession of certain inside information which gave it an advantage over its competitors. The Ethics Clause at page 10 of the tender document (Doc A) provided, among other things, as follows:-

30.1 Any attempt by a candidate or tenderer to obtain confidential information, enter into unlawful agreements with competitors or influence the committee or the Central Government Authority during the process of examining, clarifying, evaluating and comparing tenders will lead to the rejection of his candidacy or tender and may result in administrative penalties.

30.2 Without Enemalta's prior written authorisation, the Contractor and his staff or any other company with which the Contractor is associated or linked may not, even on an ancillary or sub-contracting basis, supply other services, carry out works or supply equipment for the project. This prohibition also applies to any other programmes or projects that could, owing to the nature of the contract, give rise to a conflict of interest on the part of the Contractor.

30.3 When putting forward a candidacy or tender, the candidate or tenderer must declare that he is affected by no potential conflict of interest, and that he has no particular link with other tenderers or parties involved in the project.

That meant that the consultant monitor had to declare that he did not actually or potentially have a conflict of interest but once the recommended tenderer had carried out the EIA of the Delimara Project it became an interested party; and

- v. according to Volume 1 Section 5 (page 20 of the tender document) ‘Conflict of Interest’ meant:

Any event influencing the capacity of a candidate, tenderer or supplier to give an objective and impartial professional opinion, or preventing him, at any moment, from giving priority to the interests of the Central Government Authority and the Contracting Authority. Any consideration relating to possible contracts in the future or conflict with other commitments, past or present, of a candidate, tenderer or supplier, or any conflict with his own interests. These restrictions also apply to sub-contractors and employees of the candidate, tenderer or supplier.

[At that stage Dr Lia also referred to a contract which he claimed that the consultant monitor had to enter into with the Malta Environment and Planning Authority (MEPA) which, with regard to ‘conflict of interest’ at clause 4.2 stated that: *Not to have been involved in giving any professional advice to the developers submitting his application for the development permission to the authority.* On checking, it turned out that this kind of contract did not form part of the tender dossier in question and hence the PCRБ decided to discard this evidence].

Dr Antoine Cremona, on behalf of Enemalta Corporation, the contracting authority, rebutted with the following arguments:-

- a. the appellant’s allegation of conflict of interest mentioned in his letter of objection did not refer to any specific circumstances;
- b. conflict of interest provisions were meant to prevent a contractor from having a finger in more than one pie which could prejudice his performance;
- c. moreover, conflict of interest could potentially occur if one was involved in the simultaneous execution of two or more contracts on the same project but that would not be the case if one had terminated a contract and then been awarded another new contract to carry out specific tasks – in this case as outlined in the objectives at page 29 of the tender document;
- d. the preferred bidder had carried out the EIA which had led to the grant of the permit by MEPA, which permit in turn laid down the conditions under which certain works were to be executed, including the monitoring of such aspects as dust and noise. Therefore, what mattered for monitoring purposes were the conditions stipulated in the MEPA permit and not anything that had been laid down in the EIA;
- e. the appellant had misinterpreted Ethics Clause 30.1 to 30.10 because the point of departure was whether the contractor was involved in the simultaneous execution of two or more contracts on the same projects, which was not the case. Moreover, sub-clauses 30.2 and 30.3 (as per above) and 30.9 which read as follows:

30.9 - The Contractor shall refrain from any relationship likely to compromise his independence or that of his staff. If the Contractor ceases to be independent,

Enemalta may, regardless of injury, terminate the contract without further notice and without the Contractor having any claim to compensation.

referred to future situations. That meant that the consultant monitor was being precluded from future involvement with any other contractors and/or contracts on the same project which situation could influence his performance in the execution of the monitoring contract. However, the Ethics Clause did not refer to past and completed contracts. The purpose of the Ethics Clause was for the contractor to provide objective monitoring by his independence and detachment from any other contracts/contractors for the duration of the monitoring contract;

- f. the appellant was the incumbent contractor, the one who was providing Enemalta with similar monitoring service on the Delimara Project and hence, by the same argument put forward by Dr Lia, S&A Ltd was the tenderer that had or might have a conflict of interest;
- g. Enemalta sought the opinion of MEPA – the entity to which the consultant monitor will be reporting – as to whether the recommended tenderer had any conflict of interest in view of the fact that it was the same contractor that had carried out the EIA and the response from the Senior Environment Protection Officer, in conclusion read as follows

Regulation 29 of the EIA Regulations (or the extract thereof which was attached to the EIA terms of reference issued in June 2008). Kindly note that this regulation relates to conflict of interest vis-a-vis the consultants commissioned to conduct the EIA. In this regard, it was relevant to the EIA process proper, which has long since been concluded.

S.L. 504.79 – Environmental Impact Assessment Regulations– provided as follows with regard to ‘conflict of interest’:

29. (1) In the interests of fairness, objectivity and the avoidance of bias, all consultants shall be required to sign, and abide by, a declaration that they have no personal or financial interest in the proposed development.

(2) The Director of Environment Protection shall not approve consultants, groups of consultants or consultancy firms that are in any way associated with any company, association or grouping that has any direct or indirect personal, professional or financial interest in the proposed development.

(3) The Director of Environment Protection shall not approve any environmental impact statement or environmental planning statement produced by a consultant or group of consultants, one or more of whom does not comply with the provisions of sub-regulations (1) or (2).

- h. this tender was to be awarded to the cheapest technically compliant bidder and it emerged that the appellant’s offer was €384,089.96 against Enemalta’s estimate of €120,000 and therefore, in the event that the recommended offer of €117,820.90 would be rejected it was likely that a fresh call would have to be issued.

Dr Lia insisted that the term ‘project’ did not refer to the monitoring but to the whole Delimara project and he contended that the price quoted by the recommended tenderer was in itself an

indication that the recommended tenderer had inside information that assisted him in arriving at that price thus gaining an advantage over his competitors.

Dr Cremona reiterated that the appellant was the current contractor who was carrying out about five-sixths of the services being requested in the tender and that by Dr Lia's same argument it was the appellant who was at an advantage over his competitors in view of the experience gained from the execution of the current contract.

Ing. Mario Schembri, on behalf of the recommended tenderer, remarked that:

- a so far during the hearing, the appellant only made allegations and insinuations but did not produce a shred of evidence to back up his claim that AIS Ltd had the type of inside information referred to in sub-clause 30.1 of the Ethics Clause;
- b in this tender the contractor was being requested to monitor the development works so as to assess whether they were being executed in accordance with the conditions set out in the MEPA permit and not in the EIA;
- c the contractor was also to monitor the conditions that emerged from the Construction Management Plan which AIS Ltd had nothing to do with;
- d this tender was requesting a higher standard of monitoring than that carried out that far;
- e the claims made by the appellant demonstrated a lack of understanding of the various stages of the project and of the various contracts that had to be issued for the implementation of the project;
- f issues of conflict of interest should be more appropriately addressed to the appellant who was the current consultant monitor; and
- g at appeal stage, the appellant was expected to justify why he should have been awarded the tender and not to denigrate the tender submission of the other tenderers or to cast doubts for the purpose of leading to the cancellation of the tender;

Dr Paul Lia insisted that conflict of interest and transparency issues had to be raised in this case for the following reasons:-

- i. the recommended tenderer was going to monitor what he had recommended in the EIA;
- ii. the EIA and the monitoring should be carried out by different contractors;
- iii. the EIA was one of the considerations on which MEPA decided as to whether the development permit should be issued or not, however, the EIA contractor was selected and paid by the developer and therefore the EIA contractor had an interest in the project being approved by MEPA;
- iv. the same argument was applicable to the consultant monitor who was selected and paid

by the developer to render a service to MEPA - which the agreement between MEPA and the consultant monitor implied; and

- v. contractors were expected to behave responsibly and ethically but still, transparency called for safeguards to be taken.

Dr Cremona opined that the remarks made by the appellant showed a lack of understanding of the various processes involved. Dr Cremona explained that:

- a. the EIA had to be carried out by someone independent of the developer;
- b. once MEPA issued the development permit what mattered were the conditions laid down in the MEPA permit and not in the EIA or, for that matter, in any other report; and
- c. the objectives and the works contemplated in the tender involved the monitoring of certain aspects which monitoring was to be carried out objectively and on empirical evidence in accordance with MEPA permit conditions and reported upon to MEPA.

Perit Joseph Cassar, member of the adjudicating board, stated that the level of noise, dust and the like were not set by the EIA but were set by legislation and therefore the consultant monitor had to ensure in an objective manner that the limits stipulated by law were being observed.

The Acting Chairman PCRB remarked that evidence in writing had been produced indicating that according to MEPA there was no issue with regard to conflict of interest in engaging the recommended tenderer as the consultant monitor.

At this point, the hearing was brought to an end.

The Board,

- Having noted that the appellants, through their letter of objection dated 9 February 2011 and through the verbal submissions made on their behalf by Dr. Pawlu Lia during the hearing held on the 25th May 2011, had objected to the decision taken by the authorities to award the tender to AIS Ltd.
- Having noted appellants' representative's claims and submissions, particularly i) that his complaint did not concern the technical aspect of the tender submissions; ii) that AIS should have been considered ineligible to participate in the tender because conflict of interest, since it had carried out the Environment Impact Assessment of the Delimara Power station project; iii) that the monitoring contemplated in this tender ensued from the EIA draw up by the intended awardees, so if this contract were to be awarded to AIS Ltd, it would mean that AIS Ltd, who recommended the monitoring, was to carry out the said monitoring itself; iv) that this did not reflect well on the tendering process so far as transparency was concerned; v) that as AIS Ltd had conducted the EIA, that meant that it was in possession of inside information which gave it advantage over the other bidders; vi) that the Ethics Clause in the contract documents meant that the consultant monitor had

to declare that he did not have an actual or potential conflict of interest, but as AIS Ltd had carried out the EIA, it became an interested party; and vii) that according to Volume 1 Section 5 page 20 of the tender documents, conflict of interest meant : *“Any event influencing the capacity of a candidate, tenderer or supplier to give an objective and impartial professional opinion, or preventing him, at any moment, from giving priority to the interests of the Central Government Authority and the Contracting Authority. Any consideration relating to possible contracts in the future or conflict with other commitments, past or present, of a candidate, tenderer or supplier, or any conflict with his own interests. These restrictions also apply to sub-contractors and employees of the candidate, tenderer or supplier.”*

- Having noted Enemalta Corporation’s representative’s arguments and rebuttals stating that: i) the appellant’s allegation of conflict of interest mentioned in his letter of objection did not refer to any specific circumstances; ii) that conflict of interest provisions were meant to prevent a contractor from having a finger in more than one pie which could prejudice his performance; iii) such a conflict of interest could potentially occur if one was involved in the simultaneous execution of two or more contracts on the same project but that would not be the case if one had terminated a contract and then been awarded another new contract to carry out specific tasks – in this case as outlined in the objectives at page 29 of the tender document; iv) the preferred bidder had carried out the EIA which had led to the grant of the permit by MEPA, which permit in turn laid down the conditions under which certain works were to be executed, including the monitoring of such aspects as dust and noise. Therefore, what mattered for monitoring purposes were the conditions stipulated in the MEPA permit and not anything that had been laid down in the EIA; v) the Ethics Clause 30.1 to 30.10 referred to by appellant, refer to future situations. That meant that the awardee would be precluded from future involvement with other contractors working on the project; vi) the appellant was the incumbent contractor, the one who was providing Enemalta with similar monitoring service on the Delimara Project and hence, by the same argument put forward by Dr Lia, S&A Ltd was the tenderer that had or might have a conflict of interest; and vii) Enemalta had already sought the opinion of MEPA regarding the question of conflict of interest through the intended awardee having also drawn up the EIA, and was informed that there was no such conflict; and viii) this tender was to be awarded to the cheapest technically compliant bidder and it emerged that the appellant’s offer was €384,089.96 against Enemalta’s estimate of €120,000 and therefore, in the event that the recommended offer of €117,820.90 is rejected, it was likely that a fresh call would have to be issued.
- Having noted the recommended tenderer’s remarks wherein he stated that: i) the appellant had only made allegations and insinuations but did not produce a shred of evidence to back up his claim that AIS Ltd had the type of inside information referred to in sub-clause 30.1 of the Ethics Clause; ii) in this tender the contractor was being requested to monitor the development works so as to assess whether they were being executed in accordance with the conditions set out in the MEPA permit and not in the EIA; iii) the contractor was also to monitor the conditions that emerged from the Construction Management Plan which AIS Ltd had nothing to do with; iv) this tender was requesting a higher standard of monitoring than that carried out that far; v) the claims made by the appellant demonstrated a lack of understanding of the various stages of the project and

of the various contracts that had to be issued for the implementation of the project; vi) issues of conflict of interest should be more appropriately addressed to the appellant who was the current consultant monitor; and vii) at appeal stage, the appellant was expected to justify why he should have been awarded the tender and not to denigrate the tender submission of the other tenderers or to cast doubts for the purpose of leading to the cancellation of the tender;

reached the following conclusions, namely:

1. The present case revolves about whether, as the appellants insisted, the EIA and the monitoring should be carried out by different contractors, as otherwise there would be conflict of interest.
2. Appellant, explained his claim by citing the Ethics Clause in the tender documents. The Board, however, agrees with the interpretation given to this clause by the Contracting Authority that this refers to future liaisons of the monitor with other contractors performing work for Enemalta in the same project, and not to past completed contracts.
3. No evidence was produced to show that AIS Ltd, having conducted the EIA, was in possession of certain inside information which gave it an advantage over its competitors.
4. The Board also agrees that the EIA had to be carried out by someone independent of the developer. In the present case, evidence produced shows that this EIA was carried out some years ago to enable MEPA to decide whether to allow the development to take place and if so, impose necessary conditions. It does not follow therefore, that the chosen monitor could not be the same person as the one who drew up the EIA.
5. Furthermore, the monitoring that the selected tenderer is expected to perform, involved also aspects of items set down by law, and not only on the conditions that MEPA had set, based on the EIA report.
6. AIS Ltd's bid was the cheapest, technically compliant offer, and within the estimate.

In view of the above this Board finds against the appellant company and also recommends that the deposit paid by the appellants should not be reimbursed.

Edwin Muscat
Acting Chairman

Carmel Esposito
Member

Joseph Croker
Member

6 June 2011.