

PUBLIC CONTRACTS REVIEW BOARD

Case No. 299

MRRA/W570/2010/1; Adv No. 13/2011

Tender for a Visitor Assessment Study at Buskett required as part of the Management Plan Studies for Buskett, Malta

This call for tenders was published in the Government Gazette on 11th February 2011. The closing date for this call with an estimated budget of € 18,000 (inclusive of VAT) was 4th March 2011.

Four (4) tenderers submitted their offers.

Messrs M Fsadni & Associates filed an objection on 5th April 2011 against the decision by the Ministry for Resources and Rural Affairs to recommend tender award to Dr Louis F Cassar being the cheapest bidder.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr. Carmel Esposito and Mr Joseph Croker as members convened a public hearing on Wednesday, 8th June 2011 to discuss this objection.

Present for the hearing were:

Messrs M Fsadni & Associates

Ms Marika Fsadni	Managing Associate
Irina Atanasova	Research Analyst

Dr Louis F Cassar

Dr Louis F Cassar	Representative
Dr Elizabeth Conrad	Representative

Ministry for Resources and Rural Affairs (MRRA)

Dr Victoria Scerri	Legal Representative
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Evaluation Board:

Architect Ray Farrugia	Chairman
Dr George Buhagiar	Member
Architect Mario Bonello	Member
Dr Albert Caruana	Member
Mr Joe Casaletto	Secretary

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

Ms Marika Fsadni, representing the appellant, made the following submission:

Background

The purpose of the tender was to conduct a visitor assessment study at Buskett over a 10-month period to:

- i. understand the level and type of visitors access Buskett
- ii. understanding the spatial patterns of use of Buskett
- iii. identify the extent and manner visitors impact natural and cultural features
- iv. augment institutional awareness of visitor impacts
- v. recommend a more comprehensive visitor management scheme considering conservation areas

According to the tender document the contractor was obliged to produce four progress updates in the form of a presentation every two months and a final research findings report within 10 months from the order to start works.

Personnel to be engaged on this project

- a) at section 3.1.2 the tender document stipulated that the tenderer should be deemed to be in position to carry out all the services specified;
- b) *Key Experts*: Section 7.6 (b) of the tender document requested the tenderer to submit a list of key experts, together with their CVs, who had to be approved by the Malta Environment and Planning Authority;
- c) at any time prior to the award of the tender, the contracting authority reserved the right to request the tenderer to provide a certificate issued by the Employment Training Corporation, indicating the number and details of employees duly registered for the purpose of confirming that the tenderer possessed, or had available, adequate human resources to perform the contract to a timely and successful completion - Section 5.4.2 of the tender;
- d) the project in question was highly labour-intensive which necessitated the engagement of a team of competent field market researchers/interviewers, fieldwork supervisors and support personnel;
- e) the appellant firm was an established entity in this sector and so were the other participating tenderers, ADI Associates Environmental Consultants Ltd. and EMCS Consulting Group,

however the recommended tenderer was a rather unknown quantity though she respected Dr Louis Cassar as a highly qualified expert in this area; and

- f) the appellant firm's representative was confident that the firm could handle this contract with its organisational set-up. Nevertheless, Ms Fsadni questioned the ability of the recommended tenderer to undertake this contract considering that he appeared to be a sort of 'sole trader' and that if he was going to have recourse to subcontracting then that was likely to exceed the 50% provided for at section 4.4.7 of *Form 4 - Data on Joint Venture/Consortium*.

Methodology

The tender document outlined the following methodology:-

- a) conduct a visitor survey on a seasonal basis
- b) mapping of visitor characteristics, natural and cultural resources and impacts
- c) provide all data related to threats, pressures and activities in the form of codes stipulated by the Malta Environment and Planning Authority in Section 17 of the Habitat Directive

As a result, proceeded Ms Fsadni, a number of field interviewers had to be engaged simultaneously to cover the vast area of Buskett in order to take a snapshot from seven different visitor areas that had been identified at Buskett such as, roads, parking areas, bus stops, entry points and gates. The appellant's representative also stated that account had to be taken of the various uses of Buskett, namely camping, walking, cycling, educational issues, seasonality factors, as well as time windows relating to weekdays and weekends.

Labour costs

At this stage Ms Fsadni argued that a rough estimate of the labour costs involved in onsite fieldwork included the fact that at the:

- minimum labour rate of €3.91 per hour (rounded up to €4) for 5 weeks spread over 10 months worked out at about €9,120 which was almost equivalent to the total price of the recommended tender, namely, €8,813+VAT
- rate of €6 per hour paid by the appellant firm the cost worked out at about €13,000

Abnormally Low Price

Ms Fsadni claimed that, considering the very specific project objectives and deliverables, including seasonality, the 10-month span and the labour costs involved in the execution of this contract, the recommended price of €10,400 (inclusive of VAT), was considered abnormally low. The appellant's representative stated that this was further demonstrated by the fact that the estimated price of the tender was €18,000 and that the other three bids

ranged from €23,600 to €38,940. In this context, he made reference to Regulation 29 of the Public Procurement Regulations which stipulated that:

“A contracting authority shall be entitled to reject tenders which appear to be abnormally low in relation to the activity to be carried out:”

The appellant’s price was not inflated but it reflected the services that had to be delivered in line with tender conditions and according to appellant firm’s methodology with only a modest profit margin.

Ms Fsadni stated that the website of the University of Malta described the recommended tenderer as a full-time lecturer who headed *The Institute of Earth Systems* and so, the appellant company’s representative claimed, he did not run a full-fledged commercial market research firm employing full-time personnel. As a result, Ms Fsadni said, it followed that the low price offered was not the result of his company's excess capacity.

Conclusion

The appellant’s representative requested the contracting authority to ensure that there was sufficient evidence in the tender submission of the recommended tenderer that clearly demonstrated that:

- a) Dr Louis F Cassar had the resources to execute the contract and to do so in full respect of local labour laws
- b) the proposed strategy, organisation and research methodology were detailed enough
- c) there were exhaustive explanations as to the abnormally low price offered

Dr Victoria Scerri, legal representative of the Ministry for Resources and Rural Affairs, explained that the tendering process was carried out diligently by competent officers according to the documentation presented to them by the bidders. She added that the bidders first had to qualify from the technical point of view and only then would the successful bidders be considered on the merit of price. Dr Scerri remarked that the evaluation board judged that the recommended tenderer had satisfied the tender conditions and that the price offered of €10,400 was not considered abnormally low when compared to the estimate of €18,000.

Regarding the appellant firm’s claim that the bidder had to undertake at least 50% of the contract works, Dr Scerri contended that that was applicable only in the case of a joint venture/consortium, as per *Form 4 ‘Data on Joint Venture/Consortium’*, but it was not applicable in the case of the recommended tenderer.

Architect Ray Farrugia, chairman of the evaluation board, explained that:

- i. the key experts proposed by the recommended tenderer were approved by the Malta Environment and Planning Authority;

- ii. the bidder had the option to have recourse to sub-contracting and that the recommended bidder indicated that he would be sub-contracting, as per Form 5 and as per 'Schedule of Prices & Rates', where even the value was indicated;
- iii. the recommended tenderer had presented a complete tender submission and the evaluation board was satisfied that it met tender conditions and specifications;
- iv. it was not unheard of that a contract was awarded below the department's estimate;

Finally, Architect Farrugia, under oath, confirmed that the bids were evaluated first from the technical standpoint and then the bids which were found technically compliant were considered in terms of price.

Dr Albert Caruana, a member of the evaluation board, explained that:

- i. the estimated value of the contract was arrived at in consultation with the Malta Environment and Planning Authority since that entity had considerable experience in this sector;
- ii. the tender document did not specify the number of field workers that had to be deployed or the points where the field workers had to be stationed since the details of the methodology was left up to the bidder;
- iii. the tender document obliged the bidder to submit a report and to make a presentation thereon every two months to the Ministry for Resources and Rural Affairs' officials, who would be assisted by representatives of the Malta Environment and Planning Authority and that the payments to the selected contractor were tied to these two-monthly presentations being to the satisfaction of the contracting authority;
- iv. the recommended tenderer was not a joint venture and that, as far as he was aware, the tender document did not attach a percentage to the sub-contracting permissible in circumstances similar to those of the recommended tenderer. Furthermore, proceeded Dr Caruana, tenders for project management or such consultancy services normally requested key experts and these were not considered as sub-contractors but as part of the team that would assist the bidder in his or her work;
- v. Architect Farrugia was correct in his statement that there were cases where tenders were awarded well below the estimated value and that the service rendered turned up to be of the required standard.

Dr Louis Cassar, the recommended tenderer, presented the following explanations:

- a) he was a director of The Institute of Earth Systems, which was equivalent to a Dean of faculty at the University of Malta;

- b) it was illegal to engage students on such field work but as a full-time resident academic he was allowed and even encouraged to undertake private work;
- c) he would execute the contract in his private capacity and that the field workers that he would engage were VAT registered, including himself;
- d) in drawing up the methodology he had consulted his colleague, Dr Elizabeth Conrad, and, whilst it could well be the case that his methodology differed from that of the appellant firm, yet it was evident that his methodology was to the satisfaction of the contracting authority and he declared that he was prepared to discuss it with the board in private given the commercial aspect involved;
- e) his submission contemplated the compilation of 1,200 questionnaires which, statistically speaking, represented a very extensive sample;
- f) he had been in this specialised sector for 37 years and had been involved in 133 assignments locally and abroad and that it was not the first time that he carried out such work without payment;
- g) in his circumstances, he considered the price he quoted as reasonable and argued that he could opt to undertake the work even at a loss and he considered that there was nothing illegal about that;
- h) the appellant firm had no right to adjudicate his tender submission as that responsibility was vested in the evaluation board.

Dr Elizabeth Conrad, also representing the recommended tenderer, stated that (a) they have been working on similar projects for a number of years, (b) the proposed methodology was carefully drawn up and (c) it was up to the technical evaluation board and not the appellant firm to judge whether his proposed methodology met tender conditions.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellant company, in terms of their ‘reasoned letter of objection’ dated 5th April 2011 and also through their verbal submissions presented during the hearing held on 8th June 2011, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant firm’s representative’s claims and observations, particularly, the reference made to (a) the fact that the purpose of the tender which was to conduct a visitor assessment study at Buskett over a 10-month period during which time frame the contractor was obliged to produce four progress updates in the form of a presentation every two months and a final research findings report, (b) section 3.1.2 of the tender document which stipulated that the tenderer should be deemed to be in position to carry out all the services specified, (c) Section 7.6 (b) of the tender document which requested the tenderer to submit a list of key experts, together,

with their CVs, who had to be approved by the Malta Environment and Planning Authority, (d) the fact that the project in question was highly labour-intensive which necessitated the engagement of a team of competent field market researchers/interviewers, fieldwork supervisors and support personnel, (e) the presumed inability of the recommended tenderer to undertake this contract considering that he appeared to be a sort of 'sole trader' and that if he was going to have recourse to subcontracting then that was likely to exceed the 50% provided for at section 4.4.7 of *Form 4 - Data on Joint Venture/Consortium*, (f) the fact that a number of field interviewers had to be engaged simultaneously to cover the vast area of Buskett in order to take a snapshot from seven different visitor areas that had been identified at Buskett such as, roads, parking areas, bus stops, entry points and gates, (g) the fact that account had to be taken of the various uses of Buskett, namely camping, walking, cycling, educational issues, seasonality factors, as well as time windows relating to weekdays and weekends, (h) anticipated labour costs, (i) the fact that, considering the very specific project objectives and deliverables, including seasonality, the 10-month span and the labour costs involved in the execution of this contract, the recommended price of €10,400 (inclusive of VAT), was considered abnormally low especially when one takes into consideration the fact that the estimated price of the tender was €18,000 and that the other three bids ranged from €23,600 to €38,940, (j) the fact that the said appellant firm's price was not inflated but it reflected the services that had to be delivered in line with tender conditions and according to appellant firm's methodology with only a modest profit margin and (k) the fact that the website of the University of Malta described the recommended tenderer as a full-time lecturer who headed *The Institute of Earth Systems* which implied that he did not run a full-fledged commercial market research firm employing full-time personnel and that the low price offered was not the result of his company's excess capacity;

- having considered the contracting authority's representative's reference to the fact that (a) the tendering process was carried out diligently by competent officers according to the documentation presented to them by the bidders, (b) the evaluation board judged that the recommended tenderer had satisfied the tender conditions and that the price offered of €10,400 was not considered abnormally low when compared to the estimate of €18,000, (c) regarding the appellant firm's claim that the bidder had to undertake at least 50% of the contract works that was applicable only in the case of a joint venture/consortium, as per *Form 4 'Data on Joint Venture/Consortium'*, but it was not applicable in the case of the recommended tenderer, (d) the key experts proposed by the recommended tenderer were approved by the Malta Environment and Planning Authority, (e) the bidder had the option to have recourse to sub-contracting and that the recommended bidder indicated that he would be sub-contracting, as per *Form 5* and as per 'Schedule of Prices & Rates', where even the value was indicated, (f) the recommended tenderer had presented a complete tender submission and the evaluation board was satisfied that it met tender conditions and specifications, (g) it was not unheard of that a contract was awarded below the department's estimate, (h) the estimated value of the contract was arrived at in consultation with the Malta Environment and Planning Authority since that entity had considerable experience in this sector, (i) the tender document did not specify the number of field workers that had to be deployed or the points where the field workers had to be stationed since the details of the methodology was left up to the bidder, (j) eventual payments to the selected contractor were tied to the two-monthly presentations being to the satisfaction of the contracting authority and (k) tenders for project

management or such consultancy services normally requested key experts and these were not considered as sub-contractors but as part of the team that would assist the bidder in his or her work;

- having also considered the recommended tenderer's representative's reference to the fact that (a) it was illegal to engage students on such field work but as a full-time resident academic he was allowed and even encouraged to undertake private work, (b) he would execute the contract in his private capacity and that the field workers that he would engage were VAT registered, including himself, (c) in drawing up the methodology he had consulted his colleague, Dr Elizabeth Conrad, and, whilst it could well be the case that his methodology differed from that of the appellant firm, yet it was evident that his methodology was to the satisfaction of the contracting authority, (d) his submission contemplated the compilation of 1,200 questionnaires which, statistically speaking, represented a very extensive sample, (e) he had been in this specialised sector for 37 years and had been involved in 133 assignments locally and abroad and that it was not the first time that he carried out such work without payment, (f) in his circumstances, he considered the price he quoted as reasonable and argued that he could opt to undertake the work even at a loss and he considered that there was nothing illegal about that and (g) the appellant firm had no right to adjudicate his tender submission as that responsibility was vested in the evaluation board,

reached the following conclusions, namely:

1. The Public Contracts Review Board has been presented with no tangible proof which could, in any way, lead it to doubt that (a) Dr Louis F Cassar has the resources to execute the contract and to do so in full respect of local labour laws, (b) the proposed strategy, organisation and research methodology as submitted by Dr Cassar were not detailed enough and (c) the price quoted represents a fair offer.
2. The Public Contracts Review Board feels that commercial decisions are acceptable throughout the procurement procedures albeit there may be instances where these could be interpreted as 'dubious'. Nevertheless, in this particular instance, this Board is not convinced of the arguments brought forward by the appellant firm and considers most of the points raised as based on pure personal opinion. As a matter of fact this Board fails to, *inter alia*, understand (a) where one could tangibly argue that Dr Cassar is not in a position to conduct a visitor assessment study at Buskett over a 10-month period during which time frame he is obliged to produce four progress updates in the form of a presentation every two months and a final research findings report, (b) why should Dr Cassar not be considered as suitably enabled to carry out all the services specified just because his methodology - the details of which the appellant firm was not tangibly *au courant* - differed from the ones submitted by the same appellant, (c) why should one conclude that, being fully cognisant of the fact that the tender specifications did not establish the number and type of labour force required to fulfil the tenderer's obligations to the best of one's ability, one has to, necessarily, adopt a 'modus operandi' which is quite, if not entirely, similar to another one which is suggested by another tenderer, in this case the one being suggested by the appellant firm, (d) why should Dr Cassar be precluded from exercising his academic skills just because

the appellant firm feels that he does not run a full-fledged commercial market research firm employing full-time personnel and (e) why Dr Cassar had to conduct his activity through the same number of minimum points that the appellant firm had identified.

3. The Public Contracts Review Board acknowledges that this Board has not encountered any tangible or apparent evidence that Dr Cassar's submission fails, in any way, to fulfil the necessary mandatory requirements. Furthermore, in the absence of such tangible evidence, one cannot but argue that the contracting authority always retains the prerogative to terminate any agreement which it may enter into with Dr Cassar considering that eventual payments to the selected contractor are tied to the two-monthly presentations being to the full satisfaction of the contracting authority. Needless to say that such prerogative would have been equally applicable had any other participating tenderer been successful instead of the recommended tenderer.
4. As a result of (1) to (3) above the Public Contracts Review Board argues that, following a thorough examination of facts as submitted in writing and verbally during the hearing, there is nothing which this Board could possibly identify as contravening the pivotal parameters of transparency, adherence to specifications and equitable treatment of offers submitted.

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

Alfred R Triganza
Chairman

Carmel Esposito
Member

Joseph Croker
Member

16 June 2011