

PUBLIC CONTRACTS REVIEW BOARD

Case No. 311

MEUSAC MP/005/2011

Tender for the Development and Administration of a Web Portal with a Content Management System inclusive of Online Components and Applications for a European Citizens' Toolkit

This call for tenders was published in the Government Gazette on the 18th February 2011. The closing date for this call with an estimated budget of € 45,000 (incl. of VAT) was the 25th March 2011.

Eight (8) tenderers submitted their offers.

Alert Communications Ltd filed an objection on 19th May 2011 against the decision taken by MEUSAC/Departmental Contracts Committee to award the tender to Bay Leaf Ltd as the most economically advantageous tender.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr. Edwin Muscat and Mr Carmel Esposito as members convened a public hearing on Wednesday, 13th July 2011 to discuss this objection.

Present for the hearing were:

Alert Communications Ltd

Dr Tiziana Filletti	Legal Representative
Dr Marthese Portelli	Legal Representative
Ms Claudine Cassar	Managing Director

Bay Leaf Ltd

Dr Anthony Galea	Legal Representative
Mr Jonathan Camilleri Bowman	Representative

Office of the Prime Minister (OPM) & MEUSAC

Dr Silvio Brincat	Legal Representative
Dr Vanni Xuereb	Head MEUSAC
Mr Alex Magro	Director Corporate Services (OPM)

Evaluation Board:

Ms Maria Schembri	Chairperson
Mr Karl Pullicino	Member
Ms Maureen Cutajar	Member
Mr Jesmond Sciberras	Member
Mr Roberto Formosa	Member
Mr Robert Azzopardi	Member
Mr Osvaldo Zammit	Secretary

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

Dr Tiziana Filletti, legal representative of Alert Communications Ltd, the appellant company, made the following submission:-

- i. her client was an established firm in this line of business with 13 years experience having its own premises and personnel;
- ii. by email dated 12th May 2011 the contracting authority informed her client that the tender had been awarded to Bay Leaf Ltd as it was considered to be the most economically advantageous tender, even though her client had submitted a cheaper offer and was technically competent in this line of work;
- iii. on asking for more information as to the technical evaluation of the offer submitted by Alert Communications Ltd, the contracting authority gave very limited information such that her client was complaining about this withholding of information when the company had a right for this information;
- iv. her client had also asked for an explanation as to how the technical score was arrived at and the said company could not understand the reasons behind the allocation of certain points as some appeared to have been awarded in an arbitrary manner; and
- v. the contracting authority failed to furnish her client with the extract of the report relevant to the technical evaluation of its offer and that amounted to lack of transparency;

Ms Claudine Cassar, managing director of Alert Communications Ltd, submitted the following remarks:

- a. after 13 years in this line of business this was the second time that the company was lodging an appeal and the reason behind the appeal was the withholding of information by the contracting authority and the apparent lack of transparency in the tendering process;
- b. the tender was published on the 18th February 2011 and, as per timetable at page 11 of the tender document, it was indicated that the deadline "*for request for any additional information from the Contracting Authority – up to 10 a.m. of Friday 18th February 2011*", i.e. the same day the tender was issued, a condition which was unheard of and certainly not in the public interest;
- c. the tender document was defective in various respects, such as, clauses 1.3 and 1.5 under 'Mandatory Requirements' at page 52 made reference to sections 1.2.10 and 1.2.3 respectively which were inexistent in the tender document but notwithstanding these errors she still felt that her company could participate in the tender by going through the tender document and sort out these deficiencies;

- d. she had insisted on a debriefing session from MEUSAC in order to note her company's mistakes so that her company would avoid repeating the same mistakes in future cases. However, when via email dated 12th May 2011, Ms Cassar asked for a breakdown of the technical score as per evaluation grid at page 19 of the tender document and the extract of the evaluation report pertinent to Alert Communications Ltd, the contracting authority did furnish via email dated 16th May 2011 the scores given by the five evaluators. Nevertheless, the contracting authority failed to furnish the relative extract of the evaluation report to enable her to see the explanations given by the evaluators to back their score stating in email dated 17th May 2011 – just before the expiry of the 5 days within which her company could lodge an appeal – that, unfortunately, it had to remove the abstract from the adjudication report that explained the basis on which the points were awarded as, according to the Department of Contracts, such information should not be provided at that stage;
- e. pointed out that this was a MEAT tender and the allocation of points was crucial for tender award and, as a result, her company wanted to know the reason/s justifying the allocation of points to enable the company she managed to properly exercise its right to appeal. She remarked that, going through the point system, it was very confusing for her to note that, for example, in respect of 'Timing, Sequence and Duration of Activities' under section 'Timetable of Activities', three evaluators allocated Alert Communications Ltd 10 out of 10 points whereas the other two evaluators allocated 8 points each and the same applied to 'Completeness and quality of the proposal' where the allocation of points varied from 9 to 6 out of 10 points, 'Creativity and innovative concepts applied' where the allocation of points varied from 25 to 16 out of 30 points and 'Compatibility with the most popular and widespread programming language' where points varied from 19 to 17 out of 20 points;
- f. according to regulations, the contracting authority was not obliged to furnish that information because the value of the tender was under €50,000 but, on the other hand, the regulations did not prohibit the contracting authority from furnishing such information;
- g. she felt more aggrieved when she discovered that the recommended tenderer, that was adjudicated technically superior, was, according to the Malta Financial Services Authority, a tea importing company, unknown on the IT local market, a turnkey construction contractor, with an address of a notary public and with telephone and fax numbers that did not exist;
- h. Bay Leaf Ltd was registered only 1 year prior to the issue of the tender when the tender document called for 2 years experience; and
- i. Volume 6 at page 51 under 'Mandatory Requirements' provided that the *"tenderer shall name three projects of a similar nature which were conducted during the past two years"*

Dr Silvio Brincat, legal representative of the contracting authority, complained that most of the points being brought up by the appellant company were not included in

the letter of objection and, as a consequence, the contracting authority was unprepared to answer the allegations. He added that it appeared that the inconsistencies in the tender document mentioned by the appellant company were not so misleading after all so much so that the appellant company sorted them out and presented a correct tender submission.

Mr Osvaldo Zammit, secretary to the evaluating board, under oath, gave the following evidence:-

- i. the evaluating board was made up of five technical members;
- ii. he conceded that the tender document was defective with regard to (a) the time given for clarifications and (b) with regard to certain references which did not exist/correspond because at one stage there was a renumbering which was not reflected in certain clauses however this situation was common to all bidders;
- iii. if one would have submitted clarifications the contracting authority would have considered them. In fact, bidders sought some clarifications, one of which dated 25th February 2011, and these were answered and displayed on MEUSAC's website;
- iv. MEUSAC fell within the portfolio of the Office of the Prime Minister and hence the recommendations of the evaluating board were subject to the approval of the Office of the Prime Minister's Departmental Contracts Committee (DCC), as per established government procedure, which had the authority to review any aspect of the tendering process; and
- v. the tender was submitted by Bay Leaf Ltd but it included a sub-contractor, 2i Co. Ltd, which had a track record in the IT sector.

Ms Maria Schembri, chairperson of the evaluating board, under oath, gave the following evidence:-

- a. Bay Leaf Ltd included in its tender submission a sub-contractor, 2i Ltd, and the two-year experience/track record was attributed to this sub-contractor;
- b. according to Volume 1 Section 2 'Tender Form' (3) (page 24) the "*maximum amount of sub-contracting must not exceed 30% of the total contract value. The main contractor must have the ability to carry out at least 70% of the contract value by his own means*"; and
- c. the difference that emerged in the point allocation by evaluators was attributable to the interpretation that each evaluator gave to such indefinable terms as 'quality' and 'creativity and innovative concepts'.

The Chairman together with the other members of the Public Contracts Review Board (i) questioned the grounds on which clarifications received after the prescribed time were accepted and answered once the contracting authority had not issued a clarification to all eight participating bidders that the period for the submission of clarifications had been extended, (ii) pointed out that the responsibility to publish a

correct tender document rested with the contracting authority and (iii) expected a certain degree of convergence - not uniformity otherwise there would be no purpose in having five evaluators - among technical evaluators especially on objective criteria because the allocation of points was crucial in a tender adjudicated on the basis of MEAT.

Mr Jonathan Camilleri Bowman, representing the recommended tenderer, under oath, gave the following explanations:-

- i. he was a director and co-owner of 2i Ltd, a company launched in Malta and which operated successfully in Malta, Libya and the UK whereas Bay Leaf Ltd was set up by himself and his wife and it had been in operation for about 18 months;
- ii. it was correct for one to remark that he did not invest in a proper website for Bay Leaf Ltd but still it was a regular company where his wife handled the tea importation sector and he handled other sectors like, defensive military and security products, business analysis, project management and ICT solutions, such as, server maintenance and websites, where in some cases, 2i Ltd was brought in to offer its services;
- iii. although Bay Leaf Ltd had not been set up for 2 years still he was the director of both Bay Leaf Ltd and 2i Ltd and, at the end of the day, a company's performance was dependent on its management and employees;
- iv. he could have tendered through 2i Ltd, which had all the necessary experience for this tender, but he opted to submit the tender through Bay Leaf Ltd - due to personal and other reasons - and he had clearly indicated so in his company's tender submission;
- v. he declared that 70% of the contract works such as project management, business analysis and client meetings were going to be carried out by Bay Leaf Ltd and, although this same company was capable of executing the entire contract by itself, he decided to include 2i Ltd to use its track record which Bay Leaf Ltd did not have;
- vi. he was a minority shareholder, 49%, in 2i Ltd and when bidding for a project he, personally, sometimes felt the need to engage a sub-contractor for a specific task and this time it was 2i Ltd and next time it could well be Alert Communications Ltd itself; and
- vii. the 30% share of the contract that 2i Ltd would undertake in so far as this tender is concerned consisted of a ready-made product, namely a web portal with a content management system, whereas the 70% to be carried out by Bay Leaf Ltd consisted of the services rendered by developers to design, customise and support the product for the particular use of the client, namely, MEUSAC.

Dr Brincat insisted that most of the issues raised at the hearing did not feature in the letter of objection and so ought to be discarded. He added it was not fair and that it even amounted to a breach of the principle of 'equality of arms' to introduce new

elements to the case in respect of which he was not given the opportunity to prepare himself.

On her part Dr Filletti:-

- a. pointed out that Bay Leaf Ltd and 2i Ltd were legally two distinct entities;
- b. remarked that the objection was based on three issues, i.e. (1) the withholding of information, (2) lack of transparency and (3) contradictory marking. Furthermore, she added that the last paragraph of the letter of objection stated that *“Alert reserves the right to present further evidence and submissions at the hearing of the present appeal”*
- c. argued that the issues raised were related to provisions laid down in the tender document and to a simple due diligence carried out through the Malta Financial Services Authority and the fact that the appellant company was well prepared should in no way be used to appellant company’s disadvantage; and
- d. insisted that the appellant company asked questions for which there were clear answers, such as, with regard to the lack of experience of the tendering company, the role of the sub-contractor and inconsistencies in the tender document.

Dr Anthony Galea, legal representative of the recommended tenderer, Bay Leaf Ltd, remarked that (i) Mr Jonathan Camilleri Bowman was a director of both Bay Leaf Ltd and 2i Ltd and (ii) Bay Leaf Ltd was a relatively new company which had to take off at some point in time and what really mattered was whether the employees / representatives of Bay Leaf Ltd had the necessary experience to carry out the works contemplated in the tender document and whether the tenderer had sufficient back up to execute this contract, which the tenderer had by engaging 2i Ltd as his sub-contractor.

Ms Cassar intervened to remark that (a) the provision that, effectively, prevented tenderers from seeking clarifications did prejudice the process, (b) contrary to what the contracting authority said, it was not a question of renumbering but there were certain omissions in the tender document, (c) although the evaluators carried out their duties in good faith still, given the lack of proper guidelines as to how to award points, the end result was that there were certain instances where a wide variation emerged in the marks allocated for the same item, and (d) it was inconceivable how the recommended tenderer, a company with one year experience, was going to be assigned 70% of a public contract, meaning, that the bulk of the work was going to be done by an inexperienced entity since Mr Camilleri Bowman could not perform by himself all the tasks required to execute this contract.

Ms Cassar proceeded by alleging that on presenting the appeal Dr Marthese Portelli, the representative of Alert Communications Ltd, was told by Mr Osvaldo Zammit that if Alert Communications Ltd were to be successful in their appeal then the contracting authority would cancel the tender.

Dr Brincat objected to the allegation that Ms Cassar levelled at Mr Zammit.

The Chairman Public Contracts Review Board remarked that the Board, practically, had no control on such statements that were not expressed during the hearing. Still, he continued, the hearings and the decisions of the Public Contracts Review Board were public and could, eventually, be followed up by the competent authorities if the latter would consider it fit to do so.

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 19th May 2011 and also through their verbal submissions presented during the hearing held on 13th July 2011, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant company’s representatives’ claims and observations, particularly, the references made to the fact that (a) by email dated 12th May 2011 the contracting authority informed the appellant company that the tender had been awarded to Bay Leaf Ltd as it was considered to be the most economically advantageous tender, even though Alert Communications Ltd had submitted a cheaper offer and was technically competent in this line of work, (b) on asking for more information as to the technical evaluation of the offer submitted by Alert Communications Ltd, the contracting authority gave very limited information such that the appellant company was complaining about this withholding of information when the company had a right for this information, (c) although the evaluators carried out their duties in good faith still, given the lack of proper guidelines as to how to award points, the end result was that there were certain instances where a wide variation emerged in the marks allocated for the same item, (d) the contracting authority failed to furnish the appellant company with the extract of the report relevant to the technical evaluation of its offer and that amounted to lack of transparency, (e) albeit the tender was published on the 18th February 2011 the timetable at page 11 of the tender document indicated that the deadline “*for request for any additional information from the Contracting Authority – up to 10 a.m. of Friday 18th February 2011*”, i.e. the same day the tender was issued, a condition which was unheard of and certainly not in the public interest, (f) the tender document was defective in various respects, such as, clauses 1.3 and 1.5 under ‘Mandatory Requirements’ at page 52 made reference to sections 1.2.10 and 1.2.3 respectively which were inexistent in the tender document, (g) the recommended tenderer, that was adjudicated technically superior, was, according to the Malta Financial Services Authority, a tea importing company, unknown on the IT local market, a turnkey construction contractor, with an address of a notary public and with telephone and fax numbers that did not exist, (h) Bay Leaf Ltd was registered only 1 year prior to the issue of the tender when the tender document called for 2 years experience, (i) Bay Leaf Ltd and 2i Ltd were legally two distinct entities, (j) the issues raised were related to provisions laid down in the tender document and to a simple due diligence carried out through the Malta Financial Services Authority and the fact that the appellant company was well prepared should in no way be used to appellant company’s disadvantage, (k) the appellant company asked questions for which

there were clear answers, such as, with regard to the lack of experience of the tendering company, the role of the sub-contractor and inconsistencies in the tender document and (l) it was inconceivable how the recommended tenderer, a company with one year experience, was going to be assigned 70% of a public contract, meaning, that the bulk of the work was going to be done by an inexperienced entity;

- having considered the contracting authority's representative's reference to the fact that (a) most of the points being brought up by the appellant company were not included in the letter of objection and, as a consequence, the contracting authority was unprepared to answer the allegations, (b) it appeared that the inconsistencies in the tender document mentioned by the appellant company were not so misleading after all so much so that the appellant company sorted them out and presented a correct tender submission, (c) whilst the evaluation board conceded that the tender document was defective with regard to (1) the time given for clarifications and (2) with regard to certain references which did not exist/correspond because at one stage there was a renumbering which was not reflected in certain clauses, yet this situation was common to all bidders, (d) if one would have submitted clarifications the contracting authority would have considered them – as a matter of fact clarifications, dated 25th February 2011, were answered and displayed on MEUSAC's website, (e) the tender was submitted by Bay Leaf Ltd but it included a sub-contractor, 2i Ltd, which had a track record in the IT sector, (f) the two-year experience/track record was attributed to the sub-contractor, 2i Ltd and (g) the difference that emerged in the point allocation by evaluators was attributable to the interpretation that each evaluator gave to such indefinable terms as 'quality' and 'creativity and innovative concepts';
- having considered the recommended tenderer's representative's reference to the fact that (a) although Bay Leaf Ltd had not been set up for 2 years still Mr Camilleri Bowman was a director in both Bay Leaf Ltd and 2i Ltd, (b) it was argued that a company's performance was dependent on its management and employees, (c) Bay Leaf Ltd was a relatively new company which had to take off at some point in time and what really mattered was whether the employees/representatives of Bay Leaf Ltd had the necessary experience to carry out the works contemplated in the tender document and whether the tenderer had sufficient back up to execute this contract, which the tenderer had by engaging 2i Ltd as his sub-contractor, (d) as stated by Mr Camilleri Bowman a decision could have been taken for the tender to be submitted by 2i Ltd, which had all the necessary experience for this tender, but instead, due to personal reasons, it was decided for a tender to be submitted through Bay Leaf Ltd, (e) 70% of the contract works such as project management, business analysis and client meetings were going to be carried out by Bay Leaf Ltd and, although this same company was capable of executing the entire contract by itself, it was decided to include 2i Ltd to use its track record which Bay Leaf Ltd did not have and (f) the 30% share of the contract that 2i Ltd would undertake in so far as this tender is concerned consisted of a ready-made product, namely a web portal with a content management system, whereas the 70% to be carried out by Bay Leaf Ltd consisted of the services rendered by developers to design, customise and support the product for the particular use of the client, namely, MEUSAC,

reached the following conclusions, namely:

1. The Public Contracts Review Board cannot but place enough emphasis on the fact that the responsibility to publish a correct tender document rests solely with the contracting authority;
2. The Public Contracts Review Board would like to express its concern and total unacceptability of the *modus operandi* adopted by the evaluating board / contracting authority wherein the latter accepted and replied to clarifications received after the prescribed time once the contracting authority had not issued a clarification to all eight participating bidders that the period for the submission of clarifications had been extended;
3. The Public Contracts Review Board opines that the fact that, during the hearing, the recommended tenderer tried to minimise the importance of the 70/30 mix as stipulated in the tender document between actual tenderer *vis-a-vis* subcontractor participation level in this tender claiming that (a) Bay Leaf Ltd was a relatively new company which had to take off at some point in time and (b) what really mattered was whether the employees/representatives of Bay Leaf Ltd had the necessary experience to carry out the works contemplated in the tender document and whether the tenderer had sufficient back up to execute this contract, which the tenderer had by engaging 2i Ltd as the bidder's sub-contractor, is considered by the public Contracts Review Board as an admission that the greater part of the pivotal work considered to be indispensable for this tender will be carried out by 2i Ltd, the sub-contractor. This is '*sui generis*' a breach of the 70 / 30 benchmark as it is more than obvious that the sub-contracting activity will be more than 30%.
4. The Public Contracts Review Board cannot overlook the evidence given under oath by the Chairperson of the evaluating board wherein she stated that the two-year experience/track record was attributed by the Board to the sub-contractor, 2i Ltd, considering that this was the crux as regards a tenderer's capability to carry out the work associated with this tender;
5. The Public Contracts Review Board concurs with the appellant company's remarks relating to the fact that other points raised during the hearing by the appellant company's representatives simply referred to provisions laid down in the tender document and to a due diligence carried out through a simple browsing of the Malta Financial Services Authority website which is, after all, of public domain. Undoubtedly, albeit not explicitly stated in the appellant company's objection letter, yet such issues are generally considered as admissible in similar circumstances.
6. Finally, the Public Contracts Review Board observes that none of the objections raised would, possibly, have been accepted had 2ic Ltd opted to bid for this tender in its own capacity. Needless to say that this is just an observation as, after all, the company's management may have had their valid reasons for not doing so.

In view of the above this Board finds in favour of the appellant company and recommends that the said tenderer be reinstated in the evaluation process as well as recommending that the deposit paid by the latter should be reimbursed.

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmel Esposito
Member

18 July 2011