

## PUBLIC CONTRACTS REVIEW BOARD

### Case No. 330

#### TM/005/2011

#### **Tender for Marine Environment Baseline Studies (Proposed Yacht Marina at Sa Maison) – Lot 1: Marine Ecology Baseline Study**

This call for tenders was published in the Government Gazette on 25th February 2011. The closing date for offers was 17th March 2011.

The estimated value of this tender was Euro 18,000.

Four (4) tenderers had originally submitted their offers.

Messrs **Ecoserv Ltd** filed an objection on 17<sup>th</sup> June 2011 against the decision by Transport Malta to award Lot 1 - Marine Ecology Baseline Study - to AIS Environmental Ltd.

The Public Contracts Review Board composed of Mr Edwin Muscat as Acting Chairman and Mr Carmel Esposito and Mr Joseph Croker as members convened a meeting on Wednesday 5th October 2011 to discuss this objection.

Present for the hearing were:

#### **Ecoserv Ltd**

Dr Stefan Camilleri	Legal Representative
Ms Lucienne Borg	Representative
Ms Sarah Debono	Representative

#### **AIS Environmental Ltd (AIS)**

Ms Ruth Debrincat	Representative
Ms Joanna Hauge	Representative

#### **Transport Malta**

Dr Joseph Cammilleri	Legal Adviser
Mr Adrian Mallia	Technical Adviser

#### **Evaluation Board**

Capt. Richard Gabriele	Chairman
Mr Kevin Brincat	Member
Ms Gabrielle Galea	Member
Mr Chris Schembri	Member
Mr Josef Mercieca	Secretary

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

**Dr Stefan Camilleri, legal representative of Ecoserv Ltd, the appellant,** stated that his client was objecting on two aspects of the tender requirements, namely, the key expert and subcontracting.

### **The Key Expert**

Dr Stefan Camilleri made the following submission:-

- i. the key expert of the recommended bidder does not have the qualifications/experience required in Volume 1 Section 1 'Instructions to Tenderers' clause 6.1.2 B (1) of the tender document which read as follows:

#### *For Lot 1- Marine Ecology Baseline Study*

*The Key Experts in accordance with the Contracting Authority's requirements are:*

- 1) Marine Ecologist/Biologist with a minimum of 10 years general professional experience. This expert shall have participated in at least 3 assignments of a similar nature involving surveys of benthic marine environments, infaunal studies, and sediment studies over the past 10 years. Must also have experience in chemical analysis of marine sediments, taxonomy of marine species and species identifications.*
- ii. the one key expert had to satisfy all the requirements mentioned above and it was not permissible to have more than one key expert to account for these requirements;
- iii. as far as Dr Camilleri was aware, there was only one expert that satisfied all the criteria set out in (i) above and that was Dr Joseph A. Borg, the key expert proposed by his client; and
- iv. according to the terms of reference issued by the Malta Environment and Planning Authority (MEPA), which formed part of the tender document, certain tests had to be carried out because the area was ecologically and biologically sensitive, e.g. the existence of a particular protected species of sea shell which was found only in this area and which species was discovered by Dr Joseph Borg.

**2.2 - Dr Joseph Camilleri, legal representative of Transport Malta, the contracting authority,** on his part submitted the following:-

- a. the award criteria of the tender, clause 32.1, stipulated that the tender was to be awarded to the cheapest compliant tenderer and therefore it was not

a question of which bidder submitted the best offer in terms of presentation, personnel, equipment and so forth, but that meant that once a bidder was found administratively and technically compliant, then, that bidder had to be considered at the financial stage;

- b. the objections raised by the appellant did not concern the technical aspect but rather the administrative aspect of the tender since they dealt with the selection criteria;
- c. the appellant might have been correct in stating or assuming that locally, there was only one expert that possessed the requirements set out in the tender, namely, Dr Joseph Borg who was the key expert proposed by the appellant. However, according to the CV of Dr Lorenzo Pacciardi, the key expert proposed by his client, Dr Pacciardi is a marine biologist/ecologist – a graduate in marine biology and PhD in ecology – and therefore he did satisfy the tender requirements in terms of qualifications, the ten-year experience and the three previous similar assignments; and
- d. the other supporting staff included by the recommended tenderer were over and above the tender requirements because Dr Pacciardi, on his own, already satisfied all the requisites of the key experts.

The Acting Chairman PCRB observed that the technical evaluation report drawn up by Mr Adrian Mallia, who advised Transport Malta on this project, highlighted various shortcomings with regard to the offer submitted by the recommended tenderer and therefore he asked whether those shortcomings had been addressed or taken into account by the adjudication board.

Dr Joseph Camilleri, legal representative of Transport Malta, remarked that it appeared that the technical adviser, Mr Mallia, did not carry out his exercise on the award criteria of the cheapest compliant tenderer but he compared the offers submitted by the bidders and in so doing he judged that the appellant's offer was superior to that of the recommended tenderer. However, according to the adjudication board, AIS Ltd's offer met the minimum requirements set out in the tender document. Dr Camilleri defended the actions of the adjudication board that once the recommended tender met the administrative and technical criteria then that bid had to be considered further along with the other compliant bids and the deciding factor from then onwards was the price.

**2.3 - Mr Adrian Mallia, technical adviser to Transport Malta**, under oath gave the following evidence with regard to Lot 1, which was the subject of the appeal:-

- i. his organisation had been awarded a contract by Transport Malta to coordinate matters related to Environmental Impact Assessments (EIA) and part of the assignment was to prepare tenders for baseline studies and to coordinate specific studies, such as marine environment, and, in

consultation with MEPA, to draw up terms of reference including the method statements which the tenderer had to abide by, otherwise, he had to provide an explanation for variations;

- ii. although the selection criteria at section 6 of the 'Instructions to Tenders' might not have covered all the requirements, still, there were other requirements elsewhere in the tender document which the tenderer had to satisfy;
- iii. Ecoserv Ltd presented a fully compliant tender submission.
- iv. With regard to the tender submission by AIS Environmental Ltd:

(a) the method statement had indicated the 'shore normal transects', i.e 90 degrees with the coastline, however, AIS proposed a zig-zag pattern which did not provide the same kind of coverage. Once this represented a departure from the method statement, then AIS was obliged to give cogent explanations and MEPA clearance had to be obtained – Transport Malta confirmed that no explanations were requested on this issue;

(b) of the five previous projects provided, two related to Grand Harbour and Mgarr EIAs, both Transport Malta projects, however from the titles of the other three projects it was not clear if they met the standards set out in the tender and therefore a clarification was called for – Transport Malta confirmed that a clarification was sought and a satisfactory explanation provided;

(c) Dr Pacciardi, AIS Ltd's key expert, had the 10-year general professional experience however it was not clear if he had worked on 3 similar assignments over the past 10 years. -- Dr Joseph Camilleri, on behalf of Transport Malta, remarked that the tender document did not specify that the 3 assignments had to be EIAs but it simply stated similar assignments and the adjudication board judged that the previous works described in Dr Pacciardi's CV were of a similar nature;

(d) Dr Alan Deidun, another key expert, did not possess the 10-year experience requested in the tender. Dr Joseph Camilleri, on behalf of AIS Ltd, remarked that it was sufficient to have one key expert who satisfied all the criteria and AIS provided that by proposing Dr Pacciardi;

(e) Dr Alan Deidun featured as one of the key experts in two separate tender submissions . Dr Camilleri rebutted that (i) the tender conditions did not ban an expert from featuring in more than one tender submission but it laid down that the key expert of the awarded tenderer had to render the service requested in the tender, (ii) Dr Pacciardi, and not Dr Deidun, was the key expert nominated by AIS

and (iii) one of the reasons that disqualified Taktraco Ltd was that Dr Deidun did not have the required experience of a key expert;

(f) access to laboratories was indicated for chemical analysis, i.e. subcontractor Ambiente s.c. but not for biological samples, however one could not exclude that the tenderer, (AIS Ltd) had his own laboratories to carry out these tests;

(g) the recommended tenderer acknowledged that the 'type of corer and pre-treatment' had to be carefully considered but he gave no information as to how he was going to address this matter;

(h) the methodology proposed by AIS Ltd did not conform to the terms of reference but that did not mean that it was not acceptable to MEPA because that still had to be established by consulting MEPA; and

(i) he did not consider AIS's submission fully compliant up to the time that he drew up his report, however, it could be the case that, eventually, certain shortcomings might have been addressed.

**Ms Gabrielle Galea, member of the adjudication board**, remarked that the technical adviser had commented on certain aspects, such as the methodology, which did not form part of the selection criteria at section 6 of the 'Instructions to Tenderers' and therefore could not be considered by the adjudication board.

Dr Joseph Camilleri observed that the methodology requested in the tender was not very specific but provided a certain measure of flexibility and the adjudication board felt that if it were to disqualify AIS Ltd on the observations made by Mr Mallia, the technical adviser, it would exceed the remit granted to it in the tender document. He reiterated that this tender had to be adjudicated not on the basis of the most economically advantageous tender but solely on price, i.e. the cheapest priced tender satisfying the administrative and technical criteria.

Dr Stefan Camilleri argued that once the recommended tenderer was not in line with certain aspects of the methodology laid down in the tender, such as the 'shore normal transects', then, the technical expert's advice could not be overlooked. Dr Camilleri also questioned whether Dr Pacciardi had '*experience in chemical analysis of marine sediments, taxonomy of marine species and species identifications*'.

**Capt. Richard Gabriele, chairman of the adjudication board**, remarked that the board rested on the declaration submitted in the offer submitted by AIS Ltd, that Dr Pacciardi was a specialist in the areas of marine biology, taxonomy of Benthos, impacts on Benthic Faunal Assemblages and sediment quality assessments.

Dr Joseph Camilleri stressed that the tender document did not request an expert on the particular seashell species found in the Sa Maison area but it requested a

marine biologist and so forth and the adjudication board considered Dr Pacciardi's CV and decided that he satisfied that requirement.

### **Equipment and Human Resources**

Dr Stefan Camilleri submitted that AIS Environmental Ltd did not have the necessary equipment and human resources to carry out at least 50% of the contract works by their own means, as required under section 6.1.2 D:

*"Data concerning subcontractors and the percentage of services to be subcontracted. (Form 5 of Vol. 1, Sec. 4).*

*Note - The maximum amount of sub-contracting must not exceed 50% of the total contract value. The main contractor must have the ability to carry out at least 50% of the contract works by his own means."*

Dr Stefan Camilleri on behalf of appellants added that in the case of a similar contract awarded to AIS Ltd, his client was engaged as subcontractor to carry out most of the works.

In reply, Dr Joseph Camilleri on behalf of the preferred bidder, remarked that:-

- a. the recommended tenderer had indicated his intention to subcontract up to 25% of the works contemplated in the tender, i.e. the 'granulometry and chemical analysis of surface sediment' to 'Ambiente s.c. of Via Frassina, 21 Carrara (MS) 54033 Italia', which declaration satisfied the subcontracting limit set out in the tender document; and
- b. the appellant's claim that the recommended tenderer had in the past engaged appellants as subcontractors on a similar contract by no means meant that, presently, the recommended tender did not have the necessary means to carry out more than 50% of the works or that on previous occasion/s the recommended tenderer had opted to subcontract certain works for purely commercial reasons rather than lack of own resources

**Ms Ruth Debrincat, on behalf of AIS Ltd** remarked that (i) Dr Pacciardi satisfied all the requisites of the key expert and that Dr Deidun was being taken on as an additional expert, given his expertise on the local marine environment, (ii) a clear declaration had been submitted that the intention was to subcontract up to 25% of the works and (iii) currently, AIS Ltd was executing a similar contract without the need of engaging Ecoserv Ltd as its subcontractor.

Dr Joseph Camilleri, for Transport Malta, concluded that:

- a. in the tendering process a contracting authority always strived to obtain as much evidence as possible, however, there came a time when on certain aspects the contracting authority had to rest on declarations made by tenderers. However, if during contract execution such declarations would turn out to be incorrect, then penalties were contemplated in the contract;

- b. one could not, *a priori*, exclude a bidder on suspicion that he might default on his commitments.
- c. with regard to the two issues raised in the appeal (a) Dr Pacciardi satisfied the requirements of the key expert and (b) there was a declaration that 25% - against the 50% permissible – was going to be subcontracted; and
- d. in the circumstances, the adjudication board acted correctly by not excluding AIS Ltd on the premise that Ecoserv’s bid was technically superior because the award criteria was not based on MEAT but solely on price, after having been adjudicated administratively and technically compliant.

Dr Stefan Camilleri, on behalf of Ecoserv Ltd concluded by (a) maintaining that Dr Picciardi did not satisfy all the requisites of the key expert so much so that Dr Deidun was included to make up for his shortcomings, such as, expertise in the local marine environment, and (ii) questioning the 25% subcontracting declaration since that related only to chemical analysis and excluded that for biological samples.

The hearing which was suspended at 10.25 a.m – to bring over Mr Adrian Mallia to give evidence – resumed at 11.25 am and was brought to a close at 12.05 pm.

This Board,

- having noted that appellants, in terms of their “reasoned letter of objection” dated 17<sup>th</sup> June 2011, and also through their verbal submissions presented during the hearing held on 5<sup>th</sup> October, 2011, had objected to the decision taken by the pertinent authority,
- having taken note of appellants representative’s claims, namely, that (a) key expert of recommended bidder did not have the qualifications and experience required in the tender document, and (b) the recommended bidders did not have the necessary equipment and human resources to carry out at least 50% of contract works by their own means,
- having considered the arguments brought forward by the legal representative of Transport Malta, particularly that (a) the award criteria of the tender stipulated that the tender was to be awarded to the cheapest compliant tenderer and not to the bidder who submitted the best offer in terms of presentation, personnel etc. and (b) the expert proposed by the recommended bidder satisfied tender requirements, and (c) the objections raised by appellants concerned administrative aspects of the tender rather than technical ones, and (d) Transport Malta’s technical adviser did not carry out his exercise on the award criteria of the cheapest compliant tenderer. Instead, he carried out a comparative exercise of the offers submitted by the two compliant bidders, and (e) the recommended tenderer had indicated his intention to subcontract up to 25% of works contemplated in the tender. In this context, one could not, *a priori*, exclude a bidder on suspicion that he might default on his commitments.
- having considered the evidence given by Transport Malta’s technical adviser, particularly, that (a) Ecoserv Ltd’s offer was fully compliant and was, technically,

the better of the two compliant bidders, and (b), AIS Ltd's proposal does not include shore normal transects but a zig-zag pattern across the creek and is therefore not in line with the Method Statement, and (c), Dr Pacciardi had ten (10) years general professional experience, however, it was not clear from the information provided by AIS Ltd whether the list of projects listed met tender requirements. Following clarification, Transport Malta confirmed that those projects were acceptable and (d) AIS Ltd had indicated that they had access to laboratories for chemical analysis but not for biological samples. He added that he could not exclude the possibility that tenderer had his own laboratory, and (e), the methodology proposed by AIS Ltd did not conform to terms of reference but that did not mean that it was not acceptable to MEPA who would eventually decide on the matter, and (f) he did not consider AIS Ltd's submission to be fully compliant up to the time he drew his report, however, he did not rule out that eventually certain shortcomings might have been addressed.

- having taken note of Ms Gabrielle Galea's ( member of adjudication board) remarks that the adviser had commented on certain aspects of the offers made by the bidders, such as methodology, that did not form part of the selection criteria. On this issue, the Board had also taken note of appellants' legal adviser's comment that once the recommended tenderer was not in line with the methodology laid down in the tender, then the technical adviser's advice could not be ignored.
- having taken note of Ms Ruth Debrincat's intervention on behalf of AIS Ltd, namely, that (a) Dr Pacciardi satisfied all the requisites of the key expert, and (b) Dr Deidun was engaged as an additional expert given his knowledge of the local marine environment, and (c) a declaration was submitted by AIS Ltd that it intended to subcontract up to 25% of works envisaged in this tender, and (d) currently AIS Ltd was executing a similar contract without the need to engage Ecoserv Ltd as a subcontractor.

reached the following conclusions, namely, that:

1. Appellants failed to justify their claim that the key expert of the preferred bidder does not have the necessary qualifications and experience to carry out the required works. AIS Ltd had proposed two experts, namely, Dr Pacciardi as the key expert and Dr Deidun as an adjunct to Dr Pacciardi. During the hearing, it emerged that Dr Deidun, who is a marine biologist with good knowledge of the local environment does not have the required 10 year professional experience ( he graduated in 2006 ) but he had already carried out three assignments similar to the one required in the tender document. As regard Dr Pacciardi, his C V attests that he has both the experience ( having graduated in the year 2000 ) and the qualifications necessary to meet the tender requirements. Dr Pacciardi's qualifications to meet such requirements have not been successfully challenged neither by appellants nor by Transport Malta technical adviser who in his analysis of AIS Ltd's offer, noted with regard to Dr Pacciardi's experience that "it is not clear from the information provided, whether he has the requisite experience in EIA's, After seeking clarifications on this and other issues , the adjudicating board agreed that Dr Pacciardi met tender requirements and deemed AIS Ltd offer to be technically compliant.

2. As regards appellants' other claim, namely, that AIS Ltd does not have the necessary equipment and human resources to carry out 50% of contract works by their own means, again, lacks conviction. During the hearing, it was established that, apart from the two experts mentioned earlier, AIS Ltd had identified another expert –Ing Mario Schembri – as team manager and another four staff members of their own --- three environmental scientists and one graphic designer. Besides, the company declared that it intended to sub-contract only 25% of the value of works, namely, laboratory services, to Italian company, Ambiente S C. No concrete indications were given by appellants to substantiate their claim.

As a consequence of the above, the Board agrees with the conclusion reached by Transport Malta evaluation board and decides against the appellants.

In line with legal provision, the Public Contracts Review Board also recommends that the deposit by appellants should be forfeited in favour of Government.

Edwin Muscat  
Acting Chairman

Carmel Esposito  
Member

Joseph Croker  
Member

*17 October 2011*