

PUBLIC CONTRACTS REVIEW BOARD

Case No. 339

CT/2237/2010 Adv No CT/020/2010

Tender for the Provision of Consultancy Services for the Carrying Out of a Market Analysis of the Broadband Sector in Malta

This call for tenders was published in the Government Gazette on 1st February 2011. The closing date for this call with an estimated budget of €236,000 was the 29th March 2011.

Six (6) tenderers submitted their offers.

TERA Consultants filed an objection on the 20th July 2011 against the decision by the Contracts Department to disqualify its tender on being found administratively non-compliant.

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, 26th October 2011 to discuss this objection.

Present for the hearing were:

TERA Consultants

Mr Francois Epinat Representative

Analysys Mason Ltd

Mr Luca Bonnici Associate Consultant

Malta Communications Authority (MCA)

Dr Antoine Cremona Legal Adviser
Dr Nicholas Borg Legal Adviser

Evaluation Board:

Mr Victor Zammit Chairman
Mr Alan Christopher Cassar Member
Ms Joanna Formosa Borg Member
Mr Miguel Scerri Secretary

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

Mr Francios Epinat, representing TERA Consultants, the appellant company, stated that by letter dated 15th July 2011, the Department of Contracts informed TERA Consultants that the offer was found administratively not compliant because, according to the evaluation board, TERA Consultants:

“provided an incorrect sub-contracting value in the Tender Form submitted with the bid. The sub-contracting value quoted in the bid bond excluded the services of Prof. Bruno Deffains, which has been confirmed as being a sub-contractor.

As rectifications to the Tender Form cannot be made, the bid submitted by TERA Consultants has to be considered as administratively non-compliant due to incorrect/incomplete information submitted in the Tender Form Volume 1 Section 2, in relation to the sub-contracting value.”

Mr Epinat submitted that:-

- i. by way of email dated 11th May 2011, the Malta Communications Authority had requested TERA Consultants to clarify the relationship between Prof. Bruno Deffains and TERA Consultants, namely whether he was a sub-contractor or an employee of TERA Consultants;
- ii. on the 13th May 2011 TERA Consultants, through Mr Denis Basque, had informed the Malta Communications Authority that Prof. Deffains was a sub-contractor and that the amount of sub-contracting did not exceed the 30% of the contract value as stipulated in the tender document;
- iii. the reply by Mr Basque that Prof. Deffains was a sub-contractor within the context of this tendering process was erroneous for the following reasons:
 - a. the primary professional activity of Prof. Deffains was that of professor at the University of Paris 2 (Pantheon – Assas);
 - b. the second professional activity of Prof. Deffains was to provide expert services to TERA Consultants for which he had signed an exclusivity declaration;
 - c. had Prof. Deffains been a sub-contractor of TERA Consultants, he would have billed TERA Consultants for his services and he would have been registered as such with the French administrative services, however, TERA Consultants paid Prof. Deffains in the same way as its other employees, namely by way of a payslip and it even settles social security charges on his behalf which would not be the case had he been considered as a sub-contractor;

- d. Prof. Deffains also entered into an annual contract for the provision of expert advice to TERA Consultants;
- e. the activities of a professor outside the university was strictly controlled in France so much so that a professor was allowed a maximum of 21 days within a year to perform work outside the university and it had to be in the sector that one would be a specialist in;
- f. Prof. Deffains, who was employed by TERA Consultants for the last 2 to 3 years, had been engaged on specific assignments and he could not work for anyone else, apart from his primary job as a university professor; and
- g. although it was conceded that Prof. Deffains was paid for specific jobs carried out during the 21 days that he was permitted to work outside the university, he insisted that Prof. Deffains was a TERA Consultants employee and that he was not paid a consultancy fee as such.

Dr Antoine Cremona, legal representative of the Malta Communications Authority, the contracting authority submitted that:-

- a. one could participate in a tendering process either as the bidder or as the co-bidder within a consortium or as a sub-contractor;
- b. clause 6.1.2 of the tender document, among other things, stipulated that the maximum amount of sub-contracting must not exceed 30% of the contract value;
- c. in its reply of the 15th May 2011 to the Malta Communications Authority 's request for a clarification, the appellant company not only confirmed that Prof. Deffains was a sub-contractor but added that the sub-contracting element of TERA Consultants' bid did not exceed the 30% limit set in the tender document;
- d. in its tender submission the appellant company had failed to fill in the sub-contractor's declaration that sub-contracting would not exceed 30 % of the contract value and the Contracts Department had advised the Malta Communications Authority against amending the *Tender Form* by the filling in of the relevant sub-contracting details; and
- e. the Malta Communications Authority would not go into the merits of who was considered as an employee or as a sub-contractor under French regulations or work practices but the Malta Communications Authority was only required to evaluate the bids in line with the provisions of the tender document and, as things turned out, Prof. Deffains was a sub-contractor of TERA Consultants and the appellant company's tender submission lacked the required documentation in that regard.

Mr Epinat stated that the tender document did not provide a definition of a 'sub-contractor' and he added that Prof. Deffains was not self-employed but on TERA Consultants' payroll. Mr

Epinat conceded that albeit Prof. Deffains's working schedule was flexible, his first obligation/allegiance was towards his role as professor.

At the end of the hearing session it was agreed that Mr Epinat was to submit a translation of the contract between Prof. Deffains and TERA Consultants together with his payslip and social security deductions within two days or so.

(This document was subsequently received and deliberated upon by the Public Contracts review Board)

At this point the hearing was brought to a close.

This Board,

- having noted that the appellant's company, in terms of the reasoned letter of objection dated 20th July 2011 and through the verbal submissions made during the hearing held on the 26th October 2011, had objected against the decision by the Contracts Department to disqualify its tender on being found administratively non-compliant;
- having noted the appellant firm's representatives' claims and observations regarding the fact that (a) by way of email dated 11th May 2011, the Malta Communications Authority had requested TERA Consultants to clarify the relationship between Prof. Bruno Deffains and TERA Consultants, namely whether he was a sub-contractor or an employee of TERA Consultants, (b) on the 13th May 2011 TERA Consultants, through Mr Denis Basque, had informed the Malta Communications Authority that Prof. Deffains was a sub-contractor and that the amount of sub-contracting did not exceed the 30% of the contract value as stipulated in the tender document, (c) the reply by Mr Basque that Prof. Deffains was a sub-contractor within the context of this tendering process was erroneous in view of the fact that (1) the primary professional activity of Prof. Deffains was that of professor at the University of Paris 2 (Pantheon – Assas), (2) the second professional activity of Prof. Deffains was to provide expert services to TERA Consultants for which he had signed an exclusivity declaration, (3) had Prof. Deffains been a sub-contractor of TERA Consultants, he would have billed TERA Consultants for his services and he would have been registered as such with the French administrative services, however, TERA Consultants paid Prof. Deffains in the same way as its other employees, namely by way of a payslip and it even settles social security charges on his behalf which would not be the case had he been considered as a sub-contractor, (4) Prof. Deffains also entered into an annual contract for the provision of expert advice to TERA Consultants, (5) the activities of a professor outside the university was strictly controlled in France so much so that a professor was allowed a maximum of 21 days within a year to perform work outside the university and it had to be in the sector that one would be a specialist in, (6) Prof. Deffains, who was employed by TERA Consultants for the last 2 to 3 years, had been engaged on specific assignments and he could not work for anyone else, apart from his primary job as a university professor, (7) although it was conceded that Prof. Deffains was paid for specific jobs carried out during the 21 days that he was permitted to work outside the university, he insisted that Prof. Deffains was a TERA Consultants employee and that he was not paid a consultancy fee as such, (d) the tender document did not provide a definition of a 'sub-contractor' and (e) albeit Prof. Deffains's working schedule was flexible, his first obligation/allegiance was towards his role as professor

- having considered the contracting authority's representative's submissions, namely that (a) one could participate in a tendering process either as the bidder or as the co-bidder within a consortium or as a sub-contractor, (b) clause 6.1.2 of the tender document, among other things, stipulated that the maximum amount of sub-contracting must not exceed 30% of the contract value, (c) in its reply of the 15th May 2011 to the Malta Communications Authority's request for a clarification, the appellant company not only confirmed that Prof. Deffains was a sub-contractor but added that the sub-contracting element of TERA Consultants' bid did not exceed the 30% limit set in the tender document, (d) in its tender submission the appellant company had failed to fill in the sub-contractor's declaration that sub-contracting would not exceed 30 % of the contract value and the Contracts Department had advised the Malta Communications Authority against amending the *Tender Form* by the filling in of the relevant sub-contracting details and (e) the Malta Communications Authority would not go into the merits of who was considered as an employee or as a sub-contractor under French regulations or work practices but the Malta Communications Authority was only required to evaluate the bids in line with the provisions of the tender document and, as things turned out, Prof. Deffains was a sub-contractor of TERA Consultants and the appellant company's tender submission lacked the required documentation in that regard ;
- having, subsequent to this hearing session, also given due consideration to the translated version - sent to this Board by the appellant company's representative - of the contract between Prof. Deffains and TERA Consultants together with his payslip and social security deductions,

reached the following conclusions:

1. The Public Contracts Review Board feels that, despite the arguments raised in the appellant company's defence by Mr Basque during and after the hearing, it remains unconvinced that Prof. Deffains status in the appellant company's bid in this tender.
2. The Public Contracts Review Board has taken full cognizance of the fact that during the hearing it was conceded by Mr Basque that Prof. Deffains was paid for specific jobs carried out during the 21 days that he was permitted to work outside the university and that, when asked a direct question by this Board, Mr Basque replied that, albeit Prof. Deffains's working schedule was flexible, the latter's first obligation/allegiance was towards his role as professor.
3. The Public Contracts Review Board concurs with the stand taken by the contracting authority wherein the latter refrained to go into the merits of who was considered as an employee or as a sub-contractor under French regulations or work practices as it was only required to evaluate the bids in line with the provisions of the tender document.

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

Alfred R Triganza
Chairman

Carmel Esposito
Member

Joseph Croker
Member

14th November 2011