

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case No. 340**

#### **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 1<sup>st</sup> February 2011. The closing date for this call with an estimated budget of €236,000 was the 29<sup>th</sup> March 2011.

Six (6) tenderers submitted their offers.

Europa Research and Consultancy Services (ERCS) filed an objection on the 25<sup>th</sup> 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, 26<sup>th</sup> October 2011 to discuss this objection.

Present for the hearing were:

#### **Europa Research and Consultancy Services (ERCS)**

Dr Peter Fenech	Legal Representative
Mr Bernard Mallia	Representative

#### **Analysys Mason Ltd**

Mr Luca Bennici	Associate Consultant
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#### **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

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

Dr Peter Fenech, legal representative of Europa Research and Consultancy Services, the appellant company, stated that by letter dated 15<sup>th</sup> July 2011, the Contracts Department had informed his client that its offer was deemed technically non compliant mainly for two reasons, namely Dr Emanuela Lecchi, Europa Research and Consultancy Services's expert on this contract, did not meet the tender requirements and that certain documentation was missing.

### **A) Dr Emanuela Lecchi**

- (a) One of the reasons for disqualification was that the expert on this project, namely, Dr Emanuela Lecchi, did not satisfy the tender requirements since her experience was achieved in her own personal capacity or with another company other than Europa Research and Consultancy Services Ltd and, as a result, it pertained to her exclusively and was not attributable in any way to the main bidding company.

Dr Fenech made the following submissions:-

- i. his client was going to rely on the services and experience of Dr. Lecchi as provided for in clause 6.1.2 of the tender document, viz:

*'An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in this case prove to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract, for example, by producing an undertaking by those entities to place the necessary resources at the disposal of the economic operator';*

- ii. Dr. Lecchi was to form part of the Europa Research and Consultancy Services's team which would carry out the broadband market analysis and she even signed the declaration of exclusivity and availability as required in the tender document whereby she pledged her availability for the duration of the project which is the subject of this tendering process;
- iii. an expert gained his/her experience over a period of time and while rendering service to one or more employer/s or as a self-employed but still the experience belonged to the person concerned and not to the entities with whom s/he had worked for and wherever that person took up employment s/he would take the expertise with him/her. In other words, when an entity recruited an expert it would actually recruit the individual with all the expertise that s/he would have gained along the years with other employers or as self-employed;
- iv. what the appellant company had to prove to the contracting authority was that it would have the technical ability to execute the contract and not whether its selected expert had acquired her experience during her employment with the said company.

- (b) other reasons for rejection were that (1) Dr. Lecchi had gained her experience by conducting market analysis of the telecommunications market in the Bahamas and United Arab Emirates (UAE), which countries were not EU Member States and therefore did not follow the methodologies and processes established under the EU Regulatory Framework and (2) the minimum number of projects of a similar nature completed in the last 5 years had to be at least 2 in number.

Dr Fenech submitted that:

- i. the tender document requested that the “*consultant must demonstrate in its submission a clear understanding of broadband market dynamics and be well versed with the process of carrying out a market analysis using the methodology established under the Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C 165/03)*”;
  - ii. the tender document did not request a consultant who gained his/her experience in the EU;
  - iii. the evaluation committee concluded that the Bahamas and the UAE were not subject to the EU Regulatory Framework and, as a consequence, those two countries were not susceptible to *ex ante* regulation however his client made it clear that the use of *ex ante* regulation in telecommunications markets was not a method of regulation found or practiced only in the EU so much so that both the Bahamas and the UAE used the same methodology used within the EU, which information was readily available on the internet;
  - iv. Dr Lecchi also lectured staff members of national telecommunications regulatory authorities of EU Member States on, among other things, market analysis and therefore she was very well-versed with the process and methodology of carrying out a market analysis according to the *Commission Guidelines* in the broadband sector; and
  - v. his client had satisfied the requirement of 2 projects of similar nature in the last 5 years with the submission of the two projects executed by Dr Lecchi in the Bahamas and the UAE.
- (c) the evaluation board noted that Dr. Lecchi’s previous experience in this field was specifically related to the provision of legal advice and not the carrying out of a full blown market analysis.

Dr Fenech declared that the role played by Dr Lecchi in the previous market analyses carried out was not limited to the provision of legal advice but included economics-related expertise. Moreover, his client’s bid included the economic and technical support of Mr Robert Geismann.

Dr Antoine Cremona, legal representative of the Malta Communications Authority, submitted the following remarks:-

- i. although there was an issue about the relationship between Dr Lecchi and the appellant company, in the sense that she had gained her experience in her own capacity or with other employers and that, as a result, that experience was not attributable to the appellant company, the evaluation board did not exclude the appellant on such administrative aspects;
- ii. an individual could only participate in a tendering process either as the bidder or as a co-bidder in a consortium or as a sub-contractor. There was no statement in Dr Lecchi's declaration that she was going to take up employment with the appellant company but all that she declared was that she was going to render her services exclusively to the appellant company. It was at appeal stage that it emerged that Dr Lecchi was going to be employed but without an undertaking on her part to that effect.
- iii. it was likely that the appellant company opted not to present Dr Lecchi as a sub-contractor to circumvent the fact that, as a sub-contractor, she would be executing more than 30% of the contract;
- iv. the appellant company was rejected at the technical level, namely, with regard to experience as per clause 6.1.2 which stipulated - besides what Dr Fenech had already quoted - the following:-

*'Evidence of relevant experience in carrying out services of a similar nature over the past 5 years including the nature and value, as well as contracts in hand and contractually committed.*

*By services of a similar nature the Malta Communications Authority specifically refers to the carrying out of a full blown analysis of one or more of electronic communications markets as listed by the European Commission in the Commission Recommendation of the 17 December 2007 on relevant Product and Services markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21 /EC of the European parliament and of the Council on a common regulatory framework for electronic communications networks and services (2007/879/EC) or earlier versions of the same Recommendation';*

- v. a full blown analysis and in accordance with the Directive also meant a market analysis that had to be subjected to the approval of the European Commission (EC) and, as a result, the contractor had to be one that had carried out such an analysis and had it successfully endorsed by the EC. The appellant company provided no such proof;
- vi. a market analysis carried out in the Bahamas and the UAE might have been done on the same methodology as that used in the EU but such analysis would certainly not have been subject to the scrutiny and approval of the EC. The contracting authority was very

specific about this requirement and with good reason because in the past the Malta Communications Authority had gone through the negative experience of having its broadband market analysis rejected by the EC and the Malta Communications Authority wanted to prevent the recurrence of such an event;

- vii. albeit the Malta Communications Authority did not question the qualifications of Dr Lecchi, yet, the Malta Communications Authority was not after a lecturer but it was after a contractor/consultant that had performed fully blown analysis which satisfied the demands of the EC. Dr Lecchi had carried out two projects in the Bahamas and the UAE which, however, were not subjected to the scrutiny of the EC and that was a vital requirement;
- viii. in its tender submission the appellant company indicated that Dr Lecchi had carried out the legal part of the Bahamas project and it was only in the appeal that the bidder was indicating that Dr Lecchi provided both the legal and the economic expertise; and
- ix. the contracting authority was not obliged to seek clarifications to support/regularise the bidder's submission but only to clear some point in order to assist the contracting authority in evaluating the bid on the information already available.

Dr Nicholas Borg, legal representative of the Malta Communications Authority, stressed that it was not an option but a must for the Malta Communications Authority to submit its broadband analysis for the approval of the EU since Malta was an EU member state whereas that crucial process was not required in the cases of the Bahamas and the UAE, being countries outside the EU.

**B)Europa Research and Consultancy Services Ltd, as a company in its own right, has not carried out any full blown market analysis as requested in the Tender Document' either within the EU or outside the EU for that matter.**

Dr Fenech submitted that, contrary to what the evaluation board stated, the tender document did not list this as a requirement but what it did stipulate at clause 6.2.1 was that an “*economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them.....*”

Dr Fenech insisted that the tender document did not state that the projects that had to be submitted to demonstrate experience had to be carried out in the EU but what was requested was a question of EU standards and regulations and not geography.

Dr Cremona on his part contended that:

- i. apart from the number of other shortcomings in the appellant company's bid, the crux of the matter was that the said company failed to provide, either in its own name or through other entities, on whose services it was going to rely on as per clause 6.1.2, the two fully blown broadband analysis as already explained;

- ii. to say the least, it was even doubtful if Dr Lecchi had carried out the legal, economic and technical analysis in the Bahamas because another bidder (KPMG) in this tendering process had claimed to have carried out the Bahamas project (point listed in the Contracts' letter of disqualification); and
- iii. the provisions of clause 6.1.2 was meant not to stifle but to widen competition as much as possible such that a bidder was allowed to rely on the resources of any other entity irrespective of the links between them.

**C) Missing Documents - *No detailed work plan and cost breakdown by resources and phase was submitted***

Dr Fenech submitted that:

- i. point 4 of clause 30.4 of the tender document (page 14) stated that:
 

*“A detailed work plan of the work to be performed is to be submitted in the proposal. The work plan is to include the timelines for each phase of the project. The plan must fulfil all the specific requirements set in section 4.2 Terms of Reference.”*
- ii. at Section 6 of the tender submission his client provided what was requested including the resources allocated to the project, the time allocated per project phase and the resources to be deployed besides a Gantt Chart displaying the time allocated per phase and per activity;
- iii. his client company clearly laid down in its offer that all resources would be working on all the tasks as per Section 19 (rather than Section 6) where a detailed breakdown of costs per phase and per resource was provided;
- iv. Dr Lecchi, as an employee, was part of the company's costs and, whilst since she was not a sub-contractor, she was not considered as a resource, nevertheless, all the phases were given;
- v. at Volume 1 Section 5 (page 30 of the tender document) under the heading 'Definitions' with reference to 'Terms of Reference' stated that the *“document in Volume 3 Section 1, drawn up by the Contracting Authority giving the definition of its requirements and/or the objectives in respect of the provision of services, specifying, where applicable, the methods and resources to be used by the Contractor and/or the results to be achieved by it (emphasis added)”*; and
- vi. Dr Fenech maintained that his client had furnished all the documentation requested and argued that if the Malta Communications Authority considered any item of the terms of reference as 'relevant' whereas the bidder might have considered it 'not relevant' or if the Malta Communications Authority wanted more breakdowns than those provided, the Malta Communications Authority could have asked for a clarification which was permissible under the Public Procurement Regulations.

Dr Cremona rebutted that:

- a. page 49 of the tender document, third bullet under the heading ‘Project Plan and Costs’ stated that the “*consultant needs to provide a detailed breakdown of all costs involved per Phase and per resource*”.
- b. section 19 of the appellant company’s bid consisted of a cost allocation per phase but not per resource and there was no room for a clarification on this point because the Malta Communications Authority had made its requirements amply clear by using the term ‘The consultant needs to provide’; and
- c. in his view the disclosure of the cost per resource in the case of Dr Lecchi, who was more of a sub-contractor than anything else, could have demonstrated that she was going to perform more than 30% of the contract value.

*The Public Contracts Review Board was informed that in the end of the process only one bidder was found administratively and technically compliant as the other four bidders were disqualified for the various reasons indicated in the evaluation report.*

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 25<sup>th</sup> July 2011 and through the verbal submissions made during the hearing held on the 26<sup>th</sup> 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) the Contracts Department had informed the appellant company that its offer was deemed technically non compliant mainly for two reasons, namely Dr Emanuela Lecchi, Europa Research and Consultancy Services’s expert on this contract, did not meet the tender requirements and that certain documentation was missing, (b) Dr. Lecchi was to form part of the Europa Research and Consultancy Services’s team which would carry out the broadband market analysis and she even signed the declaration of exclusivity and availability as required in the tender document whereby she pledged her availability for the duration of the project which is the subject of this tendering process, (c) an expert gained his/her experience over a period of time and while rendering service to one or more employer/s or as a self-employed but still the experience belonged to the person concerned and not to the entities with whom s/he had worked for and wherever that person took up employment s/he would take the expertise with him/her, (d) other reasons for rejection were that (1) Dr. Lecchi had gained her experience by conducting market analysis of the telecommunications market in the Bahamas and United Arab Emirates (UAE), which countries were not EU Member States and therefore did not follow the methodologies and processes established under the EU Regulatory Framework and (2) the minimum number of projects of a similar nature completed in the last 5 years had to be at least 2 in number, (e) since the tender document requested that the “*consultant must demonstrate in its submission a clear*

*understanding of broadband market dynamics and be well versed with the process of carrying out a market analysis using the methodology established under the Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C 165/03)*” one had to argue that the tender document did not request a consultant who gained his/her experience in the EU, (f) the evaluation committee concluded that the Bahamas and the UAE were not subject to the EU Regulatory Framework and, as a consequence, those two countries were not susceptible to *ex ante* regulation, (g) the use of *ex ante* regulation in telecommunications markets was not a method of regulation found or practiced only in the EU so much so that both the Bahamas and the UAE used the same methodology used within the EU, which information was readily available on the internet, (h) among other things, Dr Lecchi also lectured staff members of national telecommunications regulatory authorities of EU Member States on market analysis and, therefore, she was very well-versed with the process and methodology of carrying out a market analysis according to the *Commission Guidelines* in the broadband sector (i) they had, as participating tenderers, satisfied the requirement of 2 projects of similar nature in the last 5 years with the submission of the two projects executed by Dr Lecchi in the Bahamas and the UAE, (j) the role played by Dr Lecchi in the previous market analyses carried out was not limited to the provision of legal advice but included economics-related expertise, (k) contrary to what the evaluation board stated, the tender document did not list as a mandatory requirement that a company had to, in its own right, to carried out a full blown market analysis either within the EU or outside the EU and that what clause 6.2.1 actually stated was that an “*economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them.....*” and (l) the company had furnished all the documentation requested arguing that if the Malta Communications Authority considered any item of the terms of reference as ‘relevant’ whereas the bidder might have considered it ‘not relevant’ or if the Malta Communications Authority wanted more breakdowns than those provided, the Malta Communications Authority could have asked for a clarification which was permissible under the Public Procurement Regulations;

- having considered the contracting authority’s representative’s submissions, namely that (a) although there was an issue about the relationship between Dr Lecchi and the appellant company, in the sense that she had gained her experience in her own capacity or with other employers and that, as a result, that experience was not attributable to the appellant company, the evaluation board did not exclude the appellant on such administrative aspects, (b) whilst there was no statement in Dr Lecchi’s declaration that she was going to take up employment with the appellant company and that all that she had declared was that she was going to render her services exclusively to the appellant company, it was at appeal stage that it emerged that Dr Lecchi was going to be employed but without an undertaking on her part to that effect, (c) the appellant company was rejected at the technical level, namely, with regard to experience as per clause 6.1.2, (d) a full blown analysis and, in accordance with the Directive, also meant a market analysis that had to be subjected to the approval of the European Commission (EC) and, as a result, the contractor had to be one that had carried out such an analysis and had it successfully endorsed by the EC. Nevertheless, the appellant company provided no such proof, (e) a market analysis carried out in the Bahamas and the UAE might have been done on the same methodology as that used in the EU but such analysis would certainly not have been subject to the scrutiny and approval of the EC, (f) albeit the Malta Communications Authority did not question the qualifications of Dr Lecchi, yet, the Malta Communications Authority was not after a lecturer but it was after a contractor/consultant that had performed fully blown analysis which

satisfied the demands of the EC - yet, she had carried out two projects in the Bahamas and the UAE which, however, were not subjected to the scrutiny of the EC and that was a vital requirement, (g) in its tender submission the appellant company indicated that Dr Lecchi had carried out the legal part of the Bahamas project and it was only in the appeal that the bidder was indicating that Dr Lecchi provided both the legal and the economic expertise, (h) the contracting authority was not obliged to seek clarifications to support/regularise the bidder's submission but only to clear some point in order to assist the contracting authority in evaluating the bid on the information already available and (i) section 19 of the appellant company's bid consisted of a cost allocation per phase but not per resource and there was no room for a clarification on this point because the Malta Communications Authority had made its requirements amply clear by using the term 'The consultant needs to provide',

reached the following conclusions:

1. The Public Contracts Review Board acknowledges that, whilst the fact that Dr Lecchi had also lectured staff members of national telecommunications regulatory authorities of EU Member States on market analysis which 'per se' could imply that she is very well-versed with the process and methodology of carrying out a market analysis according to the *Commission Guidelines* in the broadband sector, yet, the fact of the matter still remained that this Board agrees with the contracting authority's interpretation of clause 6.1.2 wherein the said authority claimed that a full blown analysis and, in accordance with the Directive, meant a market analysis that had to be subjected to the approval of the European Commission (EC) and, as a result, the contractor had to be one that had carried out such an analysis and had it successfully endorsed by the EC. This Board has not been provided with tangible evidence that Dr Lecchi has carried out such a market analysis.
2. The Public Contracts Review Board also maintains that, whilst a market analysis carried out in the Bahamas and the UAE might have been done on the same methodology as that used in the EU, yet such analysis would certainly not have been subject to the scrutiny and approval of the EC thus, 'sui generis' infringing the specific scope of the entire clause as contemplated in this tender.
3. The Public Contracts Review Board agrees with the contracting authority that the latter was not obliged to seek clarifications to support or regularise the bidder's submission but could only try to clear some point in order to assist itself in evaluating the bid on the information already available. This Board acknowledges that section 19 of the appellant company's bid consisted of a cost allocation per phase but not per resource and there was no room for a clarification on this point because the Malta Communications Authority had made its requirements amply clear by using the term "The consultant needs to provide".

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

14<sup>th</sup> November 2011