

## PUBLIC CONTRACTS REVIEW BOARD

Case No. 385

F/47/09/2

**Tender for the Carrying out of a Feasibility Study and a Cost Benefit Analysis for the New Fishmarket at Albert Town Marsa**

This call for tenders was published in the Government Gazette on the 27<sup>th</sup> December 2011. The closing date for this call with an estimated budget of € 30,000 was the 10<sup>th</sup> January 2012.

Six (6) tenderers submitted their offers.

David Spiteri Gingell Consulting Ltd filed an objection on the 18<sup>th</sup> January 2012 against the decisions of the Ministry for Resources and Rural Affairs to disqualify its offer as administratively non-compliant and to recommend the award of the tender to Grant Thornton Consulting Ltd.

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 Monday, 9<sup>th</sup> March 2012 to discuss this objection.

### **David Spiteri Gingell Consulting Ltd (DSG Consulting)**

Mr David Spiteri Gingell      Managing Director

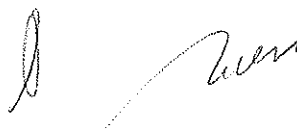
### **Grant Thornton Consulting Ltd**

Dr Wayne Pisani                      Legal Representative  
Mr George Vella                      Representative

### **Ministry for Resources and Rural Affairs (MRRA)**

### **Evaluation Board**

Mr Stefan Cachia                      Chairman  
Mr Marco Cassar                      Member  
Ms Lara Pace                              Member



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

Mr David Spiteri Gingell representing David Spiteri Gingell Consulting Ltd, the appellant company, remarked that by letter dated 16<sup>th</sup> January 2012, the contracting authority had communicated that the company's offer was found to be non-compliant on two counts, namely the non-submission of the method statement and that the bidding firm did not have five years experience in drafting and preparing feasibility studies and cost benefit analysis.

At this point Mr Spiteri Gingell went on to offer the following explanations:-

**A) Non-Submission of a Method Statement:**

The contracting authority was not correct because in Section 2 of its tender submission DSG Consulting Ltd had stated as follows:

*"We adopt the EU Guidelines as our base methodology to Cost Benefit Assessment - including:*

*'Guide to Cost-Benefit Analysis of investment projects', Prepared for the Evaluation Unit of the Directorate General Regional Policy, European Commission in 2002.*

*'Guide to Cost Benefit Analysis of Investment Projects: Structural Funds, Cohesion Fund and Instruments for Pre-Accession', Directorate General Regional Policy, July 2008.*

*'Guidance on the Methodology for carrying out Cost-Benefit Analysis', Working Document No. 4: The New Programming Period 2007-2013.*

*EC study on 'Social Impact Assessment as a tool for mainstreaming social inclusion and social protection concerns in public policy in EU Member States directed to lead to better informed, more evidence-based political decisions.'*

Mr Stefan Cachia, chairman of the adjudicating board, made the following submissions:-

- i. Clause 8.3 'Submission of Documents' requested the bidder to submit, among other things: "*A method statement stating the description of the drafting of the analysis*";
- ii. in its tender submission the appellant company made reference to EU guidelines which it declared that it would be adopting by way of methodology in carrying out this cost benefit analysis;
- iii. albeit the contracting authority, including himself (Mr Cachia), was aware that Mr Spiteri Gingell possessed the professional skills requested for the task



requested, yet, the tender document specifically required the submission of a description of the methodology that was going to be used to execute this task;

- iv. the adjudicating board did not consider the appellant company's references to EU guidelines to represent the method statement requested in the tender document;
- v. the adjudicating board expected the bidding company to submit a description as to how it intended to produce the specific feasibility and cost benefit analysis requested in the tender document and, in that regard, the adjudicating board was unable to evaluate the appellant company's offer;

and

- vi. the other tenderers did submit what was requested of them with regard to the methodology statement

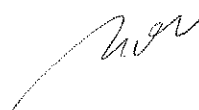

Mr Spiteri Gingell pointed out that the method statement requested in the tender document was, in itself, a methodology and insisted that the tender document did not request a step-by-step layout of the methodology that was to be applied. Nevertheless, the appellant company's representative argued, it was obvious that when one made references to international standards then it stood to reason that one was committing oneself to adopt that defined methodology.

The Chairman, Public Contracts Review Board, remarked that it would appear that (a) the appellant company expected the contracting authority to (1) consult the various EU guidelines referred to by the said appellant company and (2) work out the kind of methodology that it was likely to use to deliver this study, (b) the contracting authority requested the tenderer to submit the methodology, based on EU guidelines, that it would apply in practice to this particular task. As an example, the Chairman Public Contracts Review Board stated that one could either just state that one would drive from 'Point A' to 'Point B' or else one could indicate the exact routes that one would follow to get from 'Point A' to 'Point B'.

Mr Cachia explained that once this project was going to be part-financed from the 'Fisheries Operational Programme 2007-2013' of the EU Fisheries Fund it was taken as a given that the contractor would follow EU guidelines and standards in conducting this study and what the contracting authority was after as per clause 8.3 (1) was a document as to how those standards and guidelines were going to be put in practice to produce this study.

At this point Mr Spiteri Gingell intervened to remark that:-

- the tender document requested a work method and not a breakdown of the different phases of each particular domain of that work method;
- his company submitted an international benchmark, namely the EU guidelines, that clearly indicated that it would be applying an existing and tested type of methodology, especially once this project was partly financed from EU funds;



- it was important to indicate the framework within which one was to operate and then it followed that one had to follow the rigid rules of that process in gathering, analysing and presenting data so as to eliminate, as far as possible, discretion in arriving at results;
- admittedly, the appellant company's representative stated, perhaps his company could have attached EU guidelines and standards to the tender submission but he, personally, felt that reference to these established standards was sufficient;

and

- what the tender document requested was a work method and if the contracting authority wanted a breakdown of the tasks, the interaction process of each task and the like then it should have asked for them specifically because the term 'description' used in clause 8.3 (1) did not clearly convey that requirement.

Ms Lara Pace, a member of the adjudicating board, remarked that the adjudicating board had to abide by the provisions of the tender document with regard to the method statement even for the purpose of comparing the bids on a like-with-like basis.

Dr Wayne Pisani, legal representative of Grant Thornton Consulting Ltd, the preferred bidder, remarked that Clause 8.5, among other things, laid down that "*The aim of the feasibility study is to analyse and evaluate the proposed new fish market and determine the viability of the construction of the new fish market. The preparation of the studies shall be according to EU guidelines and policy documents established by the European Commission.*"

Dr Pisani argued that the bidders did not have to declare that they were going to apply EU guidelines and standards, as the appellant company did in its tender submission, because that was one of the tender conditions. However, continued Dr Pisani, what the bidder had to submit was a description of how it was going to apply those guidelines in drafting this analysis.

### ***B) Five Years Experience in Drafting and Preparing Feasibility Studies and Cost Benefit Analysis***

Dr Spietri Gingell stated that his firm started operations in April 2008 – closing date of the tender January 2012, thus the bidding firm had been set up for almost 4 years. He submitted his CV, as the project leader for this assignment, which demonstrated that he had a track record that dated back to 1994 when he held the CEO position at Management Efficiency Unit (1994 to 1998), the government's in-house management consultancy organisation. He observed that, apparently, the adjudicating board did not take into account his personal experience in its evaluation process.

Mr Stefan Cachia explained that:-

- a. clause 8.3 (2) requested that "*the Bidder must have at least 5 years experience drafting and preparing feasibility studies and cost benefit analysis*";

- b. in this case, the bidder was DSG Consulting Ltd which started operations in April 2008 and, as a result, lacked the requested five years experience;
- c. DSG Consulting Ltd project leader for this assignment, Mr David Spiteri Gingell, did possess the requested five years experience in this sector and had the tender submission been presented in his own name it would have been compliant but, as already stated, the bidder was DSG Consulting Ltd and the adjudicating board had to abide by the tender conditions (which were not contested by the closing date of the tender);

and

- d. one had to keep in view that other firms might have refrained from submitting a bid precisely because of the 5-year experience requirement


Mr Spiteri Gingell remarked that the clause requesting a minimum of 5 years experience was discriminatory against emerging companies and stifled competition.

Dr Pisani intervened to submit that it was evident that the appellant was a firm that did not satisfy the 5-year experience mandatory requirement laid down in the tender document and that there could have been other tenderers who did not participate because they did not possess the required experience.

At this point the hearing was brought to a close.

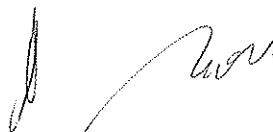
This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated 17<sup>th</sup> October 2012 and also through their verbal submissions presented during the hearing held on the 9<sup>th</sup> February 2012, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by letter dated 16<sup>th</sup> January 2012, the contracting authority had communicated that the company's offer was found to be non-compliant on two counts, namely the non-submission of the method statement and that the bidding firm did not have five years experience in drafting and preparing feasibility studies and cost benefit analysis, (b) the contracting authority was not correct because in Section 2 of its tender submission DSG Consulting Ltd had stated that the company would adopt the EU Guidelines as its base methodology to Cost Benefit Assessment including (1) "Guide to Cost-Benefit Analysis of investment projects", Prepared for the Evaluation Unit of the Directorate General Regional Policy, European Commission in 2002, (2) 'Guide to Cost Benefit Analysis of Investment Projects: Structural Funds, Cohesion Fund and Instruments for Pre-Accession', Directorate General Regional Policy, July 2008, (3) 'Guidance on the Methodology for carrying out Cost-Benefit Analysis', Working Document No. 4: The New Programming Period 2007-2013, (4) EC study on 'Social Impact Assessment as a tool for mainstreaming social inclusion and social protection concerns in public policy in EU Member States directed to lead to better informed, more evidence-based political decisions', (c) apart from the fact that the method statement requested in the tender document was, in itself, a methodology



and insisted that the tender document did not request a step-by-step layout of the methodology that was to be applied, it was also obvious that when one made references to international standards then it stood to reason that one was committing oneself to adopt that defined methodology, (d) it was important to indicate the framework within which one was to operate and then it followed that one had to follow the rigid rules of that process in gathering, analysing and presenting data so as to eliminate, as far as possible, discretion in arriving at results, (e) admittedly, perhaps the appellant company could have attached EU guidelines and standards to the tender submission but Mr Spiteri Gingell, personally, felt that reference to these established standards was sufficient, (f) what the tender document requested was a work method and if the contracting authority wanted a breakdown of the tasks, the interaction process of each task and the like then it should have asked for them specifically because the term 'description' used in clause 8.3 (1) did not clearly convey that requirement, (g) albeit the appellant company started operations in April 2008 – closing date of the tender January 2012, thus the bidding firm had been set up for almost 4 years – Mr Spiteri Gingell submitted his CV, as the project leader for this assignment, which demonstrated that he had a track record that dated back to 1994 when he held the CEO position at Management Efficiency Unit (1994 to 1998), the government's in-house management consultancy organisation, (h) apparently, the adjudicating board did not take into account Mr Spiteri Gingell's personal experience in its evaluation process and (i) the clause requesting a minimum of 5 years experience was discriminatory against emerging companies and stifled competition;

- having considered the contracting authority's representatives' reference to the fact that (a) Clause 8.3 'Submission of Documents' requested the bidder to submit, among other things: "*A method statement stating the description of the drafting of the analysis*", (b) in its tender submission the appellant company made reference to EU guidelines which it declared that it would be adopting by way of methodology in carrying out this cost benefit analysis, (c) albeit the contracting authority was aware that Mr Spiteri Gingell possessed the professional skills requested for the task requested, yet, the tender document specifically required the submission of a description of the methodology that was going to be used to execute this task, (d) the adjudicating board did not consider the appellant company's references to EU guidelines to represent the method statement requested in the tender document, (e) the adjudicating board expected the bidding company to submit a description as to how it intended to produce the specific feasibility and cost benefit analysis requested in the tender document and, in that regard, the adjudicating board was unable to evaluate the appellant company's offer, (f) the other tenderers did submit what was requested of them with regard to the methodology statement, (g) once this project was going to be part-financed from the 'Fisheries Operational Programme 2007-2013' of the EU Fisheries Fund it was taken as a given that the contractor would follow EU guidelines and standards in conducting this study and what the contracting authority was after as per clause 8.3 (1) was a document as to how those standards and guidelines were going to be put in practice to produce this study, (h) the adjudicating board had to abide by the provisions of the tender document with regard to the method statement even for the purpose of comparing the bids on a like-with-like basis, (i) clause 8.3 (2) requested that "*the Bidder must have at least 5 years experience drafting and preparing feasibility studies and cost benefit analysis*" and in this case the bidder was DSG Consulting Ltd which started operations in April 2008 and, as a result, lacked the requested five years



experience, (j) DSG Consulting Ltd project leader for this assignment, Mr David Spiteri Gingell, did possess the requested five years experience in this sector and had the tender submission been presented in his own name it would have been compliant but, as already stated, the bidder was DSG Consulting Ltd and the adjudicating board had to abide by the tender conditions (which were not contested by the closing date of the tender) and (k) one had to keep in view that other firms might have refrained from submitting a bid precisely because of the 5-year experience requirement;

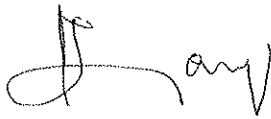
- having also considered the recommended tenderers' representatives' reference to the fact that (a) Clause 8.5, among other things, laid down that "*The aim of the feasibility study is to analyse and evaluate the proposed new fish market and determine the viability of the construction of the new fish market. The preparation of the studies shall be according to EU guidelines and policy documents established by the European Commission.*", (b) the bidders did not have to declare that they were going to apply EU guidelines and standards, as the appellant company did in its tender submission, because that was one of the tender conditions, (c) what the bidder had to submit was a description of how it was going to apply those guidelines in drafting this analysis and (d) it was evident that the appellant was a firm that did not satisfy the 5-year experience mandatory requirement laid down in the tender document and that there could have been other tenderers who did not participate because they did not possess the required experience,

reached the following conclusions, namely:

1. The Public Contracts Review Board opines that, with regard to the issue relating to the five years experience in drafting and preparing feasibility studies and cost benefit analysis, albeit no one was disputing the fact that the actual tenderer at time of closing date of the tender under review had been set up for almost 4 years, namely a year or so short of the required time frame as stated in the tender document, yet, it was also evidently clear that, prior to incorporation, Mr Spiteri Gingell, in his personal capacity, had gained considerable operational experience in the field. This fact has also been recognised by the chairman of the adjudicating board itself wherein the latter, during the hearing, conceded that DSG Consulting Ltd's project leader for this assignment, Mr David Spiteri Gingell, did possess the requested five years experience in this sector.
2. The Public Contracts Review Board argues that that the bidders did not have to declare that they were going to apply EU guidelines and standards, as the appellant company did in its tender submission, because that was one of the tender conditions. Furthermore, this Board agrees with the argument raised by the contracting authority's representative that, once this project was going to be part-financed from the 'Fisheries Operational Programme 2007-2013' of the EU Fisheries Fund it was taken as a given that the contractor would follow EU guidelines and standards in conducting this study.
3. This Board agrees that what was more pivotal in this tender submission was for a tenderer to describe how it was going to apply those guidelines in drafting this analysis. This Board argues that it was wrong for the appellant company to expect the contracting authority to (i) consult the various EU guidelines referred to by the

said appellant company and (2) work out the kind of methodology that it was likely to use to deliver this study – evaluation boards should not be expected to go beyond their remit, namely that of evaluating proposals as submitted; undoubtedly, evaluation boards should never be expected to be forced to embark on personal initiatives to reach a conclusion.

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

20<sup>th</sup> March 2012



Carmel Esposito  
Member



Joseph Croker  
Member