

PUBLIC CONTRACTS REVIEW BOARD

Case No. 406

CT/3101/2011; CT/N/009/2011

Negotiated Procedure – Tender for Management Planning and Implementation of Communication Measures for Terrestrial Natura 2000 Sites in the Maltese Islands

This call for tenders was published in the Government Gazette on the 30th November 2011. The closing date for this call – which attracted no fewer than three (3) tenderers - with an estimated budget of € 3,500,000 was the 22nd December 2011.

Ecolibrium Consortium filed an objection on the 15th April 2012 against the decision of the Contracts Department to disqualify its offer as administratively non-compliant.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr. Carmel Esposito and Mr Paul Mifsud as members convened a public hearing on Wednesday, 9th May 2012 to discuss this objection.

Present for the hearing:

Ecolibrium Consortium

Dr Adrian Delia	Legal Representative
Mr Lou Bondi	Representative
Ms Anita Aloisio	Representative
Not. Matthew Pulis	Representative
Ms Desiree Falzon	Representative
Mr Paul J. Vassallo Mintoff	Representative

Outlook Management and Communications – No representative turned up

ADI Associates Environmental Consultants Ltd

Ms Krista Farrugia	Representative
Ms Eilis McCullogh	Representative

Malta Environment and Planning Authority

Dr Ian Stafrace	Chief Executive Officer
Dr Lydia Abela	Representative

Evaluation Board

Mr Darren T Stevens	Chairman
Ms Claire Cordina Borg	Member
Ms Aimee Brincat	Member
Ms Raffaella Zammit	Member
Mr Keith Capello	Secretary

Department of Contracts

Ms Marisa Gauci	Representative
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After the Chairman's brief introduction, the appellant's legal representative was invited to explain the motives of his client's objection.

Dr Adrian Delia, legal representative of Ecolibrium Consortium, the appellant, remarked that by email dated 6th April 2012, the Contracts Department had informed his client that its offer was not administratively compliant on two grounds.

A) Non-Government Organisations (NGOs) In Receipt of Public Funds

Dr Delia submitted that:-

- i. the Contracts Department's answer to question 6 of Clarification No. 1, dated 5th December 2011, which concerned the payment of VAT on the full contract value when NGOs - which were exempt from the payment of VAT, formed part of a consortium - read as follows, namely

"If an NGO is partly funded / funded by public funds, it cannot form part of a consortium. No such restrictions apply for NGOs which are not state funded. In any case VAT has to be paid on the whole contract value."

- ii. in the extract of the evaluation report covering his client's bid, the contracting authority remarked that *"Tenderer 1, (Ecolibrium Consortium), was made up of a consortium which included two NGOs, one of which, Birdlife Malta, was the lead partner. The evaluation committee wanted to ask Tenderer 1 for a clarification whether the NGOs within this consortium are in receipt of public funds. During the subsequent meeting the evaluation committee while assessing the Experience as Contractor Form (Doc A), it transpired that Birdlife Malta declared the receipt of public funds. Therefore, the evaluation committee agreed that there was no need to request a clarification on the matter"*;

and

- iii. contrary to what the contracting authority stated, his client did not indicate in his tender submission that Birdlife Malta was publicly funded.

Mr Keith Capello, secretary to the adjudicating board, remarked that, on examining the 'Experience as Contractor' Form in respect of Birdlife Malta for the previous three years, the evaluation board noted that Birdlife Malta had worked on various projects funded by the Office of the Prime Minister and by the Malta Environment and Planning Authority itself.

Dr Ian Stafrace, chief executive officer of the Malta Environment and Planning Authority, remarked that the evaluation committee did not go into the merits of what constituted public funding but the evaluation committee noted from the list of contracts submitted by Birdlife Malta to demonstrate its experience that it received funds from two public entities and, subsequently, it acted on the advice given by the Department of Contracts that NGOs in receipt of public funds could not form part of a consortium. He added that, in his answer, the Director of Contracts gave additional information which probably misled the evaluating committee.

Dr Delia explained that:-

- a. the legislation regulating NGOs allowed them to participate in public contracts and there was no provision in the tender document that prohibited NGOs from submitting a bid;

and

- b. one had to distinguish between (1) having a bidder that received public funds by way of subsidy or subvention, which case would amount to unfair competition *vis-a-vis* the other bidders once the NGO's expenses, in part or in full, would be met out of public funds and (2) having an NGO in receipt of public funds for services rendered through a public contract which case should not lead to exclusion from participating in public contracts as, otherwise, any contractor who worked on a public contract would be excluded from bidding for other public contracts for having been in receipt of public funds on the first contract.

B) Experience of Ecologist

Dr Delia stated that the extract of the evaluation report pertaining to his client's offer read as follows, namely

"The evaluation committee noted that the Ecologist presented by Tenderer 1, Ecolibrium Consortium, has less than 6 years general professional experience required for the Ecologist in the tender document."

Dr Delia added that the only ecologist proposed by his client was Mr Nicholas Barbara and as per Form 3 'Key Experts' he was in possession of a B.Sc. in Biology and Chemistry and an M.Sc. in Conservation and Biodiversity with 6 years of general experience, from 2006 to 2011, as requested in the tender document.

Mr Darren Stevens, chairman of the adjudicating board, explained that:-

- a. this tender was in connection with Natura 2000, which started operating in Malta since the latter's accession to the EU, namely 2004, and that was why the contracting authority requested in page 8 of the tender document 6 years general professional experience in the area related to ecology and nature (2004-2010);
- b. whilst the closing date of the tender was the 22nd December 2011 which, at first glance, suggested that the period 2006 to 2011 represented a 6 year period, yet once Mr Barbara's CV was analysed, one faced a scenario wherein his work experience started in June 2006 which meant that he did not have the required 6 years professional experience;
- c. the contracting authority had to act in fairness with the other two bidders who proposed ecologists with the requested experience and even with other entities that might have been prevented from submitting a bid because of the experience requested;

- d. locally, there were ecologists with the experience requested in the tender document, including himself, who had been engaged on nature conservartion projects since 1995;

and

- e. the other bidders even took on foreign partners in order to meet all the requirements of the tender document because this was rather an extensive and technical contract.

The Chairman Public Contracts Review Board remarked that he was very critical as to why experience had to be determined strictly by a given number of years when one could apply a combination of criteria to gauge experience. Additionally, one could not be oblivious of the fact that human resources are scarce and one should not limit them further. Yet, there again, in spite of that, he added that one had to normally give particular attention to the tender specifications and condtions which participating tenderers had agreed to.

Dr Delia pointed out that the tender document requested 'general' professional experience. Albeit Mr Barbara's work experience started in June 2006, as per CV, yet, he had obtained his B. Sc. in 2005 and, as a result, his professional experience started in 2005. He added that one had to keep in view that on gaining his B.Sc. qualification in 2005 Mr Barbara went on to read an M.Sc. which, to attain it, entailed carrying out professional work.

Dr Ian Stafrace pointed out that:-

- i. the evaluation committee made a very objective assessment of the experience with regard to the proposed ecologist by examining Form 3, which indicted the period 2006 – 2011 and by considering also Mr Barbara's CV where it was indicated that his work experience started in June 2006;

- ii. albeit one would have expected Mr Barbara to include in his CV all the professional work that he had carried out, even prior to 2006, if any, yet, it was Mr Barbara himself who indicated that his professional experience started as from June 2006;

and

- iii. it was not the intention of the contracting authority to belittle the professional abilities of Mr Nicholas Barbara but the contracting authority had to carry out an objective assessment on an objective criterion, namely the requirement of not less than six years general professional experience.

The Chairman Public Contracts Review Board stated that one had to make a distinction between being in possssion of an academic qualification and having professional experience.



Mr Stevens explained that:-

- a. the work included in the statement dated December 2005 referred to work carried out at the Ghadira Nature Reserve for the Malta Environment and Planning Authority as part of the dissertation that Mr Barbara eventually presented in connection with his B.Sc. qualification, namely when he was an undergraduate, in fact it was carried out under the supervision of Prof. Patrick J. Schembri;
- b. the work carried out on the 'Ecology of the saline pool macrofauna at the Ghadira Nature Reserve' in 2005 by Prof. Patrick J. Schembri and Mr Nicholas Barbara was not included under 'Work Experience' but under 'Publications' 'other works' (page 2 of CV);
- c. both reports were carried out as an undergraduate under the supervision of Prof. J Schembri and both were executed for the Malta Environment and Planning Authority;

and

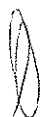
- d. during the clarification meeting bidders were encouraged to submit CVs, even if they were not mandatory requirements;

Dr Delia contended that:-

- i. the Public Procurement Regulations provided for the number of years of experience required, namely in the case of works, Reg. 52 (2) (a) (i) referred to "a list of the works carried out over the past five years" whereas in the case of services Reg. 52 (2) (a) (ii) referred to "a list of the principal deliveries effected or the main services provided in the past three years" and therefore, in spite of the explanation given by the contracting authority, the 6 year experience stipulated was not according to regulations;
- ii. contracting authorities ought to draw up specifications and conditions such that they would allow as wide a competition as possible and not stifle competition;
- iii. the mandatory requirement was Form 3 and not the CV and, therefore, the contracting authority should rest on the information given in Form 3, 2006 – 2011, and not on what was indicated in the CV, which was additional information;
- iv. that work carried out in the attainment of the second degree (M.Sc), i.e. between 2005 and 2006, should be considered as part of the professional experience once that work involved nature conservation irrespective of whether that work was done against payment or not;

and

- v. as far as he was aware, an ecologist did not require a warrant to practice.



Dr Stafrace insisted that:-

- a. one should not be subjective in this issue when it concerned evaluation of an objective criterion, namely the mandatory requirement of not less than 6 years general professional experience;
 - b. professional experience could be gained after obtaining a degree, so any work carried out prior to that stage could not be considered for this purpose;
- and
- c. there was no indication that Mr Barbara had carried out any general professional work prior to June 2006 and his CV provided that evidence.

The Chairman Public Contracts Review Board remarked that one had to make a distinction between work experience, 'academic' qualifications and 'professional' experience. He added that when one attains an academic qualification this does not necessarily mean that one would be attaining a 'professional' status, so much so that, most professions, be it law or medicine or accountancy, necessitate a certain amount of work experience to enable one to obtain a professional warrant.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their 'letter of objection' dated 15th April 2012 and also through their verbal submissions presented during the hearing held on the 9th May 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 email dated 6th April 2012, the Contracts Department had informed the appellant company that its offer was not administratively compliant on two grounds, namely (1) Non-Government Organisations (NGOs) In Receipt of Public Funds and (2) Experience of Ecologist, (b) with regard to 'Non-Government Organisations (NGOs) In Receipt of Public Funds' (1) the Contracts Department's answer to question 6 of Clarification No. 1, dated 5th December 2011, which concerned the payment of VAT on the full contract value when NGOs - which were exempt from the payment of VAT, formed part of a consortium - read as follows, namely, "*If an NGO is partly funded / funded by public funds, it cannot form part of a consortium. No such restrictions apply for NGOs which are not state funded. In any case VAT has to be paid on the whole contract value*", (2) contrary to what the contracting authority stated, the appellant company did not indicate in its tender submission that Birdlife Malta was publicly funded, (3) the legislation regulating NGOs allowed them to participate in public contracts and there was no provision in the tender document that prohibited NGOs from submitting a bid, (4) one had to distinguish between (i) having a bidder that received public funds by way of subsidy or subvention, which case would amount to unfair competition *vis-a-vis* the other bidders once the NGO's expenses, in part or in full, would be met out of public funds and (ii) having an NGO in receipt of public funds for services rendered through a public contract which case should not lead to exclusion from participating in public contracts as, otherwise, any contractor who worked on a public contract would be excluded from bidding for other public contracts for having been in receipt of public funds on the first contract, (c)



with regard to 'Experience of Ecologist' (1) the evaluation report pertaining to the appellant company's offer read as follows, namely "*The evaluation committee noted that the Ecologist presented by Tenderer 1, Ecolibrium Consortium, has less than 6 years general professional experience required for the Ecologist in the tender document*", (2) the only ecologist proposed by the appellant company was Mr Nicholas Barbara and as per Form 3 'Key Experts' he was in possession of a B.Sc. in Biology and Chemistry and an M.Sc. in Conservation and Biodiversity with 6 years of general experience, from 2006 to 2011, as requested in the tender document, (3) that the tender document requested 'general' professional experience (4) albeit Mr Barbara's work experience started in June 2006, as per CV, yet, he had obtained his B. Sc. in 2005 and, as a result, his professional experience started in 2005 (5) that one had to keep in view that, on gaining his B.Sc. qualification in 2005, Mr Barbara went on to read an M.Sc. which, to attain it, entailed carrying out professional work, (6) the Public Procurement Regulations provided for the number of years of experience required, namely in the case of works, Reg. 52 (2) (a) (i) referred to "a list of the works carried out over the past five years" whereas in the case of services Reg. 52 (2) (a) (ii) referred to "a list of the principal deliveries effected or the main services provided in the past three years" and therefore, in spite of the explanation given by the contracting authority, the 6 year experience stipulated was not according to regulations, (7) contracting authorities ought to draw up specifications and conditions such that they would allow as wide a competition as possible and not stifle competition, (8) the mandatory requirement was Form 3 and not the CV and, therefore, the contracting authority should rest on the information given in Form 3, 2006 – 2011, and not on what was indicated in the CV, which was additional information, (9) that work carried out in the attainment of the second degree (M.Sc), i.e. between 2005 and 2006, should be considered as part of the professional experience once that work involved nature conservation irrespective of whether that work was done against payment or not and (10) as far as he was aware, an ecologist did not require a warrant to practice;

- having considered the contracting authority's representatives' reference to the fact that (a) on examining the 'Experience as Contractor' Form in respect of Birdlife Malta for the previous three years, the evaluation board noted that Birdlife Malta had worked on various projects funded by the Office of the Prime Minister and by the Malta Environment and Planning Authority itself, (b) the evaluation committee did not go into the merits of what constituted public funding but the evaluation committee noted from the list of contracts submitted by Birdlife Malta to demonstrate its experience that it received funds from two public entities and, subsequently, it acted on the advice given by the Department of Contracts that NGOs in receipt of public funds could not form part of a consortium, (c) the Director of Contracts gave additional information which probably misled the evaluating committee, (d) this tender was in connection with Natura 2000, which started operating in Malta since the latter's accession to the EU, namely 2004, and that was why the contracting authority requested in page 8 of the tender document 6 years general professional experience in the area related to ecology and nature (2004-2010), (e) whilst the closing date of the tender was the 22nd December 2011 which, at first glance, suggested that the period 2006 to 2011 represented a 6 year period, yet once Mr Barbara's CV was analysed, one faced a scenario wherein his work experience started in June 2006 which meant that he did not have the required 6 years professional experience, (f) the contracting authority had to act in fairness with the other two bidders who proposed ecologists with the requested experience and even with other entities that might have been prevented from submitting a bid because of the experience requested, (g) locally, there were ecologists with the experience requested in the tender document, including himself, who had been engaged on nature conservation projects since 1995, (h) the other bidders even took on foreign



partners in order to meet all the requirements of the tender document because this was rather an extensive and technical contract, (i) the evaluation committee made a very objective assessment of the experience with regard to the proposed ecologist by examining Form 3, which indicated the period 2006 – 2011 and by considering also Mr Barbara's CV where it was indicated that his work experience started in June 2006, (j) albeit one would have expected Mr Barbara to include in his CV all the professional work that he had carried out, even prior to 2006, if any, yet, it was Mr Barbara himself who indicated that his professional experience started as from June 2006, (k) it was not the intention of the contracting authority to belittle the professional abilities of Mr Nicholas Barbara but the contracting authority had to carry out an objective assessment on an objective criterion, namely the requirement of not less than six years general professional experience, (l) the work included in the statement dated December 2005 referred to work carried out at the Ghadira Nature Reserve for the Malta Environment and Planning Authority as part of the dissertation that Mr Barbara eventually presented in connection with his B.Sc. qualification, namely when he was an undergraduate, in fact it was carried out under the supervision of Prof. Patrick J. Schembri, (m) the work carried out on the 'Ecology of the saline pool macrofauna at the Ghadira Nature Reserve' in 2005 by Prof. Patrick J. Schembri and Mr Nicholas Barbara was not included under 'Work Experience' but under 'Publications' 'other works' (page 2 of CV), (n) both reports were carried out as an undergraduate under the supervision of Prof. J Schembri and both were executed for the Malta Environment and Planning Authority, (o) during the clarification meeting bidders were encouraged to submit CVs, even if they were not mandatory requirements, (p) one should not be subjective in this issue when it concerned evaluation of an objective criterion, namely the mandatory requirement of not less than 6 years general professional experience, (q) professional experience could be gained after obtaining a degree, so any work carried out prior to that stage could not be considered for this purpose and (r) there was no indication that Mr Barbara had carried out any general professional work prior to June 2006 and his CV provided that evidence;

reached the following conclusions, namely:

1. The Public Contracts Review Board acknowledges the fact that, with regard to the issue of public funding, the evaluation board acted on the advice given by the Department of Contracts who claimed that NGOs in receipt of public funds could not form part of a consortium. This Board differentiates between NGOs which are subsidised and those which receive some kind of other funds following e.g a call for an EU funded programme. Undoubtedly, this Board would have to assume that the Department of Contracts would have been referring to the 'subsidised' NGOs which, in this case, considering that reference was being made to *Birdlife Malta*, there should have been no issue as this scenario does not apply.
2. The Public Contracts Review Board takes cognizance of the fact that there is a difference between 'work experience' and 'professional experience'. Macmillan Dictionary defines 'work experience' as "the experience and skills that you gain in doing a particular job". Collins Dictionary defines 'professional experience' as an experience "undertaken or performed for gain or by people who are paid".
3. This Board, however, opines that the issue at stake here is more a question of time frame (number of years) rather than a question of phrase definition (namely 'work' as compared to 'professional' experience).

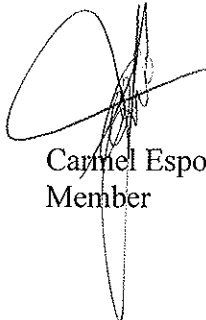


4. The Public Contracts Review Board notes that the contracting authority requested in page 8 of the tender document 6 years general professional experience in the area related to ecology and nature. Yet, this Board also acknowledges that this time frame was not based on some scientific calculation but rather on the fact that this tender was in connection with *Natura 2000*, which started operating in Malta since the latter's accession to the EU, namely 2004. This Board also notes the fact that during the clarification meeting bidders were encouraged to submit CVs even if this was not a mandatory requirement. As a result, this Board fails to understand that, based on the premise that (a) the 6 years general professional experience in the area related to ecology and nature was not based on some scientific calculation and that, for all intents and purposes, this time frame could have been 4 years or 8 years for all that matters and (b) the submission of the CVs was not mandatory thus ensuring that, irrespective of content, no tenderer could have been adversely effected by anything which would have been submitted over and above the mandatory requirement – *one could have easily declared a period of professional experience without a CV corroborating such details and yet such tenderer would have had to have the bid equally evaluated by the adjudication board*. This Board disagrees with contracting authority's stand taken against appellant consortium on both issues in question.
5. The Public Contracts Review Board feels that, considering all the above, namely (a) having 5½ years professional experience instead of 6 years professional experience within a context wherein a time frame was not arrived at via some kind of scientific method and, more importantly, (b) with details emanating from a CV which was taken into consideration despite the fact that the submission of such CV was not a mandatory requirement, this Board opines that a certain degree of pragmatism – the relativity of a six month additional professional experience within a six year time frame arrived at arbitrarily - could have been introduced by the evaluation board at deliberation stage.
6. This Board cannot also agree with the evaluation board's reasoning as to the fact that, in its opinion, the contracting authority had to act in fairness with other entities that might have been prevented from submitting a bid because of the experience requested. At this stage one cannot but make reference to the fact that these other entities could have availed themselves from a clarification process - envisaged in the procurement regulations – prior to deciding whether to submit a tender or not.


In view of the above, this Board finds in favour of the appellant consortium and recommends that the said appellant, apart from being reintegrated in the evaluation process, be reimbursed with the deposit it had paid to enable it to file a formal objection.



Alfred R Triganza
Chairman



Carmel Esposito
Member



Paul Mifsud
Member

28th May 2012