

PUBLIC CONTRACTS REVIEW BOARD

Case No. 443

MRRA/P/304/2011

Tender for the Provision of Consultancy Services required for the monitoring and control of Projects Contracted under Measure 121, Measure 123, Measure 313 and Measure 323 of the Rural Development Programme (2007-2013)

This call for tenders was published in the Government Gazette on the 20th January 2012. The closing date for this call with an estimated budget of € 45,000 was the 14th February 2012.

Five (5) tenderers submitted their offers.

Terracore Ltd filed an objection dated the 14th May 2012 against the decision of the Ministry for Resources and Rural Affairs to disqualify its offer as technically non-complaint and to recommend award of the tender to Design & Technical Resources Ltd

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Joseph Croker and Mr Paul Mifsud as members convened a public hearing on Thursday, 9th August 2012 to discuss this objection.

Present for the hearing were:

Terracore Ltd

Dr Jean Farrugia	Legal Representative
Dr Tonio Cachia	Legal Representative
Mr Alfred Xerri	Representative
Mr Filippo Ciadamidaro	Representative

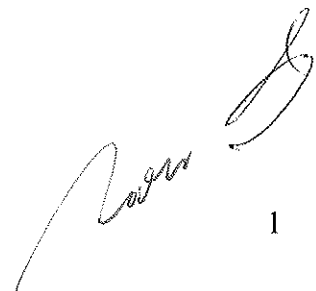
Design & Technical Resources Ltd

Dr Norval Desira	Legal Representative
Architect Etienne Magri	Representative

Ministry for Resources and Rural Affairs

Evaluation Board

Mr Sharlo Camilleri	Chairman
Mr Robert Naudi	Member
Ms Maria Carla Ciscaldi	Member



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

Dr Jean Farrugia, legal advisor of Terracore Ltd, the appellant company, explained that:-

- i. by letter dated 7th May 2012 his client was informed that his offer had been disqualified as it was not in accordance with the technical specifications of the tender document, namely, Section 8.6 'Professional Competencies' as the 'Project Manager/Key Expert' did not satisfy the following criteria at sub-section 8.6.1, viz:-
 - University degree in project management or similar
 - At least five years general experience in project management
 - Experience in the management of EU co-funded projects
 - Experience with contract procedures in accordance with EU procurement procedures
 - Good verbal and written communication skills (ordinary level or equivalent or higher) in English Language
 - Certified involvement during the past five years as Project Manager in at least 3 successfully completed civil works project of a value not less than €300,000, as shall be certified by past employers and/or clients by means of letter of reference;
- ii. once in its letter of rejection the contracting authority was not specific as to in which respect/s the key expert, namely, Mr Filippo Ciadamidaro, did not satisfy requirements, the contracting authority was asked to elaborate in this regard.

Mr Sharlo Camilleri, chairman of the evaluation board, explained that:-

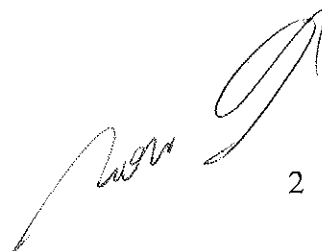
- a. whereas the appellant company submitted the qualifications and the CV of the key expert together with the list of projects that the key expert was involved in to corroborate his experience, the appellant company failed to submit the 3 letters of reference by past employers/clients certifying three successfully completed civil works projects of a value not less than €300,000;

and

- b. only one such reference was submitted, that by Dr Wayne Pisani, on behalf of Bovis Lend Lease, dated 6th April 2011.

Dr Farrugia submitted that:-

- i. through an oversight on the part of his client, the remaining two certificates/references in respect the three past projects requested had not been submitted with his original tender submission;



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- ii. on the other hand, as far as experience on the part of the key expert was concerned, it should be pointed out that his client had submitted various documents, namely the CV, the list of past projects and related details;
- iii. the contracting authority was allowed to ask for supplementary documentation, namely, in addition to what had already been submitted in that regard as per Reg. 53 of the Public Procurement Regulations which read as follows:-

(2) Contracting authorities may invite the candidates or tenderers to supplement or clarify the certificates and documents submitted in terms of sub-regulation (1) and regulation 50, and the matters referred to in regulations 51 and 52.

- iv. the key expert in question, Mr Filippo Ciadamidaro, had worked and was currently working on other Ministry for Resources and Rural Affairs projects, the contracting authority, and so the Ministry for Resources and Rural Affairs was well aware of his technical competencies;

and

- v. notwithstanding the evidence of experience of the key expert provided by the appellant company in its tender submission, his client was prepared to furnish the missing references right away

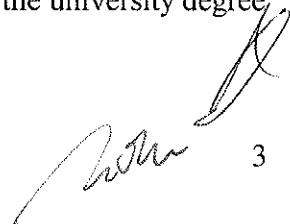
Dr Norval Desira, legal representative of the recommended tenderer, submitted that:-

- a. the appellant company had admitted that the mandatory references were not presented with its original tender submission and such mandatory documentation could not be furnished after the closing date of the tender;
- b. it was correct that Reg. 53 (2) dealt with clarifications or supplementary papers but those were allowed only with regard to certificates and documents already submitted and not with regard to mandatory documentation which had not been submitted in the original tender submission;

and

- c. the contracting authority had to evaluate this tender only on the merits on the documentation submitted in connection with this call for tenders and not on information it might have acquired in the course of other tendering procedures or through past experience.

The Chairman Public Contracts Review Board noted that in its interim evaluation report 'Technical Specifications for Project Manager', the evaluation board had indicated all the requisites under clause 8.6.1 in the negative, except for computer literacy which, then again, was not listed under clause 8.6.1., when it appeared that the appellant company did submit certain documentation such as the university degree or similar.



Mr Camilleri explained that the board arrived at that assessment because it could not corroborate certain statements with documents presented - for example, in his CV it was indicated that he had a very good command of the English language but it was not backed by the certificates indicated or their equivalent.

The Chairman Public Contracts Review Board remarked that:-

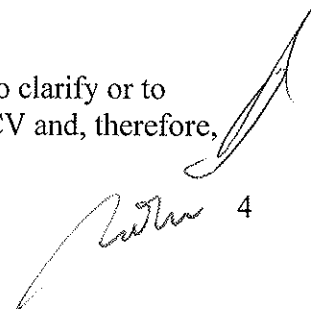
- i. English language certificates were not specifically requested in the fifth bullet of clause 8.6.1 and once it had been declared in his CV that he was fluent in English then perhaps a clarification in that case would have been in place in terms of Reg. 53 (2).
 - ii. the Public Procurement Regulations had been amended in 2010 in a way so as to allow the submission of certain documentation within a specified timeframe and against a fee but, then again, that did not apply to all missing documents;
 - iii. clause 4.4.1 'Part 1 Administrative Compliance' permitted the evaluation committee, after seeking the approval of the Departmental Tenders Committee, to request rectification in respect of incomplete/non-submitted information pertinent to the documentation as outlined in clause 2.1.3 which, in turn, referred to rectifications in respect of incomplete/non-submitted information pertinent to the documentation as outlined in sub-clauses 1.2.3, 1.2.5, 1.2.6, 1.2.7 and 1.2.8 only within 2 days and against a fee of €50;
- and
- iv. sub-clauses 1.2.3, 1.2.5, 1.2.6, 1.2.7 and 1.2.8 had nothing to do with the requisites listed in clause 8.6.1 and it was, therefore, evident that the evaluation board could not have asked for any missing document (rectification) with regard to what was requested in clause 8.6.1.

Dr Farrugia reiterated that the purpose of clause 8.6.1 was to ascertain technical competence on the part of the key expert and since his client did submit documentation to attest to the key expert's experience, namely the CV, list of projects and so on, then the evaluation board could have exercised its discretion granted by Reg. 53 (2) to ask for missing documentation to corroborate the documentation already submitted with regard to experience. He added that the same contracting authority had already accepted this same key expert in connection with the execution of its projects.

The Chairman Public Contracts Review Board pointed out that the fact that the key expert was known to the contracting authority through other tendering processes under its responsibility should not have a bearing on the adjudication of this particular tender since the contracting authority should evaluate these bids strictly on the documentation specifically requested and submitted.

Dr Desira concluded that:-

- i. one had to distinguish between (a) asking for a document to clarify or to supplement documentation already submitted such as the CV and, therefore,



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the contracting authority had the discretion to ask clarifications about it, and (b) the non-submission of mandatory documents which were specifically requested in their own right as per clause 8.6.1, namely the three certificates by past employers and/or clients for successfully completed works of which only one such certificate/letter of reference had been submitted;

and

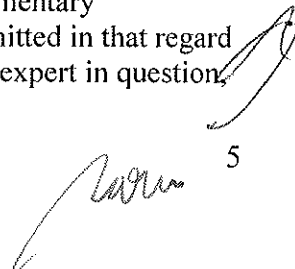
- ii. it was clearly laid down in clause 2.1.3 that the contracting authority had no discretion to ask for the submission of the two missing letters of reference.

Dr Farrugia concluded that (i) from the initial seven failures indicated by the contracting authority in its letter of rejection now it turned out that his client only infringed one of them and (ii) the contracting authority had to evaluate the tender submission in a holistic manner taking into account the number of documents already presented in the original tender submission to prove the key expert's technical competence.

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 the 14th May 2012 and also through their verbal submissions presented during the hearing held on the 9th August 2012, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant's representative's claims and observations, particularly, the references made to the fact that (a) by letter dated 7th May 2012 the appellant company was informed that its offer had been disqualified as it was not in accordance with the technical specifications of the tender document, namely, Section 8.6 'Professional Competencies' as the 'Project Manager/Key Expert' did not satisfy the following criteria at sub-section 8.6.1, namely (1) University degree in project management or similar, (2) At least five years general experience in project management, (3) Experience in the management of EU co-funded projects, (4) Experience with contract procedures in accordance with EU procurement procedures, (5) Good verbal and written communication skills (ordinary level or equivalent or higher) in English Language and (6) Certified involvement during the past five years as Project Manager in at least 3 successfully completed civil works project of a value not less than €300,000, as shall be certified by past employers and/or clients by means of letter of reference, (b) once in its letter of rejection the contracting authority was not specific as to in which respect/s the key expert, namely, Mr Filippo Ciadamidaro, did not satisfy requirements, the contracting authority was asked to elaborate in this regard, (c) through an oversight on the part of the appellant company, the remaining two certificates/references in respect the three past projects requested had not been submitted with the original tender submission, (d) on the other hand, as far as experience on the part of the key expert was concerned, the appellant company had submitted various documents, namely the CV, the list of past projects and related details, (e) the contracting authority was allowed to ask for supplementary documentation, namely, in addition to what had already been submitted in that regard as per Reg. 53 of the Public Procurement Regulations, (f) the key expert in question,



Mr Filippo Ciadamidaro, had worked and was currently working on other Ministry for Resources and Rural Affairs projects, the contracting authority, and so the Ministry for Resources and Rural Affairs was well aware of his technical competencies, (g) notwithstanding the evidence of experience of the key expert provided by the appellant company in its tender submission, the latter was prepared to furnish the missing references right away, (h) the purpose of clause 8.6.1 was to ascertain technical competence on the part of the key expert and since the appellant company did submit documentation to attest to the key expert's experience, namely the CV, list of projects and so on, then the evaluation board could have exercised its discretion granted by Reg. 53 (2) to ask for missing documentation to corroborate the documentation already submitted with regard to experience, (i) the same contracting authority had already accepted this same key expert in connection with the execution of its projects, (j) from the initial seven failures indicated by the contracting authority in its letter of rejection now it turned out that the appellant company only infringed one of them and (k) the contracting authority had to evaluate the tender submission in a holistic manner taking into account the number of documents already presented in the original tender submission to prove the key expert's technical competence;

- having considered the contracting authority's representative's reference to the fact that (a) whereas the appellant company submitted the qualifications and the CV of the key expert together with the list of projects that the key expert was involved in to corroborate his experience, the appellant company failed to submit the three letters of reference by past employers/clients certifying three successfully completed civil works projects of a value not less than €300,000, (b) only one such reference was submitted, that by Dr Wayne Pisani, on behalf of Bovis Lend Lease, dated 6th April 2011 and (c) whilst it was a fact that, in its interim evaluation report 'Technical Specifications for Project Manager', the evaluation board had indicated all the requisites under clause 8.6.1 in the negative, except for computer literacy which, then again, was not listed under clause 8.6.1, when it appeared that the appellant company did submit certain documentation such as the university degree or similar, yet the board arrived at that assessment because it could not corroborate certain statements with documents presented - for example, in his CV it was indicated that he had a very good command of the English language but it was not backed by the certificates indicated or their equivalent;
- having also considered the recommended tenderer's representative's reference to the fact that (a) the appellant company had admitted that the mandatory references were not presented with its original tender submission and such mandatory documentation could not be furnished after the closing date of the tender, (b) it was correct that Reg. 53 (2) dealt with clarifications or supplementary papers but those were allowed only with regard to certificates and documents already submitted and not with regard to mandatory documentation which had not been submitted in the original tender submission, (c) the contracting authority had to evaluate this tender only on the merits of the documentation submitted in connection with this call for tenders and not on information it might have acquired in the course of other tendering procedures or through past experience, (d) one had to distinguish between (1) asking for a document to clarify or to supplement documentation already submitted such as the CV and, therefore, the contracting authority had the discretion to ask clarifications about it, and (2) the non-submission of mandatory documents which were specifically requested in their own right as per clause 8.6.1, namely the three certificates by past employers and/or clients for successfully completed works of which only one such certificate/letter of reference had been submitted and (e) it was clearly laid down in

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clause 2.1.3 that the contracting authority had no discretion to ask for the submission of the two missing letters of reference,

reached the following conclusions, namely:

1. The Public Contracts Review Board feels that English language certificates were not specifically requested in the fifth bullet of clause 8.6.1 and once it had been declared in the key expert's CV that he was fluent in English then perhaps a clarification in this case would have been in place in terms of Reg. 53 (2).
2. This Board observes that whilst (a) the Public Procurement Regulations had been amended in 2010 in a way so as to allow the submission of certain documentation within a specified timeframe and against a fee but, then again, that did not apply to all missing documents and (b) clause 4.4.1 'Part 1 Administrative Compliance' permitted the evaluation committee, after seeking the approval of the Departmental Tenders Committee, to request rectification in respect of incomplete/non-submitted information pertinent to the documentation as outlined in clause 2.1.3 which, in turn, referred to rectifications in respect of incomplete/non-submitted information pertinent to the documentation as outlined in sub-clauses 1.2.3, 1.2.5, 1.2.6, 1.2.7 and 1.2.8 only within 2 days and against a fee of €50, yet (c) sub-clauses 1.2.3, 1.2.5, 1.2.6, 1.2.7 and 1.2.8 had nothing to do with the requisites listed in clause 8.6.1 and it was, therefore, evident that the evaluation board could not have asked for any missing document (rendering such request to be turned into a rectification) with regard to what was requested in clause 8.6.1.
3. The Public Contracts Review Board opines that the fact that the key expert was known to the contracting authority through other tendering processes under its responsibility should not have a bearing on the adjudication of this particular tender since the contracting authority should evaluate such bids strictly on the documentation specifically requested and submitted in connection with this tender.
4. This Board is fully cognisant of the fact that the appellant company had admitted that the mandatory references were not presented with its original tender submission and such mandatory documentation could not be furnished after the closing date of the tender. Also, this Board observes that it was correct for one to state that Reg. 53 (2) dealt with clarifications or supplementary papers but those were only allowed with regard to certificates and documents already submitted and not with regard to mandatory documentation which had not been submitted in the original tender submission

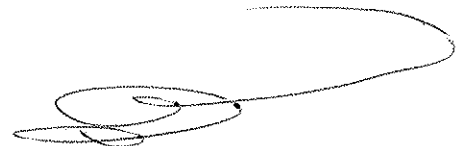
In view of the above, this Board finds against the appellant and recommends that the deposit paid by the same appellant for the appeal to be lodged should not be reimbursed.



Alfred R Triganza
Chairman



Joseph Croker
Member



Paul Mifsud
Member

10th September 2012