

PUBLIC CONTRACTS REVIEW BOARD

Case No: 523

CT/3039/2012

Tender for the Restoration of the Historic Fabric of Fort St Angelo, Birgu

The call for tender was published in the Government Gazette of the 20th July 2012 with a closing dated on the 27th September 2012. The estimated value amounted to €6,500,000 excluding VAT. There was no recommended price/tenderer at this stage.

An objection was filed by MT R Contracting Ltd on 4 February 2013 against the decision of the Contracts Department to disqualify its offer as administratively non-compliant.

The Public Contracts Review Board, with Mr Joseph Croker as A/Chairman and Messrs Carmelo Esposito and Paul Mifsud as members, convened a public hearing on Monday 18th February 2013 to discuss the objection.

Present:

MT R Contracting Ltd

| | |
|----------------------|----------------------|
| Dr Joseph Ellis | Legal Representative |
| Dr Stefano Filletti | Legal Representative |
| Ms Filomena Capriata | Director |
| Mr Joseph Zammit | Representative |

Castille Joint Venture

| | |
|-------------------|----------------------|
| Dr Matthew Pulis | Legal Representative |
| Mr Hugh Vella | Representative |
| Mr Anton Schembri | Representative |

Restoration Group JV

| | |
|--------------------|----------------------|
| Dr Franco Vassallo | Legal Representative |
| Mr Charles Ellul | Representative |
| Mr Jimmy Calleja | Representative |

Heritage Malta

| | |
|----------------------|----------------------|
| Dr Patrick Valentino | Legal Representative |
| Dr Ruth Baldacchino | Legal Representative |

Evaluation Board

| | |
|-------------------------|-----------|
| Perit Ruben Abela | Chairman |
| Ms Anastasia Anastasi | Secretary |
| Ms Veronica Bonello | Member |
| Mr Godwin Vella | Member |
| Ms Daphne Zammit Fenech | Member |

Contracts Department

| | |
|---------------------|----------------|
| Mr Jonathan Barbara | Representative |
|---------------------|----------------|

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

Preliminary Plea: Dr Stefano Filletti, in his name and on behalf of Dr Josph Ellis, submitted that they had made a request to the PCRB for the deferment of the hearing to another date or perhaps even to later on the same day due to other urgent work that they had to attend to at the Law Courts, which request had evidently not been acceded to. A/Chairman explained that it was not possible to adjourn the hearing to later during the day or to another day. It was agreed to proceed with the hearing.

Dr Stefano Filletti, on behalf of MT R Contracting Ltd, the appellant, made the following submissions:

- i. by letter dated 25th January 2013 the Department of Contracts informed his client that his offer was adjudicated as administratively not compliant for the following reasons: *In Volume 1 Section 7 Form 6, Personnel to be employed on this Contract - Conservation Architect, the Tenderer provided the CV of Perit Edward Said as Conservation Architect. Request for Clarifications 02, Answer 3 issued on the 2nd August 2012, refers to Clause 9.1 of the General Conditions of Service Tenders which states that "The Contractor shall take all necessary measures to prevent or end any situation that could compromise the impartial and objective performance of the Contract. Such conflict of interest could arise in particular as a result of economic interest, political or national affinity, family or emotional ties, or any relevant connection or shared interest. Any conflict of interest which could arise during performance of the contract must be notified in writing to the Contracting Authority without delay". It results to the Evaluation Committee that Perit Edward Said has familiar ties with representatives of the Contracting Authority and thus in line with the clarification quoted above a conflict of interest could arise. This also presents a potential conflict of interest as per Article 37.0 of "Ethics Clauses" of Volume 1, Section 1 – Instructions to Tenderers; and*
- ii. request was being made for a copy of the 'General Conditions of Service Tenders' since both the reason of exclusion and the Clarification Note No. 2 dated 2nd August 2012 made reference to them and as far as he was aware such conditions did not exist.

Dr Patrick Valentino, on behalf of the contracting authority, submitted that:

- a. Clarification Note No. 2 dated 2nd August 2012 – closing date for submission of tenders 27th September 2012 - Question 3 asked as follows: *Are nominated Key Staff who have members of their family engaged with Heritage Malta accepted?* The answer to that question read as follows:

Please be directed by clause 9.1 of the General Conditions of Services Tenders: "The Contractor shall take all necessary measures to prevent or end any situation that could compromise the impartial and objective performance of the Contract. Such conflict of interest could arise in particular as a result of economic interest, political or national

affinity, family or emotional ties, or any relevant connection or shared interest. Any conflict of interest which could arise during performance of the contract must be notified in writing to the Contracting Authority without delay;

- b. it was clearly indicated that the clarifications set out in letter dated 2nd August 2012 were construed to form an integral part of the Tender Document.

Dr Filletti remarked that:-

- i. the crux of the matter was precisely that the 'General Conditions of Services Tenderers' did not exist and he contested Dr Valentino's declaration that a clarification could alter the legal requisites set out in the tender document itself, i.e. once the tender document included conditions from the 'General Conditions of Works Contracts' then one could not alter that by including conditions from the 'General Conditions for Services Tenders' through a clarification; and
- ii. this was more so when the tender document already included a 'Conflict of Interest' clause which was entirely different from that included in the clarification and in the General Conditions of Services Contracts.

Dr Joseph Ellis, on behalf of the appellant, submitted that:-

- a. the tender document made reference to the 'General Conditions of Works Contracts' (version 1.02 dated 1st December 2011) and not to the 'General Conditions of Services Tenders' as erroneously indicated by the contracting authority in its letter of rejection and in Clarification Note No. 2;
- b. volume 1 section 5 (page 31) gave the following meaning to 'Conflict of Interest':

Any event influencing the capacity of a candidate, tenderer or supplier to give an objective and impartial professional opinion, or preventing him, at any moment, from giving priority to the interests of the Central Government Authority and the Contracting Authority. Any consideration relating to possible contracts in the future or conflict with other commitments, past or present, of a candidate, tenderer or supplier, or any conflict with his own interests. These restrictions also apply to sub-contractors and employees of the candidate, tenderer or supplier.

- c. clause 9 of the 'Tenderer's Declaration' (page 22) read as follows:-

We agree to abide by the ethics clauses of the instructions to tenderers and, in particular, have no potential conflict of interests or any relation with other candidates or other parties in the tender procedure at the time of the submission of this application. We have no interest of any nature whatsoever in any other tender in this procedure. We recognise that our tender may be excluded if we propose key experts who have been involved

in preparing this project or engage such personnel as advisers in the preparation of our tender.

- d. according to these provisions in the tender document ‘conflict of interest’ could arise if the bidder was related to other tenderers or if the proposed key experts were involved in the preparations for this project and not as the contracting authority was interpreting matters that conflict of interest could arise if someone attached to the bidder was related to someone employed with the contracting authority as per clause 9.1 of the ‘General Conditions of Service Tenders’;
- e. it was not on to discard the clauses regarding ‘conflict of interest’ specifically included in the tender document and apply other conditions;
- f. these general conditions would apply at post award stage and not at adjudicating stage;
- g. moreover, in the case that, say, a family member of the key expert of the bidder would be appointed, say, chairman of Heritage Malta during the execution of the contract, the ‘General Conditions of Service Contracts’ cited by the contracting authority provided a remedy at clause 9.2 which read as follows:-

The Contracting Authority reserves the right to verify that such measures are adequate and may require additional measures to be taken if necessary. The Contractor shall ensure that its staff, including its management, are not placed in a situation which could give rise to conflict of interests. Without prejudice to Article 7, the Contractor shall replace, immediately and without compensation from the Contracting Authority, any member of its staff exposed to such a situation.

- h. therefore, in such a case the contractor had to remove any member of his staff exposed to such a situation but the contract would by no means be cancelled;
- i. it was therefore evident that the contracting authority’s decision to exclude his client at this stage was incorrect and legally unjustified because it applied the wrong or inexistent conditions and because the relevant conditions were those related to a works contract and not clause 9.1 of the conditions of service tenders and even if the latter were to be applied clause 9.2 provided the remedy whereby the staff member concerned had to be replaced; and
- j. it was not justified to exclude his client from such a large contract on the pretext of conflict of interest brought forward by the contracting authority when there were other remedies to this kind of conflict of interest.

Dr Valentino maintained that:-

- i. it was no use quoting bits and pieces of the tender provisions but what mattered was that one had to be careful to address adequately the issue of conflict of interest;

- ii. the answer to Question 3 of Clarification Note No. 2 was quite clear in that if a staff member, in this case the key expert, of the bidder had family ties with member/s of staff engaged with Heritage Malta, in this case the chairman, that amounted to a conflict of interest;
- iii. this clarification formed an integral part of the tender document and the appellant did not contest this condition and therefore by submitting his offer the appellant was accepting all the tender conditions including the clarifications which were issued and circulated prior to the closing date for tender submissions;
- iv. it was no secret that Perit Edward Said was the son of the chairman of Heritage Malta;
- v. how could one not raise the possibility of conflict of interest in the case of the key expert of the bidder being the son of the chairman of the contracting authority in a tender worth some €6.5m; and
- vi. the appellant seemed to imply that it was allowed to have a conflict of interest between a son and his father in the case of a works tender whereas it was not allowed in the case of a services tender.

Dr Ellis argued that:-

- a. once the contracting authority was concluding that this father and son relationship led to a conflict of interest then he wished to formally call the two persons concerned to the stand to ask them about this alleged conflict of interest;
- b. it could be that in this case the son did not have good relations with his father; and
- c. one could also picture a situation when during the execution of the contract the members of the board of Heritage Malta could be replaced and one of the new members would be related to a staff member of the contractor in which instance the contractor would have to remove the party exposed to such a situation.

Dr Franco Vassallo, on behalf of Restoration Group JV, a participating bidder, remarked that:-

- i. his client wished to register that his request to be given a copy of the appellant's letter of objection had not been entertained, even though he was aware that the PCRБ was not obliged to furnish him with one;
- ii. the contracting authority was acting correctly to bring up the issue of conflict of interest arising from family ties between the key expert of the appellant and the chairman of Heritage Malta;

- iii. if this issue had not been raised at this stage but came to light at a later stage it would have led to the annulment of the tendering process and this stand was taken by the PCRB in a similar case, i.e. Case No. 209 of 2010 (Doc A), where the tender was cancelled after having been compromised by the family ties of the key expert of the appellant, Ms Simone Vella Linicher, and a member of the contracting authority, the Grand Harbour Regeneration Corporation;
- iv. clause 67.10 of the 'Ethics Clauses' applicable to all tenders stated that:

The Contractor shall refrain from any relationship likely to compromise his independence or that of his staff. If the Contractor ceases to be independent, the Contracting Authority with the prior written approval of the Central Government Authority, may, regardless of injury, terminate the contract without further notice and without the Contractor having any claim to compensation.

- v. when dealing with public procurement one had to avoid any conflict of interest; and
- vi. the appellant could have queried the clarifications issued by the contracting authority prior to the closing date for the submission of tenders but once the appellant participated without quering those conditions then that meant that he had to accept them.

Dr Matthew Paris, on behalf of Castille Joint Venture registered his client's complaint that his repeated request to be provided with a copy of the letter of objection had not been met while pointed out that apart from this forum the other venue available to his client to contest the tender proceedings was the courts of justice.

Dr Ellis:-

- a. reiterated his initial distinction between a works contract and a service contract and that the contracting authority had not acted correctly when it made reference to a service tender in its clarification;
- b. stated that article 67 'Ethics Clause' quoted by Dr Vassallo did not contemplate the cancellation of the contract but contemplated the suspension or cancellation of project financing as per clause 67.11;
- c. repeated that even if this were to be a services contract, which was not the case, clause 9.2 would have called on the contractor to replace the person exposed to the conflict of interest but it did not lead to the cancellation of the tender/contract;
- d. in this case, the contracting authority applied in-existent or in-applicable conditions because they did not contemplate the conflict of interest under reference; and

- e. requested that in view of the declarations made at the hearing by the contracting authority regarding the alleged conflict of interest arising from the fact that a key expert was the son of the chairman of Heritage Malta, the two persons concerned should be summoned as witnesses.

The A/Chairman remarked that the PCRB had enough information to deliberate on this case and therefore there was no need to summon further witnesses.

This Board:

- having noted that the appellants in terms of their letter of objection and also through their verbal submissions during the hearing of the 18th February 2013 had objected to the decision taken by the Department of Contracts to disqualify their bid as being administratively non-compliant;
- having noted the appellant's representatives claims and observations in particular to the fact that the offer submitted by the appellant was discarded as it was alleged that the fact that the Conservation Architect happened to be the son of the Chairman of Heritage Malta constituted a conflict of interest in terms of Clause 9.1 of the General Conditions of Service Tenders and in terms of Article 37.0 of the Ethics Clauses of Vol 1, Sect 1 – Instructions to Tenderers; that he was requesting a copy of the mentioned conditions since he is not aware of their existence; that this was a works contract and not a service contract and as a result different interpretations of conflict of interest are applicable; that even if hypothetically there existed a conflict of interest, then this did not necessarily lead to the non-acceptance of the tender but that there were other remedies that may be applied;
- having noted the Contracting Authority's representative's explanation that it was very clear from the reply given to clarification Note No.2 of the 2nd August 2012 in reply to question 3 "*Are nominated Key Staff who have members of their family engaged with Heritage Malta accepted?*" where tenderes were directed to clause 9 of the General Conditions of Services Tenders which dealt with these issues and included 'family or emotional ties' as a situation which could give rise to conflict of interest; that it was clearly indicated that this clarification note became an integral part of the tender document; that it was useless quoting bits and pieces of tender provisions since what really mattered was that one had to address the issue of conflict of interest and that one cannot imagine how a situation where the key expert is the son of the Chairman of Heritage Malta did not give rise to a real (if only perceived) conflict of interest;
- having noted the representatives' interested parties complaints that they were not provided with copies of the appeals, even if the PCRB was not legally obliged to do so;

came to the following conclusions:

1. that the fact that Perit Said was the son of the Chairman of Heritage Malta and that he was appointed as the key expert by the appellants was not in dispute;
2. that though this was a Works Tender the Contracting Authority made mention of the General Conditions of Services Tenders in the letter disqualifying the appellant's bid;
3. that reference was made by the Contracting Authority to the General Conditions of Services Tenders in clarification No. 2 in reply to Question 3 and thus this clarification became an integral part of the tender document;
4. that the appellant chose to tender under these conditions even though he might have had certain reservations, and thus became subject to these conditions;
5. that a perusal of the Department of Contracts website under 'Resources – General Conditions etc' would show that the words 'tender' and 'contract' are interchangeable where these conditions are concerned and thus the appellants' representatives claim that the quoted regulations did not exist are unfounded;
6. that the main scope of these General Conditions, especially the sections concerning ethics, whether entitled General Conditions of Service or Works, was to ensure the greatest possible transparency and avoid any possible conflicts of interest, whether actual or perceived.

In view of the above, the Board finds against the appellant and recommends that the deposit paid by the appellant to file his appeal be forfeited.

Joseph Croker
A/Chairman

Carmelo Esposito
Member

Paul Mifsud
Member

27 February 2013