

PUBLIC CONTRACTS REVIEW BOARD

Case No. 553

MTA/828/2012

Service Tender for the Provision of Mathematical Modelling for a Beach Replenishment Project (II)

This call for tenders was published in the Government Gazette on the 13th July 2012. The closing date for this call with an estimated budget of €45,000 (excl. VAT) was the 7th August 2012.

Two (2) tenderers submitted their offers.

Tektraco Ltd filed an objection on the 4th February 2013 against the decision of the Malta Tourism Authority to disqualify its offer as technically non-compliant and to award the tender to Artelia Group.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Joseph Croker and Mr Carmel Esposito as members convened a public hearing on Wednesday, 22nd May 2013 to discuss this objection.

Present for the hearing were:

Tektraco Ltd

Dr Jean Farrugia	Legal representative
Dr Maria Micallef	Legal Representative
Mr Colbert Balzan	Representative
Mr Joe Camilleri	Representative

Artelia Group – notified that no one will be attending

Malta Tourism Authority

Dr Frank Testa	Legal Representative
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Evaluation Board

Mr Francis Albani	Chairman
Mr Oliver Farrugia	Member
Ms Stephanie Attard	Member
Mr Patrick Attard	Secretary

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

Dr Jean Farrugia, legal representative of Tektraco Ltd, the appellant company, made the following submissions:-

- i. by letter dated 28th January 2013 the contracting authority informed the appellant company that its tender was being disqualified as it was considered to be technically non-compliant because *“when evaluating clause 30.3 (ii) (evidence of technical capacity sub-clause 6.1.2) the evaluation committee noted that the bidder (Tektraco) failed to supply any evidence as requested and instead submitted details of a company named Nautilus Ing. Maritima S.L. which relationship between the companies could not be established”*;
 - ii. with its tender submission, the appellant company had presented a commitment letter dated 1st March 2012 from Nautilus Ingenieria Maritima S.L. (Nautilus) which stated that Nautilus was ready to collaborate with Tektraco Ltd for the services requested in this tender using all the resources necessary for the execution of the contract in accordance with the terms of reference for the ‘Mathematical Modelling’;
 - iii. as a consequence it was made clear from the outset that the appellant company was going to rely on the experience and expertise of Nautilus;
 - iv. unlike what the contracting authority was contending, the appellant company did spell out the relationship it had with Nautilus and, having also submitted the cheapest bid, the appellant company should have been awarded this contract;
- and
- v. in the light of the above, the contracting authority was being requested to confirm whether the only reason for exclusion was that it could not establish the relationship between Tektrako Ltd and Nautilus.

Dr Frank Testa, legal representative of the contracting authority, submitted that:-

- the reason for exclusion was the appellant company's complete reliance on Nautilus;
- in its letter of objection the appellant company was quoting Regulation 52 (3) of the Public Procurement Regulations (PPR) whereby “an economic operator may, where appropriate and for the particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them....” ;

and

- the fact was that the tender document did not include the provisions of Regulation 52 (3) of the PPR and, as a result, the appellant company could not rely on the services of third parties.

Dr Farrugia argued that:-

- a. once the tender document did not mention Reg. 52 (3) at all, then it did not preclude bidders from relying on third parties to execute this contract;
- b. it must be stressed that the contracting authority did not exclude the appellant company because it intended to utilise the services of a third party but because the contracting authority could not establish the relationship between the tenderer and the third party, Nautilus, and at appeal stage one had to stick to that one and only reason for exclusion;
- c. clause 30.2 of the tender document provided, among other things, that “the evaluation committee shall, after having obtained the approval of the MTA’s Tenders Committee request rectifications in respect of incomplete/non-submitted information pertinent to the documentation as outlined in sub-clause 16.1 (a), (b) and (c) of these Instructions to Tenderers”;
- d. the appellant company contended that the point at issue fell under 16.1 (c) and, therefore, the contracting authority was obliged to ask the tenderer for a clarification and/or rectification in this regard within 2 working days rather than resort to outright disqualification;
- e. the appellant company had clearly indicated its relationship with Nautilus in its tender submission and the term ‘sub-contracting’ referred to third parties not mentioned in the appellant company’s tender submission;

and

- f. in the circumstances, it was not justified or reasonable to exclude the appellant company.

The Chairman Public Contracts Review Board remarked that in case of doubt the bidder could have asked whether it was permissible to rely on the resources of third parties prior to the closing date of the tender.

Dr Testa explained that:-

- i. the bidder’s reliance on the resources of third parties was not allowed and referred to the following:-
 - clause 6.1.2 requested in the most clear terms information about the tenderer’s technical capacity and technical expertise available (own staff);
 - clause 16.1 (c) ‘Technical Capacity’ which was mentioned by the appellant company corresponded to Note 3 of clause 16 which read as

follows, “*No rectification shall be allowed. Only clarifications on the submitted information may be requested*”;

- ii. in Part A of Volume 1 Section 2 ‘Tender Form’ (page 18) the appellant company indicated that Tektraco Ltd would assume 100% responsibility for this project when, elsewhere in the tender submission it indicated that it was going to rely on the experience and expertise of Nautilus, a third party;
 - iii. Note 3 of Part A of the ‘Tender Form’ clearly stated that ‘*Sub-contracting is not allowed*’;
- and
- iv. the appellant company’s tender submission was so clear that it left no room for the request of any clarifications.

The Chairman Public Contracts Review Board observed that the term ‘to collaborate’ used by Nautilus in its letter dated 1st March 2012 meant that Nautilus was going to be responsible for part of this project but that was not reflected in the tender submission because Tektraco Ltd declared that it was assuming 100% responsibility.

Mr Patrick Attard, secretary to the evaluation board, remarked that the recommended tenderer was a foreign firm which relied completely on its own resources.

Dr Testa argued that:-

- a. the letter of objection demonstrated that the appellant company had understood the reasons behind its exclusion so much so that it mentioned the provisions of Reg. 53 (2) of the PPR which dealt with the bidder’ reliance on third parties which the tender document prohibited in this case;
- and
- b. it was quite clear that the appellant company had tendered for a contract which it was not going to execute itself.

Mr Francis Albani, chairman of the evaluation board, remarked that once the appellant company’s tender submission did not indicate that the tenderer was a joint venture between Tektraco Ltd and Nautilus then, by default, Nautilus was going to be a sub-contractor. Nevertheless, continued Mr Albani, at this stage one had to place emphasis on the fact that sub-contracting was not allowed, adding that had Nautilus submitted the tender in its own name then it would have been on the same level as the recommended tenderer.

The Chairman Public Contracts Review Board observed that Note 2 of Part A of the ‘Tender Form’ provided that partners had to indicate their share of responsibility in the execution of the contract and that the lead partner, in this case Tektraco Ltd, had to carry out at least 50% of the contract.

Mr Colbert Balzan, also on behalf of the appellant company, under oath, gave the following evidence:-

- i. there were no local service providers who possessed the necessary expertise to deliver this specialised service and that was why Tektraco Ltd relied on the resources of Nautilus;

and

- ii. Nautilus was going to be responsible for about 90% of the contract works.

Dr Farrugia reiterated that the reason for exclusion was not the appellant company's almost total reliance on Nautilus or that it could not resort to sub-contracting but the sole reason was that the contracting authority could not establish the relationship between the bidder and Nautilus and at appeal stage one could not come up with additional reasons for exclusion.

At this point the hearing came to a close.

This Board,

- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated 4th February 2013 and also through its representatives verbal submissions presented during the hearing held on the 22nd May 2013, 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 28th January 2013 the contracting authority informed the appellant company that its tender was being disqualified as it was considered to be technically non-compliant because "*when evaluating clause 30.3 (ii) (evidence of technical capacity sub-clause 6.1.2) the evaluation committee noted that the bidder (Tektraco) failed to supply any evidence as requested and instead submitted details of a company named Nautilus Ing. Maritima S.L. which relationship between the companies could not be established*", (b) with its tender submission, the appellant company had presented a commitment letter dated 1st March 2012 from Nautilus Ingenieria Maritima S.L. (Nautilus) which stated that Nautilus was ready to collaborate with Tektraco Ltd for the services requested in this tender using all the resources necessary for the execution of the contract in accordance with the terms of reference for the 'Mathematical Modelling', (c) as a consequence it was made clear from the outset that the appellant company was going to rely on the experience and expertise of Nautilus, (d) unlike what the contracting authority was contending, the appellant company did spell out the relationship it had with Nautilus and, having also submitted the cheapest bid, the appellant company should have been awarded this contract, (e) in the light of the arguments raised during the hearing, the contracting authority was being requested to confirm whether the only reason for exclusion was that it could not establish the relationship between Tektraco Ltd and Nautilus, (f) once the tender document did not mention Reg. 52 (3) at all, then it did not preclude bidders from relying on third parties to execute this contract, (g) it must be stressed that the contracting

authority did not exclude the appellant company because it intended to utilise the services of a third party but because the contracting authority could not establish the relationship between the tenderer and the third party, Nautilus, and at appeal stage one had to stick to that one and only reason for exclusion, (h) clause 30.2 of the tender document provided, among other things, that “the evaluation committee shall, after having obtained the approval of the Malta Tourism Authority’s Tenders Committee, request rectifications in respect of incomplete/non-submitted information pertinent to the documentation as outlined in sub-clause 16.1 (a), (b) and (c) of these Instructions to Tenderers”, (i) the appellant company contended that the point at issue fell under 16.1 (c) and, therefore, the contracting authority was obliged to ask the tenderer for a clarification and/or rectification in this regard within 2 working days rather than resort to outright disqualification, (j) the appellant company had clearly indicated its relationship with Nautilus in its tender submission and the term ‘sub-contracting’ referred to third parties not mentioned in the appellant company’s tender submission, (k) in the circumstances, it was not justified or reasonable to exclude the appellant company, (l) there were no local service providers who possessed the necessary expertise to deliver this specialised service and that was why Tektraco Ltd relied on the resources of Nautilus and (m) Nautilus was going to be responsible for about 90% of the contract works;

- having considered the contracting authority’s reference to the fact that (a) the reason for exclusion was the appellant company’s complete reliance on Nautilus, (b) in its letter of objection the appellant company was quoting Regulation 52 (3) of the Public Procurement Regulations (PPR) whereby “an economic operator may, where appropriate and for the particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them...”, (c) the fact was that the tender document did not include the provisions of Regulation 52 (3) of the PPR and, as a result, the appellant company could not rely on the services of third parties, (d) the bidder’s reliance on the resources of third parties was not allowed and referred to the following (1) clause 6.1.2 requested in the most clear terms information about the tenderer’s technical capacity and technical expertise available (own staff) and (2) clause 16.1 (c) ‘Technical Capacity’ which was mentioned by the appellant company corresponded to Note 3 of clause 16 which read as follows, “*No rectification shall be allowed. Only clarifications on the submitted information may be requested*”, (e) in Part A of Volume 1 Section 2 ‘Tender Form’ (page 18) the appellant company indicated that Tektraco Ltd would assume 100% responsibility for this project when, elsewhere in the tender submission it indicated that it was going to rely on the experience and expertise of Nautilus, a third party, (f) Note 3 of Part A of the ‘Tender Form’ clearly stated that ‘*Sub-contracting is not allowed*’, (g) the appellant company’s tender submission was so clear that it left no room for the request of any clarifications, (h) the recommended tenderer was a foreign firm which relied completely on its own resources, (i) the letter of objection demonstrated that the appellant company had understood the reasons behind its exclusion so much so that it mentioned the provisions of Reg. 53 (2) of the PPR which dealt with the bidder’s reliance on third parties which the tender document prohibited in this case, (j) it was quite clear that the appellant company had tendered for a contract which it was not going to execute itself, (k) once the appellant company’s tender submission did not indicate that the tenderer was a joint venture between Tektraco Ltd and Nautilus then, by default, Nautilus was going to be a sub-contractor and

(1) had Nautilus submitted the tender in its own name then it would have been on the same level as the recommended tenderer,

reached the following conclusions, namely:

1. The Public Contracts Review Board feels that in case of doubt the bidder could have asked whether it was permissible to rely on the resources of third parties prior to the closing date of the tender.
2. The Public Contracts Review Board contends that the term ‘to collaborate’ used by Nautilus in its letter dated 1st March 2012 meant that Nautilus was going to be responsible for part of this project but that was not reflected in the tender submission because Tektraco Ltd declared that it was assuming 100% responsibility. At this stage this Board places emphasis on the fact that Note 2 of Part A of the ‘Tender Form’ provided that partners had to indicate their share of responsibility in the execution of the contract and that the lead partner, in this case Tektraco Ltd, had to carry out at least 50% of the contract. Furthermore, during the hearing the appellant company’s representative, under oath, stated that Nautilus was going to be responsible for about 90% of the contract works.
3. This Board is fully cognisant of the fact that Note 3 of Part A of the ‘Tender Form’ clearly stated that ‘*Sub-contracting is not allowed*’
4. The Public Contracts Review Board opines that (a) the appellant company’s tender submission was so clear that it left no room for the request of any clarifications and that (b) it was quite clear that the appellant company had tendered for a contract which it was not going to execute itself.
5. This Board concurs with the statement made by one of the contracting authority’s representatives, namely that had Nautilus submitted the tender in its own name then it would have been considered on the same level as the recommended tenderer.

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

Alfred R Triganza
Chairman

Joseph Croker
Member

Carmel Esposito
Member

31st May 2013