

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case No. 641**

**CT 2031/2013**

Framework Agreement for the Provision of Insurance Brokerage Services for the Enemalta Submarine Cable Interconnector.

The tender was published on the 7<sup>th</sup> May 2013 and the closing date was on the 2<sup>nd</sup> July 2013.

The estimated value of the tender was €300,000 (Exclusive of VAT)

Three (3) bidders had submitted an offer for this tender.

On the 7<sup>th</sup> November 2013 Messrs. Mediterranean Insurance Brokers (Malta) Limited filed an objection against the decision to award the tender to Allcare Insurance Brokers Limited for the price of €37,500 including VAT.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Tuesday 17<sup>th</sup> December 2013 to discuss this objection.

**Present when the hearing started were:**

### **Mediterranean Insurance Brokers (Malta) Limited - Appellant**

Ms Fiona Borg	Representative
Mr Joe Cutajar	Representative
Dr Franco Galea	Legal Representative
Dr Michael Sciriha	Legal Representative

### **Allcare Insurance Brokers Limited - Preferred Bidder**

Mr Ramon Mizzi	Representative
Mr Malcolm Cachia	Representative
Dr Paul Cachia	Legal Representative
Dr Simon Cachia	Legal Representative

### **Enemalta Corporation - Contracting Authority**

Ing. Ivan Bonello	Chairman Evaluation Board
Ing. Joseph Vassallo	Representative
Dr Antoine Cremona	Legal Representative

### **Witnesses**

Mr Joe Saliba	Employment and Training Corporation
Mr Claudio Scerri	Malta Financial Services Authority
Mr Edmond Brincat	GO Plc

The Chairman made a brief introduction and suggested that the case be heard together with the following one on the list, the objection made by Marsh Island Consortium since the cases both dealt with the same tender and all the parties were present. Thus there would be no unnecessary repetition of submissions and hearing of witnesses. The representatives of all the three bidders involved in this tender agreed and the Board started hearing the submissions of appellant Mediterranean Insurance Brokers (Malta) Limited.

Dr Franco Galea on behalf of the appellant said that the award criterion for this tender was the cheapest price satisfying the administrative and technical criteria. The recommended bidder did not satisfy the tender technical criteria and therefore was not the cheapest compliant bidder. He stated that this is a repeat tender of another tender HO/T/4015/2012, but there is a difference between the two tenders regarding the award criteria. Clause 7 of the tender dealt with the criteria, both administrative as well as technical, of the tender which all bidders had to comply with. He referred to proof of technical capacity at page 5 of the tender, Clause 7.1.B.ii. (3) and (4) which lists the five criteria that have to be satisfied. These sub clauses (3) of the present tender states that the brokerage firm making the bid had to prove that it had provided similar brokerage services on an interconnector to the value of a minimum of €70 million. Sub clause (4) refers to the key experts for this tender, one of which had to have had similar experience. Dr Galea contended that the recommended bidder does not satisfy these two conditions. The preferred bidders relied for this experience on the capacities of another company, JLT as per Article 52.3 of the Public Procurement Regulations which states that a bidder may, where appropriate rely on the capacities of other entities. This article is the same as the EU Directive. However this is not correct since this Article does not apply to this tender. Sub clause (3) of the present tender states that this reliance can be resorted to in case of a joint venture or consortium, with the lead brokerage firm satisfying the criterion. Appellant did not form a joint venture or consortium but chose to file a bid itself, using a sub-contractor. Clause 7 of the tender precludes this and experience cannot be obtained through a sub-contractor. The present tender makes no mention of Article 52.3, where a bidder could rely on any other entity to satisfy the need of experience. The original tender, previously issued, had included this clause and therefore the reliance on sub-contractors had been valid in that tender. The present tender did not include it. Therefore the preferred bidder could not avail itself of the provision. Furthermore all bidders had to show that they had the necessary resources and staff to be able to provide the service. The preferred bidder cannot provide this. Finally Dr Galea contended that he had doubts whether the preferred bidder's sub-contractor satisfied the requisite number one of the technical capacities, and that was the reason why the evidence from MFSA employees was indicated.

Dr Antoine Cremona on behalf of the contracting authority said that the objection by MIB was purely speculative and was based on something not known to the appellant, that is, the compliance of the preferred bidder. Therefore the appellant could not have based the objection on this. The objection should have been based on the issues, appellant's bid was discarded. Appellant also added to the selection criteria for example that the provision in the tender allowing for reliance on other entities referred only to consortia or joint ventures. This was simply not true. Regarding subcontracting, the question is whether the bidder could rely on the experience of others. According to Clause 7.1.A, eligibility criteria, in the general conditions at page 4 Clause 7.1.A ii it is clear that the contracting entity can rely on the experience of other entity if it can show a relationship with the other entity. Allcare, the preferred bidder submitted in its tender a list showing vast experience in the sector by JLT as well as a declaration by the said JLT stating that it was undertaking to work on the project with the preferred bidder. This was the normal procedure in such tenders that bidders could

rely on the experience of others provided that bidders could show that these others were willing to offer their services to the bidders. Reliance does not depend on the nature of relationship; it could be subcontracting, joint venture, consortium and any other relationship. It is not understood why the present case was being claimed to be different.

Dr Franco Galea on behalf of the appellant claimed that Article 52.3 does not cover all tenders. The present tender as worded, in Clause 7 requires the bidder himself to satisfy the requisite, to have the experience. The preferred bidder admitted not having the necessary experience but stated that its subcontractor did have. The tender continually refers to consortium and joint ventures. That is why the tender specified that the subcontractor was not considered a partner. Joint ventures are bound 'in solidum' with bidders while subcontractors are not so bound. Finally Dr Galea asked that the preferred bidder to state which of the JLT companies was the subcontractor in this tender.

Dr Paul Cachia on behalf of the preferred bidder said that without any doubt, JLT had the necessary experience, and this fact is known worldwide. JLT gave an undertaking to the preferred bidder offering its resources. LJT is the leading world Brokerage firm. The legal point in this appeal is the fact that no one can impose conditions on the tender other than those emanating from the tender document itself. Bidders are free to organise their affairs in any way unless otherwise restricted by the tender. Appellants are trying to impose conditions that do not arise from the tender document. The condition implied by the appellant – that the preferred bidder cannot rely on the expertise of a subcontractor- is not found in the tender document itself. The tender did not impose any restrictions that bidders could not rely on the experience of a subcontractor. The tender document on the other hand recognizes the use of subcontractors. It is common knowledge that no insurance broker in Malta had the capacity to bid for this tender on its own capacity alone. The tender document stated that bidders could choose to bid either through consortia/joint ventures or through subcontracting. While other bidder chose to bid as joint ventures or consortia, the preferred bidder chose to bid using a subcontractor, and the tender did not exclude this. He contended that the on line application had a clause which read: *“An economic operator may, where appropriate, and for a particular contract, rely on the capacities of other entities regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract, for example, by producing an undertaking by those entities to place the necessary resources at the disposal of the economic operator. In such circumstance, please upload a copy of this undertaking with all relevant information”*, however this was not even needed since the tender allowed for subcontracting and there were no restrictions. Apart from this the Clause reflects the EU Directive. The clause mentioned by the appellant that, subcontractors are not considered as partners, means that that legally, Allcare alone, the preferred bidder, had to assume all the legal responsibility and liability for damages. Joint ventures and consortia would be responsible and liable in solidum.

Finally, Dr Cachia pointed out that the wording of article 7.1.B at page 5 paragraph one says that **“evidence that the tendering insurance broker”** while in clause 3 cited by appellants it says **“brokerage firm must provide”** and does not state “tendering insurance broker”, who has to satisfy the conditions. Thus the tender is allowing two concepts, one being tendering insuring broker which is the preferred bidder, and then there is the concept of a brokerage firm, which includes the possibility of a subcontract with JLT with JLT being the brokerage firm. If the tender document wanted to state that the bidder itself had to have had experience of a project of €70 million, it would have used only the words “tendering insurance broker.”

He contended that article 6, concerning subcontractors, allowed such subcontracting without limits. In fact the tender asked for the bidders to state the percentage of the project to be performed by the subcontractor.

Dr Antoine Cremona on behalf of the contracting authority stated that the matter boiled down to the fact whether what was submitted by the preferred bidder satisfied or not the tender requirements. It is clear that appellants only read part of the tender document because Article 7.1A Eligibility, ii General Rules at page 4 of the tender document, clause 2.4 states that “*An economic operator may, where appropriate, and for a particular contract, rely on the capacities of other entities regardless of the legal nature of the links which it has with them. ....*” it is evident that appellants did not read these general rules.

At this point the Chairman wanted someone to testify on JLT. And there was a free for all for several minutes.

Mr Malcolm Cachia on behalf of the preferred bidder, under oath, replying to questions by the Chairman stated that the preferred bidder work with JLT on specific projects and thus he could not say how long was the relationship of Allcare with JLT. JLT definitely had the technical capacity to carry out this project. They, JLT had carried out several similar projects before. Replying to questions by Dr Franco Galea for the appellant, he stated that the JLT Company referred to in this tender was Speciality Limited. Allcare’s dealings were with the JLT Group but the subcontractor was the Speciality Limited. Dr Paul Lia for Mash Island Consortium asked for information about the payment arrangement between the preferred bidder and the subcontractor.

Dr Michael Sciriha on behalf of the appellant quoted the legal principle *lex specialis derogat legi generalis*. He claimed that this was an important tender that required great attention and that was why the first tender had been withdrawn. Circumstances indicate that appellant’s contention was the right one. But he submitted to the decision of the Board. But, Dr Sciriha insisted that his client was the only Maltese group that had worked on a similar project.

Dr Antoine Cremona stated that the General Rules of contract Clause 2.4 allow any entity to rely on any other entity for experience as long as the latter gave an undertaking. Appellant’s submissions were thus erroneous because appellant based them on the tender without taking into consideration the general rules.

The hearing was at this point brought to a close.

**This Board,**

**Having noted the Appellant’s objection, in terms of the ‘Reasoned Letter of Objection’ dated 7th November 2013 and also through the Appellant’s verbal submissions during the hearing held on 17<sup>th</sup> December 2013, had objected to the decision taken by the pertinent Authority, in that:**

- a) The Preferred Bidder does not pertain the necessary experience as specified in the tender document.**

- b) **The Preferred Bidder's offer had to provide proof that at least one key expert had to have the experience relating to interconnector insurance.**

**Having considered the Contracting Authority's verbal submissions during the hearing held on 17<sup>th</sup> December 2013, in that:**

- a) **In accordance with clause 7.1.a of the general conditions of the tender document, it was clearly specified that the tenderer can substantiate experience through the association of related entities. The preferred bidder was compliant in this regard.**
- b) **Clause 2.4 of the General Rules of the tender document permits the tenderer to rely on the experience of other related entity, as long as the latter gives an undertaking to the satisfaction of the Contracting Authority.**

**Reached the following conclusions:**

1. **From submissions made during the hearing it was proved that the Preferred Bidder had the necessary 'Back Up' experience that was mandatorily required in the tender conditions. It is a known fact that no local Insurance Broker could handle such a cover without the backing of a much bigger similar organisation which has the necessary specialised acumen in this type of brokerage.**
2. **The fact that the related party of the Preferred Bidder gave the necessary undertaking which was to the satisfaction of the Evaluation Board, is proof enough for the award of the tender, that the Preferred Bidder had the necessary experience and capability of fulfilling all the conditions laid out in the tender document.**
3. **The Preferred Bidder's offer, apart from being fully compliant, was the cheapest.**

**In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed.**

Dr. Anthony Cassar  
Chairman

Dr. Charles Cassar  
Member

Mr. Richard A. Matrenza  
Member

*22 January 2014*

