

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case No. 642**

**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 Marsh Island Consortium filed an objection against the decision to award the tender to Allcare Insurance Brokers Limited for the price of €37,500 including VAT, and asked that the bids of the two other bidders be disqualified.

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:**

### **Marsh Island Consortium - Appellant**

Mr Mark Spiteri	Representative
Dr Carmelo Cascun	Representative
Dr Pawlu Lia	Legal Representative
Dr Alessandro Lia	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
Ms Judith Schembri	Representative
Ing. Stephen Camilleri	Member Evaluation Board
Ms Janice Mercieca	Member Evaluation Board
Mr Joseph Elsadig	Member Evaluation Board

## Witnesses

Mr Joe Saliba  
Mr Claudio Scerri  
Mr Edmond Brincat

Employment and Training Corporation  
Mala Financial Services Authority  
GO Plc

The Chairman made a brief introduction and suggested that the case be heard together with the previous one on the list, the objection made by Mediterranean Insurance Brokers (Malta) Limited 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.

Dr Alessandro Lia on behalf of the appellant Marsh Island Consortium said that this tender had specific conditions and rules, and one has to abide by the rules. These rules were clear in that a subcontractor cannot be deemed to be a partner for the purposes of this tender. Allcare, the preferred bidder claimed that the Clause cited by appellant eliminates the word “tendering brokerage firm.” In the beginning of Clause 7.1 it is stated that “tenderers must provide evidence that they meet the minimum criteria. All the relevant clauses in the tender refer to the “tendering insurance brokers.” Clause 7.1.B ii (3) required that the bidders themselves had to have provided at least one similar brokerage service involving an interconnector and amounting to at least €70 million. Dr Lia contended that neither the preferred bidder, nor the other bidder, Mediterranean Insurance Brokers (Malta) Limited satisfied this condition. Dr Lia stressed that this clause specifically mentions that the “*brokerage firm must provide information regarding brokerage services of a similar nature.... and the brokerage firm (the lead brokerage firm in the case of a joint venture or consortium) must have provided brokerage services on at least....*”, and this means that it was the bidder itself or his lead partner in case of a joint venture who was obliged to give this proof. So much so that the same clause of the tender also requires bidders to give their consent for the evaluation committee to be able to contact the bidders end clients.

Dr Lia continued that in the original tender, which lapsed without being awarded, there was clause 6.1 which allowed reliance on other entities but when the tender was redrafted, certain dispositions were different. In a joint venture all parties forming it are bound jointly. The preferred bidder, Allcare did not satisfy this criterion and neither did MIB. He claimed that no firm of insurance brokers in Malta could satisfy the €70 million interconnection criterion. MIB did not provide a cover exceeding €70 million to satisfy this criterion.

Dr Alessandro Lia continued to address the appellant’s second grievance and stated that the tender document absolutely prohibited the payment of any commissions, direct or indirect, unless the contract fee, and nothing more, by any of the bidders. However, he continued when taking into consideration the price offered both by the preferred bidder as well as by MIB, and the expenses involved in such a tender, doubts are certainly raised if these prices were tenable. Again when looking at this, doubts are raised whether the execution of this contract could be endangered through these low quotes.

Dr Paul Cachia on behalf of the preferred bidder said that the broker assumed no risks. It was the insurance company that assumed all the risks. His client gave a low price because of efficiency, not like the appellants who asked an exaggerated price. He declared that no commissions on this contract are being paid by his client, Allcare, and the allegations made by appellant were not proven. He stressed on the legal aspect and said that no further restrictions could be imposed except those set forth by the tender document itself. He explained that JLT was not the firm taking risk and having to make good damages in case of

anything going wrong. JLT was just a brokerage firm who would find an appropriate insurer.

Dr Antoine Cremona for the contracting authority explained that the tender was for the provision of brokerage service and not for insurance cover. He also stated that with regards to the offer made by the Mediterranean Insurance Brokers, the subject of the cross appeal by the present appellant, the evaluation board relied on the documents submitted by the bidder itself in Form 4 experience as contractor submitted with the tender. Dr Lia claimed here that MIB did not have the necessary experience while the contracting authority relied on the documents submitted. He was not the person to state whether the document represented the truth or not. The contracting authority had no doubts during adjudication of the veracity of the submission by MIB.

Dr Michael Sciriha on behalf of MIB said that that was he would be bringing forward the testimony of members of the company. He wanted to produce as witness a representative of GO Plc. He wanted to prove that his client had experience both locally as well as overseas.

Dr Franco Galea for MIB stated that although the tender allowed for the possibility of subcontracting, however the bidder himself had to have the necessary experience. He could not agree with what Dr Lia claimed regarding commissions.

Mr Edmond Brincat, the Financial Administrator at GO Plc under oath stated that the two submarine cables laid by his firm between Malta and Sicily, did not cost €70 million, the value of the cables themselves is of a commercial nature and cannot be divulged. The value of the cables themselves does not cost €70 million, however for insurance purposes, the cover for these two cables against all indemnities, then the value of that tender exceeded €70 million. The type of cover for insurance purposes exceeded this amount. Replying to questions by Dr Michael Sciriha witness stated that the cover included a package for the risks involved in the cable. The amount cover exceeded the amount.

Mr Claudio Scerri, representative of the MFSA, under oath said that he was producing a list that shows all the authorized licensed insurance brokers who can operate in Malta according to the Act. He said that there is another list that shows which brokerage firms based overseas can work in Malta, is on line on the MFSA internet website. He did not bring this list with him.

Mr Joe Cutajar, a director at Mediterranean Insurance Brokers, under oath said that his firm, the MIB was established in 1976. At that time AON was a shareholder holding 24% of the company. Over the years this shareholding has increased to 51% and today the shareholding is 100%. Which means that AON it is the owner of MIB. The AON chairman is still a director of MIB and therefore it may be said that MIB and every employee of MIB is in fact employed by AON. In this tender MIB submitted its joint experience with AON's because they belong to the same community. However MIB is still the same company that it was in 1976. The government projects worked during the term between that year and ten years later were done by MIB. Answering Dr Michael Sciriha, Mr Cutajar continued that when his company covered the GO Plc cables it covered them for 4 types of liabilities: material damage, business interruptions, increase of cost of working, and public liability. The cable for the present tender is the most expensive type of cable, required the same 4 types of cover but the cost of the present cables is much higher. The cover for the GO contract was for €72.5 million. Replying to questions by Dr Antoine Cremona, witness continued that the present bidder was in fact MIB. When asked by Dr Cremona if he confirmed that Mediterranean

Insurance Brokers (Malta) Limited had during the past five years provided brokerage for all the projects listed in Form 4, witness said no.

The Chairman asked witness if in fact the MIB had provided the brokerage projects his company listed in Form 4.

Mr Joe Cutajar replied that MIB had worked the GO contract; the others were done by AON of which MIB was the wholly owned subsidiary company.

Dr Antoine Cremona stated that Dr Alessandro Lia had stated that a subcontractor can never be deemed to be a partner. He stressed that he wholly agreed with this.

Dr Michael Sciriha on behalf of MIB said like with like, his client provided brokerage service over €70 million. Brokerage services imply the whole project and not just the cost of cable. He referred to subsection 3 of the selection criteria which clearly states “must have provided brokerage services on at least one interconnector of at least €70 million contract value.” Thus the €70 million has to cover all the aspects of the contract and not just the cost of the cable. He emphasized this.

Dr Alessandro Lia on behalf of appellant said that Allcare relied on another entity for experience when it could not, and MIB relied on another entity and that the only tender it performed cost less than €70 million and therefore appellant Marsh Island Consortium was the only bidder that satisfied the tender conditions in full.

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 7<sup>th</sup> 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 Appellant insisted that the Evaluation Board had to abide by the fact that the Mandatory experience clause stipulated in the tender document had to be strictly adhered to. In this regard, the Preferred Bidder did not satisfy such a requirement.**
- b) The Appellant contends that the tender document prohibited the payment of commissions by any bidder. The Preferred Bidder’s price raises doubts whether this condition is adhered to by the Preferred Bidder.**

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

- a) The Tender was issued for Insurance Brokerage services and not for the Insurance of the actual interconnector cable.**

- b) **The Preferred Bidder's offer was fully compliant and satisfied the purpose in all respects for which the tender was issued.**

**Reached the following conclusions:**

- 1. A differentiation has to be made between Insurance Brokerage and Insurance Cover. This tender requested Brokerage Services and in this regard the Insurance Brokerage Company is contractually responsible to the Contracting Authority however the ultimate safeguarding factor is the Insurance Company.**
- 2. The fact that the Preferred Bidder quoted a cheaper rate for the Brokerage services does not, in any way, undermine the Insurance Service to be provided for the coverage of the product.**

**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

*27 January 2014*