

PUBLIC CONTRACTS REVIEW BOARD

Case 1206 – TM 003/2018 – Tender for the Design, Mapping and Compilation of an Implementation of a National Safe Cycling Route Network as part of ERDF.07.0091 SMITHS

The publication date of the call for tenders was the 10th February 2018 whilst the closing date of the call for tenders was the 2nd March 2018. The estimated value of the tender (exclusive of VAT) was € 127,118

On the 2nd August 2018, Crowd Net Ltd filed an appeal against Transport Malta as Contracting Authority against their exclusion on the grounds that their bid had not been accepted due to a potential conflict of interest and that the tender had been subsequently cancelled. A deposit of € 635.59 was paid.

There were three (3) bidders

On 4th September 2018 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Richard A Matrenza as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellant – Crowd Net Ltd

Dr Stefan Zrinzo Azzopardi	Legal Representative
Arch. William Lewis	Representative
Arch. Odette Lewis	Representative

Contracting Authority – Transport Malta

Dr Chris Cilia	Legal Representative
Mr Joseph Cutajar	Chairperson Evaluation Board
Eng. Ronald Attard Pullicino	Member Evaluation Board
Mr Dale Hamilton	Member Evaluation Board
Ms Liz Markham	Representative
Mr Ray Stafrace	Representative

Dr Anthony Cassar, Chairman of the Public Contracts Review Board, welcomed the parties and asked them to make their submissions.

Dr Stefan Zrinzo Azzopardi, Legal Representative of Crowd Net Ltd stated that this tender was about the actual design, mapping and compilation of routes for a cycling network. There were two aspects to this appeal – the tenderer was not only excluded but the tender was cancelled. Transport Malta’s reason for cancellation of the tender due to the alleged conflict of interest was not covered in the tender documents conditions – hence the cause for the contestation of the cancellation. The conflict of interest aspect has wide parameters in both local and European laws and there would be serious repercussions if its narrow interpretation here in the sphere of work done by consultants was to be accepted. We are here dealing with a tender by a Company in which Architect Odette Lewis is a shareholder and Director, and the reason for the potential conflict of interest has been raised due to the fact that she worked for Transport Malta up to 2012. Her previous work on contracts such as the Mriehel/Rabat Road and the Marsa Project is not in any way connected to this tender.

The bone of contention is that Architect Lewis did not have any knowledge of matters covered in this tender that was not available to any other contractor, so she had no advantage over anybody else. The strategy and the design guidelines were prepared by and known only to others. Furthermore, in reply to a clarification sought by a third party bidder, the Contracting Authority stated that working on other Transport Malta contracts was not grounds for exclusion. (A copy of this clarification note was tabled by Dr Zrinzo Azzopardi).

Dr Chris Cilia, Legal Representative of Transport Malta stated that the reason for cancellation of the tender was that there were problems with all three bids – after the exclusion of Crowd Net Ltd only two bids were left, both of which were financially non-compliant as their bids were above the financial allocation for this contract, therefore there were no bids on the table and hence the cancellation followed. According to Article 18.3 of the Public Procurement Regulations, under conditions for cancellation, the words used are ‘may occur’ – therefore they are not legally binding, and it would not make sense to claim that tender may not be cancelled if none of the bidders are compliant. With regard to the conflict of interest, the Contracting Authority does not agree that there is a difference between Crowd Net Ltd and Architect Lewis, due to the simple fact that it is not difficult to equate the perception that a tenderer who was a consultant engaged by Transport Malta has a conflict of interest. Dr Cilia quoted a case heard by the Court of Appeal in 2013, M.T.R. Contracting Ltd vs Director of Contracts & Heritage Malta, where the matter of a perceived conflict of interest was addressed. He also referred to invoices submitted to the Department by Architect Lewis for consultancy services on the cycling policy and which show that she was intrinsically connected with this project. She also worked closely with Mr Peter Paul Barbara the ‘factotum’ on the cycling network policy. Referring to the clarification note tabled by Dr Zrinzo Azzopardi, Dr Cilia said that this refers to Smiths Global Project which is a vast project and covers areas others than cycling including work on marinas etc.

Mr Peter Paul Barbara (94867M) testified on oath that he is the Director of the Sustainable Mobility Unit at Transport Malta and he was managing this tender. The aim of the tender was to

appoint a consultant to study the possibility of, and identify, safe cycle routes in urban roads running parallel with arterial roads and which can be upgraded to form a network in Malta and Gozo on a 'shared concept basis'. There were several calls offering consultants a wide range of works from upgrading marinas to ferry services among others. This originated from a study by an Italian firm with assistance from Maltese consultants working on the implementation of Smiths Global Plan. The preparation of the policy and the strategy was done with the assistance of another architect and later with Architect Lewis – however there was no connection between the strategy study and the present tender. The material in the Italian study was not sufficient to enable a tender to be issued and new information had to be sought for cycle routes. In reply to a question by Dr Zrinzo Azzopardi, witness stated that this was a 'stand-alone tender' to identify and actuate road networks.

Questioned by Dr Cilia, witness stated that Dr Lewis helped in the review of the first draft of the Government cycling policy - this was not related to the tender. He also stated that he does not recall if Architect Lewis had any other contacts with other personnel at Transport Malta. The invoices to which Dr Cilia made reference covered payment for preliminary work done regarding the cycling shared space which was fundamental to the cycle policy.

Further questioned by Dr Zrinzo Azzopardi, witness said that the pilot project for safe cycle routes was started by him working with the Italian firm. He did not see how this pilot project could influence the tender requirements. The standards and the technical specifications of the tender were not in the public domain as they were still incomplete – in any case the tender does not refer to standards.

Mr Joseph Cutajar (420859M) stated that he was the Chairperson of the Evaluation Committee. As advised by the Director of Contracts the tender could not be awarded as the preferred bids were over the financial threshold. The Director did not comment on the conflict of interest aspect as at that stage of the evaluation, Crowd Net Ltd had already been eliminated.

Dr Zrinzo Azzopardi said that Mr Barbara's testimony explained the process but one had to look at the fundamental aim of the tender (which was the identification of routes), and whether Architect Lewis's participation in that earlier process had any influence on the policy which was still incomplete. This was a stand-alone tender, independent of other work done by Transport Malta. This, and the fact that the policy does not yet exist, was confirmed by the witness. He referred to the Public Procurement Regulations and decisions by the European Court regarding the need for openness and equality of opportunity in the award of tenders.

Dr Cilia said that one should not try to oversimplify matters. The Court of Appeal had urged the avoidance of bias in adjudications. Dr Lewis as a contracted consultant had worked closely with the unit drafting the tender and worked with the individuals involved in the process. She had worked with the unit on cycling policy which related to the cycling network and which did not make the tender a stand-alone, as policy and network were related. The Evaluation Committee were following the law in excluding Crowd Net.

The Chairman thanked both parties for their submissions and declared the hearing closed.

This Board,

having noted this Objection filed by Crowd Net Limited, (hereinafter referred to as the Appellants) on 2 August 2018, refers to the contentions made by the same Appellants with regards to the cancellation of Tender of Reference TM 003/2018 issued by Transport Malta and listed as Case No 1206 in the records of the Public Contracts Review Board.

Appearing for the Appellants: Dr Stefan Zrinzo Azzopardi

Appearing for the Contracting Authority: Dr Chris Cilia

Whereby:

- a) the Appellants maintain that the reason given by the Contracting Authority, for the rejection of their offer in that, Transport Malta deemed that the latter involved an element of a “*conflict of interest.*” In this regard, Crowd Net Limited maintain that Architect Lewis was not involved in the tendered project during her consultancy to the Authority and insist that the Architect’s previous services to the latter did not, in any way, relate to this particular project;**

b) the Appellants contend that in view of Transport Malta’s incorrect decision on their offer, the Tender should not have been cancelled.

This Board has also considered the Contracting Authority’s “*Letter of Reply*” dated 18 August 2018 and its verbal submissions during the Public Hearing held on 4 September 2018, in that:

a) Transport Malta insists that Architect Lewis, who was engaged as a Consultant with Transport Malta, indeed had a conflict of interest in this particular Tender, as the same Architect was providing consultancy services on the policy and strategy with regards to the provision of cycle lanes in Malta, which services are directly linked to this particular Tender;

b) The Contracting Authority maintains that since there were no compliant offers, they had no other option but to cancel the Tender.

This same Board took into consideration the testimony of the following witnesses:

- 1. Mr Peter Paul Barbara – duly summoned by Crowd Net Limited**
- 2. Mr Joseph Cutajar – duly summoned by the Public Contracts Review Board**

This Board, after having examined the relevant documentation to this Appeal and heard submissions made by the parties concerned, including the testimony of the witnesses duly summoned, opines that the issue to be considered by this Board is the alleged “*conflict of interest*”.

In regulation 2 of SL 174.04, the term “*conflict of interest*”, is defined as “*any situation where any person, including staff members of the contracting authority or of a procurement service provider acting on behalf of the contracting authority, who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.*”

The above mentioned regulation deserves further examination and interpretation as it covers a wide spectrum of the definition of a “*conflict of interest*”, in that, three important elements emerge which determine the presence of a “*conflict of interest*” and in this Board’s opinion these are:

- a) involvement in the procurement process;**
- b) direct or indirect personal interest;**
- c) other interests which gives an added advantage to the particular bidder.**

1. Involvement in the Procurement Procedure

Such a scenario is the most indicative factor of the existence of a conflict of interest, however, again, one must define and establish what constitutes “*involvement*” and in this respect, this Board would list the glaring features which may render a particular tender as having an element of a conflict of interest, as follows:

- Drafting of the tender document;**
- Advisory Services on parts or all of the technical specifications of a tender document;**
- Prior knowledge of what the Contracting Authority is expecting and such knowledge is not made available to all prospective bidders;**
- Having access to documentation relating to the tender itself or in possession of documentation which will give the particular bidder an advantage over the other participating bidders;**
- Involvement in a tender which is related or connected to the present tendered works.**

In this particular case, this Board, through the vivid explanation given by the witness namely, Mr Peter Paul Barbara, was made aware that this tender originated through a study prepared by an Italian Firm, relating to the implementation of Smiths Global Plan which consisted of a national policy and strategy of various works and services connected with the transport systems of Malta. Included in this study was the policy for providing cycle lanes and at this stage of consideration, this Board notes the testimony of Mr Barbara with regards to Architect Lewis' involvement in the latter project, that is the policy of cycle lanes, as follows:

“Avukat: Pero’ dan huwa proċess distint u separat minn dan it-tender li qed nitkellmu dwaru.

Xhud: Iva, pero’ imbagħad ovvjament fil-project design u project implementation bhala proġett intern kien hemm ukoll il-way forward kif għandu jkun dan l-istrategy li qed nitkellmu fuqu biex jinsab network addizzjonali nazzjonali. Issa apparti dan, kien hemm hsieb li jsir tfassil ta’policy għaċ-ċiklizmu. Kien thejja l-ewwel draft minn perit iehor li jahdem mal-awtorita. Inghata lili dan id-dokument to review it.

Avukat: Kont qed tispjegalna fuq l-istrategija. Min kien qed jahdem fuqha?

Xhud: Bhalta strategija kien hemm perit iehor li ghamel l-ewwel draft tas-cycling policy. Ic-Chairman ghaddieh lili for review u kelli nerga' nibda x-xoghol mill-gdid. Gab ghajnuna ic-Chairman ghax fil-unit tieghi ma kellix nies bizzejjed u qalli biex nahdem mal-perit Lewis biex tghini fit-tfassil tal-policy.

Avukat: Tal-policy jew tal-istrategy?

Xhud: Policy u strategy.

Avukat: Din l-istrategija giet ippubblikata?

Xhud: Ghadha le. Bhalissa qeghda ghall-public consultation”

From the above testimony, it is evident that Architect Lewis was knowledgeable of the policy and strategy for the provision of cycle lanes and, in fact, it has been established that the said architect was also assisting Mr Barbara in the preparation of this policy. In this regard, this Board was made aware that such a policy report has not yet been published so that Architect Lewis was knowledgeable about such a particular policy on cycle lanes which other bidders could not be aware of, as this report was not published and not referred to in the tender document.

This Board also considered Appellants’ insistence that the tendered project should be considered as a “*stand-alone*” tender since the parameters and objectives of this tender relate to a different process of procurement. From the testimony of Mr Barbara, this Board is not justifiably convinced that this particular tender has no connection or relation to the policy and strategy of the cycle lanes in which Architect Lewis was involved and which has not yet been published for all to be aware of and in this regard, this Board opines that there existed an involvement of Architect Lewis in this procurement.

2. Direct or Indirect Personal Interest

With regards to this particular indication, this Board would point out that actual conflict of interest exists also when, given one’s personal or private interests, the Bidder is in a position to be influenced through works or services performed and which are related, directly or indirectly, to the tender for which he has submitted an offer.

In this particular case, the Appellants, through the major shareholder and director of the company namely, Crowd Net Limited, submitted an offer for services based on a report which was compiled and known only to the

major shareholder of the bidder with regards to contents and these were not available to other competing bidders. Apart from the fact that, such a scenario creates an unlevel playing field, the Appellants applied the knowledge of such information to their personal benefit in their submissions.

In this regard, this Board is not really concerned about the fact that Architect Lewis was providing consultancy services to the Authority but rather perturbed by the participation of the same Architect Lewis in the compilation of the policy and strategy, in the form of a report directly related to this tender, so that, as explained in the foregoing paragraphs, a conflict of interest had definitely evolved and in this respect, this Board opines that there was a direct personal interest through the submission of the Appellants' offer.

3. Other interests giving advantage to the Appellants

With regards to this particular issue, this Board takes into consideration the basic fact that Architect Lewis was providing consultancy services to the Authority so that it is a practical and natural incidence that the said

Architect was aware of Transport Malta’s intentions when issuing this particular tender, apart from the established fact that Architect Lewis was involved in the formulation of policy and strategy for “*safe cycling route network*.”.

This Board has also noted the Contracting Authority’s reply to Crowd Net Limited’s clarification request, whereby Architect Lewis enquired whether working on other contracts that concerned the Smiths project can be one of the exclusion grounds. In this respect, this Board opines that such a reply from Transport Malta should have been amplified more in that, the fact that Architect Lewis was also involved in assisting in the preparation of a report related to the tender and which is only known to the Contracting Authority and Architect Lewis, should have also been pointed out and indicated that such a situation creates a conflict of interest.

- 4. With regards to Crowd Net Limited’s Second Contention, this Board acknowledges and justifiably establish the fact that, since there were three offers for this Tender, two of which exceeded substantially the estimated threshold and the Appellants’ offer was not compliant, Transport Malta, quite appropriately, had no other option but to cancel the Tender.**

In view of the above, this Board:

- i) does not uphold Crowd Net Limited's contentions and confirm that an element of a conflict of interest evolved in their offer;**
- ii) upholds Transport Malta's decision in the cancellation of the Tender;**
- iii) in view of the fact that the Tender is to be cancelled, this Board recommends that the deposit paid by the Appellants should be fully refunded.**

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Richard A Matrenza
Member

27th September 2018