

PUBLIC CONTRACTS REVIEW BOARD

Case 1304 – MESDC 342/2018 – Tender for the Provision of Service to Maintain Current Database, GIS and Game Reporting System to WBRU, to Implement Enhancements and to Develop New Modules and Software with the said System

The publication date of the call for tenders was the 31st October 2018 whilst the closing date of the call for tenders was 3rd December 2018. The estimated value of the tender (exclusive of VAT) was € 200,000.

On the 8th April 2019, Seasus Ltd filed an appeal against the Ministry for the Environment, Sustainable Development and Climate Change (Wild Bird Regulation Unit) as the Contracting Authority objecting that their bid was rejected as it was considered to be technically non-compliant. A deposit of € 1,000 was paid.

There were five (5) bidders.

On 30th April 2019 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – Seasus Ltd

Dr Damien Degiorgio	Legal Representative
Mr Kenneth Bone	Representative

Recommended Bidder – IPRO Solutions Ltd

Dr Graziella Bezzina	Legal Representative
Mr Philip Pullicino	Representative
Mr Djordje Vukelic	Representative

Contracting Authority – Ministry for Environment, Sustainable Development and Climate Change

Mr Richard Lia	Representative
Ms Elaine Caruana	Chairperson Evaluation Committee
Mr Nicholas Farrugia	Member Evaluation Committee
Ms Jessica Fenech	Member Evaluation Committee
Mr Luke Cassar	Member Evaluation Committee

Dr Anthony Cassar, Chairman of the Public Contracts Review Board, welcomed the parties and invited submissions.

Dr Damien Degiorgio Legal Representative of Seasus Ltd (Seasus) said that Appellants were originally selected as the winning bidders but after an appeal by a third party the evaluation committee were ordered by the Public Contracts Review Board (PCRB) to change the dates for the implementation of the project. Appellants were expected to start operating straight away on somebody else's system with which they were not familiar with a start date of 9th January 2019 when the tender was not awarded till the 26th December 2018. These tight dates did not give them the chance to start operating immediately. It is neither logical nor reasonable to expect tenderers to operate within such short time scales.

Mr Kenneth Bone Representative of Seasus Ltd gave a resume of events leading to the award of the tender. The vital dates were that the closing date of the tender was the 3rd December 2018 and the system had to be operative on the 9th January 2019. In the case of IPRO who were the incumbents all they had to do was to maintain the 'status quo'. On the 26th December 2018 Appellants were advised that they had been awarded the tender, and IPRO filed an objection following which on the 9th January 2019 the Contracting Authority notified the former that their Gantt Chart overrun the starting date – this statement is incorrect. Following an appeal the PCRB ordered that the bids be re-evaluated. On the 29th March 2019 Seasus Ltd were notified that they were disqualified as they could not start operating on the 9th January 2019. The Contracting Authority was not allowing enough time for submissions and for handing over of the system from the incumbent – the latter was the only bidder who could meet these restrictive dates. Appellants' bid was € 50,000 cheaper than the next compliant bid.

Mr Richard Lia Representative of the Ministry for the Environment, Sustainable Development and Climate Change stated there was an issue in Appellants' submission in that stage 1 (the so called 'going live' stage) in the Gantt Chart had to be initiated in month 1 but was in fact shown in month 2. This did not meet the specifications as a seamless transmission from the previous operator was required. The date of 9th January was specific and had been set when no delays in the evaluation of the tender were anticipated.

The Chairman pointed out that maintaining the 9th January date did not make sense once delays occurred. The role of the Board was to decide on the validity of the tender process not on deciding who should be awarded the tender.

Dr Graziella Bezzina Legal Representative of IPSO Solutions Ltd (IPSO) said that the evaluation committee had decided in the first Case that Seasus 'go live' system was only going to operate in month 2 and was therefore technically non-complaint. It was immaterial when the contract was signed as this time lag existed then and exists now.

Ms Elaine Caruana (573290M) called as a witness by the Board testified on oath that she was the Chairperson of the Evaluation Committee which had originally recommended that Seasus was awarded the contract. It was only after IPSO appealed that it was realised that the 'go live' part of the system was in the second month which did not meet their requirement for a seamless handover. It was recommended therefore, that IPSO's offer, being the next best offer, be awarded the contract.

Mr Kenneth Bone (267375M) called as a witness by Appellants testified on oath tht he was the Managing Director of Seasus Ltd and that his firm had worked out that from the time of submission to the time of 'going live' would have been right to enable a smooth handover from the old contractor. The Gantt Chart covers 40 weeks, so it was condensed into months as otherwise it would have been too extensive to produce.

At this stage Mr Lia intervened to point out that the contract had expired on the 8th January 2019 and there was no service operating now, so it was nebulous to talk now about follow-up dates from the original contract.

The Chairman agreed that there was no point in talking about carrying on the service when there was no service.

Dr Bezzina mentioned that at clarification stage there was no indication given by Seasus on how they planned to take over the service and on other details on how it was going to be handled.

Dr Degiorgio commented that Appellants were offering the same service at a cheaper price.

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

This Board,

having noted this objection filed by Seasus Limited (herein after referred to as the Appellants) on 8 April 2019, refers to the claims made by same Appellants with regard to the tender of reference MESDC 342/2018 listed as case no 1304 in the records of the Public Contracts Review Board, awarded by the Ministry

for Environment, Sustainable Development and Climate Change (herein after referred to as the Contracting Authority).

Appearing for the Appellants: Dr Damien Degiorgio

Appearing for the Contracting Authority: Mr Richard Lia

Whereby, the Appellants contended that:

- a) Appellants' main concern refers to the fact that, the tender was awarded on 26 December 2018 and they, being the successful tenderers, were expected to commence operations 'On Line', with effect from 9 January 2019. In this regard, Appellants maintain that, the time scale period was too short to start operating on somebody else's system. After an appeal by the incumbent operator, Appellants were informed, on the 29 March 2019 that their offer was non-compliant due to the fact that Appellants could not 'Go live' as soon as the tender is awarded.**

This Board also noted the Contracting Authority's 'Letter of Reply' dated 10 April 2019 and its verbal submissions during the hearing held on 30 April 2019, in that:

a) the Authority insists that, the date of 9 January 2019, was mandatory for the commencement of the execution of the tendered service and on reviewing Appellants' Gantt Chart, it was noted that Appellants intended to 'Go Live' in month two (2) and not month one (1), as stipulated in the tender dossier.

This same Board also noted the testimony of the witnesses namely;

Mr Kenneth Bone – duly summoned by Seasus Limited

Ms Elaine Caruana – duly summoned by 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 that merits consideration is the start-up date of 'Go Live' system.

- 1. First and foremost, this Board takes into consideration the sequence of events up to the award of the tender. Through an e-mail dated 26 December 2018, Appellants were informed that their offer was recommended for award. The incumbent service provider filed an appeal**

after which, this Board instructed the Contracting Authority to re-evaluate all the submitted offers.

2. On the 29 March 2019, the Contracting Authority informed Appellants that upon reviewing the Gantt Chart submitted by same, Appellants failed to indicate commencement of the ‘Go Live’ system in month one (1), as stipulated in the tender dossier, so that their offer was not compliant.

3. This Board would respectfully refer to clause 5.2 of section 4, of the tender document which stipulates the following:

“5.2 – Commencement Date & Period of Execution

On 9th January 2019 the system as-is is to be continued from its current state. Enhancements and development of modules as specified in this tender document are to be executed within the first forty (40) weeks of commencement of contract. Hosting, support and maintenance are to provided between 9th January 2019 until 8th January 2024.”

The above clause clearly stipulated the commencement of the tender services and it also denotes that development of modules are to be

executed within the first forty (40) weeks of the commencement of the contract.

4. The objective of this tender was to ensure that the service will be operative on a ‘Go Live’ system on the 9 January 2019. It is being acknowledged that, the responsibility and obligation lies with the successful bidder to abide by the urgent requirements, however, this Board takes also into consideration the events which affected the requirements of the commencement date of the 9 January 2019, as follows:

- i. The fact that there was an appeal before this Board, after which there had to be a re-evaluation process, by far, went beyond the required date. So much so that, Appellants were notified of the rejection of their offer on the 29 March 2019.**
- ii. Through submissions made, this Board was made aware that, at present (date of hearing) such a service is not in operation, as the previous tender expired, so that the commencement date of 9 January 2019 is no longer relevant and can never be achievable by any of the Bidders.**

5. This Board would respectfully point out that one of the basic essentials of the technical specifications of a tender is that, such specifications must be achieved by the prospective Bidder and in this regard, this Board opines that, as at today, such requirements are impossible to be provided, as the 9 January has long passed.

6. With regard to the fact that Appellants failed to offer a start-up date in month one (1), this Board would respectfully point out that considerations must be taken in that, the new service provider requires a prudent time scale to take over and operate an already established system, previously installed by the then incumbent economic operator. At the same instance, this Board opines that the way in which events evolved renders the commencement date of 9 January 2019, ineffective and impossible to be achieved.

In conclusion, this Board opines that:

- a) **Since the tender was recommended for award on the 26 December 2018, the start-up date of 9 January 2019, was not reasonable and could not be achieved by any new tenderer, except by the incumbent operator.**

- b) **The sequence of events that occurred between the publication of the tender and the recommendation for award, did not allow Appellants to commence operation on the 9 January 2019, through the ‘Go Live’ system.**

- c) **The technical specifications and requirements, as so stipulated, gave an advantage to the incumbent Bidder and the Authority should ensure that dictated time scales for commencement of operations, on a ‘Go Live’ system, should be reasonable and easily achievable by any prospective Bidder.**

In view of the above, this Board,

- i. **does not uphold the contracting Authority’s decision in the award of the tender,**

- ii. upholds Appellants' contentions,**

- iii. Directs that the tender be cancelled and a new one issued, taking into consideration this Board's findings and ensure that stipulated time scales for the commencement of operations, are drawn up in such a manner which are achievable and does not, in any way, give advantages to the incumbent operator,**

- iv. directs that the deposit paid by Appellants should be fully refunded.**

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

16 May 2019