

PUBLIC CONTRACTS REVIEW BOARD

Case 1395 – IMA – 2019/008 – Tender for Modification Works at Identity Malta Agency Office in Marsa

The publication date of the tender was the 23rd July 2019 whilst the closing date was the 30th August 2019. The estimated value of the tender (exclusive of VAT) was € 139,920.

On the 3rd October 2019 iProjects Ltd filed an appeal against Identity Malta as the Contracting Authority on the grounds that they had been disqualified on the basis of a conflict of interest. A deposit of € 699.60 was paid.

There were two (2) bidders.

On 3rd December 2019 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Richard Matrenza as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – iProjects Ltd

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| Dr Ryan Pace | Legal Representative |
| Mr Tonio Grixti | Representative |
| Mr Mario Grixti | Representative |

Contracting Authority – Identity Malta

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| Dr Neil Harrison | Legal Representative |
| Mr Martin Bowerman | Chairperson Evaluation Committee |
| Ms Chantelle Tanti | Secretary Evaluation Committee |
| Mr Wilfred Saliba | Member Evaluation Committee |
| Mr Brian Portelli | Member Evaluation Committee |
| Mr Pablo Cachia Belli | Member Evaluation Committee |
| Mr Edwin Ebeyer | Representative |

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

Dr Ryan Pace Legal Representative for iProjects Ltd said that Appellants had been disqualified on the basis of an alleged conflict of interest. In reaching this incorrect decision the evaluation

committee had ignored certain pertinent facts none of which were countermanded when raised in the appeal letter.

Dr Neil Harrison Legal Representative for Identity Malta said that the evaluation committee in adjudicating a tender had to consider all aspects. The Health & Safety (H&S) Report submitted by Appellants was prepared by the H & S officer of Transport Malta and post adjudication that same officer would be looking after the H & S aspect of the project – there was thus a further conflict.

Mr Mario Grixti (204864M) called as a witness by Appellants testified on oath that he was a director of iProjects Ltd, a company dealing mainly in the refurbishment of offices. One of the requisites of the tender was the submission of an H & S report. A report requested from JK Consultancy for another tender, about eight months previously, was also used for this tender. This report was not specific to this particular tender but consisted of all facets of a refurbishment project, and at no time had they contacted JK Consultancy in regard to the tender in this case – they merely used the report.

In reply to questions witness confirmed that the contracting authority had not queried or sought any clarification on this report, and that JK Consultancy were not even aware that the report had been used. The Report was generic in nature and not all of the points in it applied to this tender, and witness had not attended any site meetings on this project.

Mr Kevin Borg (192679M) called as a witness by Appellants testified on oath that he was self employed and traded under the name of JK Consultancy and JK Security. He stated that up to around a month ago he had worked for Identity Malta for seventeen months as contracts safety manager. His work was to prepare standard risk assessments and had never been involved in any tender process.

He confirmed that the report referred to in the tender documents was a generic report prepared for his clients to enable them to comply with H & S regulations. He was not involved in this tender – in fact he was not even aware of its existence until around September when he was contacted by Appellants about this report and which he had prepared about nine months previously.

In reply to a question from Dr Harrison witness replied that during his employment with Identity Malta from which he resigned in October 2019 he had never been consulted on any tender.

Mr Martin Bowerman (399462M) called as witness by the Public Contracts Review Board testified on oath that he was the Chairperson of the evaluation committee. He explained that the committee had examined all the documents submitted by Appellants and they had come across the name of Mr Kevin Borg. They decided at that stage that the bidder might have information not available to other bidders, which might give him an unfair advantage. The report was not dated and therefore there was no way of knowing when it had been produced. Mr Borg was the only H & S officer at Identity Malta and would have been the H & S officer on this project had he not left his employment.

In reply to question from Dr Pace witness stated that the evaluation committee had not read the report prepared by Mr Borg – as soon as his name cropped up the evaluation stopped and the committee did not go into any further details. The committee had not spoken to Mr Borg nor sought any clarification. He finally confirmed that, unlike in some other Identity Malta tenders, this particular one did not place any restrictions on personnel to be used in the tender submissions.

In reply to a question from Dr Harrison witness confirmed that Mr Borg had not been consulted on this tender.

Dr Pace said that Identity Malta as contracting authority had disqualified his clients on an alleged conflict of interest when from the resulting facts there was no conflict at all. The Appellants' bid despite being the most advantageous had been discarded on assumption that the report by Mr Kevin Borg would cause problems. This decision was even more perverse since the H & S officer nominated to handle this project was Mr Joseph Gili and it would be the latter who would deal with any problems. The report on which the disqualification was based was a generic one prepared for another project. For a conflict of interest to arise it has to be established that one party was given an advantage. Mr Borg was not involved in this tender and his client had therefore been disqualified without having been given any advantage. He referred to Case 1164 where the Court of Appeal upheld the principle of advantage in deciding if a conflict of interest existed.

The evaluation committee had not spoken to Mr Borg, nor had they sought clarification and the latter was not even aware that his report was being used by Appellants. This allegation of conflict of interest could have serious consequences for Appellants as it might affect their standing in the commercial community.

Dr Harrison said that there was no intent by the evaluation committee to black list Appellants. Identity Malta had to take action on an apparent case of conflict of interest as Mr Borg was employed full time by them even though he was not involved in the tender process or in adjudication – the interest of the Government of Malta also had to be safeguarded and one also had to consider the perception aspect.

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

End of Minutes

Decision

This Board,

Having noted this objection filed by iProjects Ltd (herein after referred to as the Appellants) on 3 October 2019, refers to the claims made by the same

Appellants with regard to the tender of reference IMA-2019/008 listed as case No. 1395 in the records of the Public Contracts Review Board, awarded by Identity Malta (herein after referred to as the Contracting Authority).

Appearing for the Appellants: Dr Ryan Pace

Appearing for the Contracting Authority: Dr Neil Harrison

Whereby, the Appellants contend that:

- a) Their offer was disqualified due to the alleged reason that there existed a conflict of interest in Appellants offer. In this regard, Appellants maintain that such alleged claim referred to the endorsement of the Health & Safety report by an employee of the Contracting Authority, which report was not formulated for this particular tender and contained generic Health & Safety issues which rendered no particular advantage to Appellants' offer.**

This Board also noted the Contracting Authority's 'Letter of Reply' dated 9 October 2019 and its verbal submissions during the hearing held on 3 December 2019, in that:

a) The Authority insists that the Health & Safety report was prepared by an employee of the Authority who will eventually be in charge of the Health & Safety aspect of the tendered works, so that the Authority deemed that there was a conflict of interest.

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

Mr Mario Grixti, duly summoned by iProjects Ltd

Mr Kevin Borg, duly summoned by iProjects Ltd

Mr Martin Bowerman 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 that merits consideration is the alleged existence of a conflict of interest in Appellants' submissions.

- 1. This Board would respectfully refer to what constitutes a conflict of interest in that, an eventuality exists where a person or entity has a duty/loyalty towards more than one person or organisation and cannot do justice to the actual or potentially adverse interests of both parties. In other words, a conflict of interest is created when an individual or entity**

has competing interests or loyalties. It must also be mentioned that, through such a conflict, an advantage is given to a particular party.

- 2. In this particular case, this Board noted that Appellants' offer was deemed, by the Evaluation Committee, to be administratively non-compliant due to the fact that the 'Health & Safety Report' submitted by Appellants, prepared by JK Consultancy Ltd, was endorsed by one of its Directors namely, Mr Kevin Borg who was an employee of Identity Malta (the Contracting Authority), at the time of the submission of offers.**

- 3. From the testimony of Mr Mario Grixti, a Director of the Appellant Company, this Board was informed that such a report was compiled about eight months ago and not for the purpose of this tender. Furthermore, the witness confirmed that this was a generic report dealing with Health & Safety issues which is normally compiled for prospective bidders for other tenders. At the same instance, the witness maintained that JK Consultancy Ltd were not even aware that such a report was included in Appellants' submissions for this particular tender.**

4. This Board also noted the testimony of Mr Kevin Borg, the signatory to the Health & Safety report, who attested the fact that, he traded under the name of JK Consultancy Ltd and the report consisted of standard risk assessment in Health & Safety. Same witness also confirmed that he was never involved in any tender process and the report was prepared about eight months ago. In this regard, this Board, after having examined closely the Health & Safety report submitted by Appellants, opines that such a report is of a generic nature relating to Health & Safety at the place of work and is not specifically limited to the nature of the tendered works.

5. From the testimony of Mr Martin Bowerman, Chairman of the Evaluation Committee, this Board was made aware that the said Committee did not delve into the details of the report submitted by Appellants but, aborted the continuation of the evaluation process on Appellant's offer, as soon as the name of Mr Kevin Borg was identified as the signatory of such report.

6. This Board noted in particular the testimony of Mr Bowerman where he stated that, the Evaluation Committee assumed that Mr Kevin Borg

might have information which might give advantage to Appellants. In this regard, this Board opines that decisions should not be taken on assumptions and if the Evaluation Committee had doubts as to a possible conflict of interest, it was the duty and obligation of the Committee to seek clarifications from Appellants. In this regard, this Board notes that such an action was not taken by the Committee.

In conclusion, this Board opines that:

- a) The Health & Safety report submitted by Appellants was prepared eight months ago and this justifies the fact that such a report was not compiled for this particular tender.**
- b) The said report contains generic information regarding risk assessment in Health & Safety and is not addressed to the specific tendered works.**
- c) The Evaluation Committee based their decision to disqualify Appellants' offer on assumptions and not on concrete facts. In this regard, such an eventuality necessitated a request from the Evaluation Committee, which was not affected.**
- d) It could not identify any advantages being given to Appellants through the Health & Safety report endorsed by Mr Kevin Borg who was not involved in the tendering and evaluation process of this tender.**

e) It also noted that the Health & Safety officer of the tendering works has no relationship with Mr Kevin Borg, so that it does not find any trace of a conflict of interest through the endorsement by Mr Kevin Borg, of the Health & Safety report submitted by Appellants.

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 the Authority to re-integrate Appellants' offer in the evaluation process**
- iv. directs that the deposit paid by Appellants' should be fully reimbursed.**

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Richard A Matrenza
Member

17 December 2019