

## **PUBLIC CONTRACTS REVIEW BOARD**

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**Case 1399 – CT 2349/2019– Tender for the Professional Services of Project Designers, Project Supervisors and Project Management and other Supporting Services for the construction of Taxiway LIMA**

### **Remedy before Closing Date of a Call for Competition**

The publication date of the call for tenders was the 13<sup>th</sup> October 2019 whilst the closing date was the 29<sup>th</sup> October 2019 (extended to 12<sup>th</sup> November 2019). The estimated value of the tender (exclusive of VAT) was € 1,650,000

On the 28<sup>th</sup> October 2019 Athens Development Office S.A. (ADO SA) sought a Remedy against Malta Industrial Parks Ltd as the Contracting Authority because they felt aggrieved by the tender specifications.

On 10<sup>th</sup> December 2019 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

### **Appellants – Athens Development Office S.A.**

Dr Adrian Mallia	Legal Representative
Mr Georgios Kavalieratos	Representative

### **Contracting Authority – Malta Industrial Parks Ltd**

Mr Keith Buttigieg	Representative
Mr Ray Vella	Representative
Mr Anthony Caruana	Representative

### **Department of Contracts**

Dr Franco Agius	Legal Representative
Ms Marisa Gauci	Representative

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

Dr Adrian Mallia Legal Representative for Athens Development Office SA said that this remedy was being sought on a tender for securing of professional services. There was no objection on the financial figures mentioned in the tender but on the issue of the local warrants for professional personnel where specific expertise was requested. To have genuine competition on this project it was essential to be able to rope in foreign expertise and this created the problem of timing in the ability to obtain the warrant to operate locally. The vital requirements that were being demanded to issue this warranting was a National Insurance registration number, professional recognition and a contract in hand – which made the requirement unachievable unless a contract was issued. Appellants were asking for more leeway in the warranting requirements to open up the tender to competition.

Dr Franco Agius Legal Representative for the Department of Contracts stated that he had been advised by both the Boards of Periti and Engineers that it was not necessary to have a contract in hand to obtain warranting – that can take place later and an appropriate clarification had been issued. The Department was not averse to the Public Contracts Review Board issuing different criteria on this point.

Mr Ray Vella (463567M) called as a witness by the Public Contracts Review Board testified on oath that he was a representative of Malta Industrial Parks Ltd. He tabled a letter (Doc 1) dated 9<sup>th</sup> March 2019 from the Bord tal-Warrant tal-Periti stating that one would not require a temporary licence to offer a temporary and occasional service in Malta.

The Chairman said that the Board will recommend that the tender is worded such that it will be open for competition. He then thanked the parties for their submission and declared the hearing closed.

End of Minutes

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## **Decision**

**This Board,**

**having noted this ‘Call for Remedy Prior to the Closing Date of a Call for Competition’ filed by Athens Development Office S.A. (herein after referred to as the Appellants) on 28 October 2019, refers to the claims made by the same Appellants with regard to the tender of reference CT 2349/2019 listed as case No. 1399 in the records of the Public Contracts Review Board.**

**Appearing for the Appellants: Dr Adrian Mallia**

**Appearing for the Contracting Authority: Mr Ray Vella**

**Appearing for the Department of Contracts: Dr Franco Agius**

**Whereby, the Appellants contend that:**

- a) **Their concern relates to the fact that, the assignment of foreign architects, as experts, in the execution of the tendered works, necessitates that, such experts must be locally warranted to operate in Malta. In this respect, upon enquiring with the Local Chamber of Architects, they were informed that the requirements for such an application involves the registration of the individual with local labour Authorities, the attainment of professional recognition and a contract in hand. In this regard, for logistics purposes, Appellants request that, the tender document should provide for a reasonable period of time in which the successful bidder can obtain the necessary warrant for the experts involved, after the award of the tender.**

**This Board also noted the Contracting Authority's 'Letter of Reply' dated 21 November 2019 and its verbal submissions during the hearing held on 10 December 2019, in that:**

**a) The Authority contends that the answer to question of clarification No. 2 clearly lists the requirements with regard to the Team Leader/Perit's credentials and at the same instance, it must be noted that the expert's warrant is being requested at contract stage and not at tendering stage.**

**This same Board has also noted the testimony of the witness namely:**

**Mr Ray Vella duly summoned by the Public Contracts Review Board.**

**This Board has also taken note of the documents submitted by Malta Industrial Parks Ltd which consisted of:**

**Document No. 1 – Letter from the Board Tal-Warrant Tal-Periti**

**This Board, after having examined the relevant documentation to this 'Call for Remedy' and heard submissions made by the parties concerned, including the testimony of the witness duly summoned, opines that the issue that merits consideration is the mandatory requirement of a local warrant.**

- 1. This Board acknowledges that the tendered works are of a specialised nature and the mandatory requirements being stipulated with regard to experts are truly justified and necessary.**

**2. This Board would respectfully refer to clarification No. 2, dated 18 October 2019, with particular reference to question 2 and its relative reply, as follows:**

***“Question 2:***

*Reference: Clarification Note No. 1 dated 26 June 2019, Answer 12*

*Query: In this clarification answer it is stated that: ‘The Team Leader is required to be in possession of either a local warrant or a temporary warrant by the closing date of tender...’*

*In order to undertake this process we made a telephone enquiry to the Periti Warranting Board at the Ministry for Transport and Infrastructure. Their guidance was that, for non-Maltese companies, the process for applying for a the Warrant would take place when a contract is awarded; based on the qualified personnel being considered qualified to act as an engineer in an EU nation.*

*Kindly reconsider if the requirement for a local warrant or a temporary warrant may be achieved upon award of contract, rather than upon close of tender.*

***Answer 2:***

*To further clarify Answer 12 of Clarification Note 1 dated 26<sup>th</sup> June 2019, the Contracting Authority shall consider Team Leader/Perit possessing either*

*1. an Architect & Civil Engineer Warrant as per Periti Act Chapter 390;*

*OR*

*2. shall hold an approval of Temporary Service by the “Board tal-Warrant Tal-Periti” of Malta for the provision of civil engineering services in Malta. Proof of compliance to this requirement is to be provided in the tender submission;*

*OR*

*3. if the approval of Temporary Service by the “Board tal-Warrant tal-Periti” is still in process, the correspondence for application with the “Board tal-Warrant tal-Periti” must be submitted as part of the tender bid. In this regard the approval of Temporary Service by the “Board tal-Warrant tal-Periti” must be in place **before the signing of the contract.***

*The above conditions are subject that the proposed key Experts shall satisfy the minimum qualification and experience requirements as established in Section 1, Article 7 C (i) (1).*

*Moreover proposed key experts who are not in possession of a warrant to practise in Malta are also to submit a copy of their warrant to practise in their respective country with their offer.”*

**Item 3 of the above-mentioned reply from the Authority indicates that at the date of submission of the offer, proof of an application for a warrant is sufficient and the actual approval of such an application will be mandatorily requested at the contract stage.**

- 4. Upon enquiring with the ‘Board tal-Warrant tal-Periti’, Appellants were informed that, in order to apply, the person to be warranted must have an N.I. Number, attainment of professional recognition and contract in hand. In this regard, the only limitation which this Board can identify at this particular stage is the availability of a contract in hand.**
  
- 5. From submissions made by the Authority, the latter confirmed that proof of an application for a warrant is sufficient. At the same instance, the Authority presented a formal letter from the ‘Board tal-Warrant tal-Periti’ which pointed out that “An Architect formally registered in a member state who will offer a temporary and occasional service in Malta, will not require a temporary licence. However, one would have to advise the ‘Board tal- Warrant tal-Periti’ by giving proof.”**

- 6. This Board would advise the Authority to confirm what is meant by ‘Temporary Service’ and obtain a clear-cut explanation of the position of the proposed expert in this particular tender, from the ‘Board tal-Warrant tal-Periti’.**
  
- 7. At the same instance, it is evident that the attainment of a local warrant does take its duration to be processed so that, the tender should provide for leeway, upon confirmation of the award, for the involved party to obtain the necessary warrants for its expert.**

**In conclusion, this Board opines that:**

- a) The Authority should establish, after consulting officially with the ‘Board tal-Warrant tal-Periti’, if, in the case of the experts in particular tender, a temporary warrant is necessary and the length of the procedure to obtain such an application.**
  
- b) The tender document should also indicate a reasonable and realistic period of time by which a confirmed local warrant has to be attained, after the award notice.**

**In view of the above, this Board,**

- i. upholds Appellants' concern,**
  
- ii. directs the Authority to obtain officially a ruling from the 'Board tal-Warrant tal-Periti', on the actual stipulated duties which the foreign expert is in duty bound to perform,**
  
- iii. directs the Authority to include a provision in the tender dossier, specifying by which period of time, the local warrant has to be presented, after the notice of award.**

Dr Anthony Cassar  
Chairman

Mr Lawrence Ancilleri  
Member

Mr Carmel Esposito  
Member

*18 December 2019*