

PUBLIC CONTRACTS REVIEW BOARD

Case 1505 – IM 014/2020 – Professional Services in connection with the Supervision and Works Certification for Works Tender IM006/2020 – Tender for the Provision of a High Voltage Shore Connection (HVSC) System in the Port of Valletta, Grand Harbour, Malta

The tender was published on the 27th March 2020 and the closing date of the tender was the 18th May 2020. The estimated value of the tender (exclusive of VAT) was € 900,000.

On the 28th September 2020 EMDP Ltd filed an appeal against Infrastructure Malta as the Contracting Authority objecting to their disqualification on the grounds that their bid was not technically compliant.

A deposit of € 4,500 was paid.

There were six (6) bidders.

On 22nd October 2020 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Richard Matrenza as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – EMDP Ltd

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| Dr Charlon Gouder | Legal Representative |
| Dr Ramona Attard | Legal Representative |

Contracting Authority – Infrastructure Malta

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| Dr Maurice Meli | Legal Representative |
| Dr Stefano Filletti | Legal Representative |
| Arch Janice Borg | Chairperson Evaluation Committee |
| Dr Anthea Galea | Representative |

Recommended Bidder – iManage Ltd

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| Dr Massimo Vella | Legal Representative |
| Mr Mark Zammit | Representative |

Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties. He noted that since this was a virtual meeting all the parties agreed to treat it as a normal hearing of the Board. He then invited submissions.

Dr Maurice Meli, Legal Representative for Infrastructure Malta by way of a preliminary point contended that the additional objections filed on the 20th October 2020 should be disregarded due to the late submission.

The Chairman stated that as a general rule the Board cannot accept such late submissions; however if as claimed by Appellants the documents are in support of the original objection letter they will be considered. He then asked for submissions to be made.

Architect Janice Borg (150638M) called as a witness by the Contracting Authority testified on oath that she was the Chairperson of the Evaluation Committee. She stated that the tender called for a key expert with an Architect and Civil Engineer's degree at level 6 or higher. The first person nominated by Appellants for this role did not have the required five years experience and through a rectification note Appellants were asked to nominate a replacement. This project is co-financed by the European Union and strict adherence to the rules was essential. Appellants submitted the name of a Greek individual who is qualified and warranted as a civil engineer and claimed that under the EU Directive 36/2005 regarding mutual recognition he should be considered suitable as a key expert. This submission conflicts with the tender requirements as everything about the proposed expert pointed to experience only as a civil engineer. The C.V. and all related information, including the warrant from the Greek authorities, presented to the evaluation committee indicated no experience in the field of architecture. The Contracting Authority required qualifications in both fields but what was offered was not up to that requirement.

In reply to several questions witness stated that fresh information was supplied to the evaluation committee but it did not indicate that the key expert proposed had the qualification as an architect – this was not a question of interpretation of qualifications it was a question of fact and further verifications were not necessary. Referred to Clause 6 (1) of S.L. 390.05 which deals with citizens of a Member State being conferred an equivalent title witness stated that the Committee is guided by the tender terms and a *Periti* requires a local warrant – the above equivalence point in subsidiary legislation does not therefore apply as at the time the applicant did not have the necessary experience as an architect. Directed to an extract from the Greek Government Gazette witness said that that referred to the combined roles of architect and civil engineer (although it distinguished between them), but this information was only submitted at appeal stage. At evaluation stage it was not up to the Committee to seek information further than that submitted in the tender.

Dr Simon Micallef Stafrace (522463M) called as a witness by Appellants stated on oath that he is the Chairman of the *Periti* Warranting Board, which had the function of establishing the requirements for award of the warrant and for disciplinary matters. There are two criteria which the Board looks into for awards – the academic record and the number of years experience. In the case of foreign applicants it was not enough to show experience but one must provide evidence of expertise in the particular subject matter of the tender in question. In the case of citizens from the European Union once the curriculum and certain experience factors are satisfied then the Board must wait for the issuing of the contract to grant a temporary warrant, although one cannot be 100% certain that it will be issued.

Dr Micallef Stafrace, in reply to questions, stated that a civil engineering qualification does not warrant the award of an architect's warrant automatically and much depends on the work envisaged and the documentation available. Warrants are not granted automatically in the case of foreign nationals with the University of Malta usually being requested to compare qualifications. Nobody is excluded but it is essential to compare the curricula. Witness re-iterated that as a general rule applications are made after the award of a tender although it is possible to make enquiries beforehand.

Dr Charlon Gouder Legal Representative for EMDP Ltd said that the key expert qualification which contained components of architecture was sufficient to enable the evaluation committee to accept his nomination. The process to obtain a warrant could not start till after the award of the contract as outlined by Dr Micallef Stafrace. Within the next two years the Maltese Authorities are planning in separating these two disciplines into distinct qualifications, as has already happened in Greece. The degree requested in the tender exists only in Malta and therefore everyone is excluded unless they happen to be Maltese. The Level 6 requested in the tender is more than satisfied by the Level 7 offered by the key expert and this was an unjust disqualification as the individual excluded met the qualifications requested.

Dr Maurice Meli said that the Contracting Authority requested an architect and civil engineering qualification and the proposed candidate submitted a civil engineering qualification with no indication of having worked as an architect. Appellants had to prove that the person offered was suitable and it was not in the realm of the evaluation committee to dig further into this person's background. It is up to the bidder to ensure that he meets the requirements requested, and it has not been proven that there was any failure by the Committee in their evaluation.

Dr Massimo Vella Legal Representative for iManage Ltd stated that documents in support of Appellants' claim were submitted after the close of the evaluation and further that no proof has been submitted that the qualifications of the proposed key expert meets the requirements. Witness Dr Micallef Stafrace said that he could not express an opinion without seeing documents and the candidate's qualifications cannot therefore be examined. What will happen in two years time as to the architects' qualification is totally immaterial and does not affect the award of this tender.

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 EMDP Ltd (hereinafter referred to as the Appellants) on 28th September 2020, refers to the claims made by the same Appellants with regard to the tender of reference IM 014/2020 listed as case No. 1505

in the records of the Public Contracts Review Board recommended for award by Infrastructure Malta (hereinafter referred to as the Contracting Authority).

Appearing for the Appellants: Dr Charlon Gouder

Dr Ramona Attard

Appearing for the Contracting Authority: Dr Maurice Meli

Dr Stefano Filletti

Appearing for the Preferred Bidder: Dr Massimo Vella

Whereby, the Appellants contend that:

- a) Their offer was rejected due to the alleged fact that, the key expert 2 namely, Mr Vasileios Melios does not possess a degree in architecture as duly stipulated in tender dossier. In this respect, Appellants maintain that, the Evaluation Committee failed to interpret correctly the qualification of Mr Melios. Furthermore, Appellants contend that, key expert is a qualified civil engineer who carried out various assignments in the architectural field, as can be deduced from his C.V.**

This Board also noted the Contracting Authority's 'Letter of reply' dated 7th October 2020 and its verbal submissions during the virtual hearing held on 22nd October 2020, in that:

- a) The Authority insists that, the tender document stipulated that key expert 2 must be in possession of a degree in architecture, however, Mr Melios’s degree was only in civil engineering, so that, the Evaluation Committee had no other option but to deem Appellants’ offer as technically non-compliant.**

This same Board also noted the testimony of witnesses namely:

Architect Janice Borg duly summoned by the Contracting Authority

Dr Simon Micallef Stafrace duly summoned by EMDP Ltd.

On a preliminary note, this Board examined the additional documentation sent by Appellants just before the hearing of this appeal and notes that, such documentation was not included in Appellants’ original submissions and in this regard, this Board will not treat such late submission well after the closing date of the tender.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties, including the testimony of the witnesses duly summoned opines that, the issue that merits consideration is the compliance of the Key Expert’s (Mr Vasileios Melios) qualifications.

- 1. First and foremost, this Board would respectfully refer to clause 6.1 of the technical specifications, wherein ‘Expert Requirements’ are duly stipulated as follows with regards to key expert 2, shown under ‘Resident Engineer’ as follows:**

“Resident Engineer 1 Degree 5 5 years in a Full time on site during construction, restoration and civil work in Architecture & Civil Engineering - MQF Level 6 or better leading role in major Civil Engineering works. Leading role in the last 5 years as Supervisor or Project Manager in at least 1 major project worth over EUR 5 million.”*

The above-mentioned clause clearly stipulates the level and type of qualification the resident engineer (Key Expert 2) must possess, i.e. a degree in civil engineering and architecture.

- 2. Appellants’ contention in this regard, refers to the fact that, Mr Vasileios Melios, is fully qualified to carry out the stipulated assignments and also complies with the requirements of clause 6.1 of the technical specifications. On the other hand, the Authority insists that Mr Melios does not possess a degree in architecture but only in civil engineering, so that he is not compliant with the stipulated requirements.**
- 3. At this particular stage of consideration, this Board can only carry out its review on the documentation submitted by Appellants in their original**

submission and from Mr Melios's Curriculum Vitae, it notes that Mr Melios has a vast experience on large projects of a civil engineering nature.

- 4. This Board also considered the testimony of Dr Simon Micallef Stafrace, Chairman of the 'Periti Warranting Board' who explained very explicitly that, in the case of foreign applicants, it was not enough to show experience but one must prove that he is proficient in the particular subject matter. Dr Micallef Stafrace also stated that, in the case of EU citizens, once the Curriculum and Experience are satisfied, the Warranting Board will issue a temporary warrant to the applicant.**
- 5. From the testimony of Dr Micallef Stafrace, an interesting issue emerged and which this Board feels it should be addressed in that, in the case of foreign nationals, nobody is excluded but it is essential to compare the curricula and much depends on the work envisaged to be carried out by the Appellant.**
- 6. This Board was made aware of the EU directive relating to the regulations for the mutual recognition of professional qualifications however, since the tendered assignment will be carried out in Malta, it stands to reason that, Mr Melios's qualifications must be assessed in Malta to establish if such qualifications will entitle Mr Melios to carry out the specified architectural works as dictated in the tender dossier. In this respect, this Board takes into consideration the fact that, this is an EU funded tender so that, the exclusion**

of Mr Melios due to inadequate academic qualifications must be truly justified or credibly indicated by the local ‘Periti Warranting Board’.

- 7. This Board is not implying, in any manner whatsoever, that the Evaluation Committee did not carry out its duty in the appropriate manner but, same Board would be more comfortably assured, if Mr Melios’s qualification issue, is established or indicated for equivalency, by the officially constituted Body that is responsible for the issue of the temporary warrant.**

In conclusion, this Board opines that:

- a) The Evaluation Committee should provide the information submitted by Appellants regarding Mr Melios qualifications and experience, together with the architectural duties to be assigned in this tender, so that, the ‘Periti Warranting Board’ will be in a position to give their opinion on Mr Melios’s qualifications equivalency.**
- b) It must be pointed out that, the information to be submitted to the ‘Warranting Board’ should represent Appellants’ original submissions only.**

In view of the above, this Board,

- i. suspends the decision of the Contracting Authority in the award of the tender,**
- ii. directs the Evaluation Committee to obtain an opinion or an indication from the ‘Periti Warranting Board’ as to Mr Melios’s qualifications and as to**

whether such qualifications are adequate and proper to be able to carry out the stipulated architectural assignments.

- iii. directs that, Appellants' offer be reintegrated in the revaluation process after the Evaluation Committee obtains the 'Warranting Board's opinion.**
- iv. directs the Evaluation Committee to re-evaluate all the offers.**
- v. Directs that the deposit paid by Appellants should be fully refunded.**

Dr Anthony Cassar
Chairman
29th October 2020

Mr Lawrence Ancilleri
Member

Mr Richard A Matrenza
Member