

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case 1589 – IM029/2020 – Professional Services in connection with the Supervision and Works Certification for Works Tender IM010/2020 – Construction of an Underpass at the Roundabout Junction Node Wa23 between Triq San Tumas, Triq il-Kunsill tal-Ewropa and Vjal l-Avjazzjoni in Luqa**

**30<sup>th</sup> June 2021**

The Board,

Having noted the letter of objection filed by Dr Alexander Schembri on behalf of Thake Desira Advocates acting for and on behalf of iManage Ltd, (hereinafter referred to as the appellant) filed on the 19<sup>th</sup> April 2021;

Having also noted the letter of reply filed by Dr Alexander Scerri Herrera acting Infrastructure Malta (hereinafter referred to as the Contracting Authority) filed on the 28<sup>th</sup> April 2021;

Having also noted the letter of reply filed by Dr Clement Mifsud Bonnici and Dr Calvin Calleja on behalf of Ganado Advocates acting for and on behalf of Meinhardt Malta Pvt Ltd (hereinafter referred to as the Preferred Bidder) filed on the 29<sup>th</sup> April 2021;

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by the legal representatives of the parties;

Having noted and evaluated the minutes of the Board sitting of the 22<sup>nd</sup> June 2021 hereunder-reproduced.

### **Minutes**

**Case 1589 – IM 029/2020. Tender for Professional Services in connection with the Supervision and Works Certification for Works Tender IM 010/2020 – Construction of an Underpass and Overpass at the Roundabout Junction Node WA23, between Triq San Tumas, Triq il-Kunsill tal-Ewropa and Vjal l-Avjazzjoni in Luqa**

The tender was published on the 31<sup>st</sup> October 2010 and the closing date was the 3<sup>rd</sup> December 2020. The value of the tender was € 512,011.50.

On the 19<sup>th</sup> April 2021 iManage Ltd filed an appeal against Infrastructure Malta as the Contracting Authority objecting to their decision to reject their bid as it was deemed to be not technically compliant.

A deposit of € 2,560 was paid.

There six (6) bidders and seven (7) bids.

On 22nd June 2021 the Public Contracts Review Board (PCRB) composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

**Appellant – iManage Ltd**

Dr Norval Desira	Legal Representative
Mr Steve Gambin	Representative
Mr Mark Zammit	Representative

**Contracting Authority – Infrastructure Malta**

Dr Alexander Scerri Herrera	Legal Representative
Mr Robert Zerafa	Representative
Mr Daniel Micallef	Representative
Ms Rebecca Grech	Representative
Ms Christine Friggieri	Representative
Ms Melanie Portelli	Representative

**Preferred Bidder – Meinhardt Malta Pvt. Ltd**

Dr Calvin Calleja	Legal Representative
Mr John Rizzo Naudi	Representative

Mr Kenneth Swain 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 in line with Article 89 of the Public Procurement Regulations. He then asked Appellant’s representative to make his submissions.

Dr Calvin Calleja Legal Representative for Meinhardt Malta Pvt Ltd requested that Appellant’s preliminary plea should be heard first. In Clause 6.1.1 the Contracting Authority asked for three key experts. In the case of Expert 2 it was stipulated that the educational qualifications had to include a specialisation in Structural Engineering. The Authority requested clarification on this aspect from the University of Malta which had themselves awarded the qualifications to the key expert concerned. The Appeal was based on the interpretation of the tender conditions, and thus should have been raised under Regulation 262 of the Public Procurement Regulations – the seeking of a remedy before the close of call. Instead Appellant objected after the award on the basis of Article 270. Reference was made to the Court of Appeal Case *Managing Consulting Service Industry vs Direttur tal Kuntratti* which upheld the concept of seeking remedies before the closing date of tender on grievances or ambiguities requiring clarification. Two further Court of Appeal cases were quoted in regard to grievances existing before the close of competition – *Euro Academy* decided on 3.9.2019 and *Sultech* decided on 9.8.2020. Reference was made to PCRB Case 1416 which confirmed the principle of complete acceptance of the tender stipulations and which is underpinned by Clause 9.4 of the General Rules Governing Tenders which states that the tenderer accepts in full the contents of the tender document.

Dr Norval Desira Legal Representative for iManage Ltd stated said that the appeal was not based on ambiguity or clarification and that thus there was no need to seek a precontractual remedy. Appellant is simply claiming that the proposed key expert is qualified for the required role.

The Chairman proposed a short recess to enable the Board to consider the preliminary plea raised.

On resumption the Chairman said that the Board had considered the plea and decided that the point raised by the preferred bidder that Appellant should have challenged the tender on the basis of a precontractual remedy was justified as the Contracting Authority had clearly stated in the tender documents that the key expert qualification had to be 'specialised in structural engineering' which was a definite term and not subject to interpretation.

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

End of Minutes

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**Hereby resolves:**

The Board refers to the minutes of the Board sitting of the 22<sup>nd</sup> June 2021.

Having noted the objection filed by iManage Ltd (hereinafter referred to as the Appellant) on 19<sup>th</sup> April 2021, refers to the claims made by the same Appellant with regards to the tender of reference IM029/2020 listed as case No. 1589 in the records of the Public Contracts Review Board.

Appearing for the Appellant:	Dr Norval Desira
Appearing for the Contracting Authority:	Dr Alexander Scerri Herrera
Appearing for the Preferred Bidder:	Dr Clement Mifsud Bonnici & Dr Calvin Calleja

Whereby, the Preferred Bidder's preliminary plea is based on the following:

1. The Appeal is Inadmissible – the Appellant failed to file an application for a pre-contractual remedy in terms of Regulation 262 of the PPR. The Appellant is challenging a tender specification of the Tender which was drafted clearly and unambiguously.
2. The Appellant's letter of objection is *ex admisis* based on one central issue; namely, the alleged restrictive interpretation by the Contracting Authority of the phrase 'specialised in Structural Engineering'.
3. Appellant failed to request clarifications in terms of Regulation 38 of the PPR.

This Board, after hearing submissions made by the Preferred Bidder's and Appellant's legal representatives, opines that the issue that merits immediate attention is whether an objection should have been filed in accordance with Regulation 270 or whether a call for remedies should have been initiated by virtue of Regulation 262 of the Public Procurement Regulations (PPR).

This Board notes that the tender document is clearly stating that the Key Expert 2 is to be 'specialised in structural engineering'. This is a definite term and is not subject to interpretation. Hence, any grievance should have been dealt with by Regulation 262 of the PPR.

**In conclusion this Board;**

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) Does not uphold Appellant's Letter of Objection and contentions,
- b) Upholds the Contracting Authority's decision in the recommendation for the award of the tender,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

**Mr Kenneth Swain**  
Chairman

**Dr Charles Cassar**  
Member

**Mr Lawrence Ancilleri**  
Member