

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 and Overpass at the Roundabout Junction Node Wa23 between Triq San Tumas, Triq il-Kunsill tal-Ewropa and Vjal l-Avjazzjoni in Luqa

14th February 2022

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 19th April 2021;

Having also noted the letter of reply filed by Dr Alexander Scerri Herrera acting on behalf of Infrastructure Malta (hereinafter referred to as the Contracting Authority) filed on the 28th 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 29th April 2021;

Having heard and evaluated the testimony of the witness Mr Robert Sant (Key Expert as proposed by iManage Ltd) as summoned by Dr Alexander Schembri acting for iManage Ltd;

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 8th February 2022 hereunder-reproduced;

Minutes

Case 1589 IM029/2020 – Professional Services in connection with the Supervision and Works Certificate for Works Tender IM010/2020 – 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 issued on the 31st October 2020 and the closing date was the 3rd December 2020. The value of the tender, excluding VAT, was € 512,011.50

On the 19th April 2021 iManage Ltd filed an appeal against Infrastructure Malta as the Contracting Authority objecting to their disqualification on the grounds that their tender was deemed to be technically not compliant.

A deposit of € 2,560 was paid.

There were six (6) bidders.

On the 8th February 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Dr Vincent Micallef as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – iManage Ltd

Dr Alexander Schembri	Legal Representative
Mr Mark Zammit	Representative

Contracting Authority – Infrastructure Malta

Dr Alex Scerri Herrera	Legal Representative
Mr Robert Zerafa	Chairperson Evaluation Committee
Ms Melanie Portelli	Secretary Evaluation Committee
Ms Christabel Duca	Member Evaluation Committee
Mr Daniel Micallef	Member Evaluation Committee
Ms Rebecca Grech	Member Evaluation Committee
Ms Rachel Powell	Representative

Preferred bidder – Meinhardt Pvt. Ltd

Dr Clement Mifsud Bonnici	Legal Representative
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 invited submissions.

Dr Alexander Schembri Legal Representative for iManage Ltd stated that the tender requested a Structural Engineer - Appellant nominated Perit Sant who is well qualified to undertake the work. The outcome of the award turns on the definition of a 'specialist', which was interpreted by the University of Malta as someone with a degree in structural engineering. It is not necessary to have a specific qualification as such because one can rely on experience and projects undertaken. In fact, the tender did not specify a specific qualification or doctorate in structural engineering and thus other factors need to be taken into consideration.

Dr Alex Scerri Herrera Legal Representative for Infrastructure Malta said that the key expert offered by Appellant had not specialised in structural engineering and there was no indication that Perit Sant had undertaken any form of specialisation. Granted that the experience was

there in his case but this is not what the tender required on a major, complicated project requiring certain specialisation. The Tender Evaluation Committee (TEC) were justified in their conclusion.

Dr Calvin Calleja Legal Representative for Meinhardt Pvt. Ltd stated that page 31 of the tender shows the minimum qualification required in structural engineering.

Perit Robert Sant (568762M) called as a witness by Appellant testified on oath that his University degree included Architecture and Civil Engineering and on both disciplines he had to present a thesis. Reference was made to the major engineering projects listed in his C.V. supporting his nomination as a key expert. Particular details were gone into regarding the structural engineering projects undertaken by witness and particular reference was made to the Reconstruction of the Coast Road project which was very complicated and where he executed fully the role of a structural engineer. It was precisely on the experience of the Coast Road project that Appellant had selected him for this tender as on that occasion he had been responsible for the supervision of the contractor to ensure faithfulness to the design and for all calculations up to final certification stage. Witness stated that he was also responsible for project management in the Esplora scheme and that he felt he was fully competent without necessarily having a Master's degree in Structural Engineering.

Questioned by Dr Scerri Herrera witness said that in previous projects he was dealing with the same people but under different authorities. Requirements in this tender were equivalent to the Coast Road project which involved a bridge some 27 metres long and qualified as a flyover. He confirmed that he had qualified as an Architect and Civil Engineer but at the time there was no specialist course in structural engineering. He was able to gain experience in civil engineering works as his degree covered this discipline. Witness stressed that there was no difference between his qualification and the tender requirements as they are both at MQF 7 level and the reply from Prof Torpiano was qualified in line with current University courses. If he had specialised in structural engineering he would be in exactly the same position as now.

This was the end of the testimony.

Dr Schembri said that what Infrastructure Malta was looking for was a combination of experience and qualifications. The requirement for structural engineering qualification limits the number of suitable people and the interpretation of specialisation has to be broader. Prof Torpiano's views are only from the University perspective. The tender did not ask for a Master's degree but simply specialisation. Perit Sant's experience was undoubted and the present Contracting Authority was aware of his ability as he had worked for related entities. If he was accepted as a structural engineer five years ago why was he not qualified now?

Dr Clement Mifsud Bonnici Legal Representative for Meinhardt Pvt. Ltd said that the matter was back to the starting point – namely discussing if the qualification meets the tender requirements. The arguments put forward did not quite cover the question. The Appellant only meets the tender requirements by experience but not by qualifications. Perit Sant himself admitted that he had not specialised in structural engineering – the tender was clear

on this point and it is not right that alternatives should be accepted at this stage especially bearing in mind self-limitation principles. The bidder was given the opportunity of clarifying but had not taken advantage of this.

Dr Scerri Herrera said that Prof Torpiano's e-mail does not mention the academic point of view. If Perit Sant wanted to specialise he could have availed himself of the course currently available at the University. There are over 20 persons qualified in structural engineering and the tender is not limited to Malta so foreigners could have applied. The tender dossier mentions two aspects – qualification and experience and both are needed. The Coast Road project was totally different- in that project there were no flyovers and underpasses which structures require different competences. The tender is clear and is not subject to interpretation.

There being no further submissions the Chairman thanked the parties and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 8th February 2022.

Having noted the objection filed by iManage Ltd (hereinafter referred to as the Appellant) on 19th 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 Alexander Schembri

Appearing for the Contracting Authority: Dr Alexander Scerri Herrera

Appearing for the Preferred Bidder: Dr Clement Mifsud Bonnici & Dr Calvin Calleja

Whereby, the Appellant, in their Letter of Objection, contend that:

- a) The bid was deemed as technically non-compliant for the following reason “..... *it is understood that the qualification of this Key Expert do not include a specialisation in Structural Engineering.*”
- b) The Key Expert does hold a degree qualification in Civil Engineering – MQR Level 7 or equivalent as required by the tender dossier. This also as confirmed by the University of Malta, Dean, Faculty for the Built Environment, Prof Dr Eur. Ing. Alex Torpiano.

- c) It is evident that whereas the Contracting Authority correctly deemed Key Expert 2, as proposed by the Appellant Company, as having the required “Degree Qualification in Civil Engineering – MQF Level 7 or equivalent”, it did not deem the same Key Expert 2 as being “specialised in Structural Engineering”
 - i. If the term “specialised in Structural Engineering” is interpreted restrictively, it would preclude the absolute majority of local graduate and warranted architects from participating in this tender.
 - ii. Changes to the University of Malta Architecture course were done very recently (2010) to allow for different specialisations, i.e Masters in Architecture or Masters in Engineering.
- d) No tender should ever be designed in such a way so as to eliminate most, if not all, local competition, thus ensuring that the said tender may only be awarded to an extremely limited pool of people.
- e) The phrase “specialised in Structural Engineering” should have been given a wider interpretation by the Contracting Authority. This is the only way to ensure that the tender in caption is not effectively, intended for a very limited pool of people.
- f) Key Expert 2, as proposed, does indeed qualify as a person holding a “Degree Qualification in Civil Engineering – MQF Level 7 or equivalent”.

This Board also noted the Contracting Authority’s Reasoned Letter of Reply filed on 28th April 2021 and its verbal submission during the virtual hearing held on 8th February 2022, in that:

- a) The Key Expert failed to submit any documentation to justify or in fact prove that he does in fact possess a specialisation in Structural Engineering. This requirement was specifically mentioned in the technical requirements due to the exigencies and complexities of the project at hand.
- b) The bone of contention is not the Civil Engineering degree – MQF Level 7, but the lack of a specialisation in structural engineering. Regulation 222 of the PPR was followed due to the need of the Contractual Authority to have a Structural Engineer service provided. There are numerous qualified Structural Engineers in Malta both those having qualified in recent years, as well as any individual who could have chosen to further their studies after having completed their Degree in Architecture and Civil Engineering.
- c) In view of the extent of responsibilities vested upon the Key Expert in question, it would be wrongful, and it may also result in serious consequences, to suggest that an individual qualified as an Architect/Civil Engineer can provide the necessary certification of works when one is not in possession of qualifications specialised in Structural Engineering.
- d) The Appellant company failed to present the necessary evidence to substantiate any allegations made by the said proposed Key Expert that he does in fact have a specialisation in Structural Engineering. Simply providing that one is a graduate in architecture and civil engineering – MQF

Level 7 is not sufficient for the individual to qualify in line with the technical requirements of the tender.

- e) The Evaluation Committee justly declared that the proposed Key Expert in question does not satisfy the tender requirements.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 29th April 2021 and its verbal submission during the virtual hearings held on 8th February 2022, in that:

- a) Legal Submissions on the Merits – the Appellant's appeal is not substantiated by facts, legal principles or even legal provisions underpinning the applicable body of public procurement legislation. The decision by the Evaluation Committee of the Contracting Authority to eventually declare the Appellant's bid as technically non-compliant was taken on the basis of the written advice of the University of Malta.
- b) The Evaluation Committee acted in an extremely proportionate manner by not only having allowed the Appellant to rectify the matter relating to Key Expert 2, but also by taking active steps to obtain clarifications from the University of Malta to avoid the rejection of the Appellant's bid. However, the rejection of the Appellant's bid could not be avoided since, as a matter of fact, the academic qualifications did not comply with the tender specifications.

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, will now consider Appellant's grievances.

The Board notes that the main bone of contention in this specific case revolves around the definition of the term 'Specialised in Structural Engineering' and whether the Key Expert as submitted / proposed by the Appellant company does in fact meet this definition or otherwise.

Key Experts – Page 31 of the Tender Dossier

- a) In order to analyse this situation, this Board will initially refer to page 31 of the Tender Dossier and examine in detail what was required by prospective bidders. In relation to the 'Key Experts', more specifically the 'Structural Engineer', the Tender Dossier required that:
 - i. 1 Structural Engineer be proposed
 - ii. Minimum Qualifications – Degree Qualification in Civil Engineering specialised in Structural Engineering – MQF Level 7 or equivalent'
 - iii. Minimum Years of Professional Experience – 5

- iv. Minimum Years of Experience in Similar Works – 5 years in a leading role in major Civil Engineering works related to analysis, design and supervision of major civil engineering structures. Leading role in the last 5 years as Structural Engineer in at least 1 major project worth over €5 million.
- b) It is the opinion of this Board that these four (4) requirements were ALL to be satisfied. This Board will now proceed to analyse these in detail.
- c) The first requirement was for prospective bidders to propose one (1) Structural Engineer. The Board notes that the proposed bidder, now Appellant, did provide a Curriculum Vitae of a Warranted Architect. Hence this initial requirement is deemed to be satisfied.
- d) The 3rd and 4th requirement as per above, i.e. Minimum Years of Professional Experience and Minimum Years of Experience in Similar Works were discussed at length during the hearing (refer to the minutes) and there was little to no contestation on Mr Sant’s previous work experience. Even though some projects worked by Mr Sant were in fact discussed, this Board deems those discussions irrelevant because from the CV provided, it is evident that Mr Sant has more years of experience than the minimum required by the Tender Dossier. Hence these two requirements are also deemed to be satisfied.
- e) The Board notes that it is this 2nd requirement, i.e. ‘Minimum Qualifications – Degree Qualification in Civil Engineering specialised in Structural Engineering – MQF Level 7 or equivalent’ which created cause for this appeal. From the outset it is being stated that in the opinion of this Board, it is obvious that Mr Sant meets the first part of this requirement, i.e. “Degree Qualification in Civil Engineering”. Further analyses however is required to ascertain if he satisfies the second part of the requirement, i.e. “specialised in Structural Engineering – MQF Level 7 or equivalent”.
- f) Reference is made to the:
 - i. Objection Letter filed on 19th April 2021,
 - ii. the minutes of the hearing,
 - iii. the testimony under oath of Mr Robert Sant,

which duly explain the differences in between the University of Malta course Bachelor of Engineering and Architecture as to how it developed during the years. In substance, in the years when Mr Sant obtained his qualifications it did not involve any specific specialisations but nowadays it is more “tailor made” in the sense that eventually the students reading for such qualification will either specialise in a Master’s Degree in Design or a Master’s Degree in Structural Engineering but not both.

- g) It is the opinion of this Board, that the Evaluation Committee correctly took advice from the ‘issuer’ of such degree to Mr Sant, i.e. University of Malta (“UoM”), to ascertain whether such qualifications obtained by Mr Sant duly falls within the requirements of the Tender Dossier. Such reply from UoM clearly states *“In answer to your specific query, I would suggest that a BE&A degree issued in 1989 is a Degree in Civil Engineering, **but I cannot say that it is a ‘specialisation in Structural***

Engineering’ – certainly not from a University point of view – since it was a degree programme which allowed a number of electives structured around a specific theme, but which led to the same degree award” (Bold emphasis added)

- h) It is therefore being confirmed, by Professor Torpiano of UoM that the degree issued in 1989 cannot be considered as a ‘specialisation in Structural Engineering’.
- i) Another question / issue however remains, in reference to the statement by Prof Torpiano “*certainly not from a University point of view*”. This phrase is deemed as very relevant by this Board. It is this Board’s opinion, and this was not disputed by the parties, that the requirement of the Tender Dossier is “Degree Qualification in Civil Engineering specialised in Structural Engineering – MQF Level 7 or equivalent”. The issue at hand , as already stated, rests with its interpretation. The Board opines, that who better to provide advice as to whether a degree provides specialisation or otherwise than the same entity which issued such qualification? Hence, this Board agrees with the Evaluation Committee in that the ‘University point of view’ is very relevant to this case and the degree issued in 1989 does not equate to a specialisation in Structural Engineering.

Therefore, this Board will conclude on this grievance, by stating that it agrees with the stance adopted by the Evaluation Committee in that the Key Expert, although having a Degree Qualification in Civil Engineering and meeting all the minimum years of experience, including experience in similar works, he does not meet the remaining criteria of “specialised in Structural Engineering”. This Board also notes that the Evaluation Committee also communicated with the Appellant, being a Note 2 item, to rectify such position.

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 Vincent Micallef
Member

Mr Lawrence Ancilleri
Member