

PUBLIC CONTRACTS REVIEW BOARD

Case 1694 – CT2244/2021 – Tender for Professional Services of an Architect for General Consultancy, Concert Hall, Extension of Costume House and Restoration of Priory of Navarre Façade at Teatru Manoel (Lot 3)

14th March 2022

The Board,

Having noted the letter of objection filed by Dr Veronique Dalli, Dr Alessandro Lia and Dr Andrew Saliba on behalf of Dalli Advocates acting for and on behalf of AP Valletta, (hereinafter referred to as the appellant) filed on the 31st January 2022;

Having also noted the letter of reply filed by Ms Diane Degabriele acting for and on behalf of Manoel Theatre (hereinafter referred to as the Contracting Authority) filed on the 8th February 2022;

Having heard and evaluated the testimony of the witness Ms Penelope Ciangura (Member of the Evaluation Committee) as summoned by Dr Alessandro Lia acting for AP Valletta;

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 10th March 2022 hereunder-reproduced;

Minutes

Case 1694 – CT 2244/2021 – Tender for Professional Services of an Architect for General Consultancy, Concert Hall, Extension of Costume House and Restoration of Priory of Navarre Façade at Teatru Manoel

LOT 3

The tender was issued on the 18th August 2021 and the closing date was the 5th October 2021. The value of the tender for this Lot, excluding VAT, was € 77,340.

On the 31st January 2022 AP Valletta filed an appeal against the Teatru Manoel as the Contracting Authority objecting to their disqualification on the grounds that their offer was not administratively compliant.

A deposit of € 400 was paid.

There were nine (9) bidders.

On the 10th March 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Mr Richard Matrenza as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – AP Valletta

Dr Veronique Dalli	Legal Representative
Dr Alessandro Lia	Legal Representative
Dr Andrew Saliba	Legal Representative
Mr David Felice	Representative

Contracting Authority – Teatru Manoel

Dr Charlon Gouder	Legal Representative
Mr Brian Bonnici	Member Evaluation Committee
Ms Penelope Ciangura	Member Evaluation Committee
Ms Katherine Louisa Field	Member Evaluation Committee

Preferred Bidder – EMDP (Lot 1)

Perit Mariello Spiteri	Representative
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Preferred Bidder – Open Work Studio (Lot 2)

Dr Matthew Cutajar	Legal Representative
Perit Joanna Spiteri Staines	Representative

Preferred Bidder – Perit Samuel Formosa (Lots 3 & 4)

Perit Samuel Formosa	Representative
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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.

At this stage the Secretary of the Board wished that it be recorded that one of the Evaluators on this tender was his daughter. The Chairman pointed out that the Secretary is not a voting member of the Board and asked if there were any objections to him continuing to participate in the meeting. There were no objections.

It was agreed by all parties present that since the appeals and the reasoned replies were all similar on all four lots the hearings will take place concurrently.

Dr Alessandro Lia Legal Representative for AP Valletta requested that a witness be heard first.

Ms Penelope Ciangura (71873M) called as a witness by the Appellant testified on oath that she was a member of the Technical Evaluation Committee (TEC) and was involved in, and explained in detail, the purpose of the Clarification note 8, issued on 17th September 2021. The TEC preferred bidders to list completed contracts but projects up to € .5 million could be considered if they fell in with the stated time period. Appellant failed to provide information or evidence of value of projects as at December 2020 – so the TEC had only information on the overall value of the projects. The submissions were only on ongoing projects with no reference to completed works and disqualification was based on this point. The value of relevance was the value of the contract as at December 2020. Since this came under Note 2 the TEC requested clarification regarding ongoing projects and the reply from bidder was to refer the TEC to clarification no.8. The TEC did not ask for clarification regarding the value of the projects as at December 2020, since the tender only asked for completed projects which the bidder did not offer, unlike all other bidders who complied on this point.

In reply to questions by Perit Mariello Spiteri, Representative for EMDP, witness stated that the proof the TEC required was evidence of the work carried out as at December 2020. In their letter of the 21st October 2021 Appellant only provided the value of the full projects not the value carried out. The projects were all included in the ESPD in their full value – since the clarification was not replied to it made bidder non-compliant.

This concluded the testimony.

Dr Lia said that it is clear that today's statements were made with the benefit of hindsight. The letter from the Authority did not state the reason for disqualification – when asked to rectify it only stated that it was invalid, not that there was some information missing. The reason was only stated in today's evidence thus the Appellant had been misguided. The reply in clarification no. 8 was that ongoing projects would be accepted and there was no choice on the Authority to accept or reject. The wording in Note 2 clearly states "incorrect or incomplete". Appellant was misguided and there has been a play with semantics on the definition of 'can' or 'shall'. The tenders should be re-evaluated as the invalidity claim on submissions only surfaced today. The ongoing project by AP Valletta are all well before December 2020 and the indicated value, though not completed was well in excess of the half-million required.

Dr Matthew Cutajar Legal Representative for Open Work Studio insisted that the parameters were clear from the very beginning and they were clear and not in need of interpretation. If one looked at the evaluation grid in the tender one would realise the low material impact on the tender that Appellant's bid enjoyed.

Perit Mariello Spiteri said that the clarification of 17th September 2021 obliged tenderers to identify the amount of ongoing work on projects up to December 2020 and is very clear. Section 5 of the tender requests identification of clients to enable the TEC to do their checking – in this case these details were not provided and therefore the bid was not compliant. Accepting these shortcomings was detrimental to the other bidders who abided fully by the requirements. There is no point in a re-evaluation as it prejudices other bidders and only favours one party. The TEC acted correctly.

Perit Samuel Formosa representing himself agreed fully with the comments of Perit Spiteri.

Dr Charlon Gouder Legal Representative for the Teatru Manoel said that the tender document is a contract. What the Authority requested is clear and Appellant claim that the TEC was acting in hindsight is not sustainable as they always acted within the terms of the tender. The tender requested projects between two set dates within a certain capping figure and it was clear and precise what was required. The Authority stated that they would consider ongoing projects in line with the tender requirements and hence there was no misguiding. The tender requested definite capping and this was very clear. In Case 1339 the Board held that a clarification must sustain what is stated in the tender. The Appellant indicated aggregate value of projects, and was placed quite low down in the qualification list and it does not justify their claim to re-evaluate.

Dr Lia said that it appears as if there is an attempt to move the goal posts. The submissions heard today are on refusal to accept ongoing projects with the Authority playing on the use of the word 'can'; but this is all done in hindsight and these submissions must be discarded. The reference to case 1339 is not correct as in that Case the clarification prejudiced the appellant not *vice-versa*. Today's clarification gave the Appellant additional rights which according to today's submissions had led to the refusal of the bids. Re-evaluation would not prejudice any party.

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 10th March 2022.

Having noted the objection filed by AP Valletta (hereinafter referred to as the Appellant) on 31st January 2022, refers to the claims made by the same Appellant with regards to the tender of reference CT2244/2021 listed as case No. 1694 in the records of the Public Contracts Review Board.

Appearing for the Appellant:

Dr Veronique Dalli, Dr Alessandro Lia &

Dr Andrew Saliba

Appearing for the Contracting Authority:

Dr Charlon Gouder

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

- a) Reason provided in Rejection Letter is as follows:

“Thank you for participating in the above-mentioned tender procedure. However, I regret to inform you that the offer submitted by your company was found to be Admin non-compliant as follows:

Lot 1

A rectification was issued on the 12th of October 2021. No information related to completed projects between 2016 and 2020 amounting to €500,000 value as per section 1 Clause 5(c) (i) (a) Technical and Professional Ability. Furthermore, no client name and email addresses were submitted.”

- b) Reason provided essentially deals with Clause 5 (c) (Technical and Professional Ability) which states:

For Services Contract: performance of services of the specified type: List of principal services (as per ESPD tender response format) of a similar nature being the design and construction project management of Historical Buildings Related Projects as follows to substantiate the below. This information shall be included in the online ESPD form in Part IV: Selection criteria - Technical and professional ability:

a. State the value of Architecture and Structural Engineering services in Historical Buildings Related Projects of a similar nature as described above completed during the last five (5) years (being 2016 - 2020): the minimum value of the aggregate related works project must not be less than €500,000 in total for the quoted period. A breakdown for each (including overall project value and end client details) must be provided in table format below.

b. State the number of Construction Project Management services in Historical Buildings Related Projects of a similar nature as described above effected during the last five (5) years (being 2016 - 2020): the minimum number of which must be at least one (1) in Historical Buildings Related Projects for the quoted period. A breakdown for each (including overall project value and end client details) must be provided in table format below.

- c) Notwithstanding the words “completed during the last five (5) years (being 2016-2020)” in the clarification letter of 17th September 2021 (Clarification Question 8), it was stated:

Question No 8: Eligibility criteria: are ongoing projects valid?

Answer No. 8: If proof can be submitted that the ongoing projects within the last five (5) as indicated in Section 1, Clause 5(C), these can be considered valid. Otherwise kindly abide by the requirements in the specific clauses.

Hence, it is clear when the Contracting Authority replied “ongoing projects” in the last 5 years are considered as valid.

This Board also noted the Contracting Authority’s Reasoned Letter of Reply filed on 8th February 2022 and its verbal submission during the virtual hearing held on 10th March 2022, in that:

- a) The reply provided in the clarification request of 17th September 2022 was clear in that it didn’t mention that ‘ongoing projects’ will be considered valid. The reply was “these can be considered valid” and not “these shall be considered valid”

Clause 5(c) was clear in that “*State the value of Architecture and Structural Engineering services in Historical Buildings Related Projects of a similar nature as described above **completed** during the last five (5) years (being 2016 - 2020): the minimum value of the aggregate related works project must not be less than €500,000 in total for the quoted period. A breakdown for each (including overall project value and end client details) must be provided in table format below.*” (bold & underline emphasis added)

It was clear and unambiguous that completed projects had to be submitted.

- b) After the clarification request of 17th September 2021, a rectification request was subsequently issued whereby the appellants were provided with a further 5 days to reply. The appellant replied on 15th October 2021 stating they re-confirmed the reply provided in the clarification request no.8.
- c) Finally, the Appellant company failed to provide a list of completed projects in terms of clause 5(c)

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 witness duly summoned, will consider Appellant’s grievances, as follows:

Initially, this Board will summarise the main relevant facts of the case.

1. Section 1 Clause 5(c) (i) (a) Technical and Professional Ability of the Tender Dossier states: “*State the value of Architecture and Structural Engineering services in Historical Buildings Related Projects of a similar nature as described above **completed** during the last five (5) years (being 2016 – 2020): the minimum value*” (bold emphasis added)
2. On 17th September 2021 a clarification note was issued by the Department of Contracts.
“*Question No 8: Eligibility criteria: are ongoing projects valid?*
Answer No 8: If proof can be submitted that the ongoing projects within the last five (5) as indicated in Section 1, Clause 5 (c), these can be considered valid. Otherwise kindly abide by the requirements in the specific clauses.”
3. On 12th October 2021 a rectification note was issued by the Contracting Authority whereby:
Point 5 “*Please refer to ‘State the number of Construction Project..... Your submission of ‘Construction Project Management services in Historical Buildings Related Projects’ is non-compliant **as it only includes ongoing projects**. You are kindly requested to rectify your position by submitting the above-mentioned information*” (bold emphasis added)
4. A Rejection Letter was issued by the Department of Contracts on 21st January 2022 which stated
“*A rectification was issued on the 12th October 2021. **No information related to completed projects** between 2016 and 2020 amounting to €75,000 value as per section 1 Clause 5 (c)(i)(a) Technical and Professional Ability. Furthermore, no client name and email addresses were submitted.*” (bold emphasis added)

This Board will now enter into the analyses of the merits of this case.

- a) It is this Board's opinion that the tender dossier is clear and unambiguous in its requirement that it required "Completed" projects to be listed as per Section 1 Clause 5 (c)(i)(a) Technical and Professional Ability.
- b) However, the Evaluation Committee, through its clarification note of 17th September 2021, allowed submissions to include 'ongoing' projects with the proviso that 'proof' had to be submitted. Hence, it is this Board's opinion that through this Clarification note, 'ongoing projects' are to be deemed acceptable. Otherwise, the Evaluation Committee should have simply responded that prospective bidders are to abide with the requirements of the 'original' tender dossier.
- c) The prospective bidder, now Appellant, AP Valletta, did in fact provide within his submission, information relating to 'ongoing projects', as he was eventually allowed to do so as per the Clarification Note of 17th September 2021.
- d) This Board, in fact, cannot understand as to why, the rectification request of 12th October 2021 "re-requested" information relating to 'completed projects', when it was the same Contracting Authority that allowed submissions of an 'on going' nature just a mere three weeks prior, i.e. on 17th September 2021.
- e) Moreover, reference is made to the testimony under oath of Ms Penelope Ciangura, whereby she explained that the reason for rejection, according to the Evaluation Committee, was that the value of the projects submitted by Appellant were of values representing 'completed' projects rather than the value of "works-in-progress" as at 31st December 2020. However, this Board opines that neither the Rectification Request and neither the Rejection Letter mention this point.
- f) It is hence, this Board's opinion that the Appellant was misguided by the Contracting Authority. He was first allowed to submit information that related to projects of an 'ongoing' nature and was then deemed non-compliant for doing so. Once prospective bidders were allowed to provide information on projects which were still 'ongoing' it is inconceivable for them to be eliminated from the tendering process for abiding by the same rules adopted by the Contracting Authority.

Therefore, this Board will uphold Appellant's grievances.

In conclusion this Board;

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

- a) To uphold the Appellant's concerns and grievances;
- b) To cancel the 'Notice of Award' letter dated 21st January 2022;
- c) To cancel the Letter of Rejection dated 21st January 2022 sent to AP Valletta;
- d) To order the contracting authority to re-evaluate the bid received from AP Valletta in the tender through a newly constituted Evaluation Committee composed of members which were not involved in the original Evaluation Committee, whilst also taking into consideration this Board's findings;
- e) after taking all due consideration of the circumstances and outcome of this Letter of Objection, directs that the deposit be refunded to the Appellant.

Mr Kenneth Swain
Chairman

Mr Lawrence Ancilleri
Member

Mr Richard Matrenza
Member