

PUBLIC CONTRACTS REVIEW BOARD

Case 1726 – SPD8/2021/160 – Services Tender for the Provision of Consultancy Services for a Strategic Environmental Assessment and an Appropriate Assessment for the National Spatial Strategy

20th May 2022

The Board,

Having noted the letter of objection filed by Mr Adrian Mallia and Ms Rachel Xuereb acting for and on behalf of Adi Associates, (hereinafter referred to as the appellant) filed on the 25th March 2022;

Having also noted the letter of reply filed by Mr Kevin Portelli acting for the Planning Authority (hereinafter referred to as the Contracting Authority) filed on the 4th April 2022;

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

Having noted and evaluated the minutes of the Board sitting of the 17th May 2022 hereunder-reproduced;

Minutes

Case 1726 – SPD8/2021/160 – Tender for the Provision of Consultancy Services for a Strategic Environmental Assessment and an Appropriate Assessment for the National Spatial Strategy

The tender was issued on the 16th December 2021 and the closing date was the 27th January 2022. The value of the tender, excluding VAT, was € 100,000.

On the 25th March 2022 Adi Associates Environmental Consultants Ltd filed an appeal against the Planning Authority as the Contracting Authority objecting to their disqualification on the grounds that their bid was deemed to be technically not compliant.

A deposit of € 500 was paid.

There were four (4) bids.

On the 17th May 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Ms Stephanie Scicluna Laiviera as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Adi Associates Environmental Consultants Ltd

Mr Adrian Mallia	Representative
Ms Rachel Xuereb	Representative

Contracting Authority – The Planning Authority

Mr Kevin Portelli	Chairperson of the Evaluation Committee
Ms Carmen Galea	Secretary Evaluation Committee
Perit Christopher Borg	Member Evaluation Committee
Perit Joseph Scalpello	Member Evaluation Committee
Ms Michelle Borg	Member Evaluation Committee
Mr Keith Capello	Representative
Mr Marco Attard Portughes	Representative

Preferred Bidder – Epsilon Malta Ltd

Dr Jonathan Thompson	Legal Representative
Dr Paula Briffa	Legal Representative
Mr Marc Bonazountas	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.

Ms Rachel Xuereb Representative for Adi Associates Environmental Consultants Ltd stated that the Contracting Authority had highlighted two points as the basis for the disqualification of their bid. The additional environment assessment required in Stage 2 was in fact present in the report and Appellant did not ignore the strategic options. The submitted proposal stated that bidder was willing to discuss the submission with the Authority. Bidder's experience in environmental assessments seems to have been ignored despite the fact that the tender requested experience which was obvious in the way the bid was compiled – the Covid mitigation being one example. Reference was made to various criteria were points were deducted and where Appellant disagreed with the Evaluation Committee's (TEC) decision as detailed in their written submissions.

Mr Kevin Portelli Chairperson of the TEC said that experience was not a requisite in this tender and this was clear from the set criteria.

Perit Christopher Borg, a Member of the TEC stated that Stage 2 was totally ignored throughout the Appellant's bid. The Authority required this Initial Environment Report to be delivered by Month 7. The study is meant to be a guide for Government to choose its options but the submission by the bidder is only one component of the study. Page 20 of the tender makes it very clear what is required and this was overlooked. The Gantt chart offered confuses the reports to be submitted and the submission omitted one of the key deliverables.

The Authority expected Appellant's experience to be translated in the submissions of the present tender. The main fault however was that Stage 2 was completely ignored.

Dr Jonathan Thompson Legal Representative for Epsilon Malta Ltd said that the TEC had to follow what was requested in the tender dossier. The implication is that the Appellant had to provide other documents to satisfy the tender.

Ms Xuereb contented that it was factually wrong to state that the Appellant omitted the Environmental Report as this was clearly referred to on their submission.

Perit Borg pointed out that if one looked at the Gantt chart one can see the confusion of reports and the omission of the Stage 2 report – the requirements of Month 7 were shifted to Month 19.

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 17th May 2022.

Having noted the objection filed by Adi Associates (hereinafter referred to as the Appellant) on 25th March 2022, refers to the claims made by the same Appellant with regards to the tender of reference SPD8/2021/160 listed as case No. 1726 in the records of the Public Contracts Review Board.

Appearing for the Appellant:

Mr Adrian Mallia & Ms Rachel Xuereb

Appearing for the Contracting Authority:

Mr Kevin Portelli & Perit Christopher Borg

Appearing for the Preferred Bidder:

Dr Jonathan Thompson

Whereby, the Appellant contends that:

a) We are not in agreement with the points assigned to us and the justification of those points per Sub-Criterion (with the exclusion of Sub-Criterion D - key experts). In Table I below we provide a counter argument to the points assigned to us for each Sub-Criterion.

i. Sub Criterion A - Strategic Alternative Options;

In the requirements of Sub-Criterion A there is no mention of the 3 Strategic Alternative Options as a requirement to be fulfilled. The criterion clearly requested that the consultants show understanding of the SEA and AA processes, and the Evaluation Committee Justification confirms that our proposal demonstrated such understanding. The Alternative Options are only one component of the SEA that is being singled out by the Authority when there was no specific requirement to do so in the bid. The submission of the Strategic Options Report is acknowledged in the text provided by Adi Associates in its bid under Sub-Criterion G and Sub-Criterion B, and an Alternatives Assessment, including reasons for selecting specific alternatives, is clearly outlined in Sub-Criterion E.

ii. Sub Criterion A - Communications Plan:

The Evaluation Committee Report states that "information on the communication plan is lacking". The Tender did not request the submission of a Communications Plan but simply to "demonstrate the Consultant's ability to draw up a Communications Plan..." Our tender bid provides the framework to undertake consultation in accordance with all the requirements of the SEA Regulations. The following information is available in the Communications Plan presented in the Tender Bid: 1. Stakeholder consultation at both Scoping Stage (not a legal requirement) and Environment Report Stage (a legal requirement) with reference to the SEA Regulations. 2. The Strategy to dovetail consultation on the SEA and the Plan so that there is no repetition. 3. Transboundary consultation as required by the Regulations.

We contend that we have adequately demonstrated our ability to draw up a communications plan, including through evidence from previous such stakeholder engagement programmes that we have successfully undertaken, in some cases over a 12-month period and including international award-winning stakeholder engagement programmes. In fact, the Evaluation Committee commented on this but rather than acknowledging our ability in this regard, as requested in the Terms of Reference, this information was dismissed as not a communications plan, which we reiterate, was not a requirement of sub-Criterion A (point 3).

iii. Sub Criterion B – Assessment of Key Issues

Nowhere in the requirement of Sub-Criterion B was it required to place emphasis on the 3 Strategic Options. The Strategic Options are one of the many components of the SEA process. The bid provided what the criterion required: in point 1 monitoring of the contract in line with the expertise and timeframes and in point 2 - suggestions to improve the results. It is unclear why the Authority is placing emphasis on the 3 options when this was not a requirement in the evaluation criteria. It is also unclear how 5 out of 10 points were awarded when the bid clearly addressed both requirements of the criteria. If the Authority wanted emphasis on the Strategic Options, then this should have been made clear in the criteria for assessment.

iv. Sub Criterion C – Risk Analysis and Mitigation

With regards to sub criterion C item 1 and in accordance with the requirements of the evaluation criteria the consultants provided (1) an assessment of the risks listed in the Tender and (2) other risks. The tender bid also provided a risk ranking. The risk assessment has been carried out based on our extensive experience in undertaking SEAs in the Maltese Islands and abroad, as follows: (a) SEA of the CAP Strategic Plan (ongoing), (b) SEA of the Transport Strategy and Master Plan, (c) SEA of Malta's Rural Development Programme 2014-2020 (also accepted by the European Commission; (d) SEA of Malta's Operational Programme 2014-2020

(also accepted by the European Commission), (e) SEA of Malta's Operational Programme 2007-2013 (also accepted by the European Commission), (f) SEA of Malca's Energy Policy, (g) SEA of Malta's Aquaculture Strategy, (h) SEA of Malta's Solid Waste Strategy, (i) SEA of Malta's National Water Policy, (i) SEA of Malta's Fisheries Operational Programme 2007-2013 (also accepted by the European Commission) and the (k) SESA of the Land Development Control Plan 2012 -2022 of St Helena Island, approved by the Government of St Helena. In itself the SEA process is not a risky process, and our SEA experience of over 16 years has shown that communication with the Contracting Authority is key to addressing risks at the early stages of the Contract. For the Authority to deduct points because risks are classified as low, when this is based on our experience over several SEAs, is considered unjustified. In terms of deliverables the main deliverables of the process are the Scoping Report and the Environmental Report (with the latter being the key deliverable). Both are mentioned in the Risk Table presented in our bid. For the Authority to deduct points on this basis is again considered unjustified. In terms of the mitigation plan, as requested in Item2 of the criteria, all the risks have been identified and suitable mitigation proposed. It is noted that the SEA process is not a complex one and having a strong and experienced team as presented in our bid mitigates most risks. In addition, our proposed approach for full collaboration with the Authority mitigates other risks identified both in the tender bid and in our proposal. For the Authority to deduct points on the mitigation measures when these have been adequately described is considered unjustified.

v. Sub Criterion E

It is unclear why the description was scant when the tender bid provided 9 pages of detailed methodology on how both the SEA and AA will be carried out, This methodology is in accordance with both the Tender requirements and the SEA Regulations / AA best practice and is the methodology we have used over the past 16 years for the SEAs prepared nationally and internationally and that have all been accepted by local and international bodies including the European Commission (for the SEAs of funding programmes). With regards to the limit of one week for reviewing, this is obviously subject to agreement with the Authority and was only given as indicative so that tender timeframes are met. The Work Plan presented in Sub Criterion G response is draft - which shows that timeframes are not cast in stone and are amended in agreement with the Authority – as noted in our risk plan where at the kick off meeting such issues are discussed. The evaluation states: Indication that no new surveys will be carried out is too restrictive. It is noted that this SEA is required at a national level and includes both terrestrial and marine components of Malta's territory. At this level only nationally available data is used such as statistics, maps, reports, etc. Surveys are not carried out because these would have to be done on a national level and it is beyond the scope and budget of any SEA to carry out such surveys. The same holds for the Appropriate Assessment, which looks at the impacts of the Strategy on the integrity of the protected areas, data for which already exists. Therefore, the Committee's comment that "Indication that no new surveys will be carried out is too restrictive", is factually incorrect because at this level no environmental surveys can be carried out. In conclusion, for the Evaluation Committee to deduct points on the above issues which were amply addressed in our bid is considered unjustified.

vi. Sub Criterion F

It is unclear why full marks were not awarded here when the bid proposed a quality assurance proposal addressing 13 points to ensure quality of the outcomes. Additionally, a list of all support facilities was provided. Indeed the Evaluation Committee's report states that (i) quality Assurance is guaranteed, and (ii) Adequate resources will be made available. It is therefore unclear what is missing and why points were deducted.

vii. Sub Criterion G

The tender bid for Sub Criterion G explains the steps of the AA and SEA processes as per the tender requirements. It explains how both the SEA and AA will be carried out and how the project will be delivered successfully. Major milestones, which are mostly deliverables, are clearly identified and their timing indicated and linked to reports, where applicable. It is unclear what else the Authority required when the bid provides a

clear explanation of how delivery of the reports will be staggered to allow sufficient turnaround time for quality assurance by PA, including regular update meetings. With regards to the Gantt chart, it is not true that the Gantt chart excludes the initial SEA on options. Reference is made to Row 13 of the Draft Work Plan submitted in our bid, entitled Draft Environment Report due to be submitted in Month 7 as required by Section 2.3 Deliverable 2.2 of the Tender Document. The Gantt chart also includes public consultation as indicated in Row 21 entitled Implementation of the Communications Plan and as shown in the milestone entitled Public Consultation Report due in Month 23 as required by Section 2.3 Deliverable 2.7 of the Tender Document. It is therefore unjustified that points were deducted on the basis of information not included when this information is found in the draft Work Plan. Additionally, if the Evaluation Committee was unclear on items of the Work Plan a clarification request could have been sent to the Tenderer to clarify these items.

- b) The Evaluation Committee did not request clarifications on our technical submission and interpreted our proposal wrongly (see for example Sub-Criterion G - Timing of Activities).
- c) Our bid was based on our extensive experience carrying out SEAs in Malta and abroad. We have been working on sectoral and land use SEAs since 2006 when the first Plans and Programmes required an SEA in Malta, All our SEAs have been accepted by the local or national SEA Focal Point (as the case may be) and for those SEAs that had to go to the European Commission, these were accepted too. It is therefore unclear to us how our bid failed to be technically compliant when our detailed proposal addressed each Sub Criterion.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 4th April 2022 and its verbal submission during the virtual hearing held on 17th May 2022, in that:

- a) In the tender document Section 3 - Terms of Reference, Clause 4.2, Table 1, the Contracting Authority clearly specified the main tasks which are required to be carried out in relation to the National Spatial Strategy (NSS). Apart from the SEA and AA requirements of the draft NSS, the Contracting Authority requested an additional environment assessment (Stage 2 by Month 7, Initial Report of the SEA Environment Report) for the preliminary stage before the drafting of the NSS kick-starts. This deliverable is distinct from the normal SEA procedures adopted on a draft policy (please refer to Stages 3, 4 and 5 of Table 1). In their bid, ADI Associates, while stating that they have the required experience to tackle Stages 1, 3, 4 and 5, they have ignored Stage 2 throughout their bid.
- b) The estimated budget for this tender was less than €500,000 and as such the Contractor's experience could not be adopted as a Selection Criteria. As such, no points could be deducted or awarded on the basis of experience. Throughout their bid, ADI Associates referred to their experience as proof of their ability to deliver this contract and left out the detailed explanations that were expected by the Contracting Authority.
- c) Sub Criterion Analysis:
 - i. Sub Criterion A - This sub criterion is intended for the bidder to demonstrate the degree of understanding of the required work. The Tender TORs clearly and specifically call for the stand-alone task to undertake an SEA of the three strategic options to enable government to choose 1 option on which to prepare the NSS and then

an SEA of the National Spatial Strategy itself. The bidder failed to comprehend that there are two distinct requirements being called for. Reference to the deliverable needed to be clearly made in Sub criterion A. The systematic approach for bid evaluation was transparent and therefore bidders were expected to provide necessary information in the input for the respective sub-criteria. Points cannot be afforded for information provided in other parts of the submission. The appellant states that the TORs did not request the submission of a Communication Plan. Section 3 of the Tender - Clause 2.3 Deliverable 3.1: *“Draft Communications Plan complying with the requirements of the Laws of Malta vis-à-vis the Strategic Environment Assessment. The plan should ensure effective stakeholder involvement, community participation and publicity, and identify the relative costs by month 1..”* Furthermore, referring to previous experience in carrying out consultations is not the same as demonstrating how the Communication Plan for the specific requirements of the tender is to be carried out (in this case both for the Interim SEA Report and then for the SEA of the NSS including SEA FP, stakeholders, designated authorities and public).

- ii. Sub Criterion B - The appellant did not capture the difference between the stages of assessment being asked in the TORs with regards to SEA. In the TORs, reference to the environmental assessment of the 3 options is clearly marked as a distinct step/task from the Draft Environment Report for the SEA Of the draft NSS. The appellant claims that as it is not a legal obligation in the SEA regulations and therefore seem to dismiss it, when in actual fact, even though it is not a legal requirement it is still a Tender requirement.
- iii. Sub Criterion C - With regards to risks and mitigation the appellant refers once again to previous experience as referred to in the bid. The evaluation committee awarded points according to the information provided. As no substantial justification to back the statements provided was given, the evaluation committee could not and did not award points on statements referring to previous experience.
- iv. Sub Criterion E - With regards to implementation strategy the Evaluation Committee believes that missing out the crucial step to prepare the Initial Environment Report at this stage reflects a lack of appreciation of what the tender is requiring. Previous experience could have been translated into a sound description of methods to be adopted for project management - a simple reference to outlook calendar is not considered as sound project management. With regards to the claim for no new surveys, whilst the Evaluation Committee is aware that no new data is normally collated for SEAs, this is not the case for AAs. In particular the Evaluation Committee believes that (i) this approach is dismissive of the possibility that the new NSS may introduce a policy framework for development that is innovative/whose environmental impacts have never been assessed and (ii) environmental conditions may have change/may change until the drafting of the NSS itself. By dismissing the need for new data at this stage is considered as prejudicing the procedure.
- v. Sub Criterion F - With regards to quality assurance and support facilities, the Evaluation Committee awarded points on the basis of statements made in the bid. Details on the methodological approaches to be adopted was missing.
- vi. Sub Criterion G - The Gantt (sic) Chart refers to Draft Env Report in month 7 and final environment report in month 23. The TORs clearly specify the need for an Initial Environment Report by month 7 which is focused on the 3 strategic options NOT the NSS, a Draft Environment Report by month 19 and the final environment report by month 23. There is a clear illustration that the appellant did not clearly understand what the TOR requirements were. The Evaluation Committee is of the understanding that there was ample time for potential bidders to request for clarification prior to deadline of submissions.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties, will consider now Appellant's grievances.

The Board notes:

- a) That the Criteria for Award of this tender are as per article 6.1 of Section 1 of the tender dossier which stipulates "*The contract will be awarded to the tenderer submitting the offer with the Best Price/Quality Ratio (BPQR)*" The BPQR was established by weighing technical quality against price on a 60/40 basis respectively. Hence this Board notes the 'greater' emphasis placed by the Contracting Authority on the Technical aspect of the prospective bids.
- b) That the tender dossier has been drafted in great detail. The Board makes specific reference to Section 6.2 of Section 1, namely the 'Evaluation Grid' on page 9 of the tender dossier. This specific section, in the Board's opinion vastly reduces the risk of subjectivity on the Members of the Evaluation Committee.
- c) Although the Board notes the high technical input provided by both parties during the hearing, the matter at hand is still one of procedure and whether the evaluation committee proceeded in line with normal praxis, followed the relevant regulations and public procurement procedures.
- d) This Board opines that what emerges from "*Table 1: Adi Associates' Counter Arguments to Evaluation Committee Scores*" found in the objection letter of the Appellant filed on 25th March 2022 and the reply of the Contracting Authority in "*Evaluation Committee Feedback*" found in the reasoned letter of reply filed on 4th April 2022, is that the Appellant's bid, even though it meets certain criteria required in the tender dossier, lacks in quality and details.
- e) That the evaluation as carried out by the Evaluation Committee was not subjective. As stated on numerous occasions by this Board, in the BPQR method of evaluation, the Evaluation Committee is to be 'afforded' an element of '*leeway*' in the way it proceeds with its business of evaluation. It is after all their main responsibility for such an appointment in this respective committee. This element of '*leeway*' needs to be exercised "*...in a professional, detailed and meticulous manner and always within the remit of the Public Procurement Regulations and the specific Tender document in question.*" (PCRB Case Ref: 1577) "*Hence the Evaluation Committee still must proceed with the appropriate diligence in full cognisance of its rights, powers, duties and obligations.*" (PCRB Case Ref: 1583) In this regard, the Board opines that no specific evidence has been brought forward to show the contrary.

Finally, the Board, does not uphold the Appellant's grievances.

The 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

Ms Stephanie Scicluna Laiviera
Member