

PUBLIC CONTRACTS APPEALS BOARD

Case no 237

Adv No CT/A/011/2010; CT/3038/2010

Supply and Service Tender for the installation commissioning and operation of environmental monitoring equipment and data gathering, supply and analysis at Hal Saflieni Hypogeum.

This call for tenders was published in the Government Gazette on 16 April 2010. The closing date for this call for offers was 27 May 2010.

The estimated value of this tender was Euro 223,245.

Two (2) bidders participated in this tender.

On 16th July 2010, AIS Ltd filed an objection against the award of Lot 1 of this tender to Evolve Ltd, after being informed that their offer was not technically compliant in view of Item 1 – Temperature and Relative Humidity Sensors (35 units): sensors offered do not incorporate warmed probe technology as requested in the tender document.

The Public Contracts Appeals Board composed of Mr Edwin Muscat as Chairman and Mr Carmel J Esposito and Mr John Buhagiar as members convened a public hearing on Friday, 29th October 2010 to discuss this objection.

Present at this meeting:

AIS Ltd

Dr Ian Spiteri Bailey	Legal Representative
Ing Mario Schembri	Managing Director
Mr Anthony Bartolo	Representative
Mr Bernard Brincat	Representative
Mr Michael Lebron	Representative/Consultant

Evolve Ltd

Dr Peter Caruana Galizia	Legal Representative
Mr Christopjer Busuttil	Representative
Mr Lawrence Zammit	Representative

Heritage Malta

Dr Patrick Valentino	Legal Representative
----------------------	----------------------

Evaluation Board

Mr Anton Catania	Chairman
Mr Ray Jones	Secretary
Ms Claire Baluci	Member
Ms Maria Elena Zammit	Member
Ing Joseph Bartolo	Member
Mr Mario Galea	Member
Mr Charles Zerafa	Member

Department of Contracts

Mr Francis Attard	Director General
-------------------	------------------

After the Chairman's brief introduction appellants were invited to give a brief account of the motives of their objections.

Dr Ian Spiteri Bailey, legal adviser to AIS Ltd, explained that by letter dated 9th July 2010, the Contracts Department informed his client that (a) his offer (AIS submitted an offer for Lot 1 only) was not technically compliant with regard to Item 1 – Temperature and Relative Humidity Sensors (35 units); sensors offered do not incorporate warmed probe technology as requested in the tender document, and (b), the said lot was recommended for award to Evolve Ltd.

Dr Spiteri Bailey submitted that there appeared to have been a breach of the requirements of Clause 34(2) of the tender document insofar as the letter sent to AIS Ltd by the Contracts Department, dated 9th July 2010, did not contain all the prescribed information such as, “the criteria for award” or “the score obtained by the unsuccessful bidder and the score of the successful bidder” as specifically required in sub-paragraphs (i) and (iv) of Clause 34(2). He contended that even if, for the sake of argument, his client was awarded no points with regard to technical specification which attracted 10% of the marks allocated to Technical Criteria in respect of Lot 1, there still remained 90% of the marks available. Thus, AIS Ltd could still have obtained 70% of the marks under technical criteria that were necessary for them to qualify for the next phase, i.e. the financial evaluation of the offers.

Dr Patrick Valentino, on behalf of Heritage Malta, remarked that once the appellant failed to qualify under the technical criteria, the Adjudicating Board could not allocate the appellant any score in that regard. Dr Valentino stressed that once the appellant did not offer the product requested in the tender document, the offer was discarded at technical evaluation stage and could not therefore proceed to the financial evaluation stage.

Dr Spiteri Bailey then proceeded to air another grievance. He stated that the Adjudicating Board had sought clarifications from his client via email, in terms of Clause 29 (2) of the tender document, regarding what turned out to be the main reason for rejection. AIS Ltd were asked to highlight where the technical specifications including details were in the submitted documentation. He stressed that this clarification was sent by email on the 4th June 2010 to an incorrect email address, namely, info@ais.com.mt which is the generic email address of AIS Ltd, rather than

the email address of Mrs Odette Schembri i.e. odette.schembri@ais.com.mt who was identified as the contact person in the tender form.

Dr Spiteri Bailey remarked that, as a consequence of this error, no action was taken by his client on that email. He added that 31 minutes prior to closing time for submission of clarifications, the contracting authority contacted his client, this time through the correct email address informing him that the Adjudicating Board was still awaiting his reply. Dr Spiteri Bailey complained that as a result of the Adjudicating Board's failure and in view of the limited time afforded to AIS Ltd, the latter had no opportunity to adequately clarify his position vis-à-vis the humidity sensors.

In his reaction, Dr Valentino stated that both email addresses referred to by Dr Spiteri Bailey had been furnished by the appellant in his tender submission – one in the “Details of Bidder” and the other in the “Tender Form”. It was the responsibility of the bidder to ensure the checking of emails received on the company's email addresses. Dr Valentino added that it was, therefore, not correct to blame the Adjudicating Board for sending the email to the wrong email address. In fact, when the closing time for reply drew near, the Board alerted the company that they had not as yet received any reply.

When referring to Warmed Probe Technology, Dr Spiteri Bailey stated that it was understood that such technology was only available from Vaisala Corporation. It was also understood that the warmed probe sensors' heaters consume considerable electrical energy that would result in a big drain on the inconspicuous battery packs that were required for installation on site. According to appellants, the utility and feasibility of warmed probe technology as required in the tender document was, at best, doubtful, even if one were to install a massive battery pack. In comparison the alternative sensor solution offered by AIS Ltd is in current use by major meteo organisations in the UK, Switzerland and France and it complies with tender requirements. He added that in terms of Regulation 45(3), a contracting authority cannot “reject a tender on the grounds that the products and services tendered for, do not comply with the specification to which it has referred, once the tenderer proves in his tender to the satisfaction of the contracting authority, by whatever appropriate means that the solutions which he proposes satisfy in an equivalent manner the requirements defined by the technical specifications”. Dr Spiteri Bailey maintained that the proposal submitted by his client meets the requirements defined by the tender technical specifications, so that, in terms of the above regulation, AIS Ltd's offer should not have been rejected.

Finally, he suggested that the exclusivity pertaining to Vaisala Corporation in respect of warmed probe technology seems to be contrary to the requirements of Regulation 45(6) of the Public Contracts Regulations which *inter alia* state that “contracting authorities shall not introduce into the contractual clauses --- technical specifications which maintain products of a specific make or source of a particular process or to trade marks, patents, types --- with the effect of favouring or eliminating certain undertakings of certain products”.

Ing Joseph Bartolo, member of the Adjudicating Board was then called to the witness stand.

In his evidence, Mr Bartolo explained, under oath, that the Hypogeum has unique environmental conditions due to the presence of water droplets and the number of people that visit the place. The purpose of this tender is to monitor the temperature and humidity at this site and hence, the requested 35 sensors are the most critical item in this tender. He added that the contracting authority requested warmed measurement technology probes. Whereas Evolve Ltd, the recommended bidder, offered this type of probes, AIS Ltd offered probes with “normal” or “standard” technology which do not meet the tender’s technical requirement. Ing Bartolo explained that the warmed probe technology, includes a small heater which functions intermittently. Once a sensor gets wet due to the amount of humidity at the site, the heater will switch on automatically to dry the sensor so that the latter will continue functioning, thus producing a continuous range of data on the environmental conditions at the site.

On the other hand, the “normal” type of sensor functions only for a couple of hours. When it gets wet with humidity, it will switch off for some time until it dries up by air convection currents and then it will start functioning again. This means that for a number of hours, no data will be obtained from such sensors. This is not what Heritage Malta required. Ing Bartolo added that it was evident to the adjudicating board that appellant did not offer the warmed probe technology in his tender submission, but to confirm that, a clarification was sought. In response, the appellant presented a copy of the same original document, meaning that he did not intend to offer the technology requested by the contracting authority. In fact, in his reasoned letter of objection, appellant conceded that “AIS Ltd accepts that its tender proposal did not contain the warmed probe technology.”

Ing Bartolo further explained that Evolve Ltd offered a product from the Vaisala range which provided the requested warmed probe technology. He added that this product was freely obtainable on the open market. On the other hand, appellant offered a Rotronic (Group International) product of the “normal” or “standard” type, even though this company had in its range of products heated sensors (Hygromer RS 70) which offered the required technology. Had AIS Ltd offered this latter type of sensor, the Adjudicating Board would have been in a position to compare the two products i.e. Vaisala and Rotronic RS 70 on a like-with-like basis. However, as things stood, the Adjudicating Board considered appellants’ offer (standard sensors) as unacceptable and decided not to proceed with its further evaluation. Ing Bartolo added that the 35 sensors were intended to be installed all over the Hypogeum site to gather and analyse continuous data on the environmental conditions of the site so as to determine what kind of air conditioning or dehumidifying systems were required. Normal type sensors fail to produce data for long periods of time. Ing Bartolo concluded by confirming that the sensors offered by both tenderers were battery operated that could also be connected to the main power supply when and where conditions permitted.

Ing Bartolo was followed by Ing Mario Schembri, Managing Director of AIS Ltd who explained under oath that the Vaisala probe was an option which his company did not consider fit for the requested purpose because according to an information sheet of the product, it resulted that “The HMP 155 warmed probe is heated continuously so that its temperature is always higher than that of the environment. This prevents

condensation on the probe”. The note also stated that “during the sensor heating, the outputs are locked to the values measured before the heating cycle”.

This meant that the probe would not function effectively during the time that the sensor was being heated, so that its performance was similar to that of the sensor that was being proposed by AIS Ltd. Since the warmed probe technology sensor did not provide effective continuous monitoring during the time the heater was switched on, then his conclusion was that both probes rendered the same performance. According to Ing Schembri, the solution was not the installation of warmed probe technology sensors but how to determine humidity by, for example, the installation of air conditioners or dehumidifiers. Ing Schembri added that the purpose of the tender was to provide as much as possible continuous monitoring with inconspicuous equipment in order to preserve the environment of the site. The sensors offered by AIS Ltd were slightly larger than the size of a mobile telephone. Besides, these sensors had a battery that would last 5 years and over instead of 3 years as required in the tender document.

Ing Bartolo intervened to state that according to the product information of the Vaisala warmed probe technology, when the sensor gets wet, it will be heated up in a matter of a few seconds and the sensor will become operational almost immediately.

Dr Valentino for Heritage Malta remarked that the contracting authority requested the warmed probe technology and that it was for the contracting authority to dictate what type of sensor was required and not the bidders.

Mr Mario Galea, principal conservator and member of the adjudicating board confirmed under oath, that the Hypogeum had a near condensation environment for most of the time with the result that normal sensors as the ones presently installed would get wet and stop functioning. When that happens, hand held sensors are used to keep the place under constant monitoring. He explained that the warmed probe technology is required to provide continuous monitoring because Heritage Malta is aware that the environmental conditions at the site tended to change due to various factors, such as the number of visitors on site. This continuous monitoring will provide the required data for the authorities to introduce measures for the proper conservation of the site by installing air conditioning and/or dehumidifying equipment and limiting the number of visitors at any one time. Finally, Mr Galea confirmed that the two types of sensors offered by the respective bidders had, more or less, the same visual impact on the site.

Mr Michael Lebron, technical consultant, on behalf of AIS Ltd explained under oath, that with regard to the Rotronic RS 70 sensor which utilises heated sensors similar to the Vaisala product, he was informed over the telephone by a supplier, Omni Instruments, that this sensor was still under development and that it would not be available for this contract. He also confirmed that the Vaisala product was considered but they opted against it, because of the cost and because it required high power to operate it. This would have entailed either frequent replacement of batteries or a larger battery pack. This latter option would have a negative visual effect on the site.

A further grievance put forward by Dr Spiteri Bailey concerned the tender price and budget. Dr Spiteri Bailey explained that the budget available for Lot 1 was fixed at a

lump sum of Euro 171,453 exclusive of VAT. He noted that the offer of the preferred bidder for Lot 1 amounted to Euro 209,083.54 inclusive of VAT. This works out at Euro 177,189.44 exclusive of VAT. Eventually, his client was informed by D.G. Contracts that Lot 1 of the tender was being recommended for award to Evolve Ltd for the price of Euro 171,448.50 excluding VAT and the price of Euro 51,789.97 exclusive of VAT for Lot 2. Dr Spiteri Bailey referred (i) to article 27.4 of the Tender Document which states that reductions/observations made by tenderers after submission of tender prices will not be taken into account during evaluation of Tenders, and (ii) to article 29.2 of the Tender Document which provides for exceptions when corrections (arithmetical errors) are allowed and (iii), article 31.2 which provides for adjustments made by the evaluation committee should first be approved by the General Contracts Committee, Dr Spiteri Bailey expected a valid explanation to account for the changes in the price offered by Evolve Ltd.

Mr Anton Catania, Chairman of the Adjudicating Board, under oath, explained that during the financial evaluation of Lot 1 of the offer made by Evolve Ltd, the Adjudicating Board noted that this bidder quoted two prices (as required in the tender document) – one, itemised which was inclusive of VAT (Euro 209,083.54), and the other, a lump sum which was exclusive of VAT (Euro 171,448.50). When the Board removed the VAT element from the first (itemised) figure, the resultant price, rather than tallying with the lump sum figure, came up to Euro 177,189.44, that is, a discrepancy of Euro 5740.94 between the two prices quoted by Evolve Ltd. This discrepancy was reported to the Department of Contracts.

Mr Francis Attard, Director General, Contracts Department, under oath, confirmed that (a) tender budget for Lot 1 was Euro 171.453 exclusive of VAT and (b) bidders were requested to quote prices (lump sum) exclusive of VAT. He also confirmed that the Adjudicating Board drew the attention of the Contracts Department that in the case of Evolve Ltd's offer for Lot 1, when the VAT component was deducted from the itemised price offered by bidder (Euro 209,083.54), the result came up to Euro 177,189.44. This price differed from that (Euro 171,448.50) also quoted as lump sum by the same bidder exclusive of VAT in the same tender offer. Mr Attard explained that the General Contracts Committee operated a procedure, which is rarely used, whereby it asks the preferred bidder whether he was prepared to reduce his offer to within the budgeted amount without altering the content of the tender. Following the recommendation of the Adjudicating Board, the General Contracts Committee decided to go for this procedure and asked Evolve Ltd, who in the case of Lot 1 were the preferred bidders, whether they were prepared to reduce their offer to Euro 171,448.50 exclusive of VAT without altering the content of the tender to be within the budget amount. Evolve Ltd, the preferred bidder agreed, and reduced their offer for Lot 1 to Euro 171,448.50 exclusive of VAT.

In his concluding remarks, Dr Spiteri Bailey insisted that the product offered by AIS Ltd met the requirements of the tender so that, on the basis of Regulation 45 of the Public Contracts Regulations, the contracting authority should not have rejected his client's offer. Dr Spiteri Bailey referred also to the grievances he had aired earlier, namely, the email for clarification that was erroneously sent to the wrong email address, the lack of transparency in the changes that were allowed in the price quoted by the preferred bidder and the fact that no account had been given as to how his

client's bid had fared with regard to the technical evaluation. Dr Spiteri Bailey concluded by stating that the whole process was neither correct nor transparent.

Dr Patrick Valentino, on behalf of the contracting authority refuted the conclusion reached by his counterpart. He reiterated that the hearing had established that the appellant was not technically compliant, a fact that was admitted by AIS Ltd in its reasoned letter of objection. With regard to the clarification, Dr Valentino insisted that it was sent on an email address given by the appellant and in this regard, the contracting authority went out of its way by contacting the appellant prior to closing time. Dr Valentino stated that the product offered by the preferred bidder was battery operated as requested in the tender document with the added advantage that it could also be operated on the main power supply.

Dr Peter Caruana Galizia on behalf of Evolve Ltd stated that it was evident that the appellant had not submitted the type of product requested in the tender and therefore there was no need for the contracting authority to seek clarification in that regard. Dr Caruana Galizia remarked that even in his reply to the clarification, the appellant stuck to his original submission and even went further to query the contracting authority's request for a product having the warmed probe technology. He stressed that on the other hand his client's product was compliant to the tender specifications.

At this point, hearing was brought to a close.

This Board

- having noted that the applicants, in terms of their reasoned letter of objection dated 28th July 2010 and also through their verbal submissions presented during the public hearing held on 29th October had objected to the decision taken by the General Contracts Committee.
- having considered the arguments brought forward by the appellant's legal adviser regarding the alternative technical solution offered by AIS Ltd particularly (i) in his understanding that Warmed Probe Technology was available only from one source, namely Vaisala Corporation, so that such exclusivity could perhaps infringe upon the requirements of Regulation 45(6) of the Public Contracts Regulations, and (ii), that the feasibility/utilisation of warmed probe technology as required in the tender document was at best doubtful because of the heavy consumption of electric current, which would cause a huge drain on the small battery pack as required in the tender document and (iii) that even if, for argument's sake, one were to install large battery packs (which are not acceptable because their size would prejudice the Hypogeum's visitor area), such packs would require very regular replacements that would increase running costs considerably and (iv) that his client's offer of an alternative solution should have been accepted under the provision of Regulation 45(3) if the Public Contracts Regulations.
- having also considered the claims brought forward by AIS Ltd's legal advisor regarding the lack of transparency and seriousness noted in the evaluation of this tender, namely: (i) the latitude allowed by the Adjudicating Board/General Contracts Committee for changes to the tender price of the preferred bidder (ii) the

breach of Article 34(2) of the Tender Document when the letter of 9th July 2010 sent by the Contracts Department to his client did not indicate the criteria for award and the respective scores obtained by the successful and unsuccessful bidders (iii) the very limited time (31 minutes) afforded to his client to clarify his position with regard to the sensors incorporating warmed probe technology as a result of an error committed by the Adjudicating Committee.

- having considered the Contracting Authority legal advisor's interventions and submissions particularly those regarding (a) warmed probe technology where Dr Valentino remarked that once the Contracting Authority opted for warmed probe technology, it was unacceptable for bidders to offer other technologies/solutions as AIS Ltd had done (b) the reason why the contracting authority had failed to provide the score obtained by AIS Ltd and (c) the explanation given by Mr Valentino regarding the wrongly addressed email.
- having taken note of Ing Joseph Bartolo's evidence where
 1. he explained the purpose of the tender
 2. he explained why the contracting authority opted for temperature and relative humidity sensors incorporating warmed probe technology
 3. he confirmed that whereas Evolve Ltd offered a Vaisala product that conformed wholly to the tender specifications, AIS Ltd had offered a Rotronic sensor that did not meet tender requirements
 4. he explained why the Adjudicating Board sought the clarifications from AIS Ltd
 5. he clarified that the Vaisala product was freely available on the open market so that there was no exclusivity regarding its supply
 6. he asserted that Rotronic Int. had in its range of products a heated sensor, Hygromer RS 70, that was equivalent to Vaisala warmed probe project
 7. he explained that had AIS Ltd offered the Hygromer RS 70, they would have met the tender requirements
- having taken note of the evidence given by Ing Mario Schembri, director of AIS Ltd who (i) stated that the Vaisala probe was an option which he did not take, (ii) raised a number of issues of a technical nature with regard to the Vaisala probe and (iii) asserted that the performance of his offer was similar to that provided by the warmed probe sensors
- having taken note of Ing Joseph Bartolo's intervention with regards to Mr Schembri's latest assertion
- having considered the evidence given by Mr Mario Galea, principal conservator of the Hypogeum and member of the adjudicating board who commented on the environmental problems being faced at the Hypogeum and the importance of effecting regular monitoring for the proper conservation of the site.
- having considered the evidence of Mr Michael Lebron, technical consultant on behalf of AIS Ltd who (a) remarked that according to information received by phone, the Rotronic RS 70 was still under development and (b) confirmed that the

Vaisala product was considered, but they opted not to offer it because of the cost involved.

- having also noted certain decisions concerning the tender price and the explanations give to account for such decisions particularly those given by Mr Anton Catania, Chairman of the Adjudicating Board and Dr Francis Attard, Director General, Department of Contracts.
- having taken note of Dr Peter Caruana Galizia on behalf of Evolve Ltd who amongst other issues he insisted that his client's offer was fully compliant unlike that of appellant who failed to offer the requested type of product.

reached the following conclusions, namely, that

1. The Contracting Authority was very specific when it drew up the technical specifications of this tender. The "standard" sensors the Authority is currently using at the Hypogeum are not giving the required results. Whenever these sensors get wet with the humidity prevailing on the site, they stop functioning and employees are constrained to go round the site with hand held sensors to keep the place under constant monitoring.
2. Initially, it appeared that the Vaisala product had exclusivity over warmed probe technology and that this exclusivity could favour a particular bidder. Following the hearing of the case, the Board is satisfied that this product was freely available on the open market and accessible to any interested party. In fact, during the hearing, both Ing Mario Schembri, Managing Director of AIS Ltd and Mr Michael Lebron, technical advisor to the same company confirmed that the Vaisala product was considered but they opted not to offer it. During the same hearing, it also emerged that Rotronic Int, whose standard sensors were being offered by AIS Ltd, were also offering the RS 70 model with warmed probe technology similar to that being offered by Vaisala.
3. In the tender document, the contracting authority specifically requested monitoring equipment that incorporated warmed probe technology. Appellants opted to offer equipment without that technology claiming that the equipment they were offering still met the tender requirements. The adjudicating board concluded otherwise, and after they rejected the offer, they refrained from allocating it any score. On similar issues, the Public Contracts Appeals Board has always expressed the view that a contracting authority has the prerogative to demand, through the issue of a tender, that which it thinks is best to meet its requirements, and the bidder is expected to offer that which the authority asks for.
4. With regard to the request for clarification that was addressed incorrectly, this Board feels that the adjudicating committee erred when it sent the said email to the wrong email address. A contact person is what the designation implies and any correspondence should have strictly been addressed to that person. However, this Board feels, that the failure of the adjudicating committee to address this request for clarification to the designated person's address, was not of such material importance as to prejudice the conclusion reached by the

adjudicating committee, namely the rejection of AIS's offer and the recommendation for award to Evolve Ltd. In their request for clarification, the adjudicating committee did not ask for additional information on the offer. They only asked AIS Ltd to identify where in their tender bid, they were offering warmed probe technology. As it resulted during the hearing, AIS Ltd confirmed that they were not offering that type of equipment.

5. With regard to the financial evaluation of this tender, this Board feels that the General Contracts Committee should have tackled this issue differently. This case was particular because the preferred bidder, in accordance with tender requirements, submitted two price figures – a lump sum and an itemised one. These two figures should have tallied, but in fact, they did not. Rather than requesting the preferred bidder to reduce his offer (the itemised figure) to match the budget, the GCC could have adopted the lump sum figure which almost matched the allocated budget. In doing so, the General Contracts Committee would have obtained the same result without having had to ask for a reduction in price. In spite of this, the Board feels that the procedure adopted by the GCC was still acceptable.

As a consequence of (1) to (5) above, this Board finds against the Appellant Company.

In view of the above and in terms of the Public Contract Regulations, 2005, this Board recommends that the deposit submitted by the said appellants should not be reimbursed.

Edwin Muscat
Chairman

Carmel J Esposito
Member

John Buhagiar
Member

15 November 2010