PUBLIC CONTRACTS REVIEW BOARD

Case No. 316

CT/3098/2010 - Adv No CT/028/2011

Services Tender for Architectural Works, including Design & Supervision, for the National Interactive4 Science Centre, Malta

This call for tenders was published in the Government Gazette on the 4th February 2011. The closing date for this call with an estimated budget of € 1,080,000 (incl. of VAT) was the 5th April 2011.

Ten (10) tenderers submitted their offers.

Design Solutions Ltd (TBA Periti) filed an objection on the 11th July 2011 against the decision by the Contracts Department to disqualify its offer on being adjudicated technically non compliant.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr. Edwin Muscat and Mr Carmel Esposito as members convened a public hearing on Monday, 1st August 2011 to discuss this objection.

Present for the hearing were:

Design Solutions Ltd (TBA Periti)

Dr Philip Magri	Legal Representative
Prof. Alex Torpiano	Representative
Dr M Bonello	Representative

Design & Technical Resources Ltd (DTR)

Dr Norval Desira	Legal Representative
Mr Robert Sant	Representative
Mr Luke Zarb	Representative
Ms Veronica Bonavia	Representative
Ms Vivienne Psaila	Representative

Malta Council for Science and Technology

Dr John Cremona	Legal Representative
Mr Nicholas Sammut	Chief Executive Officer MCST

Evaluation Board

Mr Charles Attard Bezzina	Chairman
Mr Christopher Bugeja	Member
Arch. Emanuel Buttigieg	Member
Ms Isabel Fereday	Member
Ms Melanie Giorgi	Member
Mr Joe Borg Camilleri	Secretary

After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of the company's objection.

Dr Philip Magri, on behalf of Design Solutions Ltd, the appellant company**,** first made the following submission regarding the deposit that was required for the appeal:

i. on lodging his appeal, his client was requested to deposit €10,800 which, according to the Contracts Department, represented 1% of the estimated value of the contract which in this case was not made public in the tender document;

and

ii. the amount of deposit should have been €7,670, i.e. 1% of €767,000, which was the value of the offer made by his client, as per Reg. 84 (1) which, among other things, stated that:

> *"The notice of objection shall only be valid if accompanied by a deposit equivalent to one per cent of the estimated value of the tender submitted by the tenderer, provided that in no case shall the deposit be less than one thousand and two hundred euro (€1,200) or more than fifty-eight thousand euro (€58,000)"*

Prof. Alex Torpiano, also on behalf of the appellant company, explained:-

a. that in this case the estimated value of the tender was not made public and when he queried this aspect he was informed by the Contracts Department that the estimated value of the tender was 'an internal source of information'; and

b. complained that once the estimated value of the tender was not made public in the first instance, then the bidder had no means to verify the amount that he was obliged to deposit according to regulations since, apparently, it was left entirely up to the contracting authority to fix the estimated contract value in a manner that was far from transparent.

Dr John Cremona, on behalf of the Malta Council for Science and Technology, the contracting authority, remarked that the Council was not involved with regard to the amount that had to be deposited and hence he desisted from deliberating on this matter.

Dr Magri continued by making the following submissions about the matter of subcontracting:

i. by letter dated 30th June 2011 the Contracts Department informed his client that his offer was found to be technically not compliant since the total subcontracting exceeded the 35% threshold as per Volume 1 Section 2 'Tender Form' and Question/Answer No. 21 of Clarification No. 4 of the 22nd March 2011;

ii. in the evaluation grid at Clause 30.4 of Part 3 'Technical Compliance' (page 17 of the tender document) there were listed the technical compliance criteria

on which the offer was to be evaluated as to whether it was technically compliant or not and the same evaluation grid ended with a *Nota Bene* stating that "*If any of the answers to the questions in the evaluation grid above is found to be 'NO' by the Contracting Authority, then the bid is automatically considered to be 'Technically Not Compliant' and will not be evaluated further"*;

iii. on the 22nd March 2011, the Contracts Department issued Clarifications No. 4 and 5, with the latter having been referred to as *Corrigendum 1*, where Question 21 in Clarification No. 4 asked "*Is any sub-contracting allowed?"* Instead of a 'Yes' or 'No' answer, the contracting authority replied as follows "*The maximum amount of subcontracting must not exceed 35% of the total contract value"*;

iv. the answer to Question No. 21 did not constitute a clarification but the addition on another criterion/principle to the original tender document. One could acknowledge that this clarification was to be considered as an integral part of the tender document but it could not be taken as an added criterion to those listed in the 'Technical Compliance Grid' on which the offer had to be adjudicated technically compliant or not;

v. the contracting authority failed to indicate that the level of sub-contracting outlined in Question 21 of Clarification 4 was being added to the Technical Critieria and that failure to comply with that criterion would lead to disqualification; and

vi. the maximum sub-contracting permissible was 35% of the total contract value which, although not made public, it turned out to be €1,080,000, and hence if his client had increased its offer to €1,000,000, instead of the very competitive price of €767,000, with the difference of about €300,000 being added on the portion that was to be carried out by the contractor, then his client would have still been the cheapest and would have satisfied the subcontracting requirement.

Prof. Torpiano intervened to remark that:

a. the tender document was indicative that sub-contracting was permissible and that emerged from the list of key experts, some of whom were not available on the local market. Nevertheless, *Question 21* seemed to doubt this requirement since it asked whether sub-contracting was permissible or not;

b. if one were to concede that the Clarification No. 4 formed an integral part of the original tender document, the fact was that the sub-contracting element was not included in the technical compliance grid and neither was it mentioned that any infringement of the sub-contracting limit would lead to disqualification; and

c. it made no sense to refuse an offer which was 30% cheaper on the claim that the percentage sub-contracting limit had not been respected which quantum,

he contended, was not verifiable in the absence of a given mechanism as to how to arrive at it.

Dr Cremona, on his part, submitted the following comments:

i. at part 'A' of Volume 1 Section 2 'Tender Form' the tenderer had to indicate the 'Value of sub-contracting as percentage of the total cost' and note 3 stated that:

> *"The maximum amount of sub-contracting must not exceed [.... %] of the total contract value. The main contractor must have the ability to carry out at least [.... %] of the contract works by his own means."*

ii. sub-contracting was allowed in the original tender document but it did not specify up to what percentage of the contract value was subcontracting permissible;

iii. the shortcoming, as reflected in (ii) above, was clarified in the answer to *Question No. 21* in Clarification No. 4 which established the sub-contracting limit at 35% of the contract value and which instruction was made available to all the bidders;

iv. the technical evaluation grid also posed the following question, namely, "Is offer as per Terms of Reference? Since the clarifications issued formed part of the tender document, then, when the appellant company indicated that in its 'Tender Form' that the value of sub-contracting was 48% of the contract value then the company was in breach of the amount of sub-contracting permissible, namely 35% of the contract value and, in the circumstances, the evaluating board had no option but to disqualify the appellant's offer; and

v. once the tender document had already provided for sub-contracting, what was omitted was the extent subcontracting was permissible. Yet, it was immaterial if one introduced the sub-contracting limit through a clarification or a correction.

The Chairman, Public Contracts Review Board, remarked that there had to be ways and means how to verify what portion of the contract would be sub-contracted otherwise there would be no point in inserting the sub-contracting limits. He added that, besides the *bona fide* attitude that one expected on the part of the tenderer, one could also arrive at the sub-contracting element of the contract from the agreements entered into between the contractor and his sub-contractors together with the invoices issued/presented.

Mr Charles Attard Bezzina, chairman of the evaluation board, remarked that the tender document requested such information as to the portion of responsibilities, the service intended to be sub-contracted and the value of the subcontracting.

Dr Norval Desira, on behalf of the recommended tenderer, offered the following remarks:-

a. the extent to which such sub-contracting was allowed;
b. in his reply the Director of Contracts used the exact terminology found in note 3 of part A of the Tender Form;
c. in the case of a joint venture, whatever was not covered in the joint venture agreement was, effectively, going to be carried out by the subcontractor/s which, as a result, was verifiable, not to mention the *bona fide* concept on the part of the tenderer that one could not ignore unless matters indicated otherwise.

Architect Robert Sant, on behalf of the recommended tenderer, pointed out that the difference between a partner/key expert in a joint venture and a sub-contractor was that the partner/key expert could not be substituted whereas the sub-contractor could be replaced during the contract period. He added that the reason behind the requirement that sub-contracting could only be resorted to up to a certain limit was that a number of key experts had to remain on the project throughout the duration of the contract period.

Prof. Torpiano remarked that the tender form allowed a bidder to participate either as a joint venture or as a contractor with subcontractors, the latter being the case of the appellant company. He reiterated that the clarification emerging from *Question No. 21* did not indicate that the extent of sub-contracting was forming an integral part of the technical compliance criteria or the terms of reference which, if breached, would lead to disqualification.

The Chairman, Public Contracts Review Board, remarked that it was not within the realms of the said Board to question the *quantum* of the sub-contracting permissible in this contract but what it had to ascertain was that that requirement was applicable to all tenderers for the sake of level playing field.

Dr Desira concluded that (i) if a tenderer did not fill in Volume 1 Section 2 'Tender Form' properly, then that tenderer could have never satisfied the eligibility criteria, (ii) if a tenderer did not satisfy the eligibility criteria, then one's offer could not be considered in subsequent stages, including the technical compliance, (iii) if the answer to Question 21 of Clarification No. 4 was not clear enough to the appellant company, then the said company had all the opportunity to ask for a clarification on the issue, (iv) with regard to 'Technical Capacity', 'Evaluation Criteria/Technical Specifications', 'Tender Form' and 'Financial Offer', note 3 at page 27 of the Tender Form stated that "*No rectification shall be allowed. Only clarifications on the submitted information may be requested"* and (v) the responsibility of the Public Contracts Review Board was to ensure that the tendering process was transparent and fair and that the bidders were compliant with requirements but it was not the Public Contracts Review Board's remit to deliberate on the price of the cheapest compliant tender.

Prof. Torpiano concluded the appellant company's offer was compliant according to the technical compliance grid that featured in the tender document and, as a consequence, the rejection of the offer was not justified.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellant's company, in terms of the reasoned letter of objection of the 11th July 2011, and through the verbal submissions made during the hearing held on the 1st August 2011, had objected to the decision taken by the pertinent authorities, to disqualify its offer on being adjudicated technically non compliant;

- having noted the appellant firm's representatives claims and observations regarding the matter of the required deposit which they made as asked, but contested. They observed that: (a) on lodging the appeal, the appellant company was requested to deposit €10,800 which, according to the Contracts Department, represented 1% of the estimated value of the contract which, in this case, was not made public in the tender document; and (b) the amount of deposit should have been €7,670, i.e. 1% of €767,000, which was the value of the offer made by the appellant company as per Reg. 84 (1) which, among other things, stated that "*The notice of objection shall only be valid if accompanied by a deposit equivalent to one per cent of the estimated value of the tender submitted by the tenderer, provided that in no case shall the deposit be less than one thousand and two hundred euro (€1,200) or more than fifty-eight thousand euro (€58,000).";(c)* that, in this case, the estimated value of the tender was not made public and when the appellant company's representative queried this aspect he was informed by the Contracts Department that the estimated value of the tender was 'an internal source of information'; and (d) complained that once the estimated value of the tender was not made public in the first instance, then the bidder had no means to verify the amount that the company was obliged to deposit according to regulations since, apparently, it was left entirely up to the contracting authority to fix the estimated contract value in a manner that was far from transparent;

- having seen the Contracting Authority's representative's reply on the matter of the deposit wherein he stated that the contracting authority, the Malta Council for Science and Technology, was not involved with regard to the amount that had to be deposited and hence he desisted from deliberating on this matter;

- having further noted the appellant firm's representative's submissions that (a) by letter dated 30th June 2011 the Contracts Department informed the said appellant company that its offer was found to be technically not compliant since the total subcontracting exceeded the 35% threshold as per Volume 1 Section 2 'Tender Form' and Question/Answer No. 21 of Clarification No. 4 of the 22nd March 2011, (b) in the evaluation grid at Clause 30.4 of Part 3 'Technical Compliance' (page 17 of the tender document) there were listed the technical compliance criteria on which the offer was to be evaluated as to whether it was technically compliant or not and the same evaluation grid ended with a *Nota Bene* stating that "*If any of the answers to the questions in the evaluation grid above is found to be 'NO' by the Contracting Authority, then the bid is automatically considered to be 'Technically Not Compliant' and will not be evaluated further"*, (c) on the 22nd March 2011, the Contracts Department issued Clarifications No. 4 and 5, with the latter having been referred to as *Corrigendum 1*, where Question 21 in Clarification No. 4 asked '*Is any sub-contracting allowed?'* Instead of a 'Yes' or 'No' answer, the contracting authority replied as follows, namely "*The maximum amount of*

subcontracting must not exceed 35% of the total contract value", (d) the answer to Question No. 21 did not constitute a clarification but the addition on another criterion/principle to the original tender document. One could acknowledge that this clarification was to be considered as an integral part of the tender document but it could not be taken as an added criterion to those listed in the *Technical Compliance Grid* on which the offer had to be adjudicated technically compliant or not, (e) the contracting authority failed to indicate that the level of sub-contracting outlined in Question 21 of Clarification 4 was being added to the *Technical Criteria* and that failure to comply with that criterion would lead to disqualification and (f) the maximum sub-contracting permissible was 35% of the total contract value which, although not made public, it turned out to be €1,080,000, and hence if the appellant company had increased its offer to €1,000,000, instead of the very competitive price of €767,000, with the difference of about €300,000 being added on the portion that was to be carried out by the contractor then the said appellant would have still been the cheapest and would have satisfied the subcontracting requirement;

- having taken into consideration Professor Torpiano's remarks, namely that: (a) albeit the tender document was indicative that sub-contracting was permissible and that emerged from the list of key experts, some of whom were not available on the local market, yet, *Question 21* seemed to doubt this requirement since it asked whether sub-contracting was permissible or not; (b) if one were to concede that the Clarification No. 4 formed an integral part of the original tender document, the fact was that the sub-contracting element was not included in the technical compliance grid and neither was it mentioned that any infringement of the sub-contracting limit would lead to disqualification; and (c) that it made no sense to refuse an offer which was 30% cheaper on the claim that the percentage sub-contracting limit had not been respected which quantum, he contended, was not verifiable in the absence of a given mechanism as to how to arrive at it;

- having considered the contracting authority's representative's submissions, namely that (a) at part 'A' of Volume 1 Section 2 'Tender Form' the tenderer had to indicate the 'Value of sub-contracting as percentage of the total cost' and note 3 stated that "*The maximum amount of sub-contracting must not exceed [.... %]of the total contract value. The main contractor must have the ability to carry out at least [..... %] of the contract works by his own means"*, (b) as a result, sub-contracting was allowed in the original tender document but it did not specify up to what percentage of the contract value was subcontracting permissible, (c) this shortcoming was clarified as per answer to Question No. 21 in Clarification No. 4 which established the sub-contracting limit at 35% of the contract value and which instruction was made available to all the bidders, (d) the technical evaluation grid also posed the following question, "Is offer as per Terms of Reference?" Since the clarifications issued formed part of the tender document, then, when the appellant company indicated that in its 'Tender Form' that the value of sub-contracting was 48% of the contract value then it was in breach of the amount of sub-contracting permissible, namely 35% of the contract value, and, in the circumstances, the evaluating board had no option but to disqualify the appellant company's offer; and (e) once the tender document had already provided for sub-contracting, what was omitted was the extent subcontracting was permissible to

and that, as a result, it was immaterial if one introduced the sub-contracting limit through a clarification or a correction;

- having taken note of the recommended tenderer's representative's remarks that (a) in various parts of the tender document and in every clarification issued, it was repeatedly stated that clarifications/corrigenda formed an integral part of the tender document and that they were to supersede anything that was previously provided to the contrary, (b) clause 22.3 of the 'Instructions to Tenderer' (page 14) provided that "*the tender must contain no changes or alterations, other than those made in accordance with instructions issued by the Central Government Authority (issued as clarification notes) or necessitated by errors on the part of the tenderer. In the latter case, corrections must be initialled by the person signing the tender.", (c)* the answer to Question 21 of Clarification No. 4 could have been a 'Yes' or a 'No', but it was sensible of the Director of Contracts to acknowledge that the tender document already permitted sub-contracting and that what was omitted was the extent to which such sub-contracting was allowed and that in his reply the Director of Contracts used the exact terminology found in note 3 of part A of the Tender Form and (d) in the case of a joint venture, whatever was not covered in the joint venture agreement was, effectively, going to be carried out by the subcontractor/s which was, therefore, verifiable, not to mention the *bona fide* concept on the part of the tenderer that one could not ignore unless matters indicated otherwise;

- having also considered the recommended tenderer's representative's submission that (a) if a tenderer did not fill in Volume 1 Section 2 'Tender Form' properly then that tenderer could have never satisfied the eligibility criteria, (b) if a tenderer did not satisfy the eligibility criteria then one's offer could not be considered in subsequent stages, including the technical compliance, (c) if the answer to Question 21 of Clarification No. 4 was not clear enough to the appellant company then one had all the opportunity to ask for a clarification on the issue, (d) with regard to *Technical Capacity, Evaluation Criteria/Technical Specifications, Tender Form* and *Financial Offer*, note 3 at page 27 of the Tender Form stated that "*No rectification shall be allowed. Only clarifications on the submitted information may be requested"* and (e) the responsibility of the Public Contracts Review Board was to ensure that the tendering process was transparent and fair and that the bidders were compliant with requirements but it was not the Public Contracts Review Board'S remit to deliberate on the price of the cheapest compliant tender;

- having finally taken into consideration, the appellant company's last claim that its offer was compliant according to the technical compliance grid that featured in the tender document, and therefore the rejection of the offer was not justified,

reached the following conclusions:

1. The Public Contracts Review Board opines that the shortcoming in the original document wherein the extent of the subcontracting was erroneously not stated was, nevertheless, rectified through Clarification No. 4 (which referred to Question No. 21) wherein the subcontracting limit was established at a maximum of 35%. This Board has no doubt that this clarification superseded any previous

reference to the same subject matter. Furthermore, the phrase "must not exceed" is more than amply clear that this requisite is compulsory and not subject to any other interpretation. Also, it is a fact that any clarification and any amendment to original document, apart from forming an integral part of the tender document, is also binding on all participating tenderers. This Board places emphasis on the fact that one has to understand that a non-observance of a compulsory clause disqualifies a participating tenderer.

2. This Board argues that the reference made by the appellant company as regards the fact that, according to the same company, the *quantum* (the subcontracting limit not exceeding 35%) was not verifiable in the absence of a given mechanism as to how to arrive at it, is untenable. The Public Contracts Review Board retains that any disagreement with any particular clause could have easily been challenged upon the publication of the pertinent *Clarification* and not at this juncture, namely, at the appeal stage.

3. This Board feels that, in reducing the value, the appellant company took a calculated commercial risk. Undoubtedly, this Board argues, the said appellant could have easily stuck to a better quoted figure without prejudicing the subcontracting value (limit) as requested by the contracting authority.

4. The Public Contracts Review Board feels that the legal provision in question, namely - "*The notice of objection shall only be valid if accompanied by a deposit equivalent to one per cent of the estimated value of the tender submitted by the tenderer, provided that in no case shall the deposit be less than one thousand and two hundred euro (€1,200) or more than fifty-eight thousand euro (€58,000*)."- has to be construed as implying 1% of the estimated value of the tender as published by the Department of Contracts or pertinent contracting authority as otherwise the amount paid by each potential appellant would be different even though one would be filing an objection on the same tender. As a result, this Board opines that the payment of a deposit of €10,800 to enable appellant to lodge the appeal was justified.

5. As a consequence of (1) to (4) above the Public Contracts Review Board finds against the appellant company and recommends that the deposit paid by the latter should not be reimbursed.

Alfred R Triganza	Edwin Muscat	Carmel J Esposito
Chairman	Member	Member

22 August 2011