

## PUBLIC CONTRACTS REVIEW BOARD

**Case No. 383**

**WSM/109/2011**

**Period Contract for the Provision of Land Surveying Services**

This call for tenders was published in the Government Gazette on the 8<sup>th</sup> November 2011. The closing date for this call with an estimated budget of € 119,625 was the 29<sup>th</sup> November 2011.

Three (3) tenderers submitted their offers.

Messrs Matsurv & Associates Ltd filed an objection on 21<sup>st</sup> December 2011 against the decisions of WasteServ (Malta) Ltd to disqualify its offer as administratively non-compliant and to recommend the award of the tender to Randolph Camilleri Surveys Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr. Carmel Esposito and Mr Joseph Croker as members convened a public hearing on Friday, 9<sup>th</sup> March 2012 to discuss this objection.

Present for the hearing were:

### **Messrs Matsurv & Associates Ltd**

Dr Kenneth Grima	Legal Representative
Mr Mario Attard Trevisan	Representative

### **Randolph Camilleri Surveys Ltd**

Dr Antonio Tufigno	Legal Representative
Ms Michelle Camilleri	Representative

### **WasteServ (Malta) Ltd**

Dr Victor Scerri	Legal Representative
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### **Evaluation Board**

Ing. Aurelio Attard	Chairman
Perit Robert Grech	Member
Ms Louiselle Sciberras	Member



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

Dr Kenneth Grima, legal representative of Messrs Maturv & Associates Ltd, the appellant company, remarked that WasteServ (Malta) Ltd had informed his client that its tender was disqualified as it had been considered to be administratively non-complaint because it did not submit the CVs and certificates as requested in clause 1.2.10. At this point Dr Grima went on to make the following submissions:-

i. clause 1.2.10 stated as follows:-

*"Tenderers are also requested to submit with their Tender offers the Curriculum Vitae of the Team Leader and of the other team members in accordance to Clause 8.3.1 (CV's of field technicians/assistants are not required). Tenderers shall submit proof, in the form of certificates, corroborating the qualifications stated in the respective CVs. All documents provided shall be written in the English Language. Failure to comply with this clause shall render the tender offer null."*

- ii. his client submitted the detailed CV along with the certificates of the team leader, namely Mr Mario Attard Trevisan;
- iii. when his client looked up clause 8.3.1 for guidance with regard to the other team members it's representatives discovered that there was no such clause in the tender document;
- iv. no CVs were required with regard to field technicians/assistants and therefore none were presented;
- v. so, according to clause 1.2.10, his client (a) had to submit the CV and certificates of the team leader, (b) clause 8.3.1 which, supposedly, referred to the other team members was inexistent in the tender document and, as a consequence, the company's representatives could not submit what was required in the absence of the required guidelines and (c) no documentation was requested with regard to field technicians/assistants;
- vi. therefore, by submitting the detailed CV and certificates of the team leader his client had satisfied the provisions of clause 1.2.10 as featured in the tender document and so his client was compliant;
- vii. in addition, his client had submitted a leaflet demonstrating a number of projects which the company had executed where it was manifestly clear that they were not one-man-jobs but reflected a team effort;
- viii. it was not fair on his client and it was not feasible to the public purse for the contracting authority to disqualify his client due to a shortcoming in the tender document and this when the appellant company's offer was substantially cheaper, namely €64,605 against the €111,510 of the recommended offer;

and

- ix. inconsistencies and errors committed by the contracting authority in the drawing up of the tender document should not be used to penalise the bid which would otherwise be compliant as well as being the cheapest

Ing. Aurelio Attard, chairman of the adjudicating board, made the following remarks:-

- a. the bidder had to consider the tender document in its entirety and, with regard to the qualifications of the team members one could not overlook the following tender provisions, namely:-

*“6.3.1 The Contractor shall consist of a team led by a Team Leader. The Team Leader shall hold a recognized qualification relevant to the nature of this tender within the context of the civil engineering and construction industry, MQC Level 5 or higher, issued by the Department of Education or the Malta College for Art, Science and Technology (MCAST) or by any other recognised University or Institution and possess at least six (6) years of post-qualification experience in land surveying or quantity surveying.*

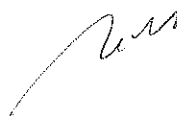
*6.3.2 The other team members shall be personnel possessing qualifications at MQC Level 4, or higher, covering the skills of draughtsmanship and land surveying supported by field technicians/assistants, all possessing at least four (4) years of related experience.”*

- b. clause 1.2.10 clearly requested the CVs and qualifications of the team leader and of the other team members and clauses 6.3.1 and 6.3.2 laid down their qualifications;
- c. admittedly, the reference made to clause 8.3.1 in clause 1.2.10 was incorrect since it did not feature anywhere in the tender document;
- d. on the other hand, the tender document provided tenderers with remedies in case they noticed inconsistencies or discrepancies in the tender document, specifically, the following:-

*“2.1.1 In submitting a Tender, the tenderer accepts in full and its entirety, the content of this tender document, including subsequent clarifications issued by the contracting authority, whatever its own corresponding conditions may be, which it hereby waives. Tenderers are expected to examine carefully and comply with all instructions, forms, contract provisions and specifications contained in this tender document.*

*2.1.5 Tenderers shall promptly notify the Chief Executive Officer of the Company of any ambiguity or discrepancy that they may discover upon examination of the tender document.*

*2.1.7 Any interpretations, corrections or changes to the tender document by the Chief Executive Officer of the Company shall be made by an official addendum. Interpretations, corrections or changes made in any other manner shall not be valid, and tenderers*



*shall not rely upon such interpretations, corrections and changes."*

- e. when the appellant company's representative noticed the incorrect reference to clause 8.3.1 (which apparently should have read 6.3.1) in clause 1.2.10, he should have notified WasteServ accordingly but instead the appellant company opted to act on its representative's own interpretation of clause 1.2.10 which was not a faithful and/or a valid interpretation;

and

- f. the adjudicating board could not evaluate the offer presented by the appellant company in the absence of these CVs and certificates.

The Chairman Public Contracts Review Board commented that the tender document had to be considered as a whole and in this case clauses 6.3.1 and 6.3.2 provided sufficient guidance to tenderers. On the other hand, proceeded the Chairman, it was not desirable on the part of the contracting authority to insert exculpatory clauses to cover its own mistakes.

Dr Victor Scerri, legal representative of the contracting authority, argued that with regard to clause 1.2.10, if one were to leave out the phrase 'in accordance with clause 8.3.1', the instructions were still very clear including the fact that the tenderer had to furnish the CVs and certificates of the team leader and other team members and that it was only in the case of the field technicians/assistants that CVs and certificates were not required. He added that clauses 6.3.1 and 6.3.2 formed an integral part of the tender document.

Dr Grima insisted that:-

- i. the erroneous reference to clause 8.3.1 in clause 1.2.10 could have easily misguided the average tenderer with regard to the requirements in connection with the other team members and, as a result, the tenderers should not be made to pay for the mistakes committed by the contracting authority;
- ii. the periodical amendments introduced to the public procurement regulations were aimed at reducing the indiscriminate exclusion of offers on petty shortcomings by allowing the bidder to correct certain discrepancies;
- iii. his client should have been asked by the contracting authority to submit what it had not submitted as a consequence of the error committed by the contracting authority itself in drawing up the tender document;
- iv. when one considered the tender as it was, albeit one would notice that his client had acted in good faith, yet the way the said company was treated during the evaluation process was certainly not equitable;

and

- v. whilst it was not unheard of that contracting authorities made mistakes in the compilation of the tender document yet it did not make sense that through its



own fault the contracting authority would have to fork out an additional €50,000 or so.

Mr Attard insisted that:-

- a. clauses 6.3.1 and 6.3.2 clearly indicated the qualifications that the team had to possess however the appellant complied with regard to the team leader but failed to comply in the case of the other team members;
- b. a clarification could be sought on submitted information but the contracting authority could not ask for the submission of information that should have been submitted in the first place;

and

- c. this mandatory information was crucial for tender evaluation purposes

Dr Antonio Tufigno, legal representative of the recommended tenderer, made the following remarks:-

- clause 1.2.10 was clear enough highlighting the fact that, out of the three categories of team members, only the field technicians/assistants were not required to produce their CVs and qualifications which meant that the other two categories, namely the team leader and the other team members, had to submit that information for evaluation purposes;
- the submission of the leaflet containing the works carried out by the appellant company did not mean that the latter would deploy the same resources on this project;

and

- a *bona fide* bidder would have considered the tender document as a whole which document left no doubt that the contracting authority was requesting the CVs and certificates of the team leader and other team members.

At this point the hearing was brought to a close.

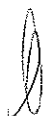
This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated 21<sup>st</sup> December 2011 and also through their verbal submissions presented during the hearing held on the 9<sup>th</sup> March 2012, had objected against the decisions of WasteServ (Malta) Ltd to disqualify its offer as administratively non-compliant and to recommend the award of the tender to Randolph Camilleri Surveys Ltd;
- having noted all of the appellant's representatives' claims and observations, particularly, the references made to the fact that (a) WasteServ (Malta) Ltd had informed the company that its tender was disqualified as it had been considered to be administratively non-complaint because it did not submit the CVs and certificates as requested in clause 1.2.10, (b) the company submitted the detailed CV along with



the certificates of the team leader, namely Mr Mario Attard Trevisan, (c) according to clause 1.2.10, his client (1) had to submit the CV and certificates of the team leader, (2) clause 8.3.1 which, supposedly, referred to the other team members was inexistent in the tender document and, as a consequence, the company's representatives could not submit what was required in the absence of the required guidelines and (3) no documentation was requested with regard to field technicians/assistants, (d) in addition, the appellant company had submitted a leaflet demonstrating a number of projects which the company had executed where it was manifestly clear that they were not one-man-jobs but reflected a team effort, (e) it was not fair on the appellant company and it was not feasible to the public purse for the contracting authority to disqualify it due to a shortcoming in the tender document and this when its offer was substantially cheaper, namely €64,605 against the €111,510 of the recommended offer, (f) inconsistencies and errors committed by the contracting authority in the drawing up of the tender document should not be used to penalise the bid which would otherwise be compliant as well as being the cheapest and (g) the appellant company should have been asked by the contracting authority to submit what it had not submitted as a consequence of the error committed by the contracting authority itself in drawing up the tender document;

- having considered the contracting authority's representative's reference to the fact that (a) the bidder had to consider the tender document in its entirety, (b) with regard to the qualifications of the team members one could not overlook the following tender provisions, namely "6.3.1 The Contractor shall consist of a team led by a Team Leader. The Team Leader shall hold a recognized qualification relevant to the nature of this tender within the context of the civil engineering and construction industry, MQC Level 5 or higher, issued by the Department of Education or the Malta College for Art, Science and Technology (MCAST) or by any other recognised University or Institution and possess at least six (6) years of post-qualification experience in land surveying or quantity surveying" and "6.3.2 The other team members shall be personnel possessing qualifications at MQC Level 4, or higher, covering the skills of draughtsmanship and land surveying supported by field technicians/assistants, all possessing at least four (4) years of related experience.", (c) clause 1.2.10 clearly requested the CVs and qualifications of the team leader and of the other team members and clauses 6.3.1 and 6.3.2 laid down their qualifications, (d) admittedly, the reference made to clause 8.3.1 in clause 1.2.10 was incorrect since it did not feature anywhere in the tender document, (e) on the other hand, the tender document - Clause 2.1.1 / Clause 2.1.5 / 2.1.7 - provided tenderers with remedies in case they noticed inconsistencies or discrepancies in the tender document, (f) when the appellant company's representative noticed the incorrect reference to clause 8.3.1 (which apparently should have read 6.3.1) in clause 1.2.10, he should have notified WasteServ accordingly but instead the appellant company opted to act on its representative's own interpretation of clause 1.2.10 which was not a faithful and/or a valid interpretation, (g) the adjudicating board could not evaluate the offer presented by the appellant company in the absence of these CVs and certificates, (h) with regard to clause 1.2.10, if one were to leave out the phrase 'in accordance with clause 8.3.1', the instructions were still very clear including the fact that the tenderer had to furnish the CVs and certificates of the team leader and other team members and that it was only in the case of the field technicians/assistants that CVs and certificates were not required, (i) a clarification could be sought on submitted information but the contracting authority could not ask for the submission of information that should have been submitted in the first place and (j) the mandatory information in question was crucial for tender evaluation purposes;

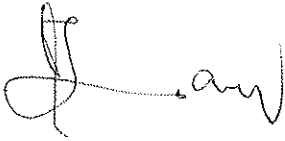


- having considered the recommended tenderer's representative's reference to the fact that (a) clause 1.2.10 was clear enough highlighting the fact that, out of the three categories of team members, only the field technicians/assistants were not required to produce their CVs and qualifications which meant that the other two categories, namely the team leader and the other team members, had to submit that information for evaluation purposes, (b) the submission of the leaflet containing the works carried out by the appellant company did not mean that the latter would deploy the same resources on this project and (c) a *bona fide* bidder would have considered the tender document as a whole which document left no doubt that the contracting authority was requesting the CVs and certificates of the team leader and other team members,

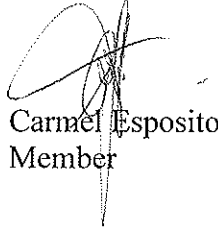
reached the following conclusions, namely:

1. The Public Contracts Review Board opines that the obligation for the content of the specifications in the tender document to be correct rests with the contracting authority. This Board would like to place emphasis on the fact that it is not desirable on the part of the contracting authority to insert exculpatory clauses in a tender document to, possibly, cover its own mistakes.
2. On the other hand, this Board equally underlines the fact that the obligation for a bid to be correct, including all that is required for the best submission possible – containing formal responses to mandatory requirements – rests with the participating tenderer.
3. The Public Contracts Review Board concurs with the contracting authority's position, namely that the tender document in question, albeit containing a few wrong cross references (e.g. 8.3.1), yet contained enough evidence of the need for submission of CVs of team leader and other team members - clause 1.2.10 was clear enough highlighting the fact that, out of the three categories of team members, only the field technicians/assistants were not required to produce their CVs and qualifications which meant that the other two categories, namely the team leader and the other team members, had to submit that information for evaluation purposes – as a matter of fact clauses 6.3.1 and 6.3.2 laid down their qualifications. Following further scrutiny of tender document this Board is left with no doubt whatsoever that the submission of such CVs was a mandatory requisite.
4. This Board places emphasis on the fact that a tender document needs to be read in its entirety.
5. Undoubtedly, this Board, whilst taking cognisance of the fact that the appellant company's bid may have been cheaper, yet, once it was not administratively compliant due to failure by the said company to include mandatory documentation in its bid then, in this particular instance, one could not even consider it as a participating bid.
6. The Public Contracts Review Board acknowledges the fact that there is no proof to the fact that, in this particular instance, the appellant company would be availing itself of the same team composite as it may have done so in other projects once it did not elaborate on subject matter in this submission.

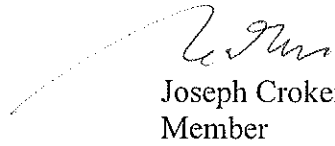
In view of the above this Board finds against the appellant company and recommends that the deposit paid by the latter should not be reimbursed.



Alfred R Triganza  
Chairman



Carmel Esposito  
Member



Joseph Croker  
Member

*20 March 2012*