

PUBLIC CONTRACTS REVIEW BOARD

Case No. 502

Pre-Contractual Objection – Service Tender for the Development of a long-term monitoring strategy for the marine environment, a social and economic analysis of the use of marine waters and costs of degradation and baseline sediment survey in inland waters – CT 3048/2012

This call for tender was published on the 7th August 2012 with a closing date of the 18th September 2012.

On 18 September 2012 AIS Environmental Ltd filed a pre-contractual objection against the decision of the Contracts Department not to answer its request for clarification claiming that the request was made after the deadline for the submission of clarifications.

The Public Contracts Review Board with Mr Joseph Croker as A/Chairman and Messrs Carmel Esposito and Paul Mifsud as Members convened a public hearing on the 3rd December 2012 to discuss this objection.

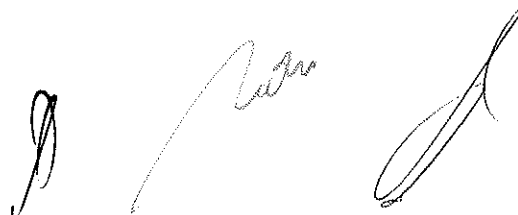
Present:

AIS Environmental Ltd

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| Dr Victor Axiak | Legal Representative |
| Ms Ruth Debrincat | Representative |
| Mr Mario Schembri | Representative |

Malta Environment and Planning Authority (MEPA)

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| Dr Saviour Formosa | Legal Representative |
| Dr Valentina Lattughi | Legal Representative |
| Mr Joseph Catania LP | Legal Representative |
| Ms Joanne Vassallo | Representative |
| Ms Stephania Baldacchino | Representative |
| Ms Marianne Rizzo | Representative |
| Ms Ashley Farrugia | Representative |
| Ms Nadine Mercieca | Representative |
| Ms Karen Vella | Representative |
| Mr Keith Cappello | Representative |



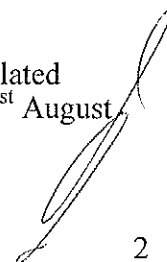
After the A/Chairman's brief introduction, the appellant was invited to explain the motives of his objection.

Dr Victor Axiak, on behalf of AIS Environmental Ltd, the appellant, made the following submissions:

- i. his client was a prospective bidder in this tendering procedure where the 18th September 2012 was the closing date;
- ii. on the 6th September 2012 his client discovered that a clarification notice dated Friday 31st August 2012 issued by the Director of Contracts had been published on the department's website and that this clarification provided, among other things, as follows:

Question 8: Can any of the contracting Authority's current contractors or subcontractors of the ERDF156 project submit an offer for this tender?

Answer 8: Offers from current contractors or subcontractors who may have gained additional information through their current work that may put them at an advantage over other bidders or may present a conflict of interest, shall not be considered;
- iii. his client contended that this notice was published online on or after Monday 3rd September 2012, that is, on the last day for the submission of requests for further information from the Contracting Authority as per Section 2 of the Instructions to Tenderers;
- iv. his client was a subcontractor responsible for the ERDF156 project and therefore the contracting authority's answer could potentially disqualify AIS Environmental Limited from submitting a bid;
- v. by email (dated 6th September 2012) his client sought a clarification from the Contracts Department as to whether AIS Environmental Limited, as a subcontractor of the ERDF156 project, fell within the definition of "a subcontractor who may have gained additional information that may put it at an advantage over other bidders or may present a conflict of interest";
- vi. the Department of Contracts declined from answering his client's request claiming in email dated 10th September 2012 that the deadline for the submission of such clarifications had lapsed (on the 3rd September 2012);
- vii. another request sent to the Contracts Department through this office on the 10th September 2012 was unanswered;
- viii. the clarification issued by the Department of Contracts was of the utmost importance to his client because it could disqualify him from participating in this tendering procedure which, being a highly technical contract, involved substantial effort and costs;
- ix. on the 10th September 2012 a second clarification letter was circulated which although it had nothing to do with the one issued on the 31st August,



2012, it did raise the question as to whether this second clarification was based on issues raised before or after the deadline for clarifications;

- x. his client was therefore requesting the PCRB to review the contracting authority's decision not to answer his request for clarification by extending the deadline for the submission of requests for clarifications so as to enable the Contracts Department to submit its answer; and
- xi. if it would result that his client was precluded from participating in this tendering process then he would contemplate taking other remedial action.

Mr Joseph Catania, on behalf of MEPA, remarked that the issue raised by the appellant concerned the Contracts Department rather than MEPA and it would have been opportune for a representative of the Department to be present at the hearing.

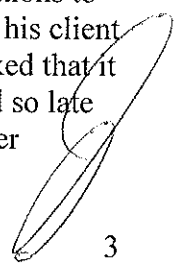
Mr Keith Cappello, on behalf of the MEPA, under oath, gave the following evidence:-

- a. at the clarification meeting held on the 21st August 2012 - as stipulated in section 2 'Timetable' of the 'Instructions to Tenderers' - which was open to all prospective bidders, one of the bidders asked Question 8 cited earlier on and on that same day, i.e. the 21st August 2012, MEPA communicated all the questions raised at the meeting to the Director of Contracts to issue the necessary clarification letter;
- b. Ms Sciberras, MEPA project leader and who was also present at the clarification meeting, on the 24th August 2012 had sent a reminder to the Director of Contracts in this regard; and
- c. the clarification letter featuring the questions and answers in connection with the 21st August 2012 meeting was issued by the Contracts Department and displayed online on the 31st August 2012.

Dr Axiak asked if the set of 12 questions and answers issued by the Department of Contracts on 10th September 2012 related to issues raised with MEP or the Contracts Department before or after the 31st August 2012 because it would appear that they were received after that date otherwise they would have been incorporated in Clarification No. 1 of the 31st August 2012.

The A/Chairman PCRB remarked that the PCRB had requested a screen dump of the Contracts Department website which demonstrated that Clarification No. 1 was displayed on the website of the Contracts Department on the 31st August 2012 at 11:22hrs. He added that it was not clear how it took the appellant 6 days to react to Clarification No. 1.

Dr Axiak pointed out that it now appeared that Clarification No 1 was published on Friday 31st August 2012 about 2 hours prior to staff clocking off and the following Monday 3rd September 2012 was the deadline for the submission of clarifications to the Department of Contracts. He therefore questioned whether it was fair on his client to be expected to react in time given this timeline of events. Dr Axiak remarked that it was not fair that question and answer no. 8 of Clarification No. 1 were issued so late since by that time his client had almost concluded the drawing up of his tender



submission which, given its complexity, necessitated the input by experts from overseas.

The A/Chairman PCRB remarked that:-

the issue at hand concerned Clarification No. 1 and not Clarification No. 2;

effectively the appellant had three and a half days to react to Clarification No 1, i.e. from 11:22hrs on Friday till Monday 3rd September 2012 and given today's efficient means of communication it should not have been prohibitive for the appellant to send an email in time conveying his request for clarification and, moreover, it was not unheard of in this time and age that sometimes one worked even during the weekend.

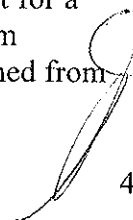
Dr Axiak concluded that what his client wished to know was whether he was being precluded from participating in this tender procedure and to highlight the fact that the time available to him to clarify that issue was very tight indeed.

At this point the hearing came to an end.

This Board:

- having noted that appellant company had by letter dated 18th September 2012 and during the hearing held on the 3rd December 2012 appealed against the decision of the Contracts Department not to reply to their clarification since the clarification was submitted post the date by which clarifications should have been made;
- having noted appellant company's representative submission that on the 6th September 2012 his company became aware that a clarification notice was published on the Contracts Department's website as under:
 - *Question 8: Can any of the contracting Authority's current contractors or subcontractors of the ERDF156 project submit an offer for this tender?*
 - *Answer 8: Offers from current contractors or subcontractors who may have gained additional information through their current work that may put them at an advantage over other bidders or may present a conflict of interest, shall not be considered;*

that clarification was published on the Department's website on the 3rd September 2012 and not on the 31st August 2012; that it was a prospective bidder for the mentioned tender and that since the company was a subcontractor for the ERDF156 project and the clarification to question 8 might result in their being precluded from participating his client by email dated 6th September 2012 had requested the Contracts Department for a clarification to verify whether they would in fact be excluded from participating in the tender; that the Department of Contracts declined from



answering his client's request claiming in email dated 10th September 2012 that the deadline for the submission of such clarifications had lapsed (on the 3rd September 2012); the appellant's claim that even were the clarification published on the 31st August 2012 this left his company little or no time to seek further clarifications by the closing date ie. the 3rd September 2012;

- having taken note of the Contracting Authority's counter claim that at the clarification meeting held on the 21st August 2012 - as stipulated in section 2 'Timetable' of the 'Instructions to Tenderers' – which was open to all prospective bidders, one of the bidders asked Question 8 cited earlier on and on that same day, i.e. the 21st August 2012, MEPA communicated all the questions raised at the meeting to the Director of Contracts to issue the necessary clarification letter; Ms Sciberras, MEPA project leader and who was also present at the clarification meeting, on the 24th August 2012 had sent a reminder to the Director of Contracts in this regard; and the clarification letter featuring the questions and answers in connection with the 21st August 2012 meeting was issued by the Contracts Department and displayed online on the 31st August 2012.
- having also verified through the submission of a screen dump by the Contracts Department of their website which showed that the clarification was actually published on the 31st August 2012;

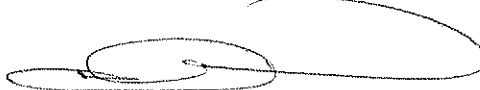
came to the following conclusions:

- a. The Board is of the opinion that it was in the appellant company's interest as a prospective bidder to monitor the Department of Contract's website so that it may follow possible developments concerning a tender it was interested in;
- b. The Board is also of the opinion that though the date when the clarification notice was published being a Friday and the closing date when requests for clarifications had to be submitted being Monday 3rd September 2012 might at first glance seem rather restrictive, in this day and age, with the tools in hand, one could have easily submitted a request in time, even during the weekend.

As a result, the Board finds against the appellant and recommends that the tender process continues.


Joseph Croker
A/Chair


Carmel Esposito
Member


Paul Mifsud
Member

18 December 2012