

## **PUBLIC CONTRACTS APPEALS BOARD**

### **Case 60**

#### **RE: CT 2485/05 – Advert No 300/2005 - Tender for Geotechnical Investigations for the Malta South Sewage Transmission Infrastructure**

This call for tenders, published in the Maltese Government Gazette on 04.10.2005 was issued by the Contracts Department following a request transmitted to the latter by the Water Services Corporation.

The closing date for this call for offers was 03.11.2005 and the global estimated value of contract was Lm 30,000 (excluding VAT).

The Water Services Corporation appointed an Evaluation Committee consisting of:

Ms Carmen Grech	- Chairperson
Ing Stefan Cachia	- Secretary
Eng Adin Bundic	- Member
Ing Paul Micallef	- Member
Perit Carmel Ellul	- Member

to analyse a total of two (2) offers submitted by different tenderers.

Following recommendations made by the Evaluation Board to the Contracts Committee for the latter to award the tender to Messrs Ballut Blocks Ltd (Lm 27,256.11, VAT inclusive), Messrs Terracore Geo Services Ltd, filed an objection on 21.12.2005.

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Edwin Muscat, respectively, acting as members, convened a public hearing on 01.02.2006 to discuss this objection.

Present for the hearing were:

#### **Terracore Geo Services Ltd**

Mr Alfred Xerri (Director, and Consortium Partner)  
Dr Vince Galea LL.D.  
Mr Anthony Cassar A&CE C.Eng. F.I.C.E.

#### **Ballut Blocks Services Ltd**

Mr Paul Vella (Director)  
Mr Joseph Gatt A&CE  
Dr Massimo Vella LL.D.

#### **Water Services Corporation – Evaluation Committee**

Ms Carmen Grech – Chairperson  
Ing Stefan Cachia – Secretary  
Eng Adin Bundic – Member

Ing Paul Micallef – Member  
Perit Carmel Ellul - Member

In their opening statement, the representative of *Messrs Terracore Geo Services Ltd.*, gave a brief overview as to what prompted them to file their objection.

Mr Anthony Cassar, representing the appellants, commenced his intervention by stating that their objection was based on the Technical Offer and its evaluation. He claimed that the recommended tenderer, namely Ballut Blocks Services Ltd, did not comply with the tender's requirements which 'inter alia' specified that (i) prospective bidders had to submit the names and *curricula vitae* of Key Experts (emphasizing that it was not the singular 'Key Expert'), (ii) they had to have at least 5 years experience in carrying out such works and that, (iii) site investigations and laboratory testing had to be carried out according to BS 5930 and BS 1377 respectively.

The appellants' representative claimed that Ballut Blocks Services Ltd submitted the name and CV of one Key Expert only while they submitted two, one relating to a Geotechnical Engineer and another relating to an Engineering Geologist. As regards experience he maintained that their competitor started doing site investigations only recently. At this stage Arch. Cassar made particular reference to two tenders that were issued by the Water Services Corporation for similar works and awarded to Terracore Geo Services Ltd, namely Malta North Sewage Treatment Plant and Gozo Sewage Treatment Plant. He stated that Ballut Blocks Services Ltd did not tender for these works because they were not yet established in carrying out such investigations. He claimed that in spite of the fact that the terms of reference specified that the reporting and laboratory tests had to be conducted in accordance with established British Standards (BS), the recommended tenderer presented an 'ISO Certificate'. It was contended that the BS was only used by the British and that in mainland Europe they used different standards.

Mr Alfred Xerri, also acting on behalf of Messrs Terracore Geo Services Ltd, alleged that Ballut Blocks Services Ltd were ill-equipped and did not have the know-how to carry out site investigations. He produced photographs and other documentary evidence. The PCAB intervened to point out that the parties should limit themselves to this particular tender and not to previous ones. Furthermore, it was explained that the PCAB's function was to ensure that at evaluation stage the proper procedure had been followed.

Dr Vince Galea, acting as legal representative to appellants, claimed that the evaluation of the technical offers had to follow the procedures set out in the Public Contracts Regulations (LN 177 of 2005). He emphasised that the list of works carried out over the past five years had to be accompanied by certificates of satisfactory execution.

Mr Paul Vella, Director, Ballut Blocks Services Ltd, rebutted the appellant's remarks by stating that his Company had established itself in the local building and construction industry over the past 50 years and that they had always provided good quality works and services. He said that they were the first to introduce equipment in Malta to carry out piling works, after which, they had many requests for ground investigations. In October

2000 they invested Lm57,000 in the purchase of equipment (*drill*) which was used to cut and test cores. The appellant said that the fact that they did not tender for the two contracts mentioned by the representatives of Terracore Geo Services Ltd was irrelevant because a Company could be heavily involved in other works at specific moments in time necessitating that it refrains from tendering for further work due to overload of capacity potential. He claimed that they carried out works of a similar nature in the private sector. Furthermore, he illustrated photographs as evidence of their competence in this field. Mr Vella said that, as far as this contract was concerned, they were going to be backed up by the services of an Italian Firm '*Geomerid*' which had vast experience and qualified people in this type of work. He contended that once the information made available met the tender's technical requirement, the adjudication board had no alternative but to award the contract to the cheapest tenderer.

Dr Massimo Vella, acting as legal council to Messrs Ballut Blocks Services Ltd., pointed out that his clients had the necessary experience in this field. He said that once Ballut Blocks Services Ltd were involved in the construction industry, they had to carry out ground investigations on various building sites before building the foundations. Dr Vella claimed that *Geomerid* indicated three experts, namely, Dr Pino Rizza (Direttore Tecnico Geologo), Dr Alberto Scuderi (Direttore del laboratorio, Geologo) and Dottoressa Marilena Romano (Tecnico Sperimentatore Geologo).

Architect Joseph Gatt remarked that, very often, they were unaware of such contracts because most probably the necessary ground investigations were carried out through direct orders or quotations.

On cross examination, Ing Stefan Cachia, Secretary to the Evaluation Committee, testified that on the basis of the specifications, which were drawn by their consultants, they were satisfied that the tenders submitted by Ballut Blocks Services Ltd and Terracore Geo Services Ltd were both technically compliant and so the Evaluation Committee recommended the award to the cheaper tender.

In reply to a specific question by the appellants' lawyer, Ing Cachia said that they did not specify 'BS or equivalent' because when they enquired on the matter they were informed that there were no equivalents. He explained that 'BS' was just a procedure that had to be followed during operations (in this case during drilling and testing) while the ISO Certificate was issued to certify that a company was capable of carrying out such works according to the international accepted norms. Thus, the 'BS' was a code of practice and the ISO was a certificate that was issued after a screening process. He emphasised that the expert/s who supervised the drilling works and who prepared and submitted the report had to be ISO certified. He said that if they did not do the work properly they would lose the ISO certification. When Dr Galea mentioned the fact that the ISO certificate made no reference to 'BS', Ing Cachia replied by stating that once they had an ISO Certificate this meant that they had to follow the BS procedure.

When asked about the fact that in Form 5.6.6 – *Experience as Contractor*, Ballut Blocks Services Ltd included only two projects of a similar nature performed during the past 5

years, the witness said that in the tender document they did not specify the minimum number of such projects and so they were satisfied that they were technically compliant. With regard to the other list of '*Major projects undertaken by Ballut Blocks Ltd in recent years*', he said that it was assumed that these were carried out beyond the past 5 years. However, such lists indicated that the contractor had the necessary experience. Apart from this, they took into consideration the experience of the supporting *Geologist Engineer* who was responsible for the supervision of works on site and for the drawing of the report and also the fact that the works were going to be supervised by a company which was ISO Certified in carrying out such works.

He rebutted Mr Cassar's opening statement about 'Key Experts' by stating that this was a generic title and therefore there were no limitations on the number of Key Expert/s which had to be submitted. He confirmed that Ballut Blocks Services Ltd's Key Expert, namely Dr Alberto Scuderi, was involved in drilling and structural works and that he operated within a company that had a laboratory which could do ISO Certified testing.

However, Mr Cassar insisted that they should have indicated two Key Experts because one had to be an *Engineering Geologist* to do the daily supervision and the other a *Geotechnical Engineer* to investigate the geotechnical characteristics of the cores. At this point, Ing Cachia drew his attention that a clarification was issued whereby it was stated that the term 'geotechnical engineer' should read 'engineering geologist'. However, Mr Cassar said that geotechnical characteristics were investigated by a *Geotechnical Engineer*.

Ing Cachia explained that, the geotechnical characteristics investigations are done by the client on the basis of the report submitted by the Engineering Geologist. They requested the report of the *Engineering Geologist* for it to be the basis for the *Geotechnical Engineer* to design the gallery according to the report. The *Geologist Engineer* compiled the report and their *Geotechnical Engineer* would interpret that report.

During Ing Cachia's testimony, Dr Galea claimed that according to Regulation 51 of the Public Procurement Regulations 2005 (LN 177 of 2005), Ballut Blocks Services Ltd should have submitted certificates of satisfactory execution for the most important works with the list of works carried out over the past five years. The appellants' lawyer contended that, in the absence of such certifications, the Evaluation Committee did not know whether the indicated two projects were in actual fact executed or whether they encountered any problems. However, Dr Massimo Vella interpreted this regulation differently and maintained that this requirement was optional and not mandatory. Ing Cachia confirmed that none of the tenderers had submitted such certifications and, therefore, all interested parties were on a level playing field. At this point, the appellants' lawyer intervened by stating that his clients did not need to submit such certificates because the fact that the WSC had effected payment for works carried out meant that they were satisfied with the execution thereof. The PCAB, without specifically referring to this particular case, pointed out that this line of reasoning was not always correct. Furthermore, it was stated that if this was mandatory then all bidders, without any exception, were obliged to abide by this regulation.

In his concluding remarks, Dr Galea said that from the outcome of these proceedings it resulted that this tender's evaluation was based on assumptions and that Ballut Blocks Services Ltd did not satisfy certain requirements of the tender, such as 'BS', 'Key Experts' and 'Experience as Contractor'. He claimed that while Terracore Geo Services Ltd did an interminable number of projects in these last five years, the recommended tenderer carried out only two projects. Also, he said that although it was indicated that prospective bidders had to submit the names of 'Key Experts', their competitors only submitted one 'Key Expert'.

Dr Vella concluded by stating that the witness had clarified all issues raised by the appellants and it was established that the Adjudication Board determined the award of this contract on the cheapest price because both tenderers were found to be in compliance with the technical evaluation criteria.

At this stage, the public hearing was brought to a close and the PCAB proceeded with its deliberations before reaching its decision.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated 21<sup>st</sup> December, 2005 and also through their verbal submissions presented during the public hearing held on 1<sup>st</sup> February, 2006, had objected to the decision taken by the General Contracts Committee, formally communicated via a letter, informing them that the tender submitted by them was not successful;
- having considered the appellants' argument against the successful tenderer's relevant track record and expected experience level relating to this particular tender;
- having also noted that Messrs Ballut Blocks Services Ltd's comment relating to the reason for the Company refraining from participating for similar tenders in the past as well as the Company's emphasis on the fact that in this particular tender they are going to avail themselves of three Italian experts in the field;
- having taken cognizance of the fact that the secretary to the Evaluation Committee testified that they were satisfied that both tenderers were technically compliant and that they proceeded by recommending the award of the tender to the cheaper offer;
- having considered the testimony given by Ing. Cachia relating to issues concerning the 'BS' and 'ISO certification' as well as the application thereof in the Committee's deliberation process leading to a favourable recommendation in favour of Messrs Ballut Blocks Services Ltd;

- having also noted Ing. Cachia's argument as regards the fact that the term 'Key Experts' as used in the Tender Document was meant as a generic reference and did not imply any specific limitation/s on the number of key Experts which had to be submitted;
- having also considered Dr Galea's and Dr Vella's arguments relating to the submission of certificates of satisfactory execution as well as Ing. Cachia's comment during the hearing that none of the tenderers did, in fact, submit such certificates

reached the following conclusions:-

The Public Contract Appeals Board, having considered the proceedings during the hearing, feels that the Evaluation Committee could have given more attention to detail.

However this Board is of the opinion that, notwithstanding the previous consideration, the arguments brought forward by appellants do not provide sufficient proof that the Evaluation Committee, have overlooked key issues whilst deliberating prior to their ultimate recommendation for the tender to be awarded to Messrs Ballut Blocks Services Ltd.

In consequence to the above, the appellants' objection to the decision, reached by the General Contracts Committee, to award the Contract to Messrs Ballut Blocks Services Ltd, cannot be upheld by this Board.

Furthermore, in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by appellants in terms of regulation 83, should not be refunded.

**Alfred R Triganza**  
Chairman

**Anthony Pavia**  
Member

**Edwin Muscat**  
Member

*17th February, 2006*