

## **PUBLIC CONTRACTS APPEALS BOARD**

### **Case No. 115**

#### **Advert No CT/WSC/T/10/2007 - CT 2247/07 – WSCD 472/06/07 Tender for the Rising Main for Sewage Pumping Station at Wied il-Mielah, l/o Gharb, Gozo**

This call for tenders was published in the Maltese Government Gazette on 30.03.2007 and was issued by the Contracts Department following a request transmitted to the latter by the Water Services Corporation (WSC).

The closing date for this call for offers was 17.05.2007 and the estimated contract value was Lm 330,407.

Three (3) different tenderers submitted their offers.

Following receipt of a letter dated 19.10.2007 and sent by the Department of Contracts to the appellants wherein the latter were notified that their bid was not among the selected ones since it was adjudicated as not complying with the tender specifications, Messrs Pius Attard and Joseph Attard (partnership) filed an objection on 25.10.2007.

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 05.12.2007 to discuss this objection.

Present for the hearing were:

#### **Mr. Pius Attard & Mr. Joseph Attard (Partnership):**

Hon. Dr. Angelo Farrugia	Legal Advisor
Mr. Pius Attard	Contractor
Mr. Edward Scerri	Architect
Mr. Joe Cordina	Accountant

#### **Adjudication Board:**

Ing. Paul Gatt	Member
Perit Adin Bundic	Member
Mr. Anthony Camilleri	Member

#### **Water Services Corporation:**

Mr. Mark Perez	Engineer
Dr. Neville Young	Legal Advisor

#### **Contracts Department:**

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

Following the Chairman's brief introduction, the appellants' legal representative was invited to explain the motive which gave rise to their objection.

Dr Angelo Farrugia explained how he filed an objection on the 23.10.2007 in favour of his clients, Messrs. Pius and Joseph Attard respectively, in which a reconsideration of the decision taken by the Adjudication Board was requested. The appellants were substantially contending that, contrary to what the Adjudication Board was claiming, their work force was capable of effecting the eventual contract subject to the tender since they have already had ample experience in doing rising mains similar to the tender in question with Water Services Corporation (WSC), the Drainage Department and the Malta Enterprise (ME).

Furthermore, Dr Farrugia sustained that with regards to their 'financial facilities', his clients "are in fact in good financial position to the extent that they have machinery of high level including trenching equipment, a quarry of their own with all the heavy planting facilities, trucks, himac etc."

On the issue of work force, the appellants' legal representative argued that his clients "cannot have full time employees when they physically do not have a tender of work", claiming that it does not make sense to have extra employees engaged with the *partnership* if the latter does not have any pending works.

At this point, Dr. Farrugia queried why his clients did not receive a reply to their objection. The PCAB informed the appellants' legal advisor that since the tender is still being processed, the Contracts Department is not bound to issue an Analysis Report as the latter is normally drawn up when the tender would have already been awarded.

Dr Farrugia claimed that his clients were being unfairly judged when, in his opinion, his clients are in a position to fulfil all the obligations requested by the tender document including (a) the facility to recruit pertinent skilled and experienced work force; (b) having enough financial credibility to carry out the necessary work and (c) having the necessary experience to carry out the works as they had done similar works with the WSC, the Drainage Department and ME.

Mr. Edward Scerri, an architect appointed by the appellants, whilst confirming that, in the past, his clients had already executed similar sewage pumping stations, commented that, in this instance, it seems that the Contracting Authority is placing more emphasis on the value of the tender than on the technical merits.

The PCAB asked what financial documents were requested from the participating tenderers. Mr. Joe Cordina, the partnership's Financial Controller, whilst stating that his clients have enough liquidity and that their work is generally self-financed, yet, admitted that they do not have a considerable amount of credit balances deposited in Banks and this could have adversely affected the Adjudication Board's analysis of facts and content of documentation presented by participating tenderers.

The PCAB commented on the fact that whilst there is, intrinsically, nothing wrong with entity having limited or no debts at all, yet, cash balances deposited in a Bank would still reflect a positive business activity. Undoubtedly, proceeded the PCAB, it

is always hard for any adjudicating panel to deliberate on facts and figures which are, knowingly or not, not made available to it.

Dr. Young, legal advisor to the WSC commented that the Contracting Authority had asked bidders to submit apposite financial statements signed by their respective accountant/s. As a matter of fact, during the hearing, it transpired that in this particular case, according to Dr Young, the Corporation had requested, on more than one occasion, the appellants, both verbally and in writing, to submit pertinent financial statements.

The Corporation's legal advisor proceeded by stating that the total amount of this project was estimated to be in the region of LM 300,000 to LM 330,000. Considering this figure, Dr Young contended that it was inconceivable for any Contracting Authority to favourably consider submissions from entities which declare an annual turnover of Lm 100,000 and whose Bank accounts were anything but comforting!

At this stage, the PCAB asked whether the tender document indicated the estimated total amount of the requested works. Mr Alan Bundic, a member of the Adjudication Board, replied in the affirmative, referring to the amount of Lm 330,000 as the estimated figure in question.

The same Board member proceeded by stating that the tender document contained quite a few forms which had to be filled in by participating tenderers. These *Forms*, added Mr Bundic, are meant to enable the Adjudication Board to acquire enough information to make it easier for them to form a better opinion and reach a just conclusion.

According to Mr Bundic, the Adjudication Board took into consideration that despite the fact that the estimated tender value, in this instance was Lm 330,000, thus implying a certain calibre of works involvement, yet, the appellants' declarations revealed only two projects the magnitude of which managed to reach a maximum of Lm 28,000 worth on one occasion! Needless to say, reflected Mr Bundic, all this within a context wherein the appellants' financial standing remained dubious, adversely affected the Board's analysis of the suitability of the appellants' overall offer.

Mr Bundic concluded his intervention by stating that albeit the tender document contemplated a performance bond, yet the value of such bond would ultimately be a trivial amount when compared to the overall financial comfort that tenderers were expected to provide.

The partnership's Financial Controller was asked by the PCAB to explain the reason why the requested financial statements were never sent to the Contracting Authority. Mr Cordina explained that due to some misunderstanding between him and Architect Scerri, *Form 4.4* of the tender document was never filled. At this stage, Mr Cordina remarked that despite this oversight, yet his clients still presented a performance guarantee.

The PCAB intervened to remark that considering that the Adjudication Board claims to have had little financial comfort with regards to the appellants' financial standing, such performance guarantee would have had little impact on enhancing the overall

declared financial credibility of the tenderer in question considering the magnitude of the tender.

Mr Cordina and the appellants' legal advisor remarked that if such parameters were to keep on governing public calls for offers, small sized operations are never going to be in a position to be successful and large entities will continue to grow whilst small operators will remain small or, simply be brought to an operational halt.

The PCAB asked members of the Adjudication Board whether their major concern was more related to the technical rather than the financial capabilities of the tenderers. Mr Bundic replied that the Adjudication Board had doubts on both factors.

At this stage Dr. Young intervened and argued that one cannot compare the previous projects with the one in question as the others were more straight-forward projects.

Mr Bundic proceeded by stating that the tender involved the digging of a 2,200 metres long trench from the pumping station at Wied il-Mielah to the village of Gharb. He also drew the attention of those present that in spite of the fact that certain stretches of the road are very narrow, yet, the contractor still had to ensure that the road was to remain open at all times including during trench works which had to be finalised within a stipulated timeframe.

When asked whether the Contracting Authority requested bidders to have permanent workers or not, Mr Bundic replied that the tender document did not specify any requirements so that bidders were allowed to engage workers specifically for this project, provided of course, that such workers had the required skills.

The PCAB remarked whether, once a contractor is able to dig a trench, would it make a difference if such trench is longer, as the basic principles would remain the same. Mr. Bundic stated that this would entail a different scale of planning and financing.

Mr. Scerri intervened and argued that following this line of thought, one had to raise a couple of significant points, namely that, in his opinion,

- from now onwards, tenders should specify that tenderers had to employ a certain amount of people and specify their minimum annual turnover;

*and*

- should the decision of the General Contracts Committee (GCC) be confirmed, small companies, similar to his clients, will stay away from submitting their bids and perhaps not even collecting the tender document.

Mr Bundic, when asked by the PCAB whether the Adjudication Board gave more weight to the technical over the financial aspect or vice versa replied that the Adjudication Board attributed the same importance to both areas.

At this stage, the PCAB observed that the appellants' undeclared liquidity does not provide comfort of its existence and no Adjudication Board could be expected to assume anything. Furthermore, the PCAB argued, what would happen if a contractor failed to complete a project, abandoning the works in the process ... wouldn't the Authority remain short of apposite finance?

Mr. Cordina rebutted by stating that if the contractor does not finish the works, the contractors would have done certain expenses which could be regarded as a financial guarantee. On his part, Dr. Farrugia drew the attention of those present that his clients had a quarry which could provide adequate financial security.

In his concluding remarks Dr Farrugia stressed that the fact that his clients did not have Bank overdraft facilities was proof enough of the appellants' financial stability. Whilst the appellants' lawyer contended that with regards to the previous projects mentioned by his clients this included trenching works across the entire road leading from Rabat to Munxar, as well as passing of cables through narrow streets, Mr. Scerri agreed that albeit such works may not have been of the same importance, one had to acknowledge that his clients regularly carry out similar trenching works in narrow alleys as they have the adequate machinery. As a matter of fact, concluded Mr. Scerri, his clients, being one of the few registered contractors with the Malta Transport Authority, have carried out several resurfacing of roads, both with tarmac and concrete, in urban and rural areas.

Mr. Mark Perez, also representing the Corporation, intervened to remind those present that there is a considerable difference between trenching 7 metres as compared to 100 metres.

At this stage the Chairman, on behalf of the PCAB, remarked that there is enough evidence for the Board to carry out the necessary deliberations and brought this hearing to a close.

This Board,

- having noted that the appellants, in terms of their 'motivated letter of objection' dated 23.10.2007, and also through their verbal submissions presented during the public hearing held on the 05.12.2007, had objected to the decision taken by the General Contracts Committee;
- having taken note of the appellants' non compliance with requests for submission of mandatory documentation such as Bank statements or financial declarations and that, in its opinion, it remains hard for any adjudicating panel to deliberate on facts and figures which are, knowingly or not, not made available to it;
- having also noted the fact that the tender document indicated the estimated total amount of the requested works as Lm 330,000 with the appellants themselves providing little formal financial and technical comfort;
- having considered the fact that in spite of the fact that the tender document contemplated a bid bond, yet the value of such bond would ultimately be a trivial

amount when compared to the overall financial comfort that tenderers were expected to provide;

- having clarified during the hearing that, since the tender document did not specify the minimum work force requirements, all was acceptable subject to those working on the job being skilled enough to do it;
- having also considered the extent of work required for a tenderer to fulfil all contractual obligations with regards to this particular tender vis-à-vis previous works carried out by appellants;
- having established that the Adjudication Board attributed equal importance to both technical and financial aspects of the tender document;

reached the following conclusions, namely:

1. the PCAB feels that one cannot rationally accept that small companies, with a limited (a) work force and, more important, (b) formally declared financial resources, could be operating on a scale far higher than their actual operational set-up;
2. any Adjudication Board has to (a) have some assurance on quality and some kind of financial guarantees to recommend the award *or* refrain from recommending the award of a contract and (b) be convinced that the tenderer is capable of finishing the project in time in an efficient and effective manner;
3. considering the declared financial standing of the partnership, works carried out in the past by appellants remain dubious as regards their comparability aspects between them and the extent of works and skill required to carry out this particular contract;
4. the lack of financial transparency is a commercial risk taken by business concerns in their own right and, whilst there may be other *fora* where such issues should be discussed and analysed further, yet, with regards to the adjudication of this tender, the Adjudication Board had to decide on facts submitted with the offer and not on facts and figures which were not made available to it.

As a consequence of (1) to (4) above, this Board decides against the appellants and recommends that the Adjudication Board proceeds with the adjudication of the said tender as previously decided.

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

**Alfred R Triganza**  
Chairman

**Anthony Pavia**  
Member

**Edwin Muscat**  
Member

31 December 2007