

## PUBLIC CONTRACTS REVIEW BOARD

Case No. 424

CT/3037/2011

### **Tender for the Rehabilitation and Restoration of the Former Maghtab Landfill – Phase II**

This call was published in the Government Gazette of the 9<sup>th</sup> December 2011 with a closing dated of the 2<sup>nd</sup> February 2012. The estimated value of the tender is €11,430,015.13 (incl. VAT).

Six (6) tenderers submitted their offers.

Elbros Construction Ltd filed an objection on the 2<sup>nd</sup> April 2012 against the decision of the Department of Contracts to disqualify its offer as technically non-compliant. This being a three-envelope tender, the appeal was submitted at the technical compliance assessment stage and as a result there is as yet no recommended tenderer.

The Public Contracts Review Board (PCRB) composed of A/Chairman Mr Joseph Croker and members Messrs Carmelo Esposito and Paul Mifsud convened a public meeting on the 15<sup>th</sup> June 2012 to discuss the mentioned objection.

#### **Elbros Construction Ltd**

Dr Franco Vassallo	Legal Representative
Dr Joseph Camilleri	Legal Representative
Mr Charles Ellul	Representative
Mr Joachim Calleja	Representative
Perit Mariello Spiteri	Representative
Mr Gabriele Fiumara	Geologist

#### **Bonnici Brothers Construction Ltd**

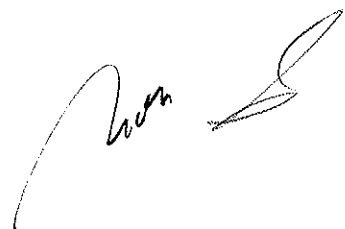
Dr John Gauci	Legal Representative
Perit David Bonnici	Representative

#### **Polidano Brothers Ltd**

Dr Franco Galea	Legal Representative
Mr Boris Farrugia	Representative
Mr Noel Vella	Representative

#### **Schatt Joint Venture**

Dr John Bonello	Legal Representative
Mr Anton Schembri	Representative



**WasteServ Malta Ltd**

Dr Victor Scerri

Legal Representative

**Evaluation Board**

Mr John Vella

Chairman

Ing. Stephen Dimech

Evaluator

Ing. Christopher Grech

Evaluator

Perit Robert Grech

Member of the Evaluation Team

**Department of Contracts**

Mr Jonathan Barbara

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

Dr Franco Galea, on behalf of Polidano Brothers Ltd, one of the bidders, made the following preliminary submission:-

- i. on being informed of this objection and hearing, he had requested the Office of the PCRБ to furnish him with the reasons prompting this appeal or better with a copy of the analysis report, which request was turned down;
- ii. once the other bidders, who were interested parties in this tendering procedure, had been invited to the hearing it was only fair and reasonable for them to be given some details relating to the appeal so that they would be able to follow and to make their input;
- iii. Volume 1 Section 6 Part XIII 'Appeals' (2) (c) (page 35 of the tender document), which reflected the provisions of Reg. 84 (2) (c) of the Public Procurement Regulations, provided, among other things, that:

*Within three working days of the publication of the replies the Secretary of the Review Board shall prepare a report (the Analysis Report) analysing the letter of objection. This report shall be circulated to the persons who file an objection and interested parties.*

The A/Chairman PCRБ remarked that in the case of a three package tendering procedure it was not the practice to forward the letter of objection to the interested parties, however, if the appellant would raise no objection then the PCRБ would pass on a copy the letter of objection to the interested parties.

Dr Franco Galea recalled other instances, e.g. PCAB Case No. 144 and 145 regarding the Tender for the Supply, Installation, Testing and Commissioning of Slaughter - Line Equipment and Ancillary Services at the Civil Abattoir Xewkija, Gozo, where the interested parties were given such information. He added that the regulations made no distinction between the single package procedure and the three package procedure in this respect and that he reserved the right to take appropriate steps to safeguard the interests of his client.

Dr John Gauci, on behalf of Bonnici Construction Brothers Ltd and Dr John Bonello on behalf of Schatt Joint Venture shared the views expressed by Dr Galea in this regard.

Dr Franco Vassallo, on behalf of the appellant, declared that his client would find no objection if the interested parties were furnished with a copy of his reasoned letter of objection.

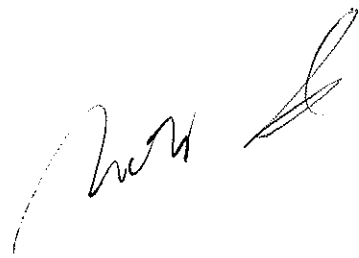
In the circumstances, the A/Chairman PCRB instructed that the interested parties be furnished with a copy of the appellant's reasoned letter of objection dated 2<sup>nd</sup> April 2012 and suspended the hearing for 20 minutes for the interested parties to acquaint themselves with the contents of the said reasoned letter of objection.

*The hearing resumed at 11:45 am.*

The A/Chairman PCRB stated that after having been furnished with the reasoned letter of objection and after having been given time to examine it, all the parties concerned agreed that the PCRB should go ahead with the hearing.

Dr Joseph Camilleri, on behalf of Elbros Construction Ltd, the appellant, submitted that:-

- i. by letter dated 23<sup>rd</sup> March 2012, the Contracts Department had informed his client that his offer was disqualified because with regard to Item 1.2 'Geocell' in Volume 1, Section 4 (Form 3) of the tender document, the evaluation board noted: *that one of the two types suggested is below the required specifications. Namely, the 'Tenax Tenweb' maximum proposed product's cell height is 100mm whereas the tender dossier, under clause 2.7.1.1 of the employer's requirements stated "...The upper layer of the Type C capping system shall comprise a 200mm deep Geocell system...."*
- ii. as per clause 32.1 the award criterion was the cheapest administratively and technically compliant tender;
- iii. as per clause 2.7.1.2: *Geocell is a three dimensional cellular geotextile system that provides protection against slope erosion and a substrate suitable to support landscape planting. It is usually, but not always, supplied in flat panels that are extended across, and secured by pins to slopes to form a matrix of cells that restrain the surface fill material when placed;*
- iv. in layman's terms a Geocell system was a sort of net to prevent soil from sliding due to erosion especially in the case of a steep slope;
- v. the tender document requested as per clause 2.7.1.1 (page 113) that: *The upper layer of the Type C capping system shall comprise a 200mm deep Geocell system;*
- vi. his client had proposed a Geocell system as requested but instead of comprising one 200mm layer it comprised 2 layers of 100mm each;



- vii. apparently, the evaluation board discarded his client's offer immediately upon noticing that the proposed Geocell system did not comprise a 200mm deep layer; and
- viii. his client retained that the interpretation and the conclusion of the evaluation board were incorrect because his proposal did in fact meet tender specifications, which specifications did not indicate that the system had to comprise only one layer of a depth of 200mm and, besides, the Geocell system was to be eventually tested by the client.

Dr Franco Vassallo, on behalf of the appellant (Elbros Ltd), made reference to page 113 of the tender document, namely:-

*Clause 2.7.1.2 – cited earlier on;*

*Clause 2.7.1.3 :- Two Geocell systems shall be proposed by the Contractor. One additional system will be proposed by the Employer. The Geocells shall be of a type specifically manufactured for the protection of steep slopes, the retention of growing media/subsoil, the support of vegetation and to aid slope drainage. The three systems shall be trialled to determine the material and installation method to be undertaken in subsequent phases;*

*clause 2.7.2:- Installation is to be to manufacturer's guidelines and recommendations. In addition the following requirements shall be adhered to.*

Dr Vassallo also remarked that:-

- a. the tender document did not indicate that it had to be a one layer system and therefore his client proposed a 2-layer system with each layer being 100mm deep and in that way obtaining the 200mm deep Geocell system requested;
- b. from the technical point of view the 2-layer system was superior to the 1-layer system;
- c. had clause 2.7.1.1 of the tender document referred to a 200mm single layer capping then the evaluation board would have been correct in its assessment but this clause referred to a Geocell system; and
- d. at this stage of the tendering process, his client was not recommending tender award in his favour but that his proposal would be considered further.

Mr John Vella, chairman of the evaluation board, remarked that, as requested, the appellant had proposed two Geocell systems, one having a 200mm deep layer and the other proposal having a 100mm deep layer and the conclusion reached by the evaluation board was that the second proposal did not meet published specifications.

Perit Robert Grech, member of the evaluation team, explained that:-

- i. according to Form 8 (page 46 of the tender document) the bidder had to provide a Design Proposal, Workplan and Programme of Works;



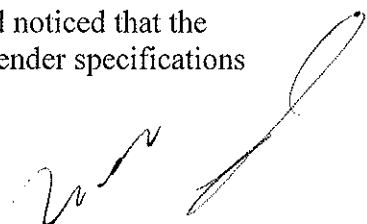
- ii. the Design Proposal included the method statement as to how the works were to be executed, e.g. the laying of the Geocell system;
- iii. whereas the tender document requested two proposals each comprising a 200mm Geocell layer, appellant submitted one with a 200mm deep layer and the other with a 100mm deep layer;
- iv. moreover, in his method statement the appellant did not indicate that he would be using two layers of 100mm each, one on top on the other, and, in the absence of that information the evaluation board considered seeking a clarification from the bidder concerned however since that represented additional information it was termed as a rectification rather than a clarification and rectifications were not allowed in that respect (notes to clause 16 - page 10 of the tender document);
- v. Section 7.1.3.1.1 at page 206 of the appellant's tender submission related to the method statement of this capping option in question (C), where bullet 3 thereof indicated as follows:
  - a. *Laying of 0.2m deep geocell, fixed with propriety 'J-Hooks'*;
- vi. this description did not provide the evaluation board with the indication that the appellant was going to put together two 100mm geocell layers to obtain a 200mm geocell layer;
- vii. the propriety 'J-Hooks' were used to join/fix the geocell with the sub-base rather than to join two geocell layers together; and
- viii. unless clearly indicated, the evaluation board could not assume that the appellant intended laying two 100mm geocell layers one on top of the other in order to obtain a depth of 200mm.

Dr Franco Galea asked where, in the appellant's tender submission did it emerge that the J-Hooks were to be used to joint two 100mm geocell layers together, when those J-Hooks were meant to fix the geocell layer to the sub-base?

Dr John Bonello, on behalf of Schatt Join Venture, raised the following questions: (a) was WasteServ happy with the double layer system proposed by the appellant, (b) was WasteServ happy with the method where these 2 100mm layers were going to be joined together with the use of J-Hooks and (c) did the appellant seek a clarification from WasteServ on this matter prior to submitting his bid?

Dr Franco Vassallo reiterated that the tender document did not request a one layer geocell but a goecell system and that his client was going to provide a 200mm geocell system, the installation of which was left up to the manufacturer's guidelines and recommendations (clause 2.7.2);

Perit Robert Grech responded that no request for clarification was received in connection with this issue. He added that once the evaluation board noticed that the 100mm geocell layer proposed by the appellant did not satisfy the tender specifications it did not go into the technical details/merits of this proposal.



Dr Franco Galea concluded that: (a) in PCAB case nos. 144 and 145, the PCAB had rejected the plea by the appellant that he would join together two items together to obtain the thickness requested in the tender document and (b) from a technical perspective it would seem to him that a single 200mm layer was different from two 100mm layers on top of each other.

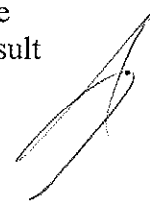
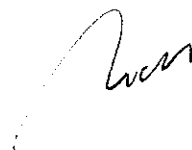
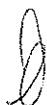
Dr John Gauci, on behalf of Bonnici Brothers Ltd, shared Dr Galea's views with regard to PCAB case nos. 144 and 145 (CT/373/2007). Dr Gauci also referred to an instance when the PCRB turned down the appellant's claim that his departure from the tender specifications was justified because the product he proposed was technically superior to that requested by the contracting authority since the PCRB held that the appellant should have sought a clarification from the contracting authority prior to the closing date of the tender to explain his intended departure from tender specifications. Dr Gauci remarked that the PCRB's role was not meant to overturn the technical assessment made by the evaluation board but its role was to ascertain that the evaluation board had acted correctly and fairly according to the documentation in its possession.

Dr Franco Vassallo, representing the appellant, concluded by:-

1. contending that PCAB case nos. 144 and 145 was not correctly represented by the interested parties because in that instance the appellant had also referred the Contracts Department to a similar project it had carried out at the Malta Abattoir; and
2. reiterating that his client had submitted what was requested in the tender document, i.e. a 200mm deep Geocell system, and therefore his client should be reintegrated in the tendering procedure.

This Board:

- having noted that the appellants (Elbros Ltd) in terms of a reasoned letter of objection and also their verbal submissions presented during this hearing objected to the decision of the pertinent authority;
- having noted all of the appellant's representative's claims and observations particularly to the fact that the tender document did not specify the provision of a structure made up 'monobloc' panels but of a Geocell system of a thickness of 200mm; having noted that the contractor was offering a system made up of panels of a thickness of 100mm each which would then be placed on top of each other and anchored to the subsoil using special proprietary hooks; having also noted that as per '*Clause 2.7.1.3 :- Two Geocell systems shall be proposed by the Contractor. One additional system will be proposed by the Employer. The Geocells shall be of a type specifically manufactured for the protection of steep slopes, the retention of growing media/subsoil, the support of vegetation and to aid slope drainage. The three systems shall be trialled to determine the material and installation method to be undertaken in subsequent phases;*' and *Clause 2.7.2:- Installation is to be to manufacturer's guidelines and recommendations. In addition the following requirements shall be adhered to*'; having noted the appellant's claim that the laying of two panels on top of each other would result in the provision of a better system; having also noted the appellant's representative contention that the cited cases PCAB 144 and 145 were not correctly presented by the interested parties;

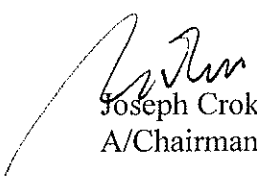


- having noted the contracting authority's statement that once the maximum thickness of the panel presented for this option by appellant was of 100mm the adjudication board considered this as being technically non-compliant and did not delve further into the proposal's technical merits; having noted that according to the contracting authority the appellant in his method statement did not mention that he would be superimposing two 100mm panels to make up the required depth; having also noted that the appellant in the same method statement bound himself to provide a 200 mm system anchored using proprietary hooks;
- having noted the various arguments brought up by the interested parties particularly the relevance of PACB cases 144 and 145 and the decisions taken in these cases to the case under discussion,

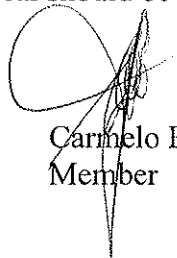
concludes as follows,

1. The Public Contracts Review Board is of the opinion that cases 144 and 145 are not relevant to the current case even though one of the tenderers in the mentioned cases had proposed the gluing of two panels to make up the required thickness of insulating board; the tenders in the cited cases insofar as may be ascertained by this Board did not include a clause which allowed this procedure, whereas the tender under discussion only specified that the thickness of the Geocell had to be 200mm thick without mentioning how this thickness was to be achieved; moreover, the tender under discussion provided that the proposed systems had to be tested and installation had to be done in accordance with the manufacturer's directions giving the latter a wider option of how he was to achieve the specifications.
2. The Public Contracts Review Board, though not in a position to establish whether or not the offered option i.e. of placing two panels on top of each other, was superior to other options, considers that once the tender document in question only specified the thickness required without going further into the specifics of how this condition was to be met and once the appellant in the method statement accompanying the tender bound himself to provide the requested thickness, and once any chosen option would be subject to testing and would be installed in accordance with the manufacturer's direction, then his offer/option should have been considered further by the Adjudication Board and should not have been discarded offhand.

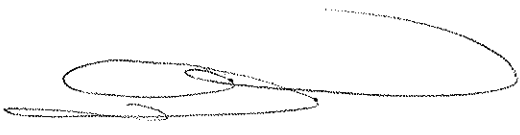
In view of the above, this Board finds in favour of the appellant company and recommends the re-integration of his bid into the tendering process. The deposit paid by the appellant to submit his appeal should be reimbursed.



Joseph Croker  
A/Chairman



Carmelo Esposito  
Member



Paul Mifsud  
Member

26 June 2012