

PUBLIC CONTRACTS REVIEW BOARD

Case No. 551

CT/3004/2012

Negotiated Procedure: Tender for the Design, Fabrication, Construction and Erection of a Protective Shelter over the Tarxien Megalithic Temples

The call for tender, with an estimated value of €1,230,000 (excl. VAT), was published in the Government Gazette of the 10th April 2012 with a closing date of the 17th May 2012. Four (4) tenderers submitted their offers.

Steel Shape Ltd filed an objection on the 4th March 2013 against the decision of the Contracts Department, to recommend the award of tender to Malta Restoration JV.

The Public Contracts Review Board composed of Mr Alfred Triganza (Chairman) and Mr Joseph Croker and Mr Carmelo Esposito as members convened a meeting on Wednesday 15th May 2013 to discuss the appeal in the presence of:

Steel Shape Ltd

Dr John Gauci	Legal Representative
Mr Ivan Coleiro	Representative
Mr Iomar Vella	Representative
Mr Joseph Vella	Representative

Pillow Space Frame Ltd– interested party

Dr Godwin Muscat Azzopardi	Legal Representative
Mr Martin Pillow	Managing Director
Mr Pierre Abela	Representative

Malta Restoration JV – recommended tenderer

Dr Massimo Vella	Legal Representative
Dr David Vella	Legal Representative
Ing. Johann Bondin	Representative
Architect Mark Camilleri	Representative
Mr Francis Vella	Representative

Contracts Department

Mr Jonathan Barbara	Procurement Manager
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Planning and Priorities Coordination Department – Office of the Prime Minister and Heritage Malta

Dr Ruth Baldacchino	Legal Representative
Dr Patrick Valentino	Legal Representative

Evaluation Board

Ms Joanne Mallia	Chairperson
Architect Ruben Abela	Member
Mr Reuben Grima	Member
Ms Katya Stroud	Member
Mr Kevin Abela	Secretary

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

Dr John Gauci, legal representative of Steel Shape Ltd, the appellant company, made the following submissions:-

- i. by letter dated 22nd February 2013 the Contracts Department informed the appellant company that its offer had been adjudicated to be technically non-compliant;
 - ii. in the same letter of disqualification it was stated that the tender was recommended for award to Malta Restoration JV for the price of €2,239,435, including VAT, which happened to be the same price quoted by the appellant company;
 - iii. on seeking a clarification, the Department of Contracts, by email dated 27th February 2013, confirmed that the tender was being awarded at the price of €2,239,435 but to Malta Restoration JV and the appellant company was therefore requesting the contracting authority to state how did the recommended tenderer scale down its quoted price of €2,587,978 to the awarded price of €2,239,435, which was quite substantial and it, therefore, followed that there must have been some kind of negotiation entailing a reduction in the works/specifications originally requested;
 - iv. the three shortcomings listed in the letter of disqualification could have easily been settled through a clarification all the more when the contracting authority had already sought clarifications from the appellant company on similar issues. In fact, on the 11th July 2012 the appellant company had received a request for more information on 9 points which it had complied with on the 17th July 2012;
 - v. in the same clarification letter dated 11th July 2012, the contracting authority referred to 6 other issues, which included issues cited for disqualification, in respect of which the appellant company was simply asked to 'indicate' where the contracting authority could find the relevant information and the appellant company complied without, however, submitting any additional information since none was requested;
- and
- vi. consequently, it was considered not fair to exclude the appellant company due to alleged lack of information on issues in respect of which the contracting authority did not ask it for any additional information but was simply asked to indicate where one could trace the information in its tender submission.

Ms Joanne Mallia, chairperson of the evaluation board, explained that:-

- a. after examining the bids received through the negotiated procedure it resulted that, whilst the recommended bid was administratively and technically

compliant, yet the price of €2,587,978 was too high compared to the funds available;

- b. in an effort to scale down the price of the cheapest compliant tender, namely that of Malta Restoration Malta JV, Heritage Malta decided to reduce certain items in the scope of works which were not considered crucial to the project overall and that was how the offer of Malta Restoration JV was reduced from €2,587,978 to €2,239,435;
- c. with regard to mandatory requirements, the evaluation board was entitled to ask only for clarifications on information already submitted by the bidder;
- d. prior to resorting to exclusion, the contracting authority gave all bidders the opportunity to indicate where it could find the information in case the evaluation board might have missed it;
- e. it was correct for one to state that in its letter dated 11th July 2012, Heritage Malta had asked for more information with regard to 9 issues whereas with regard to 6 other issues it only requested directions as to where it could trace the information in the bidder's tender submission, which latter mandatory information should have already been submitted;
- f. the appellant company's response dated 17th July 2012 included certain additional information as requested but it failed to lead the evaluation board to finding all the mandatory information indicated in the second part of the letter at points 1 to 6;
- g. the clarification letter dated 17 July 2012, among the questions and answers one found the following:

Question 8: Item 3.2 - Can you clarify whether the scaffolding listed in the Method Statement is to be used as the protective working platform over the whole site required by the MEPA permit and Volume 3: Technical specifications; Constraints clause 32?

Reply: We confirm that a protective working platform will be installed over the whole site required by the MEPA permit and Volume 3: Technical specifications; Constraints clause 3.2.

- h. the letter of rejection dated 22nd February 2013 conveyed the same reasons laid down in the evaluation report and one of them, namely para. 2 of bullet 2 read as follows:-

The information contained in Bid 1 (Steel Shape Ltd) on the installation of a protective platform are a sparse reference to the use of scaffolding in "Section 6.3 Appendix A "Method Statement" of "Quality Assurance Plan - Steel Erection and Finishing Trades", which was confirmed to be part of the protective platform in reply to clarification number 8 sent on the 20th July. The clarification also states that it will be erected manually in two phases. These references provide no specifications on the scaffolding to

be used as a working platform, nor any information on how this will be erected and dismantled and/or what precautions will be taken during the process to avoid damage to the prehistoric remains as requested in Item 3.2. As such, the submission is considered non-compliant.

- i. the information provided by the appellant company in its tender submission was not sufficient and if it were to provide it at adjudication stage it would have amounted to a rectification.

Dr Gauci stated that the MEPA permit was so detailed that it was not necessary to reproduce all those details all over again but the appellant company's reference that the platform would be installed as per MEPA permit was enough.

The Chairman Public Contracts Review Board asked the appellant company to trace the relative 'Method Statement' in its tender submission but the appellant company's representatives' efforts proved fruitless.

Ms Mallia continued that there were other deficiencies in the appellant company's tender submission and one of them was highlighted in the third bullet of the reasons for rejection which read as follows:

In Section 5 of the Design Proposal (Form 7) the tender document requires 5.1 the submission of a detailed maintenance programme for the first 10 years indicating means of access, protection of temple, etc.; and 5.2 a proposal for the following 15 years of the warranty period (including costs).

Bid 1 (the appellant) contains no information on the maintenance programme for the first 10 years nor a proposal for the following 15 years. In the reply to clarifications sent on the 20th July (Section 2, No. 4) the Bidder indicates that a working platform will be erected "should the need for maintenance works to be carried out" as well as his willingness to comply with any relevant conditions in the tender document, particularly Article 58, Article 71 and Article 72, "and therefore the maintenance programme and the general extended warranty are as stipulated in the tender document itself." However, the tender document stipulates only the duration of the maintenance agreement and does not specify qualitatively the type, frequency or method of works necessary to maintain the shelter structure over the stipulated period. As such, the submission is considered incomplete and therefore non-compliant.

Dr Gauci retorted that:-

- i. once the bidder submitted its tender it meant that it was going to abide by its conditions and specifications;
- ii. with regard to maintenance, reference was made to Doc. D, attached to the appellant company's letter of objection, para. 4 'Rules for maintenance and repair' where it was stated that the frequency of maintenance for external elements was twice a year while for interior elements it was, approximately, every ten years;

and

- iii. therefore it resulted that certain details were, in fact, given and if more information was required then the contracting authority could have asked for it.

Ms Mallia reiterated that the information given by the appellant company was insufficient.

The Chairman Public Contracts Review Board remarked that besides the bidder's undertaking to abide by tender conditions and specifications, one had also to submit all the information requested so as to demonstrate to the contracting authority that one had the capacity and the know-how to execute the works otherwise what would be the purpose of submitting a tender.

Ms Mallia referred to first bullet of the reasons for rejection which read as follows:-

- a. *In Section 1 of the Design Proposal (Form 7), the tender document requires the submission of detail design, drawings, methodologies and material specifications for:*

Rock anchoring and foundation works to be carried out.

The (appellant's) bid provides drawings (under section "Images Design and Calculation" of the bid) of the shelter supported by single pillars with no evident supporting base as well as the detailed method statement for micropiling. In fact, at the point of contact with the ground the pillar is partly covered by a plant-like representation and there are no detail designs of the interface between the micropiles and the pillar. When asked to clarify, the same drawings were re-submitted in the reply to the clarification received on the 20/07/2012. As the bid does not provide any detail design, drawings or methodologies for the interface between the pillar and the micropiles, and with no indication of size, shape or impact on the archaeologically sensitive ground, the submission was considered non-compliant;

- b. this was an essential requirement considering that one was dealing with a highly sensitive archaeological site and the appellant company failed to provide what was requested of the bidder since it provided details of the micropile by itself but not of the interface between the pillar and the micropile;

and

- c. Volume 1 Section 7 listed the forms to be submitted by the tenderer and Form 7 referred to 'Design Proposal' which at page 41 of the tender document stated that 'The submission is to include the following sections' among them, 1.1.1, 1.3.3, 3.2.1, 3.2.2.1., 5.1 and 5.2 all of which were indicated in the reasons for disqualification – in respect of Volume 1 Section 7 Form 7 applied Note 3 as per Tender Form, which provided for clarification but no rectification.

The Chairman Public Contracts Review Board requested the appellant company to go through its tender submission and identify the information which Ms Mallia had

alleged to be missing. He added that when dealing with highly sensitive archaeological sites as the one in question one would expect a certain amount of detail in the tender submission because the contracting authority had to take all the foreseeable precautions to protect the site.

Mr Jonathan Barbara, procurement manager and representing the Contracts Department, under oath, stated that Heritage Malta had requested permission from the General Contracts Committee with a view to entering into negotiations with the cheapest compliant bidder and that request was acceded to provided that the tender specifications would not be fundamentally altered.

Ms Mallia remarked that whilst, in the open tender procedure, all bids were found to be non-compliant, yet, in the negotiated procedure, all bidders had the same opportunity to submit the information which was missing in their open tender submission.

Mr Martin Pillow, also representing Pillow Space Frame Ltd, remarked that:-

- a. at the meeting held on site only three out of the six bidders participating in the negotiated procedure were present;
- b. albeit the contracting authority had hinted that its budget for these works was limited, yet it refrained from, officially, divulging the estimated value of works
- c. if one were to take the bid bond as a yardstick, then the estimated value was of about €1.2 million;
- d. the appellant company had quoted the price of almost €3.5 million and it was considered to be rather on the conservative side given the complexity of the works involved and, as a result, the appellant company opined that both the department's estimate of €1.2 million and the recommended price of €2.588 million were unrealistic;

and

- e. one feared that the recommended joint venture would not be able to execute this contract as per published specifications given that the lead partner employed only 5 to 6 persons and had to undertake 50% of the works.

Dr Gauci complained that this process represented a negotiated procedure within a negotiated procedure. He went on to question the fact that the contracting authority negotiated the price with the recommended tenderer with the consequent reduction in the scope of works but, on the other hand, the contracting authority failed to seek clarifications from the appellant company who, in the first instance, offered the same price for all the works included in the tender.

Ms Mallia explained that since this was the second attempt to award a tender to carry out this project which was crucial for the protection of this site, a request was made and accepted so that the budget of €1.2m be increased up to the value of the cheapest

offer received, namely €2,239,495 which was tendered by Steel Shape Ltd, whose bid, however, was not technically compliant and so the contracting authority turned to the next cheapest tenderer, Malta Restoration JV, and negotiated the reduction of its price from €2,587,978 to €2,239,495 by effecting a reduction in the scope of works by removing those items, such as lighting, which, though desirable, were not crucial to the main purpose which was the protection of this unique site.

Dr Patrick Valentino, legal representative of the contracting authority, concluded that it emerged clear that the appellant company's tender submission was technically non-compliant, especially with regard to the rock anchoring and foundation works, the detailed maintenance programme and the proposed installation method.

At this point the hearing came to a close.

This Board,

- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated the 4th March 2013 and also through its representatives verbal submissions presented during the hearing held on the 15th May 2013, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by letter dated 22nd February 2013 the Contracts Department informed the appellant company that its offer had been adjudicated to be technically non-compliant, (b) in the same letter of disqualification it was stated that the tender was recommended for award to Malta Restoration JV for the price of €2,239,435, including VAT, which happened to be the same price quoted by the appellant company, (c) on seeking a clarification, the Department of Contracts, by email dated 27th February 2013, confirmed that the tender was being awarded at the price of €2,239,435 but to Malta Restoration JV and the appellant company was therefore requesting the contracting authority to state how did the recommended tenderer scale down its quoted price of €2,587,978 to the awarded price of €2,239,435, which was quite substantial and it, therefore, followed that there must have been some kind of negotiation entailing a reduction in the works/specifications originally requested, (d) the three shortcomings listed in the letter of disqualification could have easily been settled through a clarification all the more when the contracting authority had already sought clarifications from the appellant company on similar issues. In fact, on the 11th July 2012 the appellant company had received a request for more information on 9 points which it had complied with on the 17th July 2012, (e) in the same clarification letter dated 11th July 2012, the contracting authority referred to 6 other issues, which included issues cited for disqualification, in respect of which the appellant company was simply asked to 'indicate' where the contracting authority could find the relevant information and the appellant company complied without, however, submitting any additional information since none was requested, (f) consequently, it was considered not fair to exclude the appellant company due to alleged lack of information on issues in respect of which the contracting authority did not ask it for any additional information but was simply asked to indicate where one could trace the information in its tender submission, (g) the MEPA permit was so detailed that it was not necessary to

reproduce all those details all over again but the appellant company's reference that the platform would be installed as per MEPA permit was enough, (h) once the bidder submitted its tender it meant that it was going to abide by its conditions and specifications, (i) with regard to maintenance, reference was made to Doc. D, attached to the appellant company's letter of objection, para. 4 'Rules for maintenance and repair' where it was stated that the frequency of maintenance for external elements was twice a year while for interior elements it was, approximately, every ten years, (j) therefore it resulted that certain details were, in fact, given and if more information was required then the contracting authority could have asked for it, (k) complained that this process represented a negotiated procedure within a negotiated procedure and (l) one questioned the fact that the contracting authority negotiated the price with the recommended tenderer with the consequent reduction in the scope of works but, on the other hand, the contracting authority failed to seek clarifications from the appellant company who, in the first instance, offered the same price for all the works included in the tender;

- having considered the contracting authority's representative's reference to the fact that (a) after examining the bids received through the negotiated procedure it resulted that, whilst the recommended bid was administratively and technically compliant, yet the price of €2,587,978 was too high compared to the funds available, (b) in an effort to scale down the price of the cheapest compliant tender, namely that of Malta Restoration Malta JV, Heritage Malta decided to reduce certain items in the scope of works which were not considered crucial to the project overall and that was how the offer of Malta Restoration JV was reduced from €2,587,978 to €2,239,435, (c) with regard to mandatory requirements, the evaluation board was entitled to ask only for clarifications on information already submitted by the bidder, (d) prior to resorting to exclusion, the contracting authority gave all bidders the opportunity to indicate where it could find the information in case the evaluation board might have missed it, (e) it was correct for one to state that in its letter dated 11th July 2012, Heritage Malta had asked for more information with regard to 9 issues whereas with regard to 6 other issues it only requested directions as to where it could trace the information in the bidder's tender submission, which latter mandatory information should have already been submitted, (f) the appellant company's response dated 17th July 2012 included certain additional information as requested but it failed to lead the evaluation board to finding all the mandatory information indicated in the second part of the letter at points 1 to 6, (g) the clarification letter dated 17 July 2012 included the following reply, namely "*We confirm that a protective working platform will be installed over the whole site required by the MEPA permit and Volume 3: Technical specifications; Constraints clause 3.2*", (h) the letter of rejection dated 22nd February 2013 conveyed the same reasons laid down in the evaluation report, (i) the information provided by the appellant company in its tender submission was not sufficient and if it were to provide it at adjudication stage it would have amounted to a rectification, (j) there were other deficiencies in the appellant company's tender submission such as those relating to the *Design Proposal (Form 7)* which information was an essential requirement considering that one was dealing with a highly sensitive archaeological site and the appellant company failed to provide what was requested of the bidder since it provided details of the micropile by itself but not of the interface between the pillar and the micropile, (k) whilst, in the open tender procedure, all bids were found to be non-

compliant, yet, in the negotiated procedure, all bidders had the same opportunity to submit the information which was missing in their open tender submission, (l) since this was the second attempt to award a tender to carry out this project which was crucial for the protection of this site, a request was made and accepted so that the budget of €1.2m be increased up to the value of the cheapest offer received, namely €2,239,495 which was tendered by Steel Shape Ltd, whose bid, however, was not technically compliant and so the contracting authority turned to the next cheapest tenderer, Malta Restoration JV, and negotiated the reduction of its price from €2,587,978 to €2,239,495 by effecting a reduction in the scope of works by removing those items, such as lighting, which, though desirable, were not crucial to the main purpose which was the protection of this unique site and (m) concluded that it emerged clear that the appellant company's tender submission was technically non-compliant, especially with regard to the rock anchoring and foundation works, the detailed maintenance programme and the proposed installation method;

- having also considered the department of contract's representative's testimony, particularly the references made to the fact that Heritage Malta had requested permission from the General Contracts Committee with a view to entering into negotiations with the cheapest compliant bidder and that request was acceded to provided that the tender specifications would not be fundamentally altered,

reached the following conclusions, namely:

1. The Public Contracts Review Board observes that there must have been something wrong with the department's estimate which was put at €1,230,000, excluding VAT, whereas the only compliant bid amounted to €3,499,811.63 and the recommended bid amounted to €2,239,435, after evidently reviewing the scope of works.
2. The Public Contracts Review Board takes full cognisance of the fact that, during the hearing it asked the appellant company to trace the relative 'Method Statement' in its tender submission but the appellant company's representatives' efforts proved fruitless.
3. This Board has also favourably acknowledged the point made by the contracting authority that after examining the bids received through the negotiated procedure it resulted that, whilst the recommended bid was administratively and technically compliant, yet the price of €2,587,978 was too high compared to the funds available.
4. The Public Contracts Review Board argues that, besides the bidder's undertaking to abide by tender conditions and specifications, one had also to submit all the information requested so as to demonstrate to the contracting authority that one had the capacity and the know-how to execute the works otherwise what would be the purpose of submitting a tender?
5. The Public Contracts Review Board opines that when dealing with highly sensitive archaeological sites as the one in question one would expect a certain

amount of detail in the tender submission because the contracting authority had to take all the foreseeable precautions to protect the site.

6. This Board contends that generic submissions as those made by the appellant company in its bid should not be considered compliant - them being based solely on the premise that (1) once the bidder would have submitted its tender this would have automatically meant that it was going to abide by the terms, conditions and specifications and (2) with regard to 'maintenance', reference was uniquely made to Doc. D attached to the appellant company's letter of objection, para. 4 'Rules for maintenance and repair' where it was stated that the frequency of maintenance for external elements was twice a year while for interior elements it was, approximately, every ten years.
7. This Board also argues that mandatory requests listed in tender document should be submitted and not be considered as an arbitrary choice. As a consequence, it is unacceptable for the appellant company to claim that the MEPA permit was so detailed that it was not necessary to reproduce all those details all over again and that its reference that the platform would be installed as per MEPA permit was enough.
8. The Public Contracts Review Board has favourably considered the fact that, during the hearing it was claimed that prior to resorting to exclusion the contracting authority gave all bidders the opportunity to indicate where it could find the information in case the evaluation board might have missed it.
9. This Board agrees with the contracting authority's viewpoint, namely that, in this particular instance, the information provided by the appellant company in its tender submission was not sufficient and if it were to provide it at adjudication stage it would have amounted to a rectification.
10. The Public Contracts Review Board concurs with the contracting authority's remarks in connection with the fact that whilst, in the open tender procedure, all bids were found to be non-compliant, yet, in the negotiated procedure, all bidders had the same opportunity to submit the information which was missing in their open tender submission.
11. This Board also acknowledges the fact that the contracting authority turned to the next cheapest tenderer, Malta Restoration JV, and negotiated the reduction of its price from €2,587,978 to €2,239,495 by effecting a reduction in the scope of works by removing those items, such as lighting, which, though desirable, were not crucial to the main purpose which was the protection of this unique site.
12. In conclusion, this Board reiterates the arguments raised during the hearing in relation to the fact that the appellant company's tender submission was technically non-compliant, especially with regard to the rock anchoring and foundation works, the detailed maintenance programme and the proposed installation method.

In view of the above this Board finds against the appellant company. Furthermore, this Board recommends that the appellant company shall forfeit the deposit paid to lodge the appeal.

Alfred R Triganza
Chairman

Joseph Croker
Member

Carmelo Esposito
Member

22 May 2013