

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case No. 616**

**TM 001/2013**

**Tender: Consultancy Services for a Traffic Impact Statement on the Kappara Junction Project.**

The tender was published on the 26<sup>th</sup> February 2013. The closing date was the 26<sup>th</sup> March 2013.

The estimated value of the Tender was €13,500 (Exclusive of VAT).

Two (2) bidders had submitted an offer.

On the 16<sup>th</sup> September 2013, Transporta JV filed an objection against the cancellation of the tender.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Tuesday 22nd October 2013 to discuss the appeal.

### **Present for the Hearing:**

#### **Transporta JV - Appellants**

Perit Mariello Spiteri	Representative
Perit Vanessa Pisani	Representative
Dr Franco Galea	Legal Representative

#### **Transport Malta - Contracting Authority**

Mr Ronald Attard Pullicino	Chairman Evaluation Board
Mr Godwin Grima	Member Evaluation Board
Mr Ray Stafrace	Representative
Mr Clinton Ellul	Representative
Dr Joseph Camilleri	Legal Representative

The Chairman made a brief introduction and invited the appellants' representative to make his submissions on the objection.

Dr Franco Galea on behalf of the appellants stated that the present tender was cancelled because all the bids exceeded the allocated budget. Appellants objection is that in the tender document there was no indication anywhere of the budget allowed for this project. There were two bids with a difference between them of around €40,000. This tender was very complicated and required long hours of work in its compilation, and at a cost to the bidders. It is not fair therefore to cancel this tender.

Dr Joseph Camilleri on behalf of the contracting authority stated that the authority for the issue of this tender was obtained before it was published. The Ministry's Permanent Secretary gave the necessary authorization and the amount to be spent on this tender was fixed at €13,500. Dr Camilleri filed a copy of this authorization where the amount of €13,500 can be verified. The facts are not contested, Dr Camilleri stated. There were two bids for this tender, one for around €70,000 and the other for around €30,000. Both offers were technically compliant. The real problem was the budget allocated for the project.

Dr Camilleri referred to the tender's 'Instructions to Tenders', in Article 33 it is clearly stated that the contracting authority has the right to stop the tender procedure. It states that the publishing of the tender does not commit the authority to implement the project. Article 33.3 goes further and cites examples of when the tender process can be halted. One of these instances is when all the bidders are compliant but their offers exceed the financial estimates. Although the appellants' claim about expenses, made earlier, may seem just, this does not mean that the tender has to be awarded. If the appellants are claiming damages, this is not the right forum to demand them. In any case the letter of objection is asking that the appellants be awarded the tender. This cannot be demanded.

Dr Franco Galea for the appellants said that even when the tender is cancelled, bidders have the right of appeal. The internal document produced today is just an internal document. There was no indication afforded to bidders in the tender document that the price was limited. No bid bond was necessary, but this would have helped prospective bidders to assess the approximate value of the tender. He contended that the contracting authority withheld information about the financial resources.

Dr Franco Galea referred to another tender issued by Heritage Malta that had also been cancelled because there were no funds available. If bidders were not informed at the tender stage that the amount allotted for the project was limited, then they could not be excluded because this amount was exceeded. He contended that the tender should not have been cancelled because this cancellation was made on the basis of an internal document not available to bidders. He contended that this could lead to abuse, and asked if the financial situation was still the same as it was in January 2013.

The Chairman explained that if the budget was exceeded, then this was exceeded. There were no funds.

Dr Joseph Camilleri on behalf of the contracting authority stated that when the evaluation board took the decision, they did not rely only on the letter from the permanent secretary. This letter was produced just to show the Public Contracts Review Board that the budgetary constraint existed even before the tender was issued. The matter was not just raised to

exclude appellants. The contracting authority, when issuing tenders, uses templates supplied by the Department of Contracts, and the Department of Contracts insists that the estimate values of the tenders are not divulged before the publication of the tender.

The Chairman said that in his opinion this is the wrong position and does not agree with it. Bidders should know approximately what they are bidding for. Thus they would be able to assess if it was worthwhile submitting an offer or not.

Dr Franco Galea for the appellants asked if the project itself was also cancelled as well.

Mr Ray Stafrace on behalf of the contracting authority said that in the present case when comparing benefits with costs, it was found that the project was not worth the costs. The information requested by this tender was already available to Transport Malta and therefore the tender is not going to be re-issued.

The hearing was at this point brought to a close.

**This Board,**

**Having noted the Appellant's objection in terms of the 'Reasoned Letter of Objection' dated 14<sup>th</sup> September 2013 and also through the Appellant's verbal submissions during the Hearing held on 22<sup>nd</sup> October 2013, in that:**

- a) **The Appellant felt aggrieved due to the fact that the tender was cancelled after having dedicated long hours and expense in compiling all the information as requested in the tender document.**
- b) **The tenderers were not made aware of the indicative budget allotted for this tender.**
- c) **The Appellant's tender bid was both 'Administratively and Technically' compliant.**

**Having considered the Contracting Authority's verbal submissions during the hearing held on 22<sup>nd</sup> October 2013, in that:**

- a) **The Contracting Authority confirmed that all bids received were 'Administratively and Technically' compliant.**
- b) **The Contracting Authority cancelled the tender after noting that the tenderers' bid prices by far exceeded the budget allotted for this same tender.**
- c) **The Contracting Authority does not feel the need to re-issue this tender.**

**Reached the following conclusions:**

- 1. First of all, this Board opines that the Contracting Authority had a right to cancel the tender as per Article 33, of the 'Instructions to Tenderers' of the tender document.**
- 2. This Board feels that any Contracting Authority should indicate the budget allotted for the particular tender, so that the prospective tenderer would know the bid price parameters prior to the submission of the tender document.**
- 3. On the other hand, in this particular case, it would have been futile to carry on the tendering process, knowing that there is lack of funds to pay to the preferred bidder.**
- 4. This Board also feels that the Evaluation Board carried out its duties in a most diligent manner.**

**In view of the above, this Board finds against the Appellant, however due to this Board's opinion and remarks as stated in conclusion 2 above, it recommends that the deposit paid by the Appellant should be reimbursed.**

Dr. Anthony Cassar  
Chairman

Dr. Charles Cassar  
Member

Mr. Lawrence Ancillieri  
Member

*16 December 2013*