

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case No. 631**

**TD/T/3124/2013**

**Contract for Trenching Works Between Rabat Mosta Road and Rabat Villa Messina Substation.**

The tender was published on the 17<sup>th</sup> May 2013. The closing date was the 19<sup>th</sup> June 2013.

The estimated value of the Tender was €108,000 (Exclusive of VAT).

Four (4) bidders had submitted an offer.

On the 17th October 2013, Hydrorocks Contractors Company Limited filed an objection against the rejection of its offers and 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 12<sup>th</sup> November 2013 to discuss the appeal.

Present for the hearing were:

### **Hydrorocks Contractors Co. Limited - Appellant**

Mr John Farrugia	Representative
Ms Nathalie Farrugia	Representative
Dr Mark Portelli	Legal Representative

### **Enemalta Corporation - Contracting Authority**

Ing. Ivan Bonello	Chairman Evaluation Board
Ing. Charles Bugeja	Member Evaluation Board
Dr Antoine Cremona	Legal Representative

The Chairman made a brief introduction and invited appellant's representative to make his submissions.

Dr Mark Portelli on behalf of the appellant said after the tender was published a clarification was issued adding another requisite to the tender requirements that construction methods offered had to be 'environmentally sound'. His client, who has over twenty years experience, works both using traditional methods, with open trenches, and another method using directional drilling that runs underground without disturbing the road surface. This method creates no dust and does not pose traffic problems, drilling holes only 200 metres apart. The work asked for in the tender is to be done in Borg Olivier Street Rabat, a road known for its traffic problems as it is quite strait. He contended that the clarification specifically referred to this method when asking for environmentally sound methods of construction.

Dr Portelli continued that his client the appellant had submitted two options for the tender. Option one using the normal open trenching method which was rejected because the evaluation board decided that the offer was non-compliant because appellant did not show the necessary experience during the past three years. Option two offered the directional drilling but was disqualified on the grounds that it was not according to the tender specifications because no variant solutions were acceptable. Dr Portelli contended that appellant's offer was environmentally sound as requested in the tender clarification. This clarification was after all probably issued because of national guidelines that had been issued. Clause 5.5 at page 60 of the tender says that the contractor may be required to draw cable through ducts, and this is precisely what client's option two offered. The technology used in directional drilling, using GPS co-ordinates creates no problems whatsoever. Even Clause 5.4 says that the contractor shall make sure that he uses the right equipment to pull and lay the cable. He brought up the example of modern surgery where some operations are performed without the need of opening up the patient. He contends that appellant's permits issued by Transport Malta refer to this directional drilling as trenching works. When this type of trenching works is used there is no need for the reinstatement of the road surfaces. Finally Dr Portelli contended that other options were considered if one examines Clause 17.4 at page 12 of the tender.

Dr Antoine Cremona on behalf of the Contracting Authority said that the present hearing was not intended to judge the working of the appellant firm or the equipment it uses. The tender is adjudicated solely on what the tender and bids contain. The appellant wants to promote its product. The tender document was committed to use trenching works. This was what the contracting authority committed itself to use and what it wanted. The contracting authority had valid reasons for requesting this type of trenching. The road in question is known for the archaeological remains the area contains and directional drilling would not allow any finds to be immediately be noticed. The contracting authority had encountered many difficulties of the kind before. Open trenching allows examination of what lies underneath the road enabling works to stop if anything is found. The contracting authority expected compliance with what was requested. Enemalta had chosen to have open trenches and that was what was requested in the tender. The contracting authority was bound by law not to accept variants. The goal posts cannot be changed in the middle of the game. On page 13 point number 21 clearly states that no variant solutions will be accepted.

Dr Cremona continued that appellant had submitted two solutions, one of these, option two could not be chosen because it was not what was requested. Option one submitted by appellant offered open trenching as requested but was rejected because it failed one of the

administrative compliance criteria. Appellant did not have the necessary experience in open trenching.

Dr Portelli stated that the goal posts were changed through the clarification.

Dr Cremona said that the tender was hundred percent clear that what was being requested was open trenches. He reiterated that appellant's option one was not administratively compliant and option two was not what was requested and could not be accepted.

Ing. Charles Bugeja on behalf of the contracting authority under oath said that appellant's option 2 was in fact environmentally friendly but technically it was not good for what the contracting authority wanted. We wanted to be able to visually examine the cables. These cables are very delicate and easily damaged. When these cables are pulled through drilled trenches they could very easily be snagged and damaged. This would result in faults arising later on. Replying to a question by Dr Portelli, Mr Bugeja said that directional drilling was used by the contracting authority for low voltage cables. In such cases tenders are specifically issued for directional drilling. However directional drilling is avoided in Mdina, Valletta, and Rabat because of likely problems because of archaeological remains. From experience it is known that these cables are very delicate. Furthermore there were cases where directional drilling ended up in shafts and basements.

Ms Nathalie Farrugia on behalf of appellant said that directional drilling was used by Enemalta at Burmarrad. She claimed that overseas, the directional drilling method was used in heritage sites, because you can dig as deep as you like and then drill across.

Dr Antoine Camilleri finally stated that what the Board had to examine was not the difference between the two technologies, but if appellant's tender was according to the tender document or not; and that the principle of substance over form does not always apply.

Here the hearing was brought to a close.

**This Board,**

**Having noted the Appellant's objection , in terms of the 'Reasoned Letter of Objection' dated 17<sup>th</sup> October 2013 and also through the Appellant's verbal submissions during the hearing held on 12<sup>th</sup> November 2013, had objected to the decision taken by the pertinent Authority, in that:**

- a) The Appellant contends that his bid was in compliance with the requirements as set out in the tender document.**
- b) The Appellant's proposed method of the execution of the requested tender works was 'environmentally sound' and does not create any inconvenience to the surroundings.**

**Having considered the Contracting Authority's verbal submissions during the hearing held on the 12<sup>th</sup> November 2013, in that:**

- a) **The Contracting Authority clearly requested the ‘Open trench method’ of excavating for valid and solid reasons as stated in the submissions during the hearing.**
- b) **The Appellant did not possess enough experience to carry out the ‘Open trench’ works as stipulated in the tender document.**

**Reached the following conclusions:**

1. **The technical reasons for discarding the Appellants’ bid were justified after hearing the submissions of the technical experts of the Evaluation Board of the Contracting Authority.**
2. **The Appellant was made fully aware of the mode of the excavation works requested by the Contracting Authority to be carried out. This was clearly stated in the tender document.**
3. **The Tenderer has to abide by the conditions laid out in the tender document and it is futile to object or to appeal if the tenderer fails to be awarded a tender if same did not abide or submit the requested information stipulated in the tender document.**
4. **The Evaluation Board of the Contracting Authority was technically correct in discarding the Appellant’s bid.**

**In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed.**

Dr. Anthony Cassar  
Chairman

Dr. Charles Cassar  
Member

Mr. Lawrence Ancillieri  
Member

*9 December 2013*