

PUBLIC CONTRACTS REVIEW BOARD

Case No. 637

HM 22/06/2013

Tender for Condition Assessment of the Hal-Saflieni Hypogeum.

The tender was published on the 11th June 2013 and the closing date was on the 16th July 2013.

The estimated value of the tender was €47,000 (Inclusive of VAT)

One (1) bidder had submitted an offer for this tender.

On the 26th November 2013 Saflieni Joint Venture filed an objection against the decision to cancel the tender.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Tuesday 17th December 2013 to discuss this objection.

Present for the hearing were:

Saflieni Joint Venture - Appellant

Perit Frank Muscat	Representative
Prof Clara Urzi	Key Expert
Dr Stefan Zrinzo Azzopardi	Legal Representative
Dr Alexia Farrugia Zrinzo	Legal Representative

Heritage Malta - Contracting Authority

Ms Maria Elena Zammit	Chairperson, Evaluation Board
Ms Katya Stroud	Secretary, Evaluation Board
Mr Mario Galea	Member Evaluation Board
Mr Matthew Grima	Member Evaluation Board
Ms Roslyn Debattista	Member Evaluation Board
Dr Alex Sciberras	Legal Representative
Mr Kenneth Gambin	Chief Executive Officer

Following a brief introduction by the Chairman, the appellant's representative was invited to make his submissions on the objection.

Dr Stefan Zrinzo Azzopardi on behalf of the appellant explained that his client's offer was the only one submitted for this tender, and that the appellant's Key Expert, Dr Clara Urzi had already provided services to the contracting authority before about the Hypogeum. He stated that while the appellant's offer had been found administratively compliant by the evaluation board, it had been deemed to be technically non-compliant, and being the sole bid, the tender was being cancelled. Dr Zrinzo Azzopardi said that his client's letter of objection had gone into great detail, rebutting the reasons for disqualification brought forward by the evaluation board. He continued that the letter of objection explained that appellant's offer did in fact include all the necessary details regarding the consultation. The disqualification letter, for example mentioned that in appellant's bid, *"the strategy submitted in step 9 mentions locating concentrations of water within the walls, however this does not differentiate between droplets, inflows, films and pools."* However he claimed that appellant had in fact not only provided this but actually offered more. The evaluation board seems to have disqualified appellant's bid because it offered more than what was requested. What was requested in this tender had been provided by the appellant. He contended that the tender allowed for clarifications to be requested, and since in the case of his client, the tender bid offered more than was requested, than the evaluation board should have resorted to clarifications and asked if what was offered over and above could be excluded from the bid. He claimed that his client's offer should have not been rejected because it offered more than was requested; this does not amount to non-compliance. Non-compliance is when something less was offered than was requested. Thus, he contended that the rejection of appellant's bid was incorrect, as explained in the letter of objection and therefore asked the Public Contracts Review Board to revoke the decision taken by the evaluation board to disqualify Saffieni Joint Venture's tender bid.

Dr Alex Sciberras on behalf of the contracting authority stated that he wanted to make it clear that the capacity of the appellant joint venture was not in question. However it is evident that the appellant did not understand properly what the contracting authority required in this tender. It is not correct to state that appellant's bid was rejected because it offered more than required. The first two points that led to disqualification were because the appellant's bid was deficient. The tender document was very clear and at page 50, Clause 4.1.1 described what was required in detail. He cited for example that the tender required the mapping of the visible presence of water for one calendar year on a regular monthly basis. *"Phenomena to be mapped include: -droplets; - inflows; -films; -pools and other."* This was very specific and bidders had to show how they would do this. The appellant however did not do so.

Dr Sciberras continued, referring to the second issue, that is, to the required chemical analysis that had to be made, appellant failed to show how it was intended to do this, but tried to do so at the appeal stage, in the letter of objection. However not even what the appellant proposed doing in the letter of objection, was still not what was required by the contracting authority. What appellant offered at the appeal stage – *"a multistep approach considering various parameters involved in the decay and to carry out a monitoring campaign through micro-invasive in situ instruments to provide a characterisation of materials, surface and environment"*, is still not acceptable to the contracting authority because the site is very sensitive to allow invasive intervention. He contended that these two points alone were sufficient to render the bid technically non-compliant. Regarding the identification and the quantification of biological organisms, Dr Sciberras insisted that the tender was very clear and specific that bids were not to include these studies because these were the subject of

another tender issued separately. Yet appellant insisted that these studies had to be performed and included them in the offer. The law is clear that bidders who had any difficulty with a tender document had to ask for clarifications. The replies from the contracting authority would then form part of the tender document. Had the proposals made by the appellant been accepted, the contracting authority would have been bound. But the contracting authority had no intention to be bound by what the appellant offered. The tender will be re-issued and the appellant would be in a position to re-submit another offer.

Perit Mario Galea on behalf of the contracting authority, under oath said that regarding the first issue, that of the water droplets, that the specifications were very specific because the contracting authority wanted to compare the new data acquired from this tender to previous past data already in its possession. Appellant did not comply with what was requested. The next point, about the chemical analysis, it was clearly stated that biological analysis was going to be obtained through another tender. Regarding issue 3, the provision of environmental data and instruments, again the tender clearly stated that these were the subject of another tender and were not required. The evaluation board took these points into consideration when proposing the rejection of appellant's bid. Replying to a question by Dr Alex Sciberras, Perit Mario Galea said that the contracting authority inherited past data from the Museums Department. The site is an extremely delicate one and therefore no invasive analysis should be permitted. For this reason, the proposed solution suggested by appellant in the letter of objection, would still not be acceptable. The contracting authority had enough studies and methodology of the site. Replying to questions by Dr Zrinzo Azzopardi, he said that the data in possession of Heritage Malta was not made available to the appellant but it will be made available to the eventual contractor. Methodologies in similar tenders are defined before hand and are derived through the knowledge or lack of knowledge that the contracting authority wanted to achieve. It is not excluded that different experts have different methodology, but for this tender, this type of methodology was specifically requested. He could not exclude that the rationale submitted by the appellant would still achieve the requirements of the contracting authority. But appellant's bid did not comply with what the contracting authority wanted, it wanted strict adherence to the specifications. Heritage is familiar with the site and wanted continuity of data. It wanted specific mapping of the various types of humidity that are intrinsic to the site, this being an underground hypogeum. The persons that were employed by the appellant for this task were themselves extremely competent. These were not the reason the tender was disqualified.

Clara Urzi on behalf of the appellant said that she was a microbiologist for more than twenty years and wanted to defend the points raised by the contracting authority as reason for disqualification of the appellant's bid. She contended that the appellant's project as submitted was holistic. Maybe the appellant's team over enthusiasm led to the bid proposing more than what was requested. Although appellant's bid did not specifically go into details about droplets etc, she was sure that the bid itself covered all the requisites. Appellants wanted to study the result of the conservation measures taken in the past.

Dr Alex Sciberras finally reiterated that there was no doubt whatsoever about the competency of the appellant joint venture or its key expert. However the appellant's tender did not give what was requested.

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 26th November 2013 and also through Appellant's verbal submissions during the hearing held on 17th December 2013, had objected to the decision taken by the pertinent Authority, in that:

- a) The Appellant stated that his offer was deemed 'technically non compliant' by the Evaluation Board, due to the fact that not all technical specifications were submitted by the Appellant.**
- b) Appellant contends that, in fact, same submitted more technical information than was requested in the tender document. This additional submission should not be a deterrent for disqualification.**
- c) The Appellant stated that the Evaluation Board should have asked for clarifications.**

Having considered the Contracting Authority's verbal submissions during the hearing held on 17th December 2013, in that:

- a) The Appellant's Bid was disqualified due to deficiencies in the specific technical requirements as required on Page 50. Clause 4.1.1 of the tender document. Due to the sensitive nature of this tender bidders had to strictly abide by the specific technical details as dictated in the tender document. In this regard, Appellant failed to provide the essential information.**
- b) Appellant also failed to submit the methodology of how the chemical analysis had to be carried out.**

Reached the following conclusions:

- 1. From the lengthy technical submissions, it is evidently clear the 'important special technical requirements', as stipulated in the tender document, were not made available by the Appellant.**
- 2. Since there might have been specific technical requirements which were perhaps misunderstood by the Appellant, it was the latter's duty to seek clarifications and not vice versa.**
- 3. This Board opines that since the tender will be reissued, the Appellant will be in a better position to understand the real technical requirements as stipulated in the tender document.**

- 4. This Board also contends that the evaluation process was carried out in a just and transparent manner.**

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

Dr. Anthony Cassar
Chairman

Dr. Charles Cassar
Member

Mr. Richard A. Matrenza
Member

12 February 2014