

PUBLIC CONTRACTS REVIEW BOARD

Case No. 671

CT 3141/2013

Tender for Trenching and Pipe Laying Works – Bakkja – Ta' Qali, Using Environmentally Sound Construction Materials and Methods.

The tender was published on the 20th December 2013. The closing date was the 11th February 2014.

The estimated value of the tender is €2,312,265 (Exclusive of VAT).

On the 4th February 2014 DP Roads Construction Limited filed an objection raising **pre-contractual concerns** regarding the tender in terms of Regulation 85 of the Public Contracts Procurement Regulations.

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 Thursday 20th February 2014 to discuss these concerns.

Present for the hearing were:

DP Roads Construction Limited - Appellant

Mr Carmelo Penza Representative

Water Services Corporation - Contracting Authority

Ing. Mark Perez	Representative
Perit Adan Bundich	Representative
Ing. Pierre Cassar	Representative
Ing Nigel Ellul	Representative
Mr Anthony Camilleri	Representative

Department of Contracts

Ms Marisa Gauci	Procurement Manager
Ms Lorraine Mangion Duca	Director

The Chairman made a brief introduction wherein he explained that the concerns raised in the three tenders CT 3141/2013, CT 3187/2013 and CT 3188/2013 by the same objector would be heard together. The appellant's representative was then invited to make his submissions.

Mr Carmelo Penza on behalf of the appellant referred to his letter of objection and stated that it was not considered fair that the three tenders could be awarded to the same bidder who offered the cheapest price, and who happened to have at his disposal four excavators. He insisted that the three tenders should be shared between different bidders.

Ing. Mark Perez on behalf of the contracting authority said that when the letter of objection was filed, the contracting authority referred the matter to the Department of Contracts since according to the regulations the contracting authority follows in issuing tenders, tenders can only be assigned to the cheapest bidders. The work involved has already been fragmented into different tenders to widen the playing field.

Ing Pierre Cassar on behalf of the contracting authority explained that these three tenders are European Union Funded and the contracting authority was thus interested in obtaining the best value for money. Therefore the authority cannot assign a tender to the cheapest bidder and the other tenders to bidders who did not offer the cheapest bid. The contracting authority cannot refuse to award a tender to the cheapest bidder just because he happened to be awarded also another tender. These three tenders happen to have been issued by the same contracting authority but the argument raised by the appellant could also refer to other authorities. The contracting authority cannot impose conditions on bidders who may have bid and won previous tenders. The contracting authority is issuing about ten similar tenders and these have to be awarded to the cheapest bidders in each of them. The contracting authority cannot refuse to award the tender to the cheapest bidder for the sole reason that he was successful in another tender. The appellant can very easily submit his tenders for these tenders and if his offer is found to be the cheapest he would be awarded the tenders.

Mr Carmelo Penza asked if the contracting authority be certain that if the same contractor, being the cheapest, is awarded these three contracts, he would be able to finish the work as required? He insists that the same contractor cannot be given all the three tenders. The work should be shared between several bidders.

Replying to a query by the Chairman, Mr Mark Perez explained that the contracting authority could have tendered for the work involved issuing just one tender. Instead it chose to divide the work into smaller tenders and this would enable more bidders to contest for the work. The present pre-contractual concern is about three of the smaller tenders, but there are more such tenders in the process of being issued.

The hearing was at this point brought to an end.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 30th January 2014, raising 'pre contractual' concerns and also through Appellant's verbal submissions during the hearing held on 20th February 2014, in that:

- a) Appellant contends that it is unfair that the three tenders under consideration could be awarded to the same bidder if the latter's offers were the cheapest.**
- b) Appellant also contends that the three tenders should be awarded to different bidders.**

Having considered the Contracting Authority's verbal submissions during the hearing held on 20th February 2014, in that:

- a) The Contracting Authority is, in duty bound to award any tender to the 'Fully Compliant' and cheapest bidder.**
- b) The Contracting Authority issued three separate tenders so that more prospective bidders can participate.**

Reached the following conclusions:

- 1. From submissions made by both the Appellant and the Contracting Authority, this Board opines that there exist no solid grounds for the 'pre contractual' concerns raised by the Appellant.**
- 2. The Contracting Authority acted in a diligent manner in issuing three separate tenders instead of one.**
- 3. The prospective Preferred Bidder must be 'fully compliant and also the cheapest'.**

In view of the above, this Board finds against the Appellant Company and recommends that the tendering process be continued.

Dr. Anthony Cassar
Chairman

Dr. Charles Cassar
Member

Mr. Richard A. Matrenza
Member

3 March 2014