

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case No. 758**

**TM 108/2014**

### **Tender for the Construction of P/O Triq il-Qasam, Swieqi.**

The tender was published on the 1<sup>st</sup> August 2014. The closing date was the 22<sup>nd</sup> August 2014. The estimated value of the Tender was €92,244.38 (Exclusive of VAT).

Five (5) tenderers had submitted an offer for this tender.

On the 30<sup>th</sup> September 2014 V & C Contractors Limited filed a letter of objection against the decision of Transport Malta to the reject its offer as being administratively non-compliant.

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 the 11<sup>th</sup> November 2014 to discuss the objection.

Present for the hearing were:

#### **V & C Contractors Ltd - Appellant**

Mr Chris Refalo	Representative
Dr Massimo Vella	Legal Representative

There were no representatives for the preferred bidders Asfaltar Construction Ltd.

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

Mr Edgar Casingena	Chairperson Evaluation Board
Ms Josianne Zahra	Secretary Evaluation Board
Perit Julian Borg	Member Evaluation Board
Perit Matthew Briffa	Member Evaluation Board
Mr Jeffrey Formosa	Member Evaluation Board
Ms Liz Markham	Representative
Mr Ray Stafrace	Representative
Dr Joseph Camilleri	Legal Representative

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

Dr Massimo Vella on behalf of the appellant submitted that the fact that appellant failed to submit the technical offer should not have resulted in disqualification. He referred to the case decided by the Court of Appeal instituted by Ballut Blocks against the Minister for Resources and Rural Affairs et al where the court had decided that such tenders should be salvaged, selecting the cheapest offer, according to the principle of proportionality.

In the present case, his client the appellant firm had submitted the cheapest offer but omitted submitting the form for Volume 3, the technical offer. However appellant's technical offer could be obtained from the declaration submitted with the tender where the content of the tender documents was entirely accepted by the appellant without reservations or restrictions. This declaration supplements the missing documents. He insisted that the contracting authority should have taken cognizance of the Court of Appeal decision and abided by it and not discarded appellant's bid.

Dr Joseph Camilleri on behalf of the contracting authority said that there was agreement on the facts as happened, but appellant had admitted not submitting the signed technical offer form. The contracting authority understood the principle of proportionality, but the evaluation board could not decide to ignore the non-submission of a mandatory form. The clause 16.1 (e) (i) which required the submission of the Technical Offer by appellant, and which was not submitted, falls under Note 3 which means that no rectification shall be allowed, only clarification on the submitted information may be requested. Since the form was not submitted its omission could not be rectified and the evaluation board had to reject the offer. In fact there was another bidder who was disqualified for the same reason.

Dr Massimo Vella for the appellant explained that the form in question was a new form requested in the present tender that had not been requested in previous tenders. It was for this reason that when the tender was filled by appellant it was erroneously omitted. The Ballut Blocks case also involved Clause 16, that was not rectifiable, but the Court still decided that contracting authorities had to try to salvage the cheaper tenders and not make it more difficult to award them. The principal aim of the tender – to award to the cheapest offer – should be adhered to and the cheapest tender should be salvaged.

Dr Joseph Camilleri for the contracting authority remarked that the Ballut case involved a signature in a form while the present case the entire form had been omitted.

Dr Massimo Vella for the appellant reiterated that any missing information had been submitted elsewhere in the appellant's tender through the declaration of acceptance. All bidders had accepted the technical specifications. He insists that appellant's tender should have been salvaged.

At this point the hearing was brought to an end.

**This Board,**

**Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 30<sup>th</sup> September 2014 and also through Appellant's verbal submissions during the hearing held on 11<sup>th</sup> November 2014, had objected to the decision taken by the pertinent**

**Authority, in that:**

- a) **Appellant contends that, although he failed to submit the technical offer as requested in Volume 3 of the tender document, he considers that this failure of submission on Appellant's part was not a valid and fair reason for the rejection of his offer by the Contracting Authority;**
- b) **Appellant claims that the declaration signed by Appellant, wherein he bound himself to abide by all the conditions as laid out in the tender document should supplement the missing technical offer as requested in Volume 3 of the same tender document.**

**Having considered the Contracting Authority's verbal submissions during the hearing held on 11<sup>th</sup> November 2014, in that:**

- a) **The Contracting Authority maintains that the principle of 'proportionality' was well understood and respected, however, missing documentation from the mandatory submissions, cannot go unnoticed and discarded by the Evaluation Committee. Appellant failed to submit the technical offer as requested in volume 3 of the tender document.**

**Reached the following conclusions:**

1. **With regards to Appellant's first grievance, this Board is credibly convinced that in its decision, the Evaluation Committee, was correct in discarding Appellant's bid for failure, on Appellant's part, to submit the technical offer as dictated in volume 3 of the tender document. This Board opines that the technical offer formed an integral part of the tender and was a mandatory condition. The conditions as laid out in any tender document must be strictly adhered to by the prospective tenderer. In this regard, this Board does not uphold Appellant's grievance.**
2. **With regards to Appellant's second grievance; in that, his declaration, duly signed by same, that he would abide by all the conditions as laid out in the tender document without any reservation or restriction, should have supplemented the missing technical offer and that his offer could have been salvaged, this Board would point out that all mandatory conditions and requisites dictated in a tender document are laid out by the Contracting Authority to ensure a fair and transparent 'level playing field'. These conditions will safeguard a logical and competitive atmosphere among all prospective bidders. This Board justifiably opines that Appellant's declaration does not, in any logical manner, substitute the non submission of the technical offer as stipulated in volume 3 of the tender document. In this regard, this Board does not uphold Appellant's second grievance.**

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

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Lawrence Ancillieri  
Member

*21 November 2014*