

PUBLIC CONTRACTS REVIEW BOARD

Case No. 866

CT 3041/2015

Tender for the Trenchless Rehabilitation of Wastewater Networks at Birzebbugia and Marsaskala.

The Tender was published on the 19th June 2015. The closing date was the 30th July 2015. The estimated value of Tender is €378,900.00 (Exclusive of VAT).

Two (2) offers had been received for this Tender.

On the 15th October 2015 Hydro Rocks Contractors Co. Limited filed an objection against the decision of the Contracting Authority finding its Tender to be technically 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 3rd November 2015 to discuss the objection.

Present for the hearing were:

Hydro Rocks Contractors Company Limited:

Mr John Farrugia	Representative
Ms Nataline Farrugia	Representative
Dr Robert Abela	Legal Representative
Dr Mark Portelli	Legal Representative

LBV Limited:

Mr Justin Attard	Director
Dr Mark Vassallo	Legal Representative
Dr Cheryl Azzopardi	Junior Lawyer

Water Services Corporation:

Mr Anthony Muscat	Chairperson Evaluation Board
Ms Michelle Ellul	Secretary Evaluation Board
Mr Sigmund Galea	Member Evaluation Board
Mr Gino Micallef	Member Evaluation Board
Mr Mark Perez	Representative

Department of Contracts:

Mr George Vella	Procurement Manager
Mr Chris Agius	Representative
Dr Franco Agius	Legal Representative
Dr Christopher Mizzi	Legal Representative

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

Dr Robert Abela on behalf of the Appellant raised a preliminary plea and contended that both at the Tender closing date and at the time of the award, the Recommended Bidder LBV Limited had not been a properly constituted society and was thus non-existent; LBV Limited did not exist when it was awarded the Tender on the 16th October 2015. He also claimed that the person behind LBV Limited had 90 cases of entities seeking redress from him pending at the Courts of Justice and had never performed this kind of work as the Tender required.

Dr Robert Abela then referred to the Contracting Authority's request asking permission to withdraw the letter of rejection. He insisted that this was not legally permissible and that the objection raised by Appellant had to be decided. The Contracting Authority had claimed that the Appellant had failed to submit the Technical Offer and this was not true. He insisted that there was no doubt that the Technical Offer had in fact been submitted and that therefore the matter of the technical literature could have easily been rectified. Apparently, the Appellant's method statement had been missed during the Evaluation.

Dr Christopher Mizzi on behalf of the Department of Contracts said that Appellant is asking for the reversal of the award and the re-evaluation of the Tender. The Department of Contracts agrees with this request, and since no contract has as yet been signed, there was still a possibility of making the evaluation anew. The Department of Contracts is obliged to intervene whenever inconsistencies are encountered.

Dr Robert Abela for the Appellant asked if this meant that his client's Tender would be re-integrated since the method statement had been submitted.

Dr Franco Agius on behalf of the Department of Contracts explained that since the award had been erroneously made, this meant that the award had to be withdrawn and the evaluation of the bids be made again but he could not state what the result would be.

Mr Anthony Muscat, an engineer, ID No. 465162M, for the Contracting Authority, under oath testified that he confirmed that the Appellant's method statement had been submitted under another heading, and this was identified by the number 1416300063276.pdf. That was the reason why it was missed during the Evaluation. Replying to questions by Dr Mark Vassallo on behalf of the Recommended Bidder, who referred witness to the letter of reply submitted by the Contracting Authority, explained that a screen shot of the Appellant's offer showed what had occurred. The Technical Offer had been left blank while the information had been uploaded into the materials section by mistake. Since the Technical Offer qualified under note 3 no rectification was possible and that was why the letter of reply stated that. However it was ascertained that the Technical Offer had been submitted under the wrong caption.

Dr Robert Abela for the Appellant cited a decision by this Board that had been confirmed by the Court of Appeal last Friday in a case involving Firetech and insisted that the principle of substance over form had to be applied in this case.

Dr Christopher Mizzi filed a copy of a Court judgement from where it resulted that the Department of Contracts had to intervene.

The hearing was closed at this point.

This Board,

Having noted the Appellant's Objection, in terms of the "Reasoned Letter of Objection" dated 15 October 2015 and also through the Appellant's verbal submissions during the Public Hearing held on 3 November 2015, had objected to the decision taken by the Pertinent Authority, in that:

- a) The Appellant contends that the Contracting Authority's request to withdraw the "Letter of Rejection" was illegal as the Objection raised by the Appellant was to be treated;**

- b) The Appellant also maintains that the reasons given by the Contracting Authority for discarding the Appellant's bid were completely wrong. In this regard, the Appellant refers to the method statement which was in fact submitted, contrary to what the Contracting Authority is claiming;**

- c) The Appellant raised a Preliminary Plea, in that LBV Ltd, the Recommended Bidder, was not legally constituted both at the submission of the Tender and also at the date of award.**

Having considered the Contracting Authority's "Letter of Reply" dated 28

October 2015 and also the latter's verbal submissions during the Public Hearing on 3 November 2015, in that:

- a) The Department of Contracts, in such rate cases is obliged to intervene. Since no contract has yet been signed, there is still the possibility of making a fresh Evaluation;**

- b) The Contracting Authority pertinently confirms that the reasons given for rejecting the Appellant's bid were wrong. Credible explanations as to why there was this mistake show that it was a genuine mistake through the E-Tendering process.**

Reached the following conclusions:

- 1. With regards to the Appellant's First Contention, this Board would credibly refer to the decision taken by the Constitutional Court in the case Stephen Schembri vs The Attorney General wherein the Court stated that: *“Din il-Qorti tifhem li l-Avukat Generali, l-Odjern Appellant ghandu fost id-dmirijet tieghu dak li jkun il-Gwardjan tal-Osservanza tal-Ligijiet tal-Pajjiż, u li ghandu jara ghalhekk li dawn ma jìgux mittiefsa darba li huma fis-sehħ. Izda min-naha l-oħra, meta ċ-ċirkostanzi ta' fatti jkunu tali li jistgħu jwasslu biex issir ingustizzja***

manifestata, huwa għandu jkun għaqli biżżejjed biex jara li haġa bħal din ma ssirx u mhux jibqa' jinsisti fuq binarju li jkunevidentement żbaljat u b'konsegwenzi evidentement kżiena."

At the same instance, this Board justifiably refers to Clause 6 of the Public Procurement Regulations which lists the duties of the Director of Contracts with specific reference to Clause 6 (i) b which clearly states that *"The Director of Contracts must establish and regulate the procedure to be followed etc."*

In this regard, this Board justifiably opines that the Director of Contracts had the obligation to rectify the situation in this particular case and the request to withdraw the *"Letter of Rejection"* was justified. In this regard, this Board does not uphold the Appellant's First Grievance.

- 2. With regards to the Appellant's Second Grievance, this Board notes the Admission of the Contracting Authority that the reasons given by the latter for the rejection of the Appellant's bid were inadvertently incorrect. This Board also acknowledges the fact that this occurrence was due to an incorrect upload in the e-Tender Procedure. In this regard, this Board upholds the Appellant's Second Contention whilst**

at the same time commends the positive approach shown by the Contracting Authority;

3. With regards to the Preliminary Plea made by the Appellant, this Board considers two merited factors on this issue as follows:

- This Board acknowledges the fact that the Recommended Bidder was not legally constituted on the submission and closing date of the Tender. In fact, this Board credibly notes that the incorporation of LBV Ltd came into force on the 16 October 2015. In this regard, this Board deplores the action taken by the Recommended Bidder.

At the same time, this Board recommends that all the Evaluation Boards should exercise more proficient “*Due Diligence*” in the Evaluation process. This Board would emphasise that public funds should not be made vulnerable and it is only during the Evaluation stage that such decisions are taken in a transparent and responsible way.

- Whilst this Board accepts the Preliminary Plea raised by the Appellants, it also weighed the options available for the benefit

and in the interest of all parties concerned and in this regard this Board has decided to treat the merits of this Appeal.

In view of the above, this Board finds in favour of the Appellant Company and recommends that:

- **The Appellant's Bid be re-integrated in the Evaluation Process;**
- **The deposit paid by the Appellant should be re-imbursed.**

Dr. Anthony Cassar
Chairman

Dr. Charles Cassar
Member

Mr. Lawrence Ancillieri
Member

10 November 2015