

PUBLIC CONTRACTS REVIEW BOARD

Case No. 942 – CT 3238/2014: Tender for the Professional Services in Connection with the Supervision and Works Certification of the Construction for a Grade Separated Junction at Node EA 15 (Kappara).

The Tender was published on the 17th April 2015. The closing date was on the 25th June 2015. The estimated value of Tender is €2,199,600 (Exclusive of VAT).

Four (4) offers had been received for this Tender.

On the 19th May 2016 PPP Joint Venture filed a Letter of Objection against the decision of the Contracting Authority to cancel 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 the 14th June 2016 to discuss the Objection.

Present for the hearing were:

PPP JV:

Mr Maurizio Ferrero	Representative
Dr Piercarlo Montaldo	Representative
Mr Edgar Caruana Montalto	Representative
Dr Julienne Portelli Demajo	Legal Representative
Dr Jonathan Thompson	Legal Representative
Dr Antoine Cremona	Legal Representative

Transport Malta:

Mr Keith Tanti	Chairperson Evaluation Board
Ms Maria Gove`	Member Evaluation Board
Mr Josef Mercieca	Member Evaluation Board
Mr David Vassallo	Member Evaluation Board
Ms Liz Markham	Procurement Manager
Mr Ray Stafrace	Representative
Dr Aaron Mifsud Bonnici	Legal Representative

Department of Contracts:

Mr Anthony Cachia	Director General
Dr Franco Agius	Legal Representative
Dr Christopher Mizzi	Legal Representative

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

Dr Antoine Cremona on behalf of PPP JV explained that his client had been ranked second and was now objecting to the cancellation of the Tender that had been awarded to BAC Limited and demanded that the Tender be awarded to his client, the second ranking bidder instead.

The Board has the power to check and vet the exercise of administrative discretion by the Contracting Authority to cancel the Tender. Dr Cremona was questioning whether this done according to law.

The Tender had been awarded to BAC Ltd on the 9th February 2016. The Appellant's offer had ranked second but was found to be both administratively and technically compliant. No Objections had been raised by any of the bidders at that time. Yet on the 5th April 2016 the DOC had declared that the Recommended Bidder had failed to submit the mandatory original of the bid-bond.

On the 10th May 2016, PPP JV had received a letter from the Department Of Contracts which stated that the Tender had been cancelled without giving any reasons for the decision; The letter also quoted irregularities in the procedure as per clause 18.3.(e) but no further explanation was given.

The Appellant contends that the Contracting Authority had no right to cancel the Tender without giving clear reasons, and Dr Cremona made reference to three previous consistent decisions given by this Board in similar matters – Cases 670, 728 and 733. The European Ombudsman had also stressed the principle, of giving clear reasons for cancellations, and deemed this as crucial when considering equal treatment of bidders and transparency. (Vide ECJ decision 1270/2007 decided in 2011.)

Dr Antoine Cremona for PPP JV contends also that the law was wrongly applied. Article 18.3 referred to irregularities committed either by the Contracting Authority such as inadequate publication of Tender, varying of deadlines, non-transparent procedures, discriminatory or imprecise selection criteria, short deadlines, modification of terms after publication etc, or by the bidder.

In the latter case this would be through fraud, collusion etc. but not through failure to submit the original bid-bond. None of the irregularities mentioned above occurred and thus no reason for cancellation existed. This failure should have led to the disqualification of the bidder and the re-award of the Tender as necessary to the compliant bidders.

Dr Antoine Cremona also commented to the Letter of Reply by the Department of Contracts. Paragraph 18 of this made a completely wrong assertion – that Appellant's offer did not satisfy the Tender requirements. This is simply not true. Appellant's offer had been found totally compliant as otherwise its offer would have been rejected not ranked second.

Appellant also contends that it was by cancelling the Tender was the Department of Contracts in breach of the equality of bidders – it was comparing compliant bidders to non-compliant ones and treating them the same. There would be trouble if this process is cancelled. Finally Dr Cremona contended that the only way his client had of knowing the truth was through

filing this Objection and it was for this reason he asked that should the Objection be rejected at least the Board should order the re-imburement of the deposit.

Dr Christopher Mizzi on behalf of the Department of Contracts explained the difference between a disqualification of a Tender during the Evaluation Process and after the award. In this case it was not a simple matter of disqualifying the faulting bidder and continuing with the adjudication process. When the disqualification occurs after the award has been made, means that additional information has emerged after the publication of the award.

The Department of Contracts had no option but to act as it acted in the present case. Dr Mizzi contended that the main issue here is not between the Appellant and the Department of Contracts but between the Recommended Bidder, BAC Limited and the Department of Contracts. The basis was the non-submission of an original bid-bond. The Department of Contracts remit is to guarantee Tendering processes and in the present case it had all the reasons to act as it had in order to be in line with the procurement regulations.

Mr Anthony Cachia ID No. 142658M, the Director General of Contracts, under oath said that normally the Evaluation Board would vet offers for administrative compliance, and this meant that if a bidder did not submit an original bid-bond, his Tender would be disqualified.

In the present case the Bid Bond was not mentioned in the Evaluation Report and thus it was taken for granted that everything was in order. Later he had become aware that checking of the offers had not been properly done. He considered the process therefore as flawed; and this was the irregularity that caused the cancellation; he felt that he had no comfort that the evaluation process was done properly.

The Evaluation Board had failed to pin point a missing mandatory document and he had decided that the only possible outcome would be the cancellation of the Tender because the evaluation process was considered as flawed. He explained that Bid Bonds are scanned to the EPPS but the original Bid Bond had to be submitted to the Department of Contracts within 5 days. When this is done bidders are given an acknowledgement. The information about the original Bid Bonds was later forwarded to the Evaluation Board.

Dr Antoine Cremona for the Appellant said that the witness had confirmed that the Evaluation Board are never in contact with the original Bid Bonds since these are received by the Department of Contracts and not by the Evaluation Board. This therefore means that the Evaluation Board's judgement was not compromised as alleged by the Department of Contracts.

Dr Christopher Mizzi for the Department of Contracts explained that the original Bid Bonds are received by the Department. These originals are then scanned and relayed to the Evaluation Board. The Evaluation Board then has to examine which of the bidders had submitted original Bid Bonds or not, and fail defaulters.

Dr Franco Agius on behalf of the Department of Contracts maintained that sufficient information is relayed to the Evaluation Board to take cognizance and determine if a bidder was compliant or not.

Dr Antoine Cremona contended that the Evaluation Board had missed nothing but had relied on information relayed to them by the Department of Contracts. Thus their judgement could

never have been compromised.

Mr Keith Tanti ID No. 159284M, under oath stated that he was the Chairperson of the Evaluation Board. He explained that assessment was based on the uploaded documentation. The Evaluation Board had missed checking the originals of all the Bid Bonds submitted by Tenderers.

He declared that an email was received on the 7th July 2015 from the Department of Contracts which stated “enclosed please find scanned copy of Bid Bonds received.” I had phoned the sender of the email and enquired why she was re-submitting to us another soft copy of what we already had. The email had three Bid Bonds attached to it but did not have one from BAC Limited. The Evaluation Board had not checked whether the original Bid Bonds had been received.

Dr Antoine Cremona for PPP JV contended that if an error had been made it had been made by the Recommended Bidder BAC Limited and not by the Contracting Authority or the Department of Contracts. The mistake had been made when the original Bid Bond was not submitted. This shows that there were no grounds for irregularity. If a mistake was done it was done by the Recommended Bidder and it was the Recommended Bidder’s fault. But this does not constitute any irregularity. It would have been a problem had the contract been signed. Any decision on this does not affect Appellant’s Tender. Not all mistakes constitute an irregularity.

Dr Christopher Mizzi for the Department of Contracts contends that the Department in view of this mistake does not have the comfort that the process was not vitiated and the Director General is not ready to endorse it.

At this point the hearing was closed.

This Board,

Having noted the Appellant’s Objection, in terms of the “*Reasoned Letter of Objection*” dated 19 May 2016 and also through their verbal submissions during the Public Hearing held on 14 June 2016 had objected to the decision taken by the Pertinent Authority, in that:

a) The Appellant is maintaining that on 10 May 2016, the Contracting

Authority issued a communication wherein it was announced that since the Recommended Bidder did not submit the original Bid Bond, the Tender is being cancelled.

In this regard, the Appellant is contending that since his offer was Administratively and Technically compliant, the Tender should have been awarded to the “*Second in Line*” compliant bidder, ie. PPP JV.

b) PPP JV is also contending that the Contracting Authority had no right to cancel the Tender without giving any specific reasons as to what kind of irregularities were identified in the Tendering Process.

The Appellants were also insisting that the fact that the Recommended Bidders did not submit the original Bid Bond within the dictated time frame does not justify the Cancellation of the Tender.

In this regard, the Contracting Authority was weighing an administrative and non compliant offer with other compliant bids.

Having considered the Contracting Authority’s “*Letter of Reply*” dated 10 June 2016 and also their submissions during the Public Hearing held on 14

June 2016, in that:

- a) **The Contracting Authority maintains that since the non submission of the original Bid Bond was noticed after the Evaluation Process was completed and since “*additional information*” had emerged after the Publication of the Award, the Department of Contracts had no other option but to cancel the Tender.**

Reached the following conclusions:

1. **With regards to the Appellant’s First Grievance, this Board after having heard all submissions made during the Public Hearing and after examining the relative documentation, would like to justifiably point out that if the Evaluation Board would have noticed, or were aware, in any way, of the non-submission of the Original Bid Bond, by the Recommended Bidder, there would have been enough reason for the Evaluation Board to award the Tender to the “*Second in Line*”. This Board is credibly comforted by the fact that this situation did not really arose.**

From the testimony, under oath, of the Chairman of the Evaluation Board, it was confirmed that the latter inadvertently acted on the

copy of the Bid Bond without verifying whether the receipt of the Recommended Bidder's "*Original Bid Bond*" did occur.

From these same submissions, this Board also noted that the Department of Contracts have sent an e-mail to the Evaluation Board confirming the receipt of three Bid Bonds which did not include the one from the Recommended Bidder.

This Board is strongly maintaining that, it was at this particular stage that the Evaluation Board had to rank the Appellant's Bid for the Award. However, from the witness' submissions, it was concluded that the Evaluation Board has overlooked the matter of whether the Recommended Bidder's "*Original Bid Bond*" was received or not.

This Board opines that there is a great difference between discarding a Bidder's Offer at Evaluation Stage and cancelling the Award for this Tender. If an offer was cancelled at Evaluation Stage, this can happen due to the simple reason that this particular offer was not fully compliant.

However, if the Administrative or Technical Compliance was overlooked by the Evaluation Board but identified prior to the signing of the "*Contract of Award*", the only fair and transparent

option remaining for the Contracting Authority is to cancel the Tender. In this regard, this Board does not uphold the Appellant's First Contention.

2. With regards to the Appellant's Second Contention, this Board, would like to justifiably note that the Letter dated 10 May sent by the Department of Contracts, did in fact state the specific reason why the Tender was being cancelled.

The first paragraph of this Letter specifically explained that "*The Recommendation dated 2 February 2016 is being withdrawn since it transpires that BAC Ltd had failed to submit an original Bid Bond*".

This Board also notes that Article 18.3 (e) of the General Rules covering Tendering, state that a Tender can be cancelled if there were irregularities in the Procedure, which there were in this particular case, as it would have been highly irregular for the Evaluation Board not to verify the receipt of the Original Bid Bond from a Prospective Bidder.

This same clause also states that a Tender can be cancelled if such actions prevented Fair Competition. In this particular case, it would

have been unfair if the Tender was not cancelled, as then the situation of comparing a non-administratively offer with fully Compliant Bids would have happened.

In this regard, this Board notes that the Evaluation Board failed to highlight or indicate, in the Evaluation Report, the non submission of the Recommended Bidder's original Bid Bond and in this respect, this same Board does consider this "*Note of Omission*" to be irregular in the Tendering Process.

On the other hand, this Board justifiably opines that it is the obligation of the Director of Contracts to cancel a Tender if he feels discomfited by the Evaluation Process where a very basic and mandatory requirement was overlooked. In this regard, this Board upholds the Contracting Authority's decision to cancel the Tender.

In view of the above, this Board finds against the Appellants, however due to these exceptional circumstances and through no direct fault of the Appellant, the deposit paid for this Appeal is to be refunded.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

23 June 2016