

## PUBLIC CONTRACTS REVIEW BOARD

### **Case No. 943 – 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 17<sup>th</sup> April 2015. The closing date was on the 25<sup>th</sup> 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 19<sup>th</sup> May 2016 BAC Limited filed a Letter of Objection against the decision of the Contracting Authority to withdraw the award of the Tender to Appellant and against the cancellation of 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 14<sup>th</sup> June 2016 to discuss the objection.

Present for the hearing were:

#### **BAC Limited:**

Mr Alexander Bezzina	Representative
Mr Keith Cole	Representative
Prof Ian Refalo	Legal Representative
Dr Mark Refalo	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
Mr George Vella	Procurement Manager
Ms Yvonne Psaila	Representative
Ms Marisa Gauci	Representative
Mr Joseph Caruana	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.

Profs Ian Refalo on behalf of the Appellant contended that his client should have been informed of the case heard before the present one since his client had an interest in its outcome. The merit of the previous case had been awarded to his client and then cancelled. He pointed out that the Appellant of the previous case heard was present for this hearing.

The Chairman remarked that the hearing is being held in public and anyone could choose to attend. The present Appellant was not precluded from being present during the previous case.

Profs Ian Refalo said that he would start by hearing the testimony of Mr Alexander Bezzina, an architect, a partner of the Appellant firm.

Mr Alexander Bezzina ID No.281758M, an architect partner in Bezzina and Cole, under oath stated that Appellant had participated in the Tender. He filed copies of a number of documents that included clarifications, application to the Bank for the issue of the Bid Bond and other relevant documents. He continued that at one point Appellant had received a notice that its Tender had been recommended for award. He said that as a director, he had to prepare the Bid Bond according to the Tender requirements. We then requested our bank to issue the bond. This was submitted through the EPPS and was accepted. He personally had records that showed that the Bid Bond had been sent. He had been abroad at the time but had left instructions that the original Bid Bond had to be sent to the Department of Contracts.

The original had been sent to the Department of Contracts through ordinary mail but he had no records of this. After some time the bank asked Appellant if the Bid Bond needed renewal, but the Department of Contracts said that there was no need to renew. The Bid Bond remained valid for the whole term. The adjudication process continued and then Appellant received a notification of award. The Department of Contracts asked Appellant to collect three copies of the contract for signature and to submit a performance bond. The three contract copies were then signed and submitted to the Department of Contracts as well of three copies of the performance bond. At this point witness explained the contents of the documents that he filed earlier stating what each document contained including the announcement of results dated 2<sup>nd</sup> February 2016 and the award notice.

The Chairman remarked that it has been established that the original Bid Bond had been allegedly remitted by ordinary mail and this allegation could not be substantiated.

Profs Ian Refalo for the Appellant explained that his client had incurred certain expenses during the course of the Tender adjudication, including the performance guarantee. Appellant had not been informed that the original Bid Bond was not received. He contended that he would have expected that a bidder who failed to submit the original Bid Bond would have been disqualified and not awarded the Tender. The events in question occurred one year ago and it was difficult now to prove anything. He insisted that the original Bid Bond had been sent through the post. The Department of Contracts should have raised the matter before and not have waited until after the evaluation and award of the Tender. The fact that his client had been awarded the Tender meant that the original Bid Bond had been regularly received.

Dr Franco Agius for the Department of Contracts contended that the point is the non-

submission of the original Bid Bond. The Appellant had not been awarded the contract but recommended for award and had not produced any evidence of having mailed the original Bid Bond.

Mr Alexander Bezzina, the witness continued that he was aware of the importance of the Bid Bond; it was meant to ensure that the awarded Tenderer would accede to the signing of the contracts. It was precisely for this reason that he had left the necessary documents to be mailed to the Department of Contracts in his absence.

Profs Ian Refalo reiterated that when contacted by client about the renewal the Department of Contracts never mentioned that the original was missing and once the evaluation process continued, the matter could not be raised now.

Dr Franco Agius ID 496577M, Secretary of the General Contracts Committee, under oath said that the Evaluation Board assesses bids and then refers its recommendations to the GCC for vetting. It was the Evaluation Board that should have verified that the original Bid Bond was submitted. The original Bid Bonds are received and kept by the Department of Contracts, and the Evaluation Board is then informed. In the present case the Evaluation Board failed to verify the original bonds. The Department had informed the Evaluation Board that original Bid Bonds had been received and enclosed copies of three. That from BAC was not included. He also confirmed that the Department was in receipt of the three signed copies of the contract.

Mr Anthony Cachia ID 142658 M under oath said that he was the Director General of the Department of Contracts. When about to sign the contracts in question it had been pointed out to him that there was no original Bid Bond. He immediately took action to obtain the original Bid Bond. Appellant's Tender should have been disqualified because the original Bid Bond should have been submitted within 5 days following the electronic submission. When it was discovered that the original Bid Bond was missing he was not comfortable that the Evaluation Board had properly conducted the evaluation process and therefore he had not signed the contract – he deemed the evaluation compromised as the Appellant should have been disqualified. For these reasons he had decided that the Tender should be cancelled. It was a staff member who had pointed out the omission.

Ms Yvonne Psaila ID No.301273M under oath stated that she works at the front office of the Department of Contracts. She keeps the guarantees registry. When shown email dated 7<sup>th</sup> July 2015 and confirmed sending it to Mr Keith Tanti. Enclosed with it there were 3 guarantees received by hand from QPM, Kocks, and PPP. These were stamped and acknowledged. If an original was dropped into the Tender box or by post another section was in charge.

Profs Ian Refalo for the Appellant contends that the original had been sent by post while the Department is claiming not to have received it. The main point is that that the matter should have been raised by the Department before. The Department should have verified matters before accepting the recommendations on the 2<sup>nd</sup> February 2016. This led to unnecessary expenses incurred by the Appellant.

Dr Mark Refalo for the Appellant cited Cases 821, where bidder had sent a cheque instead of a Bid Bond, and Case 569 where the Bid Bond had been submitted later and to other cases. He contended that the Department of Contracts had in other cases ignored the lack of a Bid

Bond.

Mr Joe Caruana ID No. 266568M, under oath said that he is employed at the Department of Contracts in the Registry section. He explained that any mail addressed to the Department of Contracts is received there. He confirmed that no Bid Bond had been received from the Appellant.

Dr Franco Agius for the Department of Contracts pointed out that Clause 8 made it clear that the original Tender guarantee is not submitted the Tender would be disqualified, a copy of the guarantee was not sufficient.

At this point the hearing was closed.

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**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's Main Contention is that although his offer was chosen for the award by the Evaluation Board on 2 February 2016, BAC Ltd were informed that the award was being withdrawn due to the fact that the Contracting Authority, allegedly, stated that it did not receive the original Bid Bond from the Appellant who was then, the Recommended Bidder, as stipulated in Article 8.1 of the "*Instructions to Tenderers*" and that this omission through the award, would constitute an irregularity. In this regard, the Appellant**

**maintains that the Original Bid Bond was sent by ordinary mail.**

- b) BAC Ltd was also maintaining that the Contracting Authority should have informed them about the non submission of the original Bid Bond before and not after the Evaluation Process and the award of the Tender.**

**Having considered the Contracting Authority's "*Letter of Reply*" dated 10 June 2016 and also through their verbal submissions during the Public Hearing held on 14 June 2016, in that:**

- a) The Contracting Authority maintains that the issue of this Appeal is the submission of the original Bid Bond by the Appellant Company. In accordance with Clause 8, it was specifically made clear that non submission of the original Bid Bond would disqualify the Bidder's offer. In this regard, BAC Ltd did not remit the original Bid Bond and thus was disqualified.**

**Reached the following conclusions:**

- 1. With regards to the Appellant's First Grievance, this Board, after having heard all submissions made by the interested parties, would**

**prudently denote a distinction between a cancellation of the Tender and a disqualification of an offer made by a Bidder.**

**In the first instance, a cancellation of a Tender may be enforced by the Department of Contracts for various credible reasons, one of which is, when the Director of Contracts notices an important omission of a very basic mandatory requirement like the original Bid Bond.**

**One has to note that this non-submission was noted after the submission of the Evaluation Report and prior to the signing of the Contract of Award. In this regard, the Evaluation Board failed in verifying the receipt of the original Bid Bond from the Recommended Bidder.**

**At the same instance, the Evaluation Board were informed of all receipts of all Bid Bonds pertaining to this Tender Requirement and it was at this stage that the Evaluation Board should have informed the Contracting Authority of such a non submission. This Board notes that the e-mail dated 7 July 2015 sent to the Evaluation Board by the Department of Contracts did not indicate the fact that the original Bid Bond pertaining to BAC Ltd was not received.**

**From submitted Testimony under oath, it was credibly established that the Evaluation Board has overlooked this requirement which should have seen the Recommended Bidder submit the Bid Bond. In this regard, and based on the submission of Testimony, it was justifiably established that the Original Bid Bond pertaining to BAC Ltd was never received at the Department of Contracts.**

**On the other hand, this Board cannot understand how such an important document is submitted by the Appellant through normal post. In this regard, no proof or evidence was produced by the Appellant to substantiate the remittance by post of his original Bid Bond.**

- 2. With regards to the Appellant's Second Contention, this Board, as has been pointed out in Paragraph 1 above, recognise the fact that an oversight by the Evaluation Board and the eventual non submission of the Recommended Bidder's original Bid Bond was not an issue at the Evaluation Stage, so that the Evaluation Board could neither disqualify the latter's offer nor inform them, within the prescribed period to submit the original Bid Bond at that time. This occurrence of the omission of BAC Ltd's original Bid Bond was found at the time**

**of awarding the contract.**

**In this respect, this Board would like to justifiably contend that it was the obligation of the Director of Contracts to cancel the Tender, as there was no comfort as to the Evaluation Procedure adopted by the Evaluation Board.**

**In this regard, this Board finds a credible reason why BAC Ltd was informed of the withdrawal of Tender at Contract Stage and in view of the proven circumstances of this case; this Board upholds the Contracting Authority's decision to cancel the Tender.**

**In view of the above, this Board finds against the Appellant Company on both Contentions. 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*