

## PUBLIC CONTRACTS REVIEW BOARD

### Case No. 966 – CT 3004/2016: Tender for Independent Testing in Connection with the Supervision of the Kappara Junction Project. (Lot 2)

The Tender was published on the 15<sup>th</sup> March 2016. The closing date was on the 26<sup>th</sup> April 2016. The estimated value of the Tender is €402,955.96 (Exclusive of VAT).

On the 5<sup>th</sup> August 2016 Terracore Limited filed an Objection against the rejection of its offer for Lot 1 and the cancellation of the Tender.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a hearing on Tuesday the 23<sup>rd</sup> August 2016 to discuss the Objection.

Present for the hearing were:

#### **Terracore Limited:**

Mr Mark Caruana	Representative
Mr Alfred Xerri	Representative
Ms Ruth Ellul	Legal Representative
Dr John L Gauci	Legal Representative

#### **Transport Malta:**

Mr Josef Mercieca	Chairman Evaluation Board
Ms Dijana Farrugia	Secretary Evaluation Board
Mr Lawrence Darmanin	Member Evaluation Board
Perit John Demicoli	Member Evaluation Board
Perit Anton Zammit	Member Evaluation Board
Ms Liz Markham	Representative
Mr Ray Stafrace	Representative
Dr Joseph Camilleri	Legal Representative

#### **Department of Contracts:**

Dr Chris Mizzi	Legal Representative
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The Chairman made a brief introduction and said that the two cases involving two lots would be heard simultaneously. The Appellant's representative was then invited to make his submissions.

Dr John L Gauci on behalf of Terracore Ltd explained that the Tender was split into 2 Lots and referred to the verifying of the test results obtained by the contractor on the Kappara Project. The Appellant had been the sole bidder for the two Lots of this Tender. The Contracting Authority had deemed both Appellant's offers as being Technically Non-Compliant for the same reasons, namely:

- a) The Appellant had written "precluded" when listing the services that had to be performed and had thus conditioned the offer. The Evaluation Board had interpreted this as meaning that the Appellant would not be offering the services.

It is clear that the Appellant would not have faithfully copied the bulleted list of services in the Draft Quality Management Plan and then failed to offer these same services.

Terracore Ltd had signed the declaration confirming adhesion to all the Tender conditions and given the price of the items listed. It is evident that the Evaluation Board should have asked Appellant for clarification about "precluded". The word in fact qualified another item that was in fact not requested.

- b) The Appellant had conditioned his offer on Lot 2 by declaring it would carry out 20% of the contractor's testing responsibilities, and conditioned Lots 1 and 2 offers by asking 24 hours advance notification before inspections and testing. Again this was interpreted wrongly by the Contracting Authority because what they were offering was additional to the required service.

Terracore Ltd had offered to accept additional responsibility for 20% of the contractor's testing. The Works Contractor was asking 24 hours notification and was by no means conditioning the Tender offer. The same holds for the 3 day notice as the Appellant bound itself to give 3 days' notice to the supervisor before testing. This again cannot be construed as being conditioning of the Tender.

Dr John L Gauci contended that the Contracting Authority should have asked Appellant for Clarifications in an effort to save the Tender procedure.

Dr Joseph Camilleri on behalf of Transport Malta submitted that the Evaluation Board did not have any option but to accept what Appellant had put down in the Tender offer, and this could not be misinterpreted but was clear. The reasons for disqualifying Appellant's Tender were not subsidiary but each was important in itself.

The Appellant when submitting the QMP was indicating what services were being offered and what services were not, where precluded. The Contracting Authority could not interpret this in any other way or ask for clarifications since the QMP formed part of the Technical Offer and therefore subject only to clarification and not rectification.

The Tender submission could not be corrected. The same reasoning also covers the other reasons of rejection. Terracore Ltd had made certain conditions on the tests and the testing timeframes. These imposed conditions meant conditional offers and had to be excluded in line with the General Conditions. Appellant had put down "*Notwithstanding the Tender's terms of reference, Terracore Ltd. shall carry out up to 20% of the contractor's testing responsibilities*".

The Tender Document in section 4 2.2 under specific objectives stated that “to carry out quality testing on materials and works procedures as requested and instructed by the supervisor”. Therefore the testing had to be performed as requested by the supervisor and the Evaluation Board had to exclude the Terracore Ltd’s offer because it was evident that the tests by the Appellant would not be made as requested.

The Tender scope was the testing of the works done by the works contractor and not to perform the tests instead of the contractor. Thus the only interpretation that could be made for the Appellant’s offer was that the 20% clause was limiting the offer. This was not acceptable. The project in question was European Union funded and subject to audit, and the Contracting Authority could not be seen as trying to save the un-saveable by rectifications.

Dr John L Gauci for the Appellant contended that the obligation of the Contracting Authority to seek clarifications arises from a European Union Directive. He contended that since all the objectives of the Tender were excluded from the Tender made it more important for the Contracting Authority to seek clarification.

Replying to a question by the Chairman, Dr Joseph Camilleri for Transport Malta said that Appellant’s Technical Offer was not compliant. He explained that Appellant’s Quality Management Plan stated that “The team’s remit precludes the provision of the following services:” and went on to list the services requested in the Tender. This meant that all the seven listed services were precluded.

Dr John L Gauci insisted that the word precluded was meant to cover only the first bullet of the bulleted list which contained more than one service.

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 5 August 2016 and also through their verbal submissions during the Public Hearing held on 24 August 2016 had objected to the decision taken by the Pertinent Authority, in that:**

- a) Terracore Ltd’s offer was rejected, as being non-technically compliant due to the fact that in their “Draft Quality Management Plant”, they included the word “preclude” when listing the services**

**that had to be performed.**

**In this regard, the Appellant is claiming that Transport Malta interpreted this to mean that Terracore Ltd would not be offering the services. The latter had also offered to accept responsibility for 20% testing;**

- b) The Appellants are contending that since they had requested 24 hour notice before the inspection and testing could be carried out, the Contracting Authority interpreted this as a condition to the Tender.**

**In this regard, Terracore Ltd maintains that the 24 hour notice was being requested from the Works Contractor and so they were not conditioning the Tender and the Contracting Authority should have requested a clarification;**

- c) The Appellant's Offer was also rejected due to the following reasons:**

**i) The Appellant requested 3 days' notice to be given to the supervisor prior to the execution of "*testing*";**

**ii) Terracore Ltd laid down that he will carry out an additional 20% of the Contractor's Testing Responsibilities.**

**Having considered the Contracting Authority’s “*Letter of Reply*” dated 12 August 2016 and also their verbal submissions during the Public Hearing held on 24 August 2016, in that:**

- a) Transport Malta contends that the Evaluation Board did not have any option but to evaluate the Appellant’s offer on what the latter had submitted. In this regard, it was ample clear that some of the services being asked for in the Tender were being precluded;**
  
- b) The Contracting Authority insists that by imposing a 24 Hour Notice for the “*Testing and Inspection*” aspect, the appellant was conditioning the exclusion of such service;**
  
- c) Again, the Contracting Authority maintains that the additions which referred to the “*3 days*” notice and the carrying of 20% of the Contractor’s responsibilities conditions the Tender Requirements.**

**Reached the following conclusions:**

- 1. With regards to the Appellant’s First Grievance, this Board, after having examined the relevant documentation and heard all submissions made by the parties concerned, opines that, in section 3.0**

of the Technical Offer submitted by Terracore Ltd, the latter had clearly stated that:

*“The team remit precludes the provision of the following services”*

Therefore Terracore Ltd had declared in advance as to which services were being non-inclusive. This Board contends that, in this regard, there is no other interpretation of the Appellant’s intentions.

This Board always maintained that the Evaluation Board had to adjudicate on what was submitted by the Appellant. In this particular case there was no missing documentation but a firm declaration by Terracore Ltd, that certain services as requested in the Tender Document, will be precluded.

There was no room for the Evaluation Board to ask for a clarification as this would have given rise to an eventual rectification which is definitely not allowed.

This Board credibly opines that it was the duty of the Appellant Company to ensure that, prior to the submission of the Tender Documentation, all requisites and conditions dictated in the Tender are strictly adhered to.

**This Board also notes that the Appellant had the remedy to seek clarifications of any deviations to be submitted prior to the closing date of the Tender. It is evidently clear that the Appellant’s offer did, in fact, condition the offer submitted by the latter and this is definitely not permitted. In this regard, this Board does not uphold the Appellant’s First Grievance;**

- 2. With regards to the Appellant’s Second Grievance, again this Board notes that the latter included the following ulterior restrictions in his Technical Offer namely:**

**Section 7.0 Ground Works – Sub Section 7.1**

*“3 days notice shall be given to the supervisor for inspection of formation levels”*

**Section 3.0 of Technical Offer**

*“Notwithstanding the Tender’s Terms of Reference, Terracore Ltd, shall carry out 20% of the Contractor’s Testing responsibilities, (in terms of quantities).”*

**It is evidently clear and obvious that by inserting the above mentioned text, the Appellant is imposing upon the Contracting Authority how things should be done and at the same time deviate from the conditions and regulations stipulated in the Tender Document.**

**In this case, again, there is no room for any clarification as Terracore Ltd is stating clearly that they will carry out certain services at their own pace which differ to the same conditions as laid out in the Tender Document.**

**If Terracore Ltd had any doubts on how such a service, i.e. *“Inspection and Testing”* is to be implemented, they should have asked for clarifications prior to the submission of their offer. In this regard, this Board does not uphold the Appellant’s Second Grievance.**

- 3. On a general note, this Board, regrettably, is being faced with Appeals and Complaints which could have been averted had the Appealing Bidder utilised the remedies available under the Public Procurement Regulations.**

**As was pointed out before, this Board would like to emphasize the**

**importance for a Bidder to abide by ALL the conditions laid out in a Tender Document. The onus is on the Bidder to seek any clarification which will eliminate any doubt or misinterpretation of any particular Clause in the Tender, always, prior to the closing date.**

**In no way, can a bidder impose a condition which is different from that dictated in the Tender Document.**

**In view of the above, this Board finds against Terracore Ltd, however, since the Tender was cancelled, this same Board recommends that the deposit paid by the latter should be refunded.**

Dr Anthony Cassar  
Chairman

Mr Lawrence Ancilleri  
Member

Mr Carmel Esposito  
Member

*30 August 2016*