

PUBLIC CONTRACTS REVIEW BOARD

Case 989 – CT 3041/2015 – Trenchless Rehabilitation of Wastewater Networks at Birzebbuga and Marsaskala

The Publication Date of the Call for Tenders was 19 June 2015 whilst the Closing Date for Call of Tenders was 30 July 2016. The Estimated Value of the Tender was € 378,900.00. (Exclusive of Vat).

Two (2) Bidders have submitted offers for this Tender.

On 16 August 2016, Hydro Rocks Contractors Co Ltd filed an Objection against the decision of Water Services Corporation against a deposit of € 2,842.00

On 6 October 2016, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Carmel Esposito as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

Appellant – Hydro Rocks Contractors Co Ltd

Mr John Farrugia	Representative
Mr Nataline Farrugia	Representative
Dr Robert Abela	Legal Representative
Dr Mark Simiana	Legal Representative

Contracting Authority – Water Services Corporation

Ing Anthony Muscat	Chairperson, Evaluation Board
Mr Mario Balzan	Member, Evaluation Board
Ing Gino Micallef	Member, Evaluation Board
Ing Sigmund Galea	Member, Evaluation Board
Mr Jonathan Xerri	Representative
Dr Neville Young	Representative

Department of Contracts

Dr Christopher Mizzi	Legal Representative
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The Public Contracts' Review Board Chairman, Dr Anthony Cassar, started by saying that this Board has already issued a decision with regards to this Objection and was wondering how come, after 8 months, the parties had once again reconvened before this Board, who felt that was being challenged by the latter. Despite this, Dr Cassar admitted that both parties had the right to appeal. Following these statements, the Chairman of the Public Contracts Review Board invited the Appellants to make their submissions.

Dr Christopher Mizzi for the Department of Contracts said that there were grounds for Objections to be made in any case while Dr Mark Simiana for Hydro Rocks Contractors Company Limited contended that it was opportune for the Public Contracts Review Board to get to know why the Tender was cancelled, at what stage did the Evaluation arrived at cancellation stage and if the cancellation was to stand whether the Tender was going to be re-issued.

Dr Anthony Cassar, Chairman Public Contracts Review Board remarked that nevertheless there was still a large gap between the first decision issued by this Board, the cancellation and the eventual Objection and reiterated the fact that the Public Contracts Review Board felt offended by this and then proceeded by asking once again the Appellants to make their submissions.

Dr Mark Simiana on behalf of Hydro Rocks Contractors Company Ltd said that their First Grievance regarded the Tender Cancellation which regarded the validity period. The 90 day period is an obvious condition imposed on all Tenders. The period was linked to the offer, particularly where bid bonds are involved which was not the case in this Tender.

The Reasoned Letter of Reply issued by the Contracting Authority also confirms what the Appellant was stating, that the Department of Contracts can extend the validity period. Clause 8.3 of the Tender Document link the extension to the Bid Bonds. Their offer had no expiry dates.

Dr Anthony Cassar, Chairman Public Contracts Review Board, remarked that one has to be careful because the Evaluation Board had recommended the offer submitted by Hydro Rocks Contractors Company Ltd on December. Dr Cassar was wondered how the Tender was cancelled since the Evaluation Board had done its job.

Dr Mark Simiana for the Appellants replied that they were not conscious of this factor while Dr Robert Abela, also for Hydro Rocks Contractors Company Ltd added that there were many things which they did not understand in this case.

Dr Mark Simiana added that the cancellation process prejudiced for all parties since the offers were known to everyone.

Dr Robert Abela stated that the decision taken by the Contracting Authority was ignoring the decision taken by the Public Contracts Review Board and that by issuing a new Tender they were getting around the decision.

Dr Anthony Cassar, Chairman Public Contracts Review Board, said that this Board was asking why this Tender was being cancelled after eight months against the Board's wishes.

Dr Christopher Mizzi for the Department of Contracts said that he disagreed with the Appellant's statement that there was no difference between the Tender Validity Period and the Bid Bond. The latter was a binding guarantee for a limited period of time which lately the Contracting Authorities are not asking to extend while the Tender Validity Period is the minimum requirement needed to be eligible in the Tender.

The 90 days mentioned in Article 8 of the General Conditions are the maximum time given by the Director General (Contracts) to the Evaluation Board to evaluate the offers. An extension can be given twice following which the Director General (Contracts) is empowered by law to cancel the Tender if this needs to be done.

The Director General (Contracts), continued Dr Mizzi, once the 90 days of the Validity Period expired had cancelled the Tender and the Public Contracts Review Board was right in questioning this. This Tender had EU Funds which expired in December 2015. The Contracting Authority had to tackle this issue and that the latter tried to find a solution together with the Planning and Priorities Co-Ordination Division within the Ministry for Finance.

Dr Anthony Cassar, Chairman Public Contracts Review Board, asked once again why eight months had expired from the first decision taken by the Public Contracts Review Board and the second cancellation.

Dr Christopher Mizzi, for the Department of Contracts, replied that at this point, given the problems which there were with the EU Funds, Water Services Corporation tried to find a solution but the Director General (Contracts) was still in the parameters of the law to cancel the Tenders after confirming that the EU Funds were lost.

Mr Neville Young for the Water Services Corporation clarified the fact that the cancellation did not come from the latter and that there was no issue with the Appellants since the problem regarded EU Funds. The Contracting Authority was still in talks with both the Ministry of Finance and the Budget Office within the latter Ministry on how to recoup the funds as there is an element of how to get retrospective funds.

If this Tender had to be cancelled, continued Mr Young, a new Tender will be re-issued and that they will apply once again for new EU Funds since the works are needed.

Mr Neville Young, for the Contracting Authority, said that the works are to start once the funds are available.

Dr Anthony Cassar, Chairman Public Contracts Review Board, asked whether the Letter of Information gave any reasons for which Mr Young replied that he was not in the Evaluation Board.

Dr Cassar then asked whether the Water Services Corporation has informed all bidders that this Tender was going to be cancelled for which Dr Christopher Mizzi replied that the only argument which the Director General (Contracts) could have raised was that the Tender expired the validity period. The latter could not cancel the Tender because of lack of funds.

Dr Mark Simiana for Hydro Rocks Contractors Company Limited said that if the reason why the Tender was cancelled was the lack of EU Funds, the Contracting Authority could award

the Tender and the works would eventually commence when the EU Funds are available. Clause 8.1 of the General Conditions state that, “*Tenders must be valid for a period of 90 days after the deadline of the submission of Tenders. Any Tenderer who quotes for a shorter Validity Period will be rejected.*” The 90 days, continued Dr Simiana, were the minimum and whoever quoted for less time would have to be disqualified.

Clause 8.2 of the General Conditions state that, “*The Director General (Contracts), Head of the Contracting Legal Authority, may then consider to cancel the Tender following consultations with the Department Contracts Committee and Permanent Secretary in the event that the Evaluation Process is not concluded by the end of the validity period of the submission of bids.*” The 90 days, Dr Simiana pointed out, are not mentioned here.

The Appellants were then asking the Contracting Authority and the Department of Contracts where, in their offer, they indicated that they were submitting 90 or less. The validity period did not expire and therefore Hydro Rocks Contractors Company Ltd’s offer was not expired. Legally, concluded Dr Simiana, the Department of Contracts gave no solid reason why his client’s offer was disqualified.

Mr Neville Young on behalf of the Water Services Corporation concluded that he has no problem to sign the deal. Dr Robert Abela for Hydro Rocks Contractors Company Ltd said that he hoped that good sense will prevail on this issue.

At this stage, the Public Hearing was closed.

This Board,

Having noted the Appellant’s Objection, in terms of the “*Reasoned Letter of Objection*” dated 16 August 2016 and also through their verbal submissions during the Public Hearing held on 6 October 2016 had objected to the decision taken by the Pertinent Authority, in that:

- a) Hydro Rocks Contractors Co Ltd contends that the 90 Day Period under which the Tender may be extended refers to the minimum period and not the maximum duration to which the Director General (Contracts) can extend.**

In this regard, the Appellant maintains that his offer should be awarded the Tender since his offer is still valid at Law.

Having considered the Contracting Authority's "*Letter of Reply*" dated 5 October 2016 and also their verbal submissions during the Public Hearing held on 6 October 2016, in that:

- a) Water Services Corporations contend that the Director General (Contracts) has the powers vested in him to cancel the Tender in accordance with Clause 8.1 and 8.2 of the General Rules. In this regard, the lapse of the 90 day period prevailed.**

Reached the following conclusions:

- 1. First and foremost, This Board would like to confirm that the Director General (Contracts) has the authority to cancel a Tender within the parameters of Article 8.1 and 8.2 of the General Rules.**

This Board, after having examined the relative documentation, with particular reference to the Evaluation Report, justifiably notes that the Evaluation Process was completed on 13 January 2016.

At the same instance, Water Services Corporation withheld the award due to the fact that they could not utilise the EU Funds and had to search elsewhere to obtain same.

The latter process, for some unknown reasons, staggered for 6 months and finally on 28 June 2016, the Contracting Authority had to take the only available solution that is the cancellation of the Tender since the 90 day period from the submission of Tender had elapsed. This Board notes that the decision to cancel the Tender came about on 2 August 2016.

From the above factual events, Water Services Corporation was aware on 13 June 2016 that the funds were by then available again and this Board cannot understand why such a long time was taken from the finalisation of the evaluation process to the recommended Memorandum, (on 28 June 2016).

From the submissions made by the Contracting Authority, it might be understood that the delay was due to finding alternative funds to finance the project. However, if that was the case, the Contracting Authority should have instructed the Bidders of such a cause for the

delay in awarding the Tender. This Board also notes some pressure to issue the Award was made by Hydro Rocks Contractors Co Ltd on 28 April 2016.

As stated in the preamble of these conclusions, this Board asserts the fact that the Director General (Contracts) is empowered to cancel the Tender within clauses 8.1 and 8.2 of the General Conditions, however, since prior to the cancellation date of 2 August 2016, funds were allocated, i.e. on 13 June 2016, the latter consideration should have been taken into consideration prior to cancellation.

Clause 8.1 of the General Conditions state that, “*Tenders must remain valid for a Period of 90 days after the deadline for submissions of Tender.*” However, same clause does not indicate whether the 90 days is the minimum or maximum period for a Tender to be valid.

In this regard, this Board does not envisage any contradiction to the Regulations 8.1 and 8.2, if the Appellant’s offer is to be regarded as still valid as at 2 August 2016. One must also take into account the extraordinary length of time taken by the Contracting Authority, between the date of finalisation of the Evaluation Process and the

date when the Tender was cancelled, definitely through no fault or deficiency on the Appellant's part.

In this regard, this Board opines that, given the circumstances and delays which occurred during the process of this Tender, it would be more fair and transparent to re-instate the Appellant's offer, as a valid offer, rather than issue a fresh Tender when their offer has been made public.

This Board would like to emphasize that it is not undermining the Authority bestowed on the Director General (Contracts) but rather considering the circumstances of this particular Tender.

In view of the above, this Board finds in favour of Hydro Rocks Contractors Co Ltd and recommends that:

- i) The Appellant's offer should be reinstated as valid;**
- ii) The Appellant's offer is to be reintegrated in the Evaluation Process;**
- iii) The Tender itself should not be cancelled;**

iv) The deposit paid by Hydro Rocks Contractors Co Ltd should be refunded.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Carmel Esposito
Member

12 October 2016