

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 990 – eCT 3013/16 – Tender for Trenching and Pipelaying Works at Triq Alfred Cachia Zammit, Żejtun by the Water Services Corporation**

The Publication Date of the Call for Tenders was 10 June 2016 whilst the Closing Date for Call of Tenders was 21 July 2016. The Estimated Value of the Tender was € 1,257,181. (Exclusive of Vat).

Four (4) Bidders have submitted offers for this Tender.

On 12 September 2016, Rock Cut Ltd filed an Objection against the decision of Water Services Corporation to award the Tender to Sier & Sons Ltd for the price of € 999,697.74 (Exclusive of VAT) against a deposit of € 9,429.00.

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 – Rock Cut Ltd**

Mr Rhys Lee Buttigieg	Representative
Dr Beryl Buttigieg	Representative

#### **Recommended Bidder – Sier & Sons Ltd**

Mr Matthew Bugeja	Representative
Mr Vincent Zammit	Representative
Dr Joe Bonnici	Legal Representative

#### **Contracting Authority – Water Services Corporation**

Ing Stefan Riolo	Chairperson, Evaluation Board
Mr Jonathan Scerri	Secretary, Evaluation Board
Ing Gino Micallef	Member, Evaluation Board
Dr Neville Young	Member, Evaluation Board

#### **Department of Contracts**

Ms Graziella Calleja	Procurement Manager
Dr Christopher Mizzi	Legal Representative

Following an introduction by The Public Contracts' Review Board Chairman, Dr Anthony Cassar, the Appellants were invited to make their submissions.

Dr Beryl Buttigieg on behalf of Rock Cut Ltd said that the Objection was based on the trivial reasons why their bid was disqualified. On the other hand, the Reasoned Letter of Reply spoke on rectification matters. The Letter of Objection spoke about clarifications and rectifications only to round up the arguments submitted by the Appellants for their Appeal.

Dr Anthony Cassar, Chairman Public Contracts Review Board, asked what the exact reasons why the Appellants were disqualified were. Dr Buttigieg replied that on the 1<sup>st</sup> page of her client's offer there was written "*Trenching, Żejtun*" but further below they wrote "*Trenching and By Plying works, Sewer Replacement due to sea water infiltration, Birzebbuga, Water Services Corporation*".

Dr Beryl Buttigieg for Rockcut Ltd continued by arguing that here were many previous sentences issued both by this Board and in European Courts which state that there should not be disqualifications for economic reasons because like this, the public expenditure is going to increase by € 100,000.

The second reason why Rockcut's offer was discarded, continued Dr Buttigieg, was that Page 8 of their offer under heading 3.1 – "*Description of Proposed Works*" said that "*Construction of a Reservoir is being specifically included, which definitely has no relevance whatsoever to the scope of this Tender. Though a typical risk assessment with, perhaps, the possibility for revision, however these works are again made ample reference to under clause "Health and Safety Policy Statement"*". This was more trivial than the first reason as the construction of the reservoirs goes over and above the requested information.

Dr Anthony Cassar, Chairman Public Contracts Review Board, remarked that therefore additional information was given to the Tender for which Dr Beryl Buttigieg for Rockcut Ltd confirmed.

Dr Anthony Cassar, Chairman Public Contracts Review Board, then asked whether the information submitted was the one asked for. The Appellants confirmed this.

Dr Beryl Buttigieg, for Rockcut Ltd, then proceeded by illustrating the third reason why her client's bid was rejected, namely Page 28 of their document which stated, "*specific reference is made that the working area is located at the fringe of Żebbuġ, which is definitely beyond the extent of this project*". As in the first point, the information was given as Żebbuġ instead of Żejtun. It was unreasonable to classify a typing error as Technically Non Compliant.

With regards to the fourth point, namely Page 32 of the document submitted by the Appellants, "*Traffic Deviation at Wied Qirda*", the Contracting Authority, continued Dr Beryl Buttigieg, was being unreasonable because in the Tender there was a condition which state that the traffic management had to be planned within three days of the issuing of the permit by Transport Malta.

Rockcut Ltd had submitted a sample of the Traffic Management Unit and should they be awarded the Tender, they had to contact Transport Malta who eventually directs Traffic Management. It was useless to talk to Transport Malta at Tender Stage, argued the Appellants.

In Page 3 of their offer, Rockcut Ltd indicated clearly in the appendices that the Traffic Management Plan was an indicative one, on the basis that a detailed and final plan was to be submitted within three days of the issuing of the Trench Permit. Page 80 of the Construction Management Plan also shows this.

Dr Beryl Buttigieg continued by stating without prejudice that article 3 of the special conditions gives a list of documents to be submitted and their order of preference namely:

- a) The Contract
- b) The Special Conditions;
- c) The General Conditions
- d) The Contracting Authority's Technical Specifications and Design Documentation
- e) The Contractor's Technical Offer and the Design Documentation, (drawings)
- f) The Bill of Quantities (after arithmetical corrections)/breakdown;
- g) Any other documents forming part of the contract.

Prior to the Construction Management Plan, Rockcut Ltd were arguing that there were four other documents which had the priority if you have any conflicts between the documents. A clarification would have been enough, concluded Dr Beryl Buttigieg.

Dr Christopher Mizzi, on behalf of the Department of Contracts, started to explain that the main discussion regarded the Technical Offer submitted under note 3 which stated that, "*No rectification shall be allowed, only clarifications can be requested*". There were no grounds for rectification from the Contracting Authority's side and a clarification would have solved nothing.

With regards the reservoir, it is not simply a case for the Contracting Authority of ignoring the additional information submitted since here we are speaking about the Technical Offer. It doesn't make sense for the Water Services Corporation to pass on documents which were part and parcel of the contract and eventually part of the Tender. The Reservoir and the Contract Management Plan was mentioned in different pages.

With regards to the Traffic Management Plan, Dr Christopher Mizzi continued by saying that the Construction Management Plan required a Traffic Deviation plan and a management plan of how the works were to be conducted. The fact that this was not included in the bid resulted in Rockcut Ltd's offer to be Technically Non Compliant because it would cause a discrepancy with the contract.

The Appellants made a reference to the rectifications which was not the case since the offer was submitted under Note 3 and would have caused a precedent if a rectification was made. There were grounds for disqualification in the way the Construction Management Plan was presented.

Mr Jonathan Scerri for the Water Services Corporation said that the several trivial issues in their entirety show that there are mistakes in the Appellant's Construction Management Plan. The reservoir was not simply given as an additional information but was included as part of the works which are to be made in the contract.

With regards the Traffic Management Plan, Mr Scerri continued that the fact that the indication shown that the works were to be held at Żebbuġ instead of Żejtun did not raise grounds for a clarification to be issued. A clarification was to be issued if there was something in the offers which was not clear. It was in the interest of the Water Services Corporation to go for the cheapest compliant Tender.

Dr Anthony Cassar, Chairman Public Contracts Review Board, asked whether it was twice that the locality was indicated wrongly for which Mr Jonathan Xerri for the Water Services Corporation confirmed.

Dr Joe Bonnici, on behalf of Sier & Sons Ltd said that they as Recommended Bidders associated themselves with whatever the Contracting Authority had said in this Public Hearing. If there was something trivial, it was obvious that a copy-and-paste exercise was made by the Appellants from a previous offer without checking whether the names submitted were correct.

The reservoir was not necessary in the Tender and things like these could not be corrected. If one sees Clause 7.1 of the Tender Document and all of its notes, in every paragraph there is a number reference. Notes 1, 2 and 3 did not apply for the whole contract. Note 1 applied only for the Tender Guarantee, Note 2 for Clarifications and Note 3 for the Technical Specifications.

Dr Bonnici then declared that the legitimate conclusion was that no rectification shall be allowed in any case and that the Public Contracts Review Board was bound by this note.

Dr Beryl Buttigieg for Rockcut Ltd said that the whole point was being missed since they were saying that the disqualification of their offer was based on trivial reasons. It was the same Contracting Authority who said that the Traffic Management Plan was correct apart from the locality mentioned which was Żebbuġ and not Żejtun as in the Tender Document. Dr Buttigieg concluded by saying that it was fair enough that clarifications were not possible to be made.

At this stage, the Public Hearing was closed.

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**This Board,**

**Having noted the Appellant's Objection, in terms of the "*Reasoned Letter of Objection*" dated 12 September 2016 and also 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) Rock Cut Ltd contend that the main overall reason for the rejection of its offer was trivial and in this regard, special reference to the site of works, reservoir and Traffic Management plan which were regarded by the Contracting Authority as Technically Non-Compliant, were in fact, a trivial nature;
- b) Rock Cut Ltd also maintains that the Contracting Authority should have asked for clarifications, when in doubt, of such trivial matters.

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 Corporation maintains that the reasons given for the rejection of the Appellant's offer were deficiencies which were fundamental and formed part and parcel of the Tender Document.

**The trivial reasons allegedly stated by the Appellants consisted of incorrect identification of “*site*”, additional information which was not requested and lack of a Traffic Management Plan.**

**In this regard, Water Services Corporation insists that due to the importance of these mandatory conditions, the Evaluation Board had to deem the Appellant’s Offer as non-Technically compliant;**

- b) Water Services Corporation contend that the alleged trivial deficiencies could not be clarified as this action falls under Clause 7.1 (Note 3), wherein it is clearly stated that no rectification shall be allowed.**

**Reached the following conclusions:**

- 1. This Board, after having examined the relative documentation and heard submissions made by all parties concerned, opines that the Appellant’s First Grievance is solely reliant and dependent upon the word “*Triviality*”.**

**In this particular case, various factors were mentioned which were regarded as “*Trivial*” by Rock Cut Ltd, such as the name of site**

where the works are to be carried out, the inclusion of a reservoir and the lack or inefficient Traffic Management Plan. This Board would like to treat these factors as follow:

i. Name of Site

One must accept the cardinal fact that the Tender Document is a contract which has to be clear in all respects so that, the site or location where the Tendered works are to be carried out must be identified and established.

In this particular case, the Tender Document dictated that the site where works are to be carried out was at “*Triq Alfred Cachia Zammit, Żejtun*”.

Rock Cut Ltd, in its submissions, did not declare the same place as that dictated in the Tender. In a contract, one has to abide by the objective and place of works and not dictate a totally different area where works are to be deployed.

**This Board opines that the site of works to be carried out was an important issue in the Tender Document and should not be considered as “trivial”.**

**ii. Reservoir**

**Rock Cut’s contention, in this regard, is that they were also penalised for giving additional information such as the inclusion of a reservoir. In this particular case, the Appellant submitted the Technical details for the construction of a reservoir.**

**This particular item was not requested in the Tender Document and as such it is considered as irrelevant. This Board opines that Bidders should, in all cases, submit documentation for what is being requested only.**

**Any additional non-requested data or specifications should not form part of the offer. This Board upholds the fact that the construction of a reservoir was irrelevant to this particular Tender as it was not asked for in the Tender Document. It is the obligation of the Evaluation Board to disregard any additional and irrelevant information.**



**iii. Traffic Management Plan**

**This requisite was a mandatory condition in the Tender Document, in that the Bidders had to submit a plan taking into consideration, traffic safety and management measures plan, traffic safety measures, routing of vehicles to and from site etc, etc, etc i.e. a complete management plan.**

**In this particular case, the Construction Management Plan was compiled but based on the location of Żebbuġ and not Żejtun. This Board, taking into account the various traffic characteristics of different localities, acknowledges the fact the the traffic management in Żebbuġ is totally different than the one in Żejtun, so that this matter is not to be considered as trivial.**

**In fact, this same Board regard this issue as highly important and thus does not uphold the Appellant's First Grievance.**

- 2. With regards to Rock Cut Ltd's Second Grievance, in that "*the Evaluation Board should have sought clarifications where and if, in doubt about a particular item*", this Board, justifiably opines that it is**

**not the Evaluation Board's jurisdiction to correct mistakes which give a totally different interpretation of what is being requested.**

**In this particular case, the Evaluation Board could not rectify the incorrect information which was submitted by the Appellant. In this regard, this Board does not uphold the latter's Second Grievance.**

**In view of the above, this Board finds against Rock Cut Ltd and recommends that the deposit paid by the latter should not be reimbursed.**

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Carmel Esposito  
Member

*11 October 2016*