

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1042 – CT 2186/2016 – Tender for Investigative Coring in Connection with the Construction of a Sub-Sea Tunnel between Malta and Gozo**

The Publication Date of the Call for Tenders was 16 September 2016 whilst the Closing Date for Call of Tenders was 10 November 2016. The Estimated Value of the Tender, (Exclusive of VAT) was € 635,593.22.

Seven (7) Bidders have submitted offers for this Tender.

On 7 April 2017, Geo Tunnel JV filed an Objection against the decision of Transport Malta to award the Tender to Geotec SpA for the price of € 751,645.60 (Exclusive of VAT) against a deposit of € 4,767.

On 25 April 2017, 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 – Geo Tunnel JV**

Mr Alfred Xerri	Representative
Dr John Gauci	Legal Representative

#### **Recommended Bidder – Geotec SpA**

Dr John Refalo	Legal Representative
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#### **Contracting Authority – Transport Malta**

Mr Clifton Borg	Chairperson, Evaluation Board
Ms Mary Grace Pisani	Secretary, Evaluation Board
Mr Lawrence Darmanin	Member, Evaluation Board
Perit John Demicoli	Member, Evaluation Board
Ms Liz Markham	Representative
Mr Ray Stafrace	Representative

#### **Department of Contracts**

Ms Graziella Calleja	Procurement Manager
Dr Franco Agius	Legal Representative
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 John Gauci, the Legal Representative for Geo Tunnel JV opened by saying that this was an Appeal from a Tender issued by Transport Malta together with the Department of Contracts for tests to occur in preparation for a Tunnel which might be built between Malta and Gozo.

The Objection was based on the fact that the Recommended Bidders for this case had no experience in the type of work which was requested to be done by this Tender. In their Objection, the Appellants were clear and they had annexed corporate information of Geotec SpA which can be easily found from their website in their Letter of Objection.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether the experience requested was regarding offshore drilling.

Dr John Gauci, the Legal Representative for Geo Tunnel JV replied that Geotec SpA had no experience in offshore drilling. This point was contested by neither by the Reasoned Letter of Reply issued by Transport Malta and the Department of Contracts nor in the Reasoned Letter of Reply issued by Geotec SpA.

Instead, the Contracting Authority was referring to Question 13 in Clarification 2 issued by the Department of Contracts on 4 October 2016 wherein it was clearly seen that the interpretation which was stated was not the one which whoever answered the question had in mind. Dr Gauci referred to this question which *inter alia* was,

*“Must the Tenderer have both the services of similar nature cited as being on-shore and off-shore coring to depth up to minimum of 200m?”*

The question therefore was a clear one and that was the interpretation which one had to give at that point. Thanks to the interpreted answer, one can argue that Bidders can be exonerated from having experience in offshore drilling.

Dr Gauci continued by saying that if one had to interpret the answer in that way, this could mean that the Recommended Bidder, who had no experience in the Maritime Sector, was going to be trusted with a sensitive area like Comino. From a legal point, Dr Gauci was going to stop there and call for the witness.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board said that technically this Board cannot delve into the matter since the crux of the matter was whether it was offshore or onshore drilling otherwise the discussion was going to deviate. Dr Franco Agius, a Legal Representative from the Department of Contracts, agreed with Dr Cassar.

Dr John Gauci, the Legal Representative for Geo Tunnel JV explained that he brought this witness to show how sensitive the matter was and therefore how one had to interpret in a supposedly restrictive way, clarifications in this respect.

At this point, Mr Joost Giese, a Commercial Director for Fugro Alluval Offshore Ltd was summoned by Geo Tunnel JV to testify under oath before the Public Contracts Review Board.

Following Mr Giese's Testimony, Dr Franco Agius, a Legal Representative for the Department of Contracts submitted that with regards to Dr Gauci's comments about the Clarifications, one had to have a good imagination to arrive to a different interpretation than the one which the Government was interpreting it.

The question was a clear one and it was asking whether a prospective Bidder must have onshore and offshore drilling experience to a minimum of 200m for which the reply was to be in the affirmative. This question came out from the way the wording was placed on article 7. Once the clarification was issued, if there was any contestation on the latter, a Pre-Contractual Remedy should have been filed. At this stage it was too late. One had to focus on the meaning of the wording of the Clarification.

Dr John Gauci, the Legal Representative for Geo Tunnel JV said that Dr Agius had indicated that in their Objection, the Appellants did not refer to that clarification. This was not done because the Appellants never thought that this was going to be the interpretation given in the sense that the interpretation which was given meant that the Recommended Bidder does not have any experience in the maritime experience.

The Appellants continued by saying that Dr Agius was stopping halfway through the question since both make a reference to 200m, you can use the minimum requirement of the service for the onshore coring for the intigated depth. The origin of this question was from someone who supposedly has an experience in land drilling and maybe he doesn't have enough in sea drilling.

The service given was going to be the same one. If one had experience until 200m drilling in land and maybe does not have drilling experience at the sea, Dr Gauci understood that one compensates the other. The Evaluation Board should have declared that they were happy with somebody who does not have enough experience.

At this point, Mr Clifton Borg, the Chairperson of the Evaluation Board holding ID Card No 59875 M was summoned by the Department of Contracts to testify under oath before the Public Contracts Review Board.

Follwoing Mr Borg's Testimony, Dr John Refalo, the Legal Representative for Geotec SpA submitted that the discussion should not centre on a competence question but whether his clients were compliant. There was a Clarification and the Recommended Bidders worked on the basis of the latter.

Dr Franco Agius, the Legal Representative for the Department of Contracts said that with regards of the second part of the Clarification question, it was complementary to the first part. The request was for offshore coring for two projects.

At this stage, the Public Hearing was adjourned to Tuesday 9 May 2017 at 09:00 wherein the Public Contracts Review Board will transmit the decision taken for this Objection verbally and then distribute a hard copy of the same to all parties concerned.

**This Board,**

**Having noted this Objection filed by Geo Tunnel JV (herein after referred to as the Appellant) on 7 April 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference CT 2186/2016 listed as Case No 1042 in the records of the Public Contracts Review Board, awarded by Transport Malta (herein after referred to as the Contracting Authority).**

**Appearing for the Appellant: Dr John Gauci**

**Appearing for the Contracting Authority: Dr Franco Agius**

**Dr Christopher Mizzi**

**Whereby, the Appellant contends that:**

- a) Geo Tunnel JV's main contention is that the Recommended Bidder has no experience in offshore drilling, since the execution of such works is to be carried out in a very sensitive area.**

**In this regard, the Appellant insists that Transport Malta is going to entrust such a delicate operation in a Bidder who has not the actual experience in such similar works.**

**This Board also noted the Contracting Authority's "*Letter of Reply*" filed on 7 April 2017 and its verbal submissions during the Public Hearing held on 25 April 2017, in that:**

- a) Transport Malta maintains that the Appellant was clearly made aware of the experience required through Question 13 of Clarification 2 issued by the Department of Contracts on 4 October 2016 which vividly stated that the Bidders' Experience, in accordance with Section 1 Article 7.1 (b) (ii) of the Tender Document, refers to onshore and/or offshore coring. In this regard, the Recommended Bidder was technically compliant.**

**This same Board also noted the Testimonies of the witness namely:**

- 1. Mr Joost Giese summoned by Geo Tunnels JV;**
- 2. Mr Clifton Borg summoned by the Department of Contracts.**

**This Board, after having treated the merits of this case, arrived at the following conclusions:**

- 1. After having heard the submissions made by all parties concerned and examined the relative documentation, this Board would, first and foremost, assert that the jurisdiction of this Board is to establish whether the Evaluation process was carried out in a fair, just and transparent manner.**

**In this regard, it is being pointed out that it is not the competence of this Board to adjudicate whether the successful Bidder possesses “*on shore*” and “*off shore*” coring experience as this issue is dictated in the Tender Document itself but rather to determine whether the alleged contentions made by the Appellant, in that Geotec SpA is not compliant with the conditions as stipulated in the Tender Document are in fact substantiated.**

**The issue in this particular case is the alleged lack of experience in carrying out works of similar nature by the Preferred Bidder in “*off shore*” coring. In this regard, this Board would like to refer to the stipulated “*Award Criteria*” in the Tender Document, with specific reference to Section 1, Article 7.1 (b) (ii) of the Tender Document, which states that the minimum requirements should include,**

*“a list of principal services of a similar nature being “on shore” and “off shore” coring to depths up to a minimum of 200m”.*

**At this particular stage, this Clause in the Tender Document, did dictate that works of similar nature were to be “on shore” and “off shore” coring, to mean that both activities included and to be regarded as similar works.**

**However, this Board notes the Reply to Question 13 of Clarification 2 issued by the Department of Contracts on 4 October 2016, (well before the closing date of the Tender), wherein the Contracting Authority clearly defined what was meant by similar works and in this respect it was vividly explained that similar works consist of “on shore and/or off shore coring”.**

**At this point in time, the “Award Criteria” was changed, in that this Clarification which now formed part of the Tender Document, stated that similar works entails either “on shore” or “off shore coring” in other words, any one such activity.**

**In this regard, this Board justifiably note that through this clarification, which was made well in time for all Bidders to be made aware of, the definition of “*works of similar nature*” had been established.**

**As stated in the opening consideration, this Board cannot interfere or delve whether the Technical Specifications as dictated in the Tender Document are the appropriate Technical Requirements in so far as the requested experience in works of similar nature.**

**This Board is justifiably convinced that it is in the interest of the Contracting Authority to entrust a particular Bidder with the works involved, which is capable of performing the Tendered Works to the satisfaction of the same Contracting Authority.**

**At the same instance, this Board is credibly convinced that the Technical Specifications and requirements in this particular Tender were formulated on the advice of professional Technical people who are well aware of what is required and who is capable of executing the Tendered Works.**

**In this regard, this Board, after taking into account Clarification 2 issued by the Department of Contracts on 4 October 2016 and with particular reference to the reply to question 13, Geotec SpA was technically compliant and in this regard, this same Board does not uphold Geo Tunnel JV's contention.**

- 2. With regards to the Appellant's claim that Transport Malta was in breach of the Principles established in the case "*Nordecon AS, Ramboll EestiAS vs Rahandusminiteerium*" decided by the European Court of Justice on 5 December 2013, this Board would respectfully point out that, in the mentioned case, the decision related to changes in conditions was made after the closing date of the Tender. In this regard, the quotation of this particular case was inaccurately linked to this particular Appeal. This Board credibly note that the change in the "*Award Criteria*", in this case, was made well before the closing date of the Tender.**

**It was distributed to all Bidders so that a Level Playing Field was respected and the clarification itself created and established the final description of "*similar works*". In this regard, this Board does not uphold Geo Tunnels JV's reference as a similar eventuality to this particular case.**

**3. This Board would pertinently point out that Appellant's alleged claims could have been smoothed out through a Pre-Contractual Concern and perhaps the matter would have been resolved at that stage.**

**However, this Board is justifiably concerned on the number of Appeals which are being raised and which same Appeals could have been avoided at a much earlier stage of the Tendering process through the remedies provided at law. In this case, the Appellant did not avail himself of such remedies.**

**In view of the above, this Board finds against Geo Tunnels JV and recommends that only € 4,000 should be refunded. An established amount of € 767 to cover the Board's expenses is being imposed.**

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Carmel Esposito  
Member

*9 May 2017*