

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

Dr Beryl Jean Buttigieg, the Legal Representative for Rockcut Limited wanted to ask on what grounds were her clients disqualified from this Tender since the Letter of Rejection issued by the Department of Contracts said on 11 August 2017 said that the Appellants were disqualified on technical grounds whilst the Reasoned Letter of Reply dated 11 September 2017 said that they were disqualified on administrative grounds. She added that the Appellant's Objection was based on the disqualification on technical grounds.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board replied that according to the documentation which has been presented to him, the Appellants were disqualified on administrative grounds.

Dr Christopher Mizzi, a Legal Representative for the Department of Contracts pointed out that the Letter of Rejection always caters the fact that the Award was given to the Bidder who had the cheapest and most technically compliant offer. If there were other reasons for disqualification, these does not vary the reasons for exclusions.

Dr Beryl Jean Buttigieg, the Legal Representative for Rockcut Limited said that there was a distinction between being rejected on administrative grounds and being rejected on technical grounds.

Dr Christopher Mizzi, a Legal Representative for the Department of Contracts said that if the Reason for disqualification regarded the European Single Procurement Document, that falls under the administrative part of the Tender.

Dr Beryl Jean Buttigieg, the Legal Representative for Rockcut Limited explained that in their Letter of Objection dated 16 August 2017, her clients said that they were disqualified from this Tender because the Żebbuġ project was valued € 585,000. In reality, this project was valued about € 2.5 million as shown by the Certificate of Payment.

This means that according to the Specifications, the Bidder was qualified to work on the project. Dr Buttigieg continued by saying that the Evaluation Board verified the projects which Rockcut Limited had worked on, which included the Triton Fountain Project which commenced in 2016. If one had to remove this project and include the one of Żebbuġ, the Appellant's Bid would still be compliant with the Tender.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board noted that the Żebbuġ project was the kingpin of the Objection.

Dr Beryl Jean Buttigieg, the Appellant's Legal Representative, admitted that there was a mistake from her client's part.

Mr Carmel Esposito, a member of the Public Contracts Review Board asked whether there were two projects in the Appellant's offer for which Dr Beryl Jean Buttigieg, Rockcut Limited's Legal Representative answered that she has the Certificate of Payment.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board said that what the Appellant submitted was below the requirement stipulated in the Tender Document.

Dr Beryl Jean Buttigieg, the Legal Representative for Rockcut Limited said that the question now was whether this decision, made on *lapsus calami*, was proportionate in the sense that if one had to look at the Tender's main scope, this had to be awarded to the cheapest price offer, which in this case was of the Appellants.

Rockcut Limited's offer could have been considered since the Triton Fountain Project commenced in 2017 but then for a reason or another, the Żebbuġ project was considered which was valued below the European Single Procurement Document. This led to the Evaluation Board making the mistake of discarding the Appellant's offer.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board said that the price had to be only considered at the end of the Evaluation Stage. The procedure was that first the Tender was considered administratively, then technically and finally financially. This procedure must be followed.

Dr Cassar then asked the Dr Buttigieg whether the offer submitted reached the limits which the Evaluation Board for which the latter replied in the negative. The Chairman of the Public Contracts Review Board remarked that at that stage, the Evaluation Board could consider the Appellant's offer any further.

Dr Beryl Jean Buttigieg, the Legal Representative for Rockcut Limited said that the Evaluation Board had made its technical considerations about their offer.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board countered that this was a matter for this Board to delve into. On the other hand, the Appellants mentioned a revalue of the offer.

Dr Beryl Jean Buttigieg, the Legal Representative for Rockcut Limited said that the amount did not change. Had the Evaluation Board referred to their offer, they would have noticed that their Financial Bid was of € 2.5 million. She was wondering what commercial advantages one must have if a project was determined to be for a lesser value. This *lapsus calami* has led to the discarding of the Appellant's Bid.

Dr Christopher Mizzi, a Legal Representative for the Department of Contracts said that in this particular circumstance, the Evaluation Board has stood by the European Single Procurement Document which Rockcut Limited has submitted with their offer. Once the latter has failed in its eligibility, the Evaluation Board has deemed the Appellant's offer to be administratively not compliant.

The criteria requested for this Tender was that Bidders must show that they worked on projects amounting to € 1.2 million between 2014 and 2016. The Evaluation Board found some difficulties and hence made a process for Rectification where Bidders had the chance to rectify some offers. There was a clear indication that the Appellants have modified the requested part but still the Evaluation Board could not reached the required sum when considering the European Single Procurement Document submitted, hence disqualifying the Appellant's offer. Dr Christopher Mizzi said that he brought a member of the Evaluation Board who can clearly explain the matter.

At this stage, Mr Dolan Debattista, a Senior Manager within the Ministry for Tourism, holding ID Card Number 49682 M was summoned by the Department of Contracts to testify under oath before the Public Contracts Review Board.

At the end of Mr Debattista's submission, Dr Massimo Vella, the Legal Representative of ABB Joint Venture, the Recommended Bidders, said that with regards to the *lapsus calami* issue raised by Dr Buttigieg that one cannot compare previous sentences issued by the Hon Court of Justice, such as Ballut Blocks vs Department of Contracts and BAC vs Department of Contracts both issued by the Hon Court of Appeal on 4 March 2014 and 15 December 2016 respectively. In those cases, there were cases of mistaken information which was submitted whilst in this case there are documents which were presented in the Letter of Objection and which do not have any weight.

These documents were not signed on a letter head and refer to a contract signed on 2010. Dr Vella checked also when the works on NFRP Żebbuġ have started and from his findings, he pointed out that these works started on 2012 and not in the time stipulated by the Tender. Besides, the nature of those works was tiling which was irrelevant for the means of this Tender.

Dr Franco Agius, a second Legal Representative from the Department of Contracts said that during this Public Hearing the Evaluation Board has clearly shown why he has taken certain decisions.

Dr Agius then referred to Case 559/10, Laboratoire Garnier et Cie vs the Office for Harmonisation in the Internal Market, decided by the European Court of Justice on 11 July 2012 wherein it was decided that the responsibility for submitting mistaken information lies within the Bidder who submits it. Dr Agius also referred to Clause 62 of the Public Procurement Regulations issued on 28 October 2016 to substantiate his arguments.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board reminded all those present that the Public Contracts Review Board's role was to ensure that the Evaluation Board did not break the rules of the Tender Document.

Dr Beryl Jean Buttigieg, the Legal Representative for Rockcut Limited said that the NFRP Żebbuġ Project was a huge project despite it being commenced in 2012. The correspondence which there was regarding the European Single Procurement Document which her clients submitted was about the projects which the Evaluation Board was not clear about. Rockcut Limited has replied to all the questions and therefore the clarification should have been accepted as it was the one regarding the Triton Fountain Project.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, remarked that this Board was not going to impose anything but on the other hand, the Evaluation Board had to look into every item into detail in order to avoid frivolous Objections being filed by Bidders.

Dr Beryl Jean Buttigieg, the Legal Representative for Rockcut Limited said that the European Single Procurement Document was issued to make the lives of the Bidders easier. When there were such declarations, the Evaluation Board should check whether these were valid.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board admitted with the latter statement while invited the Appellants not to criticize things which are correct.

Dr Franco Agius, a Legal Representative for the Department of Contracts, felt that what the Appellant's Legal Representative was saying was not fair. The Rectification was sought where there might have been evident mistakes. The Bidder was finally responsible to submit a correct offer and if there was a mistake, the blame lays squarely in his feet. This was also proven by several decision issued by both the Public Contracts Review Board and the Hon Court of Appeal.

At this stage, the Public Hearing was adjourned to Tuesday 26 September 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 Rockcut Ltd (herein after referred to as the Appellant) on 16 August 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference CT 2031/2017 listed as Case No 1083 in the records of the Public Contracts Review Board, awarded by the Department of Contracts (herein after referred to as the Contracting Authority).

Appearing for the Appellant: Dr Beryl Jean Buttigieg

Appearing for the Contracting Authority: Dr Franco Agius

Dr Christopher Mizzi

Whereby, the Appellant contends that:

- a) The “*Letter of Rejection*” sent by the Contracting Authority indicated that the grounds on which Rockcut Limited was disqualified were of a technical nature, whilst in the “*Reasoned Letter of Reply*” dated 11 September 2017, the same Contracting Authority stated that the Appellant’s offer was discarded due to administrative non-compliance;
- b) Although, admittedly, Rock Cut Limited made a genuine mistake, when quoting the projects which were completed for the years 2014 to 2016, as duly dictated in the Tender Document, the appellant maintains that if the omitted project in Żebbuġ, which was valued at € 2.5 million, had to be included, his offer would have qualified administratively. In this regard, the Appellant maintains that had the Evaluation Board referred in great depth to his offer, the Evaluation Board would have been aware that the Żebbuġ Project was inadvertently underestimated. By the inclusion of the correct value, Rockcut Limited’s offer would have been administratively compliant.

This Board also noted the Contracting Authority’s “*Letter of Reply*” dated 11 September 2017 and its verbal submissions during the Public Hearing held on 12 September 2017, in that:

a) With regards to the Appellant's First Contention, the Department of Contracts insist that the "*Letter of Rejection*" always caters the fact that the Award was given to the Bidder who had the cheapest and fully compliant offer. In this regard, the Contracting Authority maintains that the fact that the "*Letter of Rejection*" sent to Rockcut Limited, quoted technical non compliancy, this does not affect the merit of the latter's Objection;

b) With regards to the Appellant's Second Grievance, the Department of Contracts insist that Rockcut Limited was given the opportunity to rectify any mistakes/errors which were included in his first submission. In this regard, the Appellant still failed to reach the required benchmark with regards to projects completed during the years 2014 to 2016.

This same Board also noted the Testimonies of the witness Mr Dolan Debattista, duly summoned by the Department of Contracts.

This Board, after having examined the relative documentation and heard the submissions made by both parties concerned, would like to consider Rockcut Limited's grievances as follows:

1. With regards to the Appellant's First Contention, this Board refers to the "*Letter of Rejection*" dated 11 August 2017 wherein it was stated that:

"Thank You for participating in the above-mentioned Tender Procedure. However, I regret to inform you that the Tender submitted by your Company was found to be technically non compliant".

At this particular stage of the said "*Letter of Rejection*", this Board confirms the fact that the Department of Contracts applied the incorrect terminology, as grounds for rejecting the Appellant's offer. In this regard, this Board, as it had done on numerous occasions, would like to emphasize the importance of stating the correct terminology in rejecting the offer. In this particular case, Rockcut Limited's offer should have been stated as "*Administratively Non Compliant*".

However, this Board also notes the specific reasons, in detail, given by the Department of Contracts, in the said "*Letter of Rejection*" whereby, it is amply explained and indicated the specific reasons why Rockcut Limited's offer was discarded, so that, in actual fact, the

Appellant was made aware as to where and why his offer failed at the first stage of the Evaluation Process, which is the “*Administrative Compliance*” stage. In this regard, this Board opines that the fact that the wrong terminology was applied by the Department of Contracts, in its “*Letter of Rejection*”, the Appellant was fully informed as to the grounds for which his offer was rejected. In this regard, this Board does not uphold Rockcut Limited’s First Contention.

- 2. With regards to the Appellant’s Second Grievance, this Board would like to respectfully refer to the opportunity given to Rockcut Limited to rectify his original bid. Although the Appellant had the remedy available to correct or amend any details, which the latter did not submit with regards to projects completed for the years 2014 to 2016.**

This Board justifiably opines that it is always the duty and responsibility of the Appellant to ensure that, prior to the submission of his offer, all the relative requested information has been checked. Rockcut Limited’s double erroneous submission of the mandatory requirement proves the fact that they had not carried out such exercise.

The Evaluation Board can assess an offer on the information submitted by the Bidder. Although the Appellant was given a second chance to review his offer, his submissions were still below the required benchmark with regards to the experience.

At the same instance, this Board took careful notice of the Testimony of the Witness, summoned by the Department of Contracts, in that apart from the fact that Rockcut Limited had the opportunity to amend his original Bid, the Evaluation Board found incorrect information which in the end, could not achieve the dictated benchmark of past works carried out by the Appellant. This Board justifiably opines that when a Tender Document dictates information of works carried out during a particular period, such works must have been completed.

With regards to the Appellant's allegations that whilst the Evaluation Board delved into the "*Triton Fountain*" project but did not delve into the *Żebbuġ* project, this Board would like to justifiably opine that although the Evaluation Board is encouraged to delve deeply into the offers, the onus of providing the exact and correct information is on the Bidder and not the Evaluation Board.

In its opinion, this Board is comfortably satisfied that the Evaluation Board has carried out its duties in a just and transparent manner. Yet, at the same time, the default by Rockcut Limited in submitting the correct information should not be passed on to the Evaluation board to check and confirm such incorrect information.

In this respect, from the Testimony of the Witness, it was credibly confirmed that the Evaluation Board delved deeply into the Appellant's projects marked as "*Ongoing*" with the prospective possibility of inclusion of the same, to the benefit of the Appellant. However, such projects were found to have started outside the dictated period. In this regard, this Board does not uphold the Appellant's Second Grievance.

In view of the above, this Board

- i) Does not uphold Rockcut Limited's Grievances;**
- ii) Confirms that the Evaluation Board has carried out the Evaluation Process in a just, diligent and transparent manner.**

iii) Due to the fact that the incorrect terminology was applied in the “*Letter of Rejection*” dated 11 August 2017, this Board recommends that an amount of € 6,861 from the deposit filed with this Objection, is to be refunded.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Carmel Esposito
Member

26 September 2017