

PUBLIC CONTRACTS REVIEW BOARD

Case 1125 – CT 2070/2017 – Tender for the Reconstruction of Triq Bormla, Żejtun/Żabbar

The Publication Date of the Call for Tenders was 21 July 2017 whilst the Closing Date for Call of Tenders was 12 September 2017. The Estimated Value of the Tender, (Exclusive of VAT) was € 4,325,403.50.

Three (3) Bidders have submitted Four (4) offers for this Tender.

On 22 December 2017, Rockcut Limited filed an Objection against the decision of Transport Malta to award the Tender to RM Construction Limited for the price of € 3,507,771.39 (Exclusive of VAT) against a deposit of € 21,627.

On 30 January 2018, 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 – Rockcut Limited

Mr Rhys Lee Buttigieg	Representative
Dr Maria Attard	Legal Representative
Dr John Bonello	Legal Representative
Dr Beryl Jean Buttigieg	Legal Representative

Recommended Bidder – RM Construction Limited

Mr Emanuel Bonnici	Representative
Perit Sandra Magro	Representative
Dr Tonio Cachia	Legal Representative

Contracting Authority – Transport Malta

Perit David Vassallo	Chairperson, Evaluation Board
Ms Stephania Hannaford	Secretary, Evaluation Board
Mr Roderick Caruana	Member, Evaluation Board
Mr Lawrence Darmanin	Member, Evaluation Board
Perit Rodney Micallef	Member, Evaluation Board
Mr Horace Balzan	Representative

Department of Contracts

No representative for the Department of Contracts was present for this Public Hearing

In a brief introduction, the Chairman, Dr Anthony Cassar, welcomed the parties and asked Appellant's representative to make their submission.

Dr John Bonello, Legal Representative of Rockcut Limited, started by saying that this Appeal hinges on the issue of the missing Questionnaire Form, and whether the Contracting Authority's system had recorded its receipt.

Dr Anthony Cassar, Chairman of the Public Contracts Review Board enquired if the Questionnaire Form had been submitted, to which Dr Bonello replied in the affirmative and presented a document (Document 1) in the format of a questionnaire which his clients had submitted with the Tender documents.

Perit Vassallo, Chairperson of the Evaluation Board, on behalf of Transport Malta said that there was no indication that the Questionnaire Form was among the documents submitted.

Dr Bonello said that there were legal precedents in cases decide by the PCRB (Cases 1021 and 1118) in which it was established that an Evaluation Board should do its utmost to safeguard a Tender when considering it. In this particular case the technical information requested had been submitted in full. The Contracting Authority were claiming that the Questionnaire had not been received, and therefore, such being the case, it was duty bound to examine the submitted documents to ascertain if the information they were seeking had appeared elsewhere in the Tender documents. He referred to the document he tabled earlier (Doc 1) in which there are a series of questions set by the Contracting Authority and which required a 'yes' or 'no' answer and which fulfilled the same purpose as the Questionnaire.

The Chairman of the Board asked Perit Vassallo to testify under oath, and indicate what difference in details there was between the Questionnaire Form and the document Dr Bonello had tabled.

Perit Vassallo (4678M) testified that he was the Chairperson of the Evaluation Board. The Evaluation Board assesses Tenders on the basis of documents requested. It was not their function to scan every paper submitted to see if information required was covered elsewhere in the documents. In this Case a document essential to the Tender had not been included. The Questionnaire was essential in assessing the Tender as it bound the Tenderer to certain conditions necessary to fulfil the contract.

Dr Bonello said that the role of the Evaluation Board was to make sure that if a Tender could qualify, it should be accepted.

The Chairman of the Board pointed out that the duty of the Evaluation Board was to ensure that the conditions of the Tender were followed. It was also accepted that the Tender specifically did not allow clarification. He said that he wished to hear confirmation from witnesses that the Questionnaire had not been received.

Perit Vassallo, Mr Lawrence Darmanin (488656M), Mr Roderick Caruana (182880M) and Perit Rodney Micallef (119190M) all testified under oath that the Questionnaire had not been received by the Contracting Authority.

To a question from Dr Bonello, as to what action the Evaluation Board had taken when they noticed that the Questionnaire was missing, Perit Micallef replied that no action had been taken as clarification was not allowed under the terms of the Tender.

Dr Bonello said that he wished to take issue with the point that clarification could not be sought. According to Note 3 in the Tender documents no rectification was allowed. This did not mean that the Evaluation Board could not seek clarification. If clarification had been sought, Appellants would have directed the Evaluation Board's attention to the answers supplied in their submitted documents.

Perit Vassallo countered by pointing out that the Questionnaire was an important and essential part of the Tender which the bidder had to submit to confirm ability to attain objectives of the contract.

Mr Ryhs Buttigieg (389087M) testified on oath that the Tender documents submitted by his Company had an appendix that covered all the specifications required by Transport Malta including the technical specifications in the Questionnaire. There was not much sense in duplicating information.

The Chairman of the Board pointed out to Mr Buttigieg that the Tender specifications had to be followed scrupulously.

Dr Bonello queried why the Tender was being disqualified when it had been confirmed that all the information required had been submitted albeit not in the Questionnaire format.

Dr Beryl Jean Buttigieg, Legal Representative of the Appellants mentioned that in a previous case before the PCRB it had been decided that information on another page of the Tender document had been just as valid as if it had been on the proper page.

The Chairman of the Board commented that evidence had been given that the Questionnaire had not been submitted and the Board had enough information to reach a decision in this case.

Dr Tonio Cachia, on behalf of the Recommended Bidder, RM Construction Ltd, intervened to say that in his view in a Tender it was essential to submit all documents. The Questionnaire proved the suitability of the Tenderer to fulfil the contract.

The Chairman thanked the parties concerned for their submissions and declared the hearing closed.

This Board,

Having noted this Objection filed by Rockcut Limited (herein after referred to as the Appellant) on 22 December 2017, refers to the

contentions made by the latter with regards to the award of Tender of Reference CT 2070/2017 listed as Case No 1125 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 Bonello

Dr Beryl Jean Buttigieg

Appearing for the Contracting Authority: Perit David Vassallo

Whereby, the Appellant contends that:

- a) The alleged fact that Transport Malta was not in receipt of the Questionnaire, which formed part of the conditions of the tender dossier. In this regard, Rockcut Limited insist that they have submitted this documentation and that all the information requested in the questionnaire was duly contained in their offer;**

- b) Rockcut Limited also maintains that upon non receipt of the questionnaire, the Authority should have sought clarification as to the missing document.**

This Board also noted the Contracting Authority’s “*Letter of Reply*” dated 3 January 2018 and its verbal submissions during the Public Hearing held on 30 January 2018, in that:

- a) Transport Malta maintain that the questionnaire formed part of the tender dossier and at the same instance, this Document was important for the Contracting Authority to assess the Appellants’ capability and capacity in carrying out the tendered Works.**

In this regard and in the absence of such documentation, the Evaluation Board had no other option but to deem the Appellants’ offer as being technically non-compliant.

- b) Transport Malta also contend that, in accordance with Section 1 Paragraph 7 (c) (i) Note 3, where no rectification was possible and clarifications were only possible on the submitted information. In this regard, the Appellants failed to submit the information as requested in the questionnaire.**

This same Board also noted the testimonies of the witnesses namely:

- 1. Perit David Vassallo summoned by the Chairman of this Board;**

2. Mr Lawrence Darmanin summoned by the Chairman of this Board;
3. Mr Roderick Caruana summoned by the Chairman of this Board;
4. Perit Rodney Micallef summoned by the Chairman of this Board;
5. Mr Rhys Lee Buttigieg summoned by Rockcut Limited.

This Board has also taken note of the documents submitted by Rockcut Limited which consisted of a questionnaire which they claimed to have submitted with this tender.

This Board, after having examined the relevant documentation pertaining to this Appeal and heard submissions made by all parties concerned, including the testimonies of the Witnesses duly summoned, opines that the issues which merit consideration are:

1. *“The Non Receipt of Questionnaire”*;
2. *“The Contents of the Questionnaire”*.

1. **The Non Receipt of Questionnaire**

This Board would respectfully note that, from the documentation and submissions made, it had been clearly established that the

questionnaire formed part of the tender dossier and from the testimonies of the witnesses duly summoned, it was also confirmed that Rockcut Limited's questionnaire was not received by Transport Malta.

With regards to the Appellant's claim in that, through the electronic system, it was indicated that a document was uploaded and this was proof enough that such a document was the questionnaire which was submitted; this Board noted the witnesses' submissions whereby it was credibly established that the document which the Appellants claim was uploaded, in actual fact, represented a copy of the guarantee and not the questionnaire. In this regard, this Board also confirm that from documentation and back-up data which was presented, there was no evidence that the questionnaire was submitted by Appellants.

At the same instance, this Board would emphasize that the principle of self limitation has to be applied and in this respect the Evaluation Board had to abide by all the conditions and requisites as duly dictated in the tender document.

In this particular case, the Evaluation Board was faced with a missing mandatory document, the questionnaire and since the latter was limited to Note 3 to Clause 7 of the Tender Document, which clearly states that:

“Only clarifications on submitted information may be requested,”

The Evaluation Board had no other options but to discard the offer submitted by Rockcut Limited. No clarification could be made on missing documentation as this would have amounted to a rectification of the Appellants’ offer, which is not allowable. In this regard, this Board is credibly convinced that Transport Malta was not in receipt of Rockcut Limited’s replies to the questionnaire which formed part of the tender’s submissions and at the same time, this Board confirms that the Evaluation Board carried out the Evaluation process in a just, fair and transparent manner.

2. The Contents of the Questionnaire

First and foremost, this Board justifiably opines that the questionnaire formed an integral part of the tender document and its relative stated conditions. From the submissions made, it was clearly

established that the purpose of the questionnaire was not simply and solely to confirm or repeat what was declared by the Bidder in his offer, but rather to assess, more in depth, the capacity and capabilities together with the “*modus operandi*” of the execution of the tendered works.

This Board also noted that the information requested in the questionnaire contained details which could not be denoted in the tender dossier and which was important for Transport Malta to confirm the way and method for the successful execution of the works.

The questionnaire contained detailed information as to how the various stages of works will be carried out and the resources to be applied by the successful Bidder and all this information provided the necessary tool for the Evaluation Board to better assess each offer in the correct perspective. At the same instance, this Board would like to also point out that the replies to the questionnaire would enable the Evaluation Board to confirm that what the Bidder has offered was possible through his means and capabilities to carry out the works as he so declared.

This Board would also respectfully refer to the Appellants’ quote of Case 1026 decided by this same Board in a different composition on 7 March 2017, wherein it was stated that:

“Every effort should be made by the Contracting Authority to save a Tender from being disqualified”. In this respect, this Board would like to point out that the above extract from a decision taken by this Board referred to different circumstances and events, in that, primarily the information requested by the Authority was duly submitted and in this particular case, the questionnaire which was a mandatory requisite of the tender was not received by the Authority.

- 3. On a general note, this Board would also point out that the reason given by Transport Malta for the rejection of the Appellants’ offer was very specific and direct when stating that:**

“Bidder did not submit the Technical Questionnaire. In view that the Technical Questionnaire as per Section 1 Paragraph 7 (c) (i) falls under note 3, therefore no rectification shall be allowed.”

In this regard, this Board does not uphold Rockcut Limited's contention that the reasons for the rejections of their offer were not at all clear.

In view of the above, this Board:

- i) Does not uphold Rockcut Limited's contention that the details and information contained in the questionnaire were the same as those which they have submitted in their offer;**
- ii) Opines that, from documentation and testimonies of the Witnesses, it was credibly established that Transport Malta was not in receipt of the Appellants' questionnaire;**
- iii) Justifiably establishes that the notification that a document was uploaded in fact referred to a copy of the guarantee, which was not requested;**
- iv) Confirms that the reasons given by Transport Malta for the rejection of Rockcut Limited's offer were clear enough for the Appellants to be made aware as to why their offer was discarded**

v) **Opines that Transport Malta could have indicated, in the “*Letter of Rejection*”, that Rockcut Limited submitted a copy of the guarantee instead of the questionnaire. In this regard, this Board recommends that an amount of € 5,000 is to be refunded.**

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Carmel Esposito
Member

6 February 2018