

PUBLIC CONTRACTS REVIEW BOARD

Case 1210 – CT 3026/2018 – Trenching and Pipelaying Works for the Second Class Water (New Water) Distribution Network in Mellieha and Mgarr

The publication date of the call for tenders was the 31st March 2018 whilst the closing date of the call for tenders was the 3rd May 2018. The estimated value of the tender (exclusive of VAT) was as follows:

Lot 1 - € 1,232,077

Lot 2 - € 2,288,751

Lot 3 - € 1,630,161

On the 18th August 2018, ABB Joint Venture filed an appeal against the Water Services Corporation as Contracting Authority on the grounds that two Lots were being awarded to the same Bidder contrary to the tender particulars. A deposit of € 6,160 was paid.

There were four (4) bidders.

On 18th September 2018 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellant – ABB Joint Venture

Dr Massimo Vella	Legal Representative
Architect Sandra Borg	Representative
Mr Vincent Borg	Representative

Contracting Authority – Water Services Corporation

Dr Daniela Attard	Legal Representative
Eng. Charles Brincat	Chairperson Evaluation Board
Eng. Anthony Muscat	Secretary Evaluation Board
Eng. Pierre Cassar	Member Evaluation Board
Eng. Joseph Curmi	Member Evaluation Board
Mr Ryden Spiteri	Member Evaluation Board

Dr Anthony Cassar, Chairman of the Public Contracts Review Board, welcomed the parties and stated that it was not acceptable to the Board that no reasoned Letter of Reply had been submitted in this case, although not to hold matters up it would proceed to hear submissions.

Dr Massimo Vella, Legal Representative for ABB Joint Venture (ABB) stated that the tender was split into three lots. The cheapest bidder would take the first lot and it goes on subsequently until all three lots are awarded to different bidders. According to Clause 9.2 Section 1 only one lot was to be awarded to a particular bidder. However, Appellant was informed in writing by the Director of Contracts that Lots 1 and 2 had been awarded to Rockcut Ltd, when Lot 1 should have been awarded to ABB, as by then Rockcut had already been awarded one lot. No formal reply had been received to the objections raised by ABB.

Eng. Anthony Muscat (456162M) testified on oath that he was the Secretary of the Evaluation Board. He stated that Lot 1 had not been awarded to Appellant as the bid price was not reasonable. The Evaluation Committee had decided to follow the procedure outlined in Clause 9.2 Section 3 and award the lot to Rockcut Ltd. After a full evaluation of the technical, administrative and financial submissions ABB offer was 64% higher than the estimated value of the contract, which was not fair or reasonable and hence not acceptable.

In reply to questions from Dr Vella, witness stated that the estimated figure was set on the 19th January 2018 at € 1,232,077, and that Rockcut offer was still higher than the estimate – but only by 1.8%. Witness agreed that there was no distinction between the bidders since both their bids exceeded the estimate, but he related the decision of the award of the tender to the funds committed to that part of the contract.

The Chairman pointed out that a lot of the points arising at this hearing could have been avoided if a letter of reply outlining the reasons for the rejection had been filed. It was the responsibility of the Contracting Authority not the Director of Contracts to do this.

Dr Massimo Vella said that under the circumstances the least that should happen is that the deposit paid by Appellant should be refunded. The action of the Contracting Authority in ignoring ABB's offer was not correct. There were two alternatives available to the Authority – either award Lot 1 to ABB or cancel that particular Lot. The European Commission in its Public Procurement Regulations guidelines for practitioners mentions that details of set budgets should be published for greater transparency – if not, the Contracting Authority must reserve the right not to proceed - which has not happened in this case. The procedure adopted was totally alien to the rules of transparency and the method adopted failed both ABB and Rockcut. There is no option left to the Authority except to cancel.

At this stage, witness (still under oath) agreed that the letter regarding the award of the contract did not give the correct reason for disqualification. If the award of Lot 1 is to be cancelled the Authority would have to reissue the call for tender for Lot 1 as the work was essential. The

General Contract Rules should apply in the case of cancellation if they ran parallel to the tender documents.

The Chairman emphasised that clauses in tenders had to be interpreted according to the PPR - in this case they strictly say that only one lot may be given to any one bidder. That is the only issue to be considered.

Eng. Charles Brincat said that he was the Chairperson of the Evaluation Board. He re-iterated the points made earlier that the Board had followed the stipulations of Clause 9.2 of the tender documents and that ABB's offer was too high.

Dr Vella said that paragraph 18.3 of the General Tender Rules apply only in the case of a total cancellation of a tender. He also pointed out that there was no mention in the tender conditions that disqualification was possible if the budget threshold was exceeded.

Before thanking both parties for their submissions the Chairman again mentioned that no party can go against a tender clause that stipulated that only one bid would be awarded per lot. He then declared the hearing closed.

This Board,

having noted this Objection filed by ABB Joint Venture, (hereinafter referred to as the Appellants), on 18 August 2018, refers to the contentions made by the same Appellants with regards to the award of Tender of Reference CT 3026/2018 (Lots 1 and 2) awarded by the Water Services Corporation, (hereinafter referred to as the Contracting Authority), listed as Case No 1210 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Massimo Vella

Appearing for the Contracting Authority: Dr Daniela Attard

Whereby,

- a) **the Appellants’ main objection refers to the fact that one of the Bidders was awarded two lots, when clause 9.2 of section 1 of the tender document, stipulates that “*only one lot can be awarded to any particular tenderer.*”**

This Board has also considered the Contracting Authority’s verbal submissions during the Public Hearing held on the 18th September 2018, in that:

- a) **The Water Services Corporation insists that it has strictly abided by all the conditions laid out in clause 9.2 of section 1 of the tender document. The Contracting Authority also contends that the Appellants’ offer was discarded simply due to the fact that the quoted price was too expensive and well over the estimated value.**

This same Board has also noted the testimony of the witness, namely Eng. Anthony Muscat, Secretary, Evaluation Committee, who was duly summoned by the Public Contracts Review Board.

This Board after having examined the relevant documentation to this appeal and heard submissions made by the parties concerned, opines that the issue

which should be considered, is the application of clause 9.2, section 1 of the tender document.

1. Clause 9.2 of the tender document states that:

“Only one (1) Lot can be awarded to any particular tenderer. The tenderer whose offer is the cheapest fully compliant offer in more than one lot, will be automatically given the lot with the highest value. The same procedure shall be adopted for the second cheapest and this shall be applied until all available lots have been assigned. In the event that there are less recommended bidders than the available lots, the procedure identified above shall start again with the cheapest technically compliant bids available until all lots have been awarded.”

This clause strictly stipulates the procedural formula which must be applied for the award criteria. It conditions the number of lots which can be awarded to any one bidder and provides remedies in the event that there are less compliant bidders than lots available. The first condition imposed by this clause is that a bidder can only be awarded one lot. In this particular case, this Board notes that this condition was applied during the evaluation process but there arose a situation where there were less compliant bidders than the available lots to be awarded. Again, this clause

provides a remedy for such a situation, in that, the procedure would start again, for the remaining lots, selecting the remaining cheapest technically compliant bid, so that all the lots will be awarded. In this regard, the situation ended up by having Lot 1 still available, after the two compliant Bidders were awarded Lots 2 and 3 respectively, thus both Rockcut Limited and Bonnici Brothers Services Limited were awarded one Lot each. During the second phase of the selection and award process for Lot No 1, the remaining offers ranked as follows:

Rockcut Limited	€ 1,254,808
Bonnici Brothers Services Limited	€ 1,633,611
ABB Joint Venture	€ 2,024,754

It is quite obvious that the cheapest compliant bid was that of Rockcut Limited and in accordance with clause 9.2 of section 1, the Evaluation Committee carried out their evaluation process in a just and transparent manner. At the same instance, this Board notes that the chosen offer for Lot No 1 exceeded the estimated value by € 31,000, which is considered as reasonable, whilst the offer submitted by ABB Joint Venture was correctly

deemed to be well over the estimated value. In this regard, this Board opines that the Evaluation Committee carried out its duties in accordance with clause 9.2 of Section 1 of the tender document, in a just and fair manner.

2. This Board strongly feels that the said clause 9.2 deserves amplification, in that, although the clause itself provides the procedural formulae to establish the award criteria, no details and conditions are stipulated in choosing the remaining available lot/s, in the event that there are less recommended bidders than lots available. In this regard, this Board would expect that the Evaluation Committee should be clearly guided to take into consideration whether the chosen offer, in such circumstances, is within the estimated value and if not; up to what extent such an offer is to be deemed reasonable. At the same instance, a provision in the same clause should also define when such offers for the remaining lots are to be cancelled. Such conditions should be included in the said clause so that prospective bidders are well aware of the award criteria, should the event arises, as happened in this particular case.

With regards to ABB Joint Venture’s contention in that, both their offer and the Recommended Bidder’s offer were above the estimated value so that the tender for Lot 1 should be cancelled, this Board acknowledges the argument presented by the Appellants, however, this Board takes into account the fact that the chosen offer is only slightly more than the estimated value whilst the Appellants’ offer is way above expectations. In this regard, this Board opines that due to the small difference that exists, the chosen offer is considered as a reasonable offer and the principle of proportionality applies in this case.

- 3. This Board would also refer to the lack of submission of a “*Letter of Reply*” from the Corporation and in this regard, this Board regrets such an attitude from same. With regards to the “*Letter of Rejection*”, this Board regretfully notes that the Contracting Authority did not submit the correct reason for disqualification of the Appellants’ offer and, as had on many occasions, this Board expects an immediate response and future corrective action from the Authority’s end to oblige unsuccessful bidders with this mandatory requirement.**

In view of the above, this Board:

- i) does not uphold the contentions made by ABB Joint Venture;**

ii) upholds the decision of the Water Services Corporation in the award of Lot No 1;

iii) instructs the Contracting Authority that, in future, in similar Tenders, will amplify clearly clause 9.2 of section 1 of the tender document to take into consideration the recommendations which this Board is proposing to avoid misinterpretation of the action to be taken by the Evaluation Committee, in the event that there are less recommended bidders than there are Lots available for award. Such procedural instructions should be clearly stipulated and included in Clause 9.2 of Section 1, in future tenders involving lots;

iv) in view of the circumstances instigated by the subjective interpretation of clause 9.2, this Board recommends that the deposit paid by ABB Joint Venture should be fully reimbursed.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

27th September 2018