

# **PUBLIC CONTRACTS REVIEW BOARD**

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## **Case 1234 – WID 30/2015/1 –Tender for the Repair of an existing Slipway and Extension of adjoining Quay at Santa Marija Estate, Mellicha**

The publication date of the call for tenders was the 2<sup>nd</sup> August 2018 whilst the closing date of the call for tenders was 24<sup>th</sup> August 2018. The estimated value of the tender (exclusive of VAT) was € 109,111.80 plus potential costs of € 27,277.95 making an estimated value of € 136,389.75.

On the 18<sup>th</sup> October 2018, LBV Ltd filed an appeal against the Works and Infrastructure Department, Ministry for Transport, Infrastructure and Capital Projects as Contracting Authority objecting to being disqualified on the grounds that their offer was not compliant and the subsequent cancellation of the tender. A deposit of € 682 was paid.

There was one (1) bidder.

On 22<sup>nd</sup> November 2018 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Richard A Matrenza as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

### **Appellants – LBV Ltd**

Dr John Bonello	Legal Representative
Mr Elian Scicluna	Representative

### **Contracting Authority – Ministry for Transport, Infrastructure and Capital Projects**

Dr Mark Sammut	Legal Representative
Arch Nicholas Grech	Chairperson Evaluation Board
Mr Michael Cini	Secretary Evaluation Board
Mr Joseph Caruana	Member Evaluation Board
Mr John Farrugia	Member Evaluation Board
Mr Saviour Sciberras	Member Evaluation Board
Ms Marisa Pace	Representative

Dr Anthony Cassar, Chairman of the Public Contracts Review Board, welcomed the parties and invited submissions.

Dr John Bonello Legal Representative of LBV Ltd said that this Departmental tender was cancelled and the Appellant had only received a cancellation notice. The letter of the 9<sup>th</sup> November which the Contracting Authority claims to have sent was never received; therefore his client was not aware of the reason for the cancellation. He referred to the Public Contracts Review Board Case 733 and a European Court decision which both emphasised that the

Contracting Authority had to give their reasons for cancellation and disqualification. The Contracting Authority had put forward two arguments to justify their decision - the value of the offer which breached the statutory value limit in the case of a departmental tender, and that the bid was technically non-compliant. Dr Bonello stated that there were many cases where departmental tenders have exceeded the value limit and they had been referred to the Director of Contracts for approval.

Architect Nicholas Grech, Chairperson of the Evaluation Committee said that the basis of their evaluation was reasonableness and fairness. Bidders' offer was in the amount of € 185,000 which was 69% over the estimate, and therefore the bid was financially non-viable. After clarification and request for literature there were still technical shortcomings in the bid. The product offered, Microcal, did not include a rust inhibitor and a sulphate resistant ingredient as specified in the tender. From the literature submitted, only one requirement out of three was met; an anti-wash ingredient.

Dr Bonello said that the Authority was fishing for reasons to reject the offer – there was no single valid reason to disqualify his clients. The product he had offered conforms to UNI 9858 and was therefore compliant. He tabled a copy of the product's specification which he claimed was in regular use by other Government departments.

Architect Grech said that the committee could only follow the expert view of a marine architect that the product offered lacked rust inhibition and sulphate resistance ingredients.

The Chairman said that the sticking point appeared to be if the product was technically compliant and there seemed to be opposing views on this. He proposed that the parties had to establish between themselves if the product met the required standard. If the product was technically compliant there was another way of proceeding. He adjourned the hearing till the 30<sup>th</sup> November 2018 to give the parties time to reach a conclusion.

## **Second Hearing**

On 30th November 2018 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Richard A Matrenza as members re-convened a public hearing to discuss the outcome.

The attendance for this public hearing was as follows:

### **Appellants – LBV Ltd**

Dr John Bonello  
Mr Justin Attard

Legal Representative  
Representative

### **Contracting Authority – Ministry for Transport, Infrastructure and Capital Projects**

Arch Nicholas Grech

Chairperson Evaluation Board

Mr Michael Cini  
Mr Joseph Caruana  
Mr Saviour Sciberras

Secretary Evaluation Board  
Member Evaluation Board  
Member Evaluation Board

Dr Anthony Cassar Chairman of the Public Contracts Review Board invited both parties to resume their submissions, mentioning that the only reason for this second hearing was to establish if the original specifications submitted were compliant.

Dr John Bonello, Legal Representative of LBV Ltd said that he had passed on to the Contracting Authority literature on the product Microcal S.

Architect Nicholas Grech, Chairperson of the Evaluation Board, mentioned that the Microcal product, originally submitted with the tender documents satisfies the anti-wash requirement but not the rust inhibitor and sulphate resistant requirements. The bidder had now offered a different material, Microcal S which met the tender specifications but was different to what was submitted with the tender. This still left the bid offer 69% in excess of the estimated value.

The Chairman stated that if new information or documents were submitted at this stage the Board would ignore them.

Dr Bonello said that to avoid any doubts that there was no difference in the properties of the product, between Microcal and Microcal S he was tabling a letter from the manufacturer confirming that the product was one and the same.

Architect Janice Borg (150683M) called as a witness by the Contracting Authority testified under oath that she had prepared the technical specifications of the tender and had acted as a consultant during the evaluation process. Microcal does not meet the tender requirements with regards to the rust inhibitor and sulphate resistant ingredients. The literature now submitted (Microcal S) is a different product and meets the requirements of the Contracting Authority. The manufacturers claim on their website that the product is the same as previously described – it merely is the case that in October 2018 it was rebranded as Microcal S for export orders. Witness, however, reasserted that Microcal did not meet the specifications whilst Microcal S does – it was therefore not the same product. The second lot of literature had far more information than the first lot did – this second lot made the product technically compliant.

Mr Joseph Grech (332057M) called as a witness by the Contracting Authority testified on oath that he was a Director of the Survey Unit at the Ministry. The estimate value of the tender was based on current rates plus a percentage loading for inflation, and he was of the view that the prices and rates quoted by this bidder were on the high side, and the offer was generally showing inflated figures. Whilst witness conceded that by definition an estimate cannot be perfectly accurate there were big discrepancies in certain rates (as an example he quoted an instance where a product on the market at € 1 per kilo had been quoted at € 3 per kilo).

Dr Bonello reminded the Board that according to Legal Notice 26 of the 23<sup>rd</sup> January 2018 the value limit was raised to € 250,000 for a Ministry tender and therefore his clients' offer was within the limit, and his bid was not excessive within the Public Procurement Regulations. The disagreement was in regard to the product and the points in query had now been clarified and confirmed by the manufacturer.

Mr Grech said that the evaluation committee was right and correct at the time of the evaluation and the product offered was not up to the required specifications.

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

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**This Board,**

**having noted this Objection filed by LBV Limited, (hereinafter also referred to as the Appellants) on 18 October 2018, refers to the contentions made by the same with regard to the cancellation of Tender of Reference WID 30/2015/1 listed as Case No 1234 in the records of the Public Contracts Review Board and issued by the Ministry for Transport, Infrastructure and Capital Projects.**

**Appearing for the Appellants:**

**Dr John Bonello**

**Appearing for the Contracting Authority:**

**Dr Mark Sammut**

**Whereby, the Appellants contend that:**

- a) they were not informed of the reasons for the discarding of their offer and in this regard, the Contracting Authority failed to abide by the Public Procurement Regulations;
- b) with regards to the alleged reason that their offer exceeded the estimated value, there were many cases where departmental tenders exceeded the estimate value yet they were referred to the Director of Contracts for approval, hence avoiding cancellation of the Tender, since their offer was technically compliant.

This Board has also noted the Contracting Authority's "*Reasoned Letter of Reply*" dated 23 October 2018 and its verbal submissions during the Public Hearings which were held on 22 November 2018 and 30 November 2018, in that:

- a) the Ministry for Transport, Infrastructure and Capital Projects insist that the Appellants' product does not meet the tender requirements with regards to the "*rust inhibitor and sulphate resistant ingredients*"
- b) the Appellants' quoted price exceeded the estimated value by 69 % and the Evaluation Committee noted that the offer was generally showing inflated figures.

**This same Board has also noted the testimony of the witnesses summoned by the Ministry for Transport, Infrastructure and Capital Projects namely:**

- 1. Architect Janice Borg**
- 2. Mr Joseph Grech**

**This Board has also taken note of the documents submitted by LBV Limited which consisted of a letter from the manufacturer confirming that the product is the same as originally submitted in the Appellants' offer.**

**This Board, after having examined the relevant documentation to this Appeal and heard submissions made by the parties concerned, including the testimony of the witnesses duly summoned, opines that the issues that deserve due consideration are as follows:**

- 1. The reasons why LBV Limited's offer was rejected;**
- 2. The technical compliance of the offer submitted by LBV Limited;**
- 3. The excessive financial consideration**

**1. The reasons why LBV Limited's offer was rejected**

**This Board, acknowledges the fact, that, the Appellants were not served with justifiable reasons as to why their offer was rejected and in this respect, this Board, as it had on many occasions, would remind the Contracting Authority that apart from being a duty, it is an obligation on the part of the latter to submit clear and detailed reasons for the rejection of an offer. It is to be appreciated that Bidders can only object on the issues raised by the Contracting Authority, for the rejection of their offer, so that detailed knowledge of the rejection must be made available to prospective appellants. In this respect, this Board notes that LBV Limited's objection was directed towards the actual cancellation of the Tender and not the specific reasons for the rejection of their offer.**

**This Board also note that the "*Letter of Rejection*" dated 9 October 2018 was not attached with the cancellation notice, so that the contents contained therein could not be properly contested. In this regard, this Board confirms that the Appellants' were not aware of the reasons for the rejection of their offer.**

## **2. The technical compliance of the offer submitted by LBV Limited**

**With regards to the technical compliance of the Appellants' offer, this Board notes that the original literature submitted by the former, lacked details relating to rust inhibitor and sulphate resistant mixture and the Evaluation Committee, quite appropriately, requested clarifications with regards to the details of these two ingredients, so that, at this particular stage, the Appellants had the opportunity to rectify what was missing in their original submission. Since no response to this clarification request was made by the Appellants and no justification for such a lack of action, on the part of the latter, was presented, the details contained in their original submission were to be taken into consideration for the evaluation process.**

**Through the credible testimony of Architect Janice Borg, this Board was made aware that the Appellants' original submission was not technically compliant with regards to "*rust inhibitor*" and "*sulphate resistant*" ingredients, and since no reply was forthcoming from the Appellants, the Evaluation Committee had no other option but to deem the latter's offer as being technically non-compliant.**

**At the same instance, this Board would re-assert the fact that whenever literature is so requested in a Tender Document, such literature will not serve as a pictorial guideline but rather a confirmation that what the Bidder has offered to supply can be delivered and at the same time, conforms with the technical specifications as stipulated in the Tender Dossier and the declared technical offer of the Bidder. In this regard, through the credible submissions made during the Public Hearings, this Board is justifiably convinced that LBV Limited, in their original submission, submitted literature which lacked details relating to “rust inhibitor” and “sulphate resistant” ingredients and at the same instance, the Appellants’ failed to reply to the clarification request which provided the same the opportunity to remedy any lacking details in their original offer.**

**This Board is also aware of the fact that subsequently, the Appellants submitted literature of a product called “Microcal S”, the latter being compliant. However, credible testimony proved that such product is different from that indicated in the Appellants’ original offer. At the same instance, this Board was not presented with justifiable evidence as to why the Appellants did not reply to the clarification request made by the Ministry. In this regard, this Board upholds the latter’s decision to deem LBV Limited’s offer as being technically non-compliant.**

### 3. The excessive financial consideration

With regards to the financial aspect of this case and the Appellants' relevant contentions, this Board would respectfully refer to the indicated Article 9.1 (c) of the Public Procurement Regulations, which states:

*“that have been published by the Ministerial Procurement Unit in the name of the Contracting Authority listed under Schedule 16, where the estimated values of such procurement exceeds ten thousand euro (€ 10,000) but does not exceed two hundred and fifty thousand euro (€ 250,000) have to be published, administered and determined by the Ministerial Procurement Unit on its own without the need to involve the Director”*

The above clause so indicated by the Appellants refers to the Ministerial Procurement Unit and this Board opines that this particular procurement is a normal departmental Tender issued by and in the name of the same Authority which falls under a departmental Tender, so that such regulation cannot be applied in this particular circumstance.

**At the same instance, this Board would point out that the financial issue of this particular case, is not relevant due to the simple fact that once the Appellants' offer was found to be technically non-compliant, the Evaluation Process stops at that stage, so that, there is no financial consideration to be processed. In this regard, this Board does not uphold the Appellants' contention.**

- 4. On a general note, this Board would stress the importance, which must be given by the prospective Bidder, in submitting the requested information, in the first place. At the same time, it is the Appellants' onus and responsibility to reply to the clarification requests, the latter of which provide a remedy for any clarification which needs to be applied to the latter's offer and in this regard, this Board notes that such a remedy was not availed of by the Appellants.**

**In view of the above, this Board,**

- i) does not uphold the contentions made by LBV Limited;**
- ii) upholds the Ministry for Transport, Infrastructure and Capital Projects' decision to cancel the Tender;**

**iii) recommends that the deposit paid by the Appellants should be refunded.**

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Richard A Matrenza  
Member

*18<sup>th</sup> December 2018*