

Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties and prior to inviting those to make their submissions commented that certain language used in correspondence was unnecessary and should be toned down.

Dr Beryl Buttigieg, Legal Representative of Rock Cut Ltd after detailing the tender process said that the Contracting Authority requested clarification on one point of her clients' offer. She then tabled documents from the tender dossier showing Bill of Quantity (BOQ) and Programme of Works (POW). She pointed out that both these documents indicate clearly an item headed Excavations (Item 3). Clarification was sought on the shotcreting works. This was one item (3.05g) out of many under the heading Excavation – it was in fact a sub-item of a sub-item of a main item. The clarification was replied to by adding one line regarding shotcreting to the POW without in any way altering the dates indicated for the excavation works. There was no change to the POW – only thing her clients did was to split the 19 weeks of excavation works into two parts – one of which was shotcreting. The Contracting Authority claim that this was not a clarification but a rectification in the POW – in reality nothing changed in the POW - her client merely clarified what was already there.

Mr Noel Azzopardi (67777M) called as a witness by the Contracting Authority testified on oath that he was the Chief Technical Officer at Malta Industrial Parks and was a member of the evaluation committee. When the committee checked the principal items in the POW the Gantt chart showed only an item under Excavations. Shotcreting was an important part of these works, and it was necessary for it to be carried out at intervals of three metres to make the work safe – therefore it was an integral part of the contract. Despite this there was no mention of shotcreting in the POW and therefore doubts arose as to whether this work had been excluded.

At this stage the Chairman pointed out that the letter of rejection did not state that – it merely stated that the Bidder was requested to indicate where the shotcreting works were included in his POW.

Mr Azzopardi confirmed that the Authority requested an indication where the shotcreting was included in the original submission. Appellants' reply was an updated Gantt chart showing changes in the POW. A new Item 6 showing the shotcreting works was not previously shown. He confirmed, in reply to a question, that shotcreting was shown under item 3.05 (g) & (h) in the original BOQ. Witness continued by stating that under Note 3 they could not accept the revised POW.

Questioned by Dr Buttigieg witness stated that shotcreting formed an important item hence the only reason why they sought clarification only on this point and not on others. The clarification sent was an update that altered the POW; the technical offer fell under Note 3 and therefore rectification was not possible.

Dr John Refalo Legal Representative for Schembri Infrastructures Ltd said that the tender requested a detailed POW. It was not clear from Appellants' submissions if shotcreting was part

of the excavation works. There was no need for the evaluation committee to ask for clarification as no detailed plan was presented by Rock Cut Ltd.

Mr Keith Buttigieg (8879M) called as a witness by the Board testified on oath that he was a member of the evaluation committee. When questioned he confirmed that the Appellants' offer did not indicate shotcreting in the POW. He agreed that shotcreting was considered as part of the excavation works.

Dr Buttigieg said that the Contracting Authority had meant shotcreting to be part of the excavation works. It was obvious that this was meant to be so since they had included this item as a sub-item of a sub-item of a main item in the BOQ. Mr Azzopardi, in his testimony could not even state what form the clarification should take, and what the committee expected. The clarification as submitted did not alter any dates or add anything to the original offer and was not an up-dated POW – it simply answered a clarification. The question posed by the Authority was 'where in the POW was shotcreting included?' A clarification in the POW did not alter it - it provided a visual clarification image, in the absence of any indication of how the clarification was wanted.

Dr Franco Agius, Legal Representative of the Department of Contracts said that the tender required the economic operator to submit a detailed POW. The Applicants' submission was short in details in the POW. Shotcreting was an important element of the contract and Malta Industrial Parks wanted the comfort that it was included. Rock Cut had sent in a new programme as a clarification – this was rectification not clarification as it provided new details. To confirm this point he referred to EJC Cases 523/16 and 536/16.

Dr Buttigieg made the point that it was just the form of reply to a clarification that is in query by the Authority. It is illogical to claim that a one line reply by the Appellant would have been felt sufficient by the Authority...

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

This Board,

having noted this Objection filed by Rock Cut Limited, (hereinafter also referred to as the Appellants) on 12 November 2018 referring to the contentions made by the latter with regards to the award of Tender of

Reference CT 2245/2018 listed as Case No 1248 in the records of the Public Contracts Review Board awarded by the Malta Industrial Parks, (hereinafter also referred to as the Contracting Authority)

Appearing for the Appellants: Dr Beryl Jean Buttigieg

Appearing for the Contracting Authority: Dr John Bonello

Appearing for the Department of Contracts: Dr Franco Agius

Whereby the Appellants contend that:

- a) **their reply to the clarification regarding shotcreting did not alter their original offer. In this regard, the Appellants insist that by adding an explanation of shotcreting in the programme of works, the latter did not alter the dates or works in the excavation works but simply clarified what was already contained in their offer.**

This Board has also noted the Contracting Authority's "*Reasoned Letter of Reply*" dated 19 November 2018 and also its verbal submissions during the Public Hearing held on 8 January 2019, in that:

- a) **Malta Industrial Parks contend that the Appellants' reply to the clarification request included a new item namely "*shotcreting*" which was not included in the programme of works in the Appellants' original**

offer. In this regard, the Evaluation Committee, quite correctly, deemed such a reply to be a rectification of their offer and in this respect, this is not allowed, hence the Evaluation Board had no other option but to deem the Appellants' offer as technically non-compliant.

This same Board has also noted the testimony of the witness namely, Mr Noel Azzopardi, member of the Evaluation Committee who was duly summoned by Malta Industrial Parks.

This Board has also taken note of the documents presented by Rock Cut Limited which consisted of:

- 1. Bill of Quantities;**
- 2. Programme of Works**

This Board, after having examined the relevant documentation to this Appeal and heard submissions made by the parties concerned, including the testimony of the witness duly summoned by Malta Industrial Parks, opines that the issue that deserves due consideration is Rock Cut Limited's reply to the clarification request regarding "*shotcreting*"

- 1. This Board would respectfully refer to the "*Bill of Quantities*" stipulated, in the Tender Dossier, with particular reference to item 3.05 (g) which requested a rate for "*supply and apply Grade C 25/30***

shotcrete by a 100mm minimum thickness to the excavated walls.” In this regard, this Board notes that in their offer, the Appellants failed to quote a rate for this particular item in the Bills of Quantities, and therefore, the Evaluation Committee, quite appropriately, requested a clarification to establish where, in the Appellants’ offer, shotcrete is included or indicated, as follows:

“Technical

i) Programme of Works: Bidder is to indicate where in your programme of works are the shotcreting works included as requested in article 7 (c) (i) (b) of the Instructions to Tenderers and Technical Offer Form – Programme of Works (b).”

Rock Cut Limited’s reply to the above request was submitted in the form of a Gantt Chart, however showing an additional item, (shotcreting) and which was not included in the Appellants’ original submission where the programme of works consisted of the following stages:

- 1. Commencement Date**
- 2. Works**
- 3. Mobilisation**
- 4. Installation of Protection Measures if Required**
- 5. Excavation Works**
- 6. Reinstatement Works**
- 7. Commissioning**
- 8. Demobilisation**
- 9. Completion Date**
- 10. Handover**

In their reply, the Appellants submitted a revised Gantt Chart, showing the inclusion of shotcreting as follows:

- 1. Commencement Date**
- 2. Works**
- 3. Mobilisation**
- 4. Installation of Protection Measures if Required**
- 5. Excavation Works**

6. Shotcreting Works (At 3m Excavation Depth Intervals) [this Board's underlining]
7. Reinstatement Works
8. Commissioning
9. Demobilisation
10. Completion Date
11. Handover

It is obvious that the reply to the clarification request included an additional item of shotcreting in the programme of works which was not included in the original submitted documentations, as vividly confirmed by the technical witness, in his submissions, as follows:

“Xhud: Wara din l-ittra ahna rċevejna programme of works updated fejn tidher ċara illi ddaħħal item number 6, shotcreting works at 3 metres excavation depth intervals. Jiġifieri dan tniżżlet item oħra, m’ghadhiex indikat. The original submission excavation works biss kien hemm imniżżel. In the updated għandna kemm l-excavation works kif ukoll miżjuda l-item tax-shotcreting works.”

This Board was also made aware of the importance of shotcreting which was requested in the Bills of Quantities under item 6 and which Rock Cut Limited had failed to indicate in their submission. In this regard, an extract from the testimony of the technical witness highlights the importance of this technical requirement as follows:

“Xhud: Is-shotcreting bhala xoghlijiet, fix-xoghol li niltaqa’ mieghu kuljum u speċjalment f’dan ix-xoghol fejn ahna ser ninzlu 3 sulari, huwa item importanti. Huwa item li ahna dehrilna li ghandu jkun imniżżel fil-fatt kif qieghed imniżżel fil-BOQ u n-natura tax-xoghol, ma tistax inti teskava iktar minn 3 metri minghajr ma ddahhal il-kelma shotcreting bhala xoghol imkien.”

Furthermore, this Board also noted the importance of the application of the shotcreting, thus justifying the inclusion of such an important item in the excavation process and in this respect, this Board refers to an extract from the testimony of the witness as follows:

“Xhud: Id-domanda ghandha risposta semplici. L-items l-oħra huma parti mix-xogħol li ghandu jsir. Id-differenza hi li jekk inti ma ddahħalx ix-shotcreting f’dan ix-xogħol, fir-realta’ 3 metri biss tista’ taħdem u ma tistax tkomplih il-kuntratt. Ghax dan qed tipperikola, apparti l-hajja tal-haddiema li hemm, ix-shotcreting ma jistax isir f’daqqa. Ma tistax teskava.”

In this regard, this Board is justifiably convinced that the inclusion of shotcreting under excavation works represent an important section of the tendered works. At the same instance, this Board also confirms that “shotcreting” was not included in the programme of works and the Bills of Quantities of Rock Cut Limited’s original submissions and that shotcreting item was indicated as an additional item to the Appellants’ original submission. In this regard, this Board does not uphold Rock Cut Limited’s contention.

- 2. On a general note, this Board would point out that the Bills of Quantities in the Tender Document denoted clearly that shotcreting was**

a separate item under excavation works and in this respect, the Appellants failed to indicate the shotcreting element in the original Programme of Works.

One must acknowledge the fact that the Evaluation Committee has to abide by the principle of self-limitation in that, the latter must assess and evaluate each offer in accordance with the requirements of the Tender Conditions so that the principles of equal treatment and level playing field for all offers, are maintained throughout.

On the other side of the coin, the Bidder must not take the opportunity to add or amend any items so declared in his original submission, through a reply to a clarification request as this would be tantamount to a rectification.

At the same instance, if in doubt on any particular item of the technical specifications, Rock Cut Limited had the necessary remedies to clarify any issues which, in their opinion were not clear, however, this Board also notes that such available remedies were not availed of by the Appellants.

In view of the above, this Board,

i) upholds Malta Industrial Parks' decision in the award of the contract;

ii) does not uphold the contentions made by Rock Cut Limited;

iii) directs that the deposit paid by the Appellants should not be refunded

Dr Anthony Cassar
Chairman

Mr Carmel Esposito
Member

Mr Lawrence Ancilleri
Member

22nd January 2019