

PUBLIC CONTRACTS REVIEW BOARD

Case 1259 – IM 003/2018 – Tender for the Design and Construction of a Footbridge, Access Ramps, Pedestrian Lifts and Pavement at Vjal l-Avjazzjoni, Luqa

The publication date of the call for tenders was the 25th September 2018 whilst the closing date of the call for tenders was 30th October 2018. The estimated value of the tender (exclusive of VAT) was € 1.950,000

On the 7th January 2019 E & L Enterprises Ltd filed an appeal against Infrastructure Malta as the Contracting Authority objecting to being disqualified on the grounds that their offer was not administratively and technically compliant. A deposit of € 9,750 was paid.

There were four (4) bidders and six (6) bids.

On 29th January 2019 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Carmel Esposito and Mr Lawrence Ancilleri as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – E & L Enterprises Ltd

Dr Antoine Cremona	Legal Representative
Dr Clement Mifsud Bonnici	Legal Representative
Mr Joseph Camilleri	Representative
Mr Karm Farrugia	Representative
Mr Edward Camilleri	Representative

Recommended Bidder – BS JV

Dr John Refalo	Legal Representative
Mr Johann Farrugia	Representative

Contracting Authority – Infrastructure Malta

Dr Stefano Filletti	Legal Representative
Dr Anthea Galea	Legal Representative
Dr Rachel Powell	Legal Representative
Dr David Debono	Legal Representative
Eng Robert Schembri	Chairperson Evaluation Committee
Arch Kylie-Ann Borg Marks	Member Evaluation Committee
Arch Anton Zammit	Member Evaluation Committee
Mr Henry Attard	Representative

Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties and stated that the Board was not prepared to discuss both the administrative and technical non-compliance grounds at the same hearing, as this would go against the Public Procurement Regulations (PPR). Those Regulations state that the evaluation committee when assessing should stop immediately they came up against a submission that is not compliant. In this instance the Board in line with the PPR will only deal with the administrative non-compliance appeal and give its decision thereon.

Dr Stefano Filletti Legal Representative of Infrastructure Malta said that his clients were following the directives of the Director of Contracts in considering submissions past the first disqualification stage.

Dr Antoine Cremona Legal Representative of E & L Enterprises Ltd stated that if at this stage the Board considered only the administrative non-compliance aspect of this Case there will have to be another hearing to deal with the technical points.

The Chairman invited the Chairperson of the evaluation board to hear his views on this point.

Engineer Robert Schembri (222960M) called as a witness by the Board testified on oath that he was the Chairperson of the evaluation committee. He confirmed that the evaluation continued beyond the stage where the tender was found to be administratively non compliant. The Director of Contracts had given directions to proceed beyond that stage to enable the committee to give feedback to failed bidders.

Dr Antoine Cremona said that his clients' tender offer was the cheapest of four and had followed the correct procedure. Each bidder had been disqualified until the 4th bid which was some € 1.05 million higher than his clients' offer. The first reason for non-compliance, according to the Contracting Authority was that the ESPD quoted two projects that were not carried out within the required period between 2015 and 2017. There followed a request for rectification under Note 2a which requested bidder to supply information on two projects between 2015 and 2017 the minimum value of which was to be € 500,000 of which € 200,000 had to refer to steelworks. At this stage there was a change of parameters by the Authority, and thus outside the terms of the tender documents, as the minimum number of projects from 'two' became 'the two' (vide letter of 8th November from Contracting Authority). The Authority asked which two projects were completed between 2015 and 2017, and then queried in which years these projects were carried out, which rather answered the question which they themselves had asked. The Authority maintained that one project had been completed in 2018 – but this statement was not correct as the steelworks were completed in 2017. This was a design and build contract which was completed in stages over a period of time.

The second reason for disqualification was that the wrong date was given on the ESPD, and the Authority was obliged to use its discretion and the principle of proportionality and seek clarification. There were several ECJ cases supporting this process.

Dr Stefano Filletti said that one has to follow the cardinal principle that one has to abide by the rule of law. The requisite in the tender (Page 7 c 2) asked for projects completed in 2015 to 2017, but Appellant had presented works done between 2016 to 2108 leading to the need for a

clarification. There were two contracts between those years that met the specifications – the SR Technics Hanger and Arcadia (Valletta Market). SR Technics was started and finished in 2018 and was outside the requisite dates – the evaluation committee’s rules applied to all bidders and must be adhered to – these were not cosmetic but substantial and had to be followed.

The second question was regarding the Part VI declaration by the subcontractor. A rectification was asked and asked again and again submitted incorrectly. Apart from the fact that there was a limit to how many rectifications the Authority could ask for, ECJ Cases C278/14 and C599/10 both made reference to the risk of the Contracting Authority appearing to be negotiating with the bidder to ensure compliance.

Dr Cremona sought permission to call two witnesses.

Mr Edward Camilleri (507395M) called as a witness by Appellants testified on oath that he was the Commercial Manager of E & L Enterprises Ltd and was responsible for the tender submission. Referring to Page 22 of the tender documents he confirmed that the list of projects as shown in the ESPD had been completed between 2015 and 2017. (He tabled an additional list of completed steelworks projects). Witness stated that if the SR Technics Hanger project was disregarded there were still enough completed steelworks contracts to fulfil the tender requirements.

Dr Filletti drew the witness’ attention to a press release dated 6th August 2018 stating that the Prime Minister had signed a contract to facilitate the building of a hanger for SR Technics. Malta Industrial Parks has mentioned that work on this would start in 2019. Witness said that the hanger referred to by Dr Filletti is a totally separate project from the one referred to in the tender and in which there had been no Government involvement.

Mr Joseph Camilleri (237173M) called as a witness by Appellant testified on oath that he was the Managing Director of E & L Enterprises and that the hanger referred to in the tender was the property of his firm and was leased on short term (till December 2019) to SR Technics. The steelworks listed in the ESPD had been completed in 2017 and the reference to the hanger mentioned in the press release does not exist yet.

Engineer Robert Schembri resuming his testimony said that the first list submitted in the ESPD listed all projects as completed in 2018 (copy of Page 22 of the tender tabled) – clarification was sought and a fresh list submitted with dates from 2016 to 2018. Clarification was sought and Appellant replied by letter dated 9th November mentioning two projects fitting the tender criteria. The evaluation committee researched the answers on the SR Technics website and spoke to Malta Industrial Parks who confirmed that the work had started and finished in 2018. According to the witness the tender did not specify completion of only the steelworks but of the entire contract.

(Two e-mails dated 9th and 10th January 2019 were tabled by the Authority but the Chairman ruled that they should be disregarded as they were not relevant date wise).

Continuing his testimony witness stated that the subcontractors’ declaration had not been signed and the name wrongly shown as the Contracting Authority – this had been regularised after rectification.

Questioned by Dr Cremona, witness agreed that the wording used in rectification number 1 (letter of 8th November 2018) did not agree with the wording in the tender document. When asked why he had asked for ‘the two projects’ rather than any two jobs witness said that he was not certain of the dates when the works were carried out.

Dr Cremona said that from the evidence of the Chairperson of the evaluation committee it was clear that they had pushed Appellants into a dead end and then realised they had misled them. The SR Technics steel structure was all completed by 2017, and if for some reason that had not qualified within the terms of the tender there were another 17 projects to choose from. Why were the parameters changed and only two projects selected? And why restrict it to the two main ones? It appeared that the evaluation committee, having disqualified Appellants, were still in doubt of their actions as they were asking questions of SR Technics.

Dr Clement Mifsud Bonnici Legal Representative of E & L Enterprises Ltd referred to the declaration signed in the wrong date, and said that the PPR were flexible in the principles of fairness and transparency and gave possibilities to the Contracting Authority to seek more than one clarification especially in a case where there was the possibility of saving some € 1 million. The EJC had referred in several cases to the need to use clarifications and rectifications before disqualifying an offer, especially in paragraphs 37 and 39 of the China Taiping Case (C 523/16).

Dr Filletti said that it was clear that the SR Technics hanger had been finished in 2018 – this was the first submission in the tender and Appellants had disqualified themselves by choosing the wrong dates. The evaluation committee had requested a clarification and Appellants had corrected themselves by choosing the years 2016 to 2018 – committing a mistake on top of a mistake with both submissions showing different dates to those requested in the tender. The EJC in Case C278/14 and C 599/10 had emphasised the need to stick to the tender criteria and not modify the requisites. If the evaluation committee had accepted the Appellants submissions they would have been at fault and liable to be investigated.

There was no doubt that there was a mistake in the ESPD document submitted because it showed a different body and the Contracting Authority had to keep seeking rectification after rectification – the latter had to make sure that they were not seen to be favouring one party. It was the bidders’ responsibility to make themselves compliant and up to the evaluation committee to correct it if it was not. The evaluation committee was correct and just in their decisions

Dr Refalo Legal Representative of BS JV had two comments to make and those were whether the evaluation committee was right in its considerations and how many clarifications should be allowed. Here one is not talking about one isolated mistake but several mistakes twice over. The price was completely irrelevant to the award of the tender.

In a closing remark Dr Cremona said that one would be creating a dangerous precedent if following the premise of the opposing party, tenderers could be asked only once to rectify under Note 2.

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

This Board,

having noted this Objection filed by E & L Enterprises Limited, (hereinafter also referred to as the Appellants) on 7 January 2019, refers to the contentions made by the same Appellants with regards to the Tender of Reference IM 003/2018 listed as Case No 1259 in the records of the Public Contracts Review Board, awarded by Infrastructure Malta, (hereinafter also referred to as the Contracting Authority).

Appearing for the Appellants:

Dr Antoine Cremona

Dr Clement Mifsud Bonnici

Appearing for the Contracting Authority:

Dr Stefano Filletti

Whereby, the Appellants contend that:

- a) their first contention refers to the Contracting Authority's alleged claim that, their offer was administratively non-compliant, due to the fact that they quoted two projects which were not carried out within the stipulated period (2015-2017). In this regard, Appellants insist that they had submitted the information through a reply to the Contracting Authority's clarification request on 9 November 2018;**

- b) with regard to the incorrect date submitted in the European Single Procurement Document relating to the period as to when they had**

carried out the projects, the Contracting Authority should have sought further clarifications and applied the principle of proportionality.

This Board has also noted the Contracting Authority's "*Reasoned Letter of Reply*" dated 14 January 2019 and its verbal submissions during the Public Hearing held on 29 January 2019, in that:

- a) Infrastructure Malta contends that the Appellants' reply to the rectification request, confirmed that the stipulated projects which had to be effected from 2015 to 2017, were in fact so declared to have been executed between 2016 and 2018;
- b) With regards to the Appellants' second contention, the Contracting Authority maintains that after the receipt of E & L Enterprises Limited's reply to the rectification request, Infrastructure Malta deemed that further clarifications would have given an undue advantage to the Appellants, hence breaching the principle of equal treatment.

This Board has also noted the testimony of the witnesses namely,

1. Engineer Robert Schembri, who was duly summoned by the Public Contracts Review Board;

**2. Mr Edward Camilleri, who was duly summoned by
E & L Enterprises Limited;**

**3. Mr Joseph Camilleri, who was duly summoned by
E & L Enterprises Limited**

Before entering into the merits of this case, this Board would respectfully point out that, this Appeal involves an offer which was adjudicated as administratively non-compliant and thereafter, the Evaluation Committee assessed the same offer on technical merits. In this regard, this Board would point out that, it will not treat both issues, simply due to the fact that, once the offer was found to be administratively non-compliant, the same Evaluation Committee should not have advanced the Evaluation process to the technical assessment of the same Bid and therefore the Evaluation process should have stopped at the administrative stage. In this regard, this Board will consider the merits of this case relating to the administrative compliance and further consideration on the technical merits will hinge upon the outcome of this hearing.

This Board, after having examined the relevant documentation to this Appeal and heard submissions made by the interested parties, including the testimony of the witnesses duly summoned, opines that the issues which deserve consideration are twofold namely,

- a) **The submissions made by E & L Enterprises Limited;**
- b) **The Appellants' claim for further clarification**

1. The submissions made by E & L Enterprises Limited

1.1 First and foremost, this Board would emphasize that the European Single Procurement Document was implemented mainly to ease the burden on the economic operator in submitting his offer and allow small and medium size operators to participate, yet, at the same instance, one must be reminded that the same document represents the core of the Tender Document and the details contained, in such a document, must conform with the technical specifications and conditions stipulated in the Tender Documents.

1.2 In this particular case, the Tender Document requested the following:

“(c) Technical and professional Ability (Note 2A)

List of principal works (as per ESPD Question reference 4C.1 and 4C.1.1) of a similar nature being infrastructure works & steel works to substantiate the below. (Steel works to consists of any project worth over Euro 200,000)

1. *State the value of works of a similar nature, (being infrastructure works & steel works) as described above effected during the last 3 years (being 2015-2017), the minimum value of which must not be less than € 500,000 in total for the quoted period.*

2. *State the number of works of a similar nature as described above effected during the last 3 years, (being 2015-2017): the minimum number of which must not be less than 2 for the quoted period.”*

It is amply clear that Infrastructure Malta wanted to establish the experience which the economic operator has in steel works of a certain magnitude and which each Bidder had carried out, so that, the Contracting Authority set a benchmark of a minimum of € 200,000 worth of steelworks in each particular project carried out between 2015 and 2017.

- 1.3 At this stage of consideration, this Board also notes the European Single Procurement Document submitted by E & L Enterprises Limited, with particular reference to Section 4C, as follows:**

<i>Question Reference</i>	<i>Technical and Professional Ability</i>	<i>Answer</i>
<i>4C. 1</i>	<i>1a) For public works contracts only, please provide relevant examples of works carried out as specified in the procurement documents</i>	<i>Please provide your answer in the table below:</i>

<i>Description</i>	<i>Amounts</i>	<i>Dates</i>	<i>Customer/Client</i>
<i>Gold Construction Ltd</i>	<i>€ 247,059.11</i>	<i>All during 2018</i>	<i>G025 – Gold Lion Construction Ltd.</i>
<i>Works at Blata l-Bajda Museum</i>	<i>€ 58,128.55</i>		<i>S058 – SDC Museum</i>
<i>Perimeter Railing Jacuzzi</i>	<i>€ 20,146.00</i>		<i>M073 – Tanti Interiors</i>
<i>Arcadia Complex Valletta</i>	<i>€ 1,229,761.40</i>		<i>AX Construction</i>
<i>Hangar Structure</i>	<i>€ 620,923.79</i>		<i>SR Techniks</i>
<i>Ta’Kandja Steel Canopies</i>	<i>€ 113,483.00</i>		<i>B 011 – Bonnici Bros Limited</i>
<i>KPMG Office Block</i>	<i>€ 419,329.15</i>		<i>AX Construction</i>
<i>Works on Railing at Radisson Blue</i>	<i>€ 160,817.00</i>		<i>Radisson Blue</i>
<i>Dock 1 AUM Sadeen</i>	<i>€ 140,934</i>		<i>S 060 – Sadeen Education Investment Ltd</i>
<i>Freeport Terminal’s Main Canopy</i>	<i>€ 71,800.00</i>		<i>M 074 – Malta Freeport Terminals Limited</i>
<i>Kirkop Health Centre</i>			<i>V008 – V & M Turnkey Limited - General</i>
<i>Metal Works at UOM</i>	<i>€ 33,917.50</i>		<i>P044 – Project Technik</i>
<i>Paint Works at SR Technics</i>	<i>€ 38,474.58</i>		<i>S015 – SR Technics Malta Limited</i>
<i>Canteen Extension within Warehouse</i>	<i>€ 62,211.50</i>		<i>A064 – Alf Mizzi & Sons (Marketing) Limited</i>
<i>Playmobil Hal Far</i>	<i>€ 84,128.44</i>		<i>P009 – Polidano Bros Limited</i>
<i>Marigold Marsa</i>	<i>€ 33,268.00</i>		<i>B025 – Bava Holdings Limited</i>
<i>Sterling Jewellers San Ġwann</i>	<i>€ 25,342.40</i>		<i>P009 – Polidano Bros Limited</i>
<i>Manoel Theatre Roof</i>	<i>€ 102,050.00</i>		<i>V & M Turnkey Limited</i>

1.4 From the above submission, the Appellants declared that the listed assignments were all performed in 2018, which year is outside the period requested in the Tender Document, and therefore their first submission was not in accordance with the Tender conditions. Infrastructure Malta, quite appropriately, applied the remedy as stipulated under Article 7 and submitted a request for rectification, as follows:

“Rectification No 2

Reference to Tender IM 003/2018 – Tender for the Design and Construction of a Footbridge, Access Ramps, Pedestrian Lifts and Pavement at Vjal l-Avjazzjoni, Luqa. With reference to Article 7 Part C and the ESPD question reference 4C.1 and 4C1.1, you are kindly requested to rectify the ESPD and in particular to submit the following information as this falls under Note 2A:-

- a) Two in number projects between the years 2015-2017;*
- b) The minimum value of the two projects mentioned in (a) above must not be less than € 500,000;*
- c) In addition to items (a) and (b) above, a minimum of € 200,000 out of these € 500,000 must specifically refer to steel works. You are to clearly identify the projects involving steel works and also indicate their value.”*

Through the above rectification request, this Board notes that the details being requested by Infrastructure Malta were very clear and the period in which the projects were executed was again denoted to be between 2015 and 2017.

1.5 E & L Enterprises Limited’s reply to the clarification request was the following:

<i>Description</i>	<i>Amounts</i>	<i>Dates</i>	<i>Customer/Client</i>
<i>Gold Construction Ltd</i>	<i>€ 247,059.11</i>	<i>2016-2018</i>	<i>G025 – Gold Lion Construction Ltd.</i>
<i>Works at Blata l-Bajda Museum</i>	<i>€ 58,128.55</i>		<i>S058 – SDC Museum</i>
<i>Perimeter Railing Jacuzzi</i>	<i>€ 20,146.00</i>		<i>M073 – Tanti Interiors</i>
<i>Arcadia Complex Valletta</i>	<i>€ 1,229,761.40</i>		<i>AX Construction</i>
<i>Hangar Structure</i>	<i>€ 620,923.79</i>		<i>SR Techniks</i>
<i>Ta’Kandja Steel Canopies</i>	<i>€ 113,483.00</i>		<i>B 011 – Bonnici Bros Limited</i>
<i>KPMG Office Block</i>	<i>€ 419,329.15</i>		<i>AX Construction</i>
<i>Works on Railing at Radisson Blue</i>	<i>€ 160,817.00</i>		<i>Radisson Blue</i>
<i>Dock 1 AUM Sadeen</i>	<i>€ 140,934</i>		<i>S 060 – Sadeen Education Investment Ltd</i>
<i>Freeport Terminal’s Main Canopy</i>	<i>€ 71,800.00</i>		<i>M 074 – Malta Freeport Terminals Limited</i>
<i>Kirkop Health Centre</i>			<i>V008 – V & M Turnkey Limited - General</i>
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<i>Playmobil Hal Far</i>	<i>€ 84,128.44</i>		<i>P009 – Polidano Bros Limited</i>
<i>Marigold Marsa</i>	<i>€ 33,268.00</i>		<i>B025 – Bava Holdings Limited</i>
<i>Sterling Jewellers San Ġwann</i>	<i>€ 25,342.40</i>		<i>P009 – Polidano Bros Limited</i>
<i>Manoel Theatre Roof</i>	<i>€ 102,050.00</i>		<i>V & M Turnkey Limited</i>

From the above submission, E & L Enterprises Limited is now declaring that the listed works were carried out between 2016 and 2018.

In this regard, this Board notes that the years declared, still do not conform to what was requested in the Tender Document and an extract from the testimony of the Chairman of the Evaluation Committee, confirms the following:

“Xhud: Li ġara jekk nista nikkjarifika, l-ewwel submission li kellna mal-ewwel ESPD kienet all during 2018 fejn kien hemm lista ta’ proġetti li kien hemm id-description u kien hemm il-client. Il-client ta’ Hangar Structure, li l-ammont ta’ steel fih kien 600,000..... kien ta’ SR Technic. Tlabna clarification.

Avukat: X’ ġara wara?

Xhud: Li ġiet l-istess lista, kull ma nbidel kien, flok all during 2018 kien hemm 2016-2018. Jiġifieri d-dokument li qed nuri.”

From E & L Enterprises Limited’s original submission and their reply to the rectification request, this Board cannot but notice that, in both instances, the Appellants were inconsistent and somewhat confused in declaring the actual works, (including steelworks), carried out during the dictated period of 2015 to 2017 and in both instances, the same Appellants failed to adhere to this mandatory requirement.

2. E & L Enterprises Limited’s claim for further clarification

2.1 This Board would respectfully refer to the Appellants’ claim that, if the Evaluation Committee sought clarifications, the issue of the dates and works carried out, would have been clearly explained.

This Board would, first and foremost, point out that, in this particular case, the Appellants were given the opportunity to rectify their original

offer, in so far as dates and works carried out during the years 2015-2017, however, the reply to the clarification request, did not provide the necessary corrections to the original submission.

2.2 This Board would respectfully point out that in carrying out an open procedure, it is possible for the Contracting Authority to seek clarifications from Bidders on aspects of their offers. Such requests can only have the character of minor clarifications on information already submitted. In this particular case, the Appellants were requested to rectify the original submitted information and they had all the opportunities to correct the list of works carried out within the dictated period of the years between 2015 and 2017. On the other hand, clarifications should not have the effect of changing the already submitted Tender in relation to substantial information. In this respect, this Board opines that if the Evaluation Committee sought further clarifications after the reply to the rectification request, it would have breached the principle of equal treatment. At the same instance, further clarifications should not be sought in order to bring the Bidder's offer into compliancy and in this particular case, such an instance would have occurred. In this regard, this Board opines that the Appellants had the opportunity to correct their original submissions and further clarifications would not have been appropriate as these would have been

brought their offer compliant and in this respect, this Board does not uphold the Appellants' second contention.

In view of the above, this Board,

- i) does not uphold the contentions made by E & L Enterprises Limited;**

- ii) upholds Infrastructure Malta's decision finding the Appellant's tender to be administratively non-compliant;**

- iii) directs that an amount of one thousand five hundred euro (€ 1,500) from the deposit paid by the Appellants will be retained to cover the costs of this Appeal.**

Dr Anthony Cassar
Chairman

Mr Carmel Esposito
Member

Mr Lawrence Ancilleri
Member

21st February 2019