

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1459 – CT 2039/2020 – Framework Contract for the Provision of Site Investigations, Structural Integrity Analyses and Ancillary Works for Various Schools in Malta and Gozo.**

The tender was published on the 25<sup>th</sup> February 2020 and the closing date of the tender was the 26<sup>th</sup> March 2020. The estimated value of the tender (exclusive of VAT) was € 198,450.

On the 5th June 2020 Solidbase Laboratory Ltd filed an appeal against the Foundation for Tomorrow's Schools as the Contracting Authority objecting to their disqualification on the grounds that their bid was not the best price offer. A deposit of € 992 was paid.

There were four (4) bidders.

On 14th July 2020 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

#### **Appellants – Solidbase Laboratory Ltd**

Dr Adrian Mallia	Legal Representative
Mr Paolo Bugeja	Representative
Mr Roberto Bugeja	Representative

#### **Preferred Bidder – EMDP Ltd**

Dr Ramona Attard	Legal Representative
Eng Mariello Spiteri	Representative

#### **Contracting Authority – Foundation for Tomorrow's Schools**

Dr Jonathan Thompson	Legal Representative
Eng Simon Scicluna	Chairperson Evaluation Committee
Ms Alexia Sammut	Member Evaluation Committee
Eng Melchisedech Zarb	Member Evaluation Committee
Mr Franco Costa	Member Evaluation Committee
Arch Yanica Zammit	Member Evaluation Committee

Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties. He noted that since this was a virtual meeting all the parties had agreed to treat it as a normal hearing of the Board. He then invited submissions.

Dr Jonathan Thompson Legal Representative for the Foundation for Tomorrow's Schools stated that he wished to enter a preliminary plea on a matter that had come to light after an appeal was lodged. The Contracting Authority realised that the certification requested in the tender was for the assessing laboratory, which participants had complied with, but what the Authority required was certification of the individual tests, to be carried out by those laboratories, to the required standards. This was mainly in the field of the testing of concrete. What the tender asked does not satisfy the required tests. The Authority was suggesting the withdrawal of the present tender and its re-issue indicating the correct certification and procedures. At this stage the preferred bidder cannot be asked to provide further information.

Dr Adrian Mallia Legal Representative for Solidbase Laboratory Ltd stated that a reference to the Bill of Materials (BOM) indicated that the major part of the contract is the testing of concrete. The certificate submitted by bidders indicates that the laboratory cannot carry out concrete testing. The tender was drafted too widely and this was a serious omission.

Dr Ramona Attard Legal Representative for EMDP Ltd said that the appeal letter made no reference to the testing of concrete. The preferred bidder met the terms of the tender and it would be very unfair at this stage to cancel the tender. If the Authority feels that they need further reassurances they should specify what they are and ask for them. In the appeal process there was no request made that the tender be withdrawn. The certification of cement was only 20% of the tender and the request for certification to ISO 17025 standards had been met. Why had bidders not been requested to provide what the Authority requires?

Dr Thompson said that the difficulty that the Authority faced is that the ISO requested the methodology of how the tests would be carried out – what was required was assurance that the laboratory can carry out the required tests and unfortunately the technical requirements did not request individual reports.

Dr Mallia said that the Authority's decision was legally binding. The Contracting Authority had meanwhile identified the shortcoming and the only avenue open to the Public Contracts Review Board was to use Public Procurement Regulation 276(h) to decide whether to accede or reject the appeal or even cancel the call if that is in the best interest. ISO 17025 is generic but the tender requires tests on concrete which the laboratory in question is not accredited to do. The Appellants were not aware of this discrepancy at the time of their appeal.

Dr Attard mentioned that the BOM made reference to concrete and therefore it was known that tests had to be carried out – in any case concrete forms only 20% of the tender. The Authority would have a case for cancelling if it was the BOM that was affected but this is not what they were asking.

Engineer Simon Scicluna Chairperson of the evaluation committee said that the evaluators were not allowed to ask for clarification. The preferred bidder met all the tender requirements but the Authority needs attestation and assurance on the concrete tests – this will not affect the BOM.

The Chairman said that it does not make sense to cancel the whole tender if some way could be found to seek clarification, which can be sought at any stage. The parameters of the tender were not changing, it was just necessary for the Authority to obtain assurance on the tests and thus save the tender.

Dr Thompson said that the concern is that the Authority has to be satisfied that the requirement on each item of the BOQ is met.

Dr Attard confirmed that the preferred bidder does not object to providing additional certification.

The Chairman thanked the parties for their co-operative approach, thanked them for their submissions and declared the hearing closed.

End of Minutes

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## **Decision**

**This Board,**

**having noted this objection filed by Solidbase Laboratory Ltd (hereinafter referred to as the Appellants) on 5<sup>th</sup> June 2020, refers to the claims made by the same Appellants with regard to the tender of reference CT 2039/2020 listed as case No. 1459 in the records of the Public Contracts Review Board awarded by Foundation for Tomorrow's Schools (hereinafter referred to as the Contracting Authority).**

**Appearing for the Appellants: Dr Adrian Mallia**

**Appearing for the Contracting Authority: Dr Jonathan Thompson**

**Appearing for preferred bidder: Dr Ramona Attard**

**Whereby, the Appellants contend that:**

**a) The tender document stipulated that:**

*“Tenderers must be in possession of a testing accreditation (ISO 17025)”*

**In this regard, Appellants maintain that, the preferred bidder does not hold certification which could satisfy the requirements of the tender document, especially with regard to the testing of concrete.**

**This Board also noted the Contracting Authority’s ‘Letter of reply’ dated 15<sup>th</sup> June 2020 and its verbal submissions during the virtual hearing held on 14<sup>th</sup> July 2020, in that:**

- a) In its’ ‘Letter of Reply’, the Authority confirmed that, the accreditation certificate presented by the preferred bidder satisfied the requirements stipulated in the tender document.**
- b) However, in its preliminary submission, the Authority informed the Public Contracts Review Board that, the Authority realised that it had failed to obtain confirmation that the certification presented by all the bidders also included the testing of concrete, rock and soil.**

**This same Board also noted the testimony of the witness namely:**

**Engineer Simon Scicluna duly summoned by the Public Contracts Review Board.**

- 1. This Board took note of the preliminary submission made by the Contracting Authority in that, after the appeal was lodged, the contracting Authority**

**realised that, the certification which was requested in the tender dossier, referred to the accreditation of the laboratory where tests are to be conducted.**

**2. The Authority explained that, its main concern refers to the accreditation of the testing of the strength and composition of concrete, a highly important feature to which great importance is given, obviously effecting the safety of the structural aspect of the various schools. In this regard, the tender document failed to include the specific accreditation requirement for such testing of concrete and the Authority is proposing cancellation of the tender and issue of a new one.**

**3. This Board, after having heard submissions made by all the parties concerned, established that such a preliminary submission made by the Authority merits consideration as it is of great importance that, the tender document will clearly reflect the ultimate objectives of the Authority.**

**3.1. This Board was made aware that, the actual technical specifications of the new tender document, if reissued, will be the same as those contained in the present tender under appeal.**

**3.2. This Board noted that, 5b (a) which presently states that:**

*“Suitability (Note 2)*

*Tenderers must be in possession of a Testing Accreditation (ISO 17025).*

*This Information shall be included in the online ESPD form in Part IV:  
Selection criteria – Enrolment in relevant professional register”*

**In this regard, it is an evident fact that, the above-mentioned article indicates that, accreditation is referring to the laboratory which will carry tests, and nowhere does it refer to the testing of the concrete.**

- 3.3. This Board takes notice of the fact that, the preferred bidder satisfied all the conditions stipulated in the tender dossier.**
- 3.4. At the same instance, it is established that all the relevant information on all the offers is known to all the competing bidders. In this regard, this Board, would also respectfully point out that, it has been confirmed by the Contracting Authority that, in actual fact, what will change will be the submission of a confirmation that the particular laboratory is accredited to carry out test on concrete, soil and rock in accordance with ISO 17025 standards.**
- 3.5. From the testimony of Engineer Simon Scicluna, it was vividly explained that, although what the Authority is now requesting is a confirmation, according to note 3 of the tender document, such clarification cannot be requested.**
- 3.6. This Board establishes that, no alteration to the bidders’ offers is going to be effected, as the additional information which the Authority is**

requesting complements clause 5 b (a), so that, the principle of proportionality in this particular case applies.

**3.7. This Board takes into consideration the following issues:**

- a) The fact that prices are now public,**
- b) The credible and justifiable explanation by the Contracting Authority on requesting more information regarding the accreditation for the testing concrete, which was not clearly defined in the tender document and,**
- c) The fact that, all the interested parties agreed that cancellation of the tender, at this stage, is not proportional.**

**In conclusion, this Board opines that:**

- a) The additional information referring to the accreditation of the testing of concrete does not justifiable merit the cancellation of the present tender.**
- b) With regard to the required accreditation, the Authority is being directed to request confirmation that, in addition to the information requested in clause 5 b (a), an accreditation certificate proving that, the relative laboratory is also accredited to test concrete in accordance to ISO 17025 standards.**
- c) Such confirmation should be requested from all the bidders.**

- d) In their final deliberations, the Evaluation Committee will be in a position to ensure that, all the requirements to achieve the Authority's objectives are clearly identified.**
- e) It is being emphasized by this Board that, such a decision is being based on the specific nature of the circumstances of the authority's submissions and at the same instance, having noted the agreement of all parties concerned that, a cancellation of the tender, at this particular stage, will prejudice all the offers submitted, which have been made public so that, in the opinion of this Board, under these particular circumstances such a recommended cancellation of the tender will be disproportionate.**

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

- i. suspends the award of this tender until after the accreditation confirmation is assessed by the Authority,**
- ii. requests the necessary confirmation from all bidders adhering to the principle of equal treatment**
- iii. directs that the deposit paid by Appellants should be fully reimbursed.**
- iv. directs that the Evaluation Committee reconsider the award of the tender after all the requested accreditation confirmations are submitted by all the compliant offers.**

Dr Anthony Cassar  
Chairman

Mr Lawrence Ancilleri  
Member

Mr Carmel Esposito  
Member

*2<sup>1st</sup> July 2020*