

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1460 – 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 Terracore 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 – Terracore Ltd**

Dr Frank Testa	Legal Representative
Dr Matthew Cutajar	Legal Representative
Mr Rodney Xerri	Representative
Mr Matthew Xerri	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 as a preliminary point that after considering the appeals the Contracting Authority had noticed an omission on their part in the technical specifications. Under the circumstances it would be beneficial to the Authority if the tender was cancelled or if certain rectifications were sought. Tenderers had to submit ISO 17025 but this provided accreditation solely on a particular test on one product but not on others. The Authority required accreditation on all the requirements in the Bill of Quantities (BOQ), which includes tests particularly on concrete, and it was not satisfied that as it stands the crucial tests were covered.

Dr Matthew Cutajar Legal Representative for Terracore Ltd said that he bidder was eventually compliant only through subcontracting the requirement to have ISO 17025 certification. The standards requested were specific to the BOQ but the submitted certificates were using American standards. The specifications, article 4, of the tender requested testing of concrete columns slabs and beams but there was no reference to these in the preferred bid.

Dr Ramona Attard Legal Representative for EMDP Ltd stated that through the BOQ details it was clear what tests were required. If the Contracting Authority required further certification they could simply ask for them. It was ISO 17250 that was requested and that was what was submitted. The use of subcontractors was allowed and it is confirmed that they will be used.

The Chairman noted that the preferred bidders' offer made it clear that subcontractors were to be used.

Dr Thompson said that as presently drafted the tender does not meet the Authority's requirements, as there is no provision for concrete testing and unless this shortcoming is resolved the process cannot go any further.

The Chairman stated it was clear that the Authority needed assurance that the required BOQ tests will be fulfilled and accredited. It would not be wise to cancel a tender, more so, when its details were public knowledge. The parameters of the tender are not changing, they just need clarifying. It would be sensible to save the offers as they are and direct the Authority to put in additional request for certification of the concrete works.

Dr Cutajar said this proposal was acceptable to his clients and requested that under the circumstances the deposit paid be refunded.

Dr Attard stated that once there was an assurance that the BOQ would not be changed the preferred bidder was prepared to provide whatever further certification was necessary.

The Chairman thanked the parties for the amicable resolution of this appeal, thanked the parties for their submissions and declared the hearing closed.

End of Minutes

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## **Decision**

**This Board,**

**having noted this objection filed by Terracore 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. 1460 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 Frank Testa**

**Dr Matthew Cutajar**

**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

*21<sup>st</sup> July 2020*