PUBLIC CONTRACTS REVIEW BOARD

Case 1047 – TM 132/2016 – Tender for Pot-Hole Repair (Rapid Intervention) Using Proprietary (Third-Party Certified) Cold-Lay Surfacing Material

The Publication Date of the Call for Tenders was 19 August 2016 whilst the Closing Date for Call of Tenders was 16 September 2016. The Estimated Value of the Tender, (Exclusive of VAT) was € 88,871.43.

Five (5) Bidders have submitted Six (6) offers for this Tender.

On 17 March 2017, SM Contractors Ltd filed an Objection against the decision of Transport Malta to award the Tender to Bonnici Brothers Services Ltd for the price of € 88,233.19 (Exclusive of VAT) against a deposit of € 445

On 9 May 2016, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

Appellant – SM Contractors Ltd

Arch Daniel Cordina	Representative
Mr Francis Delia	Representative
Mr Sylvester Mifsud	Representative
Dr Alessandro Lia	Legal Representative

Recommended Bidder – Bonnici Brothers Services Ltd

Mr Mario Bonnici	Representative
Mr Liam Coyne	Representative
Dr John L Gauci	Legal Representative

Contracting Authority – Transport Malta

Arch Robert Zerafa	Chairperson, Evaluation Board
Arch Walter Portelli	Member, Evaluation Board
Mr Ray Stafrace	Representative
Dr Joseph Camilleri	Legal Representative

Following an introduction by The Public Contracts' Review Board Chairman, Dr Anthony Cassar, the Appellants were invited to make their submissions.

Dr Alessandro Lia, the Legal Representative for SM Contractors Ltd opened by saying that prior to his submissions he would like to summon a representative for his clients as a witness to ask him some questions.

At this point, Arch Daniel Cordina a representative for SM Contractors Ltd holding ID Card Number 547577 M was summoned to testify under oath before the Public Contracts Review Board.

Following Arch Cordina's submission, Dr Alessandro Lia, the Legal Representative for SM Contractors Ltd opened his submissions by referring to Section 4 of the Technical Specifications in the Tender Document which *inter alia* stated,

"*The aggregate within the system shall have a minimum of two (2) in number nominal sizes to provide for layered repairs*".

This was the reason why, according to the Appellants, Transport Malta did not accept the latter's offer. Dr Lia continued by admitting that the wording of the Tender was a difficult one. As a layman, he understood that the gravel and the particles which there are in the system have to be of at least two different measurements.

The Appellants' Legal Representative continued by saying that in the system for which Arch Cordina has testified and which is also found in the Clarification Documents, it was clearly requested that the particles had to be of more than one measurement. The document clearly indicates that there is an aggregate of 10mm and that he was sure that the Technical Evaluators who evaluated this Tender knew what this meant exactly and that SM Contractors Ltd have satisified the requisitions which Transport Malta had for this Tender.

Dr Alessandro Lia continued by saying that with regards of the Second Grievance, there was nowhere in the Tender Document which indicated that the Tender was only for the roads. The same Tender referred to the Road Works Regulations which referred to both roads and footpaths.

It was because of these unclear issues that the Appellants have decided to submit two offers which were € 28,000 cheaper than other Bids. When a system satisfies the Terms of Reference and in view of the fact that his clients have also documents certifying that the parameters were to be satisfied, Dr Alessandro Lia felt that it was not fair for SM Contractors to be disqualified because the Tender was not issued clearly.

Dr Joseph Camilleri, the Legal Representative for Transport Malta agreed with Dr Lia's statement that when one mentions an aggregate of 10mm that doesn't mean that it includes only 10mm gravel. That was the maximum since there would be other sizes. The Contracting Authority was disagreeing with this since they were not referring only to 1mm and 6mm gravels.

In the Tender Document, Transport Malta gives an allowance for layer works and at least the offer should have a 10mm gravel and 6mm mixture which does not have only 6mm since the two mixtures are different.

Dr Joseph Camilleri continued by saying that his clients have requested an aggregate of two sizes. The Appellants, following a clarification, have explained that they were furnishing 6mm and 10mm mixtures and it was not only them who made this type of offer. Transport Malta was insisting that the requests were for every aggregate offered.

The aggregate offer must permit for road repairs and all offers had to be in line with the Tender Document. The Appellants, continued Dr Camilleri, have admitted that the 6mm aggregate can be used for footpaths and not for roads.

With regards the airvoids issue, the Contracting Authority felt the need to question the Witness in order to confirm that the Appellants were not compliant with this issue. Arch Cordina replied that in the 10mm aggregate, the airvoids would have been between 2% and 10% while with regards to the 6mm aggregate, the airvoids were 0.9%.

Transport Malta felt that these had to agree with the Tender Document's requests and therefore they have applied any decision taken across the Board, hence SM Contractors Ltd were not the only ones to be excluded because of this.

Dr Alessandro Lia, the Legal Representative for SM Contractors Ltd, referred to Paragraph B of Section 4 Part 1 of the Tender Document which *inter alia* states that,

"*The aggregate within the system shall have a minimum of two (2) in number nominal sizes to provide for layered repairs*".

The system must have an aggregate of different systems but the cardinal point for which there was disagreement was that it was mandatory and obligatory for the Bidders to send two different systems. This was not the case since in every system there should be a single nominal size.

Dr Lia continued by saying that the Public Contracts Review Board had to protect the fact that the Evaluation Board had to evaluate and that their Bid satisfies all the requisties.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether there were other Bidders who have submitted more than one option.

Dr Joseph Camilleri, the Legal Representative for Transport Malta replied that there were other Bidders who offered 6mm and 10mm and that there were four different Bidders. There was another Bidder who offered 10mm only. Any exclusions made were because the offers were not up to spec.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board then asked whether there was anybody from the Contracting Authority who could be summoned as a witness for which Dr Joseph Camilleri, the Legal Representative for Transport Malta replied that there was the Chairman of the Evaluation Board.

At this point, Arch Robert Zerafa who presided over the Evaluation Board in this Tender, holding ID Card number 503976 M was summoned to testify under oath before the Public Contracts Review Board.

Following Arch Zerafa's Testimony, the Public Hearing was adjourned to Tuesday 16 May 2017 at 09:00 wherein the Public Contracts Review Board will transmit the decision taken for this Objection verbally and then distribute a hard copy of the same to all parties concerned.

This Board,

Having noted this Objection filed by SM Contractors Ltd (herein after referred to as the Appellant) on 17 March 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference TM 132/2016 listed as Case No 1047 in the records of the Public Contracts Review Board, awarded by Transport Malta (herein after referred to as the Contracting Authority).

Appearing for the Appellant: Dr Alessandro Lia

Appearing for the Contracting Authority: Dr Joseph Camilleri

Whereby, the Appellant contends that:

a) **His offer was rejected due to the fact that the Evaluation Board concluded that the material offered for the Tendered Works were not suited for the application of the requested interventions and thus was not technically compliant.**

In this regard, the Appellant maintains that the offered material specifications did in fact comply with those stipulated in the Tender Document and at the same instance; the Appellant contends that the latter did not indicate that the requested material was intended to be applied for carriage ways only.

b) SM Contractors Ltd also insist that the "*Ultracrete Instant Road Repair*" of 10mm is compliant with the dictated acceptable range with regards to "*Air Voids*" and is thus to be considered as Technically Compliant.

This Board also noted the Contracting Authority's "*Letter of Reply*" dated 29 March 2017 and its verbal submissions during the Public Hearing held on 9 May 2017, in that:

a) Although the Tender Document did not specifically stipulate that the Tendered Works relate to "*carriage ways*" only, one could easily conclude that the material to be utilised is for "*carriage works*" and not for "*footpaths*" or "*cycle lanes*";

b) With regards to "*Air Void Levels*", Transport Malta confirms that the Appellant's offer was within the range for the 10mm aggregate but failed in the 6mm aggregate size, so that the latter's overall bid was not Technically Compliant.

This same Board also noted the Testimonies of the witness namely:

1. Arch Daniel Cordina duly summoned by SM Contractors Ltd

2. Arch Robert Zerafa duly summoned by the Public Contracts Review Board

This Board, after having considered the merits of this case, arrived at the following conclusions:

1. With regards to SM Contractors Ltd's first Contention, this Board, after having examined the relative documentation and heard credible testimonies of both technical witnesses, opines that the main issue at stake, is the interpretation of the Tender's Technical requirements. In this regard, this Board has given great importance to the Technical Expertise and explanations given by both witnesses.

SM Contractors Ltd is claiming that the Tender Document did not indicate the fact that the material to be used was for road interventions only. In this respect, this Board would like to respectfully point out Section 4 of the Tender Document, with particular reference to clause b) wherein it is dictated what the system of intervention implies.

In particular, this clause indicates what the works involve and what ancillary services need to be taken care of by the successful Bidder. This Board also noted that included in these ancillary services to be provided is item b) 1 Under Section 4, which clearly denotes "*Traffic Control*".

From these inclusions in the Tender Document, although not stated, there is a clear indication that the Tendered Works are for rapid road repairs and not otherwise. On the other hand, this Board finds no credible evidence that the requested material was to be used also for "*footpaths*" or "*cycle lanes*".

This Board would also like to refer to the Appellant's claim that his offer was technically compliant. The Technical Specifications in the Tender Document requested two sizes of aggregates, namely 6mm

and 10mm, both of which had to be included in the mix for the patching up of pot holes.

From the relative documentation, this Board notes that SM Contractors Ltd submitted literature which expressly confirmed that the 6mm grading is only suitable for "*footways*" and "*cycle lanes*". In this respect, this material does not comply with the intended use of the mix on carriageways.

In this regard, this Board acknowledges the fact that the Evaluation Committee can only adjudicate the offers on the submitted information and in this particular instance, the latter had no other option but to reject the Appellant's bid on credible technical grounds.

This Board confirms that although the Tender Document did not exclude works to be carried out on areas outside carriage ways, at the same time, it did indicate that the works to be maintained are for rapid intervention on pot holes, with the requested ancillary services which must be performed including traffic management, the latter of which relates to roads. In this regard, this Board does not uphold the Appellant's First Contention.

2. **With regards to the Appellant's Second Grievance, this Board, after having justifiably established the fact that the requested system dictated two aggregate gradings, that of 6mm and that of 10mm, the requested "*Air Void Level*" for both gradings had to be within the range of between 2 and 10%.**

   In this regard, SM Contractors Ltd's submissions confirm that the "*Air Void Level*" of the 6mm grading was 11.9%, so that it is vividly clear that this percentage is not within the stipulated range and is therefore not Technically Compliant.

   Both gradings fall within the required system and both gradings had to satisfy the Technical Criteria as laid out in the Tender Document. In this particular case the Appellant's 10mm grading was within the dictated range whilst his 6mm grading was not. In this regard, this Board does not uphold SM Contractors Ltd's Second Grievance.

3. **On a general note, this Board would like to respectfully point out that the key issues in this Appeal were the Technical Compliancy issue and the interpretation of the requested Technical Specifications. In general, this Board is comforted by the fact that there was enough**

evidence in the Tender Document to indicate that the works were to be applied on pot holes on carriage ways and not otherwise, yet at the same instance, this Board cannot but notice certain deficiencies in the compilation of the Tender itself.

In particular, this Board would like to recommend that clear definitions and purpose should be indicated in a more precise and understandable manner to allow the prospective Bidder to fully understand what is being required by the Contracting Authority. On the other hand, this clearer picture would avoid undue misinterpretations of the Tender Document which in turn might lead to unnecessary litigation.

In view of the above, this Board finds against SM Contractors Ltd and recommends that the deposit paid by the latter should not be refunded.

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member

16 May 2017