

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1779 – IND-TBG-T083-21 – Tender for Upgrading and Embellishing in an Environmentally Friendly Manner the Existing Boundary Wall Area at Ta' Dbiegi Crafts Village, Gozo**

**16<sup>th</sup> August 2022**

The Board,

Having noted the letter of objection filed by Dr Joshua Grech acting for and on behalf of Little Rock Quarry Limited, (hereinafter referred to as the appellant) filed on the 25<sup>th</sup> July 2022;

Having also noted the letter of reply filed by Dr John Bonello and Dr Elian Scicluna on behalf of 8 Point Law acting for and on behalf of Indis Malta Ltd (hereinafter referred to as the Contracting Authority) filed on the 4<sup>th</sup> August 2022;

Having heard and evaluated the testimony of the witness Mr Keith Buttigieg (Principal Procurement and Contracts Manager at Indis Malta) as summoned by Dr John Bonello acting for Indis Malta Ltd;

Having heard and evaluated the testimony of the witness Mr Noel Azzopardi (Chief Technical Officer at Indis Malta) as summoned by Dr John Bonello acting for Indis Malta Ltd;

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by representatives of the parties;

Having noted and evaluated the minutes of the Board sitting of the 11<sup>th</sup> August 2022 hereunder-reproduced.

#### **Minutes**

#### **Case 1779 – IND-TBG-T083-21 – Tender for the Upgrading and Embellishment in an Environmentally Friendly Manner the Existing Boundary Wall Area at Ta' Dbiegi Crafts Village, Gozo**

The tender was issued on the 3<sup>rd</sup> December 2021 and the closing date was the 18<sup>th</sup> February 2022. The estimated value of the tender, excluding VAT, was € 250,587.24.

On the 25<sup>th</sup> July 2022 Little Rock Quarry Ltd filed an appeal against Indis Malta Ltd as the Contracting Authority objecting to its disqualification on the grounds that its bid was deemed to be not technically compliant

A deposit of € 1,252.94 was paid.

There were two (2) bids.

On the 11<sup>th</sup> August 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Dr Vincent Micallef as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

**Appellant – Little Rock Quarry Ltd**

Dr Joshua Grech

Legal Representative

**Contracting Authority – Indis Malta Ltd**

Dr John Bonello

Legal Representative

Mr Anthony Caruana

Chairperson Evaluation Committee

Mr Dorian Bugeja

Member Evaluation Committee

Mr Kevin Pace

Member Evaluation Committee

Mr Noel Azzopardi

Representative

Mr Keith Buttigieg

Representative

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Joshua Grech Legal Representative for Little Rock Quarry Ltd after outlining the scope of the tender said that the appeal was on the failure of Appellant to provide a design and build reservoir. The tender does not refer to the construction of such but for the use of the existing one; in other words it was not obligatory.

Dr John Bonello Legal Representative for Indis Malta Ltd said it was necessary to clarify facts. The tender was for embellishment with a latitude for bidders to design and build – both the tender and the clarification allowed the construction of a reservoir without providing details to allow the bidder leeway to come up with a proposal. The clarification in fact gave the bidder the liberty to decide the location of the reservoir. The Appellant decided to make use of the existing reservoir when the tender requested a new one.

Mr Keith Buttigieg (8879M) called as a witness by the Contracting Authority testified on oath that he is the Principal Procurement and Contracts Manager at Indis Malta. He was not involved in preparing the BOQ but reviewed it – according to the witness this was split into two parts – embellishment and the green wall. Item 14.01 of the BOQ (displayed on screen) called for the design and build of a new reservoir and as the title indicates it was up to the contractors to provide design and measurements. This is also referred to in Clarification Note 3 which did not state that the existing reservoir could be used. Item 8.21 of the BOQ conversely refers to the existing reservoir and is based on estimated measurements. No permits were sought for the new reservoir as these will be obtained once the proposal is accepted.

Questioned by Dr Bonello witness confirmed that the proposal was for a new reservoir not the use of the existing.

Mr Noel Azzopardi (67777M) called as a witness by the Contracting Authority testified on oath that he is the Chief Technical Officer at Indis and stated that the plans for the reservoir can only be requested after the award. It is a simple DNO (Development Notification Order) process once the plans are in hand and a full development permit is not required in the case of Indis projects on their estates.

This concluded the testimonies.

Dr Grech said the scope of the tender should not be a wish list. All points in the tender were fulfilled by Appellant and it is accepted that it did not include the building of a reservoir which is an ancillary part of the process. There is no qualification in the tender about obtaining planning permission. The

embellishment of the boundary wall is the point of the tender and this is mentioned several times without any mention of infrastructural works. Line items indicate that the existing reservoir could be used. Indis confirm that it will consider the building of a new reservoir but does not make it compulsory. Building a new structure requires permission which is difficult to obtain on indeterminate facts. There is need for proportionality and transparency to enable bidders to be clear what they are bidding on. The building of the reservoir was not a must and therefore the Appellant's bid was compliant.

Dr Bonello said that Appellant was trying to justify a decision that does not hold water. Appellant failed to include item in the BOQ or in the Gantt Chart. A witness testified that a permit was not required at this stage but simply a DNO as the structure was within the boundaries of the estate. Bidder cannot pick and choose which part of the tender to observe and the tender dossier must be treated as a whole. The Appeal should not have been filed in the first place as vital parts of the tender were missed.

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

End of Minutes

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**Hereby resolves:**

The Board refers to the minutes of the Board sitting of the 11<sup>th</sup> August 2022.

Having noted the objection filed by Little Rock Quarry Limited (hereinafter referred to as the Appellant) on 25<sup>th</sup> July 2022, refers to the claims made by the same Appellant with regard to the tender of reference IND-TBG-T083-21 listed as case No. 1779 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Joshua Grech

Appearing for the Contracting Authority: Dr John Bonello

Whereby, the Appellant contends that:

- a) The reason mentioned in the reason (sic) for cancellation of the tender was that the bidder did not indicate the location and design of the new reservoir specified in the Bill of Quantities and that the Gantt Chart and Method Statement confirm that a new reservoir will not be constructed.
- b) First and foremost, with all due respect, the title itself of the call for tenders is 'Tender for upgrading and embellishing in an environmentally friendly manner the existing boundary wall area at Ta' Dbiegi Crafts Village. Therefore, it is evident enough that the main works and services required by means of the issued tender were those of embellishment of the area of the boundary wall and not the building of any reservoir. The tender document itself does not provide any details whatsoever

of the building of a reservoir and in fact, the building thereof was not even requested in any part of the tender document. Furthermore, line item 14.01 is entitled as 'Green Wall' and does not give any indication of the dimensions of the proposed reservoir, which information is likewise lacking in the whole tender document.

- c) Line item 8.21 in the Bill of Quantities makes reference to the plastering and rendering to the existing reservoir and thus it is clear that the existing reservoir was to be utilised without the necessity of providing for the construction of new ones. Following on the same point, line item 14.01 further confirmed that the existing reservoir was intended to be the supply for the green wall "commissioning the green wall system to the existing water supply system"
- d) It should be noted that in the case of any building works, the necessary permissions, including but not limited to permissions from the Planning Authority would have to be requested. The tender document does not provide for any such authorisations as from a preliminary search, there are not in place any permits for any reservoir interventions in place.
- e) The only two instances where the reservoir is mentioned in the whole tender document is in items 11 and 13 of the 'Ta' Dbiegi Boundary Green Wall - Objectives and Requirements Checklist. These items make reference to a design aspect in connection with water-recycling and not necessarily the building of new reservoirs. In fact, the Contracting Authority upon issuance of the tender document did not provide any information substantiating the building of a reservoir. This further stresses the point that the building of the reservoir was not a sine qua non requirement for the tender as it did not form part of the items which the offeror had to submit. Moreover, the clarifications and the eventual replies by the Contracting Authority do not leave any space for interpretation of the issue, given that the offeror requested information about the possibility to use any existing reservoir. This request was duly replied to by an indication of the approximate location of the existing reservoir and thus it would be possible to use the existing water reservoir. The Contracting Authority continues in its reply mentioning that new locations may be considered - thus sustaining an element of choice and not necessarily that a new reservoir was being requested at any state - as this would have been an issue to be addressed at a later stage. This is what Contracting Authority duly states in the clarifications submitted by itself.
- f) Therefore, contrary to what was submitted and communicated via the letter of the 15th July, 2022 was not correct, since the offer submitted by the appellant was in fact fully compliant in all the details and requirements of the tender.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 4<sup>th</sup> August 2022 and its verbal submission during the virtual hearing held on 11<sup>th</sup> August 2022, in that:

- a) The Objector's appeal is essentially based on its disagreement with the Evaluation Board's noted deficiencies of their proposal which led to their proposal being dismissed. The tender dossier specified that contract would be awarded to the tenderer submitting the cheapest priced offer satisfying the administrative and technical criteria.
- b) The tender dossier section titled 'Ta' Dbiegi Boundary Green Wall - Objectives and Requirements Checklist' lays down specific design Requirements with respect to the required water reservoir, as follows:

*“Item 11: Adequate design considerations for integrating (hidden at back or other suitable well-planned areas) water-recycling reservoirs with boundary green wall. So as, to take the excess water dripping from the green-wall drains, to ensure that the majority of drained water is not lost but is filtrated, stored and re-used in same green wall.*

*Item 13: All necessary green wall services, control rooms, and feeding reservoirs, are to be neatly incorporated and hidden behind green wall and not visible from any side of green wall, that is neither from inside nor outside the village.”*
- c) In its submission, Objector makes absolutely no reference to the construction of a new reservoir with the abovementioned specifications. It is clear that the Objector chose to completely eliminate the necessity of the construction of the new reservoir as required, while relying on the fact that there is an existing reservoir on site.
- d) Further to the above, by virtue of a letter dated 11<sup>th</sup> May 2022, INDIS' Evaluation Committee sent a letter to the Objector requesting them to (i) indicate where is the construction of the new reservoir included in the Gantt Chart; and (ii) indicate where is the construction of the new reservoir and irrigation system indicated in the method statement. This proves that the construction of the new reservoir was indeed deemed necessary by the Contracting Authority and leaves no room for interpretation whatsoever. It was also specified that "Tenderer who fail to rectify the shortcoming identified in this communication shall be deemed to be non-compliant."
- e) The Objector did indeed reply to this letter, reiterating that they intended to use the existing reservoir, with no intent to construct a new one as required by INDIS. Such position runs counter to the Contracting Authority's scope of works. It is pertinent to note that offers submitted by other (sic) bidders proved to be non-compliant. Pursuant to the above, the Evaluation Committee recommended that this tender is cancelled in terms of article 18 . 3(a) of the general rules governing tenders which state that the tender procedure has been unsuccessful, in view of the fact that no qualitatively or financially worthwhile tender was received.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties including the testimony of the witnesses duly summoned, will consider Appellant's grievances as follows:

- a) The Board opines that this appeal hinges on one main point of contention. This being whether the building of new water reservoirs was indeed a mandatory requirement or not.
- b) After taking into consideration argumentation by both the appellant and contracting authority, and thorough review of the tender dossier, this Board is of the opinion that the tender made more than one reference for the design and build of new water reservoirs, with these being:
  - i. Bill of Quantities – Item 14.01 – “... *The design and build of **new reservoirs** for the water supply system is to be included in the rate.*” (bold & underline emphasis added)
  - ii. Ta’ Dbiegi Boundary Green Wall – Objectives and Requirements Checklist – Item 11 – “*Adequate design considerations for integrating (bidden at back or other suitable well-planned areas) water-recycling **reservoirs** with boundary green wall.*” (bold & underline emphasis added)
  - iii. Ta’ Dbiegi Boundary Green Wall – Objectives and Requirements Checklist – Item 13 – “*All necessary green wall services, control rooms, and feeding **reservoirs**.....*” (bold & underline emphasis added)
- c) With specific reference to Clarification number 3, question 3, this Board does not agree with appellant's argumentation whereby they were stating that it was clear that the building of new reservoirs was 'discretionary'. The contracting authority answer included details of the existing reservoir as such information was requested in the clarification question. Moreover, they confirmed that “*we will consider any new locations as long as they are within the INDIS administered areas and as long as they do not disrupt the tenants ongoing operations whilst constructing.*” This reply, in the Board's opinion, is in line with the testimony of Mr Noel Azzopardi, whereby he confirmed that a 'DNO' license permit is available to Indis only if such application is for works within areas administered by them. Therefore, it was left for the economic operators where they wanted to include such reservoirs within their offer.
- d) The Appellant failed to include such design and build options of new reservoirs. This on an *ex admissis* basis.

Hence, this Board does not uphold the Appellant's grievances.

**The Board,**

Having evaluated all the above and based on the above considerations, concludes and decides:

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) Does not uphold Appellant's Letter of Objection and contentions,
- b) Upholds the Contracting Authority's decision in the recommendation for the cancellation of the tender,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

**Mr Kenneth Swain**  
Chairman

**Mr Lawrence Ancilleri**  
Member

**Dr Vincent Micallef**  
Member