

PUBLIC CONTRACTS APPEALS BOARD

Case No. 37

CT 2575/04, Advert No 361/04, Rd 369/00 Tender for the Construction of Access Road to Housing Blocks at Valley Road, Msida

This call for tenders, published in the Government Gazette on the 14.12.2004 under the Three-Envelope Procedure, was issued by the Contracts Department following a formal request transmitted to the latter by the Malta Transport Authority on 26.08.2004.

The global estimated value of the contract in question was Lm 254,602.

The closing date for this call for offers was 25.01.2005.

The Malta Transport Directorate appointed an Adjudication Board consisting of Messrs.

- Arch. Edric Micallef (NI Directorate)
- Arch. Joseph Attard (NI Directorate)
- Mr Ray West (Director, Corporate Services)

to analyse a total of three (3) offers submitted by different tenderers.

Following clarifications requested from Messrs JAJ Co Ltd and correspondence relating thereto, on 09.05.2005 the Adjudication Board formally recommended to the General Contracts Committee that *“Bitmac Ltd. and Schembri Infrastructures Ltd. & Bonnici Bros. Ltd. (Joint Venture) are to pass to the next stage of the procedure, namely the opening of the financial proposals”*, discarding in the process the offer submitted by Messrs. JAJ Co Ltd. As a result of this decision, Messrs. JAJ Co Ltd filed a Notice of objection on 13.05.2005 against the decision taken by the General Contracts Committee not to select the Company’s tender since *“the list of road works submitted on 6 May 2005 has been considered as unsatisfactory.”*

The Public Contracts Appeals Board (PCAB) made up of Mr. Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr. Edwin Muscat, respectively acting as members, convened a public hearing on 15.07.2005 to discuss this objection.

Present for the hearings were:

JAJ Co Ltd

Dr Michael Tanti Dougall – Legal Representative
Mr Alfred Mizzi – Managing Director

Roads Directorate-Malta Transport Authority (ADT)

Architect Edric Micallef

Architect Joseph Attard

Witness

Architect Raymond Sammut – Bonnici Bros Ltd/ Schembri Infrastructures Ltd (ex Roads Construction Services)

Dr Michael Tanti Dougall, acting in his capacity of legal representative of JAJ Co Ltd, started by making reference to his letter dated 13 May 2005 in which he informed the Director General Contracts that they were lodging their objection because it was claimed that the list of road works submitted by his client on 6 May 2005 “*has been considered as unsatisfactory.*” Also he referred to Architect Joseph Attard’s letter dated 6 May 2005 wherein JAJ Co Ltd were asked to submit a detailed list of all road works carried out by “*clearly specifying the type of road works carried out, on whose behalf and their final certified value.*” He said that they failed to understand how the list submitted was considered as unsatisfactory considering the fact that it included all the information requested. Moreover, he was of the opinion that the decision was taken arbitrarily or subjectively.

Dr Tanti Dougall said that his client had fully complied with the tender requirements and the Roads Directorate’s requests. As a matter of fact they submitted the list of road works carried out (the list submitted on 6 May 2005 superseded the original one) as well as a recent ETC certified list of employees, indicating the number of workers assigned to particular jobs.

Architect Joseph Attard (Roads Directorate ADT) said that they were of the opinion that the list of road works submitted by JAJ Co Ltd was misleading and unsatisfactory because it included road works which were not carried out in the last three (3) years and the tenderer in question did not clearly specify which type of road works were actually carried out. Mr Attard emphasised that the Authority requested tenderers to submit road works in respect of the last three years only in view of the implementation of new specifications and standards. However, Dr Tanti Dougall replied by arguing that if the list included road works which were carried out more than three years ago then this should be considered as more than satisfactory stating also that this proved that JAJ Co Ltd had a lengthy track record in this sector.

It is pertinent to point out that, when specifically asked by the PCAB the Roads Directorate’s representatives could not specify which of the roads featuring on the list submitted by JAJ Co Ltd were carried out more than three years ago.

Architect Attard proceeded by explaining that when JAJ Co Ltd were requested to specify the type of road works carried out, they were expecting to receive a breakdown of asphalt works, trenching and services because road construction and maintenance works were too generic.

At this stage, this Board remarked that the Roads Directorate should have been more specific in their request and that considering the fact that the type of works listed by

tenderer was not, in the opinion of the Authority, that clear to one and sundry, it was obliged to seek further clarifications.

Architect Edric Micallef (Roads Directorate ADT) said that in their programme of works, JAJ Co Ltd indicated that during two weeks in phase 1 and three weeks in phase 2, no works would be carried out on-site by the Company; activity will be taking place only in-house as workers will be processing pre-cast units. This issue may raise a few eyebrows, explained Mr Micallef, as people might get the wrong impression that the project may have been brought to an abrupt halt. Furthermore he expressed his concern that JAJ Co Ltd might be carrying out other jobs on some other projects thus impeding the same Company from proceeding with this particular project works. However, when the PCAB asked Mr Alfred Mizzi (JAJ Co Ltd) to state whether during this period his employees would be assigned to some other project other than this particular one, the reply given was in the negative and it was clarified that these week slots were intended to cater for any contingency which may arise such as bad weather. Moreover, Dr Tanti Dougall said that, should JAJ Co Ltd be also contracted on some other project, then, undoubtedly, more workers will be engaged to ensure that the Company fulfils all its contractual obligations. Furthermore, should it be also necessary, JAJ Co Ltd would even invest in new equipment in order to complete this contract within the stipulated time, stated the appellant's lawyer.

During his intervention, Mr Alfred Mizzi (JAJ Co Ltd) declared that so far he was a sub-contractor with Asfaltar Ltd on road works but on this project he was going to be the main contractor. He said that, in the past, his Company had carried out all works with the exception of the laying of tarmac. When cross-examined by the PCAB, he said that all works included in the list have been completed satisfactorily and that no payments have ever been withheld for unsatisfactory work.

On cross-examination by the PCAB, Architect Joseph Attard declared that the other contractors were not requested to submit such specific list of works carried out. The reason given was that, in view of the fact that, in the past, they had already been contracted by the ADT on other major projects, they knew the track record thereof. On the other hand he claimed that, as far as JAJ Co Ltd were concerned these did not have any indication of their track record. Here, Dr Michael Tanti Dougall intervened by stating that such details should not have been requested from one particular tenderer only and that, being a public tender, they should have been requested formally from all bidders.

The only person who took the witness stand during this hearing was Architect Raymond Sammut, who was a representative of Bonnici Bros Ltd and whose tender (joint venture with Schembri Infrastructure Ltd) was among the selected ones for the financial stage.

He commented about the current Three Envelope System and the qualification and classification of contractors. He argued that only those contractors who had the abilities to carry out certain projects should be eligible to tender. He said that main contractors had all the necessary resources to complete entire projects.

It was pointed out by this Board, that this was correct but it also presupposes the existence of a formal classification system with mechanisms to ensure that contractors were not barred from entering into the various stages of classification provided that they had all the necessary qualifications. The witness and the ADT representatives agreed that no such formal system existed.

With regard to the ADT representatives' comments that JAJ Co Ltd lacked experience in major road projects, appellant's legal representative said that his client had been operating for 14 years and that he had all the abilities to carry out such projects. He contended that the Authority in question should not be making any distinction between previous and new participants in order to ensure fair competition. Furthermore, he argued that should tenderers be adjudicated on their track record, then new contractors would never have a chance to participate and therefore would be eliminated outright.

In his concluding remarks, Dr Tanti Dougall said that in view of the satisfactory explanations given to the queries formally communicated to them in respect of the list of road works submitted by his client and also to others mentioned during these proceedings by ADT's representatives regarding the programme of works, equipment and workforce, JAJ Co Ltd should be considered eligible to pass on to the next stage of the tendering procedure.

The Public Contracts Appeals Board,

- having noted in its opinion that, the appellant, had fulfilled the request by the ADT to submit the list of road works carried out as well as a recent ETC certified list of employees, indicating the number of workers assigned to particular jobs;
- having considered the fact that when specifically asked by this Board the Roads Directorate's representatives could not specify which of the roads featuring on the list submitted by JAJ Co Ltd were carried out more than three years ago;
- having also noted that the Roads Directorate should have been more specific in their request/s for clarifications;
- having established that the other contractors, in contrast with what happened with the appellant in question were not requested to submit such specific list of works carried out;
- having considered the fact that no interested party had put forward any arguments that the appellant had not been operating in this type of work, in one way or other, for a long period of time, and that the Company did not have all the abilities to carry out such projects;
- having favourably considered the point raised by the appellant's legal representative that should tenderers be adjudicated on their track record,

then new contractors would never have a chance to participate and therefore would be eliminated outright;

- having noted that a formal classification of contractors mechanism is not in force;
- having considered that the conditions of the tender documents include adequate penalties that may be applied in case of failure to perform and that the company had never been so penalised.

agreed that, Messrs JAJ Co Ltd should be reinstated and, as a consequence, considered eligible to pass on to the next stage of the tendering procedure.

In consequence, the Board has decided to uphold the appeal and has also concluded that, in terms of the provisions stipulated in the law governing these appeals, the deposit paid by appellant should be refunded.

A. Triganza
Chairman

A.Pavia
Member

E. Muscat
Member

27 July 2005