

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case No. 244**

**GHRC/009/2010**

**Tender for the Supply and Installation of Raised Access Flooring at the Banca Giuratale, No. 197, Merchants Street, Valletta.**

This call for tenders was published in the Government Gazette on 24 June 2010. The closing date for this call for offers was 20 July 2010.

The estimated value of this tender was Euro 50,000.

Five (5) tenderers submitted their offers.

Link Projects Ltd filed an objection on 27 August 2010 against the decisions by the contracting authority (i) to reject its offer due to lack of experience in the installation of such flooring and (ii) to award the tender to Joseph Cachia and Son Ltd.

In terms of PART II – Rules governing public contracts whose value does not exceed €120,000 of LN 296 of 2010 the Public Contracts Review Board, composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Carmel J Esposito as members, convened a public hearing on Monday, 12 November 2010 to discuss this objection.

Present for the hearing were:

### **Link Projects Ltd**

Dr Nicole Vella	Legal Representative
Mr Alfred Calascione	Representative
Mr Michael Valenzia	Representative

### **Joseph Cachia & Son Ltd**

Ms Maronna Filletti	Representative
Mr Hans Weenink	Representative

### **Grand Harbour Regeneration Corporation (GHRC)**

Architect Adrian Mamo	Project Consultant
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### **Adjudicating Board**

Mr Chris Paris	Chairperson
Architect Damian Vella Linicker	Member
Mr Mario Sammut	Member
Ms Charmaine Monseigneur	Member

After the Chairman's brief introduction the appellant company's representatives were invited to explain the motives which led to the objection.

Dr Nicole Vella, legal representative of Link Projects Ltd, remarked that:

- i. by email dated 18<sup>th</sup> August 2010 her client was informed that (a) its offer was found to be not compliant due to lack of experience in installing such items, which requirement, namely relevant experience. was listed as mandatory in the tender document, and (b) the tender was recommended for award to Joseph Cachia & Son Ltd;
- ii. despite the claim being made in regard, her client did have the necessary experience to execute this contract as the said appellant company has been in this line of business for the past 16 years during which time it had undertaken works at SmartCity and Portomaso, among others;
- iii. the appellant company did not declare the relevant experience because the bidder's experience requested in clause 1.9 (b) and Annex 6 of the tender document related to, at least, three projects with a value of €50,000 or more and, as such, her client carried out projects worth less than €50,000;
- iv. her client was reluctant to furnish erroneous information and, as a consequence, indicated a negative answer with regard to experience on projects worth €50,000 or more and declined from indicating the relevant experience on projects worth less than €50,000 because that was not what was requested in the tender document;
- v. her client was aware that the recommended tenderer did not have the kind of experience requested in the tender;
- vi. the bids submitted in response to this tender were all, more or less, in the region of €25,000 and, therefore, one wondered why the contracting authority requested experience on the basis of contracts worth €50,000 or more, namely double the value of this tender. The appellant company's legal advisor contended that the kind of experience requested was considered excessive such that it precluded her client from being in a position to declare the company's relevant experience;
- vii. the contracting authority, on receipt of the bids, could have issued a clarification requesting experience in the execution of contracts worth, for example, €25,000 and over, in which case her client would have been able to give account of the company's relevant experience in this sector;
- viii. her client was offering the same material/product as that of the recommended tenderer, namely that manufactured by Uniflair, with the

difference that her client was offering a price that was about €4,000 cheaper than that of the recommended tenderer;

- ix. Clause 1.18 of the tender document stated, among other things, that those *“tender offers fulfilling the Tender requirements shall be ranked in order of their respective price offers. The Bidder that quotes the best price for his offer shall be selected as the Preferred Bidder”*;
- x. it appeared that the recommended tenderer had been allowed to reduce its price from €28,445, as per list of valid tenderoffers, to €25,195, as per recommended award and a clarification was called for in this regard.

The Chairman PCRB intervened and remarked that the tenderer had the opportunity to clarify with the contracting authority this issue prior to the closing date of the tender, e.g. whether it was admissible to include experience in the execution of contracts worth less than €50,000. Furthermore, the PCRB also argued that listing the contracts executed, even if below the limit set in the tender document, was always better than indicating no experience at all. The Chairman PCRB added that it was up to the appellant company to seek the clarifications it deemed appropriate and not the other way round. The Chairman PCRB opined that the €50,000 limit indicated in the tender document did not necessarily relate to the value of the contract itself but rather to the level of experience that the contractor was expected to have to carry out these works.

Mr Chris Paris, representing the Grand Harbour Regeneration Corporation (GHRC), the contracting company, sympathised with the appellant company after having heard the explanations given at the hearing but he remarked that such explanations should have been given at tender submission stage and not at appeal stage. He added that the tenderer was free to ask for clarifications but it was not correct or ethical for the contracting authority to approach a tenderer to, for example, draw one's attention that one had indicated no experience. Mr Paris stressed that the adjudicating board had to assess on the documentation made available and that it could not rely on public knowledge or on what happened in past contracts. The adjudication board's chairperson pointed out that the appellants themselves had given a clear negative answer with regard to their experience in this line of work, which was a mandatory requirement, and, as a result, the adjudicating board had no other option but to reject the offer.

Mr Paris acknowledged that the appellant company's offer was the cheapest and, even though the contracting authority would have preferred to save money, it could not recommend award to a non compliant bidder. He explained that this was a high profile project and, as a consequence, it was important for the contracting authority to select a contractor who could guarantee a high standard in terms of workmanship.

Architect Adrian Mamo, project consultant, gave the following evidence:

- i. the appellant company's submission was a valid one except for the issue of lack of experience. The contracting authority's consultant proceeded by stating that, had the tenderer left the space available to declare one's experience blank, one might

have thought that there was some kind of error of omission. However, the tenderer indicated a definite ‘no’ which left no room for any other interpretation;

- ii. the benchmark of €50,000 was meant to ensure that the awarded bidder would be capable of executing the contract up to the desired standard;
- iii. confirmed that the preferred bidder, Joseph Cachia and Son Ltd, had declared in their submission that the works they submitted as evidence of experience were supervised by a team of foreign workers (Medi Impianti S.p.a) that had experience in this kind of installation, and that this same team was going to be engaged on the contract in question;
- iv. the preferred bidder listed three projects, namely two projects for ST Microelectronics (Malta) Ltd worth €56,000 and €65,000 and another project worth €57,000 for Steel Structures Ltd;
- v. the declaration of experience was made by Joseph Cachia & Son Ltd and hence the experience claimed was attributed to the preferred bidder;
- vi. no satisfactory execution certificate was requested in respect of the projects submitted to demonstrate experience but, at least, in the case of the preferred bidder, the contracting authority had the possibility to check them out because it had all the relevant details. In fact, the footnote at Annex 6 stipulated that failure *“to identify Client organisation will result in experience being discounted.”*

Mr Alfred Calascione, also representing the appellant company, reiterated that his firm opted to play a fair game and that was why it did not indicate contracts worth €50,000 and over because it did not have any project of that extent to its credit but, on the other hand, his firm did offer a guarantee on the works and the architect in charge had the authority to withhold payment or to impose penalties in case of breach of contract.

The Chairman PCRB observed that since the appellant company and the preferred bidder were going to use the same material, that supplied by Uniflair, then the differentiating factor seemed to be solely the installation. He added that, in the case of the appellant company, the adjudicating board had no submission to consider with regard to experience whereas in the case of the preferred bidder it had a written declaration and if that would turn out to be untrue then the bidder would face the consequences arising from a false declaration.

At this point Mr Calascione requested an explanation as to how the price offered by the recommended tenderer, which initially featured as €28, 445 on the ‘list of valid tender offers’ was subsequently reduced to €25,195 as per ‘recommendation to award’.

Dr Vella intervened to ask if it was the case that the preferred bidder had submitted two different prices.

Mr Paris explained that, following the technical examination of the tender submission, it turned out that one could extract two prices, the higher price referred to custom

fabricated material which had a particular kind of finish and the other lower price related to off-the-shelf material. Mr Paris added that although, initially, the figure of €28,445 was displayed, the original submission contained all the information wherefrom one could arrive at the price of €25,195, depending on the material selected. Mr Paris remarked that the consultant architect was satisfied with the off-the-shelf product and the contracting authority was happy to settle for the option which involved the disbursement of the least funds.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated 27 August 2010 and also through their verbal submissions presented during the public hearing held on 12 November 2010 had objected to the decision taken by the General Contracts Committee;
- having taken note of the appellant company's representatives' remarks particularly, (a) the fact that the company had the necessary experience to execute this contract as it has been in this line of business for the past 16 years during which time it had undertaken works at SmartCity and Portomaso, among others, (b) the fact that the company did not declare the relevant experience because the bidder's experience requested in clause 1.9 (b) and Annex 6 of the tender document related to, at least, three projects with a value of €50,000 or more whilst the company had, till then, carried out projects worth less than €50,000 and was reluctant to furnish erroneous information and, as a consequence, indicated a negative answer, (c) its claim that the kind of experience requested in this tender was considered excessive such that it precluded the appellant company from being in a position to declare the company's relevant experience and (d) the fact that the company was offering the same material/product as that of the recommended tenderer, namely that manufactured by Uniflair, with the difference that the said company was offering a price that was about €4,000 cheaper than that of the recommended tenderer;
- having also taken note of the contracting authority's representatives' (a) claim that, whilst sympathising with the appellant company's position, yet it was fair to state that such explanations should have been given at tender submission stage and not at appeal stage, (b) claim that the tenderer was free to ask for clarifications but it was not correct or ethical for the contracting authority to approach a tenderer to, for example, draw one's attention that one had indicated no experience, (c) reference to the fact that the adjudicating board had to assess on the documentation made available and that it could not rely on public knowledge or on what happened in past contracts, (d) reference to the fact that the appellants themselves had given a clear negative answer with regard to their experience in this line of work, which was a mandatory requirement, and, as a result, the adjudicating board had no other option but to reject the offer, (e) reference to the fact that albeit it was a fact that the appellant company's offer was the cheapest, yet even though the contracting authority would have preferred to save money, it could not, unfortunately, recommend award to a non compliant bidder and (f) explanation as to how the price offered by the recommended tenderer, which initially featured as €28, 445 on the 'list of valid tender offers' was subsequently reduced to €25,195 as per 'recommendation to award';
- having taken cognizance of Architect Mamo's testimony, especially, the points raised in connection with the fact that (a) the appellant company's submission was a valid

one except for the issue of lack of experience, (b) the benchmark of €50,000 was meant to ensure that the awarded bidder would be capable of executing the contract up to the desired standard, (c) the preferred bidder, Joseph Cachia and Son Ltd, had declared in their submission that the works they submitted as evidence of experience were supervised by a team of foreign workers (Medi Impianti S.p.a) that had experience in this kind of installation, and that this same team was going to be engaged on the contract in question, (d) the preferred bidder listed three projects, namely two projects for ST Microelectronics (Malta) Ltd worth €56,000 and €65,000 and another project worth €57,000 for Steel Structures Ltd and (e) the declaration of experience was made by Joseph Cachia & Son Ltd and hence the experience claimed was attributed to the preferred bidder,

reached the following conclusions, namely:

1. The PCAB feels that the tenderer had the opportunity to clarify with the contracting authority any issue prior to the closing date of the tender, such as whether it was admissible to include experience in the execution of contracts worth less than €50,000. The PCAB thus agrees with the contracting authority's statement wherein it was argued that explanations given by the appellant company at the public hearing should have been given at tender submission stage and not at appeal stage
2. The PCAB maintains that it was up to the appellant company to seek clarifications it deemed appropriate and not the other way round.
3. The PCAB opines that the €50,000 limit indicated in the tender document did not necessarily relate to the value of the contract itself but rather to the level of experience that the contractor was expected to have to carry out these works.
4. This Board argues that, in the case of the appellant company, the adjudicating board had no submission to consider with regard to experience whereas in the case of the preferred bidder it had a written declaration and if that would turn out to be untrue then the bidder would face the consequences arising from a false declaration.

As a consequence of (1) to (4) above this Board finds against appellant company.

In view of the above and in terms of the Public Contracts Regulations, LN 296 of 2010, this Board recommends that the deposit submitted by the said appellants should not be reimbursed.

Alfred R Triganza  
Chairman

Edwin Muscat  
Member

Carmel J Esposito  
Member

*18 November 2010*