

## PUBLIC CONTRACTS REVIEW BOARD

Case No. 337

**CT/2227/10; CT 0189/2010 HAM/47/2000**

**Tender for the Construction of 4 Apartments, 2 Penthouses, 6 Garages & 2 Car Spaces & Finishing of common parts at Plots 10 and 11 Angelo Psaila Street, Paola**

This call for tenders was published in the Government Gazette on 23<sup>rd</sup> November 2010. The closing date for this call with an estimated budget of € 197,892.36 (incl. of VAT) was the 18<sup>th</sup> January 2011.

Eleven (11) tenderers submitted their offers.

Sammut Concrete Supplies Ltd filed an objection on the 8<sup>th</sup> August 2011 against the decision by the Housing Authority to disqualify its tender on being found administratively non-compliant.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Carmel Esposito and Mr Joseph Croker as members convened a public hearing on Friday, 21<sup>st</sup> October 2011 to discuss this objection.

Present for the hearing were:

**Sammut Concrete Supplies Ltd**

Dr Edward Gatt	Legal Representative
Mr Matthew Sammut	Representative

**Rite Mix Ltd**

Mr Tano Zammit	Representative
Mr Matthew Paris	Representative

**Housing Authority (HA)**

Architect Andre Pizzuto	Executive Head
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**Evaluation Board:**

Mr Charles Vella	Chairman
Architect Alison Attard	Member
Architect Anthony Camilleri	Member
Ms Graziella Calleja	Secretary

After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of the company's objection.

Dr Edward Gatt, legal representative of Sammut Concrete Supplies Ltd, the appellant company, stated that, by letter dated 29<sup>th</sup> July 2011, the Contracts Department informed his client that the company's offer was found administratively not compliant because the bid bond was drawn up in the name of the Housing Authority and not in the name of the Contracts Department as specified in clause 20.1 of the tender document.

Dr Gatt made the following submissions:-

- i. he acknowledged that through a genuine oversight his client had drawn up the bid bond on the Housing Authority, the entity which was going to supervise the works, instead of on the Contracts Department, the contracting authority;
- ii. in the light of amendments that had been made to the Public Procurement Regulations with a view to giving tenderers the opportunity to rectify minor errors or shortcomings in their tender submissions so as to avoid the rejection of offers on trivial issues, it was expected that the contracting authority would approach his client to issue the bid bond in favour of the DG (Contracts);
- iii. although price was not the only consideration in the award of a tender it was pertinent to note that his client's offer was about €40,000 cheaper than that recommended for award;
- iv. as far as his client was concerned, economically it made no difference if the bid bond was in the name of the Housing Authority or in the name of the Contract Department;
- v. his client was experienced and had the capability to undertake this work; and
- vi. it was deemed unfair to disqualify his client on such a mere genuine mistake which could have been easily rectified.

Architect Andre Pizzuto, Executive Head at the Housing Authority, put forward the following remarks:-

- a. in the first instance, the appeal ought to have been rejected since it was lodged with the Department of Contracts instead of with the Public Contracts Review Board as per LN 296 of 2010;
- b. once the value of this tender exceeded the €120,000 mark then the bid bond was kept and maintained by the Department of Contracts;
- c. clause 20.1 of the tender document clearly stated, among other things, that:

- The tender guarantee must be drawn up in the name of the Director General of the Department of Contracts, Notre Dame Ravelin, Floriana, FRN 1600, Malta;
  - Tenderers will be requested to clarify/rectify, within two working days from the notification, the tender guarantee submitted, only in the following two circumstances, namely (a) either incorrect validity date and/or (b) incorrect value ... Failure to comply shall result in the tender offer not being considered any further;
  - Offers that are not accompanied with the mandatory Tender Guarantee (Bid Bond) by the Closing Date and Time of the tender will be automatically disqualified;
- d. Therefore, no rectification could have been requested in this case since it involved an error in the entity the bid bond was drawn upon.

Mr Charles Vella, chairman of the adjudicating board, remarked that:-

- i. on noting the discrepancy in the name of the entity on which the appellant company's bid bond was drawn, the Housing Authority contacted the Contracts Department which advised the adjudicating board to stick to the tender conditions and, as already explained, clause 20.1, led to the tenderer's disqualification in the appellant company's case; and
- ii. on receipt of the direction from the Contracts Department, the board then moved on to evaluate the other valid tenders which process took time since samples had to be requested and so forth.

Dr Gatt remarked that there was a time when his client had been requested to extend his company's bid bond, however, his attention had not been drawn to the fact that this bid bond had been erroneously addressed. The appellant company's legal advisor added that the expiry of a bid bond, in itself, led to the termination thereof and hence on renewing the bid bond, which was equivalent to the issue of a new one, it would have been opportune to ask his client to rectify the error by drawing up the renewed bid bond in favour of the DG (Contracts).

Architect Pizzuto remarked that, in this case, the Department of Contracts handled the relative bid bonds independently of the evaluation exercise that was being carried out by the adjudicating board of the Housing Authority. He added that, apart from the appellant company, there was another tenderer that had been disqualified for the same reason.

Mr Matthew Paris, legal representative of Rite Mix Ltd, the recommended tenderer, remarked that the appellant company's objection ought to be rejected because (a) the bid bond was erroneously drawn in favour of the Housing Authority, which was a mandatory requirement, and (b) the appeal itself was erroneously lodged with the Department of Contracts rather than with the Public Contracts Review Board.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellant's company, in terms of the reasoned letter of objection dated 5<sup>th</sup> August 2011 and which was duly filed on the 8<sup>th</sup> August 2011, and through the verbal submissions made during the hearing held on the 21<sup>st</sup> October 2011, had objected against the decision by the Housing Authority to disqualify its tender on being found administratively non-compliant;
- having noted the appellant firm's representatives claims and observations regarding the fact that (a) by letter dated 29<sup>th</sup> July 2011, the Contracts Department informed the appellant company that the company's offer was found administratively not compliant because the bid bond was drawn up in the name of the Housing Authority and not in the name of the Contracts Department as specified in clause 20.1 of the tender document, (b) the company acknowledged that, through a genuine oversight, the appellant company had drawn up the bid bond on the Housing Authority, the entity which was going to supervise the works, instead of on the Contracts Department, the contracting authority, (c) in the light of amendments that had been made to the Public Procurement Regulations with a view to giving tenderers the opportunity to rectify minor errors or shortcomings in their tender submissions so as to avoid the rejection of offers on trivial issues, it was expected that the contracting authority would approach the appellant company to issue the bid bond in favour of the DG (Contracts), (d) although price was not the only consideration in the award of a tender it was pertinent to note that the appellant company's offer was about €40,000 cheaper than that recommended for award, (e) as far as the appellant company was concerned, economically it made no difference if the bid bond was in the name of the Housing Authority or in the name of the Contract Department, (f) the appellant company was experienced and had the capability to undertake this work and (g) it was deemed unfair to disqualify anyone on such a mere genuine mistake which could have been easily rectified;
- having considered the contracting authority's representative's submissions, namely that (a) in the first instance, the appeal ought to have been rejected since it was lodged with the Department of Contracts instead of with the Public Contracts Review Board as per LN 296 of 2010, (b) once the value of this tender exceeded the €120,000 mark then the bid bond was kept and maintained by the Department of Contracts, (c) clause 20.1 of the tender document clearly stated, among other things, that the tender guarantee must be drawn up in the name of the Director General of the Department of Contracts, Notre Dame Ravelin, Floriana, FRN 1600 and that Malta tenderers will be requested to clarify/rectify, within two working days from the notification, the tender guarantee submitted, only in the following two circumstances, namely either (1) incorrect validity date and/or (2) incorrect value and that failure for anyone to comply shall result in the tender offer not being considered any further, (d) clause 20.1 of the tender document also clearly stated that offers that are not accompanied with the mandatory Tender Guarantee (Bid Bond) by the closing date and time of the tender will be automatically disqualified (e) no rectification could have been requested in this case since it involved an error in the entity the bid bond was drawn upon, (f) on noting the discrepancy in the name of the entity on which the appellant company's bid bond was drawn, the Housing Authority contacted the Contracts Department which advised the adjudicating board to stick to the tender conditions and, as already explained, clause 20.1, led to the tenderer's disqualification in the appellant company's case and that following receipt of the direction from the Contracts Department, the board then moved on to evaluate the other valid

tenders which process took time since samples had to be requested and so forth, (g) the Department of Contracts handled the relative bid bonds independently of the evaluation exercise that was being carried out by the adjudicating board of the Housing Authority and (h) apart from the appellant company, there was another tenderer that had been disqualified for the same reason;

- having also given due consideration to the recommended tenderer's representative's submissions, namely that the appellant company's objection ought to be rejected because (a) the bid bond was erroneously drawn in favour of the Housing Authority, which, *per se*, was a mandatory requirement and (b) the appeal itself was erroneously lodged with the Department of Contracts rather than with the Public Contracts Review Board,

reached the following conclusions:

1. The Public Contracts Review Board feels that, albeit that the appellant company, through a genuine oversight, may have drawn up the bid bond on the Housing Authority, the entity which was going to supervise the works, instead of on the Contracts Department, the contracting authority, yet this Board feels that this was a mandatory requirement and, regardless of whether the non submission was due to an oversight or not, had to be treated as such.
2. The Public Contracts Review Board disagrees with the argument raised by the appellant company when the latter referred to the fact that, in the light of amendments that had been made to the Public Procurement Regulations with a view to give tenderers the opportunity to rectify minor errors or shortcomings in their tender submissions so as to avoid the rejection of offers on trivial issues, it was expected that the contracting authority would approach the appellant company to issue the bid bond in favour of the DG (Contracts). This Board argues that the submission of mandatory requirements is not subject to rectification.
3. This Board also disagrees with the appellant company's reference to the fact that the evaluation board, regardless of whether the appellant company's offer was compliant or not due to the non submission of a mandatory requirement, had still to favourably consider its offer as it was about €40,000 cheaper than that of the recommended tenderer.
4. The Public Contracts Review Board notes that clause 20.1 of the tender document was clear enough stating, *inter alia*, that Malta tenderers will be requested to clarify/rectify, within two working days from the notification, the tender guarantee submitted, only in the following two circumstances, namely either (1) incorrect validity date and/or (2) incorrect value and that failure for anyone to comply shall result in the tender offer not being considered any further.

In view of the above this Board finds against the appellant company and recommends that the deposit paid by the latter should not be reimbursed.

Alfred R Triganza  
Chairman

Carmel Esposito  
Member

Joseph Croker  
Member

31 October 2011