

PUBLIC CONTRACTS REVIEW BOARD

Case No. 495

NLC/039/02

Tender for the Upgrading of Triq Castro – Naxxar Local Council

This call for tenders was published in the Government Gazette on the 22nd June 2012. The closing date for this call with an estimated budget of € 93,488.70 was the 24th July 2012.

Two (2) tenderers submitted their offers.

M.Quip Company Ltd filed an objection on the 9th October 2012 against the decision of the Naxxar Local Council to recommend the award of the tender to Avantgarde Projects Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Joseph Croker and Mr Paul Mifsud as members convened a public hearing on Tuesday, 27th November 2012 to discuss this objection.

M.Quip Company Ltd

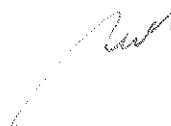
Mr Daniel Schembri	Director
--------------------	----------

Avartgarde Projects Ltd

Dr Leonard Caruana	Legal Representative
Mr Joseph Vella	Representative

Naxxar Local Councils

Dr Adrian Mallia	Legal Representative
Mr Paul Gatt	Executive Secretary
Arch. Paul Cuschieri	Adviser



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

Mr Daniel Schembri, representing M.Quip Ltd, the appellant company, submitted that:-

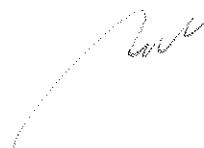
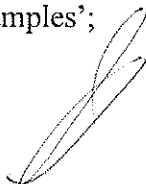
- i. by letter dated 5th October 2012 the Naxxar Local Council informed the company that the tender was recommended for award to Avantgarde Projects Ltd;
 - ii. the last para. of Annex 1 dealing with 'Urban Street Lighting' stated that "*The Contractor shall provide a sample of the offer at tendering stage*";
- and
- iii. from the 'Schedule of Rates' compiled by the contracting authority at tender opening stage it was noted that the recommended bidder had not submitted the samples in connection with street lighting and, as a consequence, the company's offer should have been disqualified forthwith.

Dr Adrian Mallia, legal representative of the Naxxar Local Council, explained that:-

- a. the contracting authority was not contesting what the appellant company had just claimed in the sense that the recommended tenderer did not submit the street lighting samples with its original tender submission but it submitted them after having been found technically compliant;
 - b. albeit the tender document did request the submission of these samples at tendering stage, yet the architect in charge requested these samples after the closing date for tenders, namely after the recommended tender was found compliant at technical evaluation stage;
- and
- c. what happened was that, in such instances, samples were usually requested after the closing date of the tender but prior to signing the contract so as to ascertain that the compliant technical literature submitted did, in fact, match the product which would actually be provided under the terms of this tender.

Dr Leonard Caruana, legal representative of the recommended tenderer, submitted that:-

- i. contrary to what the appellant company and the contracting authority were contending, the tender document indicated otherwise, that is, that the samples were not meant to be submitted with the original tender submission, so much so that:-
 - para. 04 of the 'Instructions to Tenderers' listed what 'a complete tender submission shall consist of' and none of the five items listed mentioned 'the submission of samples';



- the non submission of the samples did not necessarily lead to the disqualification of the tender according to the first page of the tender document which stated that *“Tenderers are advised that in addition to the clauses stipulated in the Instructions to Tenderers tender documents without a bid bond or with a bid bond of a lesser value than that stipulated, shall not be considered during adjudication stage and will thus be eliminated”*;
- similarly, clause 14 ‘Submissions’ of the ‘Instructions to Tenderers’ did not mention the samples at tender submission stage;
- the tenderer was requested to deposit the submission in an envelope in the tender box and, as a result, it followed that one could not physically insert the sample in the tender box;
- clause G 39 of the ‘Detailed Specifications’ read as follows *‘The contractor shall provide samples of pieces of equipment or installation material for the approval of the Engineer prior to ordering or commencing to work upon request’*;

and

- ii. the recommended tendere had, in fact, submitted the sample in question in August 2012.

Dr Mallia pointed out that clause G 39 and the last sentence of Annex 1 referred to the stage after the award of the contract so much so that they referred to the ‘contractor’ and not to the ‘tenderer’. He reiterated that, usually, tenderers were asked to submit such samples after having qualified from the technical evaluation but, in this case, the samples were requested during the tendering stage.

The Chairman Public Contracts Review Board noted that:-

- a. the General Conditions defined the ‘contractor’ as *“the person or persons whose tender has been accepted by the Local Council and shall also include any legal entity”*;
- b. on the other hand the ‘tenderer’ was a person or an entity which submitted a tender;
- c. the statement at Annex 1 ended with the following request *“The Contractor shall provide a sample of the offer at tendering stage”*;

and

- d. given the definition of ‘contractor’, it would appear that the sample was to be submitted by the ‘contractor’ following the award of the tender and not with the original tender submission.

Architect Paul Cuschieri, adviser to the Naxxar Local Council, remarked that it was not the intention of the contracting authority to ask for the submission of samples at tender submission stage.

Mr Schembri reiterated that the appellant company's understanding of Annex 1 was that the original tender submission had to include the technical specifications of the proposed street lighting and a sample which matched those technical specifications. He added that the non-submission of the sample by the recommended tenderer was noted by the contracting authority in the schedule of rates.

At this point the hearing came to a close.

This Board,


- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated the 8th October 2012 and also through its representatives verbal submissions presented during the hearing held on the 27th November 2012, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by letter dated 5th October 2012 the Naxxar Local Council informed the company that the tender was recommended for award to Avantgarde Projects Ltd, (b) the last paragraph of Annex 1 dealing with 'Urban Street Lighting' stated that "*The Contractor shall provide a sample of the offer at tendering stage*", (c) from the 'Schedule of Rates' compiled by the contracting authority at tender opening stage it was noted that the recommended bidder had not submitted the samples in connection with street lighting and, as a consequence, the company's offer should have been disqualified forthwith and (d) it was not the intention of the contracting authority to ask for the submission of samples at tender submission stage;
- having considered the contracting authority's representative's reference to the fact that (a) the contracting authority was not contesting what the appellant company had just claimed in the sense that the recommended tenderer did not submit the street lighting samples with its original tender submission but it submitted them after having been found technically compliant, (b) albeit the tender document did request the submission of these samples at tendering stage, yet the architect in charge requested these samples after the closing date for tenders, namely after the recommended tender was found compliant at technical evaluation stage, (c) what happened was that, in such instances, samples were usually requested after the closing date of the tender but prior to signing the contract so as to ascertain that the compliant technical literature submitted did, in fact, match the product which would actually be provided under the terms of this tender, (d) clause G 39 and the last sentence of Annex 1 referred to the stage after the award of the contract so much so that they referred to the 'contractor' and not to the 'tenderer', (e) tenderers were asked to submit such samples after having qualified from the technical evaluation but, in this case, the samples were requested during the tendering stage and (f) it was not the intention of the contracting authority to ask for the submission of samples at tender submission stage;

- having also considered the recommended tenderer's representative's reference to the fact that (a) contrary to what the appellant company and the contracting authority were contending, the tender document indicated otherwise, that is, that the samples were not meant to be submitted with the original tender submission, so much so that (1) para. 04 of the 'Instructions to Tenderers' listed what 'a complete tender submission shall consist of' and none of the five items listed mentioned 'the submission of samples', (2) the non submission of the samples did not necessarily lead to the disqualification of the tender according to the first page of the tender document which stated that "*Tenderers are advised that in addition to the clauses stipulated in the Instructions to Tenderers tender documents without a bid bond or with a bid bond of a lesser value than that stipulated, shall not be considered during adjudication stage and will thus be eliminated*", (3) similarly, clause 14 'Submissions' of the 'Instructions to Tenderers' did not mention the samples at tender submission stage, (4) the tenderer was requested to deposit the submission in an envelope in the tender box and, as a result, it followed that one could not physically insert the sample in the tender box, (5) clause G 39 of the 'Detailed Specifications' read as follows '*The contractor shall provide samples of pieces of equipment or installation material for the approval of the Engineer prior to ordering or commencing to work upon request*' and (6) the recommended tenderer had, in fact, submitted the sample in question in August 2012,

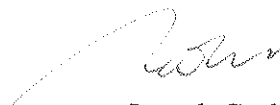
reached the following conclusions, namely:

1. The Public Contracts Review Board took cognisance of the fact that the 'General Conditions' defined (a) the 'contractor' as "*the person or persons whose tender has been accepted by the Local Council and shall also include any legal entity*" and (b) and the 'tenderer' as a person or an entity which submitted a tender. Considering that the statement at Annex 1 ended with the following request "*The Contractor shall provide a sample of the offer at tendering stage*" and, given the definition of 'contractor', the Public Contracts Review Board is clear about the fact that the sample in question had to be submitted by the 'contractor' following the award of the tender and not with the original tender submission.
2. In view of (1) above the Public Contracts Review Board establishes that the recommended bidder was right in not submitting the samples in connection with street lighting at tendering stage.

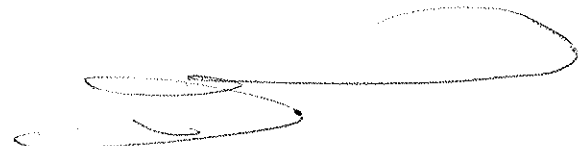
In conclusion this Board finds against the appellant company and recommends that the deposit paid by the same company for the appeal to be lodged should not be reimbursed.



Alfred R Triganza
Chairman



Joseph Croker
Member



Paul Mifsud
Member

4 December 2012