

PUBLIC CONTRACTS REVIEW BOARD

Case No. 518

MRRA/W/188/2011/6

Tender for the Supply and Laying of Natural Paving Material at Gnien Karen Grech and Community Centre at San Gwann

This call for tenders was published in the Government Gazette on the 14th September 2012. The closing date for this call with an estimated budget of €117,033.90 was the 28th September 2012.

Five (5) tenderers submitted their offers.

Attard Brothers Ltd filed an objection on the 4th December 2012 against the decision of the Works and Services Department (Ministry for Resources and Rural Affairs) to disqualify its offer as administratively non-compliant and to recommend the award of tender to SCH Joint Venture.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Joseph Croker and Mr Carmel Esposito as members convened a public hearing on Wednesday, 30th January 2013 to discuss this objection.

Present for the hearing were:

Attard Brothers Ltd

Mr Michael Attard	Chairman and CEO
Mr Carl Attard	Managing Director
Mr Matthew Micallef	Representative

SCH Joint Venture

Not. Matthew Pulis	Legal Representative
Mr Hugh Vella	Representative
Mr Andrea Vella	Representative
Mr Anton Schembri	Representative

Works and Services Department - Ministry for Resources and Rural Affairs

Dr Victoria Scerri	Legal Representative
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Evaluation Board

Architect Anton Camilleri	Chairman
Mr Emmanuel Buttigieg	Member
Mr Joseph Zerafa Boffa	Member
Mr Robert Fenech	Member

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

Mr Carl Attard, representing Attard Brothers Ltd, the appellant company, made the following submissions:

- i. by letter dated 27th November 2012 the appellant company was notified that its offer was adjudicated to be technically non-compliant because the comprehensive strength of the granite offered was less than that specified, namely it was 124 Mpa (megapascals) when the minimum was 125 Mpa;
- ii. the decision was considered disproportionate when considering that the difference of 1 Mpa was almost negligible in terms of quality and strength of the material offered and all the more when the value of which comprised only 4.6% of the offer and when considering that the bid was €18,760 or 15% cheaper than that recommended for award;

and

- iii. whilst, admittedly, the sample provided was certified as having 124 Mpa, yet, the contracting authority could have asked for a clarification in which case the appellant company would have confirmed that the material actually supplied would be up to or exceeding the 125 Mpa requested.

Architect Anton Camilleri, chairman of the evaluation board, explained that:-

- a. clause 8.4.13 provided that the 'bush hammered granite steps grey in colour' had to have a comprehensive strength greater or equal to 125 Mpa;
- b. according to the certificate presented with the sample submitted by the appellant company it was evident that the granite offered was not up to specifications with regard to comprehensive strength requirement and the evaluation board did not have any discretion to depart from the technical specifications;
- c. the granite submitted by the recommended tenderer had a comprehensive strength of 164 Mpa (as per evaluation report);
- d. there was no need for any clarification in this case because the certificate accompanying the sample was very clear in that it read 124 Mpa;
- e. technically speaking, it would not make much difference if the granite was 1 Mpa less than specified and, on a personal basis, the contracting authority would have had no hesitation in accepting it;

and

- f. it was advisable that bidders would first check that the certificate met the technical specifications because the evaluation board had its hands tied in such situations.

Mr Emmanuel Buttigieg, a member of the evaluation board, remarked that, whilst the comprehensive strength minimum of 125 Mpa was included in the tender document so as to set a standard, yet, in practice, a variation of 1 Mpa was insignificant to the quality of the product and, when such instances occurred, the contracting authority would find itself in an awkward position having to refuse a financially advantageous tender due to an almost negligible technical variation.

The Chairman Public Contracts Review Board expressed the view that, although standards had to be set in the drawing up of the tender document, yet, if one were to just limit the tender evaluation process to ticking whether or not the technical specifications had been met, then one might as well input the data into a computer and that would be that, but, the fact that experts were selected to sit on evaluation boards it would perhaps be more reasonable to allow the technical experts a measure of leeway with regard to the overall technical evaluation of the bid. He added that, in this case, the evaluation board had its hands tied.

Dr Matthew Paris, legal representative of the recommended tenderer, remarked that:-

- i. any anomalies with regard to the tender conditions/specifications had to be sorted out at pre-contractual remedy state and not at technical evaluation stage;
 - ii. once the bidder participated in the tendering procedure then that meant that one would have accepted the tender conditions and specifications;
- and
- iii. this tender had to be awarded to the cheapest tender which, however, had to satisfy the technical specifications and, evidently, the appellant company's offer was not technically compliant.

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 4th December 2012 and also through its representatives verbal submissions presented during the hearing held on the 30th January 2013, 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 27th November 2012 the appellant company was notified that its offer was adjudicated to be technically non-compliant because the comprehensive strength of the granite offered was less than that specified, namely it was 124 Mpa (megapascals) when the minimum was 125 Mpa, (b) the decision was considered disproportionate when

considering that the difference of 1 Mpa was almost negligible in terms of quality and strength of the material offered and all the more when the value of which comprised only 4.6% of the offer and when considering that the bid was €18,760 or 15% cheaper than that recommended for award and (c) whilst, admittedly, the sample provided was certified as having 124 Mpa, yet, the contracting authority could have asked for a clarification in which case the appellant company would have confirmed that the material actually supplied would be up to or exceeding the 125 Mpa requested;

- having considered the contracting authority's representative's reference to the fact that (a) clause 8.4.13 provided that the 'bush hammered granite steps grey in colour' had to have a comprehensive strength greater or equal to 125 Mpa, (b) according to the certificate presented with the sample submitted by the appellant company it was evident that the granite offered was not up to specifications with regard to comprehensive strength requirement and the evaluation board did not have any discretion to depart from the technical specifications, (c) the granite submitted by the recommended tenderer had a comprehensive strength of 164 Mpa (as per evaluation report), (d) there was no need for any clarification in this case because the certificate accompanying the sample was very clear in that it read 124 Mpa, (e) technically speaking, it would not make much difference if the granite was 1 Mpa less than specified and, on a personal basis, the contracting authority would have had no hesitation in accepting it, (f) it was advisable that bidders would first check that the certificate met the technical specifications because the evaluation board had its hands tied in such situations and (g) whilst the comprehensive strength minimum of 125 Mpa was included in the tender document so as to set a standard, yet, in practice, a variation of 1 Mpa was insignificant to the quality of the product and, when such instances occurred, the contracting authority would find itself in an awkward position having to refuse a financially advantageous tender due to an almost negligible technical variation;
- having also considered the recommended tenderer's reference to the fact that, (a) any anomalies with regard to the tender conditions/specifications had to be sorted out at pre-contractual remedy state and not at technical evaluation stage, (b) once the bidder participated in the tendering procedure then that meant that one would have accepted the tender conditions and specifications and (c) this tender had to be awarded to the cheapest tender which, however, had to satisfy the technical specifications and, evidently, the appellant company's offer was not technically compliant,

reached the following conclusions, namely:

1. The Public Contracts Review Board feels that, under normal circumstances, in this particular instance, the decision taken by the contracting authority could very well be considered disproportionate when considering that the difference of 1 Mpa was almost negligible in terms of quality and strength of the material offered and all the more when (a) the value of which comprised only 4.6% of the offer and (b) considering that the bid was €18,760 or 15% cheaper than that recommended for award.
2. This Board also acknowledges the fact that, during the hearing, the Chairman of the evaluation board himself remarked that, technically speaking, it would not make much difference if the granite was 1 Mpa less than specified.

3. The Public Contracts Review Board argues that, apart from the fact that the sample provided was certified as having 124 Mpa, the contracting authority was not allowed to seek any clarification in regard especially in view of the fact that clause 8.4.13 provided that the 'bush hammered granite steps grey in colour' had to have a comprehensive strength greater or equal to 125 Mpa.
4. This Board recognises the fact that, whilst the comprehensive strength minimum of 125 Mpa was included in the tender document so as to set a standard, yet, in practice, a variation of 1 Mpa was insignificant to the quality of the product and, when such instances occurred, the contracting authority would find itself in an awkward position having to refuse a financially advantageous tender due to an almost negligible technical variation.
5. This Board, however, also acknowledges the fact that this tender had to be awarded to the cheapest tender which had to satisfy the technical specifications and, evidently, the appellant company's offer was not technically compliant.
6. The Public Contracts Review Board argues that any anomalies with regard to the tender conditions/specifications had to be sorted out at pre-contractual remedy state and not at technical evaluation stage. As a consequence, the fact that the appellant company chose to participate implied that it had accepted the tender's conditions and specifications.
7. The Public Contracts Review Board expresses the view that, although standards had to be set in the drawing up of the tender document, yet, if one were to just limit the tender evaluation process to ticking whether or not the technical specifications had been met, then one might as well input the data into a computer and that would be that, but, the fact that experts were selected to sit on evaluation boards it would perhaps be more reasonable to allow the technical experts a measure of leeway with regard to the overall technical evaluation of the bid. Nevertheless, unfortunately, in this case, the evaluation board members had their hands tied.
8. This Board recommends that bidders should first check that a certificate meets the technical specifications because the evaluation board has, in many a similar instance, no discretionary powers whatsoever.

In view of the above 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

Carmel Esposito
Member

6 February 2013