

## PUBLIC CONTRACTS REVIEW BOARD

Case No. 556

**MXR/005/2012**

### **Tender for the Supply and Fixing of Pedestrian Guardrails and Construction of Pavements at Triq il-Kantra, ix-Xlendi and Supply and Fixing of Street Furniture for ix-Xlendi Bay**

This call for tenders was published in the Government Gazette on the 26<sup>th</sup> and 28<sup>th</sup> September 2012 respectively. The closing date for this call with an estimated budget of Lot 1 - €120,087.27 and Lot 2 - €69,918.70 (excl. VAT and Contract Manager) was the 29<sup>th</sup> October 2012.

Six (6) tenderers submitted their offers.

Bugeja Bros (Gozo) Ltd filed an objection on the 4<sup>th</sup> February 2013 against the decisions of the Munxar Local Council to disqualify its offers and to recommend the award of Lot 1 to Road Construction Ltd and Lot 2 to Mr Peter Paul Said.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Joseph Croker and Mr Carmel Esposito as members convened a public hearing on Wednesday, 22<sup>nd</sup> May 2013 to discuss this objection.

Present for the hearing were:

#### **Bugeja Bros. (Gozo) Ltd**

Dr John Gauci	Legal Representative
Mr Mario Bugeja	Representative
Architect Walter Portelli	Representative

#### **Road Construction Ltd – no one attended**

#### **Mr Peter Paul Said**

Dr Damien Bigeni	Legal Representative
Mr Peter Paul Said	Appellant's Representative

#### **Munxar Local Council**

Dr Mario Scerri	Legal Representative
Mr Joseph Sultana	Mayor
Mr Anthony Grech	Executive Secretary
Architect William Lewis	Adviser

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

Dr John Gauci, legal representative of Bugeja Bros. (Gozo) Ltd, the appellant company, made the following submissions:-

- i. by letter dated 25th January 2013 the contracting authority informed the appellant company that this tender was being recommended for award as follows:
  - Lot 1, concerning civil works, to Road Construction Ltd
  - Lot 2, concerning street furniture, to Mr Peter Paul Said;
- ii. the appellant company had submitted the cheapest offer with regard to both lots;  
  
and
- iii. according to the adjudication report dated January 2013 the appellant company was found to be non-compliant because (a) in Lot 1 the railing offered did not conform to the tender requirements and (b) in Lot 2 the appellant company submitted two options for 'benches', one cast locally and one imported. Yet, in this particular instance only the locally cast option was accompanied by the bill of quantities (BOQ) and, as a result, the options were not accepted since no separate BOQ was presented with each option.

#### **A) Lot 1 – Civil Works – Railings**

Dr Gauci explained that:-

- a. drawing No. 05 at page 68 of the tender document referred to, among other things, the proposed railing;
- b. following the appellant company's submission as to how it was going to supply this guard railing, the Munxar Local Council requested it, by email dated 17<sup>th</sup> November 2012, to present a diagram indicating which rods were solid and which ones were hollow as per quoted price of €112.50 per linear metre;
- c. in a previous email dated 15<sup>th</sup> November 2012, the appellant company had indicated that it could also provide vertical steel in circular shape at no extra cost if that was what was required besides pointing out that the drawings failed to specify type of section to be used for vertical steel;
- d. by email dated 19<sup>th</sup> November 2012 the appellant company informed the Council as follows:-

*“(Attached) Also a diagram showing the type of bars proposed in the railing. However one is to note that a section of 12.5m cannot be*

*galvanised as a whole section. Thus it has to be divided into sections and therefore square hollow sections are ideally used to facilitate jointing. Also rectangular hollow sections of 50\*25mm can be used. Re the horizontal bars, ideally a flat bar or a rectangular hollow section are used to avoid unsightly joints between two circular elements. There are many options that we are ready to provide with the price of Euro 12.50/lin.m. but these can be better discussed after you forward exactly your requirements”;*

- e. therefore the appellant company provided its suggestions as to how the work ought to be carried out and it was also prepared to abide by whatever the contracting authority had in mind at the quoted price and so one could not comprehend the comments made at page 10 of the evaluation report to the effect that “the tender requirement and the submission are different”;
- f. the evaluation report further stated at page 10 that “*following a clarification with Road Construction Ltd, Mr Victor Hili confirmed that the railing quoted for this tender is in line with the tender drawings/requirements*”;

and

- g. one could not comprehend how Road Construction Ltd was awarded the tender on the confirmation that it would provide what was requested whereas in the case of the appellant company, who likewise offered to provide according to tender requirements – apart from its suggestions – and who quoted the cheapest price, the offer was disqualified.

Dr Joe Scerri, legal representative of the contracting authority, submitted that:-

- i. albeit the tender document did not request options but the bidders were requested to provide the only option indicated in the tender document, yet the appellant company provided four options for the provision of the guard rails;
- ii. even if one were to overlook the fact that no options were requested for the guard rails still none of the options provided by the appellant company satisfied the drawings included in the tender document;
- iii. page 8 of the evaluation report reproduced the tender’s diagram (MXR 06) wherein it was indicated that the sections should be all circular and that they had to be galvanised metal rods;
- iv. in spite of those specifications, in all four options the appellant company proposed a 50mm diameter hollow section, 25mm\*4mm solid flat bars, a 50mm square hollow section and a 12 diameter circular solid section or a 16mm diameter hollow circular section, which specifications the appellant company confirmed in response to the clarification letter;
- v. whilst, following the clarification letter the appellant company limited itself to Option 1 which was the only one accompanied by the BOQ, yet, this option was still technically non-compliant;

and

- vi. although the tender specifications were quite clear, the appellant company stuck to the use of flat bars and hollow sections even after being requested to clarify its submission.

Architect William Lewis, adviser to the contracting authority, under oath, gave the following evidence:-

- a. the tender document requested three options only with regard to the finishing material of the pavement and in that respect the tender document provided three separate BOQs (pages 55 to 57 referred);
- b. the recommended tenderer had filled in the BOQ according to the diagram provided in the tender document without adding any comments and so, prior to assuming that it was going to abide by what was requested, the contracting authority asked for a confirmation that it was offering what was requested and the recommended bidder confirmed – the intention of the contracting authority was to make doubly sure;
- c. on the contrary, in its original tender submission Option 1 – reproduced in page 9 of the evaluation report - the appellant company had indicated that its offer included hollow sections, round pipes and flat bars when the diagram in the tender document referred to circular sections and galvanised solid bars and, when the contracting authority asked the appellant company for clarifications it, basically, confirmed its original submission;
- d. whilst when the contracting authority required options it explicitly asked for them in the tender document as was the case with the pavement concrete finishing, however, it requested no options with regard to the railings;

and

- e. albeit the appellant company submitted four options of railings although only Option 1 turned out to be complete, namely accompanied by the BOQ, yet none of the railings options offered by the appellant company reflected the one requested by the contracting authority.

Architect Walter Portelli, also representing the appellant company, explained that:-

- i. according to the diagram provided in the tender document, the vertical bars were not indicated as circular or rectangular however the horizontal bars were clearly indicated as circular;

and

- ii. the diagram the architect submitted on behalf of the appellant company with an email dated 19<sup>th</sup> November 2012 indicated horizontal bars as being made of

25mm\*4mm solid flat bars and 50mm diameter circular hollow section and, in addition, he offered to provide whatever the contracting authority would order.

The Chairman Public Contracts Review Board remarked that:-

- a. if it was not clear to the appellant company as to whether the vertical bars had to be circular or otherwise it's representatives should have asked for a clarification;
- b. with regard to the horizontal bars it was clear that they had to be circular but the appellant company offered solid flat bars and a circular hollow section;
- c. the bidder was not obliged to recommend alternatives but to provide what was requested in the tender document;

and

- d. once the original tender submission of the appellant company was not technically compliant then there should have been no room for any clarification.

Dr Gauci reiterated that although the appellant company offered alternatives it still offered to provide what was requested as, according to the evaluation report, was the case with the recommended tenderer.

## **B) Lot 2 – Street Furniture - Benches**

Dr Gauci explained that:-

- i. whilst, with regard to the provision of benches, the tender document requested options which the appellant company provided, yet its offers were excluded for not providing a separate bill of quantities for each option;
- ii. if, for the sake of the argument, the contracting authority discarded the option/s provided by the appellant company which could be termed as incomplete, namely without the relative BOQ, the fact remained that the appellant company had submitted one complete option which was the cheapest, however, the contracting authority discarded that option, apparently, because those benches were going to be manufactured locally so much so that, in this regard, the evaluation report (page 11) stated as follows:-

*“Bugeja Bros (Gozo) Ltd submitted two options for the benches, one cast locally and one imported ready-made. The locally cast price was included in the BOQ.*

*Options are not accepted since this was not presented as a separate BOQ.*

*Following a clarification with Peter Paul Said, it was confirmed that the concrete benches are imported from Italy and the benches of item 5 are made of recyclable material”;*

- iii. the tender document did not specify that the benches had to be made from recyclable material;
  - iv. it appeared that the preferred bidder confirmed that the benches would be imported from Italy only following a clarification;
- and
- v. it was evident that, in this case, the appellant company had submitted the cheapest compliant offer.

Architect Lewis remarked that:-

- a. the product offered by the preferred bidder was considered of a higher standard than that offered by the appellant company and since it was also within the budget it was recommended for award;
- and
- b. the product offered by the appellant company did meet the minimum tender specifications.

Architect Portelli remarked that in its tender submission the appellant company indicated that the bench was going to have a smooth finish in exposed grey concrete.

Dr Scerri pointed out that, once again, the appellant company presented two options, one for locally made benches and the other for imported ones - nevertheless, only the former was accompanied by the BOQ. He added that, although the appellant company's product met the minimum technical specifications when it came to analysing the finished product, the Local Council opted for that presented by Mr Peter Paul Said which was more attractive and highly finished.

Dr Gauci explained that:-

- i. the award criterion was the most favourable bid satisfying tender requirements as per clause 12 and, accordingly, lot 2 should be awarded to the appellant company;
- and
- ii. if the contracting authority wished to adjudicate the tender on the basis of the most economically advantageous tender then it should have laid that down in the tender document.

Dr Gauci concluded that the Public Contracts Review Board had to keep in view that each lot could be awarded to different bidders.

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 1<sup>st</sup> February 2013 and also through its representatives verbal submissions presented during the hearing held on the 22<sup>nd</sup> May 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 25<sup>th</sup> January 2013 the contracting authority informed the appellant company that this tender was being recommended for award as follows (1) Lot 1, concerning civil works, to Road Construction Ltd and (2) Lot 2, concerning street furniture, to Mr Peter Paul Said, (b) the appellant company had submitted the cheapest offer with regard to both lots, (c) according to the adjudication report dated January 2013 the appellant company was found to be non-compliant because (1) in Lot 1 the railing offered did not conform to the tender requirements and (2) in Lot 2 the appellant company submitted two options for ‘benches’, one cast locally and one imported, (d) in this particular instance only the locally cast option was accompanied by the bill of quantities (BOQ) and, as a result, the options were not accepted since no separate BOQ was presented with each option, (e) with regard to Lot 1 – Civil Works – Railings (1) drawing No. 05 at page 68 of the tender document referred to, among other things, the proposed railing, (2) following the appellant company’s submission as to how it was going to supply this guard railing, the Munxar Local Council requested it, by email dated 17<sup>th</sup> November 2012, to present a diagram indicating which rods were solid and which ones were hollow as per quoted price of €112.50 per linear metre, (3) in a previous email dated 15<sup>th</sup> November 2012, the appellant company had indicated that it could also provide vertical steel in circular shape at no extra cost if that was what was required besides pointing out that the drawings failed to specify type of section to be used for vertical steel, (4) by email dated 19<sup>th</sup> November 2012 the appellant company *attached a diagram*, (5) since the appellant company provided its suggestions as to how the work ought to be carried out and it was also prepared to abide by whatever the contracting authority had in mind at the quoted price, one could not comprehend the comments made at page 10 of the evaluation report to the effect that “the tender requirement and the submission are different”, (6) the evaluation report further stated at page 10 that “*following a clarification with Road Construction Ltd, Mr Victor Hili confirmed that the railing quoted for this tender is in line with the tender drawings/requirements*”, (7) one could not comprehend how Road Construction Ltd was awarded the tender on the confirmation that it would provide what was requested whereas, in the case of the appellant company, who, likewise, offered to provide according to tender requirements – apart from its suggestions – and who quoted the cheapest price, the offer was disqualified, (8) according to the diagram provided in the tender document, the vertical bars were not indicated as circular or rectangular however the horizontal bars were clearly indicated as circular, (9) the diagram the architect submitted on behalf of the appellant company with an email dated 19<sup>th</sup> November 2012 indicated horizontal bars as being made of 25mm\*4mm solid flat bars and 50mm diagram circular hollow section and, in addition, he offered to provide whatever the contracting authority would order and (10) although the appellant company offered alternatives it still offered to provide what was requested as,

according to the evaluation report, was the case with the recommended tenderer, (f) with regard to Lot 2 – Street Furniture – Benches (1) whilst, with regard to the provision of benches, the tender document requested options which the appellant company provided, yet its offers were excluded for not providing a separate bill of quantities for each option, (2) if, for the sake of the argument, the contracting authority discarded the option/s provided by the appellant company which could be termed as incomplete, namely without the relative BOQ, the fact remained that albeit the appellant company had submitted one complete option which was the cheapest, yet, the contracting authority discarded that option, apparently, because those benches were going to be manufactured locally so much so that, in this regard, the evaluation report (page 11) stated that *“Bugeja Bros (Gozo) Ltd submitted two options for the benches, one cast locally and one imported ready-made. The locally cast price was included in the BOQ. Options are not accepted since this was not presented as a separate BOQ. Following a clarification with Peter Paul Said, it was confirmed that the concrete benches are imported from Italy and the benches of item 5 are made of recyclable material”*, (3) the tender document did not specify that the benches had to be made from recyclable material, (4) it appeared that the preferred bidder confirmed that the benches would be imported from Italy only following a clarification, (5) it was evident that, in this case, the appellant company had submitted the cheapest compliant offer, (6) remarked that in its tender submission the appellant company indicated that the bench was going to have a smooth finish in exposed grey concrete, (7) the award criterion was the most favourable bid satisfying tender requirements as per clause 12 and, accordingly, lot 2 should be awarded to the appellant company, (8) if the contracting authority wished to adjudicate the tender on the basis of the most economically advantageous tender then it should have laid that down in the tender document and (8) the Public Contracts Review Board had to keep in view that each lot could be awarded to different bidders;

- having considered the contracting authority’s reference to the fact that (a) albeit the tender document did not request options but the bidders were requested to provide the only option indicated in the tender document, yet the appellant company provided four options for the provision of the guard rails, (b) even if one were to overlook the fact that no options were requested for the guard rails still none of the options provided by the appellant company satisfied the drawings included in the tender document, (c) page 8 of the evaluation report reproduced the tender’s diagram (MXR 06) wherein it was indicated that the sections should be all circular and that they had to be galvanised metal rods, (d) in spite of those specifications, in all four options the appellant company proposed a 50mm diameter hollow section, 25mm\*4mm solid flat bars, a 50mm square hollow section and a 12 diameter circular solid section or a 16mm diameter hollow circular section, which specifications the appellant company confirmed in response to the clarification letter, (e) whilst, following the clarification letter the appellant company limited itself to Option 1 which was the only one accompanied by the BOQ, yet, this option was still technically non-compliant, (f) although the tender specifications were quite clear, the appellant company stuck to the use of flat bars and hollow sections even after being requested to clarify its submission, (g) the tender document requested three options only with regard to the finishing material of the pavement and, in that respect, the tender document provided three separate BOQs (pages 55 to 57 referred), (h) the recommended tenderer had filled

in the BOQ according to the diagram provided in the tender document without adding any comments and so, prior to assuming that it was going to abide by what was requested, the contracting authority asked for a confirmation that it was offering what was requested and the recommended bidder confirmed – the intention of the contracting authority was to make doubly sure, (i) on the contrary, in its original tender submission Option 1 – reproduced in page 9 of the evaluation report - the appellant company had indicated that its offer included hollow sections, round pipes and flat bars when the diagram in the tender document referred to circular sections and galvanised solid bars and, when the contracting authority asked the appellant company for clarifications it, basically, confirmed its original submission, (j) whilst when the contracting authority required options it explicitly asked for them in the tender document as was the case with the pavement concrete finishing, yet, it requested no options with regard to the railings, (k) albeit the appellant company submitted four options of railings, although only Option 1 turned out to be complete, namely accompanied by the BOQ, yet none of the railings options offered by the appellant company reflected the one requested by the contracting authority, (l) the product offered by the preferred bidder was considered of a higher standard than that offered by the appellant company and since it was also within the budget it was recommended for award, (m) the product offered by the appellant company did meet the minimum tender specifications, (n) once again, the appellant company presented two options, one for locally made benches and the other for imported ones - nevertheless, only the former was accompanied by the BOQ and (o) although the appellant company's product met the minimum technical specifications, when it came to analysing the finished product, the Local Council opted for that presented by Mr Peter Paul Said which was more attractive and highly finished,

reached the following conclusions, namely:

1. The Public Contracts Review Board argues that if it was not clear to the appellant company as to whether the vertical bars had to be circular or otherwise its representatives should have asked for a clarification.
2. The Public Contracts Review Board opines that with regard to the horizontal bars it was clear that they had to be circular but the appellant company offered solid flat bars and a circular hollow section. This Board contends that a bidder was not obliged to recommend alternatives but to provide what was requested in the tender document.
3. The Public Contracts Review Board agrees with the 'modus operandi' adopted by the evaluation committee whereas, in the case of the recommended bidder it was not a rectification but a simple clarification but, with regard to the appellant company, it would have been a case of rectification had it accepted options to standard referred to in the tender document. This Board feels that once the original tender submission of the appellant company was not technically compliant then there was no scope for any clarification.
4. With regard to the street furniture this Board feels that, considering that during the hearing, Architect Lewis had stated under oath that the product offered by the appellant company did meet the minimum tender specifications thus

overcoming the administrative and technical stage, then all deliberations should have focused on the price factor and, as a consequence, the contracting authority had no right to opt for another tenderer's offer once that of the appellant company was lower in price. Needless to say that subjective opinion, whilst permissible in other circumstances, yet, at this juncture, during the course of an evaluation process, is not permissible.

In view of the above this Board finds

- A. Re Lot 1, concerning civil works, to Road Construction Ltd, against the appellant company;
- B. Re Lot 2, concerning street furniture, to Mr Peter Paul Said, in favour of the appellant company.

As a result, this Board also recommends that, apart from the appellant company's bid being reintegrated in the evaluation process with regard to Lot 2, this Board recommends also that the deposit paid by the same company for the appeal to be lodged should be reimbursed.

Alfred R Triganza  
Chairman

Joseph Croker  
Member

Carmel Esposito  
Member

*31<sup>st</sup> May 2013*