

PUBLIC CONTRACTS REVIEW BOARD

Case No. 630

eCT 3051/2013

Tender for Concrete Works and Finishes at St Paul's Link and Knights' Promenade – Dock One – Cospicua.

The tender was published on the 14th June 2013. The closing date was the 25th July 2013.

The estimated value of the Tender was €467,280 (Inclusive of VAT).

Three (3) bidders had submitted an offer.

On the 21st October 2013, Avantegarde Projects Limited filed an objection against the decision taken to disqualify its offer.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Tuesday 12th November 2013 to discuss the appeal.

Present for the hearing were:

Avantegarde Projects Limited - Appellant

Mr Joe Vella	Representative
Perit Joe Bugeja	Representative
Ms Yanika Vidal	Representative
Dr Marion Camilleri	Legal Representative

C&F Building Contractors Limited - Preferred Bidder

Mr Johann Farrugia	Representative
Mr Benjamin Muscat	Representative
Dr Gabrielle Scicluna	Legal Representative
Dr John Refalo	Legal Representative

Ministry for Transport - Contracting Authority

Mr Hector Chetcuti	Chairman Evaluation Board
Ms Katya Saliba	Secretary
Perit Mario Bonello	Member Evaluation Board
Mr Stephen Bonello	Member Evaluation Board
Ms Henriette Calleja	Member Evaluation Board
Dr Franca Giordmaina	Legal Representative

Department of Contracts

Mr Sandro Drago	Representative
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The Chairman made an introduction and invited appellant's representative to make her submissions.

Dr Marion Camilleri on behalf of the appellant referred to her client's letter of objection and contended that appellant does not agree with the reasons given by the evaluation board to discard appellant's offer. One reason for appellant's bid being considered administratively non-compliant was that appellant had submitted two projects carried out during the years between 2010 and 2012 instead of the required three. Dr Camilleri contended that this requisite was discriminatory because it did not allow new firms to participate in the tender. Appellant did in fact have the necessary experience but this was performed outside the requested period. Some of the projects were done on behalf of the same Ministry. This was why the appellant is contesting the decision to disqualify its bid. Dr Camilleri also pointed out that the relevant article quoted by the evaluation board, Article 7.1 (B) (ii) 1, does not exist. It is not found in the tender document.

The second reason for disqualifying appellant's bid, Dr Camilleri continued was that appellant had failed to assign a Key Expert for the post of Structural Engineer, and when requested by the evaluation board for clarification on this point, appellant did not confirm that Perit Joe Bugeja was the Key Expert. Dr Camilleri asked Perit Joe Bugeja to explain this point.

Perit Joe Bugeja on behalf of the appellant said that when appellant listed him as the Structural Engineer it was in order because he had a vast structural back ground. The works requested in the tender comprise also works that are not structural and well within his competence.

Mr Joe Vella on behalf of the appellant stated that in the tender in question, appellant had submitted four projects and not three, as proof of experience. Three of these were provided to the same Ministry, and one of these was not yet completed because of the client. This project had to be completed in 2012 and had it been so, the appellant would have been compliant in the present tender. The tender asked for three projects carried out during 2010, 2011 and 2012 and appellant had submitted four projects carried out during 2012 and 2013. He also said that the structural element of the present tender was minimal and so asking for structural works experience for three years is not proportional and does not make sense.

Dr Franca Giordmaina on behalf of the contracting authority started by saying that the letter of objection failed to give any reason for the grievances on which the objection was based. The evaluation report gave two fundamental reasons for the rejection of appellant's bid. One was the issue of lack of experience of the appellant in structural works. Concrete works in the current tender amounted to 40% of the project and are not therefore minimal as alleged by the appellant. In its bid, Avantgarde submitted its experience in tile laying. The evaluation board felt that appellant lacked experience in concrete works. The other issue was that of the site engineer. Albeit appellant indicated Perit Joe Bugeja, who undoubtedly has great experience in the field, a request for clarification issued by the evaluation board asking for the identification of the person responsible for the structural works, no clear reply was given by appellant that identified the key expert. Perit Joe Bugeja was identified as being the site engineer but not as the Key Expert, the structural engineer. The submission of the Key Expert was mandatory and one of the selection criteria.

Regarding Article 7.1, Dr Franca Giordmaina continued, that the evaluation board, although the Article was clear in itself, had asked for clarification from appellant but the appellant had

still not complied.

Mr Hector Chetcuti, the Chairman Evaluation Board, on behalf of the contracting authority said that when the evaluation board had examined the four projects submitted by appellant to prove experience, it was found that these were outside the limits requested in the tender. But these were examined just the same. The evaluation board issued a clarification to the appellant wherein appellant was asked to identify which of these four projects included structural works, and which were for finishes. Appellant was also asked to quantify the values and to submit references. No reply was received from the appellant. The tender had a clause that the contracting authority had the right to contact bidders' clients about the works that had been performed for them by the bidders. Using this clause, the evaluation board contacted appellant's clients for the four projects submitted. One of these clients was FTS at tal-Handaq and the project was for tiling and marble works at St Ignatius College. Two other projects were for the Works Department and it resulted that the works in question were for paving. The last project submitted by appellant was for the paving of Paolino Vassallo Square Cospicua. Thus the evaluation board had no projects involving concrete structures to assess. As regard the site engineer, there were four mandatory requisites. The key experts had to have certain qualifications and in the list submitted by the appellant there were three instead of four. The bid contained CVs and the declaration of exclusivity. This declaration of exclusivity however referred to another tender, 3057/2013 and not to the present one. All these points induced the evaluation board to decide that appellant's bid was not administratively compliant.

The Chairman asked for the reason why the appellant did not reply to the clarification request made by the evaluation board.

Mr Joe Vella on behalf of the appellant here submitted a screen shot from his computer showing the date and time when it was sent. This showed that appellant had in fact replied to the clarification.

Mr Hector Chetcuti remarked and pointed out that the screen shot submitted by Mr Joe Vella in fact was in connection with another tender, CT 3057/2013 and not in connection with the present tender. This was not received by the evaluation board. Any correspondence sent electronically was entered on line and downloaded by the evaluation board.

Dr Franca Giordmaina explained that the declarations in question, whilst referring to tender CT 3057/2013 were in fact attached to the present tender CT 3051/2013 and had nothing to do with this latter tender. The evaluation board did not examine these since they referred to another tender.

Mr Joe Vella explained that there were three tenders that closed on the same date, 3051, 3056 and 3057. Appellant had submitted bids for all three tenders. Tenders 3056 and 3057 were not awarded to appellant, but the evaluation board had requested clarifications also in those two other tenders. In tender 3051 the only clarification appellant received was about the structure. Mr Vella reiterated that there were no structural works involve.

Replying to a question of the Board whether the documents in question would have satisfied the requisites, had these been made available to the evaluation board, Dr Franca Giordmaina said that these satisfied only one point in that the structural engineer was identified. The other point regarding the experience in structural works has remained not satisfied. She reaffirmed

that the structure element of the tender was 39%.

Perit Mario Bonello under oath for the contracting authority said that the structural works in the tender were for: i) repairs of existing structures that had been considered not up to standard. Here the works involved the laying of fair-faced concrete which had been badly done by the previous contractor; ii) the completion of other structures from the start to finish. These included stairways, lift structure and platforms, all having fair-faced finishing. These needed expert workmanship. In fact the tender comprised two elements of work, the finishing and the structural, that could have been issued as two separate tenders. This was however avoided because in the past experience has shown that it would be difficult to co-ordinate the works, and it was decided to incorporate the two tenders. The structural works component has been identified at 39% of the project.

Dr John Refalo on behalf of the recommended bidder remarked that the PCRB had to examine whether the evaluation process adhered to the regulations. He brought the attention of the Board that the letter of objection failed to give any reasons for the objection. The preferred bidder was therefore denied the possibility of preparing adequately for the hearing. Dr Refalo continued that the letter of rejection of the 10th October 2013 clearly stated the reasons for appellant's rejection. One was because of lack of necessary experience and the other because of non-identification of the Key Expert. The reply given by appellant to the clarification was in fact sent, but the reply quoted another tender reference and not the present tender.

Dr Giordmaina finally pointed out that the appellant after all could have had another solution if its experience was not enough for the tender requisites. The tender allowed for sub-contracting and appellant could have sub-contracted and profited by the experience of the sub-contractor. But this solution was not resorted to. The evaluation board in this case was flexible, and had tried to remedy by the clarification, but this was not forthcoming and the evaluation board had no option but to disqualify appellant.

Here the hearing was brought to a close.

This Board,

Having noted the Appellant's objection , in terms of the 'Reasoned letter of Objection' dated 19th October 2013 and also through the Appellant's verbal submissions during the hearing held on 12th November 2013 , had objected to the decision taken by the pertinent Authority, in that:

- a) The Appellant submitted two projects instead of three as was required in the tender document. The Appellant contends that the requirement of 'three projects' was a discrimination and a deterrent factor to new bidders.**
- b) Another reason for the Appellant's to be discarded was due to the fact that Appellant failed to submit the requested regarding the 'Key Expert' on this project.**

- c) **The Appellant contends that the Architects listed in the tender documentation had enough experience to satisfy the requirements of the tender works.**
- d) **The Appellant had listed more projects than the required three as specified in the tender document.**

Having considered the Contracting Authority's verbal submissions during the hearing held on 12th November 2013, in that:

- a) **Apart from the fact that the Appellant failed to specify the reasons for his objection, the Evaluation Board established two basic reasons for his bid's refusal, as follows:**
 - i) **The expertise as requested in the tender document entailed a high knowledge of concrete works. This amounted to 40% of the tender works.**
 - ii) **The tender document clearly specified the technical mandatory qualifications and experience needed for the proper execution of the tender works.**
- b) **The Appellant did not submit the required information with regards to the mention of the 'Key Expert' to the project as stipulated in the tender.**

Reached the following conclusions:

- 1. The Appellant's bid did not satisfy the conditions as stipulated in the tender document. The mandatory requirements were of vital importance to the execution of the tender works.**
- 2. The technical Evaluators of the Evaluation Board clearly informed this Board of the importance of the experience required of the Appellant's bid to offer the necessary services according to the tender document's conditions.**

In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar
Chairman

Dr. Charles Cassar
Member

Mr. Lawrence Ancillieri
Member

4 December 2013