

PUBLIC CONTRACTS REVIEW BOARD

Case No. 683

TM 052/2013

Provision of vehicles and Pedestrian Restrain System and Various Metal Works (North Region).

The tender was published on the 15th November 2013. The closing date was the 12th December 2013.

The estimated value of the tender was €103,500 (Excluding VAT).

Three (3) bidders had submitted their offer.

On the 21st February 2014 B Grima & Sons Limited filed an objection against its bid being deemed non-compliant and against the proposed award of the tender to Road Maintenance Services Limited.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Thursday 3rd April 2014 to discuss this objection.

Present for the hearing were:

B Grima & Sons Limited - Appellant

Mr Adam Grima	Representative
Dr Tonio Cachia	Legal Representative

No representatives from the **preferred bidder Road Maintenance Services Limited** were present.

Transport Malta - Contracting Authority

Mr Josef Mercieca	Chairman Evaluation Board
Mr William Vella	Secretary Evaluation Board
Mr Saviour Ellul	Member Evaluation Board
Ms Sarah Pace	Member Evaluation Board
Ms Sarah Anastasi	Member Evaluation Board
Ms Liz Markham	Representative
Dr Joseph Camilleri	Legal Representative
Mr Ray Stafrace	Representative

The Chairman introduced the case briefly and asked the appellant's representative to make his submissions.

Dr Tonio Cachia on behalf of the appellant explained that the objection was based on two

grievances because the first reason given to his client for not being awarded the tender was succeeded by another notice giving a completely different reason.

The first notice stated that appellant's bid was not accepted because it was not the cheapest and had ranked second. However since appellant's offer was in fact the cheapest he made enquiries about this to the contracting authority he had received another notice stating that his bid was discarded because it was technically non compliant since it did not show the minimum value of projects of €50,000 per annum.

Dr Cachia explained that decisions, once given cannot be just changed, cannot be summarily revoked. Any decision should have only been revoked by the PCR. He insisted that the first reason given to his client, that its bid was not the cheapest should prevail, in which case it would be proved that on the contrary, it was the cheapest. Regarding the second reason later given for his client's disqualification where it stated that the tender "*was not technically compliant in relation to Article 16.1 (d) of the Instructions to Tenderers and as required by article 6.1.1 The minimum value of projects of a similar nature completed was less than the required €50,000 per annum.*" should have been explained in more detail. His client contends that his bid was in fact compliant.

Dr Joseph Camilleri on behalf of the contracting authority said the tender was issued as being awarded to the cheapest compliant tenderer. The tender was not just for any road works but included metal works for example like crash barriers. All bidders had to show that they had the necessary experience by giving at least works amounting to at least €50,000 per year for each of the preceding three years. Appellant had indeed submitted projects in excess of this amount but however the works submitted did not refer to road works. Many of them referred to road markings and sign fixing which although being works done on roads are not of a similar nature. They are not the same safety features as crash barriers or metal works. The tender's technical requirements show that bidders had to show the nature of the works done, it is a totally different product from road markings. The evaluation report shows that in appellant's case, the evaluation board ticked off work considered to be of a similar nature. Page 64 of the tender for example shows "supply and installation of crash barriers" south region etc was taken into consideration. Other works, for example painting of road markings or reflective markers were not in conformity with requirements and were not considered. Appellant's bid submitted only projects for the year 2012, which was a problem since the tender required €50,000 over three years. The only project of a certain value was of €51,817-upgrading of various arterial road. But this only covered one year, 2012. The value of works done in 2010 and 2011 were not given.

Dr Joseph Camilleri admitted that the first notice to appellant had been erroneously issued. However he insisted that it was not the decision of the evaluation board that was changed in the second notice but only the notice informing appellant of the reason. He admitted that perhaps more details should have been given to the appellant. This perhaps justified the reimbursement of the deposit made by appellant but was not a reason to overrule the evaluation board's decision.

Dr Tonio Cachia on behalf of the appellant said that the tender scope identified three types of works design and installation of crash barriers, design and installation of pedestrian restraint systems and design and installation of chain link fencing. These are similar but not identical. At page 41 the tender also included ancillary works such as excavation levelling etc. The tender thus speaks of generic works and not specific. In this case the CPV code was not given. The works required in the tender are covered by CPV code 45232. Crash barriers have a specific code. The works covered by the tender cannot be listed under one CPV code.

CPV code 45232 covers road barriers, road signs, bollards, street furniture and signals and safety equipment. Therefore contends that similar works included the works submitted by the appellant because similar does not mean identical and that appellant's bid was compliant.

Ms Liz Markham on behalf of the contracting authority said that the CPV codes are used for specific types of jobs and the contracting authority chose not to give these codes in order not to restrict the choice of jobs, not to be tied down.

The Chairman said that he required someone from the evaluation board with technical capacities because he wanted an explanation about whether the similar works submitted by appellant have any connection with what the tender asked.

Ms Liz Markham explained that the evaluation board had a technical consultant to help but this person has not been asked to attend today's hearing.

The Chairman explained that the Board would appoint a technical referee who would examine whether the works submitted by the appellant in his bid was in conformity with what the tender asked for.

The hearing was brought to a close at this point.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 21st February 2014 and also through Appellant's verbal submissions during the hearing held on 3rd April 2014, had objected to the decision taken by the pertinent Authority, in that:

- a) Appellant received the 'notice of refusal'; the reason given by the Contracting Authority, that Appellant's offer was not the cheapest. Later on, Appellant received another 'notice of refusal'; the reason given was that Appellant's bid was not technically compliant.**
- b) Appellant contends that his offer was technically compliant and that he satisfied the necessary experience clause as laid out in the tender document.**

Having considered the Contracting Authority's verbal submissions during the hearing held on 3rd April 2014, in that:

- a) Appellant had to prove that 'works of a similar nature' amounting to Euros50000 per annum for the years 2010, 2011 and 2012 were carried out by same. In this regard, Appellant failed to comply with this mandatory requirement.**
- b) The Contracting Authority acknowledges the fact that originally, the incorrect reason was communicated to the Appellant in the 'notice of refusal', however this was an administrative /clerical error. At the same time, the Contracting**

Authority contends that in actual fact, Appellant's bid was technically non compliant. So that the reason given in the second 'notice of refusal' was correct.

Reached the following conclusions:

- 1. This Board opines that Contracting Authorities are obliged to state the specific and detailed reasons in the 'Letter of Refusals' which are communicated to unsuccessful bidders.**
- 2. From submissions made by both the Appellant and the Contracting Authority, this Board notes that the Appellant failed to meet the 'experience criteria' , in that Appellant did not satisfy the minimum requirement of similar works carried out per annum for the years 2010, 2011 and 2012 In this regard, Appellant's bid was technically non compliant.**
- 3. In terms of Regulation Part XIV Clause 7 (i) of the Public Procurement Regulations, this Board appointed an independent Engineer to advice the Board whether the Appellant's offer was technically compliant or not.**
- 4. The appointed 'Expert Report' concludes that: 'Quote' the Appellant's bid failed to meet the criteria of Euros 50000 per annum. The Appellant has also failed to provide in a clear manner, evidence that works of a similar nature have been carried out 'Unquote'. In this regard, this Board opines that the Appellant's offer was technically non compliant.**

In view of the above, this Board finds against the Appellant Company, however due to an original erred communication to the Appellant, this same Board recommends that the deposit paid by Appellant should be reimbursed.

Dr. Anthony Cassar
Chairman

Dr. Charles Cassar
Member

Mr. Richard A. Matrenza
Member

29 April 2014