

PUBLIC CONTRACTS REVIEW BOARD

Case No. 685

02/2012: Upgrading Works (Construction and Finishing) at Victoria Playing Field.

The tender was published on the 9th March 2012. The closing date was the 10th April 2012.

The estimated value of the Tender was €249,486.50.

Five (5) bids had been received for this tender.

On the 11th September 2012 Gatt Tarmac Limited filed an objection against the award of the tender.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Mr Richard A Matrenza and Mr Lawrence Ancilleri as members convened a hearing on Tuesday the 8th April 2014 to discuss the objection.

Present for the hearing were:

Gatt Tarmac Limited - Appellant

Mr Mario Gatt	Director
Dr Noel Camilleri	Legal Advisor

Messrs. Patrick and Dominic Refalo - Preferred Bidders

No one was present.

Victoria Local Council - Contracting Authority

Ms Miriam Attard	Executive Secretary
Dr Georgianne Schembri	Legal Representative

Department of Contracts

Ms Phyllis Mercieca	Representative
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At the opening of the hearing the Chairman Public Contracts Review Board explained that this Board is an autonomous Board and no one should try to put political pressure on any of its members as this is unacceptable.

He then made a brief introduction and invited appellant's representative to make his submissions regarding the objection.

Dr Noel Camilleri on behalf of his clients Gatt Tarmac Ltd. He said that he had just been handed a copy of the letter of reply by the contracting authority and said that the question of notification had been settled by the Court of Appeal. Regarding the merits of the case he referred to the letter of objection which dealt exhaustively with the matter. In short it amounts to the fact that the evaluation board had asked the advice of the Director of Contracts about the lack of submission of samples; the Director of Contracts in a first reply advised the contracting authority to disqualify the preferred bidder since he did not produce the samples. Subsequently the evaluation board asked the Department of Contracts further advice and continued with the adjudication of the tender without waiting for the reply from the Department. According to page 29 of the tender document, paragraph "4. Samples" stated that samples of all paving slabs being requested in bill of quantities. However it results that the preferred bidder had not submitted the required samples. He contended that since the preferred bidder failed to submit these samples which after all formed the material that would be used for the works, then the preferred bidder was not compliant. The preferred bidder only submitted the samples after he was awarded the tender. Dr Camilleri asked hypothetically what would be the result if these samples were to be found not according to specifications. The contracting authority is citing article 16.1 but this is generic and one has to see the relevant headings for the specific requirements. Heading 4 is clear and requires the submission of the samples. The evaluation board could not have proceeded to recommend the award to the preferred bidder.

Dr Georgianne Schembri on behalf of the contracting authority said that the decision of the award was based on clause 16 of the tender document. The last sentence of this clause states "tenderers are not required nor expected to submit with their offer any component except those specifically mentioned in clause 16". This is found at page 11 of the tender document. This clause is thus the bidders' check list regarding documents to be submitted with the tender. This checklist does not require the submission of the samples. In fact the preferred bidder enclosed a note with his offer wherein he explained why the samples were not submitted because it was not apparently requested by clause 16. This was not an omission. The samples were not submitted because they were not requested but added that the samples would be submitted as soon as the contracting authority asked for them. It is true that the evaluation board could not adjudicate without having the samples but the board could ask for the samples at any time. The Department of Contract's advice had been that if the production of samples was mandatory, then any bid not submitting them should be rejected. As per clause 16 the preferred bidder did not need to submit samples with bid.

On being asked by the Chairman whether section 4 of the tender at page 29 should prevail or clause 16, Dr Schembri continued that clause 16 being the checklist prevailed. The evaluation board followed the advice of the Department of Contracts about mandatory requirements. The evaluation board felt that it had enough information and could continue to adjudicate. This tender involve European Funds and the evaluation board where pressed to adjudicate. The second advice sought from the Department of Contracts could take some time to be answered and thus the evaluation board elected not to wait for it and felt confident that it could decide then.

Dr Noel Camilleri on behalf of the appellant said that all the other bidders submitted both literature and samples. Only the preferred bidder failed to do so. This was because part 4 was clear that samples had to be submitted. The Department of Contracts advice was that if samples were mandatory, any bidder not submitting them should be rejected, and this advice was correct. In this case both the literature and the samples were included in the checklist. He also commented on the preferred bidder's experience. This was also incorrect because the preferred bidder was awarded the Gharb tender, to form the square. This could not count as a restoration project. Yet there he had used similar material that was not according to specifications. He contended that the preferred bidders' offer should have been disqualified both immediately as well as after the submission of the samples.

Dr Georgianne Schembri for the Contracting Authority reiterated that the preferred bidder stated in his tender that no samples were being submitted but also that these samples could be produced on demand. The Gharb project mentioned by the appellant was for restoration works and not paving works. To show work experience, the preferred bidders had submitted a list of works they did, certified by their accountant. If the present tender was misleading, the Council did not deem it fit to stop the proceedings. The first advice from the Department of Contracts was that if the production of samples was mandatory then the bid should be rejected if samples were not produced. The second advice was sought on the 27th June 2012, a reminder was sent on the 18th July 2012 and the evaluation board decided that if no reply was received by the then they would continue with the evaluation.

Dr Noel Camilleri for the appellant showed the Board page 24 of his client's bid. He contended that the preferred bidder did not sign this form. The samples were produced by the preferred bidder only after the evaluation board asked for them and contended that if these samples were not mandatory the evaluation board should not have requested them.

Dr Schembri said that page 24 is just a checklist and there is no mention of production of samples.

Ms Miriam Attard, Executive Secretary for the contracting authority said that the samples from the preferred bidder were requested afterwards and were tested. She said that if these were found not to be up to specifications, she imagined that a different decision would have been taken.

At this point the hearing was brought to a close.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 10th September 2012 and also through Appellant's verbal submissions during the hearing held on 8th April 2014, had objected to the decision taken by the pertinent Authority, in that:

- a) Appellant contends that the decision taken by the Contracting Authority was never communicated to him.**

- b) The Preferred Bidder did not submit samples as requested on page 29 of the tender document and to this effect the Preferred Bidder's offer should have been discarded.**
- c) When the Evaluation Board asked for the submission of the 'strength certificate', only the Appellant complied to this request.**
- d) The Preferred Bidder's offer does not satisfy the 'experience clause'.**

Having considered the Contracting Authority's 'Letter of Reply' dated 17th September 2012 and the verbal submissions during the hearing held on 8th April 2014, in that:

- a) Appellant was informed of the Contracting Authority's decision by way of a 'registered mail'.**
- b) The Preferred Bidder did in fact submit the 'Literature' as requested in the tender document.**
- c) All tenderers submitted the 'strength certificate' upon request by the Evaluation Board.**
- d) The Preferred Bidder did satisfy the 'experience clause' as dictated in the tender document. The list of similar works carried out by the preferred bidder was also certified by an Accountant.**

Reached the following conclusions:

- 1. From submissions and documentation presented by the Contracting Authority, it is evidently clear that the Appellant was in fact informed of the Contracting Authority's decision via 'registered mail'. This is sufficient proof that communication between the Contracting Authority and Appellant did occur.**
- 2. In accordance with clause 16 of the tender document, same clause states that "Tenderers are not required nor expected to submit, with their offer, any components of the tender document except those specifically mentioned in clause 16." Clause 16 did not impose the submission of samples. This Board notes also the Preferred Bidder's letter dated 5th April 2012 wherein a clarification was correctly made to the Contracting Authority, regarding the submission of samples.**
- 3. This Board, after verifying documentation submitted by tenderers, establish the fact that all bidders submitted the requested 'strength certificate'.**

4. This Board opines that the list of works carried out by Appellant and as certified by an Accountant, did in fact satisfy the ‘experience clause’ as requested in the tender document.

5. The Preferred Bidder’s offer was the cheapest fully compliant bid.

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

Dr. Anthony Cassar
Chairman

Mr. Richard A. Matrenza
Member

Mr. Lawrence Ancilleri
Member

19 May 2014