

PUBLIC CONTRACTS REVIEW BOARD

Case No. 707

WBG 10/2014

Quotation for the Supply and Delivery of Franka Stone as Directed by the Directorate of Projects and Development (Period Contract).

The tender was published on the 28th January 2014. The closing date was the 7th February 2014.

Two (2) quotations have been received.

On the 5th March 2014 Bugeja Bros (Gozo) Limited filed an objection against the award of the tender to Joseph Attard.

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 the 3rd June 2014 to discuss the objection.

Present for the hearing were:

Bugeja Bros Limited - Appellant

Mr Mario Bugeja	Representative
Dr John L. Gauci	Legal Representative

Mr Joseph Attard - Preferred Bidder

Mr Joseph Attard	Representative
------------------	----------------

Ministry for Gozo - Contracting Authority

Mr Saviour Tabone	Chairman Evaluation Board
Mr Saviour Bonello	Member Evaluation Board
Mr Adeodato Mercieca	Member Evaluation Board
Mr Reno Grech	Director
Dr Tatianne Scicluna Cassar	Legal Representative

Witnesses:

Ms Aimee Brincat	MEPA Representative
Mr Charles Gafa`	MEPA Representative
Mr Gordon Grech	MEPA Representative
Ms Miriam Micallef Sultana	MRA Representative

The Chairman made a brief introduction during which he remarked to the contracting authority that the tender documents submitted had been forwarded to the Public Contracts Review Board in an open envelope. He explained that such documents should be forwarded in a closed package. He then asked the appellant's representative to make his submissions.

Dr John L. Gauci on behalf of the appellant said that appellant's offer had been rejected since it was not the cheapest. Appellant's objection was based on the main point that the preferred bidder's quotation was not compliant. He contended that while Clause 6.1.2 of the quotation document stated that "*Bidder must produce evidence that the quarry from which the franka stone is supplied is operating with all the necessary permits/licences*", the quarry owned by the preferred bidder is not covered by a valid permit. In fact an enforcement notice has been issued on this quarry. There is enough proof from official sources that the extension of the quarry used by the preferred bidder has an enforcement notice. Here he requested to hear the evidence of MEPA employees who would testify on the facts.

Mr Charles Gafa` Id, No 243669M under oath said that he has produced file number PA 5043/07 which refers to quarry number 4 San Lawrenz Gozo and the applicant is Joseph Attard Id. No 51953G. The file refers to a request to regularise extension of soft stone quarry number 4. The application was still pending. He also referred to file PA 5212/08 which refers to an application by Joseph and Randu Zammit Id. Nos 93044G and 51949G to sanction the extension of an existing quarry and this application was still pending. He also referred to enforcement notice ECF 454/98. The contravener in this case was Joseph Attard of Xaghra and was in respect of quarry SG4 where an extension was made without permit. MEPA in this case had prosecuted because in spite of the enforcement notice the quarrying had continued. There had been a decision by the court of first instance and another by the court of appeal. The decision was that the quarry had to be restored within three months with a €60 daily penalty in default. The case is still open.

Replying to questions by Dr John L Gauci, witness said that presently no stone quarrying could be carried out because the area is scheduled. The Malta Resources Authority receives the yearly fees from quarry operators while MEPA is the regulatory body. Since the minerals subject plan had been suspended in 2011, MEPA relies on police licences to see if quarrying can be done. But the police licence regulated the operators not the site. If the land is scheduled MEPA is authorised to stop further quarrying even though the payment of the licence was in order.

Replying to questions by Dr Tatianne Scicluna Cassar, Mr Gafa` stated that Joseph Attard had two notices issued. One regards the extension already mentioned before number 454/98 and the other 1309/98 is about the opening of a new quarry without permit. The new quarry is not linked to the old quarry but is in the same area. The new quarry is scheduled. He confirmed that quarrying can be carried out in that part of the quarry that is not scheduled. Replying to a question by the Chairman Mr Gafa` stated that the court judgement mentioned earlier was about the new quarry. He could not state whether the old quarry was exhausted or not, but he did not see any problem if it was used to quarry stones. At this point he indicated on the aerial photo shown quarry SG4 and reiterated that quarrying could be done here. Quarrying on the other quarry 1309/98 cannot be carried out and goes against the court decision. The quantification of the amount of stone left in quarries is done by the MRA.

Dr Tatianne Scicluna Cassar on behalf of the contracting authority contended that both bidders had submitted only the MRA licence with their bids and neither of them, appellant and preferred bidder had produced the MEPA permit and the evaluation board had no remit to investigate whether the quarries were exhausted or not since they were covered by a valid

permit. After all the MRA licence is renewed each year and the preferred bidder submitted a valid licence.

Ms Miriam Micallef Sultana Id. No 122362M from the Malta Resources Authority said that there is no relation between the licence issued by the MRA which is a commercial licence and the MEPA permit. Unless objections are raised, the quarrying licences are renewed each year without verifying whether the resources have been exhausted. The Authority has no resources to check if a quarry has been exhausted. The Land Use is the competence of MEPA and the permits issued by MEPA and MRA are not interchangeable. Regarding appellant Joseph Attard, she confirmed that he has a valid licence on QSG4, valid up to March 2014.

Ms Aimee Brincat Id. No 29181M, Unit Manager Enforcement Directorate under oath said that she could not testify about whether a quarry was exhausted or not. Quarry SG4 was covered by a police licence. It was up to the operators to restore and fill in a quarry once it was exhausted. From the photo shown to her she said that she could not tell whether the quarry in question was filled in or not.

Dr Tatianne Scicluna Cassar intervened and submitted that the evaluation board had to see whether the bidders' quarries were covered by a permit and did not have to investigate whether a particular quarry was exhausted or not.

Ms Aimee Brincat continued that she could not identify the quarry in question from the photo. MEPA relied on the GIS layer for identification, and this was not available here. Before granting permits MEPA requires the submission of quantification surveys of the minerals remaining in the quarry. She could only state whether the quarry was filled in or not following a site inspection. Enforcement notices are only issued following infringements of planning regulations. If the quarry is covered by a valid licence then quarrying may take place; however a depth to which quarrying is permitted is noted in the licence. QSG4's licence is still valid. There are certain permits for development that require restoration of quarries when these are exhausted; other permits do not require this. In the file there is no indication if the quarry QSG4 has been restored/filled-in.

The Chairman remarked that some time should be allowed to enable witness to verify whether any part of the old quarry was restored and to establish the amount of material is left in the same quarry.

Ms Aimee Brincat continued testifying saying that it was not the competence of MEPA to establish this. She would however confirm whether the original perimeters of the quarry have been enlarged. The permits used to be issued on the operator and not on the site itself. When necessary, when lateral expansion is suspected, the authority asks the operator to submit a technical survey report to prove that he had not over-extended the original perimeter.

Mr Gordon Grech Id. No 26777G, Compliance and Enforcement Officer at MEPA, under oath stated that he was aware of PA 5043/07 but was not involved in it. He however knew the site where it is located. On being shown a photo dated 2012 and asked to identify quarry QSG4 he confirmed. He could not state whether the old part of QSG4 is has been filled in.

Mr Charles Gafa` recalled said that parts of the quarry SG4 may be filled in with quarrying material waste but other parts can still be used. There is no MEPA permit on the old part of the quarry since only a police licence was required when it started operating, and the quarry was covered. The police licence has now been transferred, and is managed by the MRA.

Quarries operating before the Planning Authority Act in 1992 had to have a police permit. This permit was however issued on the owner of the quarry and not on the quarry itself. Today MEPA permits are issued on the quarry itself and not on its owner. Replying to a question by the Chairman, he said it was not illegal to operate a quarry having only the police permit without a MEPA permit. No police licence has been revoked and all licences have been recognized by MEPA. The general praxis, and not specific to the case in question, both police licences and MEPA permits for quarries were issued with a condition to restore the land after the exhaustion of the mineral. Presently MEPA requires the submission of a PDS showing how the restoration would be done and in certain cases an impact assessment. In the present case a PDS has been demanded on the new quarry. The old quarry is covered by an MRA permit but has no MEPA permit, but operating the quarry is legal. The depth of the quarrying is regulated by the permit. Stone from the old quarry can be delivered. Part of the old quarry has been exhausted and restored but the rest is still usable for quarrying purposes.

Dr Tatianne Scicluna Cassar on behalf of the contracting authority submitted that both bidders had been administratively and technically compliant. To satisfy clause 6.1.2 both bidders had submitted a valid MRA licence. Hence the award criteria according to clause 32.1 remained the price factor – the cheapest offer. The preferred bidder's offer was the cheapest and thus the evaluation board rightly awarded the quotation to him.

Dr John L Gauci on behalf of the appellant submitted that it has to be seen whether the preferred bidder was compliant or not. He contended that the quarry in question was exhausted. He made a hypothetical question whether anyone who had a usable quarry would go through criminal indictment for illegally quarrying stone from another quarry if he had such a usable quarry? He contended that the PCRБ should consider the probability. He insisted that the preferred bidder had been illegally obtaining stone from the new illegal quarries. He insisted that the Board appoints an expert to determine whether the quarry is usable or not.

Dr Tatianne Scicluna Cassar insisted that the PCRБ should see whether the evaluation board had abided with the regulations when adjudicating the quotation.

At this point the hearing was closed.

This Board,

Having noted the Appellant's objection , in terms of the 'Reasoned Letter of Objection' dated 4th March 2014 and also through Appellant's verbal submissions during the hearing held on 3rd June 2014, had objected to the decision taken by the pertinent Authority, in that:

- a) Appellant contends that in accordance with clause 6.1.2. of the tender document, bidders had to provide evidence that the quarry from which the 'Franka Stone' would be supplied, had the necessary permits required by Law to operate such quarry. The source from where the Preferred Bidder would be supplying the 'Franka Stone' did not have the necessary permits.**

- b) Appellant also claims that the Preferred Bidder's quarry which has an operating licence, is fully exhausted, so that the supply of 'Franka Stone' will be obtained by same from an unlicensed quarry.**

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

- a) The Preferred Bidder's offer was cheaper than the Appellant's bid.**
- b) The Preferred Bidder produced a valid licence for the operation of the quarry from where he will supply 'Frank Stone' to carry out the tendered works.**

Reached the following conclusions:

- 1. From the various submissions made during the hearing of this Appeal, this Board notes that the Preferred Bidder does, in fact, own a quarry with the necessary permit to operate such quarry.**
- 2. The Appellant's claim that there exist 'enforcement notices' on the 'extension' of the quarry does not necessarily imply that the licensed quarry cannot operate.**
- 3. With regards to the Appellant's claim that the 'licensed quarry' is exhausted, this Board considers this contention as debatable and does not fall within the scope and jurisdiction of this Board. It is the duty of the Contracting Authority to ensure, that the supply of 'Franka Stone' is being obtained by the Preferred Bidder from a licensed quarry.**
- 4. This Board rejects the request made by the Appellant to this Board, to appoint an 'Expert' to verify whether the licensed quarry is exhausted or not. The jurisdiction of this Board is to verify:
 - i) Whether the adjudication process was carried out in a just and transparent manner.**
 - ii) Whether the award process was in accordance with the 'Public Procurement Regulations'.****
- 5. After taking into account all the facts and submissions made by both the Appellant Company and the Contracting Authority, this Board is satisfied that the adjudication process was carried out in a diligent and appropriate manner.**

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

Dr. Charles Cassar
Member

Mr. Lawrence Ancilleri
Member

22 July 2014