

PUBLIC CONTRACTS REVIEW BOARD

Case No. 803

KLM 2014/05

Professional Service for an Architect for the up-keep and maintenance of road pavements and other infrastructural projects.

The tender was published on the 30th September 2014. The closing date was the 31st October 2014.

The estimated value of tender is €12,000(Exclusive of VAT).

Seven (7) bidders had submitted bids for this tender.

On the 29th December 2014 Cornerstone Architects & Civil Engineers filed an objection against the decision of the contracting authority to disqualify their tender.

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 5th May 2015 to discuss the objection.

Present for the hearing were:

Cornerstone Architects & Civil Engineers:

Perit Joseph Saliba	Representative
Perit Mark Caruana	Representative

Perit William Lewis:

No representatives

Kunsill Lokali Marsaskala:

Mr Josef Grech	Executive Secretary
Dr Dean Hili	Legal Representative
Dr Veronique Dalli	Legal Representative

The Chairman, following a brief introduction, invited appellant's representative to make his submissions on the objection.

Perit Joseph Saliba on behalf of the appellants explained how the appellant's tender, albeit the cheapest tender, had been discarded because of the alleged lack of experience. He claimed that appellant had enough projects and experience to apply for the tender. Furthermore he contended that the tender had explained that experience would be an asset but was not however the key factor. He also claimed that a Government Circular had ruled out any disqualifications because of lack of experience for tenders below the €500,000 threshold.

Dr Veronique Dalli on behalf of the contracting authority said that the appellant's objection was based on two grievances, the experience factor and the Bills of Quantity. About the Bills of Quantity, she referred to page 4 of the tender document. Appellant is claiming that a number of services submitted by appellant is cheaper and this is admitted. These refer to items 2 and 3 which are services that are not used so much. But the services for which the appellant quoted a higher price, found in BOQ 1 are used most by the contracting authority. The preferred bidder had bid a cheaper price for BOQ 1. It was for this reason that the tender was recommended to be awarded to the preferred bidder. Dr Veronique Dalli admitted the fact that experience cannot be used as an award criteria and that the appellants have abilities and have provided a number of big projects like the Cirkewwa Terminal, but remarked that the present tender was mainly for the maintenance of pavements and the contracting authority wanted experience in these small services. She claimed that the contracting authority used BOQ 1 more than the other BOQs and the award decision was based on this fact – BOQ 1 was the most used and the preferred bidder's offer was cheaper.

Mr Josef Grech on behalf of the contracting authority admits that award should not have been based on the experience of the bidders but insists that the Local Councils have different regulations from other entities for public procurement. They use regulations issued in 1996 and he had pointed out this several times.

Perit Joseph Saliba for appellants insisted that the reason given to appellants for rejection did not mention any BOQs but related only to Article 4 b of the tender document which deals with experience. The contracting authority should not ask for a list of items and then deciding to base the award on just one of these items without previously declaring that it would do so.

Mr Josef Grech explained that the contracting authority would not be applying for MEPA permits since these had already been issued. The previous architect had applied for these permits. In the next 5 years the contracting authority would be directing its spending more to the upkeep of pavements and not on great projects. It is not in a position to make such expenses.

The Chairman asked to be shown the letter of rejection that was sent to appellants by the contracting authority. He remarked that the letter declared specifically that "your offer is not fully compatible with the requisites stipulated with reference to article 4b found in page 2 of the specific conditions of contract." There is no mention of any rates or BOQs.

Mr Josef Grech insisted that when he consulted with the Department of Local Councils he was informed that tenders should be continued to be issued on the templates and regulations issued in 1996. He claimed that Local Councils fell under Schedule 1 and not 3 and therefore

the circular about experience does not apply.

At this point the hearing was closed.

This Board,

Having noted the appellant's objection in terms of the 'resoned letter of objection' dated 26th December 2014, and also through Appellants's verbal submissions during the hearing held on 5th May 2015, had objected to the decision taken by the pertinent authority, in that:

- a) Appellant contends that his offer was disqualified due to a deficiency, on his part, regarding the experience criteria. This should not apply as the Contracting Authority should have followed the instructions given in the Government Circular No 19**
- b) Appellant also claims that his offer was the cheapest.**

Having considered the Contracting Authority's 'Letter of Reply' dated 25th February 2015 and also through verbal submissions by same during the hearing held on 5th May 2015, in that:

- a) Appellant's offer was discarded due to the fact that the services quoted in BOQ 1 by same, were higher than those of the preferred and the bulk of the tender consisted of services to be carried out under BOQ 1.**
- b) The Contracting Authority maintains that since it is a Local Council, the tender document is drafted under the Local Council's Regulations issued in 1996. The Local Councils fall under Schedule 3 and not 1 of the Public Procurement Regulations, to the effect that experience clause was part of the conditions dictated in the tender document.**

Reached the following conclusions:

- 1. With regards to Appellant's first grievance, this Board would justifiably point out the 'Local Councils' fall under Schedule 3 and not Schedule 1 as maintained by the Contracting Authority. To the effect that the 'Government Circular No 19' is applicable for tenders below the €500,000 mark. This Board justifiably opines that since the tender's value was below the €500,000 mark, the 'experience clause' should not have been included in the tender document, as per instructions given in Government Circular No 19. In this regard, this Board upholds Appellant's first contention.**
- 2. With regards to Appellant's second contention, this Board established that the bulk of services to be utilised are contained in BOQ 1 of the tender document. It has been credibly established from submissions that this situation will be so. Appellant's quoted services in BOQ 1 were higher than those quoted by Preferred**

Bidder, so that the overall cost to the Contacting Authority would render the Preferred Bidder's offer cheaper. In this regard this Board does not uphold Appellant's second grievance.

- 3. This Board would point out that the Contacting Authority were obliged to give the specific reasons to the Unsuccessful Bidder as to why the latter's offer was rejected. In this regard, this Board opines that not enough information was given to the Appellant for the rejection of his offer.**

In view of the above, this Board find against the Appellant, however due to the fact that Appellant might have been misguided by the contents of the 'Letter of Rejection', this Board recommends that the deposit paid by Appellant be reimbursed.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

14May 2015