

## PUBLIC CONTRACTS REVIEW BOARD

Case No. 810

TM 052/ 2013

### **Tender for the Provision of Vehicle and Pedestrian Restraint Systems and Various Metal Works (North Region).**

The tender was published on the 15<sup>th</sup> November 2013. The closing date was the 12<sup>th</sup> December 2013. The estimated value of tender is €103,500 (Inclusive of VAT).

Three (3) offers had been received for this tender.

On the 21<sup>st</sup> February 2014 B. Grima and Sons Limited filed an objection against the decision of the contracting authority finding their tender to be technically non-compliant.

The Public Contracts Review Board composed of Mr Lawrence Ancilleri (Chairman), Dr Paul Debattista and Mr Caesar Grech as members convened a hearing on Friday 29<sup>th</sup> May 2015 to discuss the objection, following the Court ruling on this case.

Present for the hearing were:

#### **B. Grima & Sons Limited:**

Mr Adam Grima	Representative
Dr Tonio Cachia	Legal Representative

#### **Transport Malta:**

Mr Josef Mercieca	Chairperson Evaluation Board
Ms Sarah Pace	Member Evaluation Board
Mr William Vella	Member Evaluation Board
Ms Liz Markham	Procurement Manager
Mr Ray Stafrace	Representative
Arch Joe Briffa	Representative
Dr Christine Calleja	Legal Representative

There were no representatives from the preferred bidder Road Maintenance Services Limited.

The Chairman made a brief introduction wherein he explained that the Board would be acting according to the Court of Appeal's decision of the 11<sup>th</sup> August 2014 and the hearing would be limited to the evidence whether the appellant's offer had been technically compliant or not. The appellant's representative was invited to make his submissions.

Dr Tonio Cachia on behalf of the appellant said that the tender requisites were that bidders had to have made during the years 2010, 2011 and 2012 works of a similar nature amounting to at least €50,000 per year. He contended that appellant was compliant in this regard. The fact that appellant had satisfied the requirements for the year 2012 had been acknowledged also by the contracting authority and the contestation remaining was for the years 2010 and 2011. The scope of the tender was for the design and installation (including repairs of damaged systems) of vehicle Restraint Systems (VRS); design and installation of Pedestrian Restraint Systems; and design and installation of Chain-link fencing, (including gates). The question remains on the interpretation of 'similar nature'. Appellant is basing his objection on the CPV codes. He referred to European Commission Regulation 2195/2002 which classifies the works. The works listed by appellant to prove experience all fall under 45332 which includes several works including the installation of bollards, painting work, barriers and safety equipment. He contended that all the works submitted by appellant with the tender fall under these eight sections and therefore qualify to be termed 'of a similar nature'. He contended that a restrictive interpretation of 'similar nature' should not be used. It is apparent from the evaluation board that the evaluation committee interpreted 'similar nature' to be 'identical nature'. If this was so it meant that only one bidder could be compliant, when the tender asked for a similar nature, not identical nature. Appellant had followed the CPV codes to list works while the contracting authority failed to indicate the CPV codes which would have made it easier to bid. Yet the contracting authority chose not to include the CPV codes.

Dr Christine Calleja for the contracting authority said that the authority had already dealt with the matter of the CPV codes in a note filed before the Court of Appeal. Regulation 195/2002 should not be used to choose works of a similar nature. It was just a classification of services and works in order to facilitate classification. She cited for example code 851212 which dealt with the medical services where several services were identified by this same code. And thus this cannot be used to identify similar nature. It has to be seen if the evaluation committee was legally in order when it determined whether bidders were compliant or not. Appellant had previous experience but this was not of a similar nature. Here crash barriers were the subject and appellant had to show experience of €50,000 works on these over three years. Most of appellant's experience was on road markings or signs. The evaluation board deemed appellant's bid not compliant.

Dr Tonio Cachia reiterated that the tender had not asked for crash barriers but for three different items , vide page 39 of the tender document.

At this point the parties present agreed that the years that had to be considered for the experience were 2010, 2011 and 2012 and that the appellant had satisfied the requisites for the year 2012.

Mr Adam Grima ID No. 15080M on behalf of the appellant, under oath stated that appellant had submitted a list of works carried out including crash barriers. He contended that works were of a similar nature since the fixing of both crash barriers and street signs involve the same work – digging holes and filling with concrete after inserting the metal parts. Both could be deemed as street furniture. The same applies also to chain link fencing.

Architect Joe Briffa ID No 119862M on behalf of the contracting authority, under oath said that he had drafted the specifications for the tender and had also been asked to analyse the bids for their technical content. He said that each bid had two aspects- the product to be used and the installation. In the present tender all bidders had submitted fully compliant products. He understood that since the products were imported readymade into Malta the assessment had to be made only on the installation of the products. While certain countries required licensing for the installation of crash-barriers, in Malta it was not required. The contracting authority used a system based on a legal notice that comprised 30 sections for all the material used in roads such as asphaltting, concrete etc. The contracting authority did not use the CPV codes but saw into which section the requirements fell. For example a crash barrier came under the section series 400. Traffic signs came under 1200. He was not competent to assess whether bidders were compliant in the installation of the product. It is obvious that fixing a sign would require different competences from that of fixing a traffic light. Series 1200 used by the contracting authority varies from fixing road signs to signals, and road marking. He felt that he could not assess the capabilities of bidders just from the documentation. He had not been asked to assess bidders' capability of installation, but just to assess the product compliancy. He could only assess according to series 1200 for traffic signs, VRS are included in series 400. It was the evaluation board that determined which bids were compliant and he had not been consulted on this. Replying to questions by Dr Tonio Cachia on behalf of the appellant, he said that the series mentioned came from a Legal Notice 28/2010 which has 7 volumes. Transport Malta specifications are split into 30 sections, for example, chain links fall under 200 or 300. He repeated that he had only assessed the products submitted by the bidders to see if these were compliant or not. The product submitted by the appellant was technically compliant. He had not been consulted regarding the bidders' experience.

The Chairman explained that the Board would appoint an expert to see whether the works submitted by the appellant were of a similar nature or not.

At this point the hearing was closed.

## **Second Hearing:**

The Public Contracts Review Board composed of Mr Lawrence Ancilleri (Chairman), Dr Paul Debattista and Mr Caesar Grech as members convened a hearing on Wednesday 8<sup>th</sup> July 2015 to continue the discussion of the objection.

Present for the second hearing were:

### **B. Grima & Sons Limited:**

Mr Adam Grima	Representative
Dr Tonio Cachia	Legal Representative

### **Transport Malta:**

Mr Josef Mercieca	Chairperson Evaluation Board
Ms Sarah Pace	Member Evaluation Board
Ms Sarah Anastasi	Member Evaluation Board
Mr Saviour Ellul	Member Evaluation Board
Mr William Vella	Member Evaluation Board
Ms Liz Markham	Procurement Manager
Mr Ray Stafrace	Representative
Mr Joe Briffa	Representative
Dr Joseph Camilleri	Legal Representative

There were no representatives from the preferred bidder Road Maintenance Services Limited.

The Chairman explained that the Board had appointed Dr Ing. Joseph Buhagiar from the Department of Metallurgy and Materials Engineering of the University of Malta to prepare a report on the works that had been submitted by the appellants as proof of experience.

Dr Tonio Cachia on behalf of the appellant presented a copy of the Court of Appeal proceedings.

Dr Joseph Buhagiar ID No. 131980M, the appointed expert confirmed on oath the contents of his report. He stated that since the parties had agreed that for the year 2012 appellants had satisfied the experience requirement the remaining contention was for the years 2010 and 2011. He had prepared a table and divided the works performed by appellants per year into four categories – one that contained completely different works (such as road markings, road studs, zebra crossings, reserved parking and reflective markings) that would not satisfy the conditions; one for similar works; one that listed borderline works that consisted of very similar installations (traffic signs etc) but which had different functions; and one that showed works which were not clear and he had listed the works falling under each category and under each year. It can be seen that for similar works the amount for the years 2010 and 2011 are zero while for the same years in borderline works the amounts are €219785 and 347,683.95 respectively.

Replying to questions by Dr Tonio Cachia, he said that the difference between similar and borderline cases was that in borderline cases the function is not to restrict the vehicles or pedestrians while crash barriers and pedestrian restraint systems do, but the method of installation is practically the same. Replying to Dr Joseph Camilleri, he agreed that crash barriers are safety features.

Completely Different Works			Similar Works			Border Line Works			Not Clear		
2010	2011	2012	2010	2011	2012	2010	2011	2012	2010	2011	2012
	€ 32,108.50	€ 20,000.00			€ 1,775.00	€ 75,000.00	€ 20,471.02	€ 101,502.30	€ 60,000.00	€ 5,789.45	€ 60,000.00
	€ 5,204.40	€ 25,000.00			€ 2,334.00	€ 74,330.25	€ 107,682.43	€ 101,502.30	€ 50,000.00	€ 5,789.45	€ 35,898.61
	€ 2,208.11	€ 23,000.00			€ 2,322.00	€ 70,454.75	€ 29,740.40	€ 35,000.00		€ 5,789.45	€ 51,817.80
	€ 2,387.50	€ 2,478.00			€ 850.00		€ 58,050.10	€ 27,000.00		€ 5,789.45	
	€ 2,345.66	€ 2,478.00					€ 6,070.00	€ 1,970.00			
	€ 9,000.00	€ 93,322.00					€ 820.00	€ 1,375.00			
	€ 2,052.50	€ 43,569.44					€ 75,000.00	€ 1,375.00			
	€ 2,052.50						€ 4,850.00	€ 2,500.00			
							€ 45,000.00	€ 1,665.00			
								€ 2,200.00			
								€ 1,375.00			
								€ 83,574.80			
								€ 83,574.80			
								€ 83,574.80			
								€ 83,574.80			
€ -	€ 57,359.17	€ 209,847.44	€ -	€ -	€ 7,281.00	€ 219,785.00	€ 347,683.95	€ 611,763.80	€ 110,000.00	€ 23,157.80	€ 147,716.41

Dr Tonio Cachia on behalf of the appellants contended that the last item in the “not clear” category, amounting to €51817.80, had been accepted by the contracting authority as referring to similar works during 2012. He contended that the cases referred to in the borderline category are in fact of a similar nature. He referred to the testimony of Mr Joe Briffa who had explained the same methodology to fix equipment in both categories and had declared that all bidders had been technically compliant. He submitted that tender specification should not be so restricting as to limit the choice to one bidder only.

Dr Joseph Camilleri for the contracting authority explained that the items under the not clear category referred to traffic management works and road safety upgrading. He agreed that the item for €51817.80 was for road safety upgrading and fell under ‘similar nature’ but contended that other works involving traffic management did not. He submitted that it can be seen that no similar works were carried out in the years 2010 and 2011 and the whole issue is whether the borderline cases could be considered similar. For this it is important to consider the different installation methods of crash barriers and traffic signs. The installation of traffic restraint systems is very different from the installation of traffic signs. This difference was the reason why the evaluation board had deemed the works not compliant. He also explained that the appellants’ offer technical evaluation had not yet been made and in case of appellants’ reinstatement, the evaluation board would still have to evaluate the appellants’ technical compliance.

At this point the hearing was closed.

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### **This Board**

**After having held a hearing on the 29<sup>th</sup> May 2015 wherein it was agreed by all parties concerned that this Board will appoint an expert to determine whether the Appellant’s work experience for the years 2010, 2011 and 2012 were of a “similar nature” as that requested in the Tender Document, convened a hearing on 8<sup>th</sup> July 2015 to discuss the Expert’s report which was compiled by Dr. Ing. Joseph Buhagiar, from the Department of Metallurgy of the University of Malta. From this report it emerged that:**

- a) The Expert confirmed that for the year 2012, the Appellant did satisfy the Work Experience of a “similar nature” as requested in the Tender Document;**
  
- b) The Expert provided a detailed breakdown of works carried out by the**

**Appellant for the Years 2010 and 2011. The purpose of this breakdown is to assess the works carried out in these two years classified into “Completely Different Works”, “Similar works”, “Border Line Works” and “Not Clear”. From such a classified list of works it transpires that the majority of works carried out by the Appellant in the years 2010 and 2011 were classified under “Border Line Works”;**

- c) During the Hearing, it also transpired and was confirmed by the Contracting Authority that no consideration was taken, by the Evaluation Committee, regarding the installation which is part and parcel of the Tendered Works.**

**Reached the following conclusions:**

- 1. From the Expert’s Report, this Board is justifiably convinced that the issue with regards to the work experience of similar nature is the “Border Line Cases”. In this regard, this Board is of the opinion that such “Border Line Works” should be considered as being of a similar nature. In this Board’s opinion, therefore the Appellant’s offer is administratively compliant;**
- 2. From credible submissions, it is evidently clear that no assessment has been conducted by the Evaluation Committee with regards to the installation process. Since, the installation is a most important stage of the tendered works; this issue has also to be addressed by the same committee in order to arrive to the most advantageous offer.**

**In view of the above, this Board re-affirms the previous Board's decision to reimburse the Appellant's deposit, however it also recommends that the Appellant's offer is to be re-integrated in the Evaluation Process.**

Mr Lawrence Ancilleri  
Chairman

Dr Paul Debattista  
Member

Mr Caesar Grech  
Member

*31 July 2015*