

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case No. 861**

**MXR 005/2015**

### **Tender for the Upgrading and Rehabilitation of a Path at ix-Xlendi Bay.**

The Tender was published on the 21<sup>st</sup> April 2015. The closing date was the 25<sup>th</sup> May 2015. The estimated value of Tender is €15,740.59 (Exclusive of VAT).

Four (4) offers from three bidders had been received for this Tender.

On the 26<sup>th</sup> June 2015 Mr Joseph Mercieca filed an objection against the decision of the Contracting Authority to award the Tender to Mr Jason Gauci.

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 20<sup>th</sup> October 2015 to discuss the objection.

Present for the hearing were:

#### **Mr Joseph Mercieca:**

Mr Joseph Mercieca  
Dr Damian Bigeni

Representative  
Legal Representative

#### **Mr Jason Gauci:**

No representatives present

#### **Kunsill Lokali Munxar:**

Ms Carmen Said  
Mr Anthony Grech  
Dr Adrian Mallia  
Perit William Lewis

Chairperson Evaluation Board  
Secretary Evaluation Board  
Legal Representative  
Technical Consultant

The Chairman made a brief introduction and asked the Appellant's representative to make his submissions.

Dr Damian Bigeni on behalf of the Appellant stated that the Tender specifications had clearly stated that the works are to be carried out by using local stone. This could be seen from page 63 of the Technical Specifications where the heading is "Local Limestone Paving Slabs" and point 1(a) Scope of work, on the same page which states "supply and lay of irregular roughly hewn local limestone (tas-sekonda) paving slabs". The same local stone had also been indicated in the Bill of Quantity at page 72 point number 1. While the Appellant had followed these specifications and offered local stone, the Recommended Bidder had offered to use foreign imported stone and this was not according to the Tender Specifications. Yet the Contracting Authority had awarded the Tender to this bidder. Dr Bigeni contended that his client could have offered cheaper foreign stone had he known that this would be acceptable. He stated that the Contracting Authority is now claiming that the foreign material was better than the local stone, but this reasoning was not right.

Dr Adrian Mallia on behalf of the Contracting Authority pointed out that according to the general conditions, bidders could offer material which was equivalent to that specified by the Tender, provided that this satisfied the specifications issued in the Tender Document. In the present case the stone offered by the Recommended Bidder reached the specifications. He then referred to the Appellant's pleas where he is asking for the revocation of the award and to be awarded the Tender himself. He contended that although this Board could decide with regards to the first plea, it can never decide to award the Tender to the Appellant because it was not in the Board's remit and also because other offers were to be considered.

Perit William Lewis, Technical Consultant for the Contracting Authority, under oath stated that he understood that 'local limestone' meant Maltese stone. He explained that the Recommended Bidder had made two offers or options. One was offering local stone and the other offering imported stone. Both these offers were cheaper than those of the other bidders and thus the Tender would be awarded to him. The Contracting Authority however then opted to choose the foreign stone because it was cheaper to do so. He explained that the Recommended Bidder would also have been awarded the Tender if the Contracting Authority chose his local stone offer since this was also cheaper than those of the other bidders. He explained that the chosen stone had reached and satisfied all the technical criteria.

Although he agreed that the chosen stone was foreign, this was however within the Tender specifications, in fact it was better than the specifications, and within the budget. For this reason it was decided that it was better to choose this option rather than the Recommended Bidder's other offer.

The hearing was closed at this point.

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**This Board,**

**Having noted the Appellant's Objection, in terms of the "Reasoned Letter of Objection" dated 26<sup>th</sup> June 2015 and also through the Appellant's verbal submissions during the Hearing held on the 20<sup>th</sup> October 2015, had objected to the decision taken by the Pertinent Authority, in that:**

- a) The Appellant contends that the Tender Document requested stone material from local sources. The Contracting Authority awarded the Tender to a bidder supplying imported material and in this regard, the Appellant maintains that the same Authority did not abide by its own conditions as dictated in the Tender Document.**

**Having considered the Contracting Authority's "Letter of Reply" dated 3<sup>rd</sup> September 2015 and also verbal submissions during the Public Hearing held on 20<sup>th</sup> October 2015, in that:**

- a) The Contracting Authority maintains that the bidders could offer equivalent material as long as the same material would satisfy the Technical Specifications as dictated in the Tender Document. In this regard, the Contracting Authority contends that the imported material offered by the Recommended Bidder did satisfy the Technical Specifications and was also cheaper than that offered by the Appellant.**

**Reached the following conclusions:**

- 1. With regards to the Appellant's contention, this Board, after having examined the Technical Conditions as dictated in the Tender Document; opines that the Tender Document did indeed ask for "Local Limestone Paving Slabs" as noted on Page 63 of the latter. This Board also notes that "the Local Material", is also dictated on Page 72 Note 1 which stated "Supply and Lay of Roughly Hewn Local Hard Stone paving slabs etc." This confirms that the material to be supplied was dictated to be of local product.**

**This condition was also confirmed, under oath, by the Technical Consultant, Architect Williams Lewis who asserted the fact that "Local Limestone" means Maltese Stone and not otherwise.**

**This Board justifiably points out that, if the Evaluation Committee opted for imported material during the Evaluation Stage, the same Authority shifted the goal posts and it is not proper and transparent to opt for imported material at that stage just because it was cheaper.**

**If the goal posts are changed during the Evaluation Stage, an equal opportunity should be given to all bidders to ask for imported material as well, as long as the material meets the specifications.**

**In this instance, this Board is credibly convinced that the Appellant was not given the chance to quote for imported materials. This meant that there was no consistent approach adopted by the Evaluation Committee. This Board opines**

**that since the “Local Stone” was accentuated in the Tender Document, any other compared evaluation should be based on “Local Material”.**

**At the same instance, this Board would justifiably point out that the conditions laid out in a Tender Document must be strictly adhered to, by both Tenderers and the Contracting Authority. The very fact that the Contracting Authority chose an “imported material” and not a “local product” went against the same conditions which the Authority dictated in its Tender Document.**

**In this regard, this Board does not uphold the Contracting Authority’s decision to award the tender for imported material as the latter should have acted in the following manner:**

- i) The Tender Document clearly states that “Local” or “Imported Material” would be accepted provided that the same material would meet the Technical Specifications as dictated in the Tender Document;**
- ii) Since this Board clearly and credibly established that the material to be chosen had to be local and since it has also been confirmed that the award decision constitutes a “Change of Goal Posts”, this Board credibly notes that the Appellant or the other Bidders should have been given any equal opportunity to bid for “Imported Material”. In this regard, this Board does not approve the decision taken by the Contracting Authority.**

**In view of the above, this Board finds in favour of the Appellant and recommends that:**

- a) The Appellant's bid is to be re-integrated in the Evaluation Process. At the same time, the Evaluation Committee should evaluate the bids on a "Level Playing Field" basis;**
- b) The deposit paid by the Appellant should be reimbursed.**

Dr Anthony Cassar  
Chairperson

Dr Charles Cassar  
Member

Mr Lawrence Ancillieri  
Member

*27 October 2015*