

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case No. 867**

**TXLG 02/2015**

### **Tender for the Maintenance Works on Roads and Pavements.**

The Tender was published on the 24<sup>th</sup> April 2015. The closing date was the 29<sup>th</sup> May 2015. The estimated value of Tender is €32,000.00 (Exclusive of VAT).

Two (2) offers had been received for this Tender.

On the 10<sup>th</sup> August 2015 LK Limited filed an objection against the decision of the Contracting Authority to reject its offer.

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

Present for the hearing were:

#### **LK Limited:**

Mr Ludwig Dimech	Director
Dr Franco Galea	Legal Representative
Dr Mark Grech	Legal Representative

#### **Deluxe Construction Co Limited:**

No representatives were present

#### **Kunsill Lokali Ta'Xbiex:**

Mr Matthew Dimech	Executive Secretary
Dr Larry Formosa	Legal Representative

The Chairman made a brief introduction and remarked that the Board would like to hear the testimony of the architect who had counselled the Contracting Authority on the award, Perit Daniel Camilleri first.

Mr Daniel Camilleri was called several times but failed to appear.

The Chairman declared that the testimony of the witness was essential and that therefore the hearing would have to be adjourned.

The hearing was at this point closed and adjourned to the 3<sup>rd</sup> November 2015 in order for Mr Daniel Camilleri to be produced as witness.

## **Second Hearing:**

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 3<sup>rd</sup> November 2015 to discuss the objection.

Present for the hearing were the same persons that had been present in the previous hearing of the 27<sup>th</sup> October 2015.

The Chairman asked to hear the testimony of the architect who had advised the Contracting Authority on the award of the Tender.

Mr Matthew Dimech the Acting Executive Secretary explained that the adjudication of the Tender had been made by the Council. The Council had been given legal advice to award the Tender to the cheapest bidder but had appointed architect Mr Daniel Camilleri to evaluate the offers and make comparisons of the same. On the presentation of the architect's report the Council had examined it and continued with the adjudication and award during a council sitting.

Mr Daniel Camilleri, ID No. 570980M, an architect, under oath testified that he had prepared the Bill of Quantities for the relevant Tender and had evaluated the submitted offers for the Contracting Authority. Replying to questions by the Chairman he said that he had based his recommendation on the comparison of the rates offered with those rates contained in the latest framework agreement with Transport Malta and not on his knowledge of Appellant's ability. These rates were the average rates for large works. Replying to Dr Franco Galea he confirmed that the framework agreement was an agreement signed between several contractors and the government entities. He agreed that a bidder could offer less than the framework agreement and he had not examined or gone into the amounts being paid for the same service by other local councils. Neither did he advise the Contracting Authority to contact the Appellant company and ask about the feasibility of the submitted rates; it was not his remit to do so. He confirmed that other local councils used his services for advice but he could not state what these other councils were being charged for similar service. He explained that his report and advice was based on the framework; and was based solely on the rates and not on the kind of work performed by the bidders.

Dr Franco Galea on behalf of the Appellant insisted that bidders could submit any rate they deemed feasible. He referred to judgement by the Court of Appeal delivered on the 30<sup>th</sup> October 2015 which said that the Local Council had to abide with the law if reference to Regulation 29 was resorted to. This means that if it was thought that the Appellant's offer was too low Appellant had to be consulted and asked for explanation. In the present case the consultant architect had just relied on another framework agreement. The architect assumed incorrectly that a cheaper rate meant also inferior work. He referred to, and filed documents that showed that the St Julians and Sliema Local Councils payments. In these two Tenders the same Bill of Quantities had been used and the Appellant had been successful in the awards. In the present case his client had submitted the cheapest technically compliant offer and reiterated that Appellant should have been consulted about the submitted rates.

The hearing was closed at this point.

**This Board,**

**Having noted the Appellant's Objection in terms of the "Reasoned Letter of Objection" dated 10 August 2015 and also through the Appellant's Verbal submissions during the Public Hearing held on 27 October 2015 had objected to the decision taken by the Pertinent Authority, in that:**

- a) The Appellant maintains that the Contracting Authority ignored completely the decisions taken both by the Hon. Court of Appeal and the Public Contracts Review Board;**
- b) The Appellant contends that the rates which they submitted were realistic and not as indicated in the "*Letter of Rejection*".**

**Having considered the Contracting Authority's "*Letter of Reply*" dated 1 September 2015 and also verbal submissions during the Public Hearing held on 27 October 2015, in that:**

- a) The Contracting Authority maintains that after having heard technical advice from its appointed architect, arrived at the conclusion that the rates quoted by the Appellant were unrealistic and could lead to bad workmanship.**

**Reached the following conclusions:**

- 1. With regards to the Appellant's First Grievance, this Board, as quite rightly quoted by the Appellant, issued numerous decisions relating to similar Appeals and this Board regrettably notes that these decisions are being completely ignored by the Contracting Authorities at the Evaluation Stages of a Tender.**

**The Evaluation Boards of the Contracting Authorities are in duty bound to avoid any unnecessary appeals, due to the disregard of previous decisions taken in similar cases both by the Hon. Court of Appeal and the Public Contracts Review Board. In this regard, this Board upholds the Appellant's First Grievance.**

- 2. With regards to the Appellant's Second Grievance, this Board justifiably points out that as in previous decisions and the Hon. Court of Appeal's confirmation, it was credibly established that it is neither the jurisdiction of the Evaluation Boards nor that of the Public Contracts Review Board, for the matter, to decide whether the rates quoted by a bidder reflect the performance of the same bidder in carrying out the Tendered Works.**

**This Board would like to refer to case 49/2012 of the Hon. Court of Appeal (Inferior), wherein it was clearly pointed out that,**

*“Mingħajr preġudizzju għas-subregolamenti (2) u (3), il-kuntratti pubbliċi kollha, li l-valur stmat tagħhom ma jeċċediex mija u għoxrin elf euro (€ 120,000), għandhom ikunu regolati u amministrati mill-awtorita’ kontraenti, li għandha madankollu tiżgura li jitharsu d-dispożizzjonijiet kollha applikabbli li jinsabu fit-Taqsima I u fit-Taqsima II”.*

**At the same time, this Board justifiably notes that in accordance with clause 29 (2), if the Contracting Authority had any doubt that the Appellant’s quoted rates would lead to bad workmanship, it could have consulted the Appellants to explain the methodology of the works being tendered for by the Appellant.**

**This Board notes that it did not take this action to clarify doubts but rather relied on the advice of its appointed architect, who based his assumption of bad workmanship with respect to the Appellant’s quoted rates. In this regard, this Board upholds the Appellant’s Second Grievance.**

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

**i) The Appellant's offer be reintegrated in the Evaluation Process;**

**ii) The deposit paid by the Appellant is to be fully reimbursed.**

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Lawrence Ancillieri  
Member

*12 November 2015*