

PUBLIC CONTRACTS REVIEW BOARD

Case 1008 – CT 2107/2016 – Framework Agreement for the Construction and Maintenance of Roads in Malta on behalf of the Authority for Transport in Malta

The Publication Date of the Call for Tenders was 14 October 2016. The Estimated Value of the Tender, (Exclusive of VAT) was € 20,000,000.

On 11 November 2016, Denfar Excavators Ltd filed a pre-Contractual Objection against Transport Malta.

On 24 November 2016, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Mr Carmel Esposito and Mr Richard A Matrenza as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

Appellant – Denfar Excavators Ltd

Mr Shawn Farrugia	Representative
Dr Joseph Bonnici	Legal Representative
Dr Sarah Cachia	Legal Representative

Contracting Authority – Transport Malta

Ms Claudette Mallia Esposito	Representative
Ms Liz Markham	Representative
Mr Ray Stafrace	Representative

Department of Contracts

Dr Christopher Mizzi	Legal Representative
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Following an introduction by The Public Contracts' Review Board Chairman, Dr Anthony Cassar, the Appellants were invited to make their submissions.

Dr Joseph Bonnici, the Legal Representative for Denfar Excavators opened his submissions by saying that he enjoyed reading the Reasoned Letter of Reply sent by the Director General (Contracts) dated 22 November 2016 for two reasons. The only justification which the Appellants were given for the fact that for the first time a pre requisite requiring prospective bidders to have a minimum of 20% shareholding in an asphalt mixing plant was to safeguard the continuous supply of the latter. Dr Bonnici asked why the shareholding requested was 20% and not 10, 100 or 5%.

The Appellants continued by saying that they were filing this Objection because they have already 27 years of experience in this industry, they have all the apparatus required to work similar projects but they do not own asphalt. Despite this fact they have always supplied asphalt in all the similar contracts which they have signed previously. Denfar Excavators Ltd has their own suppliers and they never had problems in supplying asphalt.

If they had a bad record or a bad conduct, Dr Bonnici would agree with that justification but they have neither of this. He continued by saying that when you see the value of the 3rd Level should not exceed € 750,000 his clients would have to go down to the 2nd Level which did not exceed € 200,000. With the apparatus and human resources which they have, Denfar Excavators Ltd cannot work this contract with those figures. That is why in the Appellant's opinion; a level playing field was not provided continued Dr Bonnici.

Before the inclusion of this pre-requisite, the Appellants would have competed with everyone and would have frequently been awarded the Tender but everybody was competing on the same level. Dr Bonnici continued by saying that his clients had nine budgeting planks whilst other similar companies had two. The other seven, acquired 23% asphalt shareholding which would have automatically excluded Denfar Excavators Ltd and other 27 companies from similar Tenders.

If there was a problem with Bidders who were awarded similar Tenders but did not work it satisfactorily, one had to just exclude them and not exclude everybody else with them continued Dr Joseph Bonnici who asked whether in the Contracting Authority's opinion his clients could not bid for this Tender because they had no asphalt.

In view of this how can one compete for similar Tenders wondered Dr Bonnici. There was a competitive and open market but one of the four founding and fundamental concepts of the European Union; freedom was being breached which could lead to unfair trading and to a creation of a dominant force. Dr Joseph Bonnici requested the Contracting Authority to justify the reasons why asphalt is a pre-requisite for this Tender.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts opened his submissions by saying that here one is discussing a Framework Agreement which is divided into three levels. He wanted to counter one of the arguments made in the Reasoned Letter of Reply with regards to the ownership of the asphalt. This pre-requisite was excluding nobody from bidding for this Tender.

This Tender was divided into three levels and this requisition was only valid for the third level of this Tender. Notwithstanding all of this, the Public Contracts' Review Board must

focus on whether this pre-requisite in the Tender was conform to the Public Procurement Regulations according to Dr Mizzi.

The Contracting Authority wanted to submit that this requisite was published from the start of the Tender, is open for everybody who was interested in bidding for this Tender, hence equal treatment was given to all prospective Bidders, was proportionate to the requirements of Transport Malta and finally was not discriminatory since it was not distinguishing between one set of bidders and another.

Dr Christopher Mizzi argued that this was the test which the Public Contracts Review Board had to make. If the latter was satisfied from this test, there were no grounds to change this Tender. Besides, he also emphasised the point that the race for the Tender started on Publication Date for the call of Tenders. If the selection criteria were to be changed at Tender stage, the change would breach the Public Procurement Regulations.

If a requisite was to be changed during the race for this Tender, which would end at deadline of submissions, the goal posts would have been changed. There were cases in the European Courts of Justice such as the Netherlands vs the European Commission wherein it was not acceptable to change the selection criteria following the Publication of the Tender because it would prejudice bidders who have originally seen the Tender and did not concur or ignored the Tender.

There were already other similar cases which appeared before the Public Contracts Review Board of Appellants requesting unsuccessfully changes in the selection criteria. The latter was a fundamental part of the Tender and it was not recommendable to change it after being published. From the Procurement point of view this was the idea which the Public Contracts Review Board had to consider according to Dr Christopher Mizzi.

The Legal Representative for the Department of Contracts continued by explaining that from a Technical point of view, this was the second time that this Framework Agreement was issued. In the previous Tender there were a lot of pre-requisites to be considered for the Selection Criteria. One had to note that these pre-requisites in the previous Tender were removed. This showed that Transport Malta has opened the doors for the market but on the other hand included only this particular pre-requisite.

Dr Christopher Mizzi sympathised with the Appellants due to the fact that this pre-requisite was a difficult one to satisfy but this was the only criteria which can separate Level 2 from Level 3.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked what does Level 3 had special from the other levels in order for this pre-requisite to be needed for this Tender.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts answered that this level was special because of the call-off value which exceeded €700,000. This would classify the works as Level 3 works. There were other thresholds for Levels 1 and 2.

From the experience gained by Transport Malta in the previous Tender, the latter felt the need to impose a certain safeguard of the asphalt because in the varied call-offs done, the percentage regarding asphalt was over 50 in many cases, sometimes reaching even 80%.

Normally, the majority of expenses in Level 3 call-offs regarded the Tarmac and Road Asphalt, therefore in view of the fact that all pre-requisites were withdrawn in order for more bidders to be allowed to compete for this Tender, the Contracting Authority felt the need to impose a safeguard on the security of Supply for this Asphalt and kept this only pre-requisite from Level 2 to Level 3.

Dr Christopher Mizzi then proceeded to present a table but Mr Richard A Matrenza, a Public Contracts Review Board member pointed out that this document did not have any paternity. Dr Mizzi replied that this table can be presented under oath by one of the Transport Malta representatives.

At this point, Mr Ray Stafrace, Director of Procurement at Transport Malta and holding the ID Card 245157 M, was called under oath to submit the Table in question. A copy of this Transcript is available at the end of this Document.

At the end of Mr Stafrace's submission, Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether the list submitted was made now for which Dr Christopher Mizzi, the Legal Representative for the Department of Contracts replied in the affirmative and added that this list was made in preparation for this Pre-Contractual Remedy.

Mr Carmel Esposito, a Board member then asked Dr Mizzi to confirm that therefore the list was not made prior to the issue of the Tender. Dr Christopher Mizzi, for the Contracting Authority replied that this was the reason why this request was made but this was the experience which Transport Malta got from the previous Framework Agreement.

Mr Esposito then insisted in asking the Contracting Authority to confirm that this document was made after the Publications for Call of Tenders for which Dr Christopher Mizzi, for the Department of Contracts replied in the affirmative and added also that the information was acquired throughout the framework agreement.

Mr Carmel Esposito, a member of the Public Contracts Review Board again asked whether this document just submitted was issued after the Publication for the Call of Tenders for which Dr Christopher Mizzi, the Legal Representative for the Contracting Authority replied that this was made in preparation for this Public Hearing so that the Public Contracts Review Board would have supplementary information to work with when taking its decision on this Pre-Contractual Concern.

Mr Richard A Matrenza, another member of the Public Contracts Review Board asked whether this data was known beforehand for which Dr Christopher Mizzi for the Contracting Authority replied in the affirmative.

Mr Matrenza then asked why Transport Malta did not include a paragraph in the Tender which incorporated this data given the fact that the latter was already known for the Contracting Authority for which Dr Mizzi replied that here the arguments revolved on selection criteria. The information was available way before the Pre-Contractual Objection was filed because this was acquired during the previous Framework Agreement. On the other hand, in the selection criteria, no explanation is given why these requirements are made. It was not normal to include the reasoning continued Dr Mizzi.

The Legal Representative for the Department of Contracts continued by saying that this was something which was made constantly and not only by Transport Malta. This was the normal praxis that if selection criteria asked for so much key experts, there aren't any reasons published why this pre-requisite was needed.

Mr Carmel Esposito, a Board member of the Public Contracts Review Board replied that one would imagine that this data was in the hands of whoever drafted this Tender. Dr Christopher Mizzi for the Contracting Authority replied that one can assume that it was not this particular document was not in their hands but whoever drafted the Tender had all the information needed available because this information was known way before the Appeal from all the call-offs which were made during these last three years.

Effectively, the essence was there because the information was available to who was drafting this Tender, continued Dr Christopher Mizzi. It was only this table as it is which was prepared for this Public Hearing.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board then stated that one of the conditions which made this Tender was that whoever bid must have 20% of shareholding in asphalt. Dr Christopher Mizzi, for the Department of Contracts confirmed this.

The Public Contracts Review Board Chairman then asked whether the Contracting Authority was aware that this was limiting the competition since supplying of asphalt can be done in different ways or means. It was also obvious that the reason for this inclusion was for Transport Malta to be safeguarded in the supplying of asphalt. Dr Christopher Mizzi confirmed this.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board then continued by saying that there are other ways and means how the Contracting Authority was to be assured the continuous supply of asphalt.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts countered that the problem was that at this point in time, the Director General (Contracts) did not recommend changes in the selection criteria to be made.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board then asked what if the selection criteria were defective with regards to the level playing field, transparency and competition what would happen then. Dr Christopher Mizzi for the Department of Contracts replied that in that case there were other solutions but for this race which started at the Publication of Call for Tenders, the Director General (Contracts) was strongly opposing and felt that it was not acceptable to change the selection criteria during Tender stage. If these were to change new selection criteria were to be calibrated.

Dr Mizzi noted that one had to remember that this was the only selection criteria which separated Level 2 from Level 3 and any changes would be staunchly opposed to by the Director of Contracts. There are previous cases which back the latter's arguments.

Dr Joseph Bonnici for Denfar Excavators Ltd said that the table presented by Transport Malta showed eight contracts for asphalt works. Four of these were for Major Patching whilst other four were for Road Construction and these were not major projects. If nothing can be

changed in this Tender, Dr Bonnici was wondering why therefore this Public Hearing was convened and what jurisdiction does the Public Contracts Review Board actually has.

The Appellants then noted that Level 1 does not exceed € 100,000, Level 2 does not exceed € 200,000 and Level 3 does not exceed € 750,000. Dr Joseph Bonnici agreed with the Public Contracts' Review Board Chairman's comments and felt that the Tender as it is was discriminatory and asked why the pre-requisite was made only on asphalt. Dr Bonnici also asked what guarantees he has whether the Tender, which is eventually given to a bidder with 20% shareholding on asphalt, has knowledge on the works made. This will create a monopoly and this is what the European Union does not want.

Dr Joseph Bonnici also questioned why the Director of Contracts was strongly opposing to change in the selection criteria. He said that there are other guarantees which one can make to safeguard the supply of asphalt such as the Bid Bonds.

Dr Christopher Mizzi, the Legal Representative for the Director of Contracts stated that this goes beyond the merit of Procurement. The Public Contracts Review Board had to see whether the clause as it is goes with the General Principles of the Public Procurement Regulations.

On the other hand, no proof was submitted on how this pre-requisite go against the General Rules regarding Procurement. Equal Treatment and discrimination are not intrinsic with a particular bidder but are considered according to the way the Tender was published. The fact that it was published with the original call for Tenders and there was no distinction between the bidders is not tantamount with the breach of equal treatment.

At this stage, the Public Hearing was closed.

This Board,

Having noted this Pre-Contractual Objection filed by Denfar Excavators Ltd (herein after referred to as the Appellant) on 11 November 2016, refers to the Contentions made by the latter with regards to the Tender of Reference CT 2107/2016 listed as Case No 1008 in the records of the Public Contracts Review Board, issued by Transport Malta (herein after referred to as the Contracting Authority).

Appearing for the Appellant: Dr Joseph Bonnici

Appearing for the Contracting Authority: Dr Christopher Mizzi

Whereby, the Appellant contends that:

a) Clause 7.1 (b) (3) dictates that:

“Prospective Bidders submitting their offers to participate under Level 3 require that they own a minimum of 20% in an asphalt mixing plant.”

In this regard, the Appellant maintains that the said clause, apart from being unreasonable, limits the scope of competition.

b) The reason given by the Contracting authority for the insertion of this clause was “to secure supply of Tarmac” is not credible. In this regard, the Appellant contends that there are other remedies to ensure “Supply of Tarmac without hindering competition”.

This Board also noted the Contracting Authority’s “*Letter of Reply*” dated 23 November 2016 and its verbal submissions during the Public Hearing held on 24 November 2016, in that:

- a) The Contracting Authority maintains that the condition on Clause 7.1 (b) (3) was known to all Bidders and equal treatment was given to all prospective Bidders. Since this clause formed part of the “*Selection Criteria*”, any changes thereto, now, would go against the Public Procurement Regulations. In this regard, it is not advisable to change or alter this “*Selection Criteria*” which applies only for Bidders participating in Level 3. Through the imposition of this clause, the Contracting Authority is being safeguarded with regards to the assurance of supplies of tarmac and asphalt.**

This same Board also noted the testimony of the witness namely Mr Ray Stafrace – ID card No 245157 duly summoned by the Contracting Authority.

This Board, after having treated the merits of this case, arrived at the following conclusions:

- 1. With regards to the Appellant's First Grievance, this Board, after having reviewed the relative documentation and heard submissions made by both parties concerned, opines that Clause 7.1 (b) (3) applies only to those Bidders submitting their offer for Level 3 of this Tender.**

This Board respectfully notes that this is a “*Framework Agreement*”, and therefore Level 1, Level 2 and Level 3 form part of the same Tender. The requisite to own 20% shareholding in an asphalt mixing plant is somewhat not easy to attain. First of all, this Board affirms the fact that there are limited Bidders who can satisfy the dictated conditions. One has to take into consideration the number of such plants that are available in Malta. This Board confirms that the number is very limited and in this particular instance alone, the said clause is limiting the number of Bidders who can submit an offer. At the same instance, one has to delve into the practicability of achieving such a requirement. It is an obvious fact that due to the limited number of asphalt plants, the latter plant's owners will not be shedding their opportunities for the benefit of their eventual competitors. In practice, it is highly unlikely for a plant owner to allow a 20% shareholding into his company for the purpose of a third party, a competitor, to satisfy clause 7.1 (b) (3). In this

situation, through the said clause, those Bidders who are technically compliant but do not own 20% in an asphalt mixing plant, are automatically excluded.

This Board opines that it is evidently clear that Clause 7.1 (b) (3) does in actual fact limit the scope of competition and the fact that the said clause applies only to Level 3 of the works does not, in any way, justify its inclusion without excluding potential Bidders who are experienced and well equipped to carry out the Tendered works but, at the same time, do not own at least 20% in an asphalt mixing plant. In this regard, this Board upholds the Appellant's First Grievance.

- 2. With regards to the Appellant's Second Grievance, this Board from submissions made by the Contracting Authority credibly established that the sole purpose for the inclusion of Clause 7.1 (b) (3) was purely to ensure the supply of asphalt and tarmac.**

In this regard, this Board finds that the inclusion which, as stated above, does limit the spirit of competition, does not justify or rather remedy the assured supply of asphalt or tarmac. This Board opines

that there are other ways of how to secure supply without limiting the scope of competition.

The non inclusion of this Clause would be in line with the EU Directives whereby, although the Contracting Authority has all the rights to dictate conditions in a Tender, at the same instance, these conditions should not be compiled in such a way as to hinder certain or a section of prospective Bidders to submit their offer. In this particular case, this Board justifiably opines that no credible reason could be found for the mandatory inclusion of the said clause without suffocating the spirit of competition.

On the other hand, this board is aware that in Malta, there exists an insignificant number of asphalt mixing plants, so that if this clause is to be applied, only few Bidders would qualify to submit their offer whilst at the same instance, there exist a much wider participation of Bidders who can qualify to participate and who have the relative experience in the field but does not own 20% shareholding in a Company or activity consisting of an asphalt mixing plant.

On the other hand, this Board notes that there are other remedies which would assure the supply of asphalt and Tarmac without

limiting the scope of competition and Level Playing Field for prospective Bidders.

On a General Note, this Board notes that although the inclusion of Clause 7.1 (b) (3) was only applicable for Level 3 of the Tendered Works; this inclusion does deter other substantial Bidders to participate in the Tender. In this regard, this Board upholds the Appellant's Second Grievance.

In view of the above, this Board recommends that a fresh Tender is to be issued wherein the Contracting Authority will include all the necessary measures to ensure supply of asphalt, without restricting the scope of competition.

Dr Anthony Cassar
Chairman

Mr Carmel Esposito
Member

Mr Richard A Matrenza
Member

30 November 2016