

PUBLIC CONTRACTS REVIEW BOARD

Case No. 913

ZGLC 08/2015

Tender for the Resurfacing of Streets with Hot Rolled Asphalt.

The Tender was published on the 11th September 2015. The closing date was on the 12th October 2015. The estimated value of the Tender was €120,000.00 (Exclusive of Vat).

Two (2) bidders had submitted offers for this Tender.

On the 13th February 2016 Gatt Tarmac Limited filed an Objection against the decision of the Contracting Authority to award the Tender to Road Construction Limited for the price of €55,444.70.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Friday the 4th March 2016 to discuss the Objection.

Present for the hearing were:

Gatt Tarmac Limited:

Mr Nathaniel Gatt	Representative
Mr Mario Gatt	Representative
Dr Noel Camilleri	Legal Representative

Road Construction Co Limited:

No representatives present

Żebbuġ Local Council, Gozo:

Mr Nicki Saliba	Mayor
Mr Daniel Cordina	Deputy Mayor
Mr Carmelo Saliba	Councillor
Ms Diane Tagliaferro	Executive Secretary
Dr Mario Scerri	Legal Representative

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

Dr Noel Camilleri on behalf of the Appellant complained that he had been handed a copy of the Letter of Reply only this morning. He informed the Board that he had wanted to hear the testimony of Architect Scerri, the Contracting Authority's consultant and had asked for the latter to appear and testify but was informed that Architect Scerri would not be present.

Dr Camilleri also claimed that he had asked the Contracting Authority for a copy of Architect Scerri's report on the Tender submissions but this had not been supplied to his client. As things stand, the Appellant is not aware if his offer had been disqualified or not since no information had been given.

The Chairman read out the minutes of the Contracting Authority's meeting. He remarked that from the report filed by Architect Edward Scerri it could be seen that the Appellant's offer had been recommended for award since this was cheaper. Furthermore he stressed that according to the Public Procurement Regulations the Contracting Authority was obliged to give the reasons to bidders why their bid was disqualified or not chosen. He asked the Contracting Authority on what basis had the Appellant's Tender not been chosen.

Dr Mario Scerri on behalf of the Contracting Authority explained that the architect had not examined the offers to see if these were against the specifications or not but had only considered the financial offer. Gatt Tarmac's offer should have been rejected because it had made two extra conditions and the conditional offers were not acceptable.

He said that the minutes of the sitting of the Local Council held on the 10th November 2015 explained why the Road Construction Co Ltd were chosen instead of the Appellant; one of the councillors had apprehensions about awarding the Tender to the latter because of his experience with them when he was mayor.

PCRB Chairman remarked that the minutes referred to did not give any reasons why it was felt that the council felt apprehensive about awarding the Tender to the Appellant.

Dr Mario Scerri for the Contracting Authority declared that the Council was not bound to choose the cheapest tender and that the Appellant had made make conditions for his offer. Therefore, his Tender should have thus been rejected immediately. Dr Scerri added that it was for this reason that certain remarks had been made in the minutes. In the past the Contracting Authority had problems with the Appellant.

PCRB Chairman remarked that the documents submitted show that any problems had been settled.

Dr Noel Camilleri for the Appellant said that their Tender could have been disqualified immediately but the Contracting Authority had appointed an expert who prepared a report that recommended the award to his client the Appellant.

Mr Mario Gatt for Gatt Tarmac Ltd contended that although the difference between bids at face value seems small, this could increase much more because the Tender could be renewed for a period of three years. It was for this reason that Appellant had made certain conditions about the price of bitumen and fuel, because this could increase in three years. The other condition was added because of previous experience when the Contracting Authority took a long time to pay. He declared that Appellant had recently been awarded three other contracts by the Contracting Authority; Triq il-Ponta, Triq il-Madonna taç-Ċiçri and Triq iç-Ċnus.

The Appellant had been paid regularly in full for all these because clearly the Contracting Authority was satisfied with the quality of Appellant's work. The vague allegations are therefore not understood.

Dr Noel Camilleri for the Appellant insisted that if the Contracting Authority had found his client's Tender not compliant then it should have disqualified for the same reason, but it did not because it was deemed compliant.

Dr Mario Scerri for the Contracting Authority explained that the Appellant had made a condition in his offer that prices "will increase accordingly" if the price of bitumen increased. This was not acceptable. The Tender Document had provided enough safeguards against this price increase in clause 52. The Tender also made it clear that payment would be made within two months and Appellant had no right to change this to one month.

Mr Nicki Saliba, the Mayor explained that when he was elected on the Council he had problems with the Appellant about Triq iċ-Ċnus. This street had been adequately finished and the residents seemed very happy with his work. However two other streets caused residents to complain. That was what led the Council to decide not to award the Tender to Appellant. Any pending payments which were due to Appellant were not paid due to the unsatisfactory work being provided.

Dr Noel Camilleri on behalf of the Appellant denied that there were any pending payments to him.

The hearing was at this point brought to an end.

This Board,

Having noted the Appellant's Objection, in terms of the "*Reasoned Letter of Objection*", dated 13 February 2016 and also through their verbal submissions during the Public Hearing held on 4 March 2016, had objected to the decision taken by the Pertinent Authority, in that:

- a) The Appellant Company contends that apart from the fact that it was not given the reasons why the Contracting Authority discarded its bid, the latter had requested a copy of the architect's report, who was**

the Contracting Authority's Technical Expert and this was not forthcoming;

- b) The Appellant maintains that due to the fact they dictated two conditions which the Contracting Authority claims that go against the spirit of the dictated conditions in the Tender Document, the latter should have disqualified Gatt Tarmac's offer for the same reason. In actual fact, this did not happen.**

Having considered the Contracting Authority's "*Letter of Reply*" dated 22 February 2016 and also through their verbal submissions during the Public Hearing held on 4 March 2016, in that:

- a) The Contracting Authority maintains that Gatt Tarmac's offer was rejected due to the fact that they dictated two conditions which did not conform with those stipulated in the Tender Document;**
- b) The Contracting Authority also maintains that one of the reasons why the Appellant was discarded was due to the problematic past experience which they had with the same Appellant.**

Reached the following conclusions:

1. With regards to the Appellant's First Grievance, this Board after having examined the relevant documentation and heard the submissions made by the parties concerned, would like to credibly point out that the "*Letter of Rejection*" dated 28 January 2016 sent by Kunsill Lokali Żebbuġ, did not state the reasons why the Appellant's offer was rejected. It simply informed the Appellant that the Tender was awarded to Road Construction Co Ltd at the latter's quoted price.

In this regard, this Board, had on many occasions, especially regarding similar Contracting Authorities, that the Contracting Authority is always in duty bound to provide reasoned grounds to the Appellant for the latter to exercise his right on what to appeal.

This Board also justifiably notes the comments submitted by the Contracting Authority in its "*Letter of Reply*" dated 22 February 2016, with particular reference to paragraph (i) wherein it was specifically revealed that one of the Tender conditions was that "*The Local Council is not bound to accept any Tender and shall not be bound to give reasons for rejection to any or all Tenders*"

This Board regretfully points out that such a condition in a Tender Document prohibits and deprives unconditionally and the Appellant

from submitting his appeal on grounds on which his offer was rejected.

At the same instance, this Board had on many occasions pointed out that once an appeal is lodged, this same Board had to abide by the *“Public Procurement Regulations”* which strictly dictate that *“Any Letter of Rejection sent to unsuccessful bidders must state the specific reasons why their offer was rejected”*.

In this regard, this Board deplors the fact that such an important regulation was not adhered to by the Contracting Authority. This Board is even more perturbed by the fact that the Tender Document had a non-disclosure clause of the reasons for rejecting an offer.

This clause in particular goes against the *“Right of Appeal”* procedure. In this regard, this Board justifiably opines that no reason was given to the Appellant why his offer was discarded and to this effect, this Board upholds Gatt Tarmac’s First Grievance.

2. With regards to the Appellant’s Second Grievance, this Board credibly notes that the latter did dictate two conditions which did not conform with the conditions as laid out in the Tender Document. However, this Board credibly points out that if these conditions were

the true cause for the rejection of the Appellant's offer, the Contracting Authority should have stated so in its *"Letter of Rejection"*.

At the same instance, this Board credibly notes that nowhere was stated in the minutes of the Contracting Authority the reason why the Appellant's offer was rejected. In fact, the minutes stated that *"From experience, the Council is sceptical regarding the award of the Tender to Gatt Tarmac Ltd and the Council agreed to meet the architect, its own Technical Expert"*.

In this particular regard, this Board has examined the various correspondences between the said architect and the Contracting Authority and credibly notes that there was no indication in such correspondence on which Kunsill Lokali Żebbuġ should have been sceptical to award the Tender to the Appellants.

This Board noted that during the submissions, the Contracting Authority indicated without proof that previous experience with Gatt Tarmac Ltd was not satisfactorily executed.

In this regard, this Board has not been provided with evidence to show that the Appellant Company had carried out previous works

which were not to the satisfaction of the Contracting Authority. On the contrary, when this Board examined the Architect's report, it was always affirmed that the previous Contractor, (a member of Gatt Holdings and not Gatt Tarmac Ltd), which has a separate identity, did conform with the specified Technical Works. In this regard, this Board upholds the Appellant's Second Grievance.

In view of the above, this Board recommends the following:

- i) The Appellant's offer should be re-integrated in the Evaluation Process with considerations that this specific Company had not incurred the Contracting Authority any damages in the past;**

- ii) The deposit paid by the Appellant should be fully re-imbursed.**

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

10 March 2016