

PUBLIC CONTRACTS REVIEW BOARD

Case 1050 – CT 2267/2016 – Tender for the Excavation and the Construction of a Multi Level Car Park at Rabat, Gozo

The Publication Date of the Call for Tenders was 9 February 2017 whilst the Closing Date for Call of Tenders was 25 May 2017. The Estimated Value of the Tender, (Exclusive of VAT) was € 10,523,864.

On 10 May 2017, Gatt Tarmac Ltd filed a Pre-Contractual Objection against the Ministry for Gozo.

On 20 June 2017, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

Appellant – Gatt Tarmac Ltd

Mr Mario Gatt	Representative
Dr Noel Camilleri	Legal Representative

Contracting Authority – Ministry for Gozo

Mr Mark Formosa	Representative
Mr Angelo Portelli	Representative
Dr Francelle Saliba	Legal Representative

Department of Contracts

Ms Doreen Seracino	Procurement Manager
Dr Christopher Mizzi	Legal Representative

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

Dr Noel Camilleri, the Legal Representative for Gatt Tarmac Ltd opened by saying that his clients felt that the Bank Guarantee requested was not equal when compared to the amount of the Tender. A Public Tender is issued so that everybody can have an equal chance to compete in it. If the Tender Conditions are being restricted, this could lead to suspicions that the Tender is being designed to be awarded to a particular Bidder, hence leading to lack of transparency.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board remarked that the subject being discussed during this sitting was the Credit Facility which the Bidders were allowed to have for this Tender.

Dr Noel Camilleri, the Legal Representative for Gatt Tarmac Ltd continued by saying that the principle should be that the Credit Facility allowed should be proportionate with the amount of the Tender. The Financial Rules always state that the principle of transparency was paramount. If a banking entity does not give a Bidder the Credit Facility required, competition was going to be restricted.

Dr Camilleri continued by comparing Credit Facilities given to this Tender with others in previous Tenders and said that his clients felt the need to file this Pre-Contractual Concern because they felt that the amount requested for this Tender was an exaggerated one and to ensure that the Credit Facility given for this Tender was a fair one.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts submitted that the latter was not bound to parameters related with previous Tenders. The Contracting Authority had the right to plan a Tender according to its needs. The Credit Facility requested comes out from the way a particular Tender is planned and it should not be seen as proportionate to the Tender but in the way the work is made.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board commented that this was a form of Credit Facility and not a Bank Guarantee.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts said that by Credit Facility he meant that a Bidder can take an overdraft for the amount requested by the Contracting Authority. This would ensure that the Recommended Bidder can start working before the payments start to be made. Credit Facilities cannot be compared from a Tender to another since the Work Programme and the payments vary.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board noted that Credit Facilities were based on the entity of the work.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts added that in this case, he wanted to anticipate the point that the Credit Facility requested was a large one since at the early stage of the works; the progress which should have been made is to be a considerable one. There must be instances where the Contractor must have by force the Credit Facility available. The Ministry for Gozo agreed with the argument raised by Gatt Tarmac Ltd in their Letter of Objection dated 9 May 2017 that the Credit Facility is to be issued at award stage.

At this point, Mr Andrew Portelli, an Architect within the Ministry for Gozo, holding ID Card 24078 G was summoned by the Department of Contracts to testify under oath before the Public Contracts Review Board.

Following Mr Portelli's Testimony, Dr Noel Camilleri, the Legal Representative for Gatt Tarmac Ltd, argued that there should be a normal praxis for this Tender. The funds for the pipeline were given by the European Union and thus the scrutiny level should be higher. The works are to concern the whole of Gozo and there needs to be a schedule not to stop the Gozitan life while the works are being completed. The Schedule of Works must be strictly adhered to.

The Appellants continued by saying that one has to be realistic and set the Credit Facility in a way that it is approximative with the Works done and with whoever has the capacity and interest to submit a Bid for this Tender. At the end of the day, it has to be the Evaluation Board which has to award the Tender.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board remarked that first of all, the Credit Facility had to be established by a particular formula. The only way which the Contractor can do this by knowing how much income and expenses do the latter have with the difference being the Credit Facility needed.

Dr Noel Camilleri, the Legal Representative for the Appellants countered that the maximum of € 1 million came out during the Public Hearing and not before.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts submitted that the works had to be measured and the payments must occur depending on the certification. Half of the works must be completed by the first third of the period and whilst the works are ongoing, the certification must be done, hence the importance of having a credit facility.

Dr Noel Camilleri, the Legal Representative for Gatt Tarmac Ltd replied that since the piles had to be done immediately, the money must be there from the word go.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board added that this was the reason why a € 2 million credit facility was needed.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts added that the € 1 million issue was an internal one. The payments will be made as per schedule by the Contracting Authority.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board added that if he was the Appellant's Financial Advisor, first and foremost he would see the cash flow so that he would know what income and expenditure the Appellant has.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts said that no Contractor can work this Tender without a credit facility. The latter was not denying the right of any prospective Bidder to submit an offer for this Tender.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board added that there should be a buffer but that the Appellant has to work well his Maths before submitting an offer.

Dr Noel Camilleri, the Legal Representative for Gatt Tarmac Ltd, stated that the wording of the Tender was a bit misleading since one had to understand that when a Tender of € 9 million is issued, the money should already be readily available.

Dr Christopher Mizzi, the Legal Representative of the Department of Contracts said that no Tender is being issued without any commitment of funds. The € 1 million issue was an internal working of the Ministry and the more time passes, the more funds will be available.

Dr Noel Camilleri, the Legal Representative for Gatt Tarmac Ltd said that what Dr Mizzi has said substantiate his clients' arguments. There was going to be a delay of a year until the full amount will be at the hands of the Ministry for Gozo. The question was all regarding the Credit Facility and the Appellant cannot be prejudiced on this matter.

There are a lot of small enterprises in Gozo and even if a particular company has an excellent relationship with a bank, there was still a procedure which has to be taken in order for a credit facility to be executed. The amount should be an approximate one.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts said that a certain amount of Credit Facility has to be available so that the Contracting Authority is ensured that the works are initiated and completed. What was sure was that at the start of works, the investment from the Contractor should be so large that maybe this Tender would only be valid for large entities. There are circumstances in the Public Procurement Regulations which permit this.

Dr Noel Camilleri, the Legal Representative for Gatt Tarmac Ltd concluded that there was no condition why the Credit Facility was to be for € 2 million.

At this stage, the Public Hearing was adjourned to Tuesday 4 July 2017 at 09:00 wherein the Public Contracts Review Board will transmit the decision taken for this Objection verbally and then distribute a hard copy of the same to all parties concerned.

This Board,

Having noted this Pre-Contractual Objection filed by Gatt Tarmac Ltd (herein after referred to as the Appellant) on 10 May 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference CT 2267/2016 listed as Case No 1050 in the records of the Public

Contracts Review Board, awarded by the Ministry for Gozo (herein after referred to as the Contracting Authority).

Appearing for the Appellant: Dr Noel Camilleri

Appearing for the Contracting Authority: Dr Christopher Mizzi

Whereby, the Appellant contends that:

- a) **His main concern is that one of the conditions in the Award Criteria is that the successful Bidder must have a Banking Credit Facility of € 2,000,000. In this regard, Gatt Tarmac Ltd maintains that referring to previous Tenders for similar works, such an amount of Credit Facility is proportionately high and in this respect, such a condition will definitely limit the scope of competition.**

This Board also noted the Contracting Authority's "*Letter of Reply*" dated 19 May 2017 and its verbal submissions during the Public Hearing held on 20 June 2017, in that:

- a) **The Ministry for Gozo contends that it is not bound to adhere to parameters related with previous Tenders. In this regard, the**

Contracting Authority insists that by imposing a banking facility of € 2,000,000, they have ensured that enough working capital is available to the successful Bidder to carry out the first phase of the project, which represents 45% of the Tendered Works.

This same Board also noted the Testimony of the witness namely, Mr Andrew Portelli duly summoned by the Department of Contracts.

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

- 1. Gatt Tarmac Ltd's concern merits two main considerations namely the "*Justification of Credit Facility*" and the establishment of the "*Amount of Credit Facility*" as follows:**

- i) Justifications of the imposed Credit Facility**

First and Foremost, this Board would like to justifiably point out that the Ministry for Gozo has every right to impose conditions in a Tender Document, which the latter deems fit to ensure that the successful Bidder will carry out and complete the Tendered works as per specifications dictated in a Tender Document.

These conditions must be attainable, fair and transparent to all prospective Bidders. At this particular stage, this Board would like to point out that it was vividly demonstrated and explained as to the nature of the Tendered Works and was also credibly informed that the first phase of the works entailed approximately 45% of the whole Tender.

It has been noted that the value of the First Phase of the Works amount to approximately € 4,000,000. One has to take into account the fact that the payments for works carried out will be made, once all the necessary certifications are completed so that there will be a time gap between the completion of the works by the successful Bidder and payments made by the Contracting Authority for such works carried out. It is justifiably required that the successful Bidder will enjoy a banking credit facility to cover the costs during this time gap.

This Board, justifiably opines that it is quite appropriate for the Ministry for Gozo to impose such a requisite as it is of the utmost important, that due to the nature of these operations works, once these commence, works will carry on and not to be hindered, in

any particular way, due to the lack of funds on the part of the successful Bidder.

In this Board's opinion, it is not only proper but obligatory for the Contracting Authority to ensure that the successful Bidder has enough financial strength to carry out the works to completion stage.

ii) Amount of Credit Facilities

It has been credibly established that the prospective Bidder can only carry out such works if he has an available banking facility. With regards to the dictated amount of € 2,000,000, this Board was informed from the Testimony of the Technical Witness that 40% of the Tendered Works will be carried out in the first four months, hence the bulk of the financial requirement will be availed of during this period.

This Board also noted that the payments will be made by the Ministry for Gozo on a monthly basis and that the same monthly income will be forthcoming to the benefit of the Bidder.

In this regard, from the Testimony of the Witness, this Board was also informed that, taking into account the length of the execution of the works to be established at 18 months and the first phase which is estimated to take 5 to 6 months, the Ministry for Gozo has, as a commitment up to December 2017, an amount of one million Euros, so that if the project starts in 2017 and the first phase will be finished by the end of the year, the Recommended Bidder can only expect a maximum revenue of € 1,000,000.

This Board notes that the amount of € 2,000,000 as banking facility was derived at by the Contracting Authority, by assuming the value of works to be carried out and the committed payment amount of € 1,000,000, which in this Board's opinion makes financial sense.

However, it is highly uneconomical for an entrepreneur to carry out works amounting to € 4,000,000 and be paid only € 1,000,000 against such works, thus leaving any arrears of € 3,000,000. In this regard, this Board would like to opine that without the banking facility of € 2,000,000, it would be impossible to carry out and finish the dictated works.

This Board also takes into account that the payments for works carried, even on a monthly basis are only effected upon certifications which, under normal circumstances, do take time to be processed.

At the same instance, this Board takes note of the fact that Gatt Tarmac Ltd referred to previous Tenders where banking facilities were also a requisite. In this regard, this Board would like to justifiably point out that, one cannot compare a particular Tender with the present one, under review.

The nature and configuration of this Tender comprises of delicate works to be carried out and which must be completed once started. Considerations must also be given for the inconvenience which would be created once works commence. The importance for the Recommended Bidder to complete the Tendered works within the dictated time frame is of the highest level.

At the same instance, when one takes into consideration, the value of works to be carried out in the first six months and the available funds to be paid to the successful Bidder, the latter would not be in a financial position to finish the works on time without the

backing of a banking facility of € 2,000,000, unless more than one million Euros worth of payments will be forthcoming from the Contracting Authority.

- 2. This Board would also like to consider Gatt Tarmac Ltd's concern regarding the limitation of the scope of competition, in that one has to be practical and realise that the size and nature of the Tendered works, in themselves, necessitates a Bidder who is highly mechanically equipped and with previous experience in working on large projects.**

At the same time, this Board justifiably points out that, although it is highly unlikely that such Bidders would be small entities, the Tendered works are not limited to one or two, but is open for other large entities.

This Board does not consider this Tender to be restricting competition but rather narrowing the type of Bidders who can compete, so that competition is available and possible.

In view of the above, this Board does not uphold Gatt Tarmac Ltd's concern and confirms that unless more committed payments by the

**Contracting Authority are made during the first six months of the project,
the imposed credit of € 2,000,000 on this project is justified.**

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member

4 July 2017