

PUBLIC CONTRACTS REVIEW BOARD

Case 1236 – MGOZ/MPU T 56/2018 –Tender for Excavation Works at the site of the new Gozo Aquatic Centre, Victoria, Gozo

The publication date of the call for tenders was the 24th August 2018 whilst the closing date of the call for tenders was 24th September 2018. The estimated value of the tender (exclusive of VAT) was € 247,632.

On the 24th October 2018 Vella Bros Ready Mix Ltd filed an appeal against the Ministry for Gozo as Contracting Authority objecting to being disqualified on the grounds that their offer was not compliant. A deposit of € 1,238 was paid.

There were four (4) bidders.

On 27th November 2018 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Carmel Esposito and Mr Lawrence Ancilleri as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellant: Vella Bros Ready Mix Ltd

Dr Damian Bigeni	Legal Representative
Mr Raymond Vella	Representative

Recommended Bidder: Little Rock Quarry Ltd

Dr Carmelo Galea	Legal Representative
Mr Louis Grima	Representative
Mr Joseph Grima	Representative

Contracting Authority – Ministry for Gozo

Dr Abigail Caruana Vella	Legal Representative
Mr Robert Xerri	Chairman Evaluation Committee
Mr Felix Cefai	Representative
Mr Robert Curmi	Representative
Mr Albert Scerri	Representative
Arch Godwin Sultana	Representative
Mr Marnol Sultana	Representative
Mr Joseph Xiberras	Representative

Dr Anthony Cassar, Chairman of the Public Contracts Review Board, welcomed the parties and invited them to make their submissions.

Dr Damian Bigeni Legal Representative for Vella Bros Ready Mix Ltd started by stating that there were two points on which this appeal was based – firstly on what was requested in the tender and secondly the reason why his client was disqualified. He sought permission to call a witness.

Mr Lorry Apap (45959G) testified on oath that he has been an Assistant Director at the Ministry for Gozo for the last six years. He confirmed that the CMU of the Gozo Ministry had used the Grima site at San Lawrenz for dumping as recently as the 21st November 2018 (Chit labelled DOC 1 tabled as evidence). The CMU had been dumping there for six to nine months and as far as he knew the dumping had not stopped, as evidenced by the dumping chits he had received over that period.

At the conclusion of the testimony Dr Bigeni said that the tender document requested a valid permit for dumping. MEPA had issued a permit on 24th March 2009 and a copy of this had been submitted to the Gozo Ministry. In line with MEPA practice this permit had a standard clause that it had a five-year validity to commence the work but it was still current as dumping was still taking place.

Mr Robert Xerri (46664G), called by the Ministry for Gozo, testified on oath that he was the Chairperson of the Evaluation Committee. Section 7 of the tender documents specifically required a valid planning permit to use the site. Appellant had submitted a permit which was for rehabilitating the site, was out of date and had expired a number of years before. The Evaluation Committee had not checked with the Planning Authority if the permit submitted was still valid. The Environmental Resources Authority permit was dated May 2017 and had therefore also expired, as it had a one-year's validity. Witness confirmed that the Committee had not spoken to ERA but referred to their website. The Contracting Authority had based their decision to disqualify on the basis of the wording in Clause 21 of the Planning Authority permit, and apart from that no further checks were carried out.

At this point the Chairman intervened to say that the Board needs to clarify two points with a representative from the Planning Authority – is it still allowed for dumping to take place at this site and is the 2009 permit still valid or did it have to be renewed every five years?

Architect Godwin Sultana (22475G) called as a witness by the Ministry for Gozo testified under oath that as a representative of the Gozo Ministry he was involved with aspects in the drafting of the tender. He stated that the Ministry wanted to ensure that dumping was still permitted at the site, and as verification asked for a valid permit to be submitted.

At this stage there was an adjournment in the proceedings to enable a representative of the PA to turn up.

Mr Oliver Magro (500180M) called as a witness by the Ministry for Gozo, testified on oath that he was a Senior Officer in the Legal office of the Planning Authority. (He was here referred by the Chairman to the Planning Permit issued in 2009). Witness confirmed that the permit was valid for five years and had been issued for the rehabilitation of the quarry. If the rehabilitation had not been completed within five years there was the need to re-apply. The particular permit in this case was specific for five years to fill-in and return the site to agricultural use. The permit was not ongoing and had to be renewed if the dumping was not completed at the end of five years. Up to now there have not been any requests for renewal of the permit. If dumping continued two permits were required – one from the PA (for dumping) and one from ERA (for environmental sanction). There had been no application to extend the original MEPA permit and there were no applications made to the PA for a fresh permit.

Dr Bigeni tabled a current ERA permit, dated 22nd November 2018 and asked witness how it was possible that an ERA permit was issued without a planning sanction. Witness stated that it was possible for such a permit to be issued without a PA permit but this would be illegal.

Dr Abigail Caruana Vella, Legal Representative for the Ministry for Gozo, said that the MEPA permit was only valid for five years specifically to rehabilitate a quarry by infilling. This was meant to be completed in five years – it was obvious it had not been completed and there had been no application to renew the permit. Appellant cannot use the site without a PA permit and the Contracting Authority decision was correct.

This Board,

having noted this Objection filed by Vella Bros Ready Mix Limited, (hereinafter also referred to as the Appellants), on 24 October 2018, refers to the contentions made by the same with regard to the award of Tender of Reference MGOZ/MPU/T 56/2018 listed as Case No 1236 in the records of the Public Contracts Review Board, awarded by the Ministry for Gozo, (hereinafter also referred to as the Contracting Authority).

Appearing for the Appellants:

Dr Damian Bigeni

Appearing for the Contracting Authority:

Dr Abigail Caruana Vella

Whereby, the Appellants contend that:

- a) what was requested in the Tender Document was complied with, in their offer, where reference was made to the reasons given by the Contracting Authority in its Letter of Rejection dated 15 October 2018. In this regard, the Appellants insist that the dumping site has a valid permit and that the Contracting Authority misinterpreted the validity of such permit to the effect that their offer was deemed to be non compliant. At the same instance, the Appellants' contend that the Ministry, if in doubt, should have asked for a clarification on this issue.

This Board has also noted the Contracting Authority's "*Reasoned Letter of Reply*" dated 12 November 2018 and its verbal submissions during the Public Hearing held on 27 November 2018, in that:

- a) the Ministry for Gozo maintains that the MEPA Permit was only valid for a period of five years, specifically to rehabilitate the quarry by

infilling, which expired in 2014, so that, at the date of submission of offers, the site had no valid MEPA Permit for dumping.

This same Board has also noted the testimony of the following witnesses namely,

- 1. Mr Lorry Apap duly summoned by Vella Bros Ready Mix Limited;**
- 2. Mr Robert Xerri duly summoned by the Ministry for Gozo**
- 3. Architect Godwin Scicluna duly summoned by the Ministry for Gozo**
- 4. Mr Oliver Magro duly summoned by the Ministry for Gozo**

This Board has also taken note of the documents submitted by Vella Bros Ready Mix Limited which consisted of Doc “X” – Chit No 002925 dated 21 November 2018.

This Board, after having examined the relevant documentation to this Appeal and heard submissions made by the parties concerned, including the testimony of the witnesses duly summoned, opines that the issue which

deserves consideration is the validity of the MEPA Permit of the dumping site, (quarry).

1. This Board would respectfully refer to Article 7 (c) (i) of the Tender Document which states:

“Approved dumping site details including details of the route from site to the approved dumping site. Submission to include copy of certificate/permit/official document indicating that the dumping site has a valid permit.”

The above mentioned condition was one of the *“selection and award criteria”* so that, it was a mandatory condition and the MEPA certificate had to be a valid one. In this particular case, Vella Bros Ready Mix Limited submitted a MEPA permit dated 24 March 2009 which was valid for a period of five years, expiring in 2014. At the same instance, this Board notes that no application for extension was made by the owner of the quarry, so that at present no dumping could be carried out in this particular quarry.

The Appellants maintain that the validity of the permit so submitted does denote that the MEPA permit is for a period of five years, however, Vella Bros Ready Mix Limited insist that this is a standard clause in all such certificates and dumping is presently being carried out in this particular quarry. In this regard, this Board was presented with documentary evidence that such dumping is actually being carried out, however, apart from the fact that it is illegal, this does not justify, in whatsoever manner, that the certificate submitted by the Appellants, is valid, so that the latter's offer did not satisfy clause 7 (c) (ii) of the Tender Document.

This Board would respectfully point out that, it is the Appellants' responsibility and obligation to ensure that all the documentation comprising their offer, was in conformity with the requirements of the Tender Document. At the same instance, it should not be expected, that, the Evaluation Committee rectifies documentation so submitted, which should have been valid and proper at submission stage of the offer. In this regard, this Board does not uphold the Appellants' contention in that the Contracting Authority should have asked for clarifications.

2. With regards to the validity of the MEPA permit submitted by Vella Bros Ready Mix Limited, this Board would refer to extracts from the testimony of Mr Oliver Magro – Senior Legal Officer of the Planning Authority, as follows:

“Chairman: *X’jigri wara hames snin? Irrid naghmel applikazzjoni għda?*

Xhud: *Dan il-permess inhareg fuq żewġ proposti biex nghid hekk. Wahda minnhom hija to sanction the extension fl-area u fid-depth tal-barriera li kien diġa’ sar minghajr permess. U t-tieni wahda hija biex jirrijabilita l-użu tal-barriera.*

Chairman: *X’tifhem biha rehabilitation?*

Xhud: *Rehabilitation hija timlieha, dumping, ovsjament subject anke fil-conditions ta’ waste management permit dak iż-żmien li llum ġie replaced bl-environmental permit minn awtorita’ oħra.*

Chairman: **Dumping jista' jsir?**

Xhud: **Iva.**

Chairman: **Jekk ix-xoghol li kellu jsir sar within 5 years, wara li jghaddu l-5 years m'hemmx bzonn nergghu napplikaw.**

Xhud: **Imma jkun lest id-dumping l-importanti u r-rehabilitation tkun saret.**

Chairman: **Jigifieri jekk id-dumping ma jkunx sar trid tapplika ghal permess.**

Xhud: **Trid tapplika ghal renewal ta'din l-applikazzjoni jew inkella for a development iehor, application ohra."**

From the above testimony, it is evidently clear that since the dumping is still ongoing, the owner of the quarry should have applied for an extension or submitted a new application. In this regard, although it is not within its remit, this Board would remind the Ministry for Gozo that any dumping in this quarry is being carried out irregularly and

infringes the regulation of MEPA. Perhaps the following extract from the testimony of Mr Magro would credibly explain the present situation with regards to dumping in this particular quarry:

“Avukat: Renewal ta’dan il-permess sar jew ma sarx?

Xhud: Renewal ma sarx. Renewal ried isir dejjem qabel ma jiskadi l-permess. Jigifieri dan il-permess jekk hareġ fl-24 ta’Marzu 2009, ir-renewal application trid tigi sottomessa qabel it-23 ta’Marzu 2014 u f’dan il-każ ma sarx.

Avukat: U allura bil-permess kif inhu, il-5 year period, din is-sena 2018 seta jiddumpja materjal?

Xhud: Le min-naħa tal-Planning Authority ma jistax jiddumpja għax permess għad-dumping m’għandux. Issa min-naħa tal-ERA ma nafx nirrispondi. Imma l-ewwel johroġ tagħna u mbagħad johroġ tal-ERA.”

In view of the above, this Board

- i) does not uphold Vella Bros Ready Mix Limited's grievances;**
- ii) upholds the Ministry for Gozo's decision in the award of the Tender;**
- iii) recommends that the deposit paid by the Appellants should not be refunded;**
- iv) instructs the Ministry for Gozo not to make use of this particular quarry until the same has the necessary valid permit from MEPA.**

Dr Anthony Cassar
Chairman

Mr Carmel Esposito
Member

Mr Lawrence Ancilleri
Member

11th December 2018