

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1379 – MGOZ/MPU/T37/2019 – Framework Agreement for the Provision of General Road Works including the Laying of Asphalt to the Ministry for Gozo**

The publication date of the tender was the 19<sup>th</sup> June 2019 whilst the closing date was the 23<sup>rd</sup> July 2019. The estimated value of the tender (exclusive of VAT) was € 249,376.

On the 9th October 2019 P&A Construction Ltd filed an appeal against the Ministry for Gozo as the Contracting Authority on the grounds that their bid was rejected as it was administratively non-compliant. A deposit of € 1,246.88 was paid.

There were three (3) bidders.

On 5<sup>th</sup> November 2019 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Richard A Matrenza as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

#### **Appellants – P&A Construction Ltd**

Dr Joseph Camilleri	Legal Representative
Ms Maria Schembri	Representative

#### **Recommended Bidder – Road Construction Co Ltd**

Dr Daniel Calleja	Legal Representative
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#### **Contracting Authority – Ministry for Gozo**

Dr Abigail Caruana Vella	Legal Representative
Mr Joseph Xiberras	Chairperson Evaluation Board
Eng Daniela Attard	Secretary Evaluation Board
Arch Shawn Micallef Spencer	Member Evaluation Board
Mr Joseph Cassar	Member Evaluation Board
Mr Victor Cini	Member Evaluation Board
Mr Marnol Sultana	Representative
Mr Silvio Cini	Representative

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

Dr Joseph Camilleri Legal Representative of P&A Construction Ltd said that Appellants had followed the tender instructions to the letter by submitting the ESPD form followed by a Word document. The Contracting Authority subsequently sought a clarification but the question asked therein did not merit a reply as it had already been answered in the submissions. The issue that is being contested is that the clarification was worded differently to the clause in the ESPD regarding the grounds relating to criminal convictions.

Mr Joseph Xiberras (4967G) called as a witness by the Public Contracts Review Board testified on oath that he is the Operations Manager at the Ministry for Gozo and was the Chairperson of the evaluation committee. He stated that there was a discrepancy between the submissions in the ESPD and the Word document since in the ESPD Appellants had stated that they were “guilty of misrepresentation, withheld information, unable to provide required documents and obtained confidential information of this procedure”. A clarification was sent seeking confirmation if this point was correct. Since this was not replied to it was assumed that the original statement of bidders stood.

Dr Abigail Caruana Vella Legal Representative for the Ministry for Gozo said that the reply in the ESPD to the question regarding criminal convictions was in the affirmative. The later hand written document had a differently worded question which was also replied to in the affirmative. There was therefore conflicting answers and so a clarification was sought which regrettably was not replied to. (Doc 1 – Exclusion Grounds on the ESPD was tabled).

Dr Camilleri said that the rectification e-mail stated that there was a discrepancy in Appellants’ submissions – there was no discrepancy and hence no need for clarification as both submissions had been answered in the same vein. There was no reason for the clarification to have been sent as it was based on a question that had already been replied to. There was no need for further replies.

The Chairman pointed out that the Contracting Authority, in seeking clarification, was acting correctly and it was wrong of Appellants not to reply to the clarification. They had the opportunity to clarify their answer and this was not taken.

Dr Camilleri said that the clarification would have been justified if there had been a discrepancy. In this case all questions had been clearly answered and no clarification was required.

The Chairman thanked the parties for their submissions and declared the hearing closed.

End of Minutes

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## **Decision**

**This Board,**

**having noted this objection filed by P&A Construction Ltd (herein after referred to as the Appellants) on 9 October 2019, refers to the claims made by the same Appellants with regard to the tender of reference MGOZ/MPU/T37/2019 listed as case no 1379 in the records of the Public Contracts Review Board, awarded by Ministry for Gozo (herein after referred to as the Contracting Authority).**

**Appearing for the Appellants: Dr Joseph Camilleri**

**Appearing for the Contracting Authority: Dr Abigail Caruana Vella**

**Whereby, the Appellants contend that:**

- a) Their original submission contained all the information stipulated in the tender document and since there was no discrepancy in their submissions, they felt that, there was no need to reply to the clarification request sent by the Authority. In this regard, the contents of the clarification note were worded differently from the clause, relating to criminal investigations,[ convictions ???] in the ESPD.**

**This Board also noted the Contracting Authority's 'Letter of Reply' dated 29 October 2019 and its verbal submissions during the hearing held on 5 November 2019, in that:**

- a) The Authority maintains that since there was a discrepancy between the submissions in the ESPD and the Word document, same Authority submitted a request for clarification to Appellants however, the latter did not reply to such communications.**

**This same Board also noted the testimony of the witness namely,**

**Mr Joseph Xiberras, Chairman Evaluation Committee duly summoned by the Public Contracts Review Board.**

**This Board has also taken note of the documents submitted by Ministry for Gozo which consisted of:**

**Doc No. 1, exclusion grounds on the ESPD.**

**This Board, after having examined the relevant documentation to this appeal and heard submissions made by the parties concerned, including the testimony**

**of the witness duly summoned opines that, the issue that merits consideration is submission of a clarification request by the Authority and the relative reaction by Appellants.**

**1. After examining the documentation contained in Appellants' submissions, this Board confirms that there was a discrepancy between the contents of the reply in the ESPD and the Word document so that, there were conflicting replies to the question relating to 'Exclusion Grounds'.**

**2. This Board would also refer to the clarification request dated 26 August 2019 sent to the bidder, which stated the following:**

➤ *With regard to information requested in the tender document in Section 1 – Instructions to Tenderers, Clause 7 Selection and Award Requirements, sub-clause B (C.) Grounds relating to insolvency, conflicts of interests or professional misconduct which state that:*

○ *Guilty of misinterpretation, withheld information, unable to provide required documents and obtained confidential information of this procedure Can the economic operator confirm that: a) It has been*

*guilty of serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria, b) It has withheld such information, c) It has not been able, without delay, to submit the supporting documents required by a contracting authority or contracting entity, and d) It has undertaken to unduly influence the decision making process of the contracting authority or contracting entity, to obtain confidential information that may confer upon it undue advantages in the procurement procedure or to negligently provide misleading information that may have a material influence on decisions concerning exclusion, selection or awards?*

*For the above question you answered with a Yes. Can you confirm this answer?"*

**Through the above request, the Authority offered the added advantage to Appellants to rectify any error or misunderstandings in their submissions. At the same instance, Appellants had the opportunity to revise their replies and correct same, in the ‘Exclusion Grounds’ section of the ESPD.**

**3. With regard to Appellants' contention that, they did not reply to the clarification request due to the fact that they were adamantly certain that the information requested was contained in their original submissions, this Board does not identify any justifiable or credible reason as to why no reply was forthcoming from Appellants. In this respect, the logical explanation for such a lack of interest, on the part of Appellants, would be that all the information submitted remains as is.**

**4. In this particular case, the Evaluation Committee were correct in being presented with confusing information in Appellants' ESPD. At that particular stage of the evaluation process, the Evaluation Committee had no obligation or duty to give the opportunity to the bidder to rectify, but quite appropriately, the Evaluation Committee gave the opportunity to Appellants to amend and rectify any error or misrepresentation in their original submissions. However, due to the fact that Appellants opted not to reply to such a clarification note, the Evaluation Committee had to adjudicate Appellants' offer on their submissions.**

**In conclusion, this Board opines that:**

- a) **There existed conflicting replies to the ‘Exclusion Grounds’ section in Appellants’ ESPD. Through such replies Appellants confirmed that they were guilty of misrepresentation and in this regard, the Evaluation Committee acted in a diligent and fair manner through the submission of a clarification request to Appellants.**
  
- b) **Appellants confirmed that they had received the clarification request but opted not to reply on the assumption that, what was being requested in the clarification request was already contained in their original submissions.**
  
- c) **Appellants were given the opportunity to revise their replies in the ESPD but opted to ignore completely the Authority’s request.**

**In view of the above, this Board,**

- i. does not uphold Appellants’ contentions,**
  
- ii. upholds the Contracting Authority’s decision in the award of the tender,**

**iii. directs that the deposit paid by Appellants should not be reimbursed.**

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Richard A Matrenza  
Member

*14 November 2019*