

**PUBLIC CONTRACTS REVIEW BOARD**

**Case No. 367**

**CT/3054/2011; CT/A/023/2011**

**Tender for the Construction of a Leisure Area at the Marsaskala Family Park**

This call for tenders was published in the Government Gazette on 30<sup>th</sup> June 2011. The closing date for offers was 11<sup>th</sup> August 2011.

The estimated value of this tender was € 2,188,521.92.

Five (5) tenderers submitted their offers.

Polidano Brothers Ltd filed an objection letter dated 25<sup>th</sup> November 2011 against the decision of the Department of Contracts to recommend the award of the tender to 3 Bees Joint Venture.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman and Mr Carmel Esposito and Mr Joseph Croker as members convened a meeting on Wednesday 18<sup>th</sup> January 2012 to discuss this objection.

Present for the hearing were:

**Polidano Brothers Ltd**

Dr Michael Sciriha	Legal Representative
Dr Franco Galea	Legal Representative
Mr Paul Polidano	Representative
Mr Boris Farrugia	Representative
Mr Noel Vella	Representative

**3 Bees Joint Venture**

Dr Massimo Vella	Legal Representative
Mr Vincent Borg	Representative
Mr Chris Refalo	Representative

**WasteServ Malta – Ministry for Resources and Rural Affairs**

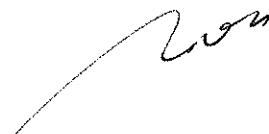
Dr Victor Scerri	Legal Representative
Mr Aurelio Attard	WasteServ Representative

**Evaluation Board**

Mr Mathieu Cilia	Chairman
Perit Robet Grech	Member

**Contracts Department**

Mr Jonathan Barbara	Representative
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After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of his company's objection.

Dr Michael Sciriha, legal advisor of Polidano Bros Ltd, the appellant company, made the following submissions:

1. by letter dated 18<sup>th</sup> November 2011 the Contracts Department had informed his client that the tender was recommended to be awarded to 3 Bees Joint Venture being the cheapest compliant tender;
2. his client was the only bidder who presented the samples required as per clauses 175 and 176 of the 'General Requirements' (page 148), apart from Road Network Malta Joint Venture which presented the samples but were refused since they were not presented in the stipulated manner;

and

3. as a result, the recommended tenderer should have been disqualified at administrative compliance stage and the tender awarded to his client.

What one had to establish was which clauses gained precedence between the *General Requirements*, which were mandatory, and the *Instructions to Tenderers*.

Mr Aurelio Attard, representing WasteServ Malta, made the following submissions:

- a. it was true that clauses 175 and 176 of the 'General Requirements' were requesting the submission of technical literature and samples;
- b. the 'Instructions to Tenderers' were considered to have precedence over the 'General Requirements' as the former dealt with the eligibility of tenderers, tender documentation and preparation together with tender evaluation and award;
- c. whilst the standard Contracts Department templates requested technical literature and samples, yet, in this particular tender no literature and no samples were being requested and he admitted that clauses 175 and 176 should not have featured in this tender document and called upon the Public Contracts Review Board's sense of comprehension with regard to this oversight by officers of WasteServ Malta and the Contracts Department who had vetted the tender document which was a very extensive one;
- d. although no samples were requested, the evaluation committee retained the right to ask for samples as per clause 30.4 of Volume 1, Section 1 – Instructions to Tenderers - Part 3: Technical Compliance which stated that:-
  - i. *At this step of the evaluation process, the Evaluation Committee will analyse the administratively-compliant tenders' technical conformity in relation to the technical specifications (Volume 3, and the documentation requested by the*



*Contracting Authority as per sub-Clause 16(e)), classifying them technically compliant or non-compliant.*

ii. *Tenders who are deemed to be provisionally technically compliant through the evaluation of their technical offer (especially the specifications) may be requested to submit samples so that the Evaluation Committee will corroborate the technical compliance of the offers received.*

e. one had to keep in mind that, prior to the closing date of the tender, tenderers had the opportunity to ask for clarifications wherever they encountered conflicting requirements in the tender document but, yet, none of the bidders did bring forward this issue;

and

f. once the contracting authority did not want certain literature or samples at tendering stage and for the sake of level playing field, the adjudicating board discarded the samples submitted by tenderer/s, however, if the samples submitted by the appellant company were to be considered they would have failed at technical compliance stage.

Dr Franco Galea, also on behalf of the appellant company, submitted that:

- i. clause 30.4 emerged from the 'Instructions to Tenderers' which were of a general nature, unlike the 'Special Conditions';
- ii. clause 30.4 of the 'Instructions to Tenderers' was not in conflict with the provisions of clauses 175 and 176 of the 'General Requirements' in Vol 3 'Technical Specifications' Section H43 because the contracting authority requested the samples specifically as per clauses 175 and 176 and at the same time it retained the right to request any other sample as per clause 30.4 of the 'Instructions to Tenderers';
- iii. what happened during this single package tender was that his client had presented the samples which were accepted, Road Network Malta Joint Venture submitted the samples but were not accepted as they were not properly presented and the other tenderers, including the recommended tenderer, did not submit any samples at all;
- iv. this was not a question of whether a tenderer was slightly technically non-compliant but it was a question of whether a bidder was fully compliant or not and, as per past Public Contracts Review Board decisions, the bidder had to provide whatever the contracting authority requested and it was not up to the bidder to choose what to submit and what to leave out;
- v. one had to keep in view also that in the tender document there were instances when one referred to 'provisionally technically compliant' tenders, as in clause 30.4, and there were other instances, such as in clauses 175 and 176, which referred to submissions 'with the tender offer';



and

- vi. the recommended tenderer should have been disqualified at administrative compliance stage and it should have never been evaluated technically.

Mr Attard pointed out that clarification number 3 was issued specifically to substitute the requirement for the submission of certain technical literature with the tender to the submission of technical literature to the supervisor upon inception of the contract.

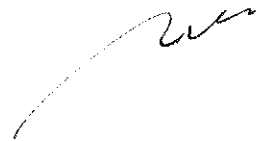
Dr Victor Scerri, legal representative of WasteServ Malta, declared that out of five participating tenders, none of them produced the labelled samples except for the appellant company and, in any case, the samples were not taken into account for evaluation purposes.

The Chairman Public Contracts Review Board remarked that level playing field did not mean that because all tenders were deficient one could lower the standards to render them compliant. He added that it was emerging that the tender document contained conflicting provisions.

Dr Sciriha requested that note be taken that, as a matter of fact, only his client did submit the technical literature and samples requested whereas, in the case of Road Network Malta Joint Venture, the samples were submitted but rejected for not being properly presented.

Dr Massino Vella, legal representative of the recommended tenderer, presented two scenarios, that is:

- a. if one were to take up the argument put forward by the appellant company that the samples were requested and, as a consequence, had to be submitted and evaluated – which argument he found deficient - the appellant company's demand in its letter of appeal that its tender ought to have been recommended for award did not stand because the samples it submitted were evidently non-compliant and the submission of non-compliant samples was equivalent to non-submission of samples;
- b. clause 30.4 of the 'Instructions to Tenderers' provided that, once a bid was adjudicated administratively compliant, then it would be evaluated technically and those bids found to be provisionally technically compliant might be requested to submit samples so that the evaluation committee would corroborate the technical compliance of the offers received;
- c. once that it had been established at the hearing that clauses 175 and 176 were included in the tender document through an oversight, then it followed that clause 30.4 should prevail over the provisions that, admittedly, found themselves in the tender by mistake;
- d. at the end of the day, through clause 30.4, the contracting authority retained the right to request any sample and not just the few mentioned at clauses 175 and 176;
- e. therefore, at technical evaluation stage, which stage had been completed once the tender had been awarded, the adjudicating board had the opportunity to ask his client for the samples indicated at clause 175 and 176 and, for that matter, any other sample;



and

- f. another question was whether it was fair to exclude a tenderer on provisions that in the first instance should not have featured in the tender document.

Dr Galea reiterated that clause 30.4 concerned the technical compliance whereas his client's appeal concerned administrative compliance and his contention was that, once the recommended tenderer failed to submit the samples requested at clauses 175 and 176, then a bidder was administratively non-compliant and should not have been technically evaluated.

Architect Robert Grech, a member of the adjudicating board, remarked that the materials relating to the samples mentioned at clause 175 and 176 represented items which constituted a small fraction - about 0.5% - of the project and if one were to request samples one would have asked for samples of tiles or aluminium which were going to be more extensively used.

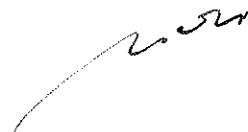
Mr Attard remarked that clause 16 of the 'Instructions to Tenderers' dealt with the content of tender which did not include the submission of these samples and reiterated that clauses 175 and 176 were included in the tender document by mistake.

Dr Sciriha concluded that clauses 175 and 176 were mandatory and should not be discarded.

At this point the hearing was brought to a close.

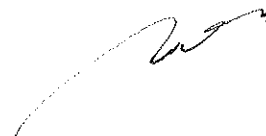
This Board,

- having noted that the appellant company, in terms of the reasoned letter of objection dated 25<sup>th</sup> November 2011 and through the verbal submissions made during the hearing held on the 18<sup>th</sup> January 2012, had objected against the decision of the Department of Contracts to recommend the award of the tender to 3 Bees Joint Venture;
- having noted the appellant firm's representatives' claims and observations regarding the fact that (a) by letter dated 18<sup>th</sup> November 2011 the Contracts Department had informed the appellant tenderer that the tender was recommended to be awarded to 3 Bees Joint Venture being the cheapest compliant tender, (b) the appellant company was the only bidder who presented the samples required as per clauses 175 and 176 of the 'General Requirements' (page 148), apart from Road Network Malta Joint Venture which presented the samples but were refused since they were not presented in the stipulated manner, (c) what one had to establish was which clauses gained precedence between the *General Requirements*, which were mandatory, and the *Instructions to Tenderers*, (d) clause 30.4 emerged from the 'Instructions to Tenderers' which were of a general nature, unlike the 'Special Conditions', (e) clause 30.4 of the 'Instructions to Tenderers' was not in conflict with the provisions of clauses 175 and 176 of the 'General Requirements' in Vol 3 'Technical Specifications' Section H43 because the contracting authority requested the samples specifically as per clauses 175 and 176 and at the same time it retained the right to request any other sample as per clause 30.4 of the 'Instructions to Tenderers', (f) this was not a question of whether a



tenderer was slightly technically non-compliant but it was a question of whether a bidder was fully compliant or not and, as per past Public Contracts Review Board decisions, the bidder had to provide whatever the contracting authority requested and it was not up to the bidder to choose what to submit and what to leave out, (g) the recommended tenderer should have been disqualified at administrative compliance stage and it should have never been evaluated technically, (h) clause 30.4 concerned the technical compliance whereas the appellant company's appeal concerned administrative compliance and his contention was that, once the recommended tenderer failed to submit the samples requested at clauses 175 and 176, then a bidder was administratively non-compliant and should not have been technically evaluated and (i) clauses 175 and 176 were mandatory and should not be discarded;

- having considered the contracting authority's representative's submissions, namely that (a) it was true that clauses 175 and 176 of the 'General Requirements' were requesting the submission of technical literature and samples, (b) the 'Instructions to Tenderers' were considered to have precedence over the 'General Requirements' as the former dealt with the eligibility of tenderers, tender documentation and preparation together with tender evaluation and award, (c) whilst the standard Contracts Department templates requested technical literature and samples, yet, in this particular tender no literature and no samples were being requested, (d) clauses 175 and 176 should not have featured in this tender document and that this happened solely through an oversight by officers of WasteServ Malta and the Contracts Department, (e) although no samples were requested, the evaluation committee retained the right to ask for samples as per clause 30.4 of Volume 1, Section 1 – Instructions to Tenderers - Part 3: Technical Compliance, (f) one had to keep in mind that, prior to the closing date of the tender, tenderers had the opportunity to ask for clarifications wherever they encountered conflicting requirements in the tender document but, yet, none of the bidders did bring forward this issue, (g) once the contracting authority did not want certain literature or samples at tendering stage and for the sake of level playing field, the adjudicating board discarded the samples submitted by tenderer/s, (h) if the samples submitted by the appellant company were to be considered they would have failed at technical compliance stage and (i) the materials relating to the samples mentioned at clause 175 and 176 represented items which constituted a small fraction - about 0.5% - of the project and if one were to request samples one would have asked for samples of tiles or aluminium which were going to be more extensively used;
- having also considered the recommended tenderer's representative's submissions namely that (a) if one were to take up the argument put forward by the appellant company that the samples were requested and, as a consequence, had to be submitted and evaluated the appellant company's demand in its letter of appeal that its tender ought to have been recommended for award did not stand because the samples it submitted were evidently non-compliant and the submission of non-compliant samples was equivalent to non-submission of samples, (b) clause 30.4 of the 'Instructions to Tenderers' provided that, once a bid was adjudicated administratively compliant, then it would be evaluated technically and those bids found to be provisionally technically compliant might be requested to submit samples so that the evaluation committee would corroborate the technical compliance of the offers received, (c) once that it had been established at the hearing that clauses 175 and 176 were included in the tender document through an oversight, then it followed that clause 30.4 should prevail




over the provisions that, admittedly, found themselves in the tender by mistake, (d) at the end of the day, through clause 30.4, the contracting authority retained the right to request any sample and not just the few mentioned at clauses 175 and 176 and (e) at technical evaluation stage, which stage had been completed once the tender had been awarded, the adjudicating board had the opportunity to ask the appellant company for the samples indicated at clause 175 and 176 and, for that matter, any other sample,

reached the following conclusions:

1. The Public Contracts Review Board opines that it is a fact that whilst the standard Contracts Department templates requested technical literature and samples, yet, according to the contracting authority's representative, in this particular tender no literature and no samples were being requested. Yet, it is also a fact that the same official also admitted that clauses 175 and 176 should not have featured in this tender document so much so that the official called upon the Public Contracts Review Board's sense of comprehension with regard to this oversight by officers of WasteServ Malta and the Contracts Department who had vetted the tender document which was a very extensive one.
2. The Public Contracts Review Board is fully cognizant of the fact that one had to keep in mind that, prior to the closing date of the tender, tenderers had the opportunity to ask for clarifications wherever they encountered conflicting requirements in the tender document but, yet, none of the bidders did bring forward this issue. However, this Board is also aware that the fact that a tenderer refrains from using such a rightful course of action does not, in any way, exculpate a contracting authority from any flawed publication of official documentation.
3. The Public Contracts Review Board feels that the comment made by the contracting authorities' representatives that
  - a. once the contracting authority did not want certain literature or samples at tendering stage and for the sake of level playing field, the adjudicating board discarded the samples submitted by tenderer/s and, especially
  - b. namely that, if the samples submitted by the appellant company were to be considered they would have failed at technical compliance stage

did nothing but complicate a situation which was not only based on an incongruent scenario but also went as far as to condition the outcome of this hearing where, regardless of how this Board decides upon this case, there has already been a clear admission as to how the evaluation committee was considering the quality of the sample submitted by the appellant company, a sample which should not, according to the same evaluation committee, have been submitted in the first place.

This Board has meticulously deliberated upon the issue relating to the fact that the contracting authority was claiming that, at the end of the day, through clause 30.4, it retained the right to request any sample and not just the few mentioned at clauses 175 and 176. In this



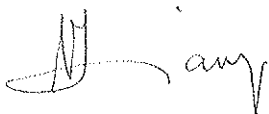
Board's opinion, the contracting authority's position in regard is flawed in view of the fact that, whilst the contracting authority has been claiming that, in this instance, all was attributable to a mere oversight by officers of WasteServ Malta and the Contracts Department, yet it was evidently manifested that the course of events could have easily prejudiced the outcome of the appellant company's bid with WasteServ Malta's officials knowing 'a priori' that the samples submitted by the appellant company which, according to the contracting authority, were not even required, were not technically compliant.

4. The Public Contracts Review Board contends that a level playing field did not mean that because all tenders were deficient one could lower the standards to render them compliant.
5. The Public Contracts Review Board, being in full cognisance of the situation, concludes that there is no doubt whatsoever that the specifications, terms and conditions of this tender left very much to be desired particularly in view of the fact that they contained contradictory instructions which, albeit no one challenged, should not have been included in the first place, especially when one considers the level of vetting which one normally expects in these circumstances.

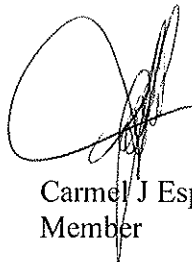
This Board cannot but insist enough on the fact that, whilst the onus of a bid being submitted correctly and as requested by the tender document's specifications rests with the bidder/s, similarly, the onus for a tender document to contain the right and proper information, instructions and so forth rests on the contracting authority. In view of the fact that this Board is aware of the conflicting requests on same subject matter ('samples') and the fact that the appellant company's bid may have now been prejudiced by comments made during the hearing by representatives of the contracting authority, this Board recommends that:

- a. all qualifying tenderers – including the appellant company - be readmitted and have their bid re-evaluated following the submission of samples (fresh samples as regards the appellant company)
- b. the samples requested will be more elaborate and far reaching reflecting the scope of the extent of the list contemplated in the bill of quantities

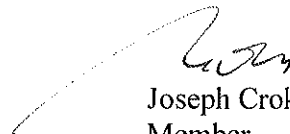
In view of the above this Board recommends that the deposit paid by the appellant company should be reimbursed.



Alfred R Triganza  
Chairman



Carmel J Esposito  
Member



Joseph Croker  
Member

6 February 2012