

PUBLIC CONTRACTS REVIEW BOARD

Case No. 484

MRRA/W/665/2011/3

Tender for Paving Works with Natural Material at the Kalkara Parish Church Parvis

This call for tenders was published in the Government Gazette on the 3rd July 2012. The closing date for this call with an estimated budget of € 138,665 (Inclusive of VAT) was the 31st July 2012.

Four (4) tenderers submitted their offers.

Avantgarde Projects Ltd filed an objection on the 23rd August 2012 against the decision of the Ministry for Resources and Rural Affairs to disqualify its offer as non-compliant and to recommend the award of the tender to Camray Co Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Carmel Esposito and Mr Paul Mifsud as members convened a public hearing on Tuesday, 6th November 2012 to discuss this objection.

Present for the hearing were:

Avantgarde Projects Ltd

Dr Leonard Caruana
Mr Joseph Vella

Legal Representative
Representative

Camray Co Ltd

Dr Reuben Farrugia
Mr Brian Miller

Legal Representative
Representative

Ministry for Resources and Rural Affairs

Evaluation Board

Architect Anton Camilleri	Chairman
Mr Robert Fenech	Member
Mr Mr Joseph Zerafa Boffa	Member
Ms Josephine Muscat	Member



After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of the company's objection.

Dr Leonard Caruana, legal advisor of Avantgarde Projects Ltd, the appellant company, made the following submissions:

- i. by email/letter dated 20th August 2012 the appellant company was informed that its offer was non-compliant and that the tender was being recommended for award to Camray Co Ltd.;
 - ii. the reasons given for non-compliance were that the samples were not as specified in the tender document and, particularly, that the thickness of some of the samples was less than that specified;
 - iii. clause 8.5.1 stated, among other things, that *'Tenderers must submit samples as indicated below, which samples shall all bear a label (marked clearly) indicating the product being proposed, as well as the name and address of the Tenderer. The size of the samples. should be as following (or similar)'*
 - iv. once the tender document called for samples with certain specifications 'or similar' therefore the specifications were not as such mandatory because even 'similar' ones were acceptable;
 - v. the samples provided by the appellant company gave the contracting authority a fair idea of the material and finishing;
 - vi. whilst the only variation was noted in the thickness, yet the thickness of the samples was only minimally less than that requested and, as a result, acceptable within the term 'or similar';
 - vii. with regard to the cubes or 'cubetti', the appellant company submitted two samples to better explain the actual product that would eventually be supplied;
- and
- viii. in conclusion, the reason for exclusion did not emanate from the tender specifications since these allowed a measure of leeway to provide samples with similar specifications.

Architect Anton Camilleri, chairman of the evaluation board, explained that:-

- a. Clause 8.5.1 stated that "bidders must submit" with tender bid the following:

"(c) Samples:

Tenderers must submit samples as indicated below, which samples shall all bear a label (marked clearly) indicating the product being proposed, as well as the name and address of the Tenderer. The size of the samples should be as following (or similar):-



- (c1) Light Grey Granite - One (1) sample of the type of granite proposed to be used, approx. size 200mm x 200mm x 30mm. Sample is to have at least one bush hammered surface.
- (c2) Dark grey Granite - One (1) sample of the type of granite proposed to be used, approx. size 200mm x 200mm x 30mm. Sample is to have at least one bush hammered surface.
- (c3) Light Grey Granite cubes or cubetti with cropped (hewn) sides and with a flamed flamed top surface finish. 100mmx100mm x 50mm (at least three)

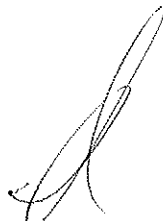
If conditions above are not strictly and fully complied with, the offer concerned will not be considered for the award of contract.

- b. there were three main shortcomings with the samples provided by the appellant company, namely the size, the thickness and the colour of the cubes or 'cubetti';
 - c. the size requested was 100mm x 100mm whereas those provided by the appellant company were 85mm x 75mm;
 - d. although the term 'similar' was not defined in the tender document, still, if the size were to vary a couple of millimetres it would have been acceptable but in this case the variation was quite substantial;
 - e. the thickness requested was 50mm whereas the sample provided was 20mm and that was far from qualifying as 'similar';
- and
- f. whilst the tender document requested light and dark grey granite, yet the samples, which were exhibited at the hearing, were practically each of a different shade of grey. Nevertheless, on closer inspection during the hearing he conceded that the colour was no longer an issue.

Mr Joseph Vella, also representing the appellant company, submitted that:-

- i. the issue concerning the colour did not feature in the letter of rejection and, as a result, should not be brought up at appeal stage;
- ii. it was not being contested that two instead of three samples of the 'cubetti' were submitted but, then again, the third one would have been identical to the ones provided;
- iii. the appellant firm was executing similar contracts on behalf of the same contracting authority and, as far as he was aware, no problems were encountered;

and



- iv. given the difference in price, about €12,000 on a contract below €100,000, the contracting authority could have asked for a clarification with regard to the points being raised.

Dr Caruana contended that 'approximately' meant one thing, namely a slight variation in the size/thickness within a certain degree of tolerance. On the other hand, 'or similar' referred to in the tender document was different from 'approximately' besides not having been defined at all in the tender document.

The Chairman Public Contracts Review Board noted that the bidder had to provide three samples of the 'cubetti'. He pointed out that, prior to submitting their offer, bidders had the opportunity to ask for clarifications on any aspect of the tender document.

Dr Reuben Farrugia, legal representative of the recommended tenderer, submitted that:-

- a. the sample had to be, as far as possible, similar to the product that would actually be supplied so that the evaluation board would be in a position to evaluate the technical aspects of the items being procured;
- b. the size, the thickness and the colour of the items were essential features when considering that the works were to be carried out on a parvis;
- c. whilst the contracting authority requested three samples of 'cubetti', which had to be identical samples in colour, size and thickness, yet, the appellant company only submitted two different samples, one to demonstrate the colour and the other for the 'flaming' and, as a result, the evaluation board did not have at its disposal not even one sample which corresponded to the tender specifications and which represented the actual item that would eventually be supplied;

and

- d. wide variations in the size and thickness did not fall within the term 'or similar' and stressed that, basically, the samples had to conform to tender specifications

Architect Camilleri explained that the samples provided by the appellant company varied from specifications as follows:

- Items C1 and C2: 200mmx200mmx30mm as per specifications
 200mmx200mmx20mm as per sample
- Item C3 100mmx100xx50mm as per specifications
 85mmx75mmx20mm as per sample

As a consequence, items C1 and C2 were compliant in size but not in thickness whereas item C3 was not compliant in both size and thickness.



Dr Caurana insisted on his earlier arguments that similar samples represented a departure from strict adherence to certain specifications. He also added that the appellant company also provided technical certificates attesting to the material of the product that it was offering.

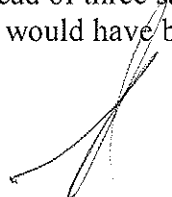
The Chairman Public Contracts Review Board remarked that whilst the evaluation board dealt with documents yet, in certain instances, the contracting authority also requested samples as a mandatory requirement to corroborate the written submission. He added that it was the responsibility of the contracting authority to publish a comprehensive tender document as much as it was the responsibility of the bidder to provide a complete and clear tender submission.

The Chairman Public Contracts Review Board also noted that clause 8.5.1 made it clear that if the conditions regarding the presentation of the samples were not adhered to then the tender would not be considered for award.

At this point the hearing came to a close.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated the 22nd August 2012 and also through their verbal submissions presented during the hearing held on the 6th November 2012, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant's representative's claims and observations, particularly, the references made to the fact that (a) by email/letter dated 20th August 2012 the appellant company was informed that its offer was non-compliant and that the tender was being recommended for award to Camray Co Ltd., (b) the reasons given for non-compliance were that the samples were not as specified in the tender document and, particularly, that the thickness of some of the samples was less than that specified, (c) clause 8.5.1 stated, among other things, that '*Tenderers must submit samples as indicated below, which samples shall all bear a label (marked clearly) indicating the product being proposed, as well as the name and address of the Tenderer. The size of the samples. should be as following (or similar)*', (d) once the tender document called for samples with certain specifications 'or similar', therefore the specifications were not as such mandatory because even 'similar' ones were acceptable, (e) the samples provided by the appellant company gave the contracting authority a fair idea of the material and finishing (f) whilst the only variation was noted in the thickness, yet the thickness of the samples was only minimally less than that requested and, as a result, acceptable within the term 'or similar', (g) with regard to the cubes or 'cubetti', the appellant company submitted two samples to better explain the actual product that would eventually be supplied, (h) in conclusion, the reason for exclusion did not emanate from the tender specifications since these allowed a measure of leeway to provide samples with similar specifications, (i) the issue concerning the colour did not feature in the letter of rejection and, as a result, should not be brought up at appeal stage, (j) it was not being contested that two instead of three samples of the 'cubetti' were submitted but, then again, the third one would have been identical to the ones provided, (k)



the appellant firm was executing similar contracts on behalf of the same contracting authority and, as far as he was aware, no problems were encountered, (l) given the difference in price, about €12,000 on a contract below €100,000, the contracting authority could have asked for a clarification with regard to the points being raised and (m) whilst 'approximately' meant one thing, namely a slight variation in the size/thickness within a certain degree of tolerance, on the other hand, 'or similar' referred to in the tender document was different from 'approximately' besides not having been defined at all in the tender document;

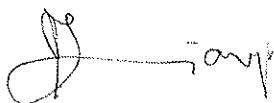
- having considered the contracting authority's representative's reference to the fact that (a) Clause 8.5.1 stated that "bidders must submit" and that "**If conditions above are not strictly and fully complied with, the offer concerned will not be considered for the award of contract**", (b) there were three main shortcomings with the samples provided by the appellant company, namely the size, the thickness and the colour of the cubes or 'cubetti'; (c) the size requested was 100mm x 100mm whereas those provided by the appellant company were 85mm x 75mm, (d) although the term 'similar' was not defined in the tender document, still, if the size were to vary a couple of millimetres it would have been acceptable but, in this case, the variation was quite substantial, (e) the thickness requested was 50mm whereas the sample provided was 20mm and that was far from qualifying as 'similar' and (f) whilst the tender document requested light and dark grey granite, yet the samples, which were exhibited at the hearing, were practically each of a different shade of grey - however, on closer inspection during the hearing it was conceded that the colour was no longer an issue and (g) in view of the fact that the samples provided by the appellant company varied from specifications as follows (1) Items C1 and C2 - 200mmx200mmx30mm as per specifications / 200mmx200mmx20mm as per sample and (2) 100mmx100mmx50mm as per specifications / 85mmx75mmx20mm as per sample, as a result, items C1 and C2 were compliant in size but not in thickness whereas item C3 was not compliant in both size and thickness;
- having also considered the recommended tenderer's representative's reference to the fact that (a) the sample had to be, as far as possible, similar to the product that would actually be supplied so that the evaluation board would be in a position to evaluate the technical aspects of the items being procured, (b) the size, the thickness and the colour of the items were essential features when considering that the works were to be carried out on a parvis, (c) whilst the contracting authority requested three samples of 'cubetti', which had to be identical samples in colour, size and thickness, yet, the appellant company only submitted two different samples, one to demonstrate the colour and the other for the 'flaming' and, as a result, the evaluation board did not have at its disposal not even one sample which corresponded to the tender specifications and which represented the actual item that would eventually be supplied and (d) wide variations in the size and thickness did not fall within the term 'or similar' and stressed that, basically, the samples had to conform to tender specifications



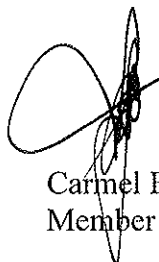
reached the following conclusions, namely:

1. The Public Contracts Review Board recognizes the fact that the bidder had to provide three samples of the 'cubetti', a requirement which, albeit was mandatory, yet the appellant company failed to fulfil its obligation to submit.
2. This Board also acknowledges that, whilst the evaluation board dealt with documents yet, in certain instances, the contracting authority also requested samples as a mandatory requirement to corroborate the written submission. The Public Contracts Review Board has always maintained that it is the responsibility of the contracting authority to publish a comprehensive and unequivocal tender document as much as it is the responsibility of a participating tenderer to provide a complete and clear tender submission and fully in line with the tender document's terms and conditions. Furthermore, this Board contends that, prior to submitting their offer, bidders have the opportunity to ask for clarifications on any aspect of the tender document but are definitely not at liberty to decide as to which mandatory samples to submit or not.
3. The Public Contracts Review Board establishes that the tender conditions were amply clear noting that clause 8.5.1 made it very unambiguous, namely that if the conditions regarding the presentation of the samples were not adhered to then the tender would not be considered for award.

In view of the above this Board finds against the appellant company and recommends that the deposit paid by the same company for the appeal to be lodged should not be reimbursed.



Alfred R Triganza
Chairman



Carmel Esposito
Member



Paul Mifsud
Member

19 November 2012