

## PUBLIC CONTRACTS REVIEW BOARD

Case No. 490

Adv: GHRC/009/2012

**Pre-Contractual Complaint – Works Tender for Infrastructure and Landscaping Works at Fort St. Elmo & Carafa Enceinte**

This call was published on the 3<sup>rd</sup> August 2012 with a closing date of the 17<sup>th</sup> August 2012.

On 15<sup>th</sup> October 2012, Road Network Malta Joint Venture filed a pre-contractual complaint against the decision of the Grand Harbour Regeneration Corporation to consider the tender submission of Attard Brothers Co. Ltd for financial evaluation when according to them it should have been considered administratively and technically non-compliant since allegedly it had not submitted one mandatory sample.

The Public Contracts Review Board composed of Mr Joseph Croker, A/Chair, and Messrs Carmelo Esposito and Paul Mifsud as members convened a public hearing on the 9<sup>th</sup> November 2012 to discuss this complaint.

Present for the hearing:

### **Road Network Malta Joint Venture (RNMJV)**

Dr Franco Galea	Legal Representative
Mr Malcolm Seychell	Representative
Mr Paul Magro	Representative

### **Grand Harbour Regeneration Corporation (GHRC)**

Dr Adrian Delia	Legal Representative
Mr Chris Paris	Chairman, Evaluation Board
Ms Charmaine Monseigneur	Executive Secretary, Evaluation Board
Mr Herbert Brincat	Representative
Perit Paul Borg	Representative



After the Chairman's brief introduction, the complainant was invited to explain the motives of his objection. Dr Franco Galea, on behalf of Road Network Malta Joint Venture, the complainant, made the following submissions:

- i. his client was informed by means of a schedule as follows: *Bidders 1* (the appellant) and *bidder 2* (Attard Brothers Ltd) have achieved the pass mark of 75 and will therefore proceed to the next stage, that is, the opening of *Envelope 3, the Financial Package*; the same schedule showed that both bidders were awarded equal marks at technical evaluation stage, i.e. 99 marks;
- ii. it resulted to his client that Attard Brothers Ltd had failed to submit a sample, which was a mandatory requirement so much so that clause 1.1.3 of the tender technical specifications stated as follows: *Samples of all material used are to be submitted. If samples and literature of the resin pavement are not provided tender will not be considered*;
- iii. his client contended that Attard Brothers Ltd failed to submit by the closing time for tender submissions item 4 'Resin Bound soil stabilizing floor material' as per list of samples;
- iv. in the circumstances, the offer of Attard Brothers Ltd should have been excluded at administrative stage let alone be considered technically and qualifying for financial evaluation; and
- v. this complaint was being lodged in terms of Regulation 85 (1) (a) of the Public Procurement Regulations.

Dr Adrian Delia, on behalf of the Grand Harbour Regeneration Corporation, submitted the following:-

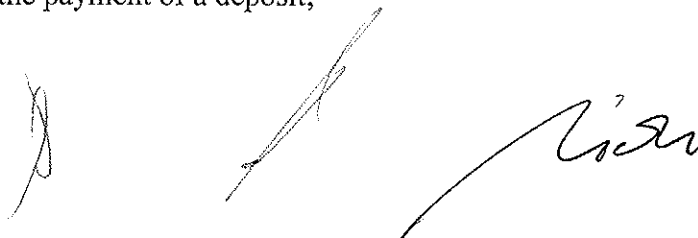
(a) the Public Procurement Regulations provided for four types of remedies to any interested party, i.e:

(i) the pre-contractual remedy, which Attard Brothers Ltd was erroneously invoking because according to Regulation 2 of the Public Procurement Regulations stated that:

*"pre-contractual remedy" means a remedy sought from the Director of Contracts or from the Public Contracts Review Board following a decision taken prior to the date of the closing of the tender;*

the complainant's letter whereby he sought pre-contractual remedy was manifestly submitted after the closing date of the tender so much so that the tendering process had reached stage 3, the financial package;

(ii) an appeal prior to the award of the tender in terms of Regulation 84 against the payment of a deposit;



(iii) the third type of objection concerned the award of the tender itself against the payment of a deposit; and

(iv) the last type of appeal was the recourse before the Courts but only on points of law;

(b) in cases a (ii) and (iii) above, all parties that had an interest in the matter had the right to attend the appeal proceedings and if the appeal would not be successful then the appellants could lose their deposit and;

(c) the kind of remedy requested by RNMJV sought:

(i) recourse to a pre-contractual remedy after the closing date of the tender;

(ii) to effectively lodge an appeal under the guise of a pre-contractual remedy in an attempt to avoid forking out the statutory deposit and the likelihood of losing that deposit;

(iii) to disqualify a bidder, Attard Brothers Ltd, who was a directly interested party but not present to defend his case;

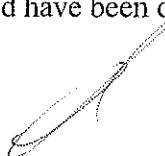
(d) in these circumstances, the kind of request being made by RNMJV was not within the legal remit of the PCRB since it was not covered by the Public Procurement Regulations, and it should not be considered.

Dr Franco Galea remarked that:-

- i. the appeal concerning the Manuel Dimech project was lodged under the pre-2010 Public Procurement Regulations when one did not have recourse to the pre-contractual remedy and therefore a tenderer had to wait for the administrative and/or technical evaluation stages to be in a position to lodge an appeal;
- ii. the Public Procurement Regulations, as revised in 2012, provided for pre-contractual remedy so that whenever there was an evident deficiency in the tendering process it could be brought to an immediate halt without wasting time and resources waiting for the evaluation stage to lodge an appeal against that deficiency;
- iii. his client was not against the other interested bidder, Attard Brothers Ltd, being present at the hearing so much so that he would even propose to defer the hearing to another date for any other interested parties to be present; and
- iv. the remedy contemplated in Reg. 85 (1) (a) was not the one being referred to by Dr Delia.

Dr Delia argued that:-

- a. had RNMJV lodged an appeal and paid the required deposit instead of resorting to the pre-contractual remedy, all the interested parties would have been present and the case would have been decided upon in one sitting;

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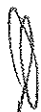
- b. Regulation 85 (1) (a) fell under Part XIV which dealt with the jurisdiction and the remit of the PCRB so much so that from the very outset it stated that:- (1) *The Review Board established in terms of regulation 34(1) shall be responsible for addressing:*
- c. it was Part XIII (Regulation 84) of the Public Procurement Regulations which dealt with the 'Procedure for the submission of appeals';
- d. if RNMJV was aggrieved by any decision taken during the tender evaluation process then the correct procedure would have been to lodge an appeal under Part XIII, pay the statutory deposit and the hearing would have been held in the presence of all interested parties; and
- e. one tended to suspect that RNMJV did not want to take the risk of lodging an appeal against the payment of a deposit and therefore it was attempting to invoke the pre-contractual remedy which did not apply in these circumstances.

Dr Galea concluded that once allegations were being made in the sense that the tendering process was vitiated then that issue fell within the remit of the PCRB because it was entrusted with the safeguard of the tendering process. He added that in this case, the fact that the bid by Attard Brothers Ltd was evaluated and reached envelope 3 stage when it should have been dismissed administratively amounted to a prejudice to his client's case.

Dr Delia concluded that the case put forward by RNMJV did not satisfy the pre-contractual remedy requisites.

This Board,

- having noted that Road Network Malta Joint V had filed a pre-contractual complaint in terms of their letter dated 12<sup>th</sup> October 2012 over the signatures of Dr John L Gauci LL.D and Dr Kenneth Grima LL.D and in their verbal submissions of the 9<sup>th</sup> November 2012 had objected to the Contracting Authority's decision to proceed to open the financial bids submitted by their Joint Venture and Attard Brothers Ltd, the other contender;
- having noted the submissions made by Dr Franco Galea on behalf of RNMJV to the effect that the complaint was lodged under the provisions of Regulation 85(1)(a) of the Public Procurement Regulations;
- having also noted the submissions tendered by Dr Adrian Delia on behalf of the GHRC that Regulation 85(1)(a) dealt with the jurisdiction of the Public Contracts Review Board and not with the method to be used in lodging an appeal which was dealt with under Regulation 84;
- having also noted the definition of 'pre-contractual remedy' under Regulation 2 of the Public Procurement Regulations LN 296/2010;



- having also noted that the complaint was lodged at stage 3 of the 3 packet procedure i.e. prior to the opening of the financial bid and not as laid down in Regulation 2 of the LN 296/2010 i.e. prior to the closing date of the tender;

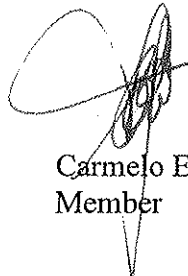
came to the following conclusions:

1. That Regulation 85(1)(a) may not be cited as a regulation under which one may lodge a complaint, since the procedure to be followed for the filing of objections is clearly laid down under Part XIII of the Public Procurement Regulations LN 296/2010.
2. Pre-contractual remedies may only be filed prior to the closing date of the tender as per definition in Regulation 2 of the mentioned Legal Notice.
3. The objection by RNMJV at the stage reached during the adjudication of this particular tender could only have been filed under the provisions of Part XIII of the Public Procurement Regulations and no other regulation may be cited ostensibly to circumvent the provisions of the pertinent regulations especially those concerning the payment of deposits.

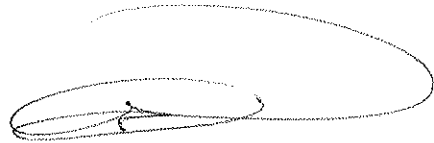
The Board finds against the appellant and strongly recommends to prospective appellants to ensure that they follow the correct procedures when filing an appeal. The Board has enough of a heavy workload without having to contend with appeals filed under the wrong procedures. The Contracting Authority may proceed with the adjudication of the tender.



Joseph Croker  
A/Chairman



Carmelo Esposito  
Member



Paul Mifsud  
Member

4 December 2012