

PUBLIC CONTRACTS REVIEW BOARD

Case 1801 – GHRC/011/2022-MXT – Tender for the Upgrading of Pavements and Parking Areas at Triq il-Lanca, Valletta

25th October 2022

The tender was issued on the 22nd June 2022 and the closing date was the 27th July 2022. The estimated value of the tender, excluding VAT, was € 1,524,967.75.

On the 16th September 2022 JJ Gauci Granite Ltd filed an appeal against the Grand Harbour Regeneration Corporation Plc as the Contracting Authority objecting to their disqualification on the grounds that their bid was not technically compliant.

A deposit of € 7,624.84 was paid.

There were seven (7) bids.

On the 18th October 2022 the Public Contracts Review Board composed of Dr Charles Cassar, as Chairman, Mr Lawrence Ancilleri and Ms Stephanie Scicluna Laiviera as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant –

Dr Peter Fenech	Legal Representative
Mr Clayton Gauci	Representative
Mr Glynn Clews	Representative

Contracting Authority – Grand Harbour Regeneration Corporation Plc

Dr Joseph Gerada	Legal Representative
Mr John Attard	Chairperson
Committee	Evaluation
Ms Andreana Pace	Secretary
Committee	Evaluation
Perit Mario Bonello	Member
Committee	Evaluation

Perit Stefan Cassar Committee	Member	Evaluation
Mr Stanley Azzopardi Mr Gino Cauchi	Member Evaluation Representative	Committee

Preferred Bidder – Schembri Barbros Ltd

Dr Naomi Schembri Mr Anton Schembri Mr Fabio Aquilina	Legal Representative Representative Representative
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Dr Charles Cassar Deputy Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Peter Fenech Legal Representative for JJ Gauci Granite Ltd said that according to the Contracting Authority Appellant did not reach a certain milestone; conflictingly however the Technical Offer did not require this 12 week milestone. The tender requested a Construction Management Plan (CMP) which was submitted. There is reference to the ‘bays’ being completed instead of ‘base’ which has a totally different meaning and the former forms a different phase of the project. The technical offer did not state when the bays were to be completed and is not included in Section 32.1 of the tender dossier and does not form part of it. The Contracting Authority did not correctly assess the Gantt Chart submitted by Appellant. In this type of contract it is normal to allow contractor to provide updated contract of works as indeed is allowed in Condition 11.11.

Dr Joseph Gerada Legal Representative for the Grand Harbour Regeneration Corporation stated that Appellant seems to have either misunderstood or ignored the tender requests. There were three stages in this project the first being twelve weeks to complete paving sub-base including services and exposed aggregate; it was clear that there were three stages to be completed within 40 weeks overall but the reason for these milestones seems to have been ignored. The Technical Offer required a programme of works in the form of a Gantt Chart and if this was unclear Appellant had the option of seeking clarification. The Gantt Chart offered makes it obvious that the request was not understood.

Mr Clive Borg Bonaci (100691M) called to testify by Appellant confirmed on oath that the tender requested completion of the project in 40 weeks with milestones. According to the witness the key words were ‘base’. ‘sub-base’ and ‘bays’ and the difference in their various uses in the tender. ‘Bays’ was not synonymous with ‘base’ and an explanatory document was

filed (Doc 1) illustrating the difference. According to the Gantt Chart week 11 is the start of the base to be completed with sub-base by week 16 – this confirms adherence to the tender. It appears that Appellant was disqualified on the basis of ‘sub-base’ but in fact the letter of exclusion refers to ‘bays’ in Article 32.1 where that word does not even appear in the tender text.

Questioned by Dr Gerada whilst referred to the Gantt Chart witness confirmed that works between week 11 to week 16 included all services and that week 13 to 21 covers slabs and concrete covering. Witness reiterated that in Article 32.1 ‘bays’ is not mentioned but agreed that it details the works schedule.

Mr John Attard (7483G) called as a witness by the Contracting Authority testified on oath that he was the Chairperson of the Evaluation Committee (EC). His role included explaining to the members of the EC the difference between Note 2 and Note 3 in a tender. In this case the Gantt Chart came under Note 3 an examination of which made it clear that Appellant was not compliant as milestones were not attained. In weeks 11 to 16 all concrete bases had to be completed. Bidder states ‘Supply and laying of underground/buried infrastructure such as sleeves’ instead of concreting base which starts in week 13. Neither ‘base’ not ‘bays’ would be completed in time and thus the offer was not valid. The tender is clear that Article 32.1 refers to ‘base’ not ‘bays’ and this was clear to the EC. The letter of objection did refer to ‘bays’. Referred to item 3 in the Technical specifications witness agreed that in past tenders when milestones were requested they were specifically asked for.

Perit Mario Bonello (89274M) called as a witness by the Contracting Authority testified on oath that he was a member of the EC and that he is an architect by profession. He said that there was either something missing in the Appellant’s Gantt Chart or it was not following the timelines requested, as for example, the manholes starting in week 13. He took the reference to infrastructure to mean pipes, wires etc. The submission indicates clearly that the work would not be completed in time. No rectification was possible as this item came under Note 3. Witness agreed that the laying of concrete, which was the focus of the works, would not start till week 13. The submissions will form part of the eventual contract and thus changes to the tender requirements mean that new conditions were being inserted. Milestones were important, said the witness, because they were part of the implementation of the contract and outside the orbit of the EC.

In reply to questions from Dr Fenech witness when referred to item 3.15 in the BOQ said that this was measured elsewhere and on item 3.08 replied that manholes were not completed at the end of the slab. However, he agreed that the manhole was part of the slab.

This concluded the testimonies.

Dr Naomi Schembri Legal Representative for Schembri Barbros Ltd said that emphasis is being made on the difference between 'base' and 'bays' – this difference is non-existent as the tender refers solely to the former whilst the latter is only mentioned in the letter of intent. Reference to previous tenders is not valid as argument is on the clarity of the present tender. Appellant is not conforming with the requested milestones.

Dr Fenech said that if the expected milestones were not reached there was always the recourse to pre-liquidated damages. The Gantt Chart is very clear that completion will be in 40 weeks. Article 34.1 makes a distinction between completion and milestone but the technical offer does not state so. Milestone is there merely to analyse the progress of works. Nowhere does Appellant indicate that it is not following this. In their letter of reply dated 20th September 2022 in points 2.1 and 2.2 the Contracting Authority are giving a totally different definition of milestones which is not the definition in the tender document. In point 2.3 the Authority is making the assumption that the Appellant would not be in a position to complete the work when the Gantt Chart makes it clear that it satisfies all the requirements. If Article 32 was part of the tender it should have been included in the technical offer as it has normally been included in past tenders. Article 3.1 in the Instructions to Tenderers is not claiming that it is not part of the Technical Specifications. The Appeal should be upheld.

Dr Gerada said that the Authority would stick to the points made in their reply to the objection. The programme of works was the Gantt Chart as part of the technical offer. The CMP presented by Appellant states that the Gantt Chart is part thereof. In the letter of intent there was a misprint or typo in the use of the word 'bays'. There was every facility to clarify any unclear or doubtful points and the Authority claims that if there was any doubt it would go in favour of the bidder. Appellant is fully aware that the Gantt Chart comes under Note 3 and therefore more attention should have been given to its preparation.

The Chairman thanked the parties and declared the hearing concluded.

End of Minutes

Decision

The Board refers to the above Minutes of the Board Meeting held on the 18th October 2022.

This Board,

Having noted this objection filed by JJ Gauci Granite Ltd., (herein after referred to as appellant) on 16/09/2022, refers to the claims made by the same appellant regarding the Tender listed as case No.1801 in the records of the Public Contracts Review Board

Whereby, the appellants mainly contend that:-

- A) According to the Contracting Authority Appellant did not reach a certain milestone by 12 weeks; conflictingly however the Technical Offer did not require this 12-week milestone.
- B) The Contracting Authority did not correctly assess the Gantt Chart submitted by Appellant.

The Contracting authority in their letter of reply dated 23rd September 2022 together with their verbal submissions contended:

- A) Appellant seems to have either misunderstood or ignored the tender requests with regards to milestones.
- B) The Technical Offer required a programme of works in the form of a Gantt Chart and if this was unclear Appellant had the option of seeking clarification.

The Board, having considered the arguments and documentation from all parties namely the appellant, the contracting authority and preferred bidder including the testimony of the witnesses duly summoned noted that:

During the hearing it was established that the letter of rejection sent by the contracting authority to Messrs JJ Gauci Granite Ltd, erroneously made reference to 'bays' instead of 'base' when quoting Article 32.1 of the published special conditions.

Through documentation submitted, the Board notes that a number of clarifications relating to the Eligibility Criteria and other Criteria falling under 'Note 2' should have been sought but were skipped on the pretext that bids were technically not compliant.

Also, the Board notes that it remains unclear on whether the first Milestone requested through Article 32.1 of the Special Condition would be reached by the appellant company and again this could have been a matter of clarification.

The Board opines that The Evaluation Process should be reinitiated and to follow fully the three (3) sequential stages of Evaluation: Administrative Evaluation, Technical Evaluation and Financial Evaluation, and clarifications sought where necessary.

A new Evaluation Committee is to be appointed to be composed of members not previously involved in this evaluation. .

The Board concludes and directs that:

- a) Upholds the Appellant's objection.
- b) Evaluation Process is to be reinitiated as detailed above
- c) A new Evaluation Committee is to be appointed composed of different members.
- d) Directs that the deposit paid by the Appellant be reimbursed

Dr Charles Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr S Scicluna Laiviera
Member

