

PUBLIC CONTRACTS REVIEW BOARD

Case 1706 – CT 2127/2021 – Tender for Restoration Works on Notre Dame Bastion and Curtain Wall, Cottonera Lines (Zabbar)

25th April 2022

The Board,

Having noted the letter of objection filed by Dr Alessandro Lia on behalf of Lia Aquilina Advocates acting for and on behalf of Vaults Co. Ltd, (hereinafter referred to as the appellant) filed on the 14th January 2022;

Having also noted the letter of reply filed by Dr Fiorella Fenech Vella acting for Ministry for the National Heritage, the Arts and Local Government (hereinafter referred to as the Contracting Authority) filed on the 1st March 2022;

Having heard and evaluated the testimony of the witness Mr Ivan Farrugia (Representative of Vaults Co Ltd) as summoned by Dr Alessandro Lia acting for Vaults Co. Ltd;

Having heard and evaluated the testimony of the witness Perit Amanda Degiovanni (Chairperson of the Evaluation Committee) as summoned by Dr Fiorella Fenech Vella acting for the Arts and Local Government;

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by representatives of the parties;

Having noted and evaluated the minutes of the Board sitting of the 14th April 2022 hereunder-reproduced.

Minutes

Case 1706 – CT 2127/2021 – Tender for Restoration Works on Notre Dame Bastion and Curtain Wall, Cottonera Lines (Zabbar)

The tender was issued on the 14th June 2021 and the closing date was the 29th July 2021. The value of the tender, excluding VAT, was € 786,237.50

On the 14th January 2022 Vaults Co Ltd filed an appeal against Restoration Directorate, Ministry for National Heritage, the Arts and Local Government as the Contracting Authority objecting to their disqualification on the grounds that their offer was found to be abnormally low and to the subsequent cancellation of the tender.

A deposit of € 3,931 was paid.

There were four (4) bidders.

On the 14th April 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman Dr Charles Cassar and Mr Richard Matrenza as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Vaults Co Ltd

Dr Alessandro Lia	Legal Representative
Mr Ivan Farrugia	Representative

Contracting Authority – Restoration Directorate

Dr Fiorella Fenech Vella	Legal Representative
Perit Amanda Degiovanni	Chairperson Evaluation Committee
Mr Keith Muscat	Secretary Evaluation Committee
Perit Daphne Fenech	Member Evaluation Committee

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties. He noted that since this was a virtual meeting all the parties agreed to treat it as a normal hearing of the Board in line with Article 89 of the Public Procurement Regulations. He then invited submissions.

Dr Alessandro Lia Legal Representative for Vaults Co Ltd requested that witnesses be heard first.

Mr Ivan Farrugia (161361M) called as a witness by the Appellant testified on oath that he is an employee of Vaults Co Ltd which is a company involved in restoration works. He stated that the Bills of Quantity do not always reflect the work required and therefore certain prices are included globally. The work would still be carried out however, with the costs being absorbed indirectly in the contract price. In this Case the project was studied carefully to ascertain overall costs before the bid was placed; this has been normal practice in many previous other contracts undertaken.

Perit Amanda Degiovanni (257073M) called as a witness by the Contracting Authority testified on oath that she was the Chairperson of the Evaluation Committee and went on to state that there is a difference between a lump sum item and measured work; whilst a lump sum is acceptable the inclusion of measured work within that sum creates anomalies since itemised prices facilitate valuation of work. The Evaluation Committee deliberated on this point before deciding to verify if this was a case of low rate as there was a whole section of work included in a lump sum. A detailed BOQ ensures equal treatment of all contractors. Appellant gave no explanation as to how the ‘zero rate’ was arrived at.

Questioned by Dr Lia witness stated that lump sum figures tend to create discrepancies between contractors as it creates difficulties with valuing the work. The Evaluators needed

explanations as to the low costs and were guided by Regulation 243 of the PPRs in this. They were given no peace of mind by Appellant at that stage submitting a zero rate on much of the measured work as they gave no clear explanation on various items that required individual costings.

This was the end of the testimonies.

Dr Lia said that the appeal was based on two points – the disqualification and the cancellation of the tender. The concept of abnormally low tenders is a dangerous tool in the hands of evaluators. The tender offers indicate a range of prices over and above the tender value. In this Case the Authority requested confirmation not explanation for the zero rating, which indicates that the Authority understood quite clearly that the items were being offered at zero rate. They merely sought further information after having indicated that certain lump sums were accepted. Any contractor is entitled to absorb certain costs by combining them and the Evaluation Committee at first seemed to be satisfied by this.

The price, compared to the estimated value of the tender was not abnormally low and the Authority's decision was erroneous. Regulation 18.3 of the General Rules quoted by the Authority does not provide the cover needed and the number of assumptions made by witness Perit Degiovanni post the award stage had no bearing on the evaluation.

Dr Fiorella Fenech Vella Legal Representative for the Restoration Directorate said that the Regulation 243 imposes a duty on the Authority to demand an explanation of costs as they are duty bound to check each item and each price submitted. With zero rated items there is a danger as there is no yardstick to measure additional work. The Evaluation Committee's decision was not based on simply one item but on 24 items which translates into a substantial amount of costs. The bidder endeavoured to change the scope of the BOQ and this creates a danger of discrimination in favour of one economic operator. General Rule 18.3 was followed as overall the bid seemed abnormally low upon examination of each individual item.

Dr Lia pointed out that in Case 127/2021 the Courts held that it has to be the overall price that is abnormally low not individual prices. In this instance the zero rate was used on items on which the Appellant felt he could take a risk.

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

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 14th April 2022.

Having noted the objection filed by Vaults Co. Ltd (hereinafter referred to as the Appellant) on 14th January 2022, refers to the claims made by the same Appellant with regard to the tender of reference CT 2127/2021 listed as case No. 1706 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Alessandro Lia

Appearing for the Contracting Authority: Dr Fiorella Fenech Vella

Whereby, the Appellant contends that:

- a) The reason for rejection was listed as *“the offer submitted by your company was found to be abnormally low”* and the Contracting Authority proceeded not to proceed with this tender procedure as per terms of paragraph 18.3(f) of the General Rules Governing Tenders and regulation 243(4) of the Public Procurement Regulations.
- b) The estimated contract value was listed at €786,237.50 while the offer of the Appellant amounted to €695,688 which equates to 88.5% of the estimated contract value.
- c) That the Contracting Authority, presumably is not stating that the overall bid was abnormally low but that certain rates within the bid seem to be abnormally low. The Appellant had indicated these items with the word *“included”*, i.e. that they are included within the bid or will be absorbed by Vaults.
- d) Moreover, the Contracting Authority proceeded to cancel the tender procedure as per terms of paragraph 18.3(f) of the General Rules Governing Tenders and regulation 243(4) of the Public Procurement Regulations. The Appellant company reiterates that since its offer could never be rejected as per regulation 243 of the PPRs, then the reasons provided for the cancellation of the tendering procedure are to be deemed null.

This Board also noted the Contracting Authority’s Reasoned Letter of Reply filed on 1st March 2022 and its verbal submission during the virtual hearing held on 14th April 2022, in that:

- a) When compared to the published estimate and the market rates, the rates submitted by your company for selected items were considered by the Evaluation Committee as abnormally low. A financial clarification was issued to Vaults to explain how they will be providing the said items at the submitted rates. Vaults stated that they *“have understood all tender conditions and shall be addressing these requirements within submitted rates”*. In the opinion of the Evaluation Committee, Vaults failed to clarify and explain how the company would provide the items listed at the indicated rates, in particular as some of these rates refer to items where the quantities need to be measured.

- b) Reference is made to the tender dossier whereby it was clear that rates needed to be listed for each item. The appellant company, rather than providing rates, listed “incl.” and this resulted in the evaluation committee listing its offer as abnormally low.
- c) As per regulation 243(1), the Contracting Authority requested the prospective bidder to explain the prices / submission listed. This through a letter dated 11th October 2021 whereby the Evaluation Committee asked the prospective bidder to confirm that the items were being listed at €0.00 and that they were included in its global price. Another letter was sent on 21st October 2021 to obtain further clarifications. The Appellant’s reply was that *“within our rates just like Bill Items 2.01 to 2.12 and can re-confirm that we have understood all tender conditions and shall be addressing these requirements within submitted rates”*. The Evaluation Committee concluded that this reply of the Appellant was too generic and didn’t answer what was requested of it.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties including the testimony of the witnesses duly summoned, will consider Appellant’s grievances as follows:

- a) Abnormally low tender grievance –
 - i. From the outset this Board will make reference to regulation 243(1) of the Public Procurement Regulations, which states *“Contracting authorities shall require economic operators to **explain** the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services”*. (bold & underline emphasis added). Therefore, the law requires an ‘explanation’.
 - ii. In the initial / first letter, of 11th October 2021, from the Contracting Authority to the Appellant, it was a confirmation that was requested, and not an explanation. The letter stated: *“For the items enlisted hereunder you have inserted ‘incl’. You are requested to clarify your position by **confirming** that these items are being offered zero-rated and are included in global sum/ total”*. (bold emphasis added). Appellant confirmed, and hence these items do in fact have a rate, i.e. €0.00. Therefore, it is clear to this Board that any additional ‘units’ of these items will have to be provided by the Appellant at the quoted rate of €0.00.
 - iii. A further clarification letter was issued on 21st October 2021 stating *“...when compared to our estimate and the market rates, the rates submitted for the following items are abnormally low. You may wish to clarify your position....”* The Appellant re-confirmed the rates by stating *“... have understood all tender conditions and shall be addressing these requirements within submitted rates”* (i.e. €0.00).
 - iv. Therefore, if one analyses the full / complete financial bid of the Appellant holistically, which amounts to €695,688 and compares it to the Estimated Value of the Tender, i.e. €786,237.50, it is evident that the offer of the Appellant is not abnormally low (11.5% less

than the Estimated Value of the Tender). The costs of the specific items listed in the clarification letters are being absorbed through other items.

- v. Regarding the argumentation by the Contracting Authority that these are 'measured' items, the Appellant has confirmed that these are zero rated at €0.00, hence any further units required if need be, will be costs to be borne by the economic operator.

Therefore, this Board upholds the grievance of the Appellant.

b) Cancellation of tender grievance –

- i. Considering that the initial and main grievance of the Appellant has been upheld, the cancellation of the tender in accordance with Article 18.3(f) of the General Rules Governing Tenders and Regulation 243(4) of the Public Procurement Regulations, cannot proceed and hence such decision is to be reversed.

Hence, this Board upholds the Appellant's grievance.

The Board,

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) To uphold the Appellant's concerns and grievances;
- b) To cancel the Letters of Rejection dated 4th January 2022 sent to Vaults Co. Ltd ;
- c) To revoke the decision on the cancellation / non-award of the tender and to re-instate the bid of Vaults Co. Ltd
- d) To order the contracting authority to re-evaluate the bid of Vaults Co. Ltd received in the tender through a newly constituted Evaluation Committee composed of members which were not involved in the original Evaluation Committee, whilst also taking into consideration this Board's findings;
- e) after taking all due consideration of the circumstances and outcome of this Letter of Objection, directs that the deposit be refunded to the Appellant.

Mr Kenneth Swain
Chairman

Dr Charles Cassar
Member

Mr Richard Matrenza
Member