

PUBLIC CONTRACTS REVIEW BOARD

Case 1717 – ZLC 3/2021 – Tender for the Cleaning, Maintenance, Upkeep and Embellishment of Soft Areas, Roundabouts, Pots and Pruning of Trees in an Environmentally Friendly Manner

9th May 2022

The Board,

Having noted the letter of objection filed by Dr Alexander Schembri on behalf of Thake Desira Advocates acting for and on behalf of Mr Christopher Bonello, (hereinafter referred to as the appellant) filed on the 9th March 2022;

Having also noted the letter of reply filed by Dr Dustin Camilleri on behalf of Emmanuel Mallia and Associates Advocates acting for Zabbar Local Council (hereinafter referred to as the Contracting Authority) filed on the 18th March 2022;

Having heard and evaluated the testimony of the witness Mr Mario Cassar (Member of the Evaluation Committee) as summoned by Dr Alexander Schembri acting for Mr Christopher Bonello;

Having heard and evaluated the testimony of the witness Mr Jorge Grech (Chairperson of the Evaluation Committee) as summoned by Dr Alexander Schembri acting for Mr Christopher Bonello;

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 5th May 2022 hereunder-reproduced;

Minutes

Case 1717 – ZLC 3/2021 – Tender for the Cleaning, Maintenance, Upkeep and Embellishment of Soft Areas, Roundabouts, Pots and Pruning of Trees in an Environmentally Friendly Manner.

The tender was issued on the 2nd November 2021 and the closing date was the 30th November 2021. The value of the tender, excluding VAT, was € 40,000

On the 9th March 2022 Mr Christopher Bonello filed an appeal against the Zabbar Local Council as the Contracting Authority objecting to the cancellation of the tender and that his offer was not accepted.

A deposit of € 400 was paid.

There were six (6) bids.

On the 5th May 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Mr Christopher Bonello

Dr Alexander Schembri	Legal Representative
Mr Christopher Bonello	Representative

Contracting Authority – Zabbar Local Council

Dr Dustin Camilleri	Legal Representative
Mr Jorge Grech	Chairperson Evaluation Committee
Mr Marco Cassar	Member Evaluation Committee
Mr Brian Farrugia	Member Evaluation Committee
Mr Cameron Farrugia	Member Evaluation committee
Ms Stephanie Testaferrata de Noto	Representative
Mr Kenneth Brincat	Representative

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 Alexander Schembri Legal Representative for Mr Christopher Bonello stated that Appellant had an identical contract in 2019 but the Zabbar Council decided not to give him a possible extension but to issue a fresh tender. Appellant submitted a bid but immediately after the tender was cancelled in line with the General Rules Governing Tenders.

Dr Dustin Camilleri Legal Representative for Zabbar Local Council said that he would be relying on his written submissions which will be substantiated by testimonies of witnesses.

Mr Mario Cassar (351381M) called as a witness by Appellant testified on oath that he was part of the Tender Evaluation Committee (TEC) and that the Committee had recommended the award to Mr Christopher Bonello who was the cheapest bidder with an offer of Eur 31,880.

Mr Jorge Grech (110896M) called as a witness by the Appellant testified on oath that he was the Chairperson of the TEC. He confirmed Minute 549.12.1 of the meeting of the Council of the 31st August 2021 and Minute 585 of the Council meeting of 22nd February 2022. Witness confirmed that Minute 549.12.1 confirmed that Mr Bonello's contract was not extended whilst Minute 558.6.4 confirmed the decision of the TEC that Mr Bonello be awarded the contract. The subsequent paragraph states that the sitting was suspended to discuss the

award in committee and witness agreed that the next paragraph indicated that a decision was taken that further requirements on the project were still being considered to enable a fresh tender to be issued. When asked, witness could not state what extra works were required as the process has not yet taken place. He confirmed that the previous contract expired on the 31st October 2021.

Questioned by Dr Camilleri witness stated that the Council was seeking the best terms for the local community. The Council had suffered from lack of proper service but there were no personal feelings in not renewing Mr Bonello's contract. The only reason for the fresh tender is the additional works envisaged.

In reply to further questions from Dr Schembri as to why a fresh tender was required for the major project witness stated that the source of funding is different and there is the need to keep it separate from maintenance works. The tender in relation to this appeal is only for maintenance.

That concluded the testimonies.

Dr Schembri said that the Council decided not to extend the tender in question but to issue a fresh one after recommending the award to Mr Bonello and then for reasons not stated decided to cancel it. The General Rules require certain parameters to cancel a tender and despite their claim that major projects were planned they still have no idea what the project is six or seven months later. All the Council stated is that extra works are required with no identification of what is involved. It is clear that they did not want to award this tender to Mr Bonello and they must realise that it is not up to the Council to hand pick who they award contracts to.

Dr Camilleri referred to his written submissions and the witnesses heard. The Council is bound to ensure that funds are not wasted and the fact that discussions on the project are still ongoing is an indication of the scale of the project. There is no proof that the Council does not want to work with Mr Bonello – they simply used their discretion in applying the General Rules.

Dr Schembri re-iterated that Tender ZLC 3/2021 is for routine work and the special project is totally different – if an actual fresh project exists then a fresh tender for it is necessary as it is not routine work.

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 5th May 2022.

Having noted the objection filed by Mr Christopher Bonello (hereinafter referred to as the Appellant) on 9th March 2022, refers to the claims made by the same Appellant with regards to the tender of reference ZLC 3/2021 listed as case No. 1717 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Alexander Schembri

Appearing for the Contracting Authority: Dr Dustin Camilleri

Whereby, the Appellant contends that:

- a) Appellant believes that the offer which he submitted in connection with the tender in caption was the cheapest technically compliant offer submitted from all bidders. In such circumstances, Appellant should have been awarded the tender in caption, particularly since the said tender should have been evaluated and adjudicated according to price and cost effectiveness.
- b) The facts of the case blatantly suggest that, in this case, the Contracting Authority had decided, *ab initio* and upon issuing the tender in caption, not to award the said tender to Appellant under any circumstances. Such practices are wholly illegal, abusive, and discriminatory, and are in total breach of the dispositions of the Public Procurement Regulations.
- c) Without prejudice to the above, the Contracting Authority decided to cancel the tender in caption on the basis of article 18.3 (B) and 18.3 (C) of the General Conditions, which state as follows:

“Cancellation may occur where: [..]

(b) the economic or technical parameters of the project have been fundamentally altered;

(c) exceptional circumstances or force majeure render normal performance of the project impossible;”

In Appellant's opinion, the Contracting Authority is bound by law to demonstrate, during the course of these proceedings, both that there was a fundamental change in the economic or technical parameters of the project, and that there existed exceptional circumstances or force majeure rendering the normal performance of the project impossible, so as to justify it's decision of the 1st March 2022.

Failing the above, the Contracting Authority would be automatically granted an unfettered discretion which will enable it to discriminate between bidders and cancel all tenders - for one reason or another, whether legitimate or otherwise - which it feels should not be awarded to the cheapest technically compliant bidder.

Naturally, the above practice would be in total breach of the Public Procurement Regulations, and would lead to illegal and abusive behaviour and decisions, to the detriment of bidders.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 18th March 2022 and its verbal submission during the virtual hearing held on 5th May 2022, in that:

- a) The Contracting Authority confirms that the tender in caption was cancelled on the basis of Article 18.3(b) and 18.3(c) of the General Rules. The decision to cancel such tender was taken at a meeting held on the 28th February 2022, since, new projects needed to be implemented without delay in the Zabbar Locality. Such projects include additional planters, a roof garden and soft landscaping. Therefore, the Contracting Authority needed to issue a new tender which included both the proposals in the tender in caption as well as the new proposals.

Given that this was an exceptional circumstance, it could not simply be solved by an amendment to the tender in caption, especially when considering that new works and services which would change the economic framework of the tender needed to be carried out. This point is further strengthened by the fact that the tender was going to be adjudicated and evaluated according to price and cost effectiveness. Thus, the Contracting Authority did have valid and lawful reasons for cancelling the tender in accordance with Article 18.3(c) and 18.3(b) of the General Rules and this as will be proved further during the course of the proceedings. It follows that the Contracting Authority acted within the remit of the law and did not behave abusively and illegally.

- b) The Appellant alleges that there was a breach of the Public Procurement Regulations since the Contracting Authority had decided it was not going to award the tender to him *ab initio*. The Appellant also suggests that such an intention could be deduced from the facts as presented by him in the Notice of Objection. Although the Contracting Authority does not contest the facts presented by the Appellant it does contest the interpretation given by the Appellant to such facts. The Contracting Authority reiterates that the reason why the Appellant's offer was rejected entails the fact that the Contracting Authority had to cancel the tender for the reasons already explained in the point above. Furthermore, if the allegations of the Appellant were true, then it would have been easier for the Contracting Authority to issue a fresh call for other tenderer to submit their proposal rather than cancel the tender altogether.
- c) The above shows that contrary to what the Appellant is alleging, the Contracting Authority's decision was based on factual and legal grounds. Moreover, the fact that the Appellant's offer was compliant with the requirements of the tender, became irrelevant once the tender was cancelled.
- d) Finally, the Appellant will have the opportunity to submit his offer for the new tender, once such tender is issued by the Contracting Authority.

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) It must be stated, as from the start, that the Contracting Authority has the right to cancel a tender procedure. This is per section 18 of the General Rules Governing Tenders and as further stated in regulation 15 of the Public Procurement Regulations ("PPR").
- b) Reference is made to Regulation 15(3) of the PPR whereby: *"The decision leading to the cancellation of a procurement procedure has to be made in writing and must include the findings and the reasoning that led to this decision"*. This Board opines that it is up to the Contracting Authority to demonstrate that such 'reasons' which led to the decision for cancellation are reasonable, justifiable and in line with the general principles of the PPR.
- c) This Board will now refer to the testimony under oath of Mr Mario Cassar whereby it was confirmed that the Evaluation Committee had recommended the award to Mr Christopher Bonello after concluding that his offer was both administratively and technically correct, whilst also being the cheapest financial bid in hand by the Contracting Authority.
- d) Reference is also made to the testimony under oath of Mr Jorge Grech whereby:
 - i. *"..the Council was seeking the best terms for the local community. The Council had suffered from lack of proper service but there were no personal feelings in not renewing Mr Bonello's contract. The only reason for the fresh tender is the additional works envisaged."*
 - ii. In reference to the 'major project': *"that the source of funding is different and there is the need to keep it separate from maintenance works. The tender in relation to this appeal is only for maintenance"*
 - iii. *".....that a decision was taken that further requirements on the project were still being considered to enable a fresh tender to be issued."* When asked, witness could not state what extra works were required as the process has not yet taken place. He confirmed that the previous contract expired on the 31st October 2021.
- e) From all of the above, this Board is of the opinion that if and when such a 'major project' is to materialise, as very little information was provided in such regard, it has little to no correlation to the tender in question. The current tender, subject of this appeal, is for maintenance purposes, whilst a 'major project' tender would envisage capital expenditure. The Estimated Procurement Value should also be considerably different; alas no information was provided during the testimony. Therefore, comparability is difficult to obtain. Moreover, the 'old' tender "ZLC 4/2019" expired on 31st October 2021, and to date no information has been provided in the testimony, of any possible dates when this new 'major project' tender is to be published.
- f) The Board opines, that all the above information create more 'question marks' rather than providing reasonable and justifiable proof for the reasons listed in the Letter of Rejection dated 1st March 2022.

Therefore, this Board, upholds the Appellant's grievances.

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 1st March 2022 sent to economic operators participating in this tender procedure;
- c) To proceed to award the tender to the cheapest priced offer satisfying the administrative and technical criteria;
- d) 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

Mr Lawrence Ancilleri
Member

Dr Charles Cassar
Member