

PUBLIC CONTRACTS REVIEW BOARD

Case 1727 – CT 2371/2021 – Works Tender for the Land Build-up Works between Ghallis Engineered Landfill and Rehabilitated Maghtab Landfill, at Ecohive Complex for WasteServ Malta

23rd May 2022

The Board,

Having noted the letter of objection filed by Dr Massimo Vella on behalf of Vella Zammit McKeon Advocates acting for and on behalf of ABB Joint Venture, (hereinafter referred to as the appellant) filed on the 14th February 2022;

Having also noted the letter of reply filed by Dr Marc Sant acting for Wasteserv (hereinafter referred to as the Contracting Authority) filed on the 23rd February 2022;

Having heard and evaluated the testimony of the witness Perit Edric Micallef (Chairperson of the Evaluation Committee) as summoned by Dr Marc Sant acting for Wasteserv;

Having heard and evaluated the testimony of the witness Mr Paul Magro (Representative of ABB Joint Venture) as summoned by Dr Massimo Vella acting for ABB Joint Venture;

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 19th May 2022 hereunder-reproduced.

Minutes

Case 1727 – CT 2371/2021 – Works Tender for the Land Build-up Works between Ghallis Engineered Landfill and Rehabilitated Maghtab Landfill, at Ecohive Complex for Wasteserv Malta

The tender was issued on the 15th November 2021 and the closing date was the 30th November 2021. The value of the tender, excluding VAT, was € 634,500.

On the 14th February 2022 ABB Joint Venture filed an appeal against Wasteserv Malta as the Contracting Authority objecting to the cancellation of the tender.

A deposit of € 3,172 was paid.

There were eight (8) bids.

On the 19th 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.

bids. He agreed that the letter from the Department of Contracts did not explain these details.

Mr Paul Magro (546374M) called to testify by the Appellant stated on oath that different rates were usual in this type of tender as the provisional rates were regarded as a 'bonus' since lower overheads were involved due to the contractor being already on site.

This concluded the testimonies.

Dr Vella said that from the evidence just heard it was confirmed that Appellant's first grievance is justified as no reason was given for the cancellation. Regarding the second point the terms in this tender were similar to many other previous tenders and the reason for lower rates being submitted for provisional items explained. The contractor is already mobilised on site leading to economies of scale – the Authority did not seem to realise the benefit of this.

Dr Sant confirmed that the Department of Contracts failed to state the reason for the cancellation. The point being made about the provisional items was not the cost problem but the difficulty in evaluating the tender.

Dr Vella re-iterated that the reason for the decision to cancel is essential and it is not sufficient to claim 'irregularities' – the decision of the Authority to cancel should be rescinded.

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 19th May 2022.

Having noted the objection filed by ABB Joint Venture (hereinafter referred to as the Appellant) on 14th February 2022, refers to the claims made by the same Appellant with regard to the tender of reference CT 2371/2021 listed as case No. 1727 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Massimo Vella

Appearing for the Contracting Authority: Dr Marc Sant

Whereby, the Appellant contends that:

- a) **The decision to cancel the Tender is null and void since it does not satisfy the requirements set out in Regulation 15(3) of the Public Procurement Regulations**

Regulation 15(3) of the Public Procurement Regulations provides the following:

“(3) 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.”

The aforementioned decision communicated to ABB JV merely states the following.

“There have been irregularities in the procedure in particular where these have prevented fair competition, this tender procedure is being cancelled.

The main reason for this cancellation is that during the evaluation process, it was evident that there were irregularities, particularly through the Bill of quantities and the financial bid form, that prevented fair competition.”

The first sentence of the decision quoted above merely reiterates paragraph 18.3(e) of the General Rules Governing Tenders v. 4.3 and, to this extent, can never amount to the findings and reasoning that led to the decision. The second paragraph, which is meant to provide the main reason for the cancellation, states in very general terms that “there were irregularities, particularly through the Bill of quantities and the financial bid form, that prevented fair competition.”

The decision leaves one completely in the dark as to what the alleged irregularities were and how they could have prevented fair competition.

The Director of Contracts does not have an unfettered right to cancel a procurement procedure but must exercise such discretion within the parameters set out by the law - Cateressence Limited v. Ministeru tal-Intern u Sigurta Nazzjonali (Court of Appeal, application 401/2019 decided on the 27/3/2020).

It is respectfully submitted that the decision forming the subject matter of this objection does not specify the findings on which it is based, nor its underlying reasoning. Therefore, the decision is in violation of the requirements set out in Regulation 15(3) of the Public Procurement Regulations and is consequently null and void. Regulation 15(3) of the Public Procurement Regulations is simply reiterating a fundamental principle of administrative law, namely the duty to give reasons. This rule is of fundamental importance as it puts the persons affected by an administrative decision in a position to challenge it before the competent court or tribunal. It is hardly necessary to point out that it is not possible to challenge a decision on its merits without knowing the reasoning on which it is based. This is exemplified in the next ground of objection.

- b) **The decision to cancel the Tender should not be upheld on its merits since the bills of quantities and financial bid form are not vitiated by any irregularity and certainly do not operate to limit competition**

To the knowledge of ABB Joint Venture, the bill of quantities and the financial bid form are not affected by any irregularity and certainly do not operate so as to limit competition.

As already submitted, the decision to cancel the Tender does not give any detail as to the findings or reasoning on which it is based and leaves one wondering as to what may have induced the Director General Contracts to cancel the Tender.

In the circumstances, ABB Joint Venture is unable, at this stage, to address the decision to cancel the Tender on its merits and is reserving the right to make additional submissions and produce relevant evidence once Regulation 15(3) of the Public Procurement Regulations is complied with.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 23rd February 2022 and its verbal submission during the virtual hearing held on 19th May 2022, in that:

- a) During the evaluation process when the WSM Evaluation Committee requested approvals to issue clarifications to the economic operators, the Department of Contracts directed the WSM Evaluation Committee to cancel the procurement procedure in view of irregularities present in the Financial Bid Form that prevent fair competition, namely through the items listed as "Provisional" in the relevant bill of quantities.
- b) That through the Financial Bid Form it was noted that provisional items (i.e. items that may or may not be utilised) are included in the overall summation of the financial bid. Therefore, items 1.2, 2.2, 3.2 and 4.2 should not have been present in the Financial Bid Form.
- c) That the summation of the total amount would vary on whether or not - and by how much - these provisional items are utilised. This could give rise to a situation where, at measurement stage, the selected bid would end up not being the cheapest bid that could have been selected.
- d) That in view of this irregularity the evaluation committee could not objectively establish the cheapest bid and in line with General Rules 18.3e, this tender procedure was cancelled.
- e) That further to the Evaluation Report submitted by the Evaluation Committee recommending the cancellation of this tender procedure, during a session held on 1 February 2022 the General Contracts Committee (GCC) recommended that this tender be cancelled, and the Director General (Contracts) agreed with this recommendation.

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) **First Grievance in relation to Regulation 15(3)** - The rejection letter issued by the Department of Contacts stated *"the main reason for this cancellation is that during the evaluation process, it was evident that there were irregularities, particularly through the Bill of quantities and the financial bid form, that prevented fair competition."* This Board's opinion is that this letter, with the reasoning provided, whilst it does explain in part, it does not provide enough information to the economic operator to determine whether to file an appeal or not. Reference is made to regulation 15(3) of the Public Procurement Regulations 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."* The rejection letter states *"that there were irregularities"*, but falls short to explain what these actually were! In this regard, this Board agrees with the Appellant that they were kept "in the dark" and they had to file this appeal in order to find out what these irregularities actually were. It does not however agree with the Appellant that therefore, this decision should be considered null and void. The DoC provided part of the reasons but did not substantiate them enough.

Due to the fact that this objection had to be filed somewhat "in the dark", this Board will refund the deposit paid by the Appellant, irrespective of the decision on the merits.

- b) **Second Grievance in relation to the Merits** – Reference is made to the minutes of this hearing including the verbal submissions by both parties and the testimonies under oath of both Perit Edric Micallef and Mr Paul Magro. After reviewing the 'example' explained to all by Perit Micallef it is evident that as issued, it was impossible for the Evaluation Committee to perform a fair and transparent evaluation of the bid on a like with like basis. Provisional figures provided could result in a different bidder being the cheapest offer with the risk that the cheapest bidder may not be awarded the tender.

The Board,

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

- a) To uphold in part Appellant's first grievance as explained;
- b) Does not uphold Appellant's second grievance
- c) Upholds the Contracting Authority's decision in the cancellation of the tender,
- d) Directs that the deposit paid by Appellant to be reimbursed.

Mr Kenneth Swain
Chairman

Mr Lawrence Ancilleri
Member

Dr Charles Cassar
Member