

PUBLIC CONTRACTS REVIEW BOARD

Case 1755 – SPD4/2021/080 – Framework Contract for the Supply and Collection of Open Skips in an Environmentally Friendly Manner at Saint Vincent De Paul Long Term Care Facility

5th July 2022

The Board,

Having noted the letter of objection filed by Dr Joseph Zammit acting for and on behalf of Pullicin Developers Ltd, (hereinafter referred to as the appellant) filed on the 6th June 2022;

Having also noted the letter of reply filed by Dr Noel Bezzina on behalf of Bezzina Legal acting for St Vincent de Paul Long Term Care Facility (hereinafter referred to as the Contracting Authority) filed on the 15th June 2022;

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 30th June 2022 hereunder-reproduced;

Minutes

Case 1755 – SPD4/2021/080 – Framework Contract for the Supply and Collection of Open Skips in an Environmentally Friendly Manner at Saint Vincent De Paul Long Term Care Facility

The tender was issued on the 8th December 2021 and the closing date was the 1st February 2022. The value of the tender, excluding VAT, was € 198,000.

On the 6th June 2022 Pullicin Developers Ltd filed an appeal against St Vincent De Paul Long Term Facility as the Contracting Authority objecting to his disqualification on the grounds that his offer was deemed to be administratively not compliant.

A deposit of € 990 was paid.

There were eleven (11) bids.

On the 30th June 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Ms Stephanie Scicluna Laiviera as members convened a virtual public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Pullicin Developers Ltd

Dr Joseph Zammit
Mr Dylan Pullicino

Legal Representative
Representative

Contracting Authority – St Vincent De Paul Long Term Facility

Dr Noel Bezzina	Legal Representative
Mr Mario Caruana	Chairperson Evaluation Committee
Ms Claudia Muscat	Evaluator
Mr Mark Micallef Costa	Evaluator
Ms Marica Saliba	Evaluator

Preferred Bidder – Mr Brian Borg

Mr Brian Borg	Representative
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Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Joseph Zammit Legal Representative for Pullicin Developers Ltd said that there was no contestation of the facts in this case and the appeal hinged on a legal point. The Contracting Authority relied on a Court of Appeal case in their reply which was different to this appeal as there was a third party involved. Appellant was awarded the tender which was revoked but there were no appeals by other bidders. Mr Brian Borg who was awarded the tender is not an interested party and has not submitted any appeals. Reference was made to PCRB Case 942 where the bid bond was missing and if it had been noticed at the start the tender would have been awarded to the second best bidder. The difference when the irregularity was noticed by the Evaluation Committee would have led to the cancellation of the tender. Once Appellant's offer was not eliminated at the evaluation stage the Board should cancel the tender as it would be unjust to proceed.

Dr Noel Bezzina Legal Representative for St Vincent de Paul Long Term Facility said that the principle of the decision referred to should still be considered – the fact that there were other parties involved is irrelevant. The law stated clearly the rules for contesting tenders and these have not been observed. *Ab initio* there was non-observance of the law. Regulation 15 of the PPR gives the right to cancel an award even after it has been published. The General Rules Governing Tenders are clear on this point and do not back the claim that the tender should be cancelled. One has to consider if the reason for submitting two bids was to mislead in which case both bids should be eliminated.

Dr Zammit referred again to Case 942 and said that if the bid was not picked up and cancelled at the evaluation stage it would create a lack of level playing field and unjust competition by not restarting the process again.

Dr Bezzina reminded the Board that the cardinal point is that in the Court of Appeal case it was stated that confusion had been created. In this instance the re-evaluation of all bids had properly been carried out once the two irregular offers had been eliminated.

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 30th June 2022.

Having noted the objection filed by Pullicin Developers Ltd (hereinafter referred to as the Appellant) on 6th June 2022, refers to the claims made by the same Appellant with regards to the tender of reference SPD4/2021/080 as case No. 1755 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Joseph Zammit

Appearing for the Contracting Authority: Dr Noel Bezzina

Whereby, the Appellant contends that:

- a) One must bear in mind that the disqualification of petitioners happened after they were awarded the Tender.
- b) Petitioners respectfully submit that if there was ground for disqualification, this should have been detected at the evaluation period. In other words if they were not administratively compliant, they should have been informed at the very outset.
- c) In this case, not only have they been found to be compliant but they were also awarded the tender as per letter dated 22nd April 2022, which letter also informed other bidders of their right to appeal by the 2nd of May 2022. No appeal has been lodged by the other bidders and without prejudice to the afore-said, in any case, even if for the sake of the argument, *dato ma non concesso*, the time for lodging an appeal was still running, it was not suspended. However on the 2nd May 2022 the Appellant was informed that the award has been revoked.
- d) Only on the 27 May 2022 was the Appellant informed about the reason of their disqualification and the re- award of tender.
- e) Needless to say that there is a difference between a disqualification of a Tender during the Evaluation Process and a disqualification of a Tender after the Award. If the administrative compliance was overlooked by the Evaluation Board but identified prior to the signing of the "Contract of Award", with all due respect petitioners feel that the Contracting Authority should have cancelled the Tender altogether rather than revoking the Award and awarding it to another bidder. This course of action taken by the Contracting Authority, when it did not cancel the Tender, is neither fair nor transparent.
- f) In any case and without prejudice to the above, it should also be stated that when the Contracting Authority did not cancel the Tender it gave rise to an unfair situation of comparing a non-administratively offer with fully compliant bids.
- g) The cancellation of petitioners' award after the evaluation stage and the subsequent award to Mr. Brian Borg has vitiated the whole process, rendering it null and void. To ensure fair competition

there is no other way than to cancel the whole call for tenders altogether. We are thus humbly claiming that a fresh process be initiated so as not pose any prejudice against the Appellant.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 15th June 2022, its verbal submission during the virtual hearing held on 30th June 2022, in that:

- a) In this regard, the Contracting Authority submits that, the decision to revoke the award of tender to the Appellant was based upon very well founded and justified grounds as explained. Following the conclusion of the evaluation process, the Contracting Authority, through the Sectoral Procurement Directorate, was informed that the Appellant had, in effect, submitted two (2) offers for the same tender; one submitted through Pullicin Developers Limited and the other through Pullicin Joint Venture.
- b) Article 3.2 of the General Rules Governing Tendering clearly states that *"A company may not, however, tender for a given contract both individually and as a partner in a joint venture/ consortium"*
- c) From information obtained through the EPPS system, it is clearly shown that besides the fact that both entities have the same details, Pullicin Joint Venture is listed as being a Joint Venture/Consortium formed jointly by Pullicin ConBrick Limited and Pullicin Developers Ltd; the latter company being the same company through which the Appellant submitted its offer and filed the present objection.
- d) It is therefore clear, that, by submitting two offers through connected companies, the Appellant breached the applicable rules and therefore the award for recommendation issued in favour of Pullicin Developers Limited was revoked and this in accordance with the Public Procurement Regulations (S.L.601.03)

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties, will now consider Appellant's grievances.

- a) The Board will directly make reference to regulation 15(1) of the Public Procurement Regulations ("PPR") whereby it is stated: *"The Director has the **right to cancel the award** of a contract **at any time during a call for tenders** or quotations **even after the recommended bidder has been decreed** and the time establish to file and appeal before the Public Contracts Review Board has lapsed, **if it is found that such a contract has been awarded either in breach of these regulations** or the award has been made in such a way as to discriminate between economic operators." (bold & underline emphasis added)*
- b) It is the Board's opinion that the regulation mentioned above, is very clear in the powers it provides to the Contracting Authority in such matters.
- c) As mentioned during the public hearing, the facts of the case are not contested. The facts are that the Appellant has, in effect, submitted two (2) offers for the same tender; one submitted through

Pullicin Developers Limited and the other through Pullicin Joint Venture. This course of action is clearly not tolerated as per Article 3.2 of the General Rules Governing Tendering which states that *“A company may not, however, tender for a given contract both individually and as a partner in a joint venture/consortium”*

- d) Therefore, it is clear in this Board’s opinion that the Appellant’s offer should have been regarded as administratively non-compliant.
- e) The Board will now proceed to assess the request of the Appellant to cancel the above-mentioned tender and to revoke the recommendation for award to Mr Brian Borg.
 - i. As already stated in paragraph (a) above, regulation 15(1) of the PPR is deemed to be highly relevant to this case.
 - ii. The Board also agrees with the Contracting Authority’s view that the case of Alistair Bezzina vs Kunsill Lokali San Pawl il-Bahar (Court of Appeal 178/21/1) is also relevant.
 - iii. The facts of the subject matter are clear in that it was the Appellant who proceeded in a non-administratively compliant manner. Now that all the financial offers of all economic bidders are publicly known , it would be ‘unfair’ on all the other economic operators to cancel this tender and re-start afresh.
 - iv. Therefore, in line with regulation 15(1) of the PPR and the fact that the tender could be ‘saved’ by the Contracting Authority, this Board is in agreement with how the Evaluation Committee concluded this procedure.
 - v. On a final note, however, this Board, also notes that if the Evaluation Committee had been more attentive as from the beginning, all these proceedings would have been avoided. It is crucial for matters of transparency and for having a level playing field scenario in public procurement, that Evaluation Committees are fully focused and well aware of the regulations they need to follow when evaluating.

Therefore, when considering all of the above, this Board does not uphold Appellant’s grievances.

The Board,

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

- a) Does not uphold Appellant’s Letter of Objection and contentions,
- b) Upholds the Contracting Authority’s decision in the recommendation for the award of the tender,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Ms Stephanie Scicluna Laiviera
Member

Mr Lawrence Ancilleri
Member