

PUBLIC CONTRACTS REVIEW BOARD

Case 1767 – SPD6/2022/009 – Works - Tender for the Sand Replenishment Pilot Study including the Construction of a Groyne at Southern Ghadira Bay, Mellieha

18th July 2022

The Board,

Having noted the letter of objection filed by Dr Franco Galea and Dr Roberto Spiteri on behalf of Saga Juris Advocates acting for and on behalf of Emarine Limited, (hereinafter referred to as the appellant) filed on the 20th June 2022;

Having also noted the letter of reply filed by Dr Sandro Zammit Felice acting for Projects Plus Ltd (hereinafter referred to as the Contracting Authority) filed on the 27th 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 14th July 2022 hereunder-reproduced.

Minutes

Case 1767 – SPD6/2022/009 – Tender for the Sand Replenishment Pilot Study including the Construction of a Groyne at Southern Ghadira Bay, Mellieha

The tender was issued on the 15th March 2022 and the closing date was the 27th April 2022. The estimated value of the tender, excluding VAT, was € 557,682.

On the 20th June 2022 Emarine Ltd filed an appeal against Projects Plus Ltd as the Contracting Authority objecting to their disqualification on the grounds that their offer was deemed not to be technically compliant.

A deposit of € 2788.41 was paid.

There were four (4) bids.

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

The attendance for this public hearing was as follows:

Appellant – Emarine Ltd

Dr Franco Galea
Perit Manuel Zammit

Legal Representative
Representative

Contracting Authority – Projects Plus Ltd

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| Dr Sandro Zammit Felice | Legal Representative |
| Mr Andrei Cachia | Representative |
| Mr Joseph Gauci | Representative |
| Eng Stephen Camilleri | Representative |

Preferred Bidder – Bonnici Bros Services Ltd

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| Dr John Gauci | Legal Representative |
| Mr Gilbert Bonnici | Representative |

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

Dr Franco Galea Legal Representative for Emarine Ltd said that the tender stated that the works had to be completed by 150 days split between 60 days for preparation and 90 days for the execution of the work on site. The Gantt Chart indicated that a longer time will be taken for preparation work but completion of the project will be on time. The tender allows 60 days for preparation but does not state that this cannot be exceeded as the material point is completion in 150 days. Nowhere does the tender state that if the 60 days for preparation are exceeded the bid will be excluded.

Dr Sandro Zammit Felice Legal Representative for Projects Plus Ltd said that the 60 days was not facultative as endorsed by the provisions in the technical document. The 60 days is mandatory because that is what the tender specified and the Evaluation Committee could not depart from this limit. Even as a matter of interpretation one cannot see how this time limit could be extended.

Dr John Gauci Legal Representative for Bonnici Bros Services Ltd referred to PCRB Case 1252 which he said was similar to this case and involved finishing within set dates and it was held that the tender terms were not followed as the bidder was not allowed to extend the tender conditions. The Gantt Chart clearly indicated that 66 days were required for the first phase – the principle of self-limitation would not allow the Evaluation Committee to change this.

Dr Galea pointed out that Case 1252 was not similar as the tender in that case was split into lots. The important point was that the work was completed within 150 days – this is the vital point of the tender.

Dr Zammit Felice said that Article 32.1 of the tender imposes a 60 day limit and the Evaluation Committee are not at liberty to interpret this differently. Appellant claims that the 60 days period is facultative when the tender does not state it.

End of Minutes

Hereby resolves:

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

Having noted the objection filed by Emarine Limited (hereinafter referred to as the Appellant) on 20th June 2022, refers to the claims made by the same Appellant with regard to the tender of reference SPD6/2022/009 listed as case No. 1767 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Franco Galea

Appearing for the Contracting Authority: Dr Sandro Zammit Felice

Appearing for the Preferred Bidder: Dr John Gauci

Whereby, the Appellant contends that:

- a) The Appellant Company is perplexed on how the Contracting Authority drew the conclusion that its Procurement Proposal was deemed non-compliant. This is because in its decision it stated plain as day that the overall duration of works is in line with the tender requirements stipulated in Article 32 of the tender document as well as Note 3 above mentioned.
- b) The Appellant Company humbly submits that even though the procurement and fabrication of material phase exceeds the 60 day time-frame, said time frame for preparation is facultative and not mandatory. The only obligation on the tenderer is to complete the project within 150 days. The only restriction tied to the 60 day time frame is that the contractor will not have access to the site in question unless so expressly authorised. The prolonged procurement and fabrication of material phase in no way affects the total execution term of the Appellant Company which is still within the overall deadline of 150 days.
- c) The most significant time-frame is the overall time frame of 150 days which has been put in place by the Contracting Authority in order for there to be avoidance of unnecessary delays by the Awarded party. The manner in which the Appellant Company apportions the 150 day timeframe should in no way render the Appellant Company's application as non-compliant.
- d) It is clearly evident that the manner in which the Contracting Authority reached its decision is flawed and as a consequence the Appellant Company risks being harmed by said Authority's infringement.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 27th June 2022 and its verbal submission during the virtual hearing held on 14th July 2022, in that:

- a) The objector is interpreting the 60 Calendar days for the procurement and fabrication of the materials, as "*facultative and not mandatory.*" This has to be seen in context of the Programme of Works submitted by Emarine Ltd. where the period aforementioned is extended by 6 days, for a total of 66 days and therefore exceeding the period allowed for the procurement and fabrication of the material, in terms of article 32.1 of the Tender document.
- b) The evaluation committee respectfully submits that it cannot agree with the interpretation posited by the objector, that the 60 calendar days are facultative. Had it been so, the relevant provision would have expressly given such discretion (ie. To exceed the said period), in line with the latin maxim *ubi lex voluit dixit, ubi noluit tacuit*. Furthermore, the fact that the provision stipulates that "*The contractor will be allowed a period of sixty (60) Calendar days from the Order to Start Works for the procurement and fabrication of the material.*" the contracting authority is clearly imposing a *sine qua non* period of time which shall not be exceeded.
- c) Moreover, even if the Contracting Authority accedes to the notion that the most significant time-frame is that of the 150 days period of performance for the whole works, this does not by consequence make the 60 calendar days facultative. The necessity of adherence to the key milestones of article 32.1 is again reiterated in the Technical Offer document which was effectively endorsed and signed by Emarine Ltd, being Section 1.4 of the Technical offer form. i.e. the declaration of compliance: "*We will deliver the permanent works in accordance with the specifications, high level construction sequence, time constraints and programme of works indicated in the tender, including the phasing. We further declare and confirm that we have understood the site constraints, site access constraints, operational constraints and their associated implications and risks and have factored such into the tender offer.*"
- d) Furthermore, Note 1 of Section 2 (Tender-Stage Workplan and Programme of Works (Gantt Chart) provides that "The Period of Execution and Key milestones stipulated in Art. 32.1 of the Special Conditions shall be adhered to and respected in the Tender-stage Programme of Works (Gantt Chart):
- e) Hence, both the hundred and fifty (150) days and the sixty (60) days period had been both binding. It is also clear that the declarations are subject to note 3, and, therefore, the Evaluation Committee could not request the objector for a clarification or rectification.

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) This Board will initially set out what it deems relevant to this appeal:
 - i. Tender Dossier article 32.1, page 30, states *"The period of performance for the whole of the works shall be one hundred and fifty (150) Calendar Days measured from the date stated in the Commencement Order until the date of Partial Provisional Acceptance. The contractor will be allowed a period of sixty (60) Calendar days from the Order to **Start** Works for the procurement and fabrication of the material required for the execution of work prior to mobilisation on site. **The Contractor won't be able to mobilise on site during this period**, unless a site instruction is given by the Contracting Authority. Hence, a resultant period of ninety (90) Calendar days will be available for the execution of works on site."* (bold & underline emphasis added)
 - ii. Reason for bid rejection / non-compliance was stated as follows *"Please note that although the Programme of Works submitted shows that the **overall duration of works is in line with the tender requirements**, the procurement and fabrication of material phase exceeds sixty (60) calendar days stipulated in Article 32.1....."* (bold & underline emphasis added)
- b) Therefore, this Board opines that it is an undisputed fact that the Appellant's bid was in line with the tender requirements of the one hundred and fifty (150) Calendar Days.
- c) What remains to be ascertained is whether the 'procurement and fabrication of material phase' was to be thought of as a strict sixty days from start to finish 'mandatory' requirement or else treated as a 'facultative' requirement.
- d) This Board, again, will make reference to article 32.1 of the tender dossier whereby *".....The contractor will be allowed a period of sixty (60) Calendar days from the Order to **Start** Works for the procurement and fabrication of the material required for the execution of work prior to mobilisation on site. **The Contractor won't be able to mobilise on site during this period.....**"* The wording of the tender dossier is in this Board's opinion very clear, in that, it is obliging economic operators to **'Start'** the procurement and fabrication of material process within those sixty (60) days. It is silent on its completion, hence not required. By reference to the Gantt Chart provided by the Appellant, it is evident that this process is immediately to start on day 1, hence in compliance to what the tender dossier is requesting.
- e) From both the written reasoned letter of reply and from the public hearing, it can be established that the Contracting Authority wanted this process to start and be finalised within the sixty (60) days timeframe. However, this is not what the tender dossier is requesting. Adherence to the tender dossier requirements is deemed to be a crucial aspect of the procurement process. Evaluation Committees are bound by the principle of self-limitation and cannot change 'goal posts' if and when required at evaluation stage.

In view of the above, 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 'Notice of Award' letter dated 9th June 2022;
- c) To cancel the Letters of Rejection dated 9th June 2022 sent to Emarine Ltd;
- d) To order the contracting authority to re-evaluate the bid received from Emarine Ltd 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

Dr Vincent Micallef
Member