

PUBLIC CONTRACTS REVIEW BOARD

Case 1123 – MSDEC/AGRIC 324/2016 – Tender for Civil and other Refurbishment Works within an Area adjacent to the Cutting and Deboning Plant at the Public Abattoir, Marsa

The publication date of the call for tenders was the 28th April 2017 whilst the closing date of the call for tenders was the 19th May 2017. The estimated value of the tender (exclusive of VAT) was €51,460.

Two (2) bidders submitted offers for this tender.

Michael Camilleri filed an objection against the decision of the Contracting Authority not to award the tender on the basis that it exceeded the budget allocated to it for this tender against a deposit of € 400.

On 23rd January 2018 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Richard A Matrenza as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellant – Mr Michael Camilleri

Dr Adrian Mallia

Legal Representative

Mr Michael Camilleri

Representative

Contracting Authority – Ministry for the Environment, Sustainable Development and Climate Change

Mr Emanuel Schembri

Chairperson, Evaluation Board

In a brief introduction, the Chairman, Dr Anthony Cassar, proposed that this Case and Case 1124 should be heard together since they both covered appeals by the same Appellant against the same Contracting Authority. He made it clear that this tender had been cancelled not through non-compliance but for budgetary reasons. The Contracting Authority had to revise their tender as there were insufficient funds available for the works involved than the amount tendered. He then invited the Appellant to proceed with his submissions.

Dr Adrian Mallia, Legal Representative for Mr Michael Camilleri, started by asking the Contracting Authority to confirm if it was intended to re-issue the tender. The contract covered certain works that were necessary, not optional.

The Chairman confirmed this point.

Mr Schembri, Chairman of the Evaluation Board on behalf of the Ministry stated that it was necessary for the work covered by the tender to be done as soon as possible. Other works hang on this tender, as tenders are part of a bigger picture covering the whole job – each part is dependent on each other.

Dr Mallia queried whether the re-issued tender will be exactly the same as the one under appeal or whether it will stipulate different specifications.

Mr Schembri confirmed that the work specification will be the same.

In reply Dr Mallia pointed out that if the tender was re-issued exactly as previous there will presumably be the same tenderers. His argument was that this could lead to serious abuse as this might enable the Contracting Authority to use this process to grant the tender to a favoured tenderer. Both Maltese and European laws allow appeals against cancellation of tenders. If the Contracting Authority is going to issue exactly the same tender they are not going to gain any advantage – they are merely wasting time by repeating the same procedure and it is inconceivable to see what benefit will be derived.

At this stage the Chairman intervened to mention that if the Contracting Authority does not have the necessary funds the contractor cannot be paid if the tender accepted is higher than the budget allocation. Once the Authority has adjusted its funds allocation the tender winner will be paid. Normally, following a revision, funds will be diverted from another source.

Dr Mallia queried why in that case this diversion of funds was not done in this instance, and the tender allowed to stand.

Mr Schembri explained that budgets were prepared one year in advance, and the appropriate requests made to the Finance Ministry. In this case there is an extensive programme of refurbishment works which started in 2013. Currently there are still estimated funds for about twenty tenders and it was a matter of balancing those tenders that were under budget with those that were over budget.

To a question by Dr Mallia whether there were any tenders under budget, the Chairman replied that there are ‘overs’ and ‘unders’ – it was all a question of *quantum* - in the case of this tender it was 147% over budget.

Dr Mallia queried whether there were guidelines as to what divergences the Contracting Authority would accept.

The Chairman replied that there were no guidelines but common sense and logic prevails as to where the line is drawn.

Mr Schembri emphasised that if the tender were to be granted on the present figures the Contracting Authority would have to reassess how to recover the excess costs. That meant a complete recapitulation of outstanding funds and possibly moving works to the following year.

Mr Michael Camilleri (20365M) asked if future contracts are likely to be considered in a similar way – he said that this is likely to lead to abuse as the virtual winner will use his figures as a guide price without incurring the expense of the costly research he had carried out.

Mr Schembri said he accepts the fact that tenderer had shown his hand; however he cannot take any tender in isolation.

In conclusion the Chairman mentioned that the Board will issue recommendations. The Contracting Authority usually co-operated with the recommendations of the Board. One recommendation is that estimates should be realistic and preferably based on the advice of a technical person. He assured the parties that the Board will deal with this case as soon as possible and they should have the decision in a week’s time.

He thanked the parties for their submission and declared the hearing closed.

This Board,

Having noted this Objection filed by Mr Michael Camilleri (herein after referred to as the Appellant) on 20 November 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference MSDEC/AGRIC 324/2016 listed as Case No 1123 in the records of the Public

Contracts Review Board, awarded by the Ministry for the Environment, the Sustainable Development and Climate Change (herein after referred to as the Contracting Authority).

Appearing for the Appellant: Dr Adrian Mallia

Appearing for the Contracting Authority: Mr Emanuel Schembri

Whereby, the Appellant contends that:

- a) **That since the Tender has been cancelled and a similar one will be issued, a new Prospective Bidder might utilize the Appellant's expertise to his advantage without going through research and compilation costs.**

This Board also noted the Contracting Authority's "*Letter of Reply*" dated 29 November 2017 and its verbal submissions during the Public Hearing held on 23 January 2018, in that:

- a) **The Ministry for the Environment, Sustainable Development and Climate Change insists that the Tender had to be cancelled simply because the compliant offers received were substantially above the estimated value.**

This Board, after having examined the relevant documentation and heard submissions by all the interested parties to this Appeal, opines that this is a typical objection when a Tender is cancelled by the Contracting Authority, however, for clarity's sake, this same Board would consider the only merit of this case, and that is, the Cancellation of the Tender.

First and foremost, this Board would like to point out that the Contracting Authority has all the rights to cancel a particular Tender. However, this should be due to valid and transparent reasons. In this particular case, the cheapest compliant offer was not within the estimated value of the Budget, which represented a valid and just reason why the Tender had to be cancelled.

In actual fact, there was a wide difference between what was quoted and what was made available for the Tendered project. In this regard, this Board would respectfully point out that it is in the interest of both parties, to cancel the Tender, when the Contracting Authority is well aware that there are no sufficient funds to be paid to the successful economic operator.

This Board acknowledges the disappointment of the Appellant, however, the Contracting Authority has stated clearly in its "*Letter of Rejection*" dated 29 November 2017, that:

“A decision was taken by the Evaluation Committee to withdraw the Tender for re-evaluation of the estimated amount and process to issue again the Tender for new submissions”

This Board justifiably notes that such circumstances are on the increase and in this regard, this Board would recommend to the Contracting Authorities that when preparing estimates for projects to be carried out, more professional and technical expertise is to be utilized in the compilation of such forecasts, so that the latter figure will realistically represent the costs of the particular project. The Ministry for the Environment, Sustainable Development and Climate Change should also appreciate the fact that the Economic Operator incurred costs and conducted research in the preparation of his offer.

In view of the above, this Board confirms the Ministry for the Environment, Sustainable Development and Climate Change’s decision to cancel the Tender, revise the estimates for this project in a more realistically technical manner and at the same instance, recommends that the deposit paid by Mr Michael Camilleri is to be fully refunded.

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Richard A Matrenza
Member

31 January 2018