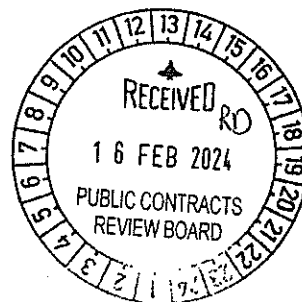


The Secretary
PUBLIC CONTRACTS REVIEW BOARD
Notre Dame Ravelin
Floriana Vlt 2000



14 February 2024

Case 1929 – SPD6/2023/026 – Supplies – Tender for the Removal and Delivery of Old Buoys to TM Stores and the Supply, Delivery Installation and Maintenance of New Fairway Buoys at Xemxija for a period of Three Years

Reply by the Authority for Transport in Malta

Dear Sirs,

1. Polaris Marine Services Co. Ltd has filed an appeal against the cancellation of the Tender procedure by the Director of Contracts. The cancellation of the Tender procedure was communicated to the Tenderer by letter dated the 30th of January 2024. The reason given by the Director was that cancellation may occur where this is not commercially feasible.
2. The Cancellation of the Tender procedure was made in accordance with with Article 18.3 of the General Rules Governing Tenders.
3. Article 18.3 reads as follows:
“18.3 Cancellation may also occur where:
 - (a) the tender procedure has been unsuccessful, namely where no qualitatively or financially worthwhile tender has been received or there has been no response at all;*
 - (b) the economic or technical parameters of the project have been altered;*
 - (c) exceptional circumstances or force majeure render normal performance of the project impossible;*
 - (d) all technically compliant tenders exceed the financial resources available.*



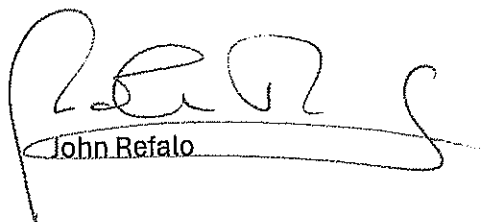
(e) there have been irregularities in the procedure, in particular where these have prevented fair competition;

(f) the duration of the evaluation has exceeded the stipulated time limit in article 8 of General Rules governing Tendering."

4. Appellant essentially argues that the cancellation is *ultra vires* because it exceeds the limits of power given to the Director under Article 15 of the Public Procurement Regulations.
5. This argument is without merit.
6. Article 15 establishes that in certain well defined circumstances the Director will always have the power to cancel a procedure. This power cannot be taken away but it can be added onto. Consequently the Director can, in tender proceedings, provide for further situations in which the cancellation remedy will be available. All the Regulations require are that these further situations or circumstances be publicised and be such as not to discriminate unnecessarily between the economic operators involved.
7. A public authority can provide, in the tender document, for different circumstances within which a tender can be cancelled. These circumstances are included in the General Contract Conditions, which are valid, binding and in conformity with Maltese and EU law.
8. A tenderer applying under this tender is presumed to be aware of the conditions of the General Contract Conditions which are expressly made applicable to this Tender. Indeed, by submitting his tender, the Tenderer automatically recognizes and accepts that those conditions are binding on him and that his tender will be subject to them.
9. In any event, it is not possible now, at this late stage, for the Tenderer to challenge the applicability of Article 18 of the General Contract Conditions. This matter should have been raised, if at law, by way of **precontractual challenge**. It was certainly known to the tenderer at the time that the application was filed. By not raising an objection pre-contractually the Tenderer is now precluded from raising the objection, not only post award, but by post cancellation of the tender. The Authority reiterates in any event that by submitting the tender without complaint the tenderer cannot be understood otherwise than to have accepted the applicability of this condition.
10. Appellant states also that the reason given by the Director is not an admissible reason according to the regulations quoted.
11. It is true that the motivation could have perhaps been more detailed. However there are currently ongoing challenges to the beachaven project which means that the marina project cannot proceed. This situation is not expected to change in the near future. In this respect there is no need to maintain the marker buoys that were intended to delineate the area for the marina.



12. Ultimately the Authority may be faced with a situation where the works will have been performed needlessly or uselessly. It was also considered that the existing buoys are not in immediate need of replacement. Therefore the Authority considered that the cost of the tendered works were not commercially viable.
13. The term "*Not commercially viable*" means that the Authority will not derive the foreseen benefit from the works. This is in actual fact the consideration that has caused the Authority to recommend the cancellation of the Tender. The director of Contracts agreed with this recommendation.
14. Lastly appellant states furthermore that the tender was not cancelled within the timeframe indicated in the decision of the Review Board of the 3rd November 2023.
15. The delay in cancelling the tender does not give mean that the cancellation effected subsequently is void. If anything the failure of the Director to issue the cancellation within the required time frame only means that the decision requiring such a cancellation could be enforced.
16. Clearly the Authority concluded that the continuation of this tender was not in the best interests of the Authority and would constitute a waste of funding and for this reason alone the Authority recommended to the Director the cancellation of the Tender.
17. The Authority reserves the right to give further explanations by way of oral testimony and documentation during the hearing.


John Refalo