

PUBLIC CONTRACTS REVIEW BOARD

Case 1977 – SPD 6/2023/026 – 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.

20th March 2024

The tender was issued in on the 17th May 2023 and the closing date was the 16th June 2023.

The estimated value of this tender, excluding VAT, was € 270,000.

On the 8th February 2024 Polaris Marine Services Co Ltd filed an appeal against Transport Malta objecting to decision of the Contracting Authority to the cancellation of the tender.

A deposit of € 1,350 was paid.

There were five bids.

On the 14th March 2024 the Public Contracts Review Board composed of Dr Charles Cassar 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 – Polaris Marine Services Co Ltd

Dr Noel Bezzina	Legal Representative
Mr Matthew Vella	Representative

Contracting Authority – Transport Malta

Dr John Refalo	Legal Representative
Mr Godwin Borg	Chairperson Evaluation Committee
Mr Ray Aquilina	Evaluator
Mr Ludwig Xuereb	Representative
Mr Konrad Muscat	Representative
Mr Kevin Brincat	Representative
Mr Mark Chapelle	Representative
Mr David Penza	Representative

Department of Contracts

Dr Audrey Marlene Buttigieg Vella	Legal Representative
Dr Mark Anthony Debono	Legal Representative

Dr Charles Cassar Deputy Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Noel Bezzina Legal Representative for Polaris Marine Services Co Ltd said that the reason for this appeal was and that the reason given for cancellation does not follow the General Rules Governing Tenders (GRGT) or (GR)

Dr John Refalo Legal Representative for Transport Malta said that the Authority relies on its written submissions at this stage.

Dr Mark Anthony Debono Legal Representative for the Department of Contracts said that the Appellant accepted the terms of the tender by submitting a bid and cannot therefore now object to the use of the GRGT. The requirements of the Contracting Authority have changed and thus it is right that they should cancel. The claim regarding the late timing of the cancellation is unfounded as the PCR decisions are executive ones.

Dr Bezzina requested that witnesses be heard.

Mr Konrad Muscat (443371M) called to testify by the Appellant stated on oath that he is the Director Ports Commercial at Transport Malta and that he had no involvement in the tender process. He was referred to the cancellation letter and requested to identify in which part of GR 18.3 the words 'not commercially feasible' appear. Witness stated that GR 18.3b refers to technical parameter changes which is exactly the situation here as the project is no longer feasible and the tender could not be proceeded with due to outstanding Court proceedings. The fairway could not be decided whilst there are outstanding matters. In 2020 after agreement out of Court had been reached with the parties involved the Contracting Authority decided to proceed but Beach Haven contested the decision. The tender was issued in anticipation that the Court will have reached a decision. Funds were available for the project but had no bearing on the decision to cancel.

Questioned by Dr Refalo witness stated that the proposed works will be carried out once the Court reaches a decision. Although the location of the proposed marina is known there is no point in having buoys and fairway until the marina is in place.

There were no other witnesses called.

Dr Bezzina said that in regard to the 20 days limit on cancellation imposed by the PCR instead of publishing the cancellation the Authority cancelled the tender award. The cancellation of the award states that it was carried out under GR 18.3 but the reason quoted does not exist in that GRs or in the Public Procurement Regulations. Regulation 15.1 of the PPR specifies two conditions when cancellation can happen. The Authority knew of problems through Court cases, so why issue a tender? Now the Authority is hiding behind the feasibility of the project to justify cancellation. In the previous case the Authority stating that the service was no longer required but are now stating that it is not feasible. According to Regulation 15.3 the decision must include the finding and the reasoning which led to it, but no reasoning was given in the rejection letter. The Authority claim that under Regulation 15 the Director of Contracts can add to the reasons but the law limits this to breach of regulations or discrimination between economic operators. Appellant is not attacking GRs but merely pointing out that they are not being respected. Appellant never expected that a tender would be issued if the Authority was aware of all the problems existing.

Dr Debono pointed out that the tender was issued by the Sectoral Procurement Directorate and thus Regulation 15 does not apply. The reasons for cancellation were explained and providing a summary of the decision is sufficient. The issue of a tender does not bind a

contracting authority to award it and any expenses incurred in the submission of a bid are the responsibility of the bidder – this right is always reserved.

Dr Refalo said that it would be waste of public funds if the Authority proceeded with the project where no benefit would be derived. The applicability of Regulation 15.1 was being looked at too restrictively by the Appellant. The Authority has every right to cancel a tender under the GR terms. In a tender the General Contract Conditions apply and once a tender is submitted that is a tacit acceptance of the conditions. The GR 18.3 states ‘may also occur’ which widens the right of cancellation. The 20 day imposition by the PCRB was not met but it was not made conditional and that claim therefore has no validity.

There being no further submissions the Chairman thanked the parties and declared the hearing closed.

End of Minutes

Decision

This Board, having noted the objection filed by

Polaris Marine Services Co Ltd (herein after

referred to as the appellant) dated 8th February 2024 and its verbal submissions during the hearing on 14th March 2024.

The objection refers to the claims

made by the same appellant against Transport Malta (herein after

referred to as the contracting authority) regarding the tender SPD 6/2023/026 listed as case No.1977in the records of the Public Contracts Review Board.

The Board also noted the Contracting Authority Letter of reply filed on the 16th February 2024 and it’s verbal submissions during the hearing on 14th March 2024, as well as the testimony of Mr Konrad Muscat cited by the Appellant. The Board also took note of the submissions made by Dr. M.A. Debono on behalf of the Department of Contracts.

Finally, the Board took into consideration the decision of the PCRB Case 1929 dated 3rd November 2024.

Whereby,

The Appellant contended that:

- A. the cancellation of the tender was outside the terms set by the Public Contracts Review Board ie. way in excess of the 20 days stipulated
- B. the cancellation of the award states that it was carried out under GR 18.3 but the reason quoted in the rejection letter 'not commercially feasible' is not listed as a specific reason for cancellation of a tender in the GRs and not in line with the Public Procurement Regulations.

The Contracting Authority contended that

- A. Though the 20 days imposition by the PCRB was not met this was not made conditional and that claim therefore has no validity.
- B. The applicability of Regulation 15.1 was being looked at too restrictively by the Appellant. The GR 18.3 states 'that cancellation may also occur' which widens the grounds for cancellation.

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After the Board considered the arguments and documentation from both parties, and the testimony of the witness, the Board's view is that:

A Though the 20 day imposed by the PCRB was not made conditional, the fact that the cancellation was effected as late as the 30th January 2024. showed a certain lack of respect to the Board and to the parties concerned.

B. The Contracting Authority Letter of rejection was clear enough in the reasons for cancellation in line with General Rule 18.3

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The Board therefore concludes and decides that:

- a) Does not uphold the Appellant's Letter of objection.
- b) Upholds the Contracting Authority's decision to cancel the tender.
- c) Directs that the deposit paid by the Appellant to be reimbursed bearing in mind the delay by the Contracting Authority in following the directions of the Board.

Dr Charles Cassar
Chairperson

Mr Lawrence Ancilleri
Member

Ms Stephanie Scicluna Laviera
Member