

PUBLIC CONTRACTS REVIEW BOARD

Case 1965 – KLP/CONS/01/2021 – Concession to Operate a Cafeteria at Pjazza San Luqa, Tal-Pieta

8th May 2024

The Board,

Having noted the letter of objection filed by Dr Daniel Calleja on behalf of Carmelo Galea & Associates acting for and on behalf of Yama Yami Limited, (hereinafter referred to as the appellant) filed on the 24th November 2023;

Having also noted the letter of reply filed by Dr Maurice Meli acting for the Pieta Local Council (hereinafter referred to as the Contracting Authority) filed on the 4th December 2023;

Having heard and evaluated the testimony of the witness Mr Etienne Montfort (Chairperson of the Evaluation Committee) as summoned by Dr Daniel Calleja acting for Yama Yami Limited;

Having heard and evaluated the testimony of the witness Mr Simon Cauchi (Board Secretary of the Evaluation Committee) as summoned by Dr Daniel Calleja acting for Yama Yami Limited;

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 sittings of the 22nd February 2024 and 9th April 2024 hereunder-reproduced.

Minutes

Case 1965 – KLP/CONS/01/2021 – Concession to Operate a Cafeteria at Pjazza San Luqa, Tal-Pieta

The tender was issued on the 24th August 2021 and the closing date was the 24th September 2021

The estimated value of this tender, excluding VAT, was calculated at € 120,000.

On the 24th November 2023 Yama Yami Ltd filed an appeal against the Tal-Pieta Local Council objecting to their disqualification on the grounds that their bid was not technically compliant.

A deposit of € 400 was paid.

There were two bids.

On the 22nd February 2024 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Ms Stephanie Scicluna Laiviera 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 – Yama Yami Ltd

Dr Daniel Calleja Legal Representative

Contracting Authority – Tal-Pieta Local Council

Dr Maurice Meli Legal Representative

Preferred Bidder – Mr Adrian Delia

Mr Adrian Delia Representative

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and stated that by way of introduction the Board would like to draw the attention of the parties that the tender document does not give an explicit estimated procurement value. It is also clear that the rejection letter sent to the Appellant was not correctly drafted with the necessary details as laid down in the Regulations. It seems that the amount of deposit required or at least a reference to the Regulation indicating this, were not communicated to the Appellant.

It is a fact that the Appellant paid a deposit of € 400.

However, it is also clear that according to the tender document the concession term is ten (10) years and the minimum payment per year had to be € 12,000 per annum. In simple terms this means a total sum of € 120,000. Referring to Regulation 109 of the Concession Contracts Regulation this means that the Appellant had to pay the sum of 0.5% of the estimated procurement value. This is mandatory.

As it is obvious that the Contracting Authority misguided the Appellant, this Board will be deferring this hearing to give the Appellant the opportunity to follow the cited Regulation by allowing him to top up the deposit by the sum of € 200 by the 29th February 2023.

This hearing is deferred to the 9th April 2024 at 9.00am.

There being no further submissions the Chairman declared the hearing adjourned.

SECOND HEARING

On the 9th April 2024 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Ms Stephanie Scicluna Laiviera and Mr Lawrence Ancilleri as members convened a virtual meeting to consider further this appeal.

The attendance for this public hearing was as follows:

Appellant – Yama Yami Ltd

Dr Daniel Calleja Legal Representative

Contracting Authority – Tal-Pieta Local Council

Dr Maurice Meli
Mr Etienne Montfort
Mr Simon Cauchi

Legal Representative
Chairperson Evaluation committee
Secretary Evaluation Committee

Preferred Bidder – Mr Adrian Delia

Mr Delia was invited but did not attend.

Dr Daniel Calleja Legal Representative for Yama Yami Ltd said the two grievances by Appellant were about the incorrect decision that its bid was not compliant and that the General Rules Governing tenders had not been adhered to in regard to the extension of the tender period. Appellant is now requesting cancellation of the tender on the grounds of this failure. He requested that witnesses be heard.

Mr Etienne Montfort (418573M) called to testify by the Appellant stated on oath that he was the Chairperson of the Evaluation Committee. He could not recall what the missing documents were as the case was evaluated some time ago and he has not updated himself on the details of the case.

At this stage the Chairman intervened to point out that the witness had been notified for some time that he had to testify and had ample time to review the case details. He had a responsibility to have reviewed the case and had a duty to reply to questions put to him. It is a waste of the Board's time, and of public funds, for cases to be delayed or deferred because witnesses had not prepared themselves properly to answer questions put to them.

Resuming his testimony, witness stated that he does not recall the reasons why Appellant was not compliant and could not recall what period of extensions on tenders were mentioned in the General Rules. He further stated that he did not wish to answer if any rectifications had been sought and prefers not to answer any further questions.

Dr Calleja then requested that the examination of the witness be suspended.

Mr Simon Cauchi (329574M) called to testify by the Appellant stated on oath that he was the Executive Secretary of the Pieta Local Council and the Secretary of the Evaluation Committee. He was present at the meeting where the Yama Yami bid was adjudged to be non-compliant as three required documents had not been submitted. Following this the Council contacted the Department of Contracts to enquire if a rectification could be sought but were advised that this was a Note 3 requirement. The extension of the validity period of the tender was not discussed by the Evaluation Committee.

Questioned by Dr Meli on behalf of the Authority, witness said that the award took two years to be decided as the project was held up due to delays with completion of some infrastructural works being carried out on the proposed site. When these were completed the tender was awarded. The preferred bidder accepted these delays and did not complain or object. Referred to the missing documents, witness stated that these had to be submitted by all bidders without fail but the Appellant failed to do so. The question of rectification was referred to the Department of Contracts.

In reply to a further question from Dr Calleja, witness said that the Local Council did not request an extension but it checked with both bidders if they were still interested despite the delay.

This concluded the testimonies.

Dr Calleja said that this evaluation was carried out in an amateurish manner, totally ignoring the General Rules with evaluators not attending the hearing and the Chairperson refusing to answer questions. It is accepted that Appellant failed to submit certain documents but clarification should have been sought – this is a simple administrative matter. The General Rules provide three reasons for extending the validity and under exceptional circumstances it allows a maximum of eight weeks. Were the infrastructural works an exceptional circumstance and did they last so long? No evidence has been provided that the bidders were requested to agree to an extension of one year and ten months. Appellant is requesting the cancellation of the award and a re-evaluation once it is given the chance to provide the missing documents whilst the failure to abide by the General Rules should lead to the cancellation of the tender.

Dr Meli stated that Mr Cauchi in his testimony explained that the delays were caused by the works being carried out which is an exceptional circumstance. The 90 day rule is there to protect the preferred bidder against higher costs or change of circumstances. Appellant declared that their bid was compliant and therefore they cannot now argue on the extension of the award. Mr Delia was happy to maintain his offer and it was thus logical to keep the tender alive. It is a fact that documents were not submitted and the Authority acted correctly.

In a final comment Dr Calleja said that the General Rules are mandatory and apply to all bidders and not solely to the preferred bidder. It is accepted that certain documents were not submitted but likewise the Authority did not prove that the delay in the award was due to the works being carried out.

The Chairman thanked the parties for the submissions and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sittings of the 22nd February 2024 and 9th April 2024.

Having noted the objection filed by Yama Yami Limited (hereinafter referred to as the Appellant) on 24th November 2023, refers to the claims made by the same Appellant with regard to the tender of reference KLP/CONS/01/2021 listed as case No. 1965 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Daniel Calleja

Appearing for the Contracting Authority: Dr Maurice Meli

Whereby, the Appellant contends that:

a) ***The Appellant's was not technically compliant -***

That Yama Yami Limited was deemed as being technically not compliant because in the decision it was stated that three missing documents being the Pest Control Programme, General Maintenance programme and the Cleaning programme which were requested in this Concession were not included in his offer. The necessity of these documents does not result from the tender document and thus these documents are not required. That the most economically-advantageous bid was that of the appellant Yama Yami Limited (C87476) and this as it results from the Opened Tender Details and thus the tender should be awarded to Yama Yami Limited.

b) ***Unwarranted extension of the initial validity period -***

That the applicable General Rules Governing Tenders (hereinafter "GRGT") are directly applicable to this procurement procedure. The GRGT in provision 12 holds that the initial period of validity of tenders is of circa three (3) months. The GRGT thereafter provides for a mechanism through which the initial validity period may be extended (hereinafter "the extended validity period") subject to three main and cumulative conditions: (i) An exceptional circumstance (ii) All the tenderers are asked to extend their offer (iii) The Extension is for a maximum of eight weeks. The above clearly and in unequivocal terms imposes that the evaluation of the tender shall be conducted within the period of three (3) months, but in the eventuality of exceptional circumstances, such evaluation may be conducted in a maximum period of five (5) months. Whilst it's the onus of the Kunsill Lokali Tal- Pietà to confirm this situation what warranted the extension of the validity period, its the appellant position that no such situation has developed to validate any extension whatsoever, if at all.

c) ***Award in breach of the GRGT -***

Without prejudice to the aforesaid, it is the position of the appellant that the award of this tender has been made outside the validity period, and is thus in breach of provision 19.1 of the GRGT. Prior to the expiration of the period of validity of tenders, the Contracting Authority will notify the successful tenderer in writing, that his tender has been recommended for award, pending any appeal being lodged in terms of the Public Procurement Regulations (being reproduced in Section 2 of the Tender Document).

The dates are as follows:

Deadline for Submission: 24/09/2021

Termination of the initial validity period: 23/12/2021

Date of award of the tender: 14/11/2023

Whilst it is unclear whether Kunsill Lokali Tal-Pieta has formally extended the tender offers, whilst it is unclear what the exceptional circumstances which warranted the extension/s of the initial validity period are, it is very clear that the award has been made after the expiration of the period of the validity of the offer, in blatant breach of provision 19.1 of the GRGT).

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 4th December 2023 and its verbal submission during the hearings held on 22nd February 2024 and 9th April 2024, in that:

a) ***Objector Was Technically Non-Compliant***

In order for the Contracting Authority to ensure that the Cafeteria is run in a financially responsible manner, as well as to make sure that standards are kept, it obliged all bidders to provide evidence relating to the proposed cleaning schedule, preventative maintenance as well as pest control programme. Reference is hereby being made to sections e, i and j of the technical offer.

Therefore, it is undoubtable (sic) that the proposed plans related to cleaning, waste management, preventative maintenance and pest control were cardinal requirements for each tender offer. Offers lacking such cardinal information could never be accepted as compliant. The Contracting Authority was obliged to refuse any and all tenders submitted which lacked the above-mentioned documentation. Whilst underlining the fact that the Contracting Authority could never accept offers that did not provide such information which was a cardinal requirement in terms of the conditions of the tender, the Contracting Authority could never accept such offers even if this obligation was not so as it would frankly be clear evidence of lack of seriousness and trustworthiness of said tenderer. Whilst it is obvious that the objector did not submit said documentation, reference is hereby made to the objection by Yama Yami Ltd. which confirms and reiterates the fact that said documents were not submitted. This in and of itself confirms the objector's technical non-compliance.

b) ***The Initial Validity Period was not Erroneously Extended -***

The objector claims that the initial validity period of the tender offer was extended incorrectly in terms of the General Rules Governing Tenders. The Contracting Authority states that this grievance is totally frivolous vexatious and unfounded. It is a mere attempt by the objector to attempt to nullify a tender process that did not conclude in the objector's favour. The rule referenced by the objector was intended as a safeguard for the preferred bidder and not for tenderers whose offer was not accepted!

Said rule was created in order to protect preferred bidders from suffering excessive increase in costs should the parties take too much time to finalise a contract. Allowing too much time to pass between the award of a tender and the eventually signing of the relative contract could cost the

preferred bidder so much that such business venture no longer remains viable and becomes a loss-making operation. It is definitely not intended to be used and abused by competing tenderers who have lost the competitive process as a means of last resort to ruin the business of its competitors!

In this case, even though a substantial amount of time has passed between the award of the tender and the eventual signing of the contract, the preferred bidder in this case had absolutely no problem retaining the same offer. If the preferred bidder had a problem with his offer due to the excessive length of time taken to sign the contract, he would have invoked said issue. However, the preferred bidder had absolutely no problem adhering to the offer originally made and was comfortable moving forward with it. If this is the case, the objector has no right at law to invoke said rule frivolously and vexatiously in order to damage and stifle his competition. What is also curious and ironic is the fact that whilst the objector is making this grievance, the same objector is now asking the public contracting (sic) review board to confirm its offer with the contracting authority made more than two (2) years ago!

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties including the testimony of the witnesses duly summoned, will consider Appellant's grievances.

a) ***Testimony of Mr Etienne Montfort -***

Initially, reference will be made to the testimony, under oath, of Mr Etienne Montfort. This Board deplores the attitude displayed by the Chairperson of the Evaluation Committee who although advised in ample time about the dates and times of the hearings, could not answer any questions posed to him. All the questions, made by the legal representative of the appellant, to Mr Montfort were in line with the grievances as filed in the letter of objection. Mr Montfort's replies, such as, "could not recall..... as the case was evaluated some time ago" and that he "did not wish to answer any further questions" are certainly not acceptable and fall short of the level required out of a Chairperson of an Evaluation Committee.

The role of Chairperson of an Evaluation Committee is to be deemed as an extremely important function in the attainment of all the cardinal principles of public procurement and is therefore not to be taken lightly.

b) ***Technical Non-compliance***

Reference is made to the tender dossier whereby the 'Technical Questionnaire' is unambiguously and specifically listed as falling under the remit of 'Note 3'. Once the documents, which required submission, were duly forming part of the 'Technical Questionnaire', and the appellant *ex admis* confirmed that they did not submit these documents, it is hereby deemed that only a rectification,

something which was not possible, could ‘amend’ the submission of the appellant. A clarification, in the circumstances such as these i.e. missing documentation, is useless and would not have remedied the situation.

Therefore, this Board does not uphold this grievance of the appellant.

c) **Validity period –**

This Board will now deal with the sections / grievances listed as ‘Unwarranted extension of the initial validity period’ and ‘Award in breach of the GRGT’ in the letter of objection.

Reference is initially made to the testimony under oath of Mr Simon Cauchi whereby he explained that the *“award took two years to be decided as the project was held up due to delays with completion of some infrastructural works being carried out on the proposed site”*. However, the same Mr Cauchi, or any other member of the evaluation committee, failed to submit and / or present any proof of these delays. Any extension periods needed to follow the specifications as listed in the General Rules Governing Tenders something which was not done as confirmed by the same Mr Cauchi who stated that *“the extension of the validity period of the tender was not discussed by the Evaluation Committee.”*

Such similar circumstances were duly considered in the PCR case 1821 decided on 15th December 2022 and once the procedural formalities were not followed and no proof of exceptional circumstances were submitted, this Board cannot but uphold this grievance of the appellant.

The Board,

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

- a) To reject the first grievance of the appellant in relation to technical compliance;
- b) To uphold the Appellant’s concerns and grievances in relation to the validity period and confirm that the initial validity period’ extension was not in accordance with the General Rules Governing Tenders;
- c) To cancel the ‘Notice of Award’ letter issued to Mr Adrian Delia;
- d) To cancel the tendering process as per regulation 90(3) of the Public Procurement Regulations,
- e) Directs that the deposit paid by Appellant to be reimbursed.

Mr Kenneth Swain
Chairman

Ms Stephanie Scicluna Laiviera
Member

Mr Lawrence Ancilleri
Member