

PUBLIC CONTRACTS REVIEW BOARD

Case 2010 – SPD8/2022/181 – Tender for the Supply, Delivery, Maintenance and Commissioning of Two Rigid Hull Inflatable Boats (RHIB) for the Department of Fisheries and Aquaculture.

20th May 2024

The tender was issued on the 7th December 2022 and the closing date was the 30th January 2023.

The estimated value of this tender, excluding VAT, was € 320,000.

On the 11th March 2024 Polaris Marine Services Co Ltd filed an appeal against the Department of Fisheries and Aquaculture objecting to the decision to cancel the tender.

A deposit of € 1,600 was paid.

There were five bids.

On the 16th May 2024 the Public Contracts Review Board composed of Dr Charles Cassar as Chairman, Ms Stephanie Scicluna Laiviera and Mr Lawrence Ancilleri 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 Chris Cilia	Legal Representative
Mr Matthew Vella	Representative
Mr William Vella	Representative

Contracting Authority – Department of Fisheries and Aquaculture

Dr Edric Micallef Figallo	Legal Representative
Ms Marie Louise Zammit	Evaluator
Mr Saviour Abela	Evaluator
Mr Joseph Chircop	Representative
Dr Audrey Balzan	Representative

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

Dr Chris Cilia Legal Representative for Polaris Marine Services Co Ltd stated that the notice of rejection sent to the Appellant was very curt and refers simply to cancellation with no other reasons given. Subsequently the Contracting Authority indicated that the reason for cancellation was that the European Union funds were exhausted. The appeal letter could not therefore address this point as it was not known at the time. A resume of the Decision of the Court of Appeal was then given. After this the appellant sent several letters to the Department of Fisheries and Aquaculture (DFA) chasing the outcome on the Court's decision. The reason given by the DFA is very poor and lame and spites the Court of Appeal decision. Cancellation is not accepted by the appellant company which is prepared to take

the matter to Court again. It is incomprehensible that a relatively low amount the money could not be found from national funds if the EU funds were truly exhausted.

Dr Edric Micallef Figallo Legal Representative for the Contracting Authority said that the appellant is correct in claiming that no proper reason was given to it for the cancellation of the tender. It is a fact that the EU funds expired but the Authority cannot swap funds. The Appeal Court decision was observed as a new adjudication was carried out. The Public Procurement Regulations allows the cancellation of tenders and it is unfortunate that it was the Department of Contracts which failed to give a reason for the cancellation. The project was only considered in the first place because EU funds were available.

Dr Cilia mentioned that the Court of Appeal decision was delivered on the 8th August 2023 and the decision of the Authority was published in January 2024 – if it had taken action earlier this problem would have been avoided – there was procrastination and failure to reply to letters after appellant had been excluded unreasonably in the first adjudication. The EU funds expired in November 2023 and there was therefore ample time after the Court decision in August to make a decision. There is no valid reason for cancellation of this tender.

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

End of Minutes

The Board refers to the minutes of the Board sitting of the 16th May 2024

Having noted the objection filed by Polaris Marine Services Co Limited (hereinafter referred to as the Appellant) on 11th March 2024, refers to the claims made by the same Appellant regarding the tender of reference SPD8/2022/ 181 listed as case No. 2010 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Chris Cilia

Appearing for the Contracting Authority: Dr Edric Micallef Figallo

Whereby, the Appellant contended that,

- A. The initial rejection notice received by the Appellant failed to give the reason for the cancellation, merely stating cancellation of the tender without any accompanying explanation. Subsequently, the Contracting Authority clarified that the cancellation was due to the depletion of European Union funds. As this crucial detail was not disclosed earlier, the appeal letter was unable to address this specific issue at the time.
- B. There is absolutely no doubt that there existed no reason in terms of Regulation 15(1) of the Public Procurement Regulations for the cancellation of this tender in clear and manifest violation of the provisions of Regulation 51 (3).

C. The Court of Appeal issued its decision on August 8, 2023, while the Authority's decision was made public in January 2024. Had the Authority acted promptly, this issue could have been averted. Unfortunately, there was also a delay in responding to correspondence after the Court's decision.

This Board also noted the Contracting Authority's (Department of Aquaculture and Fisheries) Reasoned Letter of Reply filed on 20th March 2024 and its verbal submissions during the hearing held on 16th May 2024, in that:

- A. It is regrettable that the Department of Contracts neglected to provide a justification for the cancellation.
- B. Following the Appeal Court decision, a fresh adjudication was conducted.
- C. The European Union funds had indeed expired, but the Authority was unable to substitute them with other funds. The project was initially only pursued due to the availability of EU funds.
- D. According to the Public Procurement Regulations and general Rules Governing Tenders, tender cancellations are permissible.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by the interested parties opines that,

- A. The Contracting Authority's letter of reply did indeed lack details. . In line with the Public Procurement Regulations and the General Rules the cancellation notice has to be accompanied by a summary of the relevant reasons for the cancellation.
- B. Had the Contracting Authority acted more promptly, when the funds were still available the tender could have been preserved.

Notwithstanding this the Board cannot uphold the appellants grievance as the lack of funding is a justifiable reason for the cancellation of the contract according to the General Rules of Governing Tendering Article 18.3 (b).

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The Board,

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

- A. Does not uphold the Appellant's concerns and grievances.
- B. Cancellation of the tender stands
- C. To refund the deposit to the Appellant due to the fact that the rejection letter did not specify the reason for cancellation of the tender.

Dr Charles Cassar
Chairman

Mr Lawrence Ancilleri
Member

Ms Stepanie Scicluna Laviera
Member