

PUBLIC CONTRACTS REVIEW BOARD

Case 2073 – TWO 1/2024 - Tender for the Restoration of Terracotta Tiled Pitched Roofs and Its Timber Structure at Harmony, 1B, Triq Medjez, Pembroke & at St Andrew's House, Flat 3, Triq il-Forti Pembroke, and the Restoration of the Parapet Walls with Reduced Environmental Impact

11th February 2025

The Board,

Having noted the letter of objection filed by Dr Maria McKenna, acting on behalf of AXD Co. Ltd (hereinafter referred to as the "Appellant"), filed on the 11th of October 2024;

Having also noted the letter of reply filed by Dr Raymond Zammit acting on behalf of Housing Authority (hereinafter referred to as the "Contracting Authority"), filed on the 16th of October 2024;

Having heard and evaluated the testimony of the witness Perit Ivan Pace (Chairperson of the Evaluation Committee) as summoned by Dr Mattia Felice acting on behalf of the Contracting Authority;

Having taken cognisance of and evaluated all the acts and documentation filed, as well as the submissions made by the legal representatives of the parties;

Having noted and evaluated the minutes of the Board sitting of the 30th of January 2025, hereunder reproduced:

Minutes

Case 2073 – TWO 1/2024 – Tender for the Restoration of Terracotta Tiled Pitched Roofs and its Timber Structure at Harmony, 1B, Triq Medjez, Pembroke & at St Andrew's House, Flat 3, Triq il-Forti Pembroke, and the Restoration of the Parapet Walls with reduced Environmental Impact.

The estimated value of this tender, excluding VAT, was € 66,095.

On the 11th October 2024 AXD Co Ltd filed an appeal against the Housing Authority objecting to the decision to cancel the tender

A deposit of € 400 was paid.

There was only one bid.

On the 30th January 2025, the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Ing. Damien Gatt and Mr Lawrence Ancilleri as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – AXD Co Ltd

Prof Dr Patrick Galea Legal Representative

Contracting Authority – Housing Authority

Dr Mattia Felice	Legal Representative
Perit Ivan Pace	Chairperson of the Evaluation Committee
Ms Lucienne Abela	Secretary of the Evaluation Committee
Perit Eve Ghersci	Evaluator
Perit Alessandra Fiott	Evaluator
Mr Joseph Cachia Camilleri	Evaluator
Perit Stephen Saracino Inglott	Representative
Ms Nadine Delia	Representative

Mr Kenneth Swain, Chairman of the Public Contracts Review Board, welcomed the parties and invited submissions.

Dr Patrick Galea, Legal Representative for the appellant AXD Co Ltd, said that appellant was the only bidder and that the tender was cancelled without giving it the right to reply – this is a material breach of a fair hearing, more so since it was never advised that the cancellation was due to a financial reason.

Dr Mattia Felice, Legal representative for the Contracting Authority, stated that the appeal has to be restricted to points raised in the objection letter – the only reason given was the cancellation of the tender and the Board should not consider any ancillary points raised.

The Chairman pointed out that Regulation 270 of the Public Procurement Regulations is very clear on this point, as also confirmed by the Court of Appeal. The appeal must be based on the clearly stated grievances as tabled in the letter of the 11th October 2024.

Dr Felice said that from the objection letter it is obvious that the appellant has had professional advice. Appellant's bid was technically compliant, and rejection was simply on price.

Dr Felice asked for the following Minute to be recorded:

'Dr Felice on behalf of the Contracting Authority clarifies that the offer of AXD Co Ltd, the appellant, satisfied the first two criteria of the evaluation, that is the administrative and technical compliance. It was only on the third requirement, the financial offer, that queries arose and that eventually led to the decision on which the appeal is based.'

Dr Felice then requested that a witness be heard.

Perit Ivan Pace (65576M) called to testify by the Contracting Authority stated on oath that an architect had prepared an estimate of costs for the work required. This amounted to some € 66,000 which was the estimated value of the tender. After the first two stages of the evaluation it transpired that the financial offer was more than 50% higher than the estimated value at which stage the Evaluation Committee felt that the tender should be cancelled as it was not financially viable. A table comparing estimated and tendered costs was tabled (DOC 1).

In reply to a question from Dr Galea, witness replied that on financial evaluations no requests for clarifications are allowed.

Questioned by Dr Felice witness stated the tender estimated value was known to the bidder and that figure gave an indication of the expected outcome.

This concluded the testimony.

Dr Galea said that the Authority had only communicated with the bidder on a technical matter but never on the financial parameters.

Dr Felice pointed out that clarifications were possible on the first two criteria but not on the financial side. Queries on the latter point were inconceivable if there was a situation where there was more than one bidder, and they all started querying prices. The Authority made an error in not mentioning 'financial' in quoting Rule 18.3 of the General Rules. The offer was not economically worthwhile, and the appeal should be denied.

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

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 30th of January 2025.

Having noted the objection filed by AXD Co Ltd (hereinafter referred to as the "Appellant") on the 11th of October 2024 and refers to the claims made by the same Appellant with regards to the tender of reference TWO 1/2024 listed as case No. 2073 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Prof Dr Patrick Galea

Appearing for the Contracting Authority: Dr Mattia Felice

Whereby, the Appellant contends with respect to:

a) ***No Notice or Reason for Cancellation***

AXD Co Ltd submitted an offer for a call for tender for the works in caption. AXD Co Ltd was also the only bidder for this call. The Contracting Authority requested clarifications on the bid submitted by AXD Co Ltd, to which AXD Co Ltd duly submitted a reply. The Contracting Authority subsequently cancelled such tender without giving any notice or reasons.

b) ***Precontractual Liability***

An element of precontractual liability was incurred in the above process after the call for tenders, the submission of the work and the bid by AXD Co Ltd, the request for clarification and the subsequent clarification reply, and the resultant cancellation of said tender.

c) ***Contrary to the Natural Principles of Justice***

Furthermore, the decision to cancel the tender was done without giving any reasons, and without allowing AXD Co Ltd to defend their bid. This constitutes a breach of the Public Procurement Regulations. This also goes contrary to the natural principles of justice.

d) ***Unlawful and Disproportionate Cancellation***

For these reasons it is being retained that the cancellation of the tender be disproportionate and unlawful.

The Board also noted Contracting Authority's Reasoned Letter of Reply filed on 16th of October 2024 and its verbal submission during the hearing held on 30th January 2025, in that:

a) ***Reason for Tender Cancellation***

As against what is being suggested in the letter objecting to the cancellation of the tender, the Contracting Authority in fact did give a reason for the cancellation of the tender – the notice of cancellation in fact stated 'tender has been cancelled **in terms of Article 18.3 (a)** of the General Rules Governing Tenders which states that cancellation may occur where the “*tender procedure has been unsuccessful, namely where no qualitative tender has been received*”. There is obviously a typing mistake in this rendition of the quoted article.

In fact, every cancellation of a tender must be in line with clause 18.3 of the General Rules Governing Tenders. There are 6 instances to choose from. Article 18.3 (a) is applied whenever a tender is cancelled for abnormally high bids.

The typo is found in 3 areas, twice on page 2 of the Evaluation Report and on the notice sent to the bidder. Article 18.3 (a) should read as follows:

“(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.”

In fact, the letter quotes the right and correct Article to justify the cancellation but due to a typing error the letter missed copying the words '*or financially worthwhile*' which is the correct wording included in Article 18.3(a).

However this said, the only tenderer in this bid surely must have noted that his bid cannot be sustained and that this tender would need to be cancelled since this only bid was more than 50% over the estimated value.

In fact, the published tender document page 3, clearly indicates the estimated procurement value: *“1.3 The Estimated Procurement Value for this Call for Tenders has been based on comprehensive research including appropriate financial analysis. In the context of this procurement, the Estimated Procurement Value, based on market research, is that of €66,095.00 excluding VAT.”*

So in bidding more than 50% over the estimated value the objector clearly knew that his bid would definitely not be '*qualitatively or financially worthwhile*'.

At the price quoted by this bidder, the required quality would have been twice that required or offered.

So it is incredible how the objector is expecting the Housing Authority to pay twice as much. Even if the Authority was not dealing with public funds still it would not have been ready to spend its funds in such a manner.

b) ***Precontractual Liability Claim***

The objection mentions that the objector incurred precontractual liability however it fails to indicate what this liability is and under which law or tender clause such a claim is being made. Every tenderer is presumed to know that a tender can be accepted or rejected and that every tender issued can be cancelled. A reason for the cancellation of this particular tender was given in the letter and a reading of the quoted clause would have indicated the correct reason for the cancellation.

So if it has been indicated that the tender procedure has been unsuccessful, since no qualitative or financially worthwhile tender has been received, this would not be a matter relating to one bidder being chosen instead of a better bidder, this would be a case where the whole tender was cancelled. So if the bid offered exceeded the amount that the Authority was ready to pay there would be no necessity or obligation to hear any party. The Authority can cancel a tender – and in this case a reason was given for such cancellation.

c) ***Unlawful and Disproportionate Cancellation***

There was nothing unlawful or disproportionate in the cancellation. And certainly there was no breach of Public Procurement Regulations – in fact the objector fails to mention what this alleged breach was.

d) ***Natural Justice***

The objector also claims a breach of natural justice – however in tendering processes it is evident and natural that it is the Contracting Authority that can decide whether the bids tender suit the needs of what is required. And in cancellation of a tender the decision is not aimed at a particular bidder. Where the Authority decides that the tender procedure has been unsuccessful, namely where no qualitative or financially worthwhile tender has been received, there is no alteram partem to be heard as that is an objective decision which the Authority can take.

e) ***Obligation to ask the bidder to clarify / rectify his bid***

Although the Contracting Authority at an initial stage understood that this only bid would present financial problems still by Public Procurement Regulations and practice (Section 2, 2.16 of the Standard Operating Procedures for Evaluation Committees, the Contracting Authority was obliged to ask the bidder to clarify / rectify his bid so as to conform to administrative and technical requirements. Only following such a correction could the Authority pass on to tackle the financial

requirements. And at this stage the bid would obviously fail when it comes to the third and final stage being the financial stage.

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 witness duly summoned, will now consider Appellant's grievances.

Grievance 1: No Notice or Reason for Cancellation

- The Appellant contends that the tender was cancelled without prior notice or an adequate explanation.
- The Board notes that the Award letter dated 3rd October 2024 from the Contracting Authority did cite Article 18.3(a) of the General Rules Governing Tenders, despite omitting the phrase "*or financially worthwhile.*"
- The Appellant's bid exceeded the estimated tender value by more than 50%, thereby triggering the cancellation provision under Article 18.3(a), which permits cancellation when no "*qualitatively or financially worthwhile*" tender is received.
- In the Board's view, invoking Article 18.3(a) to cancel the tender was justified and proportionate, given that the submitted bid was substantially above the estimated value.
- The Board observes, however, that the Contracting Authority could have been clearer by explicitly mentioning the 50% exceedance in addition to citing Article 18.3(a), which would have better conveyed the reasons for cancellation to the Appellant.
- Although the typographical omission and the lack of direct mention of the 50% exceedance may have reduced the clarity of the cancellation notice to the Appellant, the Board is of the opinion that cancellation itself was valid, justified, and in strict compliance with the General Rules Governing Tenders and the PPR.

Therefore, the Board does not uphold the Appellant's grievance on this point. However, due to the drafting matter referred to above, it directs that the deposit paid by the Appellant be reimbursed.

Grievance 2: Precontractual Liability

- The Appellant claims that it incurred precontractual liability due to the tender cancellation following submission of its bid and clarifications.
- Article 18.1 of the General Rules Governing Tenders states that "*The Central Government Authority/ Sectoral Procurement Directorate/ Contracting Authority reserves the right to accept or reject any tender and/ or to cancel the whole tender procedure before and after the closing established for the submission of the tenders,*

including instances where the financial offers submitted exceed the estimated value (budget) for the tender and/ or the financial offers are deemed as economically not feasible. The Central Government Authority/ Sectoral Procurement Directorate/ Contracting Authority reserves the right to initiate a new invitation to tender. Thus, the Board considers claims for precontractual liability by the appellant as unfounded.

- Furthermore, Article 18.3(a) of the same rules permits cancellation when no “*qualitatively or financially worthwhile*” tender is received.
- In the Board’s view, the Contracting Authority’s decision to invoke Article 18.3(a) was both justified and proportionate, given that the Appellant’s bid significantly exceeded the estimated tender value.
- Furthermore, the Board agrees with the Contracting Authority that it “*was obliged to ask the bidder to clarify / rectify his bid so as to conform to administrative and technical requirements.*” as per the standard Operating Procedures for Evaluation Committees.

Therefore, the Board does not uphold the Appellant’s grievance on this point.

Grievance 3: Contrary to the Natural Principles of Justice

- The Appellant contends that it was not given the opportunity to defend its bid, allegedly breaching the principles of natural justice.
- In the Board’s view, the Contracting Authority’s decision to invoke Article 18.3(a) to cancel the tender was both justified and proportionate, given that the Appellant’s bid significantly exceeded the estimated tender value.

Therefore, the Board does not uphold the Appellant’s grievance on this point.

Grievance 4: Unlawful and Disproportionate Cancellation

Based on the reasons given above, the Board does not deem that the tender cancellation is unlawful and disproportionate and that the evaluation board acted in a lawful and proportionate manner when cancelling the tender.

Therefore, the Board does not uphold the Appellant’s grievance on this point.

The Board,

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

- a) Does not uphold Appellant's Letter of Objection and contentions,
- b) Upholds the Contracting Authority's decision in the recommendation for the cancellation of the tender,
- c) Directs that the deposit paid by Appellant to be reimbursed.

Mr Kenneth Swain
Chairman

Dr Ing. Damien Gatt
Member

Mr Lawrence Ancilleri
Member