

PUBLIC CONTRACTS REVIEW BOARD

Case No. 520

Ref: 06/12

Tender for Supply & Installation of Playing Field Equipment, Soft Flooring and Fencing in Gnien il-Kunsill Lokali, Gnien Profs. Anton Tabone & Gnien Mons. Guzeppi Minuti

This call for tender was published in the Government Gazette of the 11th September 2012 with a closing date of the 12th October 2012. The estimated value of the tender is €60,000 excluding VAT.

The Birzebbugia Local Council recommended that the tender be cancelled.

FGL Commercial Services Sales Ltd filed an objection on the 18 January 2013 against the decision of the B'Bugia Local Council to recommend the cancellation of the tendering procedure.

The Public Contracts Review Board composed of Mr Joseph Croker as A/Chairman, with Messrs Carmelo Esposito and Paul Mifsud as members convened a public hearing on Monday the 18th February 2013 to discuss the appeal.

Present for the hearing were:

FGL Commercial Services Sales Ltd

Dr John Gauci	Legal Representative
Dr David Zahra	Legal Representative
Mr Gordon Dimech	Representative
Mr Tony Bonello	Representative

B'Bugia Local Council

Mr Victor Bugeja LP	Legal Representative
Mr Joseph Farrugia	Mayor
Mr Joseph Baldacchino	Councillor
Mr Carol Muscat	Councillor

Contracts Department

Mr Francis Attard	Director General
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After the A/Chairman's brief introduction, the appellant was invited to explain the motives of his objection.

Dr John Gauci, on behalf of FGL Commercial Services Sales Ltd, the appellant, made the following submissions:

- i. by email dated 11th January 2013 his client was informed that the B'Bugia Local Council had reconsidered the offers and concluded not to accept any offer as provided for in Clause 11 of the 'Instrucitons to Tenderers';
- ii. his client had already submitted an appeal against the disqualification of his offer and the proposed award of this tender to JGC Ltd and as per PCRB decision conveyed on 14th December 2012 (case no. 504) where his client's bid was re-integrated in the tendering submission;
- iii. notwithstanding the provisions of Clause 11 of the 'Instructions to Tenderers' which, according to the PCRB, afforded a measure of discretion to the Local Council still it was held that it could not act arbitrarily;
- iv. apparently, the contracting authority did not look favourably on the decision taken by the PCRB to reinstate his client's bid so much so that it was now cancelling the tender after having reconsidered all offers and, on being specifically asked to give the reason behind the cancellation, so as to enable his client to consider whether to object or not, the contracting authority stated that since the budget of the central government had not been approved it could not tell what funds were going to be made available for 2013;
- v. it was on the 10th December 2012 that the budget of the central government failed to pass through Parliament; however, in its meeting held on the 12th December 2012, the B'Bugia Local Council, while making reference to the PCRB hearing held on the 7th December 2012 and that the Council was awaiting the outcome of that hearing prior to taking further action, it made no mention regarding the unavailability of funds;
- vi. following the receipt of the decision of the PCRB on the 14th December 2012, the Council decided on the 11th January 2013 to refuse all offers and to re-issue at a later stage the tender, which according to the Council would be more specific;
- vii. one had to point out that the budget of the local councils emanated from the Local Councils Act and as such it was independent of the budget of the central government;
- viii. moreover, local councils were required to submit a 3-year work programme for approval by government and in fact the B'Bugia had presented this programme covering the three year period ending 2014;
- ix. the reconsideration of all offers was not contemplated in the regulations;

- x. it was evident that the Council had decided to ignore the decision of the PCRB, which did not indicate the cancellation of the tender but the reinstatement of his client's offer, whereas that decision had to be acted upon; and
- xi. in the light of the above, the decision to cancel the tender ought to be annulled and the tender awarded to his client as the cheapest compliant tenderer.

Mr Victor Bugeja, legal procurator on behalf of the contracting authority, explained that:-

- a. the decision of the PCRB was to reinstate the appellant's offer in the tendering procedure and not to award the tender to the appellant or to any other bidder, for that matter, and the contracting authority had in fact abided by that decision because it considered all the offers, including that of the appellant, prior to reaching its decision of the 11th January 2013;
- b. it was correct that the local council had a 3-year work programme in place and that it was independent from the central government budget but, on the other hand, it was correct to state that the execution of works were dependent on the funds provided in the budget of the central government and it so happened that the 2013 budget had not been approved and therefore the Council was not in a position to enter into contractual agreements on capital works;
- c. the Council was sort of suspending this tender until such time that funds were in fact available for the specific purpose and one had to keep in mind that in handling public funds the Council had to act very cautiously and diligently;
- d. the contracting authority could have excluded the appellant on other grounds, such as the non submission of certain documentation; and
- e. although the PCRB was entitled to look into the cancellation of the tender, on the other hand, the PCRB could not oblige the contracting authority to award the tender at all costs, if anything, the contacting authority could perhaps reimburse the expenses incurred by the tenderer in submitting his bid by way of pre-contract remedy.

The A/Chairman PCRB remarked that, as far as he was aware, whereas the central government budget was on a cash basis, the budget of the local councils operated on an accrual basis, i.e. if a project fell behind schedule the relative funds would not be lost at year's end - and perhaps re-voted in the subsequent year - but the funds would remain available by being carried forward from one year to the next. He added that it appeared that up to the Council meeting held on the 12th December 2012 the non-availability of funds was not an issue even though the budget of the central government had already not been approved.

Mr Joseph Farrugia, mayor of B'Bugia Local Council, remarked that this project was earmarked for completion in 2012 and funds were available under the Urban Improvement Fund (UIF) managed by the Malta Environment and Planning Authority (MEPA), however, given that this project was not taken in hand the funds were utilised on another urgent project.

Dr Gauci remarked that:-

- i. in a three envelope tender procedure the contracting authority could disqualify a bid at each of the three different stages however this was a single envelope tender and therefore it was not the case that the contracting authority could raise other issues for rejecting the same offer soon after the PCRB would have decided on the reintegration of that bid; and
- ii. this appeal was not a pre-contractual remedy because that was applicable only prior to the closing date for the submission of tenders but this appeal was contesting the cancellation of the tender and calling on the contracting to go ahead with the award to his client as the cheapest compliant.

The A/Chairman PCRB explained that it was not the role of the PCRB to award a tender to any particular bidder but if anything to recommend the reintegration of a bid into the tendering process. He asked what happened to the funds which, at least up to the 12th December 2012, were earmarked for this project.

Mr Joseph Baldacchino, councillor in charge of finance, under oath, gave the following evidence:-

- a. the funds available to the Council covered works/services of a recurrent nature, e.g. waste collection and the upkeep of public gardens/areas;
- b. capital projects, which would have already been approved in the 3-year programme, were financed out of the UIF managed by MEPA;
- c. presently the Council was carrying out strictly those recurrent services and works required by law however after much effort funds were granted also for urgent works on a particular road; and
- d. the Council also had about €700,000 earmarked exclusively for a project in connection with the Malta Freeport which funds could not be utilised otherwise.

Mr Joseph Farrugia, mayor, under oath, gave the following evidence:-

- i. UIF funds were meant for the execution of capital works which would have been approved on the submission of the appropriate plans and estimates, and this contract was going to be financed from that source, however, once these works were not taken in hand the same UIF funds were used on urgent roadworks at 'Tal-Papa'; and

- ii. it was up to MEPA to issue development permits and to allocate funds which sometimes did not cover all the costs.

Mr Bugeja argued that apparently the Council first issued the tender documentation together with the costings and then, those same plans and costings were submitted for MEPA's approval of funds, among other things.

Mr Paul Mifsud, PCRB member, remarked that a contracting authority could not issue a tender unless it filled in the Tender Originators Form whereby the required funds were available and duly committed for that specific purpose.

Mr Francis Attard, Director General (Contracts), under oath, explained that:-

- a. in his opinion, Clause 11 of the 'Instructions to Tenderers' provided considerable discretion to the contracting authority with regard to the rejection of tenders even in the case of compliant bids;
- b. although the Department of Contracts was not involved in the adjudication of this tender, from what he had just heard it appeared that the contracting authority had abided by the decision made by the PCRB on the first appeal in the sense that the appellant had been reinstated in the tendering process, however, following the re-examination of all the bids, including that of the appellant, the contracting authority felt that it should cancel the tendering procedure claiming that in view of unforeseen developments funds were no longer available; and
- c. tenderers had the right to lodge an appeal against the cancellation of a tender and the PCRB was entitled to look into whether that cancellation was justified or not.

The Board:

- Having noted that the appellants in terms of their letter of objection and also through their verbal submissions during the hearing of the 18th February 2013 had objected to the decision taken by the B'Bugia Local Council to cancel the tender;
- Having noted the appellant's representatives claims and observations in particular to the fact that the Local Council during its sitting of the 12th December 2012 did not mention the lack of funding as a result of the Central Government Budget not being approved by Parliament on the 10th December 2012 but only mentioned that it was awaiting the decision of the PCRB as regards Case 504 (an appeal lodged in connection with the same tender) to decide on the way forward; that the local councils funding was regulated by the Local Councils Act and was not directly dependent on the approval or otherwise of the Central Government Budget; that local councils had to draw up a 3-year work programme, which programme covered the period ending 2014;

- Having noted the contracting authority's representatives claim that the PCRB's decision re Case 504 was to reinstate the appellant and not to award the tender to any particular provider, and this decision was observed in full by the council; that though the local council budget was independent of the Central Government's it so happened that funds have to be provided from the Central Government's budget and once this was not approved the local council could not be sure that funds would be made available; that once funds allocated for this particular budget from the UIF had not been utilised during 2012, the council used them to carry out emergency repairs on a road which was in a very bad state; that the PCRB had the right to hear an appeal but could not compel a contracting authority to award a tender, and that Clause 11 empowered a contracting authority not to award a tender;
- Having also noted the Director of Contracts explanation that Clause 11 gave contracting authorities wide discretion to cancel a call for tender at any stage; however this discretion was always open to appeal;

came to the following conclusions:

1. that once the project was included in the 3-year work plan ending 2014 proposed by the B'Bugia Local Council;
2. that once any project submitted for funding through the Urban Improvement Fund (UIF) would have to be supported by detailed estimates of costs, the portion of funds that would be expected from the UIF and details of how shortfall (if any) would be covered; that development permits and any other permit would have to be submitted in support of the project;
3. that once as a result it is manifest that any project submitted by a local council would not have been accepted unless it was covered by adequate funding in order to ensure that the project is carried out; and
4. that once local councils use an accruals accounting system meaning that there would not be any potential loss of funds and that any committed funds would be transferred to the following year;
5. the reason brought forward by the Birzebugia Local Council for having cancelled the call for tender i.e lack of funds following the non-passage of the Central Government Budget through Parliament is not justifiable.

In view of the above, the Board finds in favour of the appellant and recommends that the tender adjudication process be continued. It also recommends that the deposit paid by the appellant for filing the objection be reimbursed in full.

Joseph Croker
A/Chairman

Carmelo Esposito
Member

Paul Mifsud
Member

27 February 2013