

PUBLIC CONTRACTS REVIEW BOARD

Case No. 552

HM/22/02/2012

Service Tender for 3D Documentation of Fort St Angelo, Birgu

The call for tender with an estimated value of €120,000 (excl. VAT) was published in the Government Gazette of the 3rd April 2012 with a closing date of the 14th May 2012.

Four (4) tenderers submitted their offers.

St Angelo JV filed an objection on the 30th January 2013 against the decision of Heritage Malta to cancel the tender as per clause 33.3 (b) of the tender document since “the economic or technical parameters of the project have been fundamentally altered”.

The Public Contracts Review Board composed of Mr Alfred Triganza (Chairman) and Mr Joseph Croker and Mr Carmelo Esposito as members convened a meeting on Wednesday 15th May 2013 to discuss the appeal.

Present:

Fort St Angelo

Dr Franco Galea	Legal Representative
Perit Mariello Spiteri	Representative
Perit Vanessa Pisani	Representative

Heritage Malta

Dr Ruth Baldacchino	Legal Representative
Mr Kenneth Gambin	Chief Executive Officer

Evaluation Board

Perit Ruben Abela	Chairman
Ms Joanne Mallia	Member

After the Chairman's brief introduction, the appellant joint venture's representative was invited to explain the motives of the said appellant's objection.

Dr Franco Galea, legal representative of St Angelo JV, the appellant, made the following submissions:-

- i. by letter dated 24th January 2013 the contracting authority informed the appellant that this tender was being recommended for cancellation as per clause 33.3 (b) of the tender document since "the economic or technical parameters of the project have been fundamentally altered" and, furthermore, the specified original time-frames became impossible to be met and that funds were not currently available due to the imposition of budgetary restrictions;
- ii. one could perhaps understand that position at the time when the budget had not been approved but now the budget was approved and, according to public announcements, works on the Fort St Angelo project were to be continued;

and
- iii. therefore, the contracting authority was requested to explain the current state of affairs.

Architect Ruben Abela, chairman of the evaluation board, explained that:-

- a. it was correct that works on Fort St Angelo were to continue and that there was a commitment to conclude certain works by 2015;
- b. apart from works financed through EU funds, there were other urgent structural works which were taken in hand and financed by local funds and in 2010 the government had allocated €1.5m for this purpose;
- c. whilst the works contemplated in the tender under reference were earmarked for financing out of ERDF funds and these 3D surveys were planned to be taken in hand prior to embarking on major structural works, yet the ERDF budget of €17m was curtailed to €13.4m and, as a consequence, certain works/services, which included the works in this tender, had to be excluded from foreign financing;
- d. albeit at the time of issuing the tender, namely April 2012, local funds were available to carry out these 3D surveys, yet these works experienced delay at adjudication stage and because two appeals had been lodged before the Public Contracts Review Board which were decided on the 26th October 2012;
- e. at one stage, during 2012, although government had decided to reduce the local funds available to Heritage Malta yet the *quantum* had not been communicated;

- f. in the meantime contracts had been entered into for urgent structural works financed out of local funds;
- g. given that the urgent structural works had been contracted and works were in hand – the 3D scanning had been intended to start prior to the commencement of major structural works – and the severe restrictions imposed of local funds, it was decided to do away with the 3D scanning and to cancel the tender under reference so that the limited funds available would be dedicated to the most urgent structural works already in hand;

and

- h. no 3D scanning was going to be undertaken.

Mr Kenneth Gambin, CEO Heritage Malta, remarked that, at the time the 2013 budget was being drawn up, the Ministry of Finance had clearly indicated that there would be a reduction in the funds allocated to Heritage Malta and towards the end of 2012 that indication materialised.

Architect Mariello Spiteri, representing the appellant, asked how was Heritage Malta going to meet its obligations to record all the structural alterations which were being contemplated and which had to be approved by the Malta Environment and Planning Authority unless such 3D documentation/surveys were carried out.

Architect Abela explained that:-

- i. whilst 3D documentation was only one of the methods as to how Heritage Malta could keep a record yet there were other tools available for the same purpose, such as, (a) photographic surveys, which were carried out prior to the issue of this tender and (b) the traditional land surveys, which were already available as part of the documentation required to apply for EU funds;
- ii. the ERDF financed tenders which were being issued for structural works and these were obliging contractors to furnish Heritage Malta with all documentation/surveys relative to the works carried out, however, this did not refer to laser scanning which was the subject of the tender under review;

and

- iii. this service, although desirable, was no longer considered necessary given the financial situation and the priorities of Heritage Malta.

Dr Galea referred to clause 33.3 (b) of the tender document which stated that cancellation may occur where “*the economic or technical parameters of the project have been fundamentally altered*” and argued that this provision did not cover the situation pictured by the contracting authority because, during adjudication, the works were not increased by such a measure as to render it uneconomical to carry out.

The Chairman Public Contracts Review Board remarked that tenders were issued provided that funds for the purpose were available and, in this case, the appellant's offer, apparently, turned out to be below the estimated value of the tender.

Mr Gambin gave the following timeline:-

- i. in March 2012 funds were available for this project;
- ii. during the year, the local funds originally allocated to Heritage Malta were reduced by the Ministry of Finance and, in order to abide by Finance directives, no new works/services were to be undertaken;

and

- iii. for financial year 2013 funds from local sources were provided only for contracts already awarded and in execution stage but no allocation was provided for new works.

Dr Galea alleged that it was not a question that this project was not required but, apparently, the intention was not to award this contract to the appellant.

The Chairman Public Contracts Review Board referred to the email Mr David Zahra sent to Mr Joseph Scerri (CEO), both employed at Heritage Malta, on 11th January 2013 where he outlined the reasons why this tender should be cancelled, namely:

- a. this service was meant for execution prior to the start on major structural works, which works had, however, already been taken in hand due to the length of time taken to adjudicate the tender and to the conclusion of the two appeals lodged by bidders, and, as a consequence, the purpose of this survey was defeated

and

- b. the review downwards of Heritage Malta's allocation of local funds towards the end of 2012 and the proposed 2013 budget only provided funds to manage the high priority works/commitments in hand but did not provide for such a commitment.

Dr Ruth Baldacchino, on behalf of the contracting authority, remarked that, at one stage, funds were not even available to meet the wage bill or to attend conferences abroad. She added that it was not correct to allege that these works were being carried out by other contractors.

The Chairman Public Contracts Review Board pointed out that:-

- a. it was not fair on the Public Contracts Review Board to employ time and energy to hear and decide on two separate appeals and then discover that the tender ended up cancelled because it was no longer considered 'a priority';

- b. in another case involving the protection of Tarxien Temples (CT/3004/2012), the estimated budget was increased from €1.2m to €2.24m but, apparently, no funds could be found for a project costing in the region of €73,000, which, then again, was below the entity's estimate;
 - c. the decision of the Public Contracts Review Board in the previous appeal had been quite clear, namely that St Angelo JV had to be reintegrated in the tendering process, which decision had to be carried out and if one disagreed with that decision then one could only challenge it before the Law Courts but, definitely, not decide, arbitrarily, to renege from carrying it through;
 - d. it appeared that Heritage Malta had a very ambitious programme of works but lacked the necessary funds to carry it out;
 - e. even for the sake of transparency, it should not be the case that a bidder who, successfully, appealed against exclusion from a tendering procedure would then be faced with the cancellation of the tender;
- and
- f. no ulterior motives were being attributed as to the way this case has developed but the fact remained that the outcome was not acceptable.

Mr Gambin remarked that it would have been desirable had Heritage Malta embarked on this and other new projects but it simply could not due to budgetary constraints and it was not a question of which new project Heritage Malta had to shelf but it had to shelf them all and carry on with the works already in hand or which were financed out of the ERDF.

At this point the hearing came to a close.

This Board,

- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated the 26th January 2013 and also through its representatives verbal submissions presented during the hearing held on the 15th May 2013, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant's representative's claims and observations, particularly, the references made to the fact that (a) by letter dated 24th January 2013 the contracting authority informed the appellant that this tender was being recommended for cancellation as per clause 33.3 (b) of the tender document since "the economic or technical parameters of the project have been fundamentally altered" and, furthermore, the specified original time-frames became impossible to be met and that funds were not currently available due to the imposition of budgetary restrictions, (b) one could perhaps understand that position at the time when the budget had not been approved but now the budget was approved and, according to public announcements, works on the Fort St Angelo project were to be continued, (c) therefore, the contracting authority was requested to explain the current state of affairs, (d) at the time the 2013 budget was being drawn up, the Ministry of Finance had clearly indicated that there would be a reduction in the funds allocated to Heritage

Malta and towards the end of 2012 that indication materialised, (e) asked how was Heritage Malta going to meet its obligations to record all the structural alterations which were being contemplated and which had to be approved by the Malta Environment and Planning Authority unless such 3D documentation/surveys were carried out, (f) referred to clause 33.3 (b) of the tender document which stated that cancellation may occur where “*the economic or technical parameters of the project have been fundamentally altered*” and argued that this provision did not cover the situation pictured by the contracting authority because, during adjudication, the works were not increased by such a measure as to render it uneconomical to carry out and (g) alleged that it was not a question that this project was not required but, apparently, the intention was not to award this contract to the appellant;

- having considered the contracting authority’s representative’s reference to the fact that (a) it was correct that works on Fort St Angelo were to continue and that there was a commitment to conclude certain works by 2015, (b) apart from works financed through EU funds, there were other urgent structural works which were taken in hand and financed by local funds and in 2010 the government had allocated €1.5m for this purpose, (c) whilst the works contemplated in the tender under reference were earmarked for financing out of ERDF funds and these 3D surveys were planned to be taken in hand prior to embarking on major structural works, yet the ERDF budget of €17m was curtailed to €13.4m and, as a consequence, certain works/services, which included the works in this tender, had to be excluded from foreign financing, (d) albeit at the time of issuing the tender, namely April 2012, local funds were available to carry out these 3D surveys, yet these works experienced delay at adjudication stage and because two appeals had been lodged before the Public Contracts Review Board which were decided on the 26th October 2012, (e) at one stage, during 2012, although government had decided to reduce the local funds available to Heritage Malta yet the *quantum* had not been communicated, (f) in the meantime contracts had been entered into for urgent structural works financed out of local funds, (g) given that the urgent structural works had been contracted and works were in hand – the 3D scanning had been intended to start prior to the commencement of major structural works – and the severe restrictions imposed of local funds, it was decided to do away with the 3D scanning and to cancel the tender under reference so that the limited funds available would be dedicated to the most urgent structural works already in hand, (h) no 3D scanning was going to be undertaken, (i) whilst 3D documentation was only one of the methods as to how Heritage Malta could keep a record yet there were other tools available for the same purpose, such as, (1) photographic surveys, which were carried out prior to the issue of this tender and (2) the traditional land surveys, which were already available as part of the documentation required to apply for EU funds, (j) the ERDF financed tenders which were being issued for structural works and these were obliging contractors to furnish Heritage Malta with all documentation/surveys relative to the works carried out, however, this did not refer to laser scanning which was the subject of the tender under review, (k) this service, although desirable, was no longer considered necessary given the financial situation and the priorities of Heritage Malta, (l) in March 2012 funds were available for this project, (m) during the year, the local funds originally allocated to Heritage Malta were reduced by the Ministry of Finance and, in order to abide by Finance directives, no new works/services were to be undertaken, (n) for financial year 2013 funds from local sources were provided only for contracts already awarded and in execution stage but no allocation was provided for new works, (o) this service was meant for execution prior to the start on major structural works, which works had, however, already been taken in hand due to the length of time taken to adjudicate the tender and to the conclusion of the two appeals

lodged by bidders, and, as a consequence, the purpose of this survey was defeated, (p) the review downwards of Heritage Malta's allocation of local funds towards the end of 2012 and the proposed 2013 budget only provided funds to manage the high priority works/commitments in hand but did not provide for such a commitment and (q) at one stage, funds were not even available to meet the wage bill or to attend conferences abroad and that it was not correct for one to allege that these works were being carried out by other contractors,

reached the following conclusions, namely:

1. The Public Contracts Review Board acknowledges and bases its judgement on the premise that tenders are issued provided that funds for the purpose are available and, in this case, the appellant's offer, apparently, turned out to be below the estimated value of the tender.
2. The Public Contracts Review Board argues that it was not fair for it to employ time and energy to hear and decide on two separate appeals and then discover that the tender ended up being cancelled because it was no longer considered 'a priority'. This Board feels that the issue of a tender being a 'priority' or not should be decided upon prior to any stage as it is not sound management for any entity to completely disregard the amount of time and money invested by any tenderer deciding to participate in public calls.
3. The Public Contracts Review Board opines that considering that, in another case involving the protection of Tarxien Temples (CT/3004/2012), the estimated budget was increased from €1.2m to €2.24m, in this instance funds could have been found for a project costing in the region of €73,000, which, then again, was below the entity's original estimate.
4. This Board contends that the decision of the Public Contracts Review Board in the previous appeal had been quite clear, namely that St Angelo JV had to be reintegrated in the tendering process, which decision had to be carried out and if one disagreed with that decision then one could only challenge it before the Law Courts but, definitely, not decide, arbitrarily, to renege from carrying it through.

In view of the above this Board finds in favour of the appellant. Apart from recommending that the appellant's bid be reintegrated in the evaluation process which has to proceed and finalised, this Board also recommends that the appellant be reimbursed with the deposit paid to lodge the appeal.

The Public Contracts Review Board is adamant that this time its decision shall not be ignored once again by the contracting authority.

Alfred R Triganza
Chairman

Joseph Croker
Member

Carmelo Esposito
Member

22 May 2013