

PUBLIC CONTRACTS REVIEW BOARD

Case 1186 – SNTLC 01/2018 –Tender for Resurfacing of Triq l-20 ta’ Lulju and Major Patching Works with Hot Rolled Asphalt at Triq ta’ Saguna at Sannat

The publication date of the call for tenders was the 20th February 2018 whilst the closing date of the call for tenders was the 23rd March 2018. The estimated value of the tender (exclusive of VAT) was € 38,292.52.

Road Construction Company Ltd filed an appeal on 12th May 2018 against the Sannat Local Council on the grounds that the Local Council cancelled this call for tenders. A deposit of € 400 was paid.

On 12th July 2018 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Carmel Esposito and Mr Lawrence Ancilleri as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – Road Construction Co Ltd

Dr Carmelo Galea	Legal Representative
Mr Louis Grima	Representative

Contracting Authority – Sannat Local Council

Dr Larry Formosa	Legal Representative
Mr Jason Curmi	Executive Secretary

The Chairman of the Public Contracts Review Board, Dr Anthony Cassar, welcomed both parties and suggested that this Case and Case 1187 (SNTLC 04/2018) be taken together as they involved the same parties on identical tenders.

Dr Larry Formosa, Legal Representative of the Sannat Local Council, said that his clients concurred with this procedure.

Dr Carmelo Galea, Legal Representative for Road Construction Company Ltd stated that the tender was cancelled as the Local Council claimed that through an oversight part of the Bill of Quantities (BOQ) was not uploaded on the system. This was not correct as in the two tenders there was no difference in the BOQ sheets. However in the second tender (4/2018) it appears as if one of the BOQ sheets had been tampered with as there are changes in it when compared to the first tender (1/2018). If the claim that there was an oversight in uploading part of the BOQ is correct then the two should have been identical. The Contracting Authority claims that under Regulation 18.1 of the Public Procurement Regulations they are entitled to make changes but paragraph 18.3 (e) and (f) limit the entitlement of the Authority to change only certain irregularities. There was no reason for the Local Authority to cancel this tender as there were several tenderers.

Dr Larry Formosa stated that the reason for the cancellation was that in the first tender only one street was included in the BOQ although the tender covered two streets. The Council wanted to keep costs down by having both streets tackled at once by having one tender covering both roads. Only 2 bids were received on the one street and no clarifications were sought. Under Regulation 18 cancellations are allowed if there are irregularities in the procedure. The second tender was issued to correct the errors in the first and the changes in the BOQ are in the format rather than in the substance; namely that the former included an additional street. Regrettably it has now transpired that there was a typing error in the second tender but it was not such that it would create confusion and the Council intend to issue a clarification note to sort this out.

The Chairman pointed out that if there was additional work included that changed the parameters of the tender. The objectives have to be clear and a contracting authority cannot create confusion on the bidder who has to be safeguarded.

Dr Galea said that there was no radical irregularity in this case and therefore the Authority could not correct.

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

This Board,

Having noted this Objection filed by Road Construction Company Limited, (hereinafter referred to as the Appellants) on 12 May 2018, refers to the contentions made by the same Appellants with regards to the Cancellation of Tender of Reference SNTLC 01/2018 listed as Case No 1186 in the records of the Public Contracts Review Board, issued by Kunsill Lokali Sannat.

Appearing for the Appellants: Dr Carmelo Galea

Appearing for the Contracting Authority: Dr Larry Formosa

Whereby, the Appellants contend that:

- a) It is not correct for the Local Council to cancel the Tender, due to the simple fact that the latter did not include all the documentation to represent all the works that has to be carried out. In this regard, the Appellants contended that, at the same instance, the Contracting Authority issued another Tender with slight amendments to the Bill of Quantities.**

This Board has also noted the Contracting Authority's "*Letter of Reply*" dated 14 May 2018 and its verbal submissions during the Public Hearing which was held on 12 July 2018, in that:

- a) The Contracting Authority insists that due to an error, on its part, missing documentation in the original Tender, it had to cancel the Tender of Reference SNTLC 01/2018. In order to include these omissions, the Council decided to issue a new Tender incorporating all the necessary works under Tender Reference SNTLC 04/2018.**

This Board, after having examined the relevant documentation to this Appeal and heard submissions made by the parties concerned, opines that in this particular case an obvious yet inadvertent error occurred on the part of the Contracting Authority through the issue of Tender of Reference SNTLC 01/2018, in that, in the Bill of Quantities there were omitted works to be carried out relating to one particular street. Instead of issuing a clarification to include such an omission, the Local Council decided to cancel this particular Tender.

In this regard, this Board opines that Kunsill Lokali Sannat could have avoided the cancellation of the Tender by issuing additional clarifications

complimentary to the Tender Document. However, the same Contracting Authority had every right to cancel the Tender as there were justifiable grounds for such cancellation and the latter action was appropriately carried out in accordance with the Public Procurement Regulations.

In this particular case, there were two options available for the Local Council, either to issue a clarification and include any omissions or cancel the Tender and issue a fresh one. From these two options, the Local Council chose the latter course.

In view of the above, this Board:

- i) Upholds the decision of Kunsill Lokali Sannat in the cancellation of the Tender;**

- ii) Does not uphold the contentions made by Road Construction Company Limited that the Local Council's decision to cancel the Tender was incorrect;**

iii) Considers the fact that the Tender is to be cancelled and thus recommends that the deposit paid by the Appellant should be fully refunded.

Dr Anthony Cassar
Chairman

Mr Carmel Esposito
Member

Mr Lawrence Ancilleri
Member

24th July 2018