

PUBLIC CONTRACTS REVIEW BOARD

Case 1434 – HTLC/01/2019 – Tender for Professional Services of a Contracts Manager by Tarxien Local Council

The tender was published on the 28th May 2019 and the closing date of the call for tenders was the 18th June 2019. The estimated value of the tender (exclusive of VAT) was € 40,000.

On the 19th February 2020 Synthesis Management Services Ltd filed an appeal against Tarxien Local Council as the Contracting Authority objecting to the decision of the Council to cancel the tender. A deposit of € 400 was paid.

There were two (2) bidders.

On 10th March 2020 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – Synthesis Management Services Ltd

Dr Richard Sladden	Legal Representative
Mr Raphael Carabott	Representative

Contracting Authority – Tarxien Local Council

Dr Chris Mizzi	Legal Representative
Ms Emma Vella	Representative

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

Dr Richard Sladden Legal Representative of Synthesis Management Services Ltd stated that the Local Council had left the outcome of this tender pending for eight months - a practice that could lead to serious abuse. There was no sufficient reason for such a delay and whatever the circumstances this delay was too long.

Ms Emma Vella (205772M) called as a witness by the Public Contracts Review Board testified on oath that she was the Executive Secretary of the Tarxien Local Council. She stated that the date for the opening of the bids for this and another two tenders (June 30th 2019) coincided with the change of membership of the Council and the appointment of a new Executive Secretary (1st July

2019). At the August 2019 meeting of the Council the members decided that they would await the outcome of an audit before proceeding with the opening of the bids. On 11th February 2020 the Council was notified that the three month time limit for the evaluation of the tenders had been exceeded. The Council decided to open the tenders, to re-issue two of those tenders, and to cancel the tender in this case. Witness confirmed that the decision to cancel was taken after the tenders were opened.

Questioned by Dr Sladden witness stated that she had three years experience as a deputy secretary in Local Government prior to her present appointment, and that she was aware of Council procedures. She was also aware that tenders of this type were funded through a 5% contribution from the appointed contractors.

Dr Sladden stated that there was no serious reason for cancellation of this tender. A delay of eight months does not make any sense. The fact that the tender was opened before the decision to cancel it had been taken should mitigate in favour of Appellants.

Dr Chris Mizzi Legal Representative for the Tarxien Local Council said that the Board had heard a detailed explanation of the circumstances of how the delay was caused by the hold-up in receiving the audit report. The procedure followed was in line with the General Rules Governing Tenders. The vital date is the closing date of the tender not the opening of the bids. After 90 days the offers are no longer valid. The ground for cancellation subsists as no evaluation took place. All information regarding this tender is no longer available on the EPP system and this makes re-evaluation difficult.

Dr Sladden pointed out that the change of Council members should not have mattered as the administration is there to carry on the process and should not be used as a smokescreen for this hiccup – an experienced person like the current Executive Secretary should have dealt with this matter.

Dr Mizzi said, that the issue before this Board was not the sequence of events but whether the Council had the right to cancel the tender.

The Chairman mentioned that the Board found it surprising that only three days after the tender was opened it was decided to cancel it. The claim by the Executive Secretary that the Council was faced by big debts and was unable to meet paying the successful tenderer does not hold much water since a new tender on exactly the same terms as previously was issued immediately afterwards. He then thanked the parties for their submission and declared the hearing closed.

End of Minutes

Decision

This Board,

having noted this objection filed by Synthesis Management Services Ltd (hereinafter referred to as the Appellants) on 19 February 2020, refers to the claims made by the same Appellants with regard to the tender of reference HTLC/01/2019 listed as case No. 1434 in the records of the Public Contracts Review Board.

Appearing for the Appellants: Dr Richard Sladden

Appearing for the Contracting Authority: Dr Christopher Mizzi

Whereby, the Appellants contend that:

- a) There existed no valid reason as to why the Contracting Authority should cancel the tender, after eight months of the tendering process.**
- b) They also contest the fact that, the tenders where opened and only three days after such an event, the Authority decided to cancel the tender so that, such an action on the part of the Authority prejudiced Appellants' offer.**

This Board also noted the Contracting Authority’s ‘Letter of reply’ dated 12 February 2020 and its verbal submissions during the hearing held on 10 March 2020, in that:

- a) The Authority maintains that, since there was a lapse of more than ninety days from the closing date of the tender, it followed the procedure in line with the ‘General Rules Governing Tenders’, so that, there existed no other option but to cancel the tender.**

This same Board also noted the testimony of the witness namely:

Ms Emma Vella, Tarxien Council executive secretary duly summoned by the Public Contracts Review Board.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by the parties concerned, including the testimony of the witness duly summoned opines that, the issue that merits consideration is whether the Contracting Authority’s decision to cancel the tender was justified or not.

- 1. This Board would respectfully refer to the validity of tenders as contemplated in the General Rules Governing Tenders, with special reference to article 8.1 and 8.2, as follows:**

“8. Period of Validity of Tenders

8.1 Tenders must remain valid for a period of 90 days after the deadline for submission of tenders indicated in the contract notice, the procurement document or as modified in accordance with Clause 10.1. Any tenderer who quotes a shorter validity period will be rejected.

8.2 The Director General Contract/Ministerial Procurement Unit/Head of Contracting Authority may consider cancelling the tender in line with what is established in Regulation 15 of the Public Procurement Regulations (2016).”

It should also be mentioned that, an extension to the validity period, is only Authorised in exceptional circumstances and in this particular case, no such urgent or exceptional instances existed.

- 2. This Board was also made aware as to the sequence of events which led to the prolonged period from the closing date of the tender to the Authority’s decision to cancel the tender. From the testimony of the witness, Ms Emma Vella, this Board does not find any credible cause to justify the lengthy period taken by the Authority to finalise the tendering process.**
- 3. This Board was made aware that three days prior to taking the decision to cancel the tender, the Authority opened the offers. Such an instance would provoke unnecessary suspicions among tenderers and would make**

known all competitive prices submitted. In this regard, this Board deplures such an action on the part of the Authority.

4. Through the testimony of Ms Emma Vella, the executive secretary of the Council, this Board was also informed that the main reason for the cancellation of the tender was due to lack of funds. However, this Board notes that three days after the decision to cancel the tender, same Authority issued a fresh tender for the same works and services for which the previous tender was issued and this Board is somewhat perplexed as to how in a span of three days, adequate funds were then available.
5. With regard to the Authority's 'Letter of Rejection', this Board notes that no specific reason was given to tenderers for the cancellation of the tender. This Board would remind the Authority that it is its duty and obligation to give the real and specific reasons as to why such a cancellation has been approved and in this particular case, the Authority failed to do so.

In conclusion, this Board opines that:

- a) **The Authority had the right to cancel the tender through clause 8.1 and 8.2 of the 'General Rules Governing Tenders'.**
- b) **The reasons, given by the Authority for the cancellation of the tender are conflicting.**

- c) The opening of the offers, three days prior to the decision to cancel the tender, creates unnecessary suspicions among tenderers.**
- d) The Authority did not give the specific reasons for the cancellation of the tender.**

In view of the above, this Board,

- i. has no other option but to accept the Authority's decision in the cancellation of the tender, as the tendering process took eight months to be finalised and the 90-day period elapsed the Authority had to cancel the tender.**
- ii. in view of the considerations stated above, directs that the deposit paid by Appellants be refunded in full.**

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member

12 March 2020