

PUBLIC CONTRACTS REVIEW BOARD

Case 1497 – RLC/50/188/2020. Tender for the Construction of Gnien Bir l-Iljun

The tender was published on the 14th April 2020 and the closing date of the tender was the 12th May 2020. The estimated value of the tender (exclusive of VAT) was € 188,000.

On the 7th August 2020 Northern Building Services Ltd filed an appeal against Rabat Local Council as the Contracting Authority objecting to their disqualification on the grounds that their bid was not technically compliant.

A deposit of € 940 was paid.

There were four (4) bidders.

On 2nd October 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 virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – Northern Building Services Ltd

Dr Reuben Farrugia	Legal Representative
Mr Jonathan Farrugia	Representative

Contracting Authority – Rabat Local Council

Dr Richard Sladden	Legal Representative
Mr Paul Bugeja	Chairperson Evaluation Committee
Mr Anthony Bonello	Secretary Evaluation Board
Mr Andrew Spiteri	Representative

Recommended Bidder – Mica Med Ltd

Mr James A Agius	Representative
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Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties. He noted that since this was a virtual meeting all the parties agreed to treat it as a normal hearing of the Board. He then invited submissions.

Dr Reuben Farrugia Legal Representative for Northern Building Services Ltd said that he requested confirmation, that as indicated in the appeal submission, the evaluation had been done by a third party.

Mr Paul Bugeja (113473M) called as a witness by Appellants testified on oath that he was the Chairperson of the Evaluation Committee. Questioned by Dr Farrugia he confirmed that the Rabat Local Council had asked Galea Curmi Engineering for assistance in evaluating the technical submissions in the tender. He confirmed that the latter had produced a technical evaluation report and the Council had followed the recommendations of that report. He also stated that the Council had not sought a declaration of non-conflict of interest from the engineering firm.

Dr Farrugia said that as a preliminary point he wanted to underline the fact that the technical evaluation was not carried out by the Evaluation Committee but by Council appointed experts Galea Curmi Engineering and adopted by the Local Council without checking if there was any conflict of interest. The firm chosen as experts was well known in the construction industry and were in dealings with many other entities in that industry due to the communality of works – it was therefore absolutely essential that a conflict of interest disclosure should have been sought. The lack of such disclosure and the fact that the technical evaluation was done by a third party made the evaluation report null.

Dr Richard Sladden Legal Representative for Rabat Local Council said that it was a reflection of the correct intentions of the Council that they had appointed experts in an area where they had no expertise and it would have been wrong not to do so. The appointment of experts is conditional on the Evaluation Committee having the final word. The claimed conflict of interest had not been proven – merely alleged and it was unfair to suggest any wrongdoing.

Dr Farrugia stated that it was obligatory when engaging experts to obtain declarations regarding any possible conflict of interest and once this was not submitted the whole process is faulty – there was no need to prove any allegations that the process was faulty – it was a fact.

Dr Sladden said that it was the responsibility of the Evaluation Committee to appoint experts and up to them to decide if the experts were competent. In this case the appointed experts did not decide – it was the Council that did. It was also the responsibility of the Council to decide if there existed a conflict of interest by the experts they appointed.

At this stage the Chairman proposed a short recess to enable the Board to consider the submissions made on this preliminary point.

On resumption of the hearing the Chairman stated that this was an obvious case where the Local Council had failed to follow procedure in this tender. When the Public Contracts Review Board appoints an expert they first indicate the terms of reference, then seeks a conflict of interest declaration and then distributes the expert's decision to all parties concerned. In this instance no declaration of interest had been sought and therefore the process was incomplete, and the Council appears to have abdicated totally their responsibility to the engineering firm they appointed – experts were there to help not to decide. As there was a total failure on the part of Evaluation Committee in its duties there was no need for the Board to hear further submissions since the procedure was irregular from the start.

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

End of Minutes

Decision

This Board,

having noted this objection filed by Northern Building Services Ltd (hereinafter referred to as the Appellants) on 7th August 2020, refers to the claims made by the same Appellants with regard to the tender of reference RLC/50/188/2020 listed as case No. 1497 in the records of the Public Contracts Review Board recommended for award by Rabat Local Council (hereinafter referred to as the Contracting Authority).

Appearing for the Appellants: Dr Reuben Farrugia

Appearing for the Contracting Authority: Dr Richard Sladden

Appearing for the Preferred Bidder: Mr James Agius

Whereby, the Appellants contend that:

- a) On a Preliminary issue, they request confirmation from this Board that, the evaluation process had been carried out by a third party and not by the Evaluation Committee, as it should have been.**
- b) The ‘Letter of Rejection’ stated that, their offer was rejected for some missing details, without specifying the nature of these details.**
- c) Their offer was also rejected for the alleged vague reason that some technical literature was missing. In this respect, Appellants insists that all requested**

technical literature was duly submitted. At the same instance, if there was some literature missing, the Authority had the duty and obligation to request clarifications as duly stipulated under note 2.

- d) The list of items for which the technical literature was duly requested was not identical to the list of items listed in the BOQ. In this regard, not all the items indicated in the literature form could be priced in the BOQ since some were missing on the latter document.**

This Board also noted the Contracting Authority's 'Letter of reply' dated 14th August 2020 and its verbal submissions during the virtual hearing held on 2nd October 2020, in that:

- a) The Authority maintains that, since the procured services involves works of a technical nature, it engaged, as experts, an engineering firm to evaluate the technical offer and to submit the results obtained to the Evaluation Committee. In this regard, Appellants' offer was found to be technically non-compliant.**

This Board also noted the testimony of the witness namely:

Mr Paul Bugeja Chairman, of the Evaluation Committee duly summoned by the Public Contracts Review Board.

This Board would respectfully refer to the preliminary issue raised by Appellants with regard to the involvement of engineering consultants known as ‘Galea Curmi Engineering Consultants Ltd’, in the evaluation process of this tender.

- 1. First and foremost, this Board acknowledges the fact that, the Authority has every right to engage experts on technical issues so that, the results obtained therefrom will assist the Evaluation Committee in their technical evaluation of the offers submitted.**
- 2. This Board has also examined the evaluation report and noted that, the actual technical evaluation process was carried out entirely by ‘Galea Curmi Engineering’, the assigned technical experts. . It was also noted that, the appointed experts did not sign a declaration of impartiality and confidentiality and such an omission also applies to the Evaluation Committee members.**
- 3. It must be pointed out that, when experts are assigned to carry out a technical report, they should be given terms of reference and must sign a declaration of impartiality and confidentiality; in this particular case, no such documentation formed part of the evaluation report.**
- 4. It was also noticed that the report prepared by the experts was not distributed to the participating bidders so that, they were made aware of the contents therein and be in a position to reply to such a report.**
- 5. With regard to the Authority’s contention in that, it is the Authority’s responsibility to decide if there existed a conflict of interest by the expert, this**

Board would respectfully point out that, Annex VI, which forms an integral part of the evaluation report, clearly indicates what is mandatorily requested to be carried out by the Evaluation Committee, as follows:

“Annex VI: Declarations of Impartiality and Confidentiality of each of the Evaluation Committee members including any Technical or Financial Experts and/or Observers”

5.1. For clarity’s sake, when the Authority appoints an expert for assistance, the latter will prepare a signed report containing the inquiries made with specific reasons as to why unsuccessful bidders failed in their submissions. The Authority must distribute the expert’s report to all participating bidders and allow all the parties reasonable time for the latter to make their submissions thereon. It should be pointed out that, the experts may be cross examined on their report, in the same manner as witnesses. It must also be mentioned that the Contracting Authority is not bound to adopt the report of the expert against its own decision/conviction.

5.2. From the Evaluation report, it is evidently clear that, the Evaluation Committee did not discuss the experts’ report in that, they accepted the latter’s findings at face value. In this respect, this Board would point out that, experts ,whenever appointed, should not act as adjudicators but express their technical opinion so that the members of the Evaluation

Committee after discussing the experts' findings, will themselves have a guiding reference for the technical evaluation of the offers submitted.

In conclusion, this Board opines that:

- a) From the evaluation report, this Board notes that, the Evaluation Committee relied completely on the expert's report to the extent that, the engaged experts carried out the technical evaluation completely and there was no reaction from the Evaluation Committee in this respect.**
- b) The experts' report should have been distributed to all the parties, to be given sufficient time to examine the technical report and comment thereon, and in this respect, no such distribution was effected.**
- c) The Evaluation Committee were in duty bound to obtain a declaration of non-conflict of interest from the engaged experts and in this regard, no such documentation was presented to this Board.**
- d) The members of the Evaluation Committee were in duty bound to sign a declaration of non-conflict of interest and in this regard, this Board was not presented with such mandatory documentation.**
- e) The evaluation process was not carried out in accordance with the Public Procurement Regulations, so that this Board will not treat this appeal in its merits.**

In view of the above, this Board,

- i. does not uphold the Contracting Authority’s decision in the award of the tender,**
- ii. directs that a fresh evaluation process on all the offers be carried out by an Evaluation Committee, differently composed.**
- iii. Directs that Appellants’ offer be reintegrated in the evaluation process,**
- iv. Directs that the deposit paid by Appellants be fully refunded.**

Dr Anthony Cassar
Chairman
8th October 2020

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member