

PUBLIC CONTRACTS REVIEW BOARD

Case 1576 – RLC/50/188/2020 R – Tender for the Construction of Gnien Bir l-Iljun (R)

14th June 2021

The Board,

Having noted the letter “Call for Remedies” filed by Dr Reuben Farrugia on behalf of Farrugia Advocates acting for Northern Building Services Ltd (hereinafter referred to as the appellant) on the 23rd February 2021;

Having also noted the reasoned letter of reply filed by Mr Anthony Bonello acting for Rabat Malta Local Council on the 1st March 2021;

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by the representatives of the parties;

Having noted and evaluated the minutes of the Board sitting of the 3rd June 2021 hereunder-reproduced.

Minutes

Case 1576 – RLC/50/0188/2020 R. Tender for the Construction of Gnien Bir l-Iljun using various Environmentally Friendly Manners

Remedy Prior to the Closing Date of a Call for Competition

The call for Quotations was published on the 29th January 2021 and the closing date was the 12th March 2021. The value of the tender was € 188,000.

On the 23rd February 2021 Northern Building Services Ltd filed an appeal against Rabat Local Council as the Contracting Authority objecting to the issue of this fresh tender whilst an identical tender was still being evaluated.

A deposit of € 940 was paid.

On 3rd June 2021 the Public Contracts Review Board (PCRB) composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Mr Richard Matrenza as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellant – Northern Building Services Ltd

Dr Reuben Farrugia

Legal Representative

Contracting Authority – Rabat Local Council

Mr Anthony Bonello

Representative

Mr Alexander Craus

Representative

Mr Kenneth Swain 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 in line with Article 89 of the Public Procurement Regulations. He then asked Appellant’s representative to make his submissions.

Dr Reuben Farrugia Legal Representative for Northern Building Services Ltd recalled that the PCRB had directed the original tender bearing the same number as the re-issued one, except for the additional letter R at the end, for re-evaluation under a new evaluation committee. In the course of checking the progress of the tender Appellant had discovered that an identical tender had been issued thus leading to a situation of having two identical tenders open for submissions at the same time. On the 23rd February 2021 the re-issued tender was cancelled on the same day that the Council received an appeal letter from Appellant. On the 25th February 2021 (filed at PCRB on the 1st March) the Council filed their letter of reply to the appeal. Public Procurement Regulations lay down that both tenders should have been frozen on receipt of the appeal. To add to the confusion the Council wrote to Appellant on the 16th April 2021 that his offer in the original tender was not technically compliant and it was being recommended that the tender be cancelled. This procedure is totally irregular, said Dr Farrugia, and the PCRB should direct that the second tender should be cancelled and the re-evaluation of the first tender proceeded with.

Mr Anthony Bonello Representative for the Rabat Local Council described the process leading to the issue of the second tender. PCRB upheld the appeal on the first tender due to the lack of impartiality of the expert technical adviser and directed that a new evaluation committee re-evaluate the bids. Since all bidders in this tender were non-compliant and all offers were higher than the budget the Council decided to issue a new tender reducing the value of the tender by around € 90,000. Due to these time wasting appeals the promised funds from an outside body were now lost thus restricting the available leisure facilities to the detriment of the citizens of the district.

Mr Alexander Craus (189970M) called as a witness by the Contracting Authority testified on oath that he was not appearing as a witness but merely wanted to re-enforce the statements made by Mr Bonello. The Council had followed the directions from the PCRB and the second evaluation committee consisted solely of technical persons. There was no guarantee that an award will be made on the second tender if the bids did not comply.

Dr Farrugia said that his client’s appeal was not capricious – he was following tender regulations. The appeal on the first tender was based on the lack of conflict of interest declarations and hence the PCRB on the 8th October 2020 ordered a cancellation of the award and a re-evaluation. The original tender was only cancelled whilst the process on the second tender was in progress. The PCRB did not give any direction for the issue of the second tender; instead of following these instructions the Council acted irregularly by issuing a second tender.

Mr Bonello re-iterated that the Appellant’s bid was never compliant and that was their problem. The Council had minuted on the 6th January 2021 the decision to cancel the tender and was now requesting the Board to allow the second tender to proceed.

Dr Farrugia stated that there was a point of judicial concern in some of the comments made by Mr Bonello and in his use of language in his submissions. In view of what has been stated in this hearing the PCRB cannot direct any of the tenders to proceed as both had been cancelled.

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

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 3rd June 2021.

Having noted this ‘Call for Remedy Prior to the Closing Date of a Call for Competition’ filed by Northern Building Services Ltd (hereinafter referred to as the Appellant) on 23rd February 2021, refers to the request for remedy before closing date of tender with regard to the tender of reference RLC/50/188/2020 R listed as case No. 1576 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Reuben Farrugia

Appearing for the Contracting Authority: Mr Anthony Bonello

Whereby, the Appellant contends that:

- a) The main issue to be addressed is the fact that an identical tender having the same title and having identical reference number except for the letter “R” at the end, is still “open” and currently being evaluated.
- b) The original tender was awarded to Mica Med Limited. However PCRB Case 1497 had revoked the award of the Original Tender to Mica Med Limited and directed the Contracting Authority to undertake a fresh evaluation of all offers including that of Northern.
- c) Northern was the cheapest technically and administratively compliant offer in the Original Tender.
- d) A ‘New Tender’ with identical title, scope and reference number but with the “R” at the end was published on 29th January 2021. Contents of the tender are also identical, except for a minor change relating to the public toilets.
- e) There are no valid grounds in terms of Law which justify the cancellation or withdrawal of the Original Tender, hence the New Tender should be cancelled.

This Board also noted the Contracting Authority's Letter of Reply filed on 1st March 2021 and its verbal submission during the virtual hearings held on 3rd June 2021, in that:

- a) In the PCRB Case 1497, the Board had ordered a fresh evaluation. This has been duly done by a newly appointed Evaluation Committee composed of different persons from the first one. This 'new' Evaluation Committee also found the Appellant's original offer to be technically non-compliant. The Committee found that all bidders in the 'Original Tender' were technically non-compliant and hence recommended the cancellation of the tender. The Evaluation Committee's main recommendation is *".... the Evaluation Committee recommends that this tender should be cancelled and re-issued since none of the bidders were technically compliant and all offers were higher than the estimated budget proposed by the Contracting Authority...."*
- b) Due to the recommendation received the Contracting Authority decided to re-issue another tender as soon as possible due to risk of losing European Funding for the project.
- c) Since all bidders in Original Tender exceeded the Estimated Value of Tender, the New Tender was re-issued with substantial changes, not as declared by the Appellant. This with the main aim of reducing the value of the tender.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties, will consider Appellant's grievances, as follows:

- The Board opines that the way in which this Tender was handled by the Contracting Authority created unnecessary confusion to all parties involved.
- Facts as observed by the Board:
 - The Contracting Authority, as instructed, appointed a new Evaluation Committee for the re-evaluation of the 'Old' Tender as per decree issued by this Board re Case1497;
 - The Contracting Authority stated in a meeting of 6th January 2021 of the Local Council that it would be acting on the recommendation of the 'new' Evaluation Committee to cancel the 'Old' Tender and a new tender issued. However the date of the 'New' Evaluation Committee report, making concluding remarks on the 'Old' Tender, is 23rd February 2021 (after the date of the local council meeting). It is evident that either the date of the 'new' Evaluation Committee report is stated wrongly or else the Contracting Authority was acting in advance of such notifications.
 - On the 23rd February 2021 a Call For Remedies on the 'New' Tender was filed by the Appellant, while the Contracting Authority went on to cancel this 'New Tender' (denoted by the letter R) on the same day, 23rd February 2021, as evidenced by an automated notification email issued from the e-tendering system.

- The Board would also like to point out that the right of appeal by any prospective bidder is an important tool to achieve the objectives for which the Public Procurement Regulations were designed.

The Board,

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) Directs that the whole process involving both tenders be cancelled and a fresh tender issued.
- b) In view of the above considerations, the Board furthermore orders that the deposit paid by the appellant upon filing of this call for remedies should be refunded.

Mr Kenneth Swain
Chairman

Dr Charles Cassar
Member

Mr Richard Matrenza
Member