

PUBLIC CONTRACTS REVIEW BOARD

Case 1603 – 019-1069/20 (CPSU 3457/20) Concession Tender for the Provision of Vending Machines to Mater Dei Hospital and Sir Anthony Mamo Oncology Centre with Products coming at least partially from Organic Sources

4th August 2021

The Board,

Having noted the letter of objection filed by Dr Douglas Aquilina and Dr Mark Attard Montalto on behalf of Saga Juris Advocates acting for and on behalf of Vertex Vending Services Ltd, (hereinafter referred to as the appellant) filed on the 23rd April 2021;

Having also noted the letter of reply filed by Dr Franco Agius and Dr Marco Woods on behalf of Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority) filed on the 29th April 2021;

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

Having noted and evaluated the minutes of the Board sitting of the 20th July 2021 hereunder-reproduced.

Minutes

Case 1603 – 019-1069/20. Concession Tender for the Provision of Vending Machines to Mater Dei Hospital and Sir Anthony Mamo Oncology Centre with Products coming at least partially from Organic Sources

The tender, divided into 3 lots, was published on the 9th October 2020 and the closing date was the 19th November 2020. The value of the tender was € 1,390,079.

On the 23rd April 2021 Vendex Vending Services Ltd filed an appeal against the Central Procurement and Supplies Unit (CPSU) as the Contracting Authority objecting to the cancellation of the award on Lots 2 on which they had submitted the best offer and on Lot 3.

A deposit of € 6,950.40 was paid.

There were four (4) bidders on Lot 2.

On 20th July 2021 the Public Contracts Review Board (PCRB) composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Dr Vincent Micallef as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellant – Vertex Vending Services Ltd (Vertex)

Dr Douglas Aquilina	Legal Representative
Mr Mark Azzopardi	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Franco Agius	Legal Representative
Dr Marco Woods	Legal Representative
Dr Alison Anastasi	Representative
Ms Claudine Muscat	Representative
Ms Rita Tirchett	Representative
Engineer Karl Farrugia	Representative

Preferred Bidder – Multivend Services Ltd

Mr Melvin Farrugia	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 Franco Agius Legal Representative for the Central Procurement and Supplies Unit sought to make two preliminary pleas before the main submissions were heard. He stated that Appellant’s claims were conflicting and there was lack of juridical interest in certain aspects of their appeal. The conflict lies in the request for the revocation of the cancellation of Lots 2 and 3 as well as the cancellation of the award of Lot 1 whilst also requesting that Vertex is awarded Lot 2 and to have all other lots awarded to the most favourable bidders – thus the Appellant is asking for cancellation but also for the award of Lot 2 to Vertex. Jurisprudence confirms such conflicting claims render the appeal null and void and it should be denied.

On the matter of juridical interest Appellant *ex admissis* has no interest in Lot 3 as it cannot possibly be the awarded Lot 3 if it has already secured Lot 2.

Dr Douglas Aquilina Legal Representative for Vertex Vending Services Ltd said that the CPSU letter of refusal on Appellant’s bids lists the award on Lot 1 and the cancellation of Lots 2 and 3 and indicates appeals *in toto* against the decision as there could be interest in all three lots in case any award is lost – hence juridical interest exists in all three lots. Appellant is not requesting cancellation of any particular Lot but of the overall decision of the Contracting Authority.

Dr Agius contended that the tender was not an *in toto* one but divided into three Lots (Article 3 of Section 1 of the tender). Appellant could not have an interest in Lot 1 as it was already awarded so it must follow that the appeal must be on the remaining Lots not on the whole tender.

Dr Aquilina pointed out that the Lots are conjoined until the time that a final decision is made on all lots and contracts issued. Appellant’s interest is on all lots and on the entire tender and hence the appeal is on the whole tender.

After a short recess the Chairman stated that after deliberation the Board had agreed that it will make its final decision on the preliminary pleas after all the submission on the appeal have been heard and

requested confirmatory statements from all parties that there was no objection to proceed the hear this case.

Dr Aquilina said that there were no objection to proceeding as the Board directs.

Dr Agius stated that the decision might have an impact on the final decision in the case and requested that a decision on the preliminary points be given first. The decision should be based on individual Lots not on the whole tender and deposits paid accordingly.

After another short recess the Chairman said that after a second deliberation the Board does not accept the preliminary pleas as Appellant obviously has juridical interest and as regard the conflicting claims it needs further proof. He then asked for Appellant's submissions.

Dr Aquilina explained that the subject of this Concession tender which dealt with payments to be made to the Authority in return for the concession was split up into three lots with any economic operator being awarded only one Lot. It stands to reason that the later lots offer less as one goes down the list. The Authority failed to explain what the 'change of policy' was – it merely stated that the awards on Lots 2 and 3 were not feasible. Article 22.3 of the tender lays down the terms under which cancellation can take place but nowhere does it mention the term used by the Authority – it simply decided the procedure to be adopted on a whim to suit them. The tender stipulated in Article 2 (D) (i) that the minimum concession fee was € 1500. In lot 2 the offer by Vertex was of € 2001 per machine and it makes one wonder why it was not feasible when a minimum of € 1500 set by the Authority was acceptable. The tender cannot be cancelled on the basis chosen by the Authority and the Appellant's award should be respected. If the CPSU wished to cancel the tender then the whole tender should be cancelled and re-issued as his client has an interest in all three lots.

Dr Agius said that as submitted the offers meant a loss of revenue to the Government of nearly € 1 million. The tender was split into Lots to encourage competition but the State cannot ignore this loss of revenue and jurisprudence supports this decision as well as the principle that the Government is entitled to change policy. Regulations in S.L. 601.09 on concessions are different from the Public Procurement Regulations.

Ms Celia Falzon (473265M) called as a witness by the Authority testified on oath that she is the Chief Executive Officer at Mater Dei Hospital and stated that the objective of the tender was to have an element of competition at competitive prices. The Authority realised that the outcome of the tender bids would result in a loss of revenue for the Government and they had consulted with the Director of Contracts regarding the decision to award only Lot 1. It was the intention of the Authority to re-issue the tender to ensure better terms.

Questioned by Dr Aquilina witness stated that she could not confirm, because she did not know, that Vertex offer was higher than the minimum limit set in the tender. The minimum was set by the team drawing up the tender but she was not involved in that process. The change of policy was brought about by a decision to have a more acceptable outcome as the Authority did not expect the actual outcome. Witness had no idea under which article of Section 22 the tender was cancelled.

Dr Aquilina submitted that the decision to split the tender into Lots with stated minimum fee was that of the Authority but it is now being claimed that it is not happy with the outcome. The CPSU must stick to what it stipulated in the tender and if they are minded to cancel it must cancel the whole lot and not just bits of the tender. The decision given to justify the cancellation was not one of the reasons stated in the tender in Article 22.3.

Dr Agius said that the offers provided were not worthwhile to the Authority and hence Article 22.3(a) applied. Indications were that the offer on Lot 2 could be improved upon and administratively this was not something that could be ignored – it therefore made sense to re-issue the tender. A change of policy with different criteria was necessary and a Court of Appeal judgement says that this is possible. The decision also shows diligence on the part of the Authority. Concessions were regulated by different regulations and the normal regulations do not apply in this case.

Dr Aquilina said that this was the first time that Article 22.3 (a) had been brought up but this was a concession not an acquisition. The Authority could not now claim that the offer was not worthwhile since they had established the minimum threshold themselves.

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

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 20th July 2021.

Having noted the objection filed by Vertex Vending Services Ltd (hereinafter referred to as the Appellant) on 23rd April 2021, refers to the claims made by the same Appellant with regards to the tender of reference 019-1069/20 (CPSU 3457/20) listed as case No. 1603 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Douglas Aquilina

Appearing for the Contracting Authority: Dr Franco Agius & Dr Marco Woods

Whereby, the Appellant contends that:

- a) **Lack of information regarding Reasons for Refusal and Change in Policy** – the Contracting Authority failed to specify clearly the circumstances leading to the cancellation of Lots 2 and 3 of the tender. The mere statement that there was a “change in policy” does not explain how and when this policy was changed, and why it was changed. Furthermore, this change in policy has not been made public. Reference is made to Regulation 108 of the Concession Regulations whereby “*the communication to each bidder of the proposed award or of the cancellation of the call shall be accompanied by a summary of the relevant reasons.....*”

- b) **“Change in Policy” is not a valid Ground for Cancellation** – the ground for cancellation of a tender are limited, exhaustive and specified. These in terms of Article 22.3 of Section 1 of the concession tender document. It is clear that this is a specific and exhaustive list of grounds that may lead to cancellation of the process.
- c) **Even if the Contracting Authority could Cancel the Tender, it is a Tender as a Whole which can be Cancelled and not Individual Lots** – if the Contracting Authority has grounds to cancel, it can cancel the tender as a whole. It cannot pick and choose cancellation of individual lots. This is evident from the law, general principles of procurement legislation, and it is also evident from Article 22 of the concession document and from Procurement Policy Note #39. If there was a “change in policy” which had to lead to a cancellation of Lots 2 and 3, what was different for Lot 1?

This Board also noted the Contracting Authority’s Reasoned Letter of Reply filed on 29th April 2021 and its verbal submission during the virtual hearing held on 20th July 2021, in that:

- a) **Preliminary pleas** – in its first and second request the objecting company is requesting revocation of the cancellation of lots 2 and 3 as well as the cancellation of the award of lot 1. Whilst under the second request it is only requesting the declaration that it is awarded lot 2 and it is including as well a request to have all the other lots awarded to the most favourable bidders which in terms of its third paragraph is the recommended bidder. The Contracting Authority contend that the first two requests are conflicting and secondly the bidder lacks the necessary standing to make the requests he is forwarding.
- i. **Conflicting claims** – the objecting company is under the first request asking this Board to revoke the award of the lot 1 whilst in the second request they are requesting the award of the other lots to the most favourable bidder which would inevitably mean that lot 1 is awarded to the same bidder as per admission of the same objector in paragraph 3 of his same objection. These requests are in their nature conflicting requests. Our Courts have repeatedly maintained that conflicting claims result in a null appeal.
- ii. **Juridical interest** – the requests made by the objecting company insofar as they affect the award or cancellation of lot 3 and lot 1 lack the necessary juridical interest. In particular, as stated in his appeal, lots 1 and 3 are not to be awarded to the appellant company but other bidders. This is a blatant admission that his claims regarding these two lots lack the necessary juridical interest given that the same objecting company is stating it should not be awarded these lots. Juridically an admission is regarded as the queen of all proof “*regina probationum*”.

- b) **Lack of information regarding Reasons for Refusal and Change in Policy** – from a cursory look at article 108 it is immediately clear that what the law requires is that the contracting authority gives the reasons and does not require the contracting authority to give a full and exhaustive reason. In particular the original letter included the reason that led to the cancellation of the lots “a change in policy”. However, in line with the other provisions of the concession regulations in particular regulation 80 once the bidder requested additional information this has been given to him. Noteworthy is that in terms of regulation 80, government has 15 days to reply to requests for this information starting from the date when the bidder makes this request. In this case government replied in a matter of few days and clearly explained the reason for this cancellation. Furthermore, this additional information has been given to the appellant before he submitted his appeal hence it was quite aware of the reasons and consequently he is not right when stating that his lack of knowledge should be the ground for a refund of the deposit.
- c) **“Change in Policy” is not a valid Ground for Cancellation** – had the Contracting Authority persisted in the award process government would have potentially lost the sum of €872,800. Considerations relating to change in policy have already been at the centre of another tender that has been decided by the Court of Appeal (Borg Bros vs Ministeru Għall Familja u Solidarjeta Soċjali et). In this case the contracting authority had decided to cancel the call for tenders because it decided to use another procurement strategy in particular the contracting authority decided to make use of the framework agreement. Such an instance too was not contemplated under the clause that was equivalent to the cancellation clause in this call. The court decided to uphold the decision by the contracting authority to cancel the tender.
- d) **Even if the Contracting Authority could Cancel the Tender, it is a Tender as a Whole which can be Cancelled and not Individual Lots** – the argument brought forward by the objecting company is wrong. None of the regulations nor does the tender document impose the cancellation of the call. On the contrary the call was divided into lots this in term of the contract can result in the signature of three separate contracts. This is reflected in the same article 3 of the tender document.

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:

- a) **Preliminary plea – Juridical Interest** – The Board notes:
 - i. The letter of rejection issued by the CPSU is worded in 'general' terms, thereby treating all Lots *in toto* and making reference to one (1) deposit amount to be paid should the recipient of the letter wish to appeal to its decision. It is not distinguishing between separate appeals for different lots and hence different deposits to be paid on each appeal.
 - ii. Juridical Interest exists as the Appellant bid on all three (3) lots. At appeal stage it was not known to the Appellant whether other appeals by other bidders would be forthcoming. Hence argument brought by Appellant; "*what if the award of the tender was lost / nullified?*", does in fact relate to Juridical Interest as he would still be with the possibility of being awarded a Lot in this Tender procedure.
 - iii. This Board decides that when one considers how the Tender dossier has been drafted, how the letter of rejection is 'speaking' *in toto*, and after considering the submissions brought forward by interested parties, that the Appellant does have the required Juridical Interest and as a consequence this preliminary plea is not being upheld.
- b) **Preliminary plea – Conflicting Claims** – The Board notes:
 - i. The Appellant is requesting either A) the cancellation of the decision to cancel Lots 2 & 3 and award of Lot 1 & or B) award Lot 2 to Vertex as it was the highest concession offer for Lot 2 and take opportune measures, including the award of the other Lots.
 - ii. The Board notes that argument of the Appellant hinges on the fact that even though there are separate Lots, they are still inter-linked until the time that a final decision is made on all lots and contracts issued, since bidders could only be awarded 1 specific Lot and not more.
 - iii. The Appellant is hence not requesting the cancellation of any particular Lot but of the overall decision of the Contracting Authority.
 - iv. This Board opines, since the Appellant's request is specific, i.e. to request an overall cancellation of the decision of the Contracting Authority, and not limited to this Lot or that Lot, and since the Lots are 'inter-linked', then the request of the Appellant is not conflicting in any terms.
 - v. In this context, this Board does not uphold the Contracting Authority's secondary preliminary plea.
- c) **Lack of information regarding Reasons for Refusal and Change in Policy** – this Board notes that the Rejection Letter sent to the Appellant contained only the wording "Kindly note that Lot 2 and Lot 3 are being cancelled due to a change in policy" as a reason for rejection. This is not deemed sufficient information for the Appellant to substantially consider whether it is worthwhile

or not to appeal such a decision. It is also noted that email communication was exchanged between the Appellant company and the Contracting Authority whereby more information was eventually provided. Although this is to be commended, an emphasis needs to be made that the Rejection Letters need to adequately inform bidders of the reasons why their bid has not been awarded the tender in question. This irrespective whether it is a Concession Agreement or any form of Tender Procedure contemplated in SL 601.03.

This Board upholds Appellant's first grievance.

- d) **"Change in Policy" is not a valid Ground for Cancellation** – The Board notes the following:
- i. Reference is made to the Tender dossier Section 1 – Information to Tenderers, sub section 22.3 which clearly states the reasons for possible cancellation.
 - ii. The reason provided in the letter of rejection "Change in Policy" is not listed in a specific manner in this sub section.
 - iii. It is interpreted that the "Change in Policy" in the letter of rejection, email communication between Appellant company and Contracting Authority (see point 'c' above) and the verbal submission, refer to sub section 22.3(a) which states "the tendering procedure has been unsuccessful, namely where no qualitatively or ***financially worthwhile bid*** has been received or there has been no response at all".
 - iv. The Contracting Authority is stating that if Lot 2 & Lot 3 were to be awarded, it would result in loss of revenue.
 - v. However, the main issue here is how "*financially worthwhile*" can be defined. The Board now refers to the Tender dossier Section 1 – Information to Tenderers, sub section 7(D)(i) which states "a financial offer shall consist of a minimum annual concession fee of €1,500 (one thousand five hundred per vending machine per annum and to be uploaded in the Tender Response Format". When analysing the Appellant's proposed bid it transpires that the offer per vending machine was that of €2,001 (two thousand and one euros) per vending machine.
 - vi. The Contracting Authority also made submissions that it had 'indications' that the Lots to be rejected could be improved upon. When further analysing the bids, it is also noted that the highest offer for the other rejected Lot (Lot 3) is practically similar to that of the Appellant company.
 - vii. Therefore, under the strict guidance of the Tender dossier, the Appellant's bid is "*financially worthwhile*".

This Board upholds Appellant's second grievance.

e) **Even if the Contracting Authority could Cancel the Tender, it is a Tender as a Whole which can be Cancelled and not Individual Lots –**

- i. The Board opines that, in general terms, if valid reasons are forthcoming, the Contracting Authorities are within their rights to cancel individual Lots of a Tender dossier. This however has to be in line with the relevant legislation and the specific Tender dossier.
- ii. In this case the relevant section of the Tender dossier was Section 1 – Information to Tenderers, sub section 22.3.
- iii. In the previous grievances (see above), it was already decided by this Board that the Contracting Authority did not proceed along the specific reasons for cancellation of Lots 2 & 3 as required by Section 1 – Information to Tenderers, sub section 22.3.

Hence at this stage, this Board will not be deciding on this particular grievance as it has been made irrelevant by the previous two (2) grievances and the decision taken on them by this Board.

In conclusion this Board;

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

- a) To uphold the Appellant's concerns on the first two (2) grievances;
- b) To cancel all the Letters of Rejection dated 13th April 2021 on Lots 2 and 3;
- c) Directs that a re-evaluation process of Lots 2 and 3 be carried out by a newly formed Evaluation Committee, taking into consideration this Board's findings;
- d) Directs that the Appellant's offer be reintegrated in the re-evaluation process;
- e) Directs that the deposit paid by Appellant be reimbursed.

Mr Kenneth Swain
Chairman

Dr Vincent Micallef
Member

Mr Lawrence Ancilleri
Member