

## **PUBLIC CONTRACTS APPEALS BOARD**

### **Case No. 23**

#### **MTA/102/2004**

#### **Tender for 'Design and Construction of Stand at ITB Berlin'**

The call for offers was published in the Government Gazette on the 6<sup>th</sup> August, 2004 and in the Official Journal of the EU on 3<sup>rd</sup> August, 2004.

An Evaluation Committee made up of

Mr Leslie Vella	Chairman
Mr Marcel Coppini	Member
Mr Leonard Zammit Munro	Member
Ms Naomi Attard	Member
Ms Claire Briffa	Secretary

was set up to analyse offers received and proceed with the award of the tender.

Nine offers were received and following the evaluation process, the Evaluation Board decided to award the tender to Messrs. J Barzano S.A. for a value of Lm 54,000 inclusive of VAT.

On the 28<sup>th</sup> October, 2004, Messrs. Zaffarese Exhibitions + Events Ltd filed an objection with the Director of Contracts against the decision taken by the Evaluation Board (Malta Tourism Authority) to award the said tender to Messrs. J Barzano S.A. from Barcelona in Spain.

The Public Contracts Appeals Board (PCAB) met on 15<sup>th</sup> December, 2004 to discuss the objection raised by appellant.

Mr. A. Triganza chaired proceedings accompanied by the other Board members, namely Mr. A. Pavia and Mr. E. Muscat respectively.

During the hearing the following people participated in the proceedings:

#### **Representing:**

##### ***Messrs Zaffarese Exhibitions & Events Ltd***

Mr Thomas Farrugia – Managing Director

Mr Benny Zaffarese - Proprietor

##### ***Malta Tourism Authority/ Evaluation Board***

Mr Leslie Vella – Chief Executive / Chairman

Dr Simon Tortell LL.D – Legal Representative

## **Summoned as witnesses:**

Dr John C Grech - ex Chairman Malta Tourism Authority (MTA)  
Mr Anthony Chircop – ex Chairman Marketing Board, MTA  
Ms Claire Briffa – Senior Executive / Secretary, MTA  
Mr Jeffrey Cutajar – Director Marketing & Promotion, MTA  
Mr Marcel Coppini – Financial Controller / Member, MTA  
Mr Gerald Miller - Marketing Manager, MTA

Following Mr. Triganza's brief introduction, the appellant, namely Mr B. Zaffarese, representing Messrs. Zaffarese Exhibitions & Events Ltd explained the reasons which motivated his firm to lodge the claim following the award of the tender to Messrs J. Barzano S.A. According to the appellant's representative, the Company decided to file an objection following a thorough consideration of the:

- 1. The tendering process itself as well as specific issues referred to by the Malta Tourism Authority (MTA)*
- 2. An unlevel playing field constituted because of different treatment of VAT application*
- 3. Lack of consultation regarding possible design changes*
- 4. The company's allegedly low capital base*

## **Opening Statements:**

### **Tendering process**

Mr. Zaffarese claimed that the tendering process was not transparent as the Malta Tourism Authority did not follow the established procedure. He contended that tenderers were neither asked to be present for the sealing of tender documents at noon nor were they called to attend for the opening of the tender box at 13.00 hrs. The appellant proceeded by stating that tenderers were similarly not allowed to see details of the tenderers and corresponding prices quoted claiming that the schedule was never published on the MTA's notice board.

### **Price/ VAT**

The appellant said that the difference in price between his Company's offer and that of the Spanish tender was substantially higher than the Authority's calculation of Lm7,530. Mr Zaffarese pointed out that, after taking into account the VAT element, the discrepancy would amount to approximately Lm15,000. This was partly due to the fact that the rate of VAT for SMEs in Spain was 16% while that in Malta was 18%. Also, he argued that when a Maltese client ordered work from another EU country and such work was carried out in another EU country, not in Malta, then the contractor concerned would be exempt from VAT. As a result Maltese contractors were not on the same level playing field.

### **2.1.3 – Design / changes**

As far as the design is concerned, Mr Zaffarese said that this was a subjective matter and that they should have been given the chance to explain their concept. The appellant proceeded by stating that the Adjudication Board should have allowed his company to make a presentation in order to clarify a few issues or at least allowed to elaborate on specific matters. He said that they made it clear in their tender documents that, despite the fact that as regards the design of the Stand they met all specifications and had undoubtedly reached the required standards, they were, however, prepared to discuss any changes to meet the Authority's requests.

### **Low Capital**

Mr Zaffarese stated that another reason given by the MTA, in order for the latter to justify their decision to award the tender to Messrs J Barzano S.A., was that his Company had a low capital base. The appellant said that his company formed part of a Group of Companies that was established in 1982. The Company had more than 22 years experience in this field and had worked for several government departments and organisations. Also, the Skanska Consortium had in the past awarded the tender for the supply and installation of all display signs to the Group. The value of this tender reached the Lm 200,000 figure. He said that his company had a shareholding of Lm 30,000 in the Group.

In a nutshell, the appellant claimed that considering the reasons given for his Company not being awarded the tender, there was sufficient cause to believe that his Company was being discriminated against.

At this stage, Dr Simon Tortell LL.D intervened and categorically denied that the MTA had ever discriminated against anyone, including Messrs Zaffarese Exhibitions & Events Ltd. He agreed with Mr Zaffarese's opinion, namely that this was a question of choice which was subjective. However, contrary to Mr Zaffarese's claim, Dr Tortell reiterated the fact that the MTA had never discriminated against anyone.

The MTA's legal representative claimed that Mr Zaffarese was present for the sealing and opening of the tender box.

As far as the difference in the rate of VAT charged in Spain (16 %) and the one charged in Malta (18 %), Dr Tortell claimed that the consequential effect was neutral because for this type of business VAT was recoverable in both countries. As a result, he contended that if there was a playing field that was not level this was not the VAT element but other issues such as the cost of labour and/or raw material.

MTA's legal representative said that this tender was not subject to negotiations and therefore MTA was free to choose whichever it wanted. He declared that MTA did not negotiate with the Spanish contractor.

With regard to capital, he said that the Board was composed of people with different skills. He claimed that when MTA's auditors examined Zaffarese's financial statements they found that they had a very low capital base. He wanted to assure those

present that the MTA would have, however, looked into the matter differently had the shareholders' loan of Lm30,000 been converted into capital.

**Hearing of evidence:**

Dr John C Grech gave evidence in his capacity of ex-Chairman of the Authority. Dr Grech claimed that he could not understand how he was summoned because, apart from the fact that he left his post in March 2004, he had nothing to do with this particular tender!

Upon being asked by Mr Zaffarese whether he was aware that an expression of interest was issued to those contractors who intended to tender during the year, Dr Grech replied that he only knew that Mr Zaffarese used to complain because he felt that he was not being assigned to carry out work for MTA. Subsequently the matter was referred to the Chief Executive Officer and he was given to understand that the situation had been clarified since Mr Zaffarese appeared to be satisfied with the outcome of the discussions that ensued between him and the CEO.

Dr Grech declared that he was not involved in contracts and payments, claiming also that there used to be different directorates at the MTA and that such issues were always dealt with by the Marketing Directorate which had its own set-up.

At this point, Mr Zaffarese explained that following the issue of an expression of interest, his company was chosen because it was considered to be technically and financially competent to tender. Intervening at this stage, Dr Tortell clarified that the fact that Mr Zaffarese's company had been shortlisted only implied that, holistically, he was not eliminated. The expression of interest, MTA's legal representative emphasised, apart from being issued without prejudice, was solely aimed at identifying suitable candidates for future tenders. Mr Anthony Chircop (ex Chairman, Marketing Board) corroborated Dr Tortell's description of facts.

Dr Tortell proceeded by claiming that Mr Zaffarese's company's economic viability was just one of a number of reasons why the tender was not awarded to them.

The MTA's Chief Executive & Chairman of the Selection Committee, Mr Leslie Vella was cross-examined by Dr Simon Tortell. Mr Vella explained that the documentation regarding the ITB tender was issued late in July 2004 and that the expression of interest was issued some time in 2003. The purpose of the latter was to shortlist the companies which designed and constructed such Stands. He emphasised that, considering the fact that the Authority regularly participates in similar high profile exhibitions abroad, it was indispensable for such Stands to be of the highest standard. Following Mr Zaffarese's initial complaints and as a result of the discussions which ensued between the parties involved, namely the MTA and Messrs Zaffarese Exhibitions & Events Ltd, it was decided that a call for tenders be issued specifically for each exhibition that MTA would participate in overseas.

Mr Vella said that following the introduction of the amendments in the Public Contracts Regulations, 2003, on 3 August 2004, MTA was removed from Schedule 3 and placed under Schedule 2. In view of these amendments, the MTA's CEO decided to empower Ms Claire Briffa with the responsibility of ensuring that the new procurement procedures are in accordance with the provisions of these regulations.

Moreover, Ms Briffa had to see to the standardisation of tender specifications and format.

During his testimony Mr Vella gave details of how the Adjudication Board proceeded with the submission and opening of tenders and the evaluation and award of tender. He said that all documentation was kept in sealed envelopes in the tender box while scale models and technical drawings were kept in his office under lock and key. He confirmed that Mr Zaffarese was present for the opening of the envelopes. Here, Mr Zaffarese intervened and insisted that the established procedure regarding the opening of tenders was not followed and that the process was not transparent. As a result, he could not exclude the possibility that tenders were submitted after the deadline.

In actual fact, in reply to a specific question, Mr Vella confirmed that two offers were delivered after the closing time which, according to para 2.5.1 of the tender document, the tenders had to be submitted by 12.00 hours (noon) of Monday 27<sup>th</sup> September 2004. *Furthermore, these late offers were also opened and considered after the tenders that had been received within the stipulated time were opened.* He referred to para 1.3 of the selection committee's minutes of meeting held on Monday 27<sup>th</sup> September 2004 which stated that *'Two packages were delivered by courier after the deadline. One package was delivered by UPS at 14.15 hours. The second package was delivered by FedEx at 16.15 hours. The Committee unanimously agreed to accept both tenders given that they have been delivered from overseas by courier.'* In para 1.4 of the same minutes it was indicated that these pertained to Messrs Kadoke Display Deutschland GmbH and J. Barzano S.A. respectively. He said that they had also taken into consideration the fact that none of the evaluation committee members had left the CEO's office after the opening of the tenders. He confirmed that they did not extend the deadline for the submission of tenders.

Here Dr Tortell quoted Regulation 26 (5) (d) of the Public Contracts Regulation, 2003 which stated that *'Tenders shall be submitted in writing. However, when authorised by the Contracting Authority, tenders may be submitted by any means provided that tenders are opened after the time limit for their submission has expired.'* Mr Zaffarese insisted that, according to tender conditions, offers submitted after the deadline had to be disqualified. Dr Tortell admitted that this was undoubtedly not the best procedure to be followed but the most important thing was that the decision regarding the award of tender was taken in the best interest of the country since the one chosen was the best offer. He said that one should also appreciate that this was the first tender that was issued because previously such contracts used to be given by direct order.

MTA's CEO continued by stating that Messrs J Barzano S.A.'s offer was the more expensive, albeit still within the Authority's budget for this particular tender. Mr Vella confirmed that they did not publish the schedule with the names of contractors and relative prices. The reason given was that at that time they thought that they were not obliged to do so.

He said that the basis of awarding the contract was on the *Evaluation Matrix* given to the Selection Committee by the Contracts Department, for which each contractor was awarded points on different criteria relevant to the tenders submitted. The evaluation committee compared the relativity of one tender with the other so that it would be ascertained that the tender was awarded to that contractor who had that Stand which

could best represent Malta's image abroad. In actual fact the committee agreed to award the tender to Messrs J Barzano S.A. on the basis that it obtained the highest points which satisfied all criteria. The comparative analysis regarding the evaluation of tenders was minuted during meetings held on 30<sup>th</sup> September and 8<sup>th</sup> October 2004.

Finally he declared that the Selection Committee members were all competent in their field and some had vast experience in similar fairs.

Ms Claire Briffa, in her capacity as Senior Executive and Secretary to the Selection Committee, confirmed that Messrs J Barzano S.A.'s financial report was audited.

With regard to the issue of the ITB tender, Ms Briffa said that the Contract Notice was dispatched by MTA to the Official Journal of the European Union on 26<sup>th</sup> July 2004. Such line of action was taken in accordance with the advice given on e-mail received from the Contracts Department on 16 July 2004 which stated that '*In the cases of tenders above Lm 20,000, but less than Lm 80,000, only the Contract Notice has to be published in the Official Journal*'. It was published thereon on the 3<sup>rd</sup> of August 2004. Mr Zaffarese was of the opinion that MTA did not need to publish the tender in the Official Journal because the value thereof was below the threshold. He supported his claim by forwarding to the Board a copy of the EC Procurement Thresholds. Ms Briffa said that the notification was published in the Malta Government Gazette on 6<sup>th</sup> August 2004.

During her testimony she said that she always followed the procedure according to the instructions given by the Contacts Department.

When Dr Tortell asked Ms Briffa to state whether any representative from Messrs Zaffarese Exhibitions and Events Ltd had ever requested to be present during the sealing and opening of tenders, the reply given was in the negative. Mr Zaffarese intervened and insisted that he did not need to ask MTA to allow him to be present as this right was granted by the regulations. Also he said that the decision should have been referred to the Department of Contracts.

Ms Briffa said that she would have minuted any incidence of anyone leaving the office after the opening of tenders and before Messrs J. Barzano S.A.'s tender was received.

The MTA's Director (Marketing & Promotion), Mr Jeffrey Cutajar, testified that although he did not form part of the Selection Committee, in view of his vast experience in international fairs, he was asked to give an opinion on the designs submitted for this tender.

At this stage, Mr Cutajar drew the attention of all those present that the 15<sup>th</sup> of December 2004 at 17.30 hours was the deadline for the submission of technical designs and drawings to the organisers in Berlin. The Chairman PCAB pointed out that after this hearing the Board needed its time to deliberate on the matter before arriving at its decision. However, he suggested that MTA should take the necessary action to ask the organisers in Berlin for an extension of the deadline.

Mr Cutajar continued by declaring that the ITB Fair, Berlin was considered as the most important tourism and premier Fair in the world. As a result, Malta could not

afford not to be there because the effects on Malta could be quite catastrophic in view of prestige, goodwill and the unquantifiable amount of business involved.

He concluded his testimony by stating that while he was in Spain for the EIBTU (Business Trade Fair) he received an e-mail from Mr Barzano wherein he invited him for a meeting. However he declared that, as the case was still *sub iudice*, he decided not to meet him.

Mr Marcel Coppini, the MTA's Financial Controller, declared that he was the person responsible for the financial analysis of the companies that submitted their offers for this tender. The tenderers were requested to provide their latest annual reports and auditors' certificates because they needed to analyse and assess the financial viability of each company. This was due to the fact that they were entering into a commitment for three years. He said that the audited financial statements of Messrs Zaffarese Exhibitions and Events Ltd for the year ending December 2003 disclosed that the company had an extremely low capital base of Lm 1,997.

Following the hearing of the witnesses summoned, the parties were asked by this Board to deliver their final verbal submissions.

In his concluding submission, Mr Zaffarese, representing Messrs Zaffarese Exhibitions and Events Ltd, said that during the proceedings it was clearly demonstrated that the

- a. the process lacked transparency,
- b. the MTA did not know the proper tendering procedures,
- c. the selection exercise was not based on relativity and
- d. public contracts regulations were infringed.

He was of the opinion that the evaluation committee should have asked for clarifications and for a presentation since they were prepared to make alterations to suit MTA's requirements. He argued that, in view of the fact that his Company had always delivered, the question of low capital base was irrelevant. Mr Zaffarese did not agree with the method used in the evaluation process as the price did not carry enough weight. He pointed out that the difference in price was substantial. Furthermore the difference in the rate of VAT created unfair competition for Maltese contractors and that according to local fiscal regulations, the MTA could not claim back VAT.

Mr Zaffarese clarified that he could not mention certain points in the letter of objection because, as he said earlier, the process was not transparent and because certain facts came to his knowledge afterwards.

### **Concluding remarks:**

In his concluding, remarks Dr Simon Tortell LL.D., representing the Malta Tourism Authority, insisted that the fact that everything was minuted without hesitation was a confirmation that the process was transparent. He said that

- a. the selection committee accepted late submission of tenders in *bona fide*,
- b. no irregularities had occurred, and
- c. no discrimination was proved.

He insisted that the Appeals Board should not consider the issue regarding the fact that the Selection Committee had accepted to evaluate the two tenders which were received after the deadline because Mr Zaffarese did not make any reference to this point in the motivated letter of objection. Apart from this, he argued that the late submission of tenders could have been caused through the inefficiency of the couriers concerned.

He said that the tender was awarded to Messrs J. Barzano S.A. on the latter's own merit since the Spanish Company was the tenderer who obtained the highest points, specifically in so far as the design is concerned. From these proceedings it resulted that Mr Zaffarese was present for the most important process, that is, the opening of the tenders. It had to be taken into consideration that the selection committee was straddled between two different procurement procedures.

With regard to Messrs Zaffarese Exhibition & Events Ltd's financial position, Dr Tortell remarked that, unfortunately, from the financial statements presented by the Company, it was evidently clear for anyone to notice that the Company was not adequately capitalised.

#### **Conclusions of the Public Contracts Appeals Board:**

Having considered all that was submitted and argued, the Public Contracts Appeals Board -

- a. finds that the objection made in respect of the lack of transparency shown by the Evaluation Board is justified considering that the Evaluation Board members did not fully comply with procurement procedures as specified in current regulations;
- b. notes that although no specific proof was brought forward against the standards of professional and ethical conduct demonstrated throughout the evaluation stage, yet, this Board feels that tenderers were precluded from experiencing the proper transparent process of the adjudication by not being invited to attend the opening of the offers submitted;
- c. notes that the Evaluation Board accepted offers received by courier mail from foreign tenderers in spite of the fact that such offers were received after the official closing time, scheduled for 12 o'clock noon. In the case of the offer submitted by Messrs J Barzano S.A. the Evaluation Board received the offer at 16.15 hrs contrary to normal procedure followed in the adjudication of tenders.

The board took into consideration Dr. Tortell's plea that the Appeals Board should not consider the fact that the Evaluation Board had accepted to scrutinize two tenders received after the closing time since this had not been brought forward in Messrs. Zaffareses Exhibition & Events Ltd's original letter of motivation. The Appeals Board decided that although this issue had not been specifically raised in the motivated letter of appeal, the fact that this letter included a reference to lack of transparency and aftermaths resulting therefrom, could be accepted to include also this eventuality. The PCAB, therefore, decided that it was its responsibility to take

cognisance of the fact that tenders had been received and accepted following the formal closing time.

As a consequence, the Public Contracts Appeals Board considers that the objection raised by Messrs Zaffarese Exhibitions & Events Ltd is justified.

Hence, this Board finds in favour of appellant.

This Board recommends that the award of this tender should now proceed without consideration being given to the two late entries, namely the offers submitted by Messrs. Kadoke Display Deutschland GmbH and Messrs J Barzano S.A. respectively

Furthermore, the Public Contracts Appeals Board recommends that the appellant should be reimbursed the deposit paid when filing the said objection.

**Alfred R. Triganza**  
Chairman

**Anthony Pavia**  
Board Member

**Edwin Muscat**  
Board Member

**Date: 27.12.2004**