

PUBLIC CONTRACTS APPEALS BOARD

Case No. 27

MTA/103/2004 Tender for ‘Design and Construction of Stand at the *Borsa Internazionale del Turismo* (BIT) Milan, Italy 2005 – 2007

The Malta Tourism Authority issued a call for tenders for the ‘Design and Construction of Stand at the *Borsa Internazionale del Turismo* (BIT) Milan’. The call was published in the Government Gazette on the 7 September 2004.

The global estimated value of the contract in question covering a period of three years was not to exceed Euro 84, 000, approximately Lm 32, 000 (inclusive of VAT).

The closing date for this call for offers was 29.10.2004.

An Evaluation Committee consisting of Messrs.

- L. Vella (Chairperson)
- M. Coppini (Member)
- L. Zammit Munro (Member)
- S. Psaila (Member)
- C. Briffa (Member)

was appointed to adjudicate this tender.

Following the adjudication of this tender, Messrs. Zaffarese Exhibitions & Events Limited, filed a Notice of Objection on 14.01.2005 against the said award to Messrs. Casapinta Design Group Limited.

The Public Contracts Appeals Board made up of Mr. Alfred Triganza (Chairman), Mr. Anthony Pavia and Mr. Edwin Muscat, respectively, as members, convened a formal public hearing on 16.03.2005 to discuss this objection.

Present for the hearing were:

- Mr Benny Zaffarese (Messrs Zaffarese Exhibitions & Events Ltd)
- Mr Thomas Farrugia (Messrs Zaffarese Exhibitions & Events Ltd)
- Mr Tonio Casapinta (Messrs Casapinta Design Group Limited)
- Dr Simon Tortell LL.D (Legal Representative, Malta Tourism Authority)
- Mr Leslie Vella (ex Chief Executive Officer / Chairman Evaluation Committee)
- Mr Marcel Coppini (Board Member, Evaluation Committee)
- Mr Leonard Zammit Munro (Board Member, Evaluation Committee)
- Ms Shirley Psaila (Board Member, Evaluation Committee)
- Ms Claire Briffa (Board Member, Evaluation Committee)

Mr Benny Zaffarese, representing Zaffarese Exhibitions & Events Ltd, stated that his Company submitted their objection on the basis of the fact that the Malta Tourism Authority (hereinafter referred to as the ‘MTA’) did not comply with the procurement procedures as outlined in Legal Notice 299/03. He said that Clause 22 under *Part III – Rules governing public contracts whose value exceeds Lm20,000 but does not exceed the threshold* stipulates that:

“...public contracts required by a Contracting Authority listed in Schedule 2 shall be issued, administered and determined by the Department of Contracts, which for the purposes of these regulations shall act on behalf of the Contracting Authority...”

He argued that once this tender exceeded Lm20, 000, the MTA was neither authorised to issue, nor to open and adjudicate let alone award this tender. He claimed that the opening of tenders should have been done in the presence of the Contracts Committee members and not in the presence of the MTA’s Evaluating Committee, claiming in the process that the latter was not competent to deal with such tender.

He said that the tender box was opened at 13.15 hours instead of 12.00 hours on 19 October 2004, which was the closing date of the tender. The envelopes and packages containing the offers were opened four days later.

Mr Zaffarese said that when it had come to his knowledge that, following the publication of the Public Contracts Regulations, 2003 the MTA was removed from Schedule 3 and listed under Schedule 2, he wrote to the same Authority as well as the Director of Contracts, requesting that the award of the tender be suspended.

On his part the MTA’s Legal Representative, Dr Simon Tortell, claimed that contrary to what was stated by Mr Zaffarese, the Department of Contracts was involved in the adjudication of this tender. To substantiate his point he quoted and tabled a document which, ‘*inter alia*’ stated that:

“In terms of Clause 30 and Part XIII of the Public Contracts Regulations 2003 the public is hereby notified that during the session held on Tuesday 11th January 2005 the General Contracts Committee made the recommendations indicated below. The Director General (Contracts) has agreed with their recommendations.”

The recommendations clearly indicated Messrs Casapinta Design Group Limited as the recommended tenderer.

He said that, apart from this, the tender box was opened in the presence of Mr Mario Borg as representative of the Department of Contracts. He tabled the schedule of tenders, which was written and signed by the said employee. At this stage, Mr Zaffarese intervened and pointed out that Mr Borg was not a member of the Contracts Committee. Dr Tortell insisted that the adjudication was administered in its entirety and determined by the Department of Contracts. Moreover, he explained that the tenders were not opened on the stipulated date because of a complaint raised by Mr Rueben Caruana on behalf of another tenderer, namely, Messrs. Sign It Limited.

The MTA’s legal representative placed major emphasis on the fact that whilst the tender was published in the Government Gazette on 7 September 2004, it is also a fact that the MTA was removed from Schedule 3 and listed under Schedule 2 as per amendments in the Public Contracts Regulations, 2003 issued on 3 August 2004, which came into force retrospectively as of 1 May 2004. Dr Tortell said that it was only due to the timing difference between the formal publication of the advertisement and the publication of the amendments that a level of uncertainty arose in so far as the actual procedure to be followed in the awarding of previously called ‘departmental tenders’.

Mr Leslie Vella, the MTA’s Chief Executive Officer at the time, and the Chairman of the Selection Committee, testified that *12.00 hours of the 29 October 2004* was the deadline for submission of tenders and that all the Selection Committee members were present. He said that the only tenderer present was Mr Rueben Caruana, representing Sign It Limited. Mr Vella confirmed that the tender box was opened at 13.15 hours and that the procedure

followed in the opening of the tenders was recorded as per minutes of the meeting held on that day as per para 1.2. However, the opening of tenders had to be postponed in view of two objections raised by Sign It Ltd's representative, who complained about the fact that *"the tender had not been issued through the Department of Contracts as per Public Contracts Regulations, given that Malta Tourism Authority appeared on Schedule 2 entitled, "Contracting Authorities falling within the competence of the Department of Contracts" "* and also because *"Clause 3.5.3 of the Tender Document goes against the right of appeal procedure."* Mr Vella said that Mr Caruana insisted that tenders should be opened in the presence of a Department of Contracts representative. In view of these developments it was decided not to open the tenders before all necessary clarifications were obtained.

The Evaluation Committee's Chairman said that he had to reconvene the Committee again at 14.00 hours in view of an objection raised by Mr Benny Zaffarese who had formally alleged that *"Zaffarese Exhibitions & Events had not been informed as to when the tender box was to be opened and the tenders sealed, and the time of the opening of tenders."* Mr Vella said that such information was notified in the tender.

He declared that the opening of the tenders took place during the second session which was held on 3 November 2005 and in the presence of Mr Mario Borg from the Department of Contracts and the Evaluation Committee members. Here, Mr Benny Zaffarese intervened by stating that the tender should have been opened in the presence of the Contracts Committee members. He remarked that Mr Borg was not a member of the Contracts Committee.

During Mr Vella's testimony it was established that, despite the fact that the award of the contract was suspended in terms of Regulation 103 of the Public Contracts Regulations 2003, the MTA had in actual fact participated in the Milan Fair which was held in February 2005. He said that with effect from 1 January 2005 he was no longer the Authority's CEO. Dr Tortell declared that his clients still decided to take part in the said Fair because it was in the national interest for Malta to be represented in such a fair. He said that Casapinta Design Group agreed to provide the stand free of charge and that any payment depended solely on the successful outcome of this appeal.

In his testimony, Mr Mario Borg, representing the Contracts Department, recounted his involvement in the opening of the tenders. He confirmed that the tenders, which were still sealed, were opened in his presence and that it was he who had scheduled them on 3 November 2004. Due to the fact that he was asked by Mr Edwin Zarb (Director General Contracts) to assist the MTA for the opening of tenders on their premises, he thought that the tender was valued under Lm20, 000. Also he said that he did not know the tender's date of issue. He testified that all contracts valued over Lm20, 000 were issued by the Department of Contracts and opened at the Department of Contracts in the presence of at least three Contracts Committee members. He said that, as far as he could recall, the only exception was the Lands Department, which issued tenders for the sale of land. However, this was considered irrelevant, because the tenders that were issued by the Contracts Department fell under the procurement regulations.

At this stage the Public Contracts Appeals Board summoned to the witness stand Mr Edwin Zarb, Director General Contracts.

Mr Zarb stated that, at one stage, Mr Vella had phoned him about this tender and informed him that the MTA had issued this tender under the old regulations governing the issue of public tenders under which the Authority used to be listed, namely Schedule 3. However, as widely known, the new amended regulations had, in the meantime, listed similar entities like the MTA under Schedule 2.

The DG Contracts explained that when he decided to send Mr Borg to assist the MTA in the opening of the tenders at their premises, he had also made it amply clear that the Contracts Committee would have ultimately awarded the tender.

Mr Zarb declared that in terms of the regulations, once the value exceeded Lm20, 000, the tender should have been issued by the Contracts Department and should have been opened in the presence of the Contracts Committee. However, he said that he arrived at the decision to allow the tendering process to continue after taking into consideration the urgency of the matter and the fact that the MTA had previously been under Schedule 3, which meant that they were authorised to issue tenders on their own account. The alternative would have been to suspend everything and re-issue the tender. However, he felt that in the prevailing circumstances, he took the best practical decision. The MTA's representatives declared that they needed to award this particular tender immediately as it was indispensable for Malta to participate in this fair in view of its importance.

With regard to tenders issued by the Contracts Department, Mr Zarb said that all Departments/ Contracting Authorities concerned had to submit their adjudication reports to the Contracts Committee to scrutinize them and to act on their recommendations by either accepting or refusing them. He declared that if a Department or a Contracting Authority would submit a proposal to allow them to issue a tender which was valued over Lm20, 000, he would reject such proposal.

During Mr Zarb's testimony, Dr Tortell said that the law permitted the Director of Contracts to deviate from the standard procedures. To prove his argument he made reference to Clauses 5 (1) and 5 (2) (b) and (g) of the public Contracts Regulation 2003 which stated that:

“There shall be a Director of Contracts who shall be responsible for the running of the Department of Contracts and generally for the administration of the procurement procedures as laid down in these regulations”

“(b) to authorise deviations from standard conditions in accordance with the regulations set out herein and which may be included in tender documents.”

“(g) to establish and regulate the procedure to be followed during meetings of the Contracts Committee and Departmental Adjudication Boards, and during the issue and publication of calls for tenders, receipts of offers, opening of bids, adjudication of tenders and award of contracts in accordance with the rules herein set out.”

However, Mr Zaffarese rebutted this by stating that the Director of Contracts was not authorised to amend the law and/ or tendering procedures. He said that Clause 5 (f) of the same regulations specified that the Director of Contracts had:

“to ensure that these regulations are observed by all parties involved.”

In his concluding submission, Mr Zaffarese said that consideration should be given to the dates when the tender was issued and when the regulations were amended. He said that the MTA and the Department of Contracts should have complied with procedures outlined in the procurement regulations. He repeated the irregularities in the tendering procedures adopted in the issue, opening and adjudication of the tender in question.

Dr Tortell concluded by stating that, in the circumstances, the Director of Contracts had only exercised his discretionary powers as stipulated in the law and as a result the entire procedure followed by his clients was justified.

Conclusions of the Public Contracts Appeals Board:

The Public Contracts Appeals Board having heard all the evidence brought before it feels that it is manifest that the procurement proceedings as laid down in the relevant Regulations had not been followed in this case.

It is also clear that the proceedings, as applied here, were sanctioned by the Director General of the Contracts Department, albeit at a late stage.

The Board feels that the decision by the Director General was not made as the conscious exercise of any formal discretionary powers as may be allowed to him by Law but rather as an administrative arrangement to tide over the perceived urgency of the moment. Even here, notwithstanding that certain procedures had already been infringed, the arrangement did not go far enough to bring the remaining procedures more in line with orthodox usage.

The Board considered the fact that the period of transition between the old and the new regimen may indeed have caused certain difficulties to certain Authorities, which previously could act in an independent manner. However the fact that the relevant Regulations do not include any form of transitional provisions makes it very clear that the intention of the Legislator was that the procedures as laid down by Law should be exercised in full as from day one.

The Public Contract Appeals Board therefore feels that the sanction of the Director General Contracts was not sufficient to counter-weigh the departure from the Procurement Regulations and decides to uphold the objection made by Messrs. Zaffarese Exhibitions & Events Limited and annul this award and recommends that a fresh call be issued with regards to future participation in the same exhibition.

A Triganza
Chairman

A Pavia
Member

E. Muscat
Member

31.03.2005