

PUBLIC CONTRACTS APPEALS BOARD

Case No. 29

MTA/105/2004 Tender for 'Design and Construction of Stand at IMEX, FRANKFURT (Germany) for the Period April 2005 – June 2006.

The call for offers for the *Design and Construction of Stand at IMEX, Frankfurt (Germany) for the Period April 2005 – June 2006* with an estimated value of Lm 18,000 (excluding of VAT), was published in the Government Gazette by the Malta Tourism Authority on 24 December 2004 with the closing date being the 21 January 2005.

Four offers were received with the most favoured being the one submitted by Messrs. *Sign It Ltd* which managed to gain the highest points, namely 94%, following an adjudication criteria process wherein many aspects were considered (e.g. *understanding of project and quality of proposal, Creativity, MTA's image*, and so forth) by an Evaluation Committee made up of Mr Jeffrey Cutajar (Chairperson) and Messrs Marcel Coppini and Leonard Zammit Munro respectively acting as the other members.

This Committee formally confirmed in an Internal Memorandum addressed to the Authority's Chairman, its agreement to award the tender to Messrs "Sign It Ltd. for the total value of Lm 18,200.00 inclusive of VAT and any other charges that may be applicable."

Following the publication of such recommendations Messrs. *Zaffarese Exhibition Events Ltd* filed an objection with the Director of Contracts on 9 March 2005.

The Public Contracts Appeals Board, constituted of Mr Alfred Triganza, who chaired the proceedings, and Messrs. Anthony Pavia and Edwin Muscat (Board Members), met on the 4th April 2005 to consider this appeal.

The following persons were also present during the said hearing:

Zaffarese Exhibitions & Events Ltd

Mr Thomas Farrugia

Mr Benny Zaffarese

Sing It Ltd

Mr Rueben Caruana

– Managing Director

Malta Tourism Authority and Evaluation Committee

Dr Simon Tortell LL.D – Legal Representative

Mr Jeffrey Cutajar – Chairman (Evaluation Committee)

Mr Marcel Coppini – Member (Evaluation Committee)

Mr Leonard Zammit Munro – Member (Evaluation Committee)

Ms Claire Briffa – Secretary (Evaluation Committee)

After the Chairman's brief introduction, the appellant Company's representative, Mr Benny Zaffarese, explained the motivation behind his Company's objection.

Mr Zaffarese started by stating that they submitted their objection on the basis of the fact that the Malta Tourism Authority (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, *inter alia*, 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...”

Thus, he insisted that this tender should not have been issued and evaluated by the MTA's Evaluation Committee but by the General Contracts Committee at the Department of Contracts.

The MTA's Legal Representative, Dr Simon Tortell, said that the point at issue was to determine whether the estimated contract value should be inclusive of VAT or not. Thus, during this hearing it had to be established whether VAT should be considered as part of the contract value or not. He claimed that in view of the fact that the price was estimated at Lm9, 000 (excluding VAT) for each Exhibition over a period of two years, the tender price did not exceed Lm20,000. He argued that MTA did not consider VAT as part of the contract value because MTA was exempt without credit and did not receive VAT refunds. Furthermore VAT was not an expense for the contractor because it was recoverable.

Mr Jeffrey Cutajar said that the Committee agreed to award the tender to *Sign It Ltd* for the total value of Lm18,200 inclusive of VAT and any other charges that might be applicable.

Furthermore, MTA's representatives proceeded by pointing out that in the Public Procurement Guidebook issued by the Management Efficiency Unit it was specified that *'Calculations for the estimated contract value should always be net of value added tax (VAT)'*

Dr Tortell contended that even the VAT legislation excluded VAT from the value of supply and service. He said that the Seventh Schedule [Article 18] Taxable Value of the Value Added Tax Act specified that *'Except as otherwise provided in the other provisions of this Schedule, the taxable value of a supply shall be the total value of the consideration paid or payable to the supplier by the purchaser, the customer or any other person for the supply, including any subsidy directly linked to the provisions of that supply, but excluding the value added tax chargeable under this Act on that supply.'* He also argued that once in the tender it was specified that *'the tenderer's price must not exceed Lm9,000 (excluding VAT) for each fair'*, it was this amount that should determine whether the value was in excess of Lm20,000 or not.

At this stage Dr Tortell pointed out that Messrs *Zaffarese Exhibition Events Ltd* had submitted two offers one of which was over Lm20,000 and the other was under. Thus, the argument mentioned by Mr Zaffarese that they were at a disadvantage because MTA's tender exceeded Lm20,000, was not correct.

During the proceedings, when MTA's representative's attention was drawn to the fact that the Guidebook presented was in draft form, Dr Tortell declared that it was the last version available and that it was the same copy given to participants during formal training sessions delivered to various Governmental and similar entities as the MTA, by Management Efficiency Unit (MEU) officials. The Authority's legal representative was, however, not in a position to specify whether there existed a final version or not.

Mr Zaffarese claimed that when he sought advice from the Department of Contracts, the Director of Procurement had informed him that all departmental tenders' value was always inclusive of VAT. Thus, he requested the Appeals Board to summon the Department of Contracts' representative as a witness.

At this stage, the Board decided to call to the witness stand Mr Edwin Zarb, Director General Contracts, who, when cross-examined, stated that it had always been the praxis, even under the previous regulations, namely, the *Public Service Procurement Regulation 1996*, that the estimated value of tenders issued for procurements, including direct orders and Departmental tenders (both under Lm20,000), was inclusive of VAT. However, he said that the new Public Contracts Regulations 2003 contained thresholds applicable for EU contracts, the estimated value of which was exclusive of VAT. He said that, in accordance with EU directives, it was mandatory to publish such tenders in the Official Journal of the European Union and with the estimated value net of VAT.

When he was referred to the Guidebook mentioned earlier, Mr Zarb said that both the *Guidebook* and *Training programme* were commissioned and organised by the Department of Contracts and that the relative quotation was applicable to the EU thresholds included in Schedule 9 of the Public Contracts Regulations, 2003.

In reply to Dr Tortell's remarks regarding the fact that according to VAT legislation, the value of a supply and service was exclusive of VAT, Mr Zarb stated that when VAT was introduced they had referred the matter to officials from the Ministry of Finance. The latter had replied that the value of departmental tenders and direct orders under Lm20,000 should be inclusive of VAT. Furthermore, Mr Zarb pointed out that it was his responsibility to abide by the Procurement Regulations and not by the VAT legislation.

However, Dr Tortell intervened, insisting that, in accordance with the nature of VAT legislation itself, VAT was not to be considered as part of the value of supply or service because it was recoverable by the participants. He contended that, irrespective of who issued the original directives, the praxis was evidently mistaken.

Ms Claire Briffa, at the time Senior Executive at the MTA's CEO's Office, testified that before the issue of this particular tender, she had attended a training programme organised by the Contracts Department. She said that Italian experts in the field delivered the lectures to many participants representing various aspects of direct and indirect elements of the public service. Ms Briffa also claimed that during these sessions, participants were told that all tenders, including direct order and departmental tenders, were to be issued exclusive of VAT.

Mr Rueben Caruana, Managing Director, *Sign It Ltd*, testified that when he received a copy of Mr Zaffarese's objection, he could not understand the purpose of the objection because in the tender it was specifically stated that the value of the tender was Lm9,000 (exclusive of VAT). According to Mr Caruana, it seems that the MTA did not want to exceed the Lm20,000 budget. He claimed that this objection was not only prejudicing Malta's participation in this fair but also adversely affecting the companies involved.

He alleged that Mr Zaffarese had told him in confidence that he was objecting because he wanted to give the MTA a hard time. In actual fact, he waited till the very last day to file the objection. Mr Caruana contended that he was preoccupied because his company, being the recommended tenderer, had the responsibility to deliver. Mr Caruana said that in view of the fact that the fair was going to be held between the 19th and 21st April 2005, it was imperative that a decision be taken immediately, because he still needed to send the Stand to Germany. The Chairman PCAB intervened and drew the witness' attention to the fact that the scope of this hearing was to ensure that the proper procedures were followed and, albeit fully cognisant of the urgency of this case, it had to be acknowledged that this Board needed to take its time to evaluate all issues raised and duly form its opinion in regard.

Mr Zaffarese said that Mr Caruana failed to mention that he himself had told him in the presence of Mr Thomas Farrugia that he was being treated unfairly. He clarified that such statement was made in the sense that he was not going to accede to such injustices.

When cross-examined by Dr Tortell, Mr Jeffrey Cutajar, Chairman, Evaluation Committee, made reference to a detailed letter dated 14 February 2005, in which he had explained to him the reasons as to why the tender submitted by Messrs *Zaffarese Exhibition Events Ltd* was not recommended for acceptance. He said that the award of this tender was based on the most economically advantageous tender in terms of the selection criteria established in section 4.1 of the tender document. Each criterion was given a weight as detailed in the *Evaluation Matrix* enclosed in Appendix 1 of the tender document. The tenderer with the highest points in this matrix was consequently awarded the contract.

According to the MTA's representative, the most important criteria was the 'understanding of the project' for which Messrs *Zaffarese Exhibitions & Events Ltd* submitted two options. However, both of them were not in line with the required standard. As regards 'creativity', the colours used were not in line with MTA's corporate image. As far as the price was concerned, for Option 1 the Company managed to obtain full marks (20%) while for Option 2 it managed to secure 15% and both options were within the Authority's budget. Other criteria included 'Technical specifications', 'MTA's corporate image' and 'Supplier's credentials'.

He contended that it was clear that Mr Zaffarese's Company never really understood the Authority's requirements as regards the latter's participation in overseas fairs. Mr Cutajar also placed particular emphasis on the fact that it was very important for MTA to offer its client the best service and to participate with Stands which would reflect the image it meant to create for itself, the country and the particular economic sector which it represents.

Whilst Dr Tortell stated that he had nothing further to add to what had already been said, Mr Zaffarese concluded by reiterating that he decided to file the objection because he felt that the MTA were not complying with the procurement regulations with the consequence that the procedure being followed was conceptually and legally wrong.

In analysing the evidence given during the hearing, the Public Contracts Appeals Board placed particular emphasis on:

- the fact that the MTA had acted in good faith and in line with contents of the *Public Procurement Guidebook* (MFEA/004/003);
- the fact that the praxis followed by the Contracts Department were at odds with the methodology advised by the Italian experts during the training programme organised by the same Contracts Department;
- the reference made to ‘thresholds’ on *page 14* of the same *Public Procurement Guidebook* may have, contrary to what was stated during the hearing, given rise to a misrepresentation of the true meaning and spirit of the term.

The Board also considered Dr. Tortell’s plea that the concept of value as laid down in the VAT legislation must also be applicable to the value referred to in the Public Procurement Legislation. The Board was not convinced that Dr. Tortell’s interpretation was correct and decided not to accept this plea.

Following a thorough consideration of all the points mentioned above, the Public Contracts Appeals Board feels that the Malta Tourism Authority had not acted incorrectly in this case and therefore decided in its favour.

Whilst rejecting the appeal lodged by Messrs *Zaffarese Exhibition Events Ltd*, this Board feels that the objection made was not of a frivolous nature and as a consequence decided that the appellant should be reimbursed the amount paid in lodging the claim.

The evidence given during the hearing clearly reveals that the notions of the estimated value for all contracts falling under the threshold as understood by the Department of Contracts and as explained by the Italian Experts are not congruent. This Board, therefore recommends that this matter should be examined by the Department and the correct procedure, as needs to be adopted within the new reality of Malta’s E.U. membership, should be circularized to all relevant bodies to ensure that this problem will not recur.

Alfred R. Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

Date: 13.04.2005