

PUBLIC CONTRACTS APPEALS BOARD

Case No. 33

CT 2202/05, MMA C/15/96

Internal Finishing Works of Office Areas at the Maritime Trade Centre, Marina Pinto, Floriana

This call for tenders, published in the Government Gazette on the 01.04.2005 was issued by the Contracts Department following a formal request received on 28.03.2005 by the latter from the Malta Maritime Authority (MMA).

In total, six (6) offers were submitted by tenderers on closing date for submission of offers which was 19.04.2005.

Following notification by the Contracts Committee to Messrs A.X. Construction Ltd that their offer had been disqualified (because they had failed to comply with the terms of Part XII of Legal Notice No 299 of the Public Contracts Regulations 2003 by disclosing the rates under Form A9 in envelope No. 2.) and not allowed to be regarded further in the opening of Package 3, the latter filed a Notice of Objection on 26.04.2005 against the said award.

The Public Contracts Appeals Board (PCAB) made up of Mr. Alfred Triganza (Chairman) and Messrs Anthony Pavia and Maurice Caruana (Board Members), respectively, acting as members, convened a public hearing on 27.05.2005 to discuss this objection.

Present for the hearings were:

AX Construction Ltd
Mr Angelo Xuereb
Mr George Xuereb

Malta Maritime Authority
Mr Alfred Xuereb
Mr Domenic Vella

Witness
Mr Mario Borg (Contracts Department)

After the Chairman's brief introduction the representatives of AX Construction Ltd were invited to explain the motivation of their objection.

Mr George Xuereb, a consultant, representing AX Construction Ltd, stated that his clients were informed that they had been disqualified because they failed to comply with the terms of Part XII 'Separate packages in tender offer of Legal Notice 299 of the Public Contracts Regulation 2003' by disclosing the rates under Form A9 in envelope No 2. He insisted that it was very abnormal that in any tender, whether being a normal call or a three package system, the client requested the 'Day work

Rates' on two separate documents, namely Form A9 – Schedule of Rates (Volume 2 – Forms) and Section F, 'Day works', pages F/1 and F/2 (Volume 6 – Bills of Quantities) respectively. He argued that this proved to be very confusing and notwithstanding the fact that instructions to include the said schedule (Form A9) in envelop "three" (3) were indicated, they committed a genuine error by inserting this form in the wrong package, that is, Envelope 2. He said that in Tendering Procedures, it was considered unacceptable and irregular for any bidder to alter in any way, by removing one particular page and included same under a different section, especially so when all pages are numbered. This was the case with Form A9 'Schedule of Rates, on pages 13 and 14. Mr Xuereb maintained that it had to be taken into consideration that this Form, which did not form part of the Bills of Quantities (BOQ), did not disclose the Final Tender value in any way as only rates were requested.

AX Construction Ltd' s consultant said that Section F 'Day works', pages F/1 and F/2, which was an integral part of the BOQ, was more comprehensive as allowance was made for the rates to be multiplied by the hours and the total of this section was then to be added to the 'Summary of the Tender'. As a consequence, only the figures on this form would affect the final financial figure that will be ultimately used for adjudication purposes.

He argued that in the event that at the opening of Package 3 ('Prices') their offer will end up being the cheapest, the client, the Malta Maritime Authority, would be constrained to spend more money unnecessarily for no valid and serious reason. He also pointed out that none of the other bidders did register an interest in the proceedings in terms of regulation 103 (2) (iii).

Mr Xuereb concluded by requesting the PCAB to reverse the decision of the Contracts Committee to disqualify their offer because the penalty applied for such a trivial error was too 'harsh and severe' when taking into account that (a) in no way was the Tender Value disclosed and (b) 'Day Work' rates were always provisional and were not necessarily used during the process of the works.

Mr Angelo Xuereb, also representing the appellant, claimed that in his vast experience in the construction industry as well as the tendering process, he had never come across a case where the Schedule of Rates was included in different documents. It was very rare for a client to apply 'day works' rates. He was of the opinion that this schedule should have never formed part of Volume 2. This should have been inserted in Volume 6 – Bills of Quantities, as in the case of Bill F 'Day works', Page F/1 and F/2.

Mr Xuereb said that Form A9 was not going to make any difference in the financial package of the offer and in the evaluation of tender, his Company should be allowed to proceed in the tendering process.

Malta Maritime Authority' s (MMA) representative, Mr Alfred Xuereb, said that the Authority had a set of forms which formed part of the tender document and these were to be inserted in different envelopes as indicated and specified on each form. Apart from this, Mr Xuereb declared that in the tender document itself there were two checklists indicating in which envelope each form had to be submitted (copies of which were submitted during the hearing). He said that bidders were obliged to put

Form A9 'Schedule of Rates' in Envelope No 3 and that the Contracts Committee had decided to disqualify this offer because this form was inserted in Envelope No 2.

When asked to indicate which document would be evaluated by the adjudication board when considering the financial proposals submitted, the MMA's representative declared that Forms F/1 and F/2, being part of the BOQ, would affect the final price. He continued by saying that the purpose of the two forms was different (i) the BOQ was intended for contractors to keep the rates low as much as possible and determine standard pricing and (ii) Form A9 was only used just in case that during the execution of works the Authority would be needing additional services. Mr Xuereb added that Form A9 was not so important for the evaluation of tender as it did not affect the final price.

At this stage Mr Xuereb proceeded by clarifying that the tenderer was disqualified because according to the Terms of part XII of Legal Notice 299 of the Public Contracts Regulations 2003 any financial proposal had to be submitted in envelope 3.

With regard to what was stated by Mr George Xuereb regarding the fact that it was abnormal to request labour day works in different sections of the tender document, the MMA's representative said that this procedure was always adopted in previous tenders.

When the Board asked Mr Alfred Xuereb whether all other bidders had submitted Form A9 in the proper envelope as requested, he replied in the affirmative.

Mr Mario Borg, Secretary (Contracts Committee), testified that this tender was a three package system and that it was accompanied by the mandatory Bid Bond (Package One). He said that AX Construction Ltd's tender was disqualified because during the opening of the second envelopes ('Specifications') they found Form A9 in this envelope. Mr Borg declared that it was specified in bold at the bottom of Form A9, namely, 'Schedule of Rates', that it had to be included in Envelope 3. The Committee's Secretary said that the Contracts Committee, in the presence of MMA's officials (*Messrs Alfred Xuereb and Domenic Vella*), agreed to disqualify AX Construction Ltd's tender. They arrived at this decision because according to the Terms of Part XII of Legal Notice 299 of the Public Contracts Regulations 2003 any financial details had to be submitted in Package No 3.

In reply to a specific question by Mr George Xuereb, Mr Borg declared that it was not his competence to enter into the merit of whether the figures thereon affected the tender's value.

After the public hearing was concluded, the Board proceeded with its deliberations and reached its decision, namely,

The Public Contracts Appeals Board,

- having noted that Appellant's tender was disqualified and also discarded for breaching the provisions of Part XII of the Public Contracts Regulations, 2003 (Legal Notice 299 of 2003), by disclosing the rates under Form A9 of the Tender Documents in the envelope No.2; this, in terms of a letter dated 19th April, 2005 issued by the Department of Contracts.

- having considered the reasons presented by the Appellant in terms of his motivated letter dated 27th April, 2005 in support of his Notice of Objection dated 26th April, 2005;
- having also examined Appellant's verbal and written submissions presented during the public hearing held on 27th May, 2005 for contesting the decision taken to discard his tender;
- having, during the said public hearing, also obtained the Contracting Authority Representative's explanations regarding the adoption of standard tender formalities with particular reference to the inclusion of form A9 – Schedule of Rates in Volume 2 of the Tender Documents and the clear instruction given to bidders featuring as a foot note on the said form under the heading "Important Notice", namely, "The 'Schedule of Rates' (Form A9) must be duly filled and endorsed and submitted in envelope three marked '3 – Priced Bills of Quantities' "
- having taken note of the Contracting Authority Representative's declarations to the effect that, (i) although, strictly speaking, the information given by bidders on Form A9 of the Tender Documents, does not *per se* constitute the financial package for adjudication purposes, and that it was the "bill of quantities" (pages F/1 and F/2, Day Works), which represented the basic document for financial appraisal purposes, tenderers were nonetheless given clear instructions to strictly comply with the statutory provisions of regulation 102 (1) of the Public Contracts Regulations, 2003, namely, to present the (a) Bid Bond (b) Technical specifications and (c) the financial terms in three separate packages, clearly stressed in terms of the "Important Notice" (foot note) on Form A 9 and (ii) the Tender Documents included "check lists" purposely intended to assist the tenderers in ensuring that the documents to be submitted are complete and also in strict compliance with given instructions;
- having also examined the Tender Documents, and noted that, besides the instruction given on Form A 9 under "Important Notice", the instructions given to tenderers in paragraph 1.1, on page 3 of 10 under "Very Important Notice", reproduced hereunder, do not leave any doubt whatsoever regarding the serious implications of non-compliance with the stipulated tender presentation modalities:-

“1.1 *Very Important Notice*

*This is a call for tenders published under the **three envelope** procedure and all bidders are asked to scrupulously follow the instructions contained herein when submitting their tender.*

*In particular Tenderers are to ensure that **no direct or indirect indication of any prices** is to be revealed in Envelope One (Bid Bond submission) and Envelope Two (Technical Documentation submission).*

Failure on the part of any tenderer to comply strictly with this mandatory requirement will entail automatic disqualification of the tender involved”

Agreed that, whilst accepting Appellant's argument that the inclusion of the document referred to as Form A 9, Schedule of Rates, represented an illogical arrangement, on the part of the Contracting Authority, the Board could neither excuse the Appellant from what he wrongly considers to be a genuine oversight nor accept his view that the error committed was a trivial one. According to the Board, the instructions which were expected to be followed by tenderers regarding the presentation of the three separate tender packages were clear, amply stressed and not subject to possible different interpretations. Appellant's total disregard to the "warning" given in terms of paragraph 1.1, on page 3 of 10 under "Very Important Notice", led to the "automatic disqualification" of his tender. Furthermore, the Board is not statutorily competent to consider, let alone uphold, any pleas or appeals merely on grounds of clemency.

In the light of these several considerations, the Board has no alternative other than confirming the decision taken by the Contracts Committee, namely that Messrs. AX Construction Ltd's tender should be disqualified and also discarded for breaching the instructions given in terms of paragraph 1.1, on page 3 of 10 under "*Very Important Notice*" and also in terms of the "*Important Notice*" featuring as a foot note on Form A 9.

In consequence, the Board has decided to reject the appeal and has also concluded that, in terms of the provisions of regulation 102 (4), the deposit paid by Appellant cannot be refunded.

A. Triganza
Chairman

A.Pavia
Member

M. Caruana
Member

6th June 2005