

PUBLIC CONTRACTS APPEALS BOARD

Case No. 36

RE: CT 2665/04 - Tender for Feasibility and Environmental Impact Studies for Maritime Transport Infrastructural Projects - Malta

The call for offers was published in the *Government Gazette* as well as the *Official Journal of the European Communities* on the 09.06.2005 following a request made by the Malta Maritime Authority (MMA) to the Department of Contracts in line with the EU 2003 Programme which is based on a total co-financing basis, namely Euros 680,000 *ex* EU funds and Euros 540,000 *ex* Malta Funds respectively.

The implementation stage is expected to be covered within the period March 2005 to September 2006.

An Evaluation Committee made up of

Mr Frank Galea	Chairman
Mr Charles Abela	Member
Mr Chris Farrugia	Member
Mr Godwin Xuereb	Member
Mr Jonathon Muscat	Secretary

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

A list of fourteen (14) prospective tenderers was compiled of which six (6) submitted their offer on closing date.

Following the receipt of a letter dated 09.06.2005 informing them that their tender was discarded Messrs. Dornier Consulting GmbH filed an objection on 14.06.2005 with the Director of Contracts against the decision to discard their tender because of the tender guarantee.

The Public Contracts Appeals Board met on 15th July 2005 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:

Dornier Consulting GmbH

Dr Hans-Rudolph Humpert – Lawyer
Mr Heribert Kamella – Senior Manager

KPMG

Mr Mark Bamber

Malta Maritime Authority

Mr Jonathan Muscat – EU Affairs Coordinator

Mr Frank Galea – Director

Ministry for Competitiveness and Communications

Mr Godwin Xuereb – EU Affairs Coordinator

Summoned as witnesses:

Mr Edwin Zarb – Director General Contracts

Following Mr Triganza's brief introduction, Dr Hans-Rudolph Humper, Dornier Consulting GmbH's lawyer, said that their tender was rejected from the evaluation process due to the fact that the bank guarantee was valid for 80 instead of 90 days. His attention was drawn to the fact that, according to the Commerzbank's letter dated 1 June 2005 the guarantee was valid for 60 days beyond the period of validity of the tender. Dr Humper proceeded by stating that his Company informed also the Department of Contracts in writing that this was a clerical mistake made by their Bank.

At this stage, Dornier Consulting GmbH's lawyer, wanted to emphasise that in other European Union countries it was normal practice for bidders to be given the opportunity to rectify such mistakes within a specified period of time. As a consequence, he hoped that the amended tender guarantee, which they brought with them, would be accepted.

Mr Heriber Kamella intervened, reiterating that the mistake made by their bankers was absolutely **out of their control**, submitting in the process an amended tender guarantee which was valid until 23 February 2006.

Mr Jonathan Muscat, one of MMA's representatives, confirmed that Dornier Consulting GmbH's tender was rejected during the opening session held at the Department of Contracts on 9 June 2005 because the tender guarantee did not cover the period specified in the *Instructions to tenderers*. He declared that they had no interest in rejecting any bidder because they wanted as many companies as possible to participate in this tender.

The main witness during this hearing was Mr Edwin Zarb, Director General Contracts, who declared that the Evaluation Committee did not accept the tender guarantee because it was not in accordance with the tender dossier. He said that clause 4.1 relating to Instructions to Tenderers (Tender Guarantee) stipulated that the tender guarantee *'must remain valid for 90 days beyond the period of validity of the tender.'* He explained that as the validity of the tender was 90 days, the guarantee had to cover a period of 180 days (90 days *plus* 90 days).

Mr Godwin Xuereb, who was representing the Ministry for Competitiveness and Communications, added that, in view of the fact that the expiry of the tender validity

period of the company's tender guarantee was sixty (60) days the tender guarantee covered a period of 150 days instead of 180 days.

In reply to a specific question by the PCAB, Mr Zarb stated that to his knowledge there have never been precedents where errors in respect of validity periods of bank guarantees were allowed to be rectified.

Mr Kamella intervened by reiterating that from their experience with other EU countries, tenderers were allowed to rectify minor mistakes like this within a specified period of time.

Dornier Consulting GmbH's representatives were asked by this Board to state whether they had any correspondence regarding their instructions sent to the bank for the issue of the guarantee. Dr Hans-Rudolph Humpert said that they had indicated the same period featuring in the tender document and furnished those present with relative intra-Company communication.

Mr Mark Bamber of KPMG said that their consortium was acknowledging the fact that an error has been made and that they were willing to rectify the mistake. He argued that it benefited the client to have a wider choice of bidders in the evaluation process of the offers. He invited the PCAB to take into consideration what his colleagues have stated regarding the practice adhered to across the EU rather than adopting the extreme option of exclusion of companies from the tendering process. He said that presence of the consortium's foreign representatives for the hearing in Malta showed that they were keen to participate in the adjudication process of this tender.

During these proceedings it was established that there were six bidders in all for this tender and that apart from the appellant, another tender was rejected for the same reason. Mr Jonathan Muscat tabled a copy of the invalid bank guarantee of the other bidder, namely Acquatecno s.r.l.

The Public Contracts Appeals Board,

- having noted that the Appellant's guarantee was valid for 60 days instead of 90 days, contrary to clause 4.1 relating to Instructions to Tenderers which stipulated that the tender guarantee '*must remain valid for 90 days beyond the period of validity of the tender*'
- having considered that this appeared to be a clerical mistake made by the Appellant's bankers, namely, Commerzbank Aktiengesellschaft
- having ascertained that relative intra-Company communication confirmed that the mistake was not instigated by Appellant
- having taken into consideration the fact that the Evaluation Committee had also rejected another tender for the same reason
- having taken note of the amended tender guarantee, which Messrs Dornier Consulting GmbH presented to this Board

- having taken into consideration the declaration made during the hearing by members of the Evaluation Committee that they had no interest in rejecting any bidder because they wanted as many companies as possible to participate in this tender
- having considered the fact that the envelope containing all the tender documents which were to be submitted (including the guarantee) would not normally be submitted by the Bank but by another representative of the bidding company and that therefore this representative constituted another intermediary where the documents could have been checked for correctness before submission
- having noted Mr Zarb's comments relating to the fact that, to his knowledge, there have never been precedents where errors in respect of tender validity periods were allowed to be rectified in bank guarantees
- having also examined the Tender Documents

agreed that,

- (a) albeit Appellant's plea seems *prima facie* a genuine one, yet in similar circumstances the onus of checking documentation to ultimately be submitted with the offer, always lies with tenderer and this, in order to ensure, *inter alia*, that third party documentation falls in line with that required by the Tender Document
- (b) Mr Zarb's comments relating to the fact that, to his knowledge, there have never been precedents where errors in respect of tender validity periods were allowed to be rectified in bank guarantees, are highly pertinent to this case in so far as they highlight the danger for any Adjudicating Board to decide on issues in an emotional manner rather than standing by the original terms and conditions which are, undoubtedly, unequivocal to all potential bidders

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. Dornier Consulting GmbH's tender should be rejected from the evaluation process.

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

E. Muscat
Member

27 July 2005