

PUBLIC CONTRACTS APPEALS BOARD

Case No. 42

RE: CT 2073/2005, Advert No 157/05

Malta Vessel Traffic Management Information System (VTMIS) Project Phase 2

This call for offers which was published in the Government Gazette on the 20.05.2005 was issued by the Contracts Department following a formal request received from the Malta Maritime Authority.

The estimated cost of this tender was Lm 601,000 including VAT.

The closing date of this tender was 19.07.2005

In total, four (4) offers were submitted by tenderers on closing date for submission of offers.

Following notification by the Contracts Committee to the Norcontrol IT/ Ericsson Consortium that their offer had been disqualified because they had "*failed to comply with the terms of Part XII of Legal Notice No 177 of the Public Contracts Regulations 2005, by not submitting*" their "*financial proposal in a sealed separate envelope marked number three*", the Norcontrol IT/ Ericsson Consortium filed a Notice of Objection on 21.07.2005 against the said award.

The Public Contracts Appeals Board (PCAB) made up of Mr. Alfred Triganza (Chairman), Mr Anthony Pavia (Member), and Mr Edwin Muscat (Member), convened a public hearing on 17.08.2005 to discuss this objection.

Also present for the hearing were:

Norcontrol IT/ Ericsson Consortium

Mr Jeff Walton,	Norcontrol IT
Mr Anders Rilby,	Ericsson
Mr Kevin Gaglione,	Medcomms Ltd
Dr Peter Fenech LL.D.	Legal Representative

Malta Maritime Authority

Capt. Richard Gabriele	Member Evaluating Committee
Capt. Andrew Mallia	Member Evaluating Committee
Mr John Galea	Secretary Evaluating Committee
Mr Jonathan Muscat	EU Affairs Coordinator
Mr Chris Farrugia	Project Leader

Witnesses

Mr Dennis Attard	Department of Contracts
Mr Mario Borg	Department of Contracts

After the Chairman's brief introduction, the representatives of Norcontrol IT/ Ericsson Consortium were invited to give a broad view of what instigated them to file their objection.

Dr Peter Fenech, representing the appellants, started by stating that his clients had submitted their objection following the receipt of the Director General Contracts' letter dated 19 July 2005. In this letter they were formally informed that *'once you have failed to comply with the terms of Part XII of Legal Notice No. 177 of the Public Contracts Regulations 2005 by not submitting your financial proposals in a sealed separate envelope marked number three, your tender has been disqualified.'*

Dr Fenech pointed out that Legal Notice No 177 of 2005 was not in force when the tender was submitted and, therefore, this appeal should be based on Legal Notice 299 of 2003.

Norcontrol IT/ Ericsson Consortium's legal representative stated that his clients had presented its financial proposal in full compliance with the tender documents provided. To substantiate his claim, Dr Fenech quoted textually Article 10.4 (page 11 of 87) under *Instructions to Tenderers* which specified that:

'All tenders, including annexes and all supporting documents, must be submitted in a sealed envelope bearing only:

- a) *the above address;*
- b) *the reference code of this tender procedure, (i.e., CT 2073/2005);*
- c) *where applicable, the number of the lot(s) tendered for;*
- d) *the words "Not to be opened before the tender opening session" in the language of the tender dossier*
- e) *the name of the tenderer.'*

According to Dr Fenech, Norcontrol IT/ Ericsson's tender, including annexes and all supporting documents, was submitted in a sealed cardboard carton.

At this stage, the consortium's legal representative made reference to Article 10.5 (page 11 of 87) under *Instructions to Tenderers* which stipulated that:

'The procedure laid down in Article 46 of the Special Conditions referring to Part XII of the Public Contracts Regulations 2003 shall apply, ie:

- (1) *The tender conditions stipulate that tenders shall only qualify for consideration if they are submitted in separate packages as follows:*
 - (i) *Package One: An original and valid tender bond (Bid Bond), duly executed in the form, for the amount and for the validity Period stipulated in the official tender document;*

- (ii) *Package Two: Technical specifications including supportive literature, details, designs, samples and any other matter as requested in the tender documents; and*
- (iii) *Package Three: Completed price schedules and, or bills of quantities, form of tender, payment terms or other financial arrangements; any covering letter which may provide other pertinent details of a commercial nature,'*

Dr Fenech claimed that their tender was submitted in a three separate package format within one sealed cardboard carton and that the *Tender Bond*, the *Technical Bid* and the *Financial Bid* were marked Package 1, 2 and 3 respectively.

He proceeded by saying that when his clients did some research about the definition of the word 'package' they found that according to the *Cambridge Dictionary*, the word 'package' was defined as '*a related group of things when they are offered together as a single unit*'. Furthermore, the *Oxford English Dictionary* defined the same word as '*put into a box or wrapping*' and '*combine (various products) for sale as one unit*'. Undoubtedly, claimed Dr Fenech, these same definitions would have been a good enough indication as to what the evaluation panel should have ultimately decided to do.

Dr Fenech declared that, in view of his experience in various Government posts, if he were consulted '*ab initio*' he might have advised the tenderer to include their bids in three separate envelopes. However, he insisted that their objection should be interpreted on the documentation made available and not on the accepted norm. Also, the appellants' legal representative pointed out that, in the past, there were instances where the Department of Contracts had specifically requested tenderers to submit their bids in envelopes. However, in this case, nowhere in the *Invitation to Tender* document was it specified that the Financial Package should have been included "*in a sealed separate envelope*".

When specifically asked by this Board as to how he would interpret the sentence

'When at any stage, any tenderer fails to comply with the tendering procedural requirements and, or with the specifications, the remaining packages in his tender offer are to be discarded unopened'

under paragraph 2 of Regulation 102 of the Public Contracts Regulations 2003, Dr Fenech replied by stating that if the sequence of Packages 1, 2 and 3 was not followed the remaining package/s would not be considered.

Mr Jeff Watson, representing Norcontrol IT, said that they submitted twelve (12) separate binders (one original and three copies of each of the three packages), four of which were marked Package 1 for the *Tender Bond*, another four were marked Package 2 for the *Technical Bid* and another four marked Package 3 for the *Financial Bid*.

Captain Richard Gabriele, from the Malta Maritime Authority, started his intervention by confirming that Norcontrol IT/ Ericsson Consortium submitted one sealed box containing different separate files which were all marked as explained by Dr Fenech. However, he declared that none of these files were sealed.

Captain Gabriele emphasised that the tenders were opened by the Evaluation Committee in the presence of the general public, as well as, in the presence of the Department of Contracts' officials. Captain Gabriele proceeded by stating that when the financial bid was taken out, Mr Dennis Attard from the Contracts Department, recommended that the bid should be disqualified because the packages were not sealed. Mr Gabriele said that they were not sure about the actual procedure because for most of them it was their first experience in the opening of tenders. However, he stated that all other bidders had submitted their offers in three separate sealed packages also declaring that none of the Evaluation Committee members did manage to see what was in the files.

Mr Dennis Attard, representing the Contracts Department, testified that they opened the tenders according to the *tender dossier*. He said that when they opened the sealed box they found that the packages were not entirely separate and that the financial bid was not sealed.

Mr Attard placed major emphasis on the fact that he wanted to rebut one of Captain Gabriele's assertions by stating that the fact that the financial bid itself was signed by all the Evaluation Committee members was a confirmation that they saw the amount of the appellants' offer. In order to substantiate his claim, Mr Attard exhibited the relevant signed documents. At this stage, Captain Gabriele intervened by stating that although the Evaluation Committee had signed the *Financial Bid* they did not see the actual cost of the tender.

On cross examination by this Board, Mr Attard confirmed that although the packages were not totally mixed up because they were in separate binders, none of the binders were sealed, even though the witness wanted to draw the attention of all those present that, standard usual praxis normally dictates that such three packages had to be sealed separately.

Replying to another question by this Board, Mr Attard said that this tender, being an EU funded tender, had an *ad hoc* Evaluation Committee and it was this committee which opened the tenders. He declared that each file could easily be opened and that he could not seal any of the packages himself.

In reply to another question, Mr Attard clarified that he had requested the members of the Evaluation Committee to sign the Norcontrol IT/ Ericsson Consortium's *Financial Bid* in order to verify that it was not sealed. He declared that all the packages of the other bidders were sealed. However, Mr Attard claimed that he could not recall whether there were any of the tenderers' representatives during the opening of the tenders.

Captain Andrew Mallia, another member of the Evaluating Committee, said that Mr Kevin Gaglione was present during the opening of the tenders. He recalled Mr Dennis Attard explaining to him the procedure of the three package system and also the reasons why their tender was being disqualified.

Mr Mario Borg, also representing the Contracts Department, testified that the signing of the *Financial Bid* was made to prove that the binders/ files were not sealed. He said that under normal circumstances they signed the sealed envelopes and that the envelopes containing the *Financial Bids* were kept in the strong room. Such *Bid*, as submitted by the appellants, was not considered a package but a ring binder. He was of the opinion that the manner in which it was submitted defeated the scope of the *Three Package System*.

In concluding his defence on behalf of his clients, Dr Fenech said that he wanted to categorically express his disagreement with regard to the interpretation of the definition of the word '*package*' as given under oath by Messrs Attard and Borg respectively. Dr Fenech gave the interpretation thereof through *practice*. He insisted that his clients had submitted their bid as requested in the tender conditions and regulations because these made reference to '*separate packages*' and not to '*sealed separate packages*'. The only document where the word 'sealed' was mentioned was the letter dated 19 July 2005. The appellants' legal representative said that his clients relied on the written conditions and not on normal practice. In the circumstances, he said that their tender submission should be re-instated.

At this stage, the public hearing was concluded and the PCAB proceeded with its deliberations before reaching its decision.

This Board,

- having taken note of points mentioned by appellants' legal representative relating to L.N. 177/2005, L.N 299/2003 and Article 10.4 'Instructions to Tenderer';
- having noted the fact that Norcontrol IT / Ericsson's tender, including annexes and all supporting documents, was submitted in a sealed cardboard carton;
- having examined the contents of Article 10.5 which, *inter alia*, make reference to the fact that "*tenders shall only qualify for consideration if they are submitted in separate packages*" and that appellants had done so but in one sealed cardboard carton;
- having noted that that Norcontrol IT / Ericsson had submitted their bid in the manner they did due to the fact that the appellants contend that tender conditions and regulations made reference to '*separate packages*' and not to '*sealed separate packages*';
- having considered the appellants' legal representative's reference to the official definitions of the word '*package*';

- having also noted the fact that while the appellants' legal representative may have justifiably referred to the fact that this Board should consider the relevant interpretation of the contents forming part of this document rather than an accepted norm;
 - having analysed the content of para. 2 of Regulation 102 of the Public Contracts Regulations 2003;
 - having obtained enough assurances from different witnesses that all the other bidders had submitted their offers in three separate sealed packages and that on a separate occasion the same Company had also submitted separate sealed packages;
 - having observed that members of the Evaluation Committee had signed the appellants' bid in order to prove that the binders / files were not sealed;
- (a) feels that para. 2 of Regulation 102 of the Public Contracts Regulations 2003 and Article 46 of the Special Conditions referring to Part XII of the same regulations are clear in both content and substance,

also

- (b) considers the fact that irrespective of how much one can try to formally define the word '*package*', the very fact that there is a '*three package system*' wherein only those tenders submitted in separate packages shall qualify is self-explanatory and the fact that, on this particular occasion, a tenderer has fallen short of properly understanding the spirit behind a system, does not mean that general praxis which are clear to one and sundry have to be modified in this particular instance, creating a precedent in the process, albeit the appellants' action may be based on a genuine premise.

As a result, this Board reached the conclusion that the decision taken by the Contracts Committee following recommendations made by the Evaluating Committee, was justified and, in consequence, the Board decided to reject the appellants' objection.

Alfred R. Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

Date: 31st August 2005