

## **PUBLIC CONTRACTS APPEALS BOARD**

### **Case 69**

#### **CT 2187/2005 Advert No 100/2005 - Provision of Training Services in Waste Management for Local Councils and SMEs**

This call for tenders, published in the Maltese Government Gazette on 8<sup>th</sup> April, 2005 was issued by the Contracts Department following a request transmitted to the latter by WasteServ Malta Ltd.

The closing date for this call for offers was 31<sup>st</sup> May, 2005 and the global estimated value of the contract was Lm 30,255 including VAT.

Four different tenderers submitted their offers.

Following receipt by the appellants of a formal notification (dated 03.02.2006 sent by the DG - Contracts) of the recommendations made by the Evaluation Board, The Malta Institute of Management, filed an objection on 9<sup>th</sup> February, 2006 against the intended award of the said tender to Med Ecology Foundation & Partner (Lm 25,594.40 VAT excluded).

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Edwin Muscat, respectively, acting as members, convened a public hearing on 16.03.2006 to discuss this objection.

Present for the hearing were:

**Malta Institute of Management**

Mr Reuben Buttigieg  
Mr Aldo Vassallo  
Dr Andrew Borg Cardona

**Med Ecology Foundation & Partner**

Mr Darryl Grima

**WasteServ Malta Ltd**

Dr Stefan Frendo

**Evaluation Committee**

Mr Joe Degiorgio	Chairperson
Mr Kevin Mizzi	Secretary
Ing Vincent Magri	Member
Dr Ing Christopher Ciantar	Member
Ing Aurelio Attard	Member

Following the Chairman's brief introduction, the appellants' representatives were invited to explain the motive for their objection.

Dr Andrew Borg Cardona, legal advisor to The Malta Institute of Management, commenced his intervention by stating that on 3 February 2006 the Director General (Contracts) informed his clients that their tender was not successful because their bid-bond was not valid for 90 days as requested in the tender document. He said that clause 4.1 *Tender Guarantee* under '*Instructions to tenderers*' specified that the tender had to be accompanied by a bid bond which '*must remain valid for 90 days beyond the period of validity of the tender.*' Dr Borg Cardona explained that the bid bond submitted did cover the requested 90 days because it was dated 18<sup>th</sup> May 2005 and was thus valid for three months up to 18<sup>th</sup> August 2005. Furthermore, he pointed out that the tender guarantee remained valid during the course of the relevant period because it was always extended before its expiry date. Whilst submitting a copy of all the extensions made by the bank in the interim, the appellants' legal advisor argued that the Bank would not have extended the bank guarantee had the bid bond been invalid.

At this stage, Dr Borg Cardona drew the PCAB's attention to the fact that the wording of clause 4.1 was not "shall be valid at the time of submission for 90 days" but "must remain valid for 90 days beyond the period of validity of the tender" and therefore he contended that his clients' bank guarantee was in conformity with clause 4.1. The appellants' lawyer insisted that if WasteServ Malta Ltd did not want tenderers to misinterpret this clause they should have drafted the '*Instructions to tenderers*' in a clearer and less equivocal manner. Dr Borg Cardona proceeded by claiming that whenever the intended 'spirit' is not bolstered with the wording, then the written condition prevails.

Dr Stefan Frendo, legal advisor to the beneficiary, replied by stating that, from their submission, it was evident that the appellants thought that they had to present a bid bond for a period of 90 days. In actual fact tenderers were obliged to submit a Bank Guarantee for a period of 180 days because *Clause 4.1 Tender Guarantee* specified that it '*must remain valid for 90 days beyond the period of validity of the tender*' and the validity period was defined under Clause 6 wherein it was stipulated that '*Tenderers are bound by their tenders for 90 days after the deadline for the submission of tenders*' which was 31<sup>st</sup> May 2005. It was also claimed that the two clauses, namely 4.1 and 6, could not be interpreted in isolation. Furthermore, Dr Frendo maintained that the bid bond was not valid because when the tenders were opened on 31 May 2005 the document presented by the appellants indicated clearly that the guarantee would have expired on 18 August 2005. Needless to say, contended Dr Frendo, that when evaluating offers, the adjudicators had to ensure that tenderers were compliant *ab initio*.

Mr Edwin Zarb, Director General Contracts, who was the only witness to take the stand in these proceedings, when cross-examined by PCAB members, testified that, strictly speaking, the validity period of the bid bond was 180 days because clause 4.1 specified that it '*must remain valid for 90 days beyond the period of validity of the*

*tender*'. At this stage, Mr Zarb drew the attention of those present that the word 'beyond' had since been changed to 'being'.

The DG (Contracts) asserted that, although in their letter dated 6 February 2006, Bank of Valletta p.l.c. had informed them that the guarantee had been extended up to 18 May 2006, this extension was irrelevant since the bid bond was found to be invalid for 90 days from the deadline (31 May 2005) for submission of tenders because its expiry date was 18<sup>th</sup> August 2005.

Dr Borg Cardona concluded by stating that, given the wording of clause 4.1, his clients were compliant to the tender conditions and therefore should not have been rejected.

Dr Frendo responded that they had to see the 'spirit' behind the submission of the guarantee because, by the same argument brought forward by the appellants, the bid bond would be rendered meaningless.

At this stage, the public hearing was brought to a close and the PCAB proceeded with its deliberations before reaching its decision.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated 9<sup>th</sup> February, 2006 and also through their verbal submissions presented during the public hearing held on 16<sup>th</sup> March, 2006, had objected to the decision taken by the General Contracts Committee, formally communicated via a letter, informing them that the tender submitted by them was not successful;
- having considered the appellants' reasoning as regards the validity period of the tender guarantee, especially their claim that the tender guarantee remained valid (i.e. in conformity with Clause 4.1) during the course of the relevant period because it was always extended before its expiry date;
- having also noted the beneficiary's explanation which was based on the fact that the dossier had requested that tenderers were '*bound by their tenders for 90 days after the deadline for the submission of tenders*' which was 31<sup>st</sup> May 2005;
- having also considered the point raised by the beneficiary's lawyer who argued that the bid bond originally submitted by the appellants was not valid because when the tenders were opened, on 31 May 2005, the document presented by the appellants indicated clearly that the guarantee would have expired on 18 August 2005;
- having taken cognizance of DG Contracts' testimony, particularly, the one referring to the fact that although in their letter dated 6 February 2006, Bank of Valletta p.l.c. had informed them that the (*appellants*) guarantee had been extended up to 18 May 2006, this extension was irrelevant since the bid bond originally submitted with offer was found not to be valid for the full 90 days, i.e. the period of validity of the Tender, commencing from the deadline (31 May 2005) for submission of tenders, because its expiry date was 18<sup>th</sup> August 2005;

- considers that the tenderers should bear the full responsibility for the submission of proper documentation as requested in the Tender Document;
- considers that representatives should make their complete case in favour or against during the formal hearing and therefore has ignored all correspondence received after the public hearing. This Board does not feel that further representations should be made after the holding of such hearing once ample time had been allocated to all interested parties to enable them to prepare for the hearing.

reached the following conclusions:-

1. When the Evaluation Committees conduct their evaluation process they do so by considering the documents made available to them on closing date for the submission of tenders. This Board feels that no tenderer should assume that such a Committee should shoulder the responsibility to ensure that the documents presented to them are what they actually represent. Should similar anomalies be allowed to happen this could possibly give rise to various dangerous interpretations of terms, conditions and regulations, otherwise considered normal and straightforward;
2. The *Tender Dossier* is very clear that the period of validity of the Tender is of three months and consequently the guarantee which is meant to cover the tender is clearly required for the same period;
3. This Board does not feel that the reasoning behind the appellants' argument, namely that the tender guarantee remained valid during the course of the relevant period because it was always extended before its expiry date, can be agreed to as it feels that when the tenders were opened on 31 May 2005 the document presented by the appellants indicated clearly that the guarantee would have expired on 18 August 2005, falling short of the time frame required by the *Tender Dossier*.

Consequent to (1) and (2), the Board upholds the decision taken by the Contracts Committee that appellants' tender should be disqualified.

Furthermore, in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by appellants in terms of regulation 83, should not be refunded.

**Alfred R Triganza**  
Chairman

**Anthony Pavia**  
Member

**Edwin Muscat**  
Member

*March 29, 2006*