

PUBLIC CONTRACTS APPEALS BOARD

Case 71

**RE: CT 2595/2005 – Advert No 343/2005, FTS C 11 - 05
Tender for the Demolition of Existing Building and the Construction of an
Industrial Factory at the Industrial Estate, Luqa**

This call for tenders, published in the Maltese Government Gazette on 29 November 2005, was issued by the Contracts Department following a request transmitted to the latter on 1st November 2005 by the Foundation for Tomorrow's School.

The closing date for this call for offers was 12 January 2006 and the global estimated value of the contract was Lm 92,373.50.

Seven (7) different tenderers submitted their offers.

Following the publication of the Notification of Recommended Tenderers dated 3 February 2006, Messrs Asfaltar Limited filed an objection on 21 February 2006 against the intended award of the said tender to Messrs C & F Building Contractors Ltd (Lm 84,227.39).

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 05.04.2006 to discuss this objection.

Present for the hearing were:

Asfaltar Ltd

Arch Sandra Vassallo	
Mr Paul Magro	
Mr Michael Attard	
Dr Michael Sciriha	Legal Representative
Dr Franco Galea	Legal Representative

Foundation for Tomorrow's Schools (FTS)

Arch Andrew Ellul	Chairman
Mr Chris Pullicino	Member
Mr Ivan Zammit	Member
Dr Claudine Zarb	Legal Representative

Witnesses

Mr Edwin Zarb	Director General, Contracts Department
Arch Leonard Zammit	FTS Regional Architect

After the Chairman's brief introduction, Asfaltar Ltd's representatives were invited by the Board to explain the motive leading to their objection.

Dr Michael Sciriha, legal advisor to appellants, started by criticising the findings and results of the technical report and maintained that the procedure followed by the Adjudication Board was *ultra vires*. He claimed that in the *reasoned letter of objection* dated 27 March 2006 his clients clearly indicated why the technical committee should not have arrived at that decision.

Asfaltar Ltd's legal representative maintained that in spite of the fact that under paragraphs entitled *Bill 2 – Concrete Works* and *Bill 7 Day Works* of the technical report it was stated that '*Before further consideration is given to this bid, Tenderer No 2 is to confirm the rates tendered for items 2.02, 2.04, 2.05 and 2.10 Type C, in particular item 2.70b, which is considered exceptionally low*' and '*Before further consideration, the respective tenderer is required to review his Dayworks rates, since these are considered to be excessively high and not acceptable*' respectively, the matter had never been reverted to Asfaltar Ltd as proposed. Dr Sciriha claimed that the most significant issue was the conclusion reached by the technical report wherein it was stated that '*On the basis of the above, the undersigned requires guidance from the Contracts Committee as to whether the shortcomings of Asfaltar Ltd constitute omissions giving scope to failing the bid. Should the reply be in the affirmative, it is recommended that the tender be awarded to Tender No. 7 – C&F Building Contractors Ltd.*' Dr Sciriha contended that this statement was contradictory because the Adjudication Board made its recommendation and at the same time requested guidance which was never given. He insisted that before submitting its recommendations or reaching a final decision, the Adjudication Board should have first consulted Asfaltar Ltd.

Dr Sciriha said that had such line of action been taken, Asfaltar Ltd would have explained why the rates quoted for the indicated items in respect of concrete works were low. However, he argued that once the workers chosen by Asfaltar Ltd were competent in carrying out masonry works and they had qualified people to control the quality, quantity and type thereof, then the price was the prerogative of the tenderer. Also, Dr Sciriha maintained that they were never given the chance to provide an amplified list of similar projects. Here, he mentioned B'Bugia School as one of the projects carried out by Asfaltar Ltd for the Foundation for Tomorrow's Schools (FTS).

Dr Sciriha said that he was convinced that, if the Adjudication Board had all the facts in its possession, the award of this tender would have been different.

Dr Charlene Zarb, FTS's legal representative, responded by stating that in evaluating Asfaltar Ltd's offer the Adjudication Board took into consideration the following:

- in the ETC Certificate submitted by appellants, no worker was registered as masons even though the nature of works involved was masonry;
- the works indicated by Asfaltar Ltd were all related to resurfacing and road works;

- the technical evaluation of the pre-cast, pre-stressed concrete could not be carried out because, in their offer, Asfaltar Ltd did not specify the supplier or manufacturer nor did they provide any literature. She claimed that the quality of concrete was important because this was an industrial garage.

With regard to the issue of clarifications mentioned by the appellants' lawyer, Dr Zarb pointed out that FTS could only approach the tenderers through the General Contracts Committee (GCC). She claimed that Asfaltar Ltd could have been clearer in the documents presented.

Arch Andrew Ellul and Mr Chris Pullicino, both representing the Foundation, remarked that the decision was not made by the Adjudication Board but by the GCC. Mr Pullicino maintained that when both the Adjudication Board's and Technical Advisor's reports were referred to the GCC with the shortcomings of Asfaltar Ltd they could have asked them to seek clarifications but the matter was never referred back to them. At this point the PCAB drew Mr Pullicino's attention to the fact that the Adjudication Board, however, should have first sought all necessary clarifications from the tenderer through the GCC and then, after obtaining the required clarifications, should have provided same with a definite recommendation regarding the final decision. It was emphasised that it was the technical people who had to guide the GCC and not the other way round!

In reply to a specific question by the PCAB, Mr Pullicino clarified that in their report it was stated that C&F Building Contractors Ltd '*has generally complied with the Specifications and Conditions of the Tender Document*' because they submitted all the information which was considered important for masonry works, such as, the technical details of the pre-cast pre-stressed concrete slabs and the list of similar projects.

The first witness to take the stand was Arch Leonard Zammit, who was FTS's Regional Architect and who drew the Technical Report.

On cross-examination by the PCAB, Arch Zammit testified that one of the reasons why Asfaltar Ltd's tender was not accepted was that they failed to submit a list of similar projects as requested in the Tender Document. He said that the list submitted consisted of a number of contracts for the re-surfacing of roads. Here, Architect Sandra Vassallo, representing the appellants, intervened by stating that they only gave the general title of the contracts and that certain works carried out under the 5th Italian Protocol included demolition works. However, she acknowledged that they should have indicated the works carried out at B'Bugia School.

With regard to the issue of masons, Arch Zammit declared that although it was not specified in his report, in the ETC Certificate that was submitted with the tender, C & F Building Contractors Ltd's workers were indicated as masons. At this point, Dr Sciriha explained that when he personally sought verifications from the ETC, one of the latter's officials informed him that a 'mason' could be registered either as a *skilled labourer* or as a *mason*. He said that masons employed by both the contractors in question were registered as *skilled labourers* with ETC.

As regards paragraph entitled *Clause 1.08.5 – ETC Certificate* of the Technical Report wherein it was stated that C & F Building Contractors had *'119 workers employed on its payroll and intends to employ nine skilled and 5 unskilled workers which are sufficient to carry a project of this magnitude'*, Arch Zammit clarified that these workers were going to be taken from their own existing workforce. It was pointed out that the wording was misleading because it could also be construed as referring to additional workers being employed specifically for this project.

On cross-examination by the PCAB, Mr Edwin Zarb Director General Contracts, testified that, in spite of the fact that the Adjudication Board was requested *'to seek guidance from the Contracts Department as to whether the shortcomings so mentioned constitute omissions giving scope to failing the bid'*, the General Contracts Committee was still in a position to decide because it took into consideration the FTS's Technical Advisor's concerns relating to Asfaltar Ltd's offer. Furthermore, one had to remember that there was a recommendation for the award of the tender. The DG Contracts added that the appellants' offer was not accepted mainly due to lack of experience in carrying out projects of a similar nature and for not having any masons in its records. When asked to confirm whether clarifications should be sought before submitting the final report, Mr Zarb replied that each case had to be considered on its own merits.

Replying to a specific question by Dr Sciriha, Mr Zarb said that, by the statement that *'C & F Building Contractors Ltd intends to engage nine skilled and five unskilled workers on the project which is acceptable'*, the GCC understood that these employees were going to be utilized from the tenderer's existing workforce. Also, the witness confirmed that although there could be instances where they might have needed to check certain things, yet, all in all, they relied on the Adjudication Board's reports.

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 21 February 2006 followed by a further 'clarification letter' dated 27 March 2006, and also through their verbal submissions presented during the public hearing held on 5th April, 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 conclusion reached by the technical report wherein it was stated that *'On the basis of the above, the undersigned requires guidance from the Contracts Committee as to whether the shortcomings of Asfaltar Ltd constitute omissions giving scope to failing the bid'*;
- having also noted Dr Sciriha's contention that, whilst the Adjudication Board made its recommendation, yet, at the same time, it also requested guidance from the Contracts Committee which guidance was never given by the latter;

- having also considered the appellants' legal representative's insistence regarding the fact that before submitting its recommendations or reaching a final decision, the Adjudication Board should have first consulted Asfaltar Ltd;
- having also considered Dr Sciriha's arguments with regards to the fact that had the Adjudication Board consulted the appellants, the latter would have explained why the rates quoted for the indicated items in respect of concrete works were low;
- having taken cognizance of the appellants' legal representative's point regarding the fact that subject to a tenderer having qualified people to control the quality, quantity and type thereof, then the price is to be regarded as the sole prerogative of the tenderer;
- having also examined Dr Zarb's statement with regards to considerations made (in respect of (i) registered workers, (ii) previous similar work carried out, (iii) mentioning of supplier/s *or* supply of corroborating operational literature) by the Adjudication Board when evaluating the appellants' offer;
- having also given due consideration to Dr Zarb's reference to the fact that the Adjudication Board could only approach the tenderers through the General Contracts Committee (GCC) and that Asfaltar Ltd could have been clearer in the documents presented;
- having heard the Foundation's representatives claim that they never followed up what was happening as they felt that the GCC should get in touch with them and, this, when they had requested guidance when submitting their 'so-called' recommendation which, albeit it was considered as a report seeking further guidance by the Adjudication Board, yet this same report was construed by the GCC as being a final recommendation coming from the Adjudication Board;
- having pronounced itself during the same hearing that it is considered normal praxis, in similar instances, for Adjudication Boards to first seek all necessary clarifications from the tenderer through the GCC and then, after obtaining the required clarifications, it should provide same with a definite recommendation regarding the 'final decision' reached;
- having noted Arch Zammit's evidence;
- having also taken cognizance of Arch Vassallo's (i) points made in connection with the general title of the contracts as well as (ii) the fact that certain works carried out under the 5th Italian Protocol included demolition works, and (iii) the fact that, in her own admission, in their offer, the appellants should have indicated the works carried out at B' Bugia School;
- having duly considered Dr Sciriha's explanation regarding the fact that ETC officials consider a 'mason' as possibly being registered either as a '*skilled labourer*' or as a '*mason*' and that masons employed by both the contractors in

question were registered as skilled labourers with ETC;

- having considered the DG Contracts' statement concerning the fact that the appellants' offer was not accepted mainly due to lack of experience in carrying out projects of a similar nature and that although there are instances where the GCC may have to check certain things, yet, all in all, this relies on an Adjudication Board's report to reach its decision/s;

reached the following conclusions:-

1. As corroborated by the DG Contracts himself as well as emphatically stated by this Board, it should be the technical people who should guide the GCC and not the other way round. Furthermore, this Board cannot accept the fact that a decision was taken by the GCC when according to the Adjudication Board representatives the report upon which the decision was taken was inconclusive as the latter were still seeking guidance from the same GCC.
2. One should bear in mind that pertinent clarifications should have been made by the Adjudication Board at deliberation stage rather than first recommending the way forward subject to a further 'guidance' still being sought thus reducing the procedure to a mere shambles.
3. Considering the fact that the Adjudication Board sent a report to the GCC which, according to the Board itself, was still not the final one but which included 'recommendations', albeit based upon matters which still warranted clarification subject to 'guidance', it is evident that the GCC could have easily been misled as to what the report actually meant to imply.

Pursuant to (1) to (3) above, this Board finds in favour of the appellants and, as a result, does not uphold the decision taken by the Contracts Committee and recommends that further clarifications be sought from appellants prior to conclusive recommendations being made by the Adjudication Board to the Contracts Committee.

Furthermore, in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by appellants in terms of regulation 83, should be refunded.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

April 28, 2006