

## PUBLIC CONTRACTS APPEALS BOARD

### Case 81

#### **CT 2525/2005 – Tender for the Reconstruction of Manuel Dimech Bridge, M.A. Vassalli Road, St. Julians**

This call for tenders which is meant to follow the three-package system, was published in the Maltese Government Gazette on 15.11.2005 and was issued by the Contracts Department following a request transmitted to the latter on 27.09.2005 by the Ministry for Urban Development and Roads.

The closing date for this call for offers was 02.02.2006 and the global estimated value of the contract was Lm 2,370,000 (including VAT).

Six (6) different tenderers submitted their offers.

Following the completion of the opening of the second envelope, Messrs **BCP Joint Venture** filed an objection on 18.05.2006 against the General Contracts Committee's decision to include tenderers 1, 3 and 4 for the opening of their financial proposal.

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 02.06.2006 to discuss this objection.

Present for the hearing were:

#### **BCP Joint Venture (Tenderer No 6)**

Dr Kenneth Grima LL.D  
John L Gauci B.A., Dip. Not. Pub.  
Mr Emmanuel Bonnici  
Mr Ray Sammut A&CE  
Mr Malcolm Gingell A&CE

#### **Massano Srl and SISEA S.p.A (Tenderer No 1)**

Dr Michael Sciriha LL.D.  
Dr Franco Galea LL.D.  
Arch Sandra Vassallo A&CE

#### **Malta Bridge Joint Venture (Tenderer No 3)**

Dr Joseph Fenech LL.D.  
Arch. Edgar Caruana Montaldo A&CE  
Mr Daniel Farrugia  
Mr Emanuel Vella

#### **Elbros Construction Ltd (Tenderer No 4)**

Arch Stephen Grech A&CE  
Mr Jimmy Calleja

At the beginning of the hearing the Chairman PCAB stated that the sole scope of this hearing was not to discuss the objection filed by BCP Joint Venture but to establish whether, in terms of the governing regulations, the appellants' complaint was admissible or not. The Board would rule on this issue which would decide whether the substance of the appeal could be investigated further. Following this, the representatives of BCP Joint Venture were invited to elaborate on this issue.

Dr Kenneth Grima, Tenderer No 6's, or rather BCP Joint Venture's legal representative, explained that they decided to file the objection because, except for his clients, none of the other three tenderers (i.e. Massano Srl and SISEA S.p.A (Tenderer No 1), Malta Bridge Joint Venture (Tenderer No 3) and Elbros Construction Ltd (Tenderer No 4)), who were short-listed for the final stage of the evaluation process, namely the financial package, was compliant with the requirements of the Tender *dossier*. Dr Grima said that in spite of the fact that bidders were obliged to submit a sample of the proposed 'expansion joint' and must have had experience in at least two similar projects, none of these tenderers submitted the requested sample and had experience in the construction of 'post-tensioned bridges'. He contended that, as a consequence, their bids should have been disqualified and should not have been allowed to proceed to the opening of their financial proposal because at this point the contract would be awarded to that tenderer who had the cheapest offer. Furthermore, Dr Grima said that if they did not take such line of action at this stage of the evaluation process they would be accepting that all short-listed tenderers were compliant.

When, upon being requested by the PCAB, Dr Grima confirmed that the complaint was submitted in terms of **Regulation 82 - *Separate Packages in tender offer***, the Chairman, PCAB quoted textually clauses 3 and 4 under this regulation, which specified that:

*'(3) Any decision leading to the discarding of any tender during any stage of the process is to be given publicity at the office of the contracting authority or at the Department of Contracts as the case may be and the affected tenderer is to be informed of the decision within two working days of its publication.*

*(4) A complaint by the affected tenderer and any person having or having had an interest in obtaining a particular public contract must reach the Department of Contracts or the contracting authority involved, as the case may be, within four working days from the date of notification of the decision and such complaint shall be accompanied by a deposit of 0.5% of the estimated tender value, which deposit shall only be refundable if the Appeal Board finds in the tenderer's or other person having or having had an interest in obtaining a particular public contract's favour:*

*Provided that the deposit shall in no case be less than Lm250 or more than Lm 25,000'*

The PCAB claimed that, in view of the fact that none of the tenders involved was discarded, including the appellants' tender, it was doubtful whether it was the competent entity to discuss such appeal at this stage. The PCAB drew the attention of

the appellants' legal representative that it was not the competence of the PCAB to discard any tender and that its main role was to ensure that the proper procedure had been followed and that the tendering/awarding process was transparent. Thus, considering the fact that the tender has not yet been awarded, it was questionable whether it was the right moment to appeal.

However, Dr Grima reiterated that this was the appropriate time for filing such a complaint because at the final stage the contract would be awarded on basis of price. The PCAB took note of the appellants' legal advisor and drew his attention that awards of tenders are considered holistically and not solely on 'price'.

In his intervention, Dr Michael Sciriha, legal representative for Tenderer No 1, asserted that BCP Joint Venture had no right to appeal at this stage because their tender was not discarded. He pointed out that according to Regulation 82 only those tenderers whose bids have been discarded had a right to 'appeal' or complain. Also Dr Sciriha maintained that such objection could only be discussed at 'awarding stage'. Thus, he contended that the appeal was inadmissible. Dr Sciriha claimed that clauses 3 and 4 mentioned earlier during the hearing were relevant, however, in his opinion the most significant clause was No 6 because it specified that *'The procedure to be followed by the Board when carrying out the review shall consist in a complete and detailed re-examination of the reasons brought forward by the adjudication board of any department or contracting authority for the discarding of any particular tender.'*

With regard to what was stated by Dr Grima regarding the samples and tenderers' experience, Dr Sciriha claimed that the appellants' intention was to acquire information as to how the other bidders tendered. He maintained that, as a general principle, during the evaluation process no one had a right for such information.

Dr Grima responded by stating that the right of appeal was stipulated by clause 4 under Regulation 82 because it was not only the *'affected tenderer'* who had a right to complain but also *'any person having or having had an interest in obtaining a particular public contract.'* Apart from this, the appellants' legal representative maintained that their complaint fulfilled the provisions of clause 3 because there was a *'decision leading to the discarding of any tender'* (two out of six tenders were discarded). He emphasised that there was nothing in the law which stipulated that a tenderer whose tender was not discarded could not complain. Furthermore, the appellants' lawyer said that according to clause 5 *'the review is to be effected by the public contracts Appeals Board before the next stage of the adjudication process is commenced.'* Therefore, Dr Grima insisted that on the basis of the above and considering the fact that the appellants had explained the grounds on which they based their objection, they had a right to be heard by the competent adjudicating body, namely the PCAB, and a right for its decision.

In his concluding remarks, Dr Sciriha contended that, in accordance with the procedure specified in clause 6 of Regulation 82, the PCAB had no right to disqualify any tenderer from the tendering process. Furthermore, he said that the appellants had no right to appeal at this stage because according to clauses 3 and 4 it was the *'affected tenderer'*, that is, the tenderer whose tender had been discarded, who had a

right to complain. Therefore, once the appellants' tender had not been discarded they had no right to appeal at this stage.

Finally he pointed out that an appellant could disqualify himself from appealing in terms of Regulation 83 because clause 10 specified that, *'Any tenderer or any other person having or having had an interest in obtaining a particular public contract whose complaint under this Part is not upheld shall not have the right to have recourse to the procedure for appeals as provided for in Part XIII'*.

Dr Grima said that once their right of appeal was contemplated under Regulation 82, they had a right for a decision. He reiterated that only his clients' tender was fully compliant and therefore the other tenderers should not have been allowed to proceed to the final stage.

The Chairman PCAB concluded by stating that the decision would be based on what was discussed during this hearing and that it would reflect the way forward.

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 18.05.2006, and also through their verbal submissions presented during the public hearing held on 02.06.2006, had objected to the decision taken by the General Contracts Committee's decision to include tenderers 1, 3 and 4 for the opening of their financial proposal;
- having taken into consideration the fact that that the scope of this hearing was not to discuss the objection filed by BCP Joint Venture but to establish whether, in terms of the governing regulations, the appellants' complaint was admissible or not since, according to the PCAB, it was still uncertain whether this Board was the competent entity to discuss such appeal at this stage;
- having considered the fact that the appellants' tender was, as a matter of fact, not discarded;
- Having noted that the scope of the appeal was not to discuss the grounds upon which two tenderers had been discarded but to ask the board to discard tenderers who were still in the running;
- having also noted the appellants' legal representative's claim that except for his clients, none of the other three tenderers who were short-listed for the final stage of the evaluation process, namely the financial package, was compliant with the requirements of the Tender *dossier*;
- having also considered the appellants' claim that this was the appropriate time to file such a complaint because at the final stage the contract would be awarded on basis of price;

- having taken cognizance of both (a) Tenderer No. 1's legal representative who claimed that BCP Joint Venture had no right to appeal at this stage because their tender was not discarded and that according to Regulation 82 only those tenderers whose bids have been discarded had a right to 'appeal' or complain, as well as (b) the appellants' claim that according to clause 4 under Regulation 82 ... it was not only the '*affected tenderer*' who had a right to complain but also '*any person having or having had an interest in obtaining a particular public contract.*';
- having further noted Dr Sciriha's remark which claimed that, in accordance with the procedure specified in clause 6 of Regulation 82, the PCAB had no right to disqualify any tenderer from the tendering process

reached the following conclusions:-

1. The PCAB feels that with regards to the complaints procedure to be followed under Regulation 82 (L.N. 177 of 2005), it seems that the general spirit of the regulations suggest that this procedure is there to provide a mechanism whereby a tenderer who has been discarded before the actual award of the tender can 'appeal' or complain about that decision. Yet, this same Board of Appeal also feels that this right to complain is not available only to the discarded tenderer – the wording of the regulation in fact says "*a complaint by the affected tenderer and any person having or having had an interest in obtaining a particular public contract.*" Therefore, clearly, it is not only the discarded tenderer who can complain.
2. However, the PCAB also feels that, when assessing such a complaint, it has to follow the specific procedure mentioned in the regulations. In its opinion, this consists in a complete and detailed re-examination of the reasons brought forward by the adjudication board of any department or contracting authority for the discarding of any particular tender. As a consequence, it is evident enough that the competence of the PCAB at this stage is solely limited to reviewing the reasons why a particular tender has been discarded and not the reason why other tenderers have not been similarly discarded.
3. Finally, congruent to point '2' above, this Board's opinion is that this procedure is simply a mechanism to review the reasons why a tenderer has been discarded and, in these circumstances, the PCAB is of the opinion that it does not have the right to disqualify any tenderers from the tender process.

Pursuant to (1) to (3) above, this Board cannot uphold the appeal lodged by the appellants and recommends that the adjudication process of this tender will proceed forthwith.

In view of the fact that this Board recognises that by deliberating and pronouncing itself in terms of (1) to (3) above, this objection is being considered only as a finite preliminary hearing following which the same Board decided that there was no further

scope for it to convene further formal hearings in regard, the PCAB feels that, under these circumstances, it would be only just for it to recommend that the deposit submitted by appellants on lodging the objection, should, in this exceptional case, be fully refunded.

**Alfred R Triganza**  
Chairman

**Anthony Pavia**  
Member

**Edwin Muscat**  
Member

*June 12, 2006*