

## **PUBLIC CONTRACTS APPEALS BOARD**

### **Case 83**

#### **CT 2389/2005, Advert No 345/2005 - Tender for Digital CCTV Security System for Maltese Ports, Harbours and Bays**

This call for tenders was published in the Maltese Government Gazette on 9 December 2005 and was issued by the Contracts Department following a request transmitted to the latter by the Malta Maritime Authority.

The closing date for this call for offers was 31 January 2006 and the global estimated value of the contract was Lm 170,940 (excluding VAT).

Eight (8) tenderers submitted their offers but two (2) were considered by the Evaluation Committee as being “non-compliant” and were “not to be considered further”.

Following the receipt of notification dated 17 May 2006 from the DG Contracts in which the latter stated that “the Evaluation Committee had recommended that the contract should be awarded to CSS Ltd & Global Technical Ltd.”, Messrs **Alberta Fire & Security Equipment Ltd** filed an objection on 5 June 2006 against the intended award of the said tender to Messrs **Central Security Services Ltd and Global Technical Ltd** (Lm 158,922.63).

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 28 June 2006 to discuss this objection.

Present for the hearing were:

#### **Alberta Fire & Security Equipment Ltd**

Mr Charles Camilleri  
Mr Duncan Barbaro Sant  
Dr Christian Farrugia LL.D.

#### **Central Security Services Ltd and Global Technical Ltd**

Mr Mario Cardona  
Dr Carlo M Vigna LL.D.  
Dr John Victor Mizzi LL.D.  
Mr David Vousdon

#### **Malta Maritime Authority**

Dr Franco Vassallo LL.D.

#### **Evaluation Committee**

Mr Frank Galea - Chairman  
Mr Jonathan Muscat - Secretary  
Mr John Galea - Member

Following his introduction to the case, the PCAB's Chairman invited Messrs Alberta Fire & Security Equipment Ltd's (the appellants) representatives to explain the motive of their objection.

## **1.0 GROUNDS OF OBJECTION**

Dr Christian Farrugia, the appellants' legal representative started by stating that his clients' objection was mainly based on (a) the recommended tenderer's ineligibility to participate in the tendering process, (b) the fact that the warranty cost was incorrectly calculated and (c) the fact that, in the appellants' opinion, both the technical and financial evaluation were conducted in an unsatisfactory manner.

### **1.1 RECOMMENDED TENDERER'S INELIGIBILITY TO PARTICIPATE IN THE TENDERING PROCESS**

Dr Farrugia contended that the successful bidders, acting as joint ventures, namely *Central Security Services Limited* and *Global Technical Limited*, should have been disqualified from the tendering process by the Evaluation Committee from the outset because they lacked the required qualifications to participate in the tender.

He quoted particular sections of the Tender Document, namely:

3.5 *'To be eligible for participation in this tender procedure, tenderers must prove to the satisfaction of the Contracting Authority that they comply with the necessary legal, technical and financial requirements and have the wherewithal to carry out the contract effectively.'* and

18.2 *'...Each member of such joint venture or consortium must provide the proof required under Article 3.5 as if it, itself, were the tenderer.'*

The appellants' legal representative argued that, on the basis of the above, in the case of a joint venture participating in the tender, each member had to qualify on one's own merits as if they had individually submitted the tender on their own behalf. As far as the recommended bidders were concerned, Dr Farrugia maintained that the members of the joint venture did not have the necessary financial and technical capacities.

The appellants' legal representative continued by stating that Section 11.12 of the Tender Document *inter alia* stipulated that:

*'In terms of Legal Notice 177/2005, Article 50, the Contracting Authority requires evidence of candidates' or tenderers' financial and economic standing. The Contracting Authority requires that Bidders must have an annual turnover for the years 2002, 2003 and 2004 at least three times the budgeted amount of this tender procedure.'*

He explained that this meant that the annual turnover for the years indicated had to amount to approximately Lm 510,000 (Lm 170,940 x 3). He maintained that *Central Security Services Ltd* could not have been in a position to provide the Contracting Authority with evidence of the requested annual turnover for the years 2002, 2003 and

2004 in terms of this requirement because it was formed in November 2005 and therefore had no track record.

As far as *Global Technical Ltd* was concerned, Dr Farrugia said that whilst, according to Dun & Bradstreet’s report, (a copy of which was tabled during the hearing) the Company’s turnover for 2005 amounted to Stg 273,103, no turnover figures were reported for the years 2002 to 2004. He said that in view of the fact that in 2002 the company was considered as ‘Small & Exempt’, the turnover should have been less than the amount indicated for 2005.

At this point the Malta Maritime Authority’s (MMA) representatives exhibited copies of Global Technical Ltd’s legal documents that were submitted with its tender and the relevant document showed that its annual turnover was as follows:

	Year 2002	Year 2003	Year 2004
	Stg	Stg	Stg
UK Office	350,000	390,000	450,000
China Offices	250,000	340,000	390,000
	<u>600,000</u>	<u>730,000</u>	<u>840,000</u>

Dr Farrugia intervened and pointed out that these amounts showed that Global Technical Ltd were not financially compliant.

As far as the technical aspect was concerned, the appellants’ lawyer claimed that Section 11.10A stipulated that ‘*prospective tenderers are to demonstrate their track record in installing systems of a similar nature in a port or coastal environment during the years 2002, 2003 and 2004.*’ He maintained that at least one of the companies surely could never have been technically compliant.

Dr Franco Vassallo, the MMA’s legal representative responded by stating that the appellants gave a literal interpretation of the tender document and that the only logical interpretation of section 18.2 was that it was the consortium or joint venture and not the individual partners that had to have the capability of fulfilling the requirements of the tender. He maintained that it was inconceivable to expect an agent to have the same capabilities as those of its principal. Dr Vassallo claimed that in spite of the fact that Central Security Services Ltd was formed in 2005, the consortium was recommended for award after taking into consideration Global Technical Ltd’s track record. Furthermore, he contended that the recommended tender in general was compliant with what was requested in the tender dossier.

Mr John Galea, a member of the Evaluation Committee, was the main and only witness to give his testimony in these proceedings. On taking the witness stand, Mr Galea said that the contract was EU funded and that if the project was not implemented by October 2006, Malta could lose such funds.

The witness pointed out that none of the tenderers was fully compliant with the tender specifications. He said that the annual turnover of the recommended successful tenderer was related to the product offered as stipulated under Section 11.12 (C)

whereby tenderers were requested to present '*a statement of the undertaking's turnover and its turnover in respect of the products, works or services to which the contract relates for the years 2002, 2003 and 2004.*' When specifically asked to indicate where it resulted that the turnover declared by Global Technical Ltd was related to CCTVs, Mr Galea replied by stating that this was due to the fact the this company was involved solely in this type of business. Here, Dr Vassallo remarked that the appellants had submitted their general turnover and did not state '*their turnover related to the proposed bid*' as requested in section 11.10 B.

At this point the PCAB suggested that the interpretation of Section 11.12 (C) was that, apart from the global annual turnover, bidders were also required to submit a statement of their turnover *vis-à-vis* CCTVs only in order to have an indication of the amount generated from CCTVs out of the global turnover. Dr Vassallo corroborated with this interpretation.

However, Dr Farrugia said that his interpretation was different because in Section 11.12 tenderers were requested to provide their annual global turnover for the years 2002, 2003 and 2004 and that bidders needed only to submit one of the requested statements as evidence of annual turnover. He explained that in this section it was stipulated that the requested annual turnover

*'... may be furnished inter alia, by one or more of the following*

*A) appropriate statements from bankers;*

*B) presentation of the undertaking's balance-sheets or extracts therefrom, where publication of the balance sheets is required under company law in the country in which the undertaking is resident;*

*C) a statement of the undertaking's turnover and its turnover in respect of the products, works or services to which the contract relates for the years 2002, 2003 and 2004.'*

On cross-examination by the PCAB, Mr Galea testified that both tenderers were technically compliant.

## **1.2 WARRANTY COST INCORRECTLY COMPUTED WITH MAINTENANCE COST**

Dr Farrugia said that, for some unknown reason, the Evaluation Committee unjustly computed and added the equipment warranty cost (Lm 6,250) to the maintenance cost quoted (Lm 1,200 x 3 = Lm 3,600). He insisted that the cost of this warranty should have never been added to the maintenance cost because the former was a one-off payment and the latter was a recurring cost. The appellants' lawyer maintained that, if at all, the warranty cost should have been computed as part of the equipment cost because it was intrinsically related to the equipment. He claimed that such line of action affected the scoring and therefore should be recomputed. They were confident that this revision would lead to Alberta Fire & Security Equipment Ltd's offer being considered the most advantageous.

Furthermore, Dr Farrugia said that the appellants submitted a warranty period of 18 months, even though *Section 24.1* under *Warranty Period* of the tender document specified a period of 12 months.

On cross-examination by the appellants' representatives, Mr Galea confirmed that the amount of Lm 4,750 included against Central Security Services Limited and Global Technical Ltd on page 6 of 8 of the Evaluation Report consisted of maintenance cost only while the amount of Lm 9,850 included under maintenance against Alberta Fire & Security Equipment Ltd included warranty cost (Lm 6,250).

When the witness said that there was no line item for warranty in the other bidders' offers, his attention was drawn to the fact that according to *Section 7 Miscellaneous of Annex F – Bills of Quantities*, bidders were requested to indicate the price of the warranty separately. As far as the successful bidder was concerned, it had been indicated that Item 61 *Hardware Warranty for all hardware (1 year)* was 'free of charge'.

When asked to state whether the maintenance cost of all bidders was computed for three years, the reply given was in the affirmative.

Also, during his testimony, Mr Galea said that the percentage weightings for the 'Technical' and 'Financial' Offers were 60% and 40% respectively. He explained that the score difference between the equipment (16) and maintenance (24) in respect of the Financial Offer was intended to keep maintenance cost as low as possible. Dr Vassallo pointed out that whilst the EU would finance the procurement of equipment, the Malta Maritime Authority would be paying for the maintenance costs. Here, the PCAB noted that, as regards the weightings in the tender, after taking into consideration the difference between these two bids and the maintenance cost, the Authority would not be in a position to recoup such a difference within the lifespan of equipment (5/6 years).

### **1.3 UNSATISFACTORY TECHNICAL AND FINANCIAL EVALUATION**

Dr Farrugia said that Section 20.6 of the Tender Document specified that '*The contract shall be awarded to an administratively and technically compliant tender that is the most economically advantageous taking into account the quality of the works, supplies and services offered and the price of the tender.*' He said that in a fax received from the Department of Contracts on the 24<sup>th</sup> May 2006, the financial difference between these two bids for equipment was significant – the appellants' and the recommended tenderer's offers amounted to Lm 136,070.59 (including warranty cost) and Lm214,154 respectively. Furthermore, Dr Farrugia said that his clients failed to understand how, in spite of the fact that in his testimony, Mr Galea declared that both systems were technically compliant, the recommended tenderer obtained 60 points and his clients were awarded 48 points only.

Dr Vassallo responded by pointing out that the Evaluation Committee based its weightings according to the criteria established by the Department of Contracts. The percentage weightings for each criterion were indicated in the tender document under Clause 20.6 – Award criteria. The Authority's legal representative said that the financial difference referred to by the appellants' lawyer was reflected in the

weightings because Alberta Fire & Security Equipment Ltd were awarded 16 points while the successful tenderer was given 9.7 points. However, he claimed that the weighting criteria had to be taken into account holistically and the overall score indicated that the offer of the successful bidder was the most economically advantageous.

Dr Vassallo contended that, in view of the fact that the Digital CCTV System related to the security of the country, in the evaluation process, emphasis was given to the continuation of a reliable service, maintenance and track record of the tenderers. He remarked that the successful tenderer proposed to employ a person to carry out weekly maintenance on the system while the appellants offered maintenance support every six months. In reply to a specific question by the PCAB, Dr Vassallo confirmed that the frequency was a criterion of the Evaluation Committee and not included in the tender document. However, the PCAB felt that, once the system was considered important for the security of the country, the frequency of maintenance should have been specifically mentioned in the tender document.

In his testimony on this issue, Mr John Galea said that in their evaluation they used the *Pairwise Comparison Method* whereby each evaluator took a criterion and evaluated one bidder against the other.

On the PCAB's request, the witness highlighted the major differences in the percentage weightings given to the two bidders for their technical offer as shown in the relevant table included in the Evaluation Board's report. He said that the difference in the *Maintenance Methodology (Routine/Periodical)/ Implementation Methodology* was due to the frequency of the maintenance proposed.

## **2.0 CONCLUDING REMARKS**

In his concluding remarks, Dr Farrugia said that they acknowledged that tenders were not to be solely adjudicated on the lowest price principle, but one has to ensure that the difference in the points adjudicated by the Evaluation Committee was justified.

Dr Vassallo maintained that he was convinced that the Evaluation Committee evaluated all offers correctly and that the successful tenderers's bid was a proven system.

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 13 June 2006, and also through their verbal submissions presented during the public hearing held on the 28 June 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' legal representative's argument that in the case of a joint venture participating in a tender, each member had to qualify on one's own merits, namely, as if one would have individually submitted the tender on one's own behalf;
- having also noted the MMA's legal representative's reply wherein he stated that it was the consortium or joint venture and not the individual partners that had to have the capability of fulfilling the requirements of the tender;
- having also considered Dr Vassallo's remark relating to the fact that, according to him, it is inconceivable to expect an agent to have the same capabilities as those of its principal;
- having noted that according to a key witness, Mr John Galea, a member of the Evaluation Committee, none of the tenderers was fully compliant with the tender specifications;
- having also considered (a) Mr Galea's testimony relating to the fact that Global Technical Ltd's entire business activity and corresponding turnover originated from the sale of CCTV sales only and (b) Dr Vassallo's remark that the appellants had submitted their general turnover and did not state '*their turnover related to the proposed bid*' as requested in section 11.10 B, both claims not contested by appellants. Indeed Dr Farrugia went on to place emphasis on the fact that, in Section 11.12, tenderers were requested to provide their annual global turnover for the years 2002, 2003 and 2004;
- having already expressed, during the public hearing, its interpretation of Section 11.12 (C), namely that, apart from the global annual turnover, bidders were also required to submit a statement of their turnover *vis-à-vis* CCTVs only in order to have an indication of the amount generated from CCTVs out of the global turnover;
- having (a) first heard Mr Galea testify that both tenderers were technically compliant, (b) subsequently noted Dr Farrugia's remark that in spite of this, the recommended tenderer obtained 60 points and his clients were awarded 48 points only and finally (c) having also considered the point raised by the Authority's legal representative who said that the financial difference referred to by the appellants' lawyer was reflected in the weightings because Alberta Fire & Security Equipment Ltd were awarded 16 points while the successful tenderer was given 9.7 points;
- having noted Dr Vassallo's argument as regards the different approaches submitted by bidders to the maintenance support requirements,
- having also noted Mr Galea's explanation regarding the fact that the major differences in the percentage weightings given to the two bidders for their technical offer was due to the frequency of the maintenance proposed which, although not specifically requested in the Tender Document, yet, it was a fact that anyone providing a better maintenance support arrangement would have been given some preferential consideration

reached the following conclusions:-

1. As regards the first argument brought forward by the appellants alleging that the proposed successful tenderer should be ineligible to tender, the PCAB having examined the wording of the tender specifications feels that there is a degree of ambiguity which was amply reflected in the arguments brought forward by the two sides during the hearing. However the objective of the specifications was very clear in that the tender should only be granted to an entity which can show that they have an adequate track record both as regards financial solidity and their technical capabilities. Having noted the evidence given by Mr. John Galea that none of the tenderers had fully satisfied the tender specifications the Board considers that from the gist of the evidence given during the hearing it emerged clearly that both tenderers were *substantially* compliant with the specifications and therefore decides not to uphold the first argument of the appeal.
2. As regards the warranty cost, the Board considers that since this is a one time only cost it cannot be regarded as a maintenance cost. The weightings given in this respect are therefore clearly erroneous and should be worked out again by the Evaluation Board.
3. As regards the weighting given in respect of the frequency of maintenance visits, the PCAB cannot agree with the method of assessment adopted by the Evaluation Board once there was nothing in the specifications regarding such frequency of visits. The *evaluation grid* includes a specific item where marks can be given for performance over minimum requirements. If the tendering Authority feels that the increased frequency of visits is desirable, the marks should be awarded in the correct item of the grid.

Pursuant to (1) to (3) above, this Board upholds, in part, the appeal as lodged and rules that the Evaluation Board should review the markings awarded in the light of (2) and (3) above.

In view of the above and 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

*July 12, 2006*