

PUBLIC CONTRACTS APPEALS BOARD

Case 86

CT Notice No CT/R/7/2005, CT 2433/2005; ADT File No 1689/TSD/2005 Invitation to Tender to Develop, Install and Operate a Controlled Vehicular Access System in Valletta

This call for tenders was published in the Maltese Government Gazette and the EU Official Journal on 29.09.2005 and was issued by the Contracts Department following a request transmitted to the latter on 22.07.2005 by the Malta Transport Authority.

The closing date for this call for offers was 25.10.2005 and the global annual estimated management charge payable to the contracted operator for the duration of the project was expected to be, approximately, Lm 500,000.

Eleven (11) different tenderers submitted their offers.

Following the publication of the *Notification of Recommended Tenderers*, Messrs SG Solutions Ltd filed an objection on 19.06.2006 against the intended award of the said tender to Messrs CVA Consortium (Lm 749,000 – Annual consideration).

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 26.07.2006 to discuss this objection.

Present for the hearing were:

SG Solutions Ltd

Dr Arthur Galea Salomone - Legal Representative
Mr Joe Gasan
Mr Anthony Galea
Mr Antoine Galea
Mr David Wallbank

CVA Consortium

Dr Simon Tortell - Legal Representative
Dr Michael Psaila - Legal Representative
Mr Anthony Mamo
Mr Brian J. Gatt

Malta Transport Authority

Dr Nicolette Cassar - Legal Representative
Dr Anita Fenech - Legal Representative

Evaluation Committee

Mr David Sutton
Mr Francis Cassar
Mr Brian Micallef

Following a brief introduction to this case, the Chairman, PCAB declared that it had been decided to hear and discuss the complaint filed by SG Solutions Ltd because, after examining the documentation and minutes in relative file, it was established that the complainants' tender was effectively discarded or disqualified and that the complaint was lodged within the stipulated time in accordance with the pertinent regulation. The Chairman stated that, according to Minute 121 in CT File No 2433/2005, the General Contracts Committee had considered the offer submitted by SG Solutions Ltd (T.3) '*as disqualified and not meriting any further consideration.*' Furthermore, it was noted that although the Contracts Department's rubber stamp indicated that the complainant's letter was received on 26 June 2006, a marginal note on the appellant's letter showed that it was delivered on 19th June 2006 and that it was '*provisionally not accepted (by the Department of Contracts), pending advice from AG.*'

The PCAB noted that, whilst the complainant was verbally informed about the decision on the 15th June 2006, yet, once the offer was discarded, the affected tenderer should have been notified of the decision within a designated timeframe as contemplated in the pertinent legislation. Thus, the tenderer had a right to file a complaint within four working days from the date of notification of the decision.

At this stage SG Solutions Ltd's (the appellants) legal representatives were invited to explain the motive leading to their complaint.

Dr Arthur Galea Salomone, started his submission by emphasizing that the tender was issued for a controlled vehicular access system in Valletta. He said that, according to *Clause 2.3.1 Overall Objective* of the tender document '*the Project as envisaged in this Invitation to Tender is limited to the Charging Zone identified in Drawing 1*', namely, Valletta. Furthermore, it was indicated that at an unspecified future date, Floriana could be added to this Charging Zone and that the access points could be increased. Dr Galea Salomone explained that, according to *Clause 3.1 Geographical Area*, apart from quoting an Annual Consideration for the Valletta Zone, tenderers were also required to quote for a lump sum '*if and when the Charging Zone is increased to incorporate*' Floriana and a unit price for each additional entry/exit point.

Dr Galea Salomone said that in the 'definition' section of the tender document, 'Contract Term' was defined as being '*the period starting on the date of the Contract and ending on the 31st December 2016*'. Also, under *Clause 2.3.1 Overall Objective*, it was specified that one of the reasons for the issue of tender was for the contracting authority '*to engage the services of an Operator to design, develop, implement, commission, test, maintain, support and operate an automated CVA System for a period of ten years*'.

The appellants' legal representative made reference to the *Interpretation of Contracts*, Section 1008 of the Civil Code which stipulated that '*All the clauses of a contract shall be interpreted with reference to one another, giving to each clause the meaning resulting from the whole instrument.*' Therefore, Dr Galea Salomone claimed that the basic principle was that clauses in a contract should not be interpreted in isolation but in a holistic manner.

With regards to the Valletta Zone, the complainant's lawyer said that SG Solutions Ltd and CVA Consortium quoted an amount of Lm 471,518 and Lm 749,000 per annum respectively. As a consequence, these annual considerations would give a total sum of Lm 4,715,280 and Lm 7,490,000 respectively over the contract term of 10 years, meaning, continued Dr Galea Salomone, that the recommended tenderer's offer was Lm 2,774,720 or about 59% more expensive than that of his clients.

In so far as the inclusion of *Floriana* is concerned, Dr Galea Salomone said that whilst SG Solutions Ltd submitted an offer of Lm 200,600 annually, CVA Solutions Ltd offered a lump sum of Lm 1,888,000. He argued that, in spite of the fact that his clients submitted an annual fee, their offer could have easily been evaluated by multiplying the amount quoted by ten (i.e. $\times 10$). He maintained that the fee 'per annum', considered in conjunction with the contract termination date, provided a definite and specific sum, thereby complying with the tender requirement for *Lump Sum*. He claimed that his client's offer, based on this mathematical calculation, gave a total lump sum of Lm 2,006,000. Although, this was more expensive than that of the recommended tenderer by Lm 118,000, this had no significance because *Floriana* alone was never on offer and the contract had to be awarded in respect of either *Valletta alone* or *Valletta and Floriana together*. As a consequence, if *Floriana* and *Valletta* were to be added together, SG Solutions Ltd's and CVA Consortium's overall offers would amount to Lm 6,721,280 Lm 9,378,000 respectively. Thus, the appellants' legal representative contended, his client's offer would be Lm 2,656,720 cheaper over a period of ten years. He remarked that the more the two options were introduced closer to the expiry of the Contract Term the savings to the Contracting Authority would be even greater.

During his submission, the appellants' lawyer drew the attention of those present that the Ministry for Investment, Industry and Information Technology (MIIT)'s website had publicly announced that, at a press conference given by Ministers Austin Gatt, Jesmond Mugliette, George Pullicino u Ninu Zammit on 3 July 2006, the Cabinet had decided to exclude *Floriana* from the scheme.

Dr Galea Salomone said that there was no definition of the words *Lump Sum* in this contract. However, in the Oxford and Collins English Dictionaries, *Lump Sum* was defined as "a relatively large sum of money paid at one time." Thus, he maintained that, if one were to make a multiplication, it did not mean that it was not a *Lump Sum* as the issue in this instance is with the modality of payment and not with the computation of the amount. Furthermore, Dr Galea Salomone explained that the concept of *Lump Sum* was legally used in respect of damages, personal injury and deaths, and that such amounts were arrived at by complicated calculations. He claimed that, after all, the objective of a *Lump Sum* was to have a determinate and specific amount. The appellants' legal representative explained that if they had a *per annum* amount without a contract term he would have understood the argument that their offer could not be evaluated because it would have been 'open ended'. However, he insisted that the whole issue was related with the interpretation of the words *Lump Sum* because, once they had a definite contract term and a specific annual fee, the lump sum could easily be computed.

Dr Galea Salomone pointed out that, in view of the fact that this tender was issued

under the three-envelope system, at the final stage, the considerations would be principally financial. Furthermore, he maintained that according to Clause 4.10.1 of the tender document, the contract would be awarded in favour of the most economically advantageous offer.

The appellants' lawyer said that SG Solutions Ltd quoted an 'annual fee' for the benefit of the contracting authority because it varied proportionately in accordance with the period of provision of service. The difference between the two offers was Lm 2.77 million in respect of the *Valletta* zone and Lm 2.66 million if *Floriana* were to be added to the *Valletta* zone. Dr Galea Salomone argued that, the fact that the contracting authority interpreted a *Lump Sum* in a restrictive manner went against the interests of the same contracting authority because the additional expense involved was substantial.

Dr Galea Salomone concluded by stating that the two premises on which the Evaluation Committee based its decision to disqualify his clients' tender were both incorrect because (a) the appellants' offer had a *lump sum* and, (b) it was possible for the offer to be evaluated. Furthermore, he alleged that the awarding of such a contract to a tenderer whose offer was Lm 2.77 million more expensive was an abuse of public funds. He insisted that apart from the fact that the disqualification of the complainants' offer was unfounded and unjust, it was financially also a fact that his clients' offer was more advantageous.

In reply to a specific question by the PCAB, Mr David Wallbank, representing SG Solutions Ltd, stated that they did not seek clarifications because the inclusion of *Floriana* in the scheme was always in doubt and, in actual fact its exclusion was subsequently confirmed. Furthermore, he pointed out that the tender was issued '*To develop, install and operate a Controlled Vehicular Access System in Valletta*'.

Dr Nicolette Cassar, the Malta Transport Authority's (ADT) legal representative, responded by clarifying that this hearing was convened to review the decision regarding the disqualification of the appellants' offer and not to compare the tenderers' financial offers, which at this stage was irrelevant.

Dr Cassar explained that in this case there was no need to check the regulations or the interpretation of same in the Civil Code because the tender was very clear and there was no need for anyone to interpret anything in a different manner than in the way requested in the Tender Document. The contracting authority's legal representative claimed that, according to the tender document, bidders were required to quote an *Annual Consideration* for the *Valletta* zone and 'lump sum' fees in case *Floriana* was included in the scheme and a unit price for each additional entry/exit point. She contended that *lump sum* had to be considered as opposed to *annual consideration*.

The ADT's legal representative said that the complainant's offer was discarded because they did not abide by the conditions of the tender document when they quoted an *annual fee* instead of a *lump sum* and that such decision was taken after seeking advice from the General Contracts Committee. Dr Cassar said that there were many variables and risks, which had to be taken into consideration when calculating a *lump sum*, such as *business projections* and *parameters*.

Dr Cassar stated that tenderers had to ensure that the quoted amount was viable and, at the same time, competitive. As a consequence, the authority could not take an annual fee and multiply it by 10 because the matrix of planning a *Lump Sum* was different from that of *Annual Consideration*. Furthermore, she argued that all bidders who quoted a lump sum, as requested, did not have the possibility to quote with the same method and therefore ADT would not have offered a level playing field.

During her intervention, the ADT's lawyer claimed that her clients could not understand why the appellants confuse an interpretation given to a *lump sum* vis-à-vis an *annual consideration* as, even in the Maltese language, one would find a specific translation of the term *lump sum* which is self-explanatory, namely the one found in Profs. Joseph Aquilina's Maltese dictionary, where, 'Lump Sum', is defined as '*somma ta' flus li tiġbor is-sommiet kollha flimkien.*'

Dr Cassar remarked that all other bidders, with the exception of the appellants, submitted a *Lump Sum* and that, although prospective bidders had the opportunity to seek clarifications, the appellants never requested clarifications on the matter.

Finally, she said that they could not exclude the possibility that the other bidders would have submitted a different offer if they were given such an option. However, she contended that the Evaluation Committee had to abide by the requirements of the tender document and at no point ADT could change the parameters of the tender conditions. Dr Cassar maintained that, as a consequence, it was difficult for ADT to proceed with further consideration of the appellants' offer because they could not be compared in absolute terms.

Dr Simon Tortell, CVA Consortium's legal advisor, insisted that the terms of the contract were clear because the tender was issued for a *Lump Sum* as opposed to *Annual Consideration*. He argued that it was not correct to state that a *lump sum* could be computed by simply multiplying the annual fee by 10 because those tenderers who quoted a lump sum, apart from taking a business risk, had to take into consideration many variables, which included interest payments, cost of living, rent, fuel, electricity, introduction of Euro and net present value. He maintained that the most economical, advantageous offer was not just financial and that the appellants were disqualified because they did not carry out the exercise and did not take such a risk.

Dr Tortell said that it would have been unfair on those bidders who had complied with the requirements of the tender document to alter parameters to accommodate appellants once these did not abide by such conditions. Furthermore, he said that the other bidders, including his clients, would have been put at a disadvantage had the appellants' offer not been discarded because otherwise the tenders would not have been evaluated on a level playing field. He claimed that the purpose of the *lump sum* was intended to know how much Government would be required to pay in case it was decided to terminate the contract.

Mr Edwin Zarb, Director General Contracts, who testified under oath, stated that the appellants were disqualified because they did not submit a *lump sum* for items 2 and 3 as requested in the tender conditions. He insisted that tenderers were obliged to

submit their offer as specified in the tender requirements and to abide by the tender conditions. The Director General, Contracts testified that the business risk for an *annual consideration* and a *lump sum* was different because the date of the introduction of any of the “options” was unknown. Furthermore, he explained that if the tender document requested a *lump sum*, such offer could not be adjudicated on an *annual consideration* basis because, otherwise, they would not make an equitable comparison.

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 ‘motivated letter of objection’ dated 19.06.2002, and also through their verbal submissions presented during the public hearing held on the 26 July 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 Dr Galea Salomone’s reference to Clause 3.1 and to the fact that tenderers were also required to quote for a lump sum ‘*if and when the Charging Zone is increased to incorporate Floriana*’ and a unit price for each additional entry/exit point;
- having also noted Mr Wallbank’s claim that the tender was issued ‘*To develop, install and operate a Controlled Vehicular Access System in Valletta*’;
- having also considered Dr Galea Salomone’s reference to (a) the definition of the contract term, namely, *the period starting on the date of the Contract and ending on the 31st December 2016* and (b) to Section 1008 of the Civil Code in respect of *Interpretation of Contracts*;
- having noted the appellants’ lawyer’s reference to the cost savings that, in his clients’ opinion, the taxpayer would be making if their option were to be selected, particularly, if introduced closer to the expiry of the *Contract Term* where appellants claim that the savings to the Contracting Authority would be even greater;
- having heard (a) appellants remark that the contract should be awarded to the most economically advantageous offer and (b) Contracting authority’s legal representative rebut the statement contending that the hearing was convened to review the decision regarding the disqualification of the appellants’ offer and not to compare the tenderers’ financial offers;
- having heard from appellants how they argued that their annual fee could be easily turned into a lump sum just by way of multiplying the fee by ten, the intended period of the contract, as well as the DG Contract’s testimony in regard, with the latter stating ‘*inter alia*’ that the business risk for an *annual*

consideration and a *lump sum* was different because the date of the introduction of any of the “options” was unknown;

- having heard definitions (Maltese and English) as regards the term ‘lump sum’ as defined in two reputable dictionaries;
- having noted the ADT’s legal representative’s claim that the complainant’s offer was discarded because they did not abide by the conditions of the tender document when they quoted an *annual fee* instead of a *lump sum* and that appellants never sought clarification on the matter adding that the Evaluation Committee had to abide by the requirements of the tender document and, at no point ADT could change the parameters of the tender conditions;
- having taken regard of Dr Tortell’s argument in relation to the issue of business risk involved between quoting an *annual consideration* vis-à-vis quoting a *lump sum*;
- having also reflected on the issue raised by Dr Tortell regarding the fact that the purpose of the *lump sum* was intended to know how much Government would be required to pay in case it was decided to terminate the contract.
- having, finally, considered the DG Contract’s opinion on the difference between an *annual consideration* vis-a-vis a *lump sum*,

reached the following conclusion, namely

1. The Terms and Conditions of the *Tender Document* were clear enough for all the other bidders, so much so that all of them (except the appellants) tendered an offer containing a lump sum;
2. The appellants did not, at any stage, seek clarification from the tendering authority;
3. Notwithstanding the doubt placed by the appellants’ legal advisor regarding the interpretation of the phrase ‘lump sum’, this board is of the opinion that the term cannot be interpreted otherwise than what is understood literally, i.e. a determinate and specific amount without the need of any further form of computation to arrive at the quantum;
4. Certain points raised by appellants’ legal representative, such as the possible long term cost saving to the Contracting party if one were to select their offer, may, subject to further verification, hold a certain element of truth (albeit not to be evaluated by a simple multiplication - as suggested by the appellants’ lawyer - by the presumed duration of the contract term) but the PCAB cannot ignore tender specifications which were clear to one and sundry. The extent of viability of opting for one condition or other may be considered within a different forum but certainly not by this Board at this stage;

5. The decision taken by appellants to submit an annual consideration rather than a lump sum (as requested in tender document) remains an arbitrary decision taken by appellants based on business considerations, which may have been taken with the best of intentions but still remains against the basic requirements of the tender.

As a consequence, to (1) to (5) above, this Board finds against the appellants since these have not complied with the relevant tender specifications and, therefore, they decide that appellants should not be re-considered.

In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the appellants should not be refunded.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

August 23, 2006