

PUBLIC CONTRACTS APPEALS BOARD

Case 89

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).

Appellants in question, Messrs Alberta Fire & Security Equipment Ltd, lodged another appeal as a direct consequence of their dissatisfaction relating to the methodology adopted by the contracting authority's Evaluation Committee in their re-evaluation of the appellants' offer, which, in their opinion, did not justify the real scope behind the requests made by this Board in its sentence relating to Case No. 83 which discussed the same tender.

The re-evaluation by the Evaluation Committee of the appellants' offer confirmed the initial recommendation made in favour of award of tender to Messrs CSS Ltd & Global Technical Ltd's offer (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 30.08.2006 to discuss this objection.

Present for the hearing were:

Alberta Fire & Security Equipment Ltd

Mr George Barbaro Sant
Mr Charles Camilleri
Mr Duncan Barbaro Sant
Dr Christian Farrugia - Legal Advisor

Central Security Services Ltd and Global Technical Ltd

Mr Mario Cardona
Dr S Borg Cole - Legal Advisor

Malta Maritime Authority

Dr Franco Vassallo - Legal Advisor

Evaluation Committee

Mr Frank Galea - Chairman
Mr Jonathan Muscat - Secretary
Mr Ray Demicoli - Member
Mr John Galea - Member
Mr Brian Cranmer - Member

At the beginning of the hearing, the Chairman, PCAB, made it clear that the PCAB was not going to re-consider issues already discussed and decided upon in the previous appeal and that the main reason for this session was for this Board to ensure that the ruling given in its sentence published on 12 July 2006 (Case 83) had been complied with and correctly implemented.

Whilst Dr Franco Vassallo, legal advisor to the Malta Maritime Authority (MMA), insisted that the Public Procurement Regulations did not permit an appeal over another, Dr Christian Farrugia, legal advisor to Alberta Fire and Security Equipment Ltd, the appellants, explained that his clients raised the same issue regarding the lack of the required qualifications of the successful tenderers, namely Central Security Services Ltd and Global Technical Ltd (CSS/Global), to participate in the tendering process in order not to prejudice their position in case they decided to refer the matter to the Civil Court because the decision was strictly of a legal nature. However, in principle, Dr Farrugia concurred with the Board's ultimate objectives of the hearing in question.

Dr Farrugia commenced his intervention by declaring that in its decision of the 12 July 2006 (Case No 83) the PCAB had correctly decided that once there was nothing in the specification regarding the 'frequency of maintenance visits' and there was a specific grid for 'Performance over minimum requirement', the weighting given by the Evaluation Committee in this respect should have been included in the correct item of the grid. However, he remarked that, following the PCAB's decision, the *technical scoring* for the appellants was reduced from 48 to 46 whilst that of CSS/Global remained the same (60). Dr Farrugia recalled that in the first appeal, Mr John Galea, a member of the Evaluation Committee, had testified that 'the difference in the *Maintenance Methodology (Routine/Periodical)/ Implementation Methodology* was due to the frequency of the maintenance proposed.' As a consequence, he argued that once this item was put in the correct grid there existed no justification for the discrepancy in the technical scoring, more so, considering that it had been established that both offers were technically compliant.

Mr Charles Camilleri, also representing the appellants, elaborated on this issue by stating that in a telefax message received from the Department of Contracts on 28 July 2006 it was indicated that, under *Maintenance Methodology (Routine/Periodical)*, Alberta Fire and Security Equipment Ltd and CSS/Global retained the original points of 4 and 10 respectively even though Mr Galea in his testimony declared that the difference of six points was due to the 'frequency of visits'. Also, he claimed that on '*Performance over minimum requirements*' the appellants' original score was reduced from 5 to 3 whilst CSS/Global retained the original maximum 8 points. He alleged that this was not in line with the PCAB's decision because instead of shifting the points the Evaluation Committee had reduced the objectors' points.

Dr Farrugia explained that in their submission, Alberta Fire and Security Equipment Ltd quoted Lm 3,600 for maintenance cost for three years which was based on Lm 1,200 per annum. He said that whilst his clients' financial offer was assessed accordingly, CSS /Global's bid in respect of the same maintenance cost factor amounted to Lm 4,750 based on the 'frequency of visits'. He maintained that this matter needed clarification because although in the previous appeal proceedings it

was declared that the maintenance cost of all bidders was computed over three years they still did not know whether this amount reflected the maintenance cost of one year or three years. The appellants' legal representative contended that if the maintenance cost was based over one year then the basis of assessment used was not *at par* because theirs was based over three years.

At this stage, Mr Camilleri intervened and made reference to a fax dated 24 May 2006 wherein it was clearly indicated that in the first evaluation "consumables" were calculated over one year and "maintenance" over three years. However, he claimed that, after the PCAB's decision, "consumables" and "maintenance" costs were both calculated on a three year time frame. He questioned why the calculations of consumables were changed from one year to three years and whether CSS/ Global's offer was calculated *at par*.

Dr Vassallo, said that PCAB's decision regarding the *warranty cost* and *frequency of visits* was implemented as instructed. He explained that the PCAB's decision revealed that the Evaluation Board was correct when it gave points in respect of *frequency of maintenance visits* because it only recommended the transfer of relative points from one grid to another.

He said that during a clarification meeting held in the presence of all tenderers it was emphasised that the evaluation criteria gave 40% of its weighting for the financial considerations and 60% to the technical offers. Dr Vassallo claimed that when the Evaluation Committee implemented the PCAB's decision, the appellants obtained full marks for its financial consideration whilst CSS/Global acquired full points for their technical consideration.

MMA's legal advisor added that Alberta Fire and Security Equipment Ltd's scoring for its technical consideration was reduced because, in the *Pairwise Comparison Method*, when something was changed, such adjustment would automatically affect the ultimate percentage points attributed to tenderer. He claimed that the appellants failed to mention that the frequency of maintenance visits was not the only factor that affected the weightings. As a matter of fact these included the *quality* and *reliability* of the equipment proposed and the fact that CSS/Global's offer was *a proven system*.

At this point, he invited Mr John Galea, one of the Evaluators, to explain how they implemented the PCAB's decision.

On taking the witness stand, the PCAB referred Mr Galea, who was the main witness in this hearing, to page 5 of 8 of the Evaluation Committee's revised report and asked him to calculate the appellants' financial offer for the Supply (core and additional equipment) as there appeared to be an arithmetical mistake because when they subtracted Lm 3,600 from the amount of Lm 112,308.24 and added Lm 27,212.35 the Board did not obtain the result (as indicated by the Evaluation Committee) of Lm145,920.59. However, when Mr Galea made the calculations from his documents he obtained the correct result because the amount of Lm 112,308.24 was different as it read Lm 122,308.24. It was noted that the amount in the Evaluation Committee's original report was Lm 112,308.24 as shown in the PCAB's document (Evaluation

Committee's revised report) which was copied from the Contracts Department's File CT 2389/2005 (Red 89).

At this stage, the PCAB declared that, in the prevailing circumstances, they needed to check the relevant documents to ensure that the correct amounts were taken when they calculated the appellants' financial bid. Dr Vassallo contended that they were convinced that their figures were correct.

After the hearing, the PCAB consulted the official file in the presence of the Contracts department officials and it was established that Alberta Fire and Security Equipment Ltd's financial offer consisted of the following:

	Lm
Phases 1 - 3 (including Lm 3,600 Maintenance Agreement)	118,853.04
Phase 4	27,212.35
Spare Parts	3,455.20
	149,520.59
Less Maintenance Agreement	(3,600)
	145,920.59

When Dr Vassallo intervened to cross-examine Mr Galea, the latter declared that the Evaluation Committee had met on various occasions to re-evaluate the bids as recommended in the PCAB's decision of the 12 July 2006. The witness declared that the warranty cost was transferred from the maintenance cost to the procurement cost. Mr Galea explained that, as a consequence of this change, the difference between the offers of Alberta Fire and Security Equipment Ltd and the other bidders decreased by Lm 6,200 and the net effect was that the score in respect of the overall procurement cost of CSS/Global increased from 9.7 to 10.9 while that of the appellants obtained the same score of 16. However, as far as the score in respect of the overall operating cost (inclusive of maintenance fee) is concerned, Alberta Fire and Security Equipment Ltd's score increased from 11.57 to 24 whilst that of the recommended tenderer decreased from 24 to 18.19.

With regard to the maintenance agreements, Mr Galea testified that the appellants' annual fee of Lm 1,200 was submitted on a mandatory 3 year contract and this had to be increased annually by 6% over the previous year. Apart from this, the appellants submitted three other rates: (i) Lm7.50 per hour per call for emergency callouts during office hours, (ii) Lm18 per hour per call for emergency callouts after office hours and (iii) Lm23 per hour per call for emergency callout within two hours. As regards CSS/Global's maintenance cost, the amount of Lm 4,750 included emergency callout irrespective of the frequency of callouts.

As far as spare parts were concerned, Mr Galea said that, in the same *Maintenance and Service Agreement*, the appellants included a clause which specified that ‘*All spare parts and materials deemed necessary and used for a service under this agreement will be charged to the client and invoiced separately.*’ At this stage, Mr Camilleri intervened to clarify that they submitted a list of spare parts (costing Lm 3,500) as this was one of the tender’s requirements and that the relative cost was included in their financial consideration. However, Mr Galea replied that the cost of spare parts should be covered by the *Warranty* and not invoiced by MMA. He said that CSS/Global’s warranty was free of charge. Therefore, it was established that the holistic cost of Alberta Fire and Security Equipment Ltd’s and CSS/Global’s warranty and spare parts amounted to Lm 9,750 and Lm 5,000 respectively.

In reply to a specific question by the PCAB regarding the annual maintenance cost, Mr Galea confirmed that the appellants’ and CSS/Global’s cost amounted to Lm1,200 and Lm 4,750 respectively. However, he explained that whilst the latter undertook to maintain and service all the components of the system (cameras, links, software, generators, etc.), Alberta Fire and Security Equipment Ltd’s maintenance agreement covered only one component, namely, the CCTV system. At this point, Mr Camilleri intervened by stating that they envisaged to maintain and service all equipment of the CCTV System – Phases 1, 2 and 3 which included many components (camera systems, links, generator etc). When asked to state why the appellants’ was not disqualified, the witness replied that this was due to the fact that the system was evaluated on the component element and the system in its totality (functionality of the components).

On cross-examination by the PCAB, Mr Galea confirmed that Alberta Fire and Security Equipment Ltd’s and CSS/Global’s financial offers amounted to Lm145,920.59 and Lm 214,154 respectively and that the determining factor between the two bids was the *technical consideration*. The witness declared that the relative scoring of CSS/Global was higher because they delivered over and above the tender requirements. He explained that although only a number of cameras needed to have PTZ (Pan Tilt Zoom) capabilities, all cameras offered by the successful bidder had such capabilities. Furthermore, CSS/Global offered all camera-housing with the best possible protection. He said that although the tender specified that all images had to be recorded at a rate of 6 frames per second, their system worked at 25 frames per second. Furthermore, Mr Galea mentioned the architecture which had the capability to expand by simply adding cameras and this without effecting any alterations (open industry standard architecture: non-proprietary). Other advantages included the availability of remote viewing and control, audio capability and command and control room console from a central point.

In reply to specific questions, the witness said that these were not included in the tender document because they did not want to exceed their budgetary allocations. He confirmed that these advantages were taken into consideration in their evaluation, however, they did not enter into the financial aspect thereof. Furthermore, Mr Galea said that in a clarification meeting held on 10 January 2006 with all prospective bidders (Mr Camilleri confirmed that Alberta Fire and Security Equipment Ltd were present), it was explained that “*MMA is not looking for a system conforming with*

minimum requirements, so much so, that the Evaluation Criteria had a weighting of 8% for bids that were delivering over and above the tender requirements." The witness explained that in this category the appellants' scoring was reduced from '5' to '3' because in their evaluation they compared bidder with bidder and CSS/Global's advantages were reflected in their results.

Dr Farrugia referred the witness to the evidence given in the first appeal proceeding wherein he testified that the difference in the *Maintenance Methodology* weighting between Alberta Fire and Security Equipment Ltd's '4' and CSS/Global's '10' was due to frequency of visits. He failed to understand (a) how, after the re-evaluation exercise, there was no adjustment in the original scoring obtained by his clients and the successful bidder and (b) why the other differences were not mentioned in the first appeal's session. Mr Galea explained that in the re-evaluation process the Evaluation Committee took into consideration the fact that in their maintenance agreement Alberta Fire and Security Equipment Ltd covered only one component whilst CSS/Global mentioned all components. The witness added that, with hindsight, he was in a position to declare that the difference in the score was partly due and not just due to the frequency of visits.

Replying to a question by the PCAB on the scoring of the *Maintenance Methodology*, Mr Galea said that changes effected did not necessarily need to be reflected in the score.

When Mr Galea was asked to state how the weightings obtained by the appellants (24) and CSS/Global (18.19) in respect of the overall operating costs were calculated, it was stated that these were based on the *Maintenance Agreement* in its totality, and the formulae used was Lm 3,600 (Alberta Fire and Security Equipment Ltd's three year maintenance contract cost) division by Lm 4,750 (CSS/Global's maintenance cost per year) times 24 (% weighting for this criterion). Dr Farrugia intervened by stating that the basis of assessment used was not *at par* and if the Evaluation Committee based its calculation on the cost of equal period of three years, CSS/Global's score would be reduced to 6.06. However, Mr Galea insisted that they did not agree with these calculations because they were not quantifying all expenses which could be relevant to the *Maintenance Agreement*. Their sole parameter, added Mr Galea, was to compare the annual cost inclusive of a proper maintenance schedule. Furthermore, he said that CSS/Global had indicated that it would carry out 52 maintenance visits at Lm 4,750 while the appellants offered 2 visits at a cost of Lm 1,200. Dr Farrugia pointed out that during the previous appeal proceedings the same witness, when asked to state whether the maintenance cost of all bidders was computed over three years, the reply given was in the affirmative.

The PCAB made reference to the *Addendum to the Evaluation Report* wherein it was stated that

'All things being equal, it is only natural that this Committee chooses the most economically advantageous proposal for the Malta Maritime Authority, keeping this decision in context of the national interest as required in the tender dossier advert No 345/2005'

When the PCAB asked members of the Evaluation Committee present at the hearing to declare whether

- a. following this hearing session *and*
- b. after taking into consideration the two offers holistically *and*
- c. considering the fact that both offers were financially and technically compliant

they still believed that the discrepancy of Lm 70,000 or more (dependent on which figure one should rely on) justified the advantages and value added of CSS/Global's offer over that of Alberta Fire and Security Equipment Ltd .

Mr Galea replied that the bid of the recommended tenderer was still good value for money. Mr Brian Cranmer, another member of the Evaluation Committee, declared that the CSS/Global's offer was the most viable and cost-effective in the long term. The third evaluator, namely, Mr Ray Demicoli, also replied in the affirmative. At this point, Dr Farrugia said that although all evaluators had confirmed that the discrepancy of Lm 70,000 was justified, he emphasised that the advantages had not been financially quantified.

After the witness's testimony, when the PCAB asked the representatives of the other interested party as to whether they had any comments to make, the reply given was in the negative.

In his concluding submissions, Dr Vassallo said that this tender was to be considered in its entirety of a national interest as it dealt with the security system for the Maltese port, harbours and bays. He contended that, as a consequence, it was indispensable that the system chosen had to be durable and reliable. He emphasised that 75% of this tender was being financed by the EU and that the evaluators felt that they should award their points to value-added. Dr Vassallo maintained that the 'modus operandi' was just because the rules were known to all prospective bidders. In actual fact, in the clarification meeting, it was explained that '*the evaluation criteria gives 40% of its weighting to the financial offer and 60% to the technical offer*' and that "*Bidders are to note also the 7% criteria for system robustness. Points are also awarded for maintenance and implementation methodologies. He stressed that the cheapest offer may not be the winner as the tender document emphasises a 'value for money' approach to adjudication.*" MMA's legal representative said that the methodology used by the Evaluation Committee was fair and that the decision taken was justified and in the national interest.

Dr Farrugia concurred with Dr Vassallo's argument that the decision had to be taken in favour of the best offer and in the national interest. He pointed out that it was established that the offers were both technically compliant and that both systems were more than acceptable to the Evaluation Committee. As a consequence, he questioned whether the decision taken was justified and in the national interest in view of the fact that the financial difference was substantial. Also, he questioned whether the fact that this project was co-financed by the EU had an effect on Evaluation Committee's deliberation. At this stage, the PCAB intervened to state that the issue of provenance of funds would not affect its decision.

Continuing, the appellants' legal representative mentioned the fact that during the session no reference was made to the savings factor between Alberta Fire and Security Equipment Ltd's and CSS/Global's offers. Dr Farrugia claimed that he was still not satisfied with the weighting given in the *Maintenance Methodology* because, in spite of the fact that in the re-evaluation exercise the 'frequency of visits' was shifted to the proper grid, the relative score did not change. Furthermore, the lawyer pointed out that weightings in respect of the operating cost were incorrectly calculated and not worked out *at par* as it was confirmed that the appellants' and CSS/Global's maintenance cost was worked out over three years and one year respectively.

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 8th August.2006, and also through their verbal submissions presented during the public hearing held on the 30 August 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 reasons which lead to the appellants' objection;
- having also noted the issues raised by the Evaluation Committee, particularly, Mr Galea;

reached the following conclusions, namely:

This Board understands that contracting authorities may be regularly tempted to leave as much leverage as possible when writing specifications for tender documents and, this, for the sake of, '*inter alia*', (i) transparency, (ii) competition or (iii) simply, with the intention of obtaining the best solutions in a market which is yet not clearly known by the same authorities.

The PCAB wants to remark that, despite all the good intentions, such a scenario could also give rise to various anomalous arbitrary decisions which could, ironically, negatively affect the same transparent and competitive principles for which the methodology implemented by the contracting authority would have been adopted in the first place.

In this instance it is clear that the tendering authority were not fully conscious of what was the optimum standard that they wished to acquire for their Port CCTV System. As a consequence, the specifications appeared to have been pegged at the basic level with the MMA placing its reliance on the tenderers themselves to suggest refinements on these specifications.

The Board feels that this shows insufficient preparation and research in the drawing up of the tender itself. The remedy which was attempted in the

clarification meeting, where the tenderers were asked to come up with the best solutions was, in the Board's opinion, not sufficient to make up for what appears to be a fallacious procedure.

The outcome of the specifications, as drafted in the tender document, could easily have put off other tenderers from offering superior solutions at, perhaps, cheaper prices than those that were tendered and the procedure is therefore clearly detrimental to open competition.

As regards the adjudication process, the Board may have some concerns about some aspects of how it was carried out. One particular item is the question of why one tenderer had the maintenance costs calculated over a one-year period while another's were calculated over a three-year period. However, this issue, important as it is, is not the main concern of the Board.

The *evaluation grid*, on which the various points were given, was constructed such as to allow the Evaluation Committee to arrive at a consecutive placing of tenderers. Having arrived at such placing, the reasoning is that the first placed tenderer should be awarded the tender. This, however, does not fully take into consideration the price difference between the first, the second and other tenderers.

This procedure may yield good results when the price difference between tenderer is within reasonable margins. However when the price difference between the first and second tenderer is as much as 50% (of the second tenderer's price offer) one should and must compute whether such an extra amount justifies the added advantages being offered by the first placed tenderer.

During the sitting all the members of the evaluation committee present for the hearing stated that they were certain that they were going for the best value for money offer. However it is clear that, apart from the points' allocation required to build up the *evaluation grid*, no other in-depth calculations had been carried out to confirm that the added benefits being offered by the first placed tenderer justified completely an expenditure of the extra sum being implied in their offer.

In the (a) presence of such a highly arbitrary format of decision-making and in the (b) absence of such a scientific approach to this overall feeling expressed by members of the Evaluation Committee during the hearing, the Board feels that there could well be a case where all the added benefits, which the tendering authority now deem to be desirable, could be purchased separately at a lower cost than the extra Lm 70,000 (or more) which the authority would have to pay if the recommended tenderer were to be confirmed. Needless to say that, if this were to be the case, the contracting authority would be wasting public funds in going for the best placed tender.

Furthermore, the message has to be made clear that, albeit the origin of the costs intended for this project are expected to be covered by EU funds, yet the Maltese authorities are more than cautious as to the way such funds are spent.

The Board, having taken into account the foregoing considerations, directs that the present tender should be annulled and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the appellants should be refunded.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

13 September 2006