

PUBLIC CONTRACTS APPEALS BOARD

Case 92

RE: CT 2204/2006; Advert Notice CT 160/2006 - FO 6604/17/06 - Tender for the Supply of Breakfast, Lunch and Dinner to Third Country Nationals (Irregular Immigrants) AFM

This call for tenders was published in the Maltese Government Gazette on 2.05.2006 and was issued by the Contracts Department following a request transmitted to the latter on 21.03.2006 by the Armed Forces of Malta.

The closing date for this call for offers was 22.06.2006 and the global estimated value of the contract was Lm 220,000 (inclusive of VAT).

Five (5) different tenderers originally submitted their offers.

Following the publication of the *Notification of Recommended Tenderers* on 9 August 2006, Messrs *James Caterers Ltd* filed an objection on 18 August 2006 against the intended award of the said tender to *Corinthia Palace Hotel Co. Ltd*.

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 4.10.2006 to discuss this objection.

Also present for the hearing were:

James Caterers Ltd
Mr James Barbara
Dr Ronald Aquilina

Director
Legal Advisor

Corinthia Palace Hotel Co Ltd
Dr J. J. Vella
Dr Stephania Zerafa
Mr Alfred Fabri
Mr Reginald Cuschieri
Mr Peter McWilliam
Mr Patrick Busuttil
Mr Joseph Mifsud
Ms Anna Fenech

Legal Advisor
Legal Advisor

Armed Forces of Malta
Lt Colonel Mario Schembri
Major Pierre Vassallo
WO I Peter Attard
Mr John Debattista
A/Lt Colonel Brian Gatt

Chairman, Evaluation Committee
Member, Evaluation Committee
Member, Evaluation Committee
Member, Evaluation Committee
Member, Evaluation Committee

After the Chairman's brief introduction, James Caterers Ltd's legal representative was invited to explain the reason which led to the appeal.

Dr Ronald Aquilina, the appellants' legal representative started his intervention by giving some background information on his clients' experience and reputation in the catering industry, an issue maintained to be pivotal considering the fact that, in their reply, Corinthia Palace Hotel Co Ltd had tried to give the impression that they were the best in this industry. Dr Aquilina stated that his clients have been providing catering services to all irregular immigrants under the care of AFM since September 2005 and that at a given time, namely during the CHOGM, they were responsible for the supply of meals for about 1,400 persons. Furthermore, the appellants' lawyer said that his clients have been awarded various contracts by the Department of Contracts, such as the provision of catering services to various Government Old Peoples' Homes and the Education Division.

One cannot forget to mention, exclaimed Dr Aquilina that the appellants have recently been successful in their bid to supply Mater Dei, St Luke's and Boffa Hospitals with all catering requirements for the next 10 years.

The appellants' lawyer said that the motive behind their objection was based on the fact that, in their opinion, the method of evaluation left much to be desired in the sense that, for example, the Evaluation Committee failed to inspect any of the facilities offered by both the recommended tenderer as well as his clients, contravening the same special conditions of the tender. As a direct result of this oversight, the appellants reached the conclusion that the Evaluation Committee's recommendation to award the contract to Corinthia Palace Hotel Co Ltd was solely based on the element of price. The appellants' legal representative argued that, although it was acknowledged that when dealing with public funds the price was an important factor in the decision of an Evaluation Committee, yet he did not think that this should be the only consideration in the award of tenders.

Major Pierre Vassallo, a member of the Evaluation Committee, explained that they first identified those companies that tendered and satisfied the criteria according to the conditions of the tender and then they based their recommendation on price. On cross-examination by the PCAB, it was established that no percentage weightings were included in the tender document and therefore no points could be awarded to tenderers during the evaluation process.

At this stage, Dr Aquilina claimed that under Clauses 10 and 11 of the special conditions of the tender it was specified that: *'On the date of submission of tender, the contractor must have an industrial kitchen fully equipped with the necessary equipment'* and *'An inspection of the kitchen by the Authorities concerned will form part of the tender evaluation process. An unsatisfactory hygienic standard will immediately disqualify the tenderer'* respectively. He maintained that the Evaluation Committee had to carry out an inspection of the facilities in order to ascertain that the tenderers had satisfied such requirements.

Lt Colonel Schembri responded by stating that, contrary to what was stated by the appellants' legal representative, the AFM were not authorised to carry out the inspections but had to rely on certificates issued by the Department of Health. Furthermore he claimed that Clause 11 did not specify that the inspections had to be carried out during the evaluation process. He explained that the certificates were to be issued by the authorities concerned only after on-site inspections would have been carried out and these were to be taken into consideration during the evaluation process. The Chairman of the Evaluation Committee declared that from the certificates provided it appeared that Corinthia Palace Hotel Co Ltd had satisfied the criteria of food hygiene standards, the kitchen was appropriately licensed and vehicles were licensed to transport food.

In reply to a specific question by the PCAB, Lt Colonel Schembri said that when they requested the most recent inspections they expected tenderers to present relative certificates that were issued in the same year.

During his intervention, Dr J J Vella, Corinthia Palace Hotel Co Ltd's legal representative, contended that the AFM were not competent to inspect the food hygiene and catering standards of the kitchens and that it was up to the tenderers to ensure that they had a kitchen that was fully equipped with the necessary equipment. Also, he maintained that the appellants was misinterpreting Clause 11 because the phrase '*will form part of the tender evaluation process*' did not necessarily mean that the AFM had to carry out the inspections themselves but that during the evaluation process they had to be satisfied that tenderers had presented the relevant certificates issued by the competent authorities after carrying out the necessary inspections.

Dr Vella claimed that under clause Clause 9 it was only specified that '*the caterer is bound to supply and install the necessary equipment*' and that the '*items may be inspected on request*'. He maintained that tenderers were not required to submit certificates in respect of '*the disposable cutlery and the relevant food mobile refrigeration trolleys which should show the temperature*'.

However, the recommended tenderers' legal representative declared that his clients had submitted a copy of the Health Department Certificate confirming that on 7 September 2005 a hygiene inspection had been carried out on their premises in compliance with the requirements of Clause 11 which specified that the '*kitchen must conform to approved food hygiene and catering standards as established by law*'. Furthermore, he said that Corinthia Palace Hotel Co Ltd had submitted a copy of the Food Safety Commission Certificate in accordance with the requirement of Clause 18 which stipulated that '*The tenderer is liable to an inspection by the Food Safety Section of the Division of Public Health whose report may be taken into account when awarding the tender*'.

Dr Aquilina intervened and insisted that no certificate would indicate that tenderers had an industrial kitchen fully equipped with the necessary equipment at the moment of submission of tender. He contended that it was the responsibility of the Evaluation Committee to ensure that tenderers had the required facilities because the certificates

would only indicate whether the kitchen conformed to the approved hygienic standards or not.

With regard to the vehicles, Dr Aquilina said that under under Clause 7 of the special conditions of the tender it was stipulated that these were *‘to be capable of transporting food at the prescribed temperatures. These vehicles are to be marked clearly with the name of the contractor and certified by the Health Authorities to transport food. The relative certificate is to be submitted with the tender.’* He alleged that Corinthia Palace Hotel Co Ltd was not in a position to submit the required certificate for the simple reason that they knew that they did not have such vehicles.

Lt Col Schembri said that they requested both tenderers to submit apposite certification issued from the Department of Health confirming that vehicles were capable of transporting food and licensed to transport food. He pointed out that Corinthia Palace Hotel Co Ltd had submitted such certificates but James Caterers did not submit any. The Chairman of the Evaluation Committee said that the certificate issued on 5 July 2006 by the Food Safety Commission incorporated premises and vehicles that transported food.

When specifically asked by the PCAB to state whether James Caterers Ltd had submitted such certificate, the reply given by Dr Aquilina was in the negative.

Lt Colonel Schembri remarked that although technically that they could have disqualified the appellants there was no need to resort to such line of action because Corinthia Palace Hotel Co Ltd was cheaper and, as a result, satisfied the financial parameters.

Dr Vella said that, according to Clause 7 of the special conditions of the tender, the vehicles had to be *‘certified by the Health Authorities to transport food. The relative certificate is to be submitted with the tender’*. He declared that his clients had complied with this requirement.

As regards the last issue raised in their letter of objection, Dr Aquilina said that the kitchen indicated by Corinthia Palace Hotel Co Ltd in their tender, which was held by them within the precincts of the Malta International Airport, could only be utilised for in-flight catering services and therefore they could not operate from that kitchen for the purpose of this tender. At this point, Dr Aquilina tabled copies of correspondence exchanged between James Caterers Ltd and the Ministry for Investment, Industry and Information Technology (MIIT), and between MIIT and Air Malta plc to substantiate his argument. In actual fact the extract of the lease agreement between Air Malta plc and Corinthia Palace Hotel Co Ltd that was quoted by the Chairman Air Malta plc in his letter dated 4 September 2006 specified that:

‘3. Use

The Lessee shall operate the Premise solely and exclusively as a food processing plant for the aviation industry and related tourism activities including ancillary uses such as stores which ancillary uses cannot exist

independently of the main use. No change of use may be made without the Lessor's consent and the Lessee may not file an application for change in trading activity unless such consent is forthcoming.'

As a consequence, the appellants' legal representative affirmed that Corinthia Palace Hotel Co Ltd should have been disqualified once they could not use the facilities to satisfy the requirements of the tender.

Dr Vella responded by stating that on the date of submission of tender his clients had more than one industrial kitchen fully equipped with the necessary equipment and they decided to present a certificate of one of their kitchens. The recommended tenderer's lawyer insisted that tenderers were only required to prove that they had an industrial kitchen at the moment of tendering. He claimed that the fact that the certificates presented confirmed that the kitchen was inspected by the Health Authorities was a proof that an industrial kitchen was available. Dr Vella maintained that the argument that Corinthia Palace Hotel Co Ltd had a kitchen which could not be used was a different issue. Furthermore, he emphasised that in the tender it was not specified that they had to provide the service from a determined place and therefore his clients had the right to provide the service from another location during the duration of the contract.

Replying to a question by the PCAB, Dr Vella declared that Corinthia Palace Hotel Co Ltd did not provide in-flight catering services only but also had experience in outside catering. Dr Vella said that in his letter dated 4 Sept 2006, Air Malta's Chairman said that *'It should further be pointed out that the lease agreement referred to is effective from 01 March 2006 for a period of 15 years thereafter. Prior to the 01 March 2006 there was no lease agreement in force covering the use of these premises by our in-flight caterers.'* The lawyer remarked that this issue was raised by Government with Air Malta and not by Air Malta with Corinthia Palace Hotel Co Ltd.

Dr Aquilina rebutted Dr Vella's response by insisting that the kitchen that was certified by the Health Authorities was not available to be used for the scope of this tender because it could only be used for in-flight catering services. The appellants' lawyer argued that in view of the fact that the lease agreement was effective from 1 March 2006 and the closing date of tender was 22 June 2006, then, at the moment of tendering, Corinthia Palace Hotel Co Ltd. were already aware of the restrictions regarding the use of their kitchen at the Malta International Airport. He contended that Corinthia Palace Hotel Co Ltd. should have indicated the other location from where they intended to operate the kitchen. Also, Dr Aquilina alleged that at present Corinthia Palace Hotel Co Ltd. did not have other industrial kitchens because on their website, under the heading 'Industrial Catering' reference was only made to the kitchen at the Malta International Airport.

On cross-examination by the PCAB, Lt Colonel Schembri declared that they were not aware of the contents of the documents tabled by the appellants' legal representative. However, Dr Aquilina pointed out that in their tender James Caterers Ltd had drawn their attention about this matter since it was stated that:

'We would like the Adjudicating Board to ascertain that the eventual winner has a fully licensed kitchen operating with the necessary permits from the Land Owner.'

Continuing, Lt Col Schembri said that from the contents of the letter, dated 4 September 2006, written by Air Malta plc's Chairman, it transpired that the kitchen indicated by Corinthia Palace Hotel Co Ltd. could not be used for the purpose of this tender. However, he said that the tender did not prohibit the transfer of a kitchen from one location to another provided that it was licensed and conformed to the food hygiene and catering standards.

Major Pierre Vassallo said that from the documents submitted it was clear that Corinthia Palace Hotel Co Ltd. had an industrial kitchen and that the problem was related to the land ownership. He claimed that the AFM were only interested in the catering services. He noted that the letter was issued after the evaluation process.

When the PCAB asked all interested parties for their concluding remarks, the AFM's representatives said that they had nothing to add.

On his part, Dr Vella said that the appellants made various allegations and that they had misinterpreted the conditions of the tender. He declared that Corinthia Palace Hotel Co Ltd had various options from where it could provide the service.

Dr Aquilina reiterated that during these proceedings it resulted that on the date of submission of tender Corinthia Palace Hotel Co Ltd did not have an industrial kitchen fully equipped for the purpose of this tender. The appellants' lawyer claimed that in their tender Corinthia Palace Hotel Co Ltd presented only one certificate which covered one particular location. He contended that once the premises were subject to an inspection they were obliged to indicate the location from where they intended to operate and to present relative certificates. Dr Aquilina alleged that although they knew that Corinthia Palace Hotel Co Ltd could not operate from the kitchen at the Malta International Airport, they still indicated such location because it had a direct incidence on the price due to overheads. Dr Aquilina maintained that, in view of the superficiality of the evaluation process, the decision should not be confirmed by the PCAB.

At this stage the hearing came to a close and the PCAB members proceeded with their deliberations before reaching their decision.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated 26 August 2006, and also through their verbal submissions presented during the public hearing held on 4.10.2006, had objected to the decision taken by the General Contracts to award the tender to Messrs Corinthia Palace Hotel Co. Ltd;
- having taken into consideration the points raised by all parties concerned;

- having noted the AFM's representative's reasoning on the fact that the Evaluation Committee was primarily concerned with the catering services 'per se' rather than the issue of land ownership as regards the recommended tenderers' industrial kitchen bearing in mind that at the time of evaluation the same Committee was unaware of Air Malta's Chairman's letter

concludes that:

1. the recommended tenderer's supply of a health inspection certificate relating to premises which could not be used for the purpose of this tender is to be regarded as misleading, to say the least;
2. the appellants' own admission that they had not fully complied with all tender requirements is, '*sui generis*', pretext enough for this Board to exclude the appellants from an eventual award of this tender;

and as a result of points (1) and (2) above this Board decides to nullify the award previously given and recommends that a fresh call be made.

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

November 7, 2006