

PUBLIC CONTRACTS APPEALS BOARD

Case 96

CT 2557/2006 - Advert No CT/WSC/T/57/2006 - Supply of High-pressure Cleaning Jetting-Suction Bowers

This call for tenders was published in the Maltese Government Gazette and the EU Journal on 15 September 2006 and was issued by the Contracts Department following a request transmitted to the latter on 12 September.2006 by the Water Services Corporation.

The closing date for this call for offers was 7 November.2006 and the global estimated value of the contract was Lm 300,000 (inclusive of VAT)

Seven (7) different tenderers originally submitted their offers.

Following receipt of notification from the Department of Contracts informing them that their bid had been disqualified as the tender guarantee submitted by them was erroneously “drawn up on the name of the Water Services Corporation in lieu of the Director of Contracts”, Messrs *Polisal Projects Ltd* filed an objection on 14 November 2006.

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 14.12.2006 to discuss this objection.

Also present for the hearing were:

Polisal Projects Ltd

Mr Boris Farrugia
Arch Joseph Cachia

Water Services Corporation

Mr Anthony Camilleri
Ing. Mark Perez
Mr Stefan Vella

S. R. Services

Mr David Muscat

Department of Contracts

Mr Mario Borg

Following the Chairman's brief introduction, the representatives of Polisal Projects Ltd were invited to explain the motive of their objection.

Mr Boris Farrugia, representing Polisal Projects Ltd, started by stating that the bank guarantee submitted with their offer was drawn up on the name of the Water Services Corporation as the Contracting Authority. He stressed that the same specimen of the TENDER GUARANTEE FORM that was attached to the tender document specified that the bid bond had to be issued in favour of the Contracting Authority which, as *per* definition, in the Draft Contract that was attached to the tender document was indicated as the Water Services Corporation.

In reply to a specific question by the PCAB, Mr Farrugia confirmed that there were no definitions in the tender document itself.

Mr Anthony Camilleri, one of the Water Services Corporation's representatives, responded by stating that Clause 22, *Tender guarantee*, under *Instructions to Tenderers* it was clearly specified that the tender guarantee had to be drawn up in the name of the Director of Contracts. Mr Camilleri declared that the General Contracts Committee had rejected the appellants' offer because the tender guarantee was made in the name of the Water Services Corporation. He explained that at tendering stage, if the need arose, it was the Director of Contracts and not the Water Services Corporation who had to claim the bid bond.

The main witness in these proceedings was Mr Mario Borg, representing the Department of Contracts, who gave his testimony under oath.

On cross-examination by the PCAB, Mr Borg testified that there were instances where tenderers were requested to draw up bid bonds in favour of the Water Services Corporation. However, in this particular tender, he felt that he had to draw the General Contracts Committee's attention because, under Clause 22 of the *Instructions to Tenderers*, bidders were specifically requested to draw up the tender guarantee in the name of the Director of Contracts. At this point, Mr Farrugia intervened by stating that bid bonds in respect of tenders pertaining to the Malta Maritime Authority, WasteServ Malta Ltd and Water Services Corporation, although issued by the Department of Contracts, were drawn up in favour of the entities, corporations and authorities concerned and not the Director of Contracts. Also, he pointed out that the tender documents had conflicting demands and information because, although Clause 22 indicated the Director of Contracts, in the specimen of the Tender Guarantee Form, reference was made to the Contracting Authority which was named as the Water Services Corporation in the Draft Contract.

In reply to a specific question by the PCAB, it was declared that the bid bonds of the other six bidders were made in the name of the Director of Contracts. As a direct result of this, the PCAB reflected on the fact that there appeared to be no conflicting

information in the specifications. In actual fact Clause 22 specifically mentioned the Director of Contracts.

Mr Farrugia raised the issue regarding the wording of the bid bond, stating that this was approved by the WSC in reply to an e mail that was sent to the Corporation by his company.

Mr Stefan Vella, representing the WSC declared that Mr Farrugia's claim was not at all correct as in his e-mail dated 6 November 2006 he (Mr Vella) only confirmed the wording because on the tender guarantee that was sent by the appellants to the Water Services Corporation through their bankers there was no indication of who was the Contracting Authority, Department of Contract or Beneficiary. Mr Vella tabled a copy of the tender guarantee that was attached to their e-mail. Arch Joseph Cachia, the other representative of Polisal Projects Ltd, intervened to explain that the Beneficiary on the specimen of the tender guarantee was the Contracting Authority, that is, the Water Services Corporation.

Ing Mark Perez, also representing the WSC, stated that he was of the opinion that such communication should not be taken into consideration because, according to the tender conditions, clarifications should have been communicated to tenderers 6 days before the closing date of tenders. He said that WSC's reply was submitted *bona fide* because the appellants' e-mail was received only one day before the deadline for submission of tenders. At this point, Mr Mario Borg drew the attention of those present that, according to Clause 13 under *Instructions to Tenderers*, tenderers had to submit questions in writing up to 16 days before the deadline for submission of tenders.

On his part, Mr Farrugia made reference to Article 4 *Order of precedence of contract documents*, a copy of which was tabled claiming that the Draft Contract had precedence over the Contractor's Tender Document. However, his attention was drawn to the fact that this issue was not mentioned in their reasoned letter of objection.

In his concluding remarks, Mr Farrugia continued to argue that the tender document contained conflicting scenarios about the name on whose behalf the bid bond had to be drawn.

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

This Board,

- 1 having noted that the appellants, in terms of their 'reasoned letter of objection' dated 17 November 2006, and also through their verbal submissions presented during the public hearing held on 14 November 2006, had objected to the decision taken by the General Contracts Department wherein they were informed that their bid had been disqualified as the tender guarantee submitted by them was

erroneously “drawn up on the name of the Water Services Corporation in lieu of the Director of Contracts”;

- 2 having taken into consideration the points raised by all parties concerned particularly those concerning the tender guarantee form and the draft contract;
- 3 having established that during the hearing the appellants did not come up with any evidence which could possibly persuade the PCAB that the wording of the tender document itself and the ancillary documentation attached thereto may have possibly given rise to ambiguous interpretation of requirements, terms and specifications

concludes that

1. the Evaluation Board acted in a reasoned, objective and effective operational manner.
2. this Board considers the decision reached by the Contracts Committee as justified.

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 82, should not be refunded.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

December 27, 2006