

PUBLIC CONTRACTS APPEALS BOARD

Case 104

CT 2019/2007; Advert Notice CT 31/2007; FTS C 23-06 - Tender for Aluminium Works at the New Secondary School, Qormi (Tal-Handaq)

This call for tenders was published in the Maltese Government Gazette on 26.01.2007 and was issued by the Contracts Department following a request transmitted to the latter by the Foundation for Tomorrow's Schools (FTS) on 12.12.2006.

Eleven (11) tenderers submitted their offers.

The closing date for this call for offers was 08.03.2007 and the original global estimated value of the total contract was Lm 102,695.

Following the publication of the *Notification of Recommended Tenderers*, Messrs Mifsud Aluminium Ltd filed an objection on 26.03.2007 against the intended award of the said tender to Messrs Sun Aluminium (Lm 78,070.67).

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 25.04.2007 to discuss this objection.

Also present for the hearing were:

Mifsud Aluminium Ltd

Mr Anthony Mifsud
Dr Jeffery Mifsud Farrugia Legal Advisor

Sun Aluminium Ltd

Mr Mario Sciberras
Mr George Deguara
Dr Michael Sciriha Legal Advisor
Dr Franco Galea Legal Advisor

Foundation for Tomorrow's Schools (FTS)

Adjudication Board
Mr Chris Pullicino Chairman
Arch Andrew Ellul Member

Technical Advisor
Arch Leonard Zammit

The Chairman of the PCAB commenced proceedings by inviting Messrs Mifsud Aluminium Ltd's (the appellants) representatives to explain the motive behind their objection.

Mr Anthony Mifsud, acting on behalf of the appellants, started his intervention by stating that, in spite of the fact that they had the best tender price, the results published on the Contracts Department's notice board showed that the tender was awarded to Messrs Sun Aluminium Ltd. However, Mr Mifsud continued by stating that from enquiries he carried out, it transpired that the cheapest offer was that of the recommended tenderer and the reason given was that Sun Aluminium Ltd had made a mistake in the computation of the Bill of Quantities (BOQ). Appellants argued that there was no mistake in such offer and, as a consequence, they were appealing against the decision taken by the General Contracts Committee to award the tender to Messrs Sun Aluminium Ltd

Dr Jeffery Mifsud Farrugia, the appellants' legal representative said that the main issue was Item 1.14 of the BOQ wherein tenderers were specifically requested to '*Allow sum for a master key system for all the above listed doors.*' He contended that every tenderer had quoted a price for the master key system on the basis of the number of doors requested in the tender, that is, 68 doors.

The appellants' legal representative claimed that Sun Aluminium Ltd had effectively quoted a price of Lm 200.60 after multiplying the amount of Lm 2.95 per unit price by 68 doors. He failed to understand how the amount of Lm 200.60 was adjusted to Lm 2.95 because it was impossible to offer a master key system, which included anti panic locks, tira-apri handles and master lock system, for Lm 2.95! Furthermore, Dr Mifsud Farrugia stated that if Lm 2.95 were to be divided by 68 doors, each would cost a mere 4 cents! This showed that the mistake in the calculation was in actual fact made by the Adjudication Board and not by the tenderer since the latter had worked out the computation correctly. Dr Mifsud Farrugia argued that the adjustment in the original calculation made by the Adjudication Board ended up favouring the awarded tenderer as the offers were not being equitably compared.

Dr Michael Sciriha, legal advisor to Sun Aluminium Ltd, replied by stating that the appeal could be resolved because clause 1.18.2 of the tender dossier stipulated that:

'If, after the receipt of the Tender, a discrepancy is found between the total amount inserted by the Tenderer against any item in the Bill of Quantities, and the amount that is determined by applying the corresponding rate or price inserted to the quantity stated for that item in the Bill of Quantities, the Director General (Contracts) shall alter the total amount to conform to the amount obtained by applying the rate or price entered to the quantity stated and the total price shall be adjusted accordingly. Similarly, if an error should be found in the summation of the various total amounts entered, the total price inserted in the Tender will be corrected by the Director General (Contracts). The Tender Price so corrected shall be considered as binding.'

Dr Sciriha said that, in this instance, the Director General (Contracts) had no alternative but to comply with what was stipulated under this clause and confirmed also under clause 2.08.02 – ‘Tender Evaluation’. He contended that it was the rate that was binding and not the amount. Dr Sciriha was of the opinion that the appellants were trying to put under scrutiny the performance of the DG (Contracts).

Sun Aluminium Ltd.’s legal representative contended that the DG (Contracts) had access to all the documents, and therefore, if in doubt he could have requested a detailed cost analysis as stipulated under Clause 1.18.4 wherein it was specified that:

‘During the tender evaluation period, Tenderers may be required to submit detailed cost analysis to show how rates have been calculated.’

Furthermore, Dr Sciriha claimed that the appeal lodged by Mifsud Aluminium Ltd was null and could not be acceded to because in their reasoned letter of objection the appellants asked *‘the General Contracts Committee to reconsider the recommendation made’*. The appellants’ legal representative maintained that such appeals were heard before the PCAB and not the General Contracts Committee and that the PCAB’s jurisdiction was either to confirm or overturn decisions or to award tenders. At this point, Dr Sciriha asked the PCAB to deliberate as to whether the appeal was valid or not.

The PCAB decided to proceed with the hearing, arguing that the original letter of appeal did not make reference to the General Contracts Committee and the form of that appeal was acceptable for the purpose of the Regulations, it was only in the reasoned letter of objection that the reference to the Committee was found. Also, it had to be established whether the Adjudication Board had made a mistake in the calculations as was being stated by the appellants, it had to be ensured that the process was carried out correctly and transparently, and that all tenderers were treated equally. Dr Sciriha replied that even if it was determined that there was a mistake the decision was legally ‘binding’. The PCAB responded by stating that the ‘binding’ element was included for a purpose. Furthermore, it was also stated that, in the process, a mistake should not be made to the detriment of the other tenderers, possibly resulting in the exclusion of participants from the adjudication process.

Dr Mifsud Farrugia maintained that the whole argument was that there was no mistake in the calculations made by Sun Aluminium Ltd because the multiplication was worked out correctly, namely, Lm 2.95 x 68 doors.

At this stage the Chairman (Mr Chris Pullicino) and one of the members of the Adjudication Board (Arch. Andrew Ellul) and the Foundation’s technical advisor (Arch. Leonard Zammit) were called to the witness stand.

During their testimony, which was given under oath, it was established that the other tenderers’ rates for Item 1.14 were Lm 4, Lm 250, Lm 241, Lm 200, Lm 25, Lm 340 and Lm 120 respectively.

Dr Sciriha said that if they were to compare Mifsud Aluminium Ltd's offer with those submitted by the other bidders it would result that there were instances where the appellants' offers were excessively high and others where they were excessively low. Therefore, he maintained that, while his client was declared excessively low under this particular item, Mifsud Aluminium Ltd was excessively low in others without being declared.

Mr Pullicino testified that when the Adjudication Board received the tenders, the prices quoted by Mifsud Aluminium Ltd and Sun Aluminium Ltd (as published on the Department of Contracts' Notice Board) amounted to Lm 78,169 and Lm 78,268.32, respectively. He confirmed that the rates quoted for Item 1.14 by Sun Aluminium Ltd and Mifsud Aluminium Ltd were Lm 2.95 and Lm 2,800 respectively. The witness said that these tenderers quoted an amount of Lm 200.60 and Lm 2,800 respectively for the same item. Mr Pullicino explained that when the Adjudication Board worked out the computation of each item in the BOQ it transpired that there was an arithmetical mistake under Item 1.14 as submitted by Sun Aluminium Ltd and so they adjusted the quoted amount since the rate of $Lm 2.95 \times \text{quantity } (1)$ was equal to Lm 2.95 and not Lm 200.60. The witness declared that they had complied with what was stipulated in the tender conditions and that the mistake was made by the tenderer.

At this stage Dr Mifsud Farrugia drew Mr Pullicino's attention to the fact that the quantity marked '1' as stated by the appellants referred to the 'master key system' in its entirety including all 68 doors and not one door! The appellants' legal advisor contended that, in actual fact, Sun Aluminium Ltd had quoted a rate of Lm 2.95 for one door and then multiplied this rate by 68 doors. He argued that there would have been level playing field if the amount of Lm 2,800 was compared with Lm 200.60 since it was blatantly obvious that the amount of Lm 2.95 simply referred to one door. The appellants' lawyer continued by stating that when Mifsud Aluminium Ltd quoted Lm 2,800 they took a commercial risk in the same manner that all tenderers have taken when quoting for all the items included in this tender. This was one of the reasons why prices differ.

During his testimony, Mr Pullicino declared that both offers were basically up to specifications and that, as far as quality is concerned, there was no difference between the two offers. The Chairman of the Adjudication Board said that if Mifsud Aluminium Ltd's offer were cheaper, the tender would have been awarded to them.

Architect Andrew Ellul, a member of the Adjudication Board, said that as a standard procedure a mathematical check of all BOQs is first carried out. If, upon carrying out this mathematical check it transpires that a tenderer would have made a mistake, the schedule of tenderers would be corrected in accordance with the provisions of the tender conditions. Arch Ellul explained that after this consideration the Adjudication Board usually evaluates the first three tenders to verify whether they are according to the Tender Document's specifications. As regards this particular case, the witness confirmed that the value of the offer submitted by Sun Aluminium Ltd was amended because there was a mistake in the multiplications of the rate by the quantity ($Lm 2.95 \times 1$) against item 1.14.

He confirmed that the recommended tender's offer was acceptable on the basis of prices and technical specifications.

In reply to specific questions by Dr Sciriha, Arch Ellul said that both tenderers had a good track record with the Foundation for Tomorrow's Schools and that the price of that particular item was relatively low when compared to the whole contract value. Here, the PCAB pointed out that, albeit minimal, it was crucial enough to change the order of the cheapest tenderer!

On cross examination by the PCAB, Arch Ellul said that in the price comparison of the *Technical Report* it was stated that the rates of Lm 2.95 and Lm 2,800 submitted by Sun Aluminium Ltd and Mifsud Aluminium Ltd respectively, the quotations were excessively low and excessively high. The PCAB intervened to remark that, considering the fact that the difference in the rates was significant and that it was not clear whether it was the rate of Lm 2.95 or the amount of Lm 200.60 that was correct, the Adjudication Board should have asked the General Contracts Committee to seek the necessary clarifications. However, Arch Ellul said that they had to abide by the requirements of the tender conditions.

On cross-examination by the PCAB, Arch Zammit, explained that all aluminium doors had anti panic locks and handles and that each door had three individual keys and another master key for all locks. He declared that the *Master Key System* did not comprise anti panic locks and handles as stated by the appellants' legal representative because these were included under other items in the BOQ. The witness said that the other tenderers quoted for such items separately. Here, it was stated that this could have been the reason why the appellants' quote under this item was excessively high. Mr Zammit concurred that this could have been a possibility.

In reply to another question by the PCAB, Mr Zammit stated that the correct method of making out the offer was intended to be that both the columns relating to unit price and total price would show the same figure, not as quoted by Sun Aluminium Ltd.

Mr Zammit testified that he had analysed the technical specifications and that the samples that were not submitted by the appellants were considered as a minor item. He claimed that although some items were cheaper and others were more expensive, globally the offers were very close. However, Mr Zammit maintained that the recommendation was based on the rates of the whole tender and not on one item because the tender was adjudicated holistically.

In his concluding remarks, Dr Mifsud Farrugia asked the PCAB to deliberate on the issues of excessively low and excessively high. He contended that the latter was accepted but at the risk of the tenderer. However, as regards the other issue, it was indispensable for the PCAB to establish whether the excessively low was Lm 2.95 or Lm 200.60. This issue was crucial because the difference between these two amounts had changed the order of the cheapest tenderer. He insisted that the total sum worked out by Sun Aluminium Ltd was Lm 2.95 x 68 which was equivalent to Lm 200.60. He

maintained that, as a consequence, the Adjudication Board made a mistake when it replaced Lm 200.60 with Lm 2.95 because this did not reflect the cost of a master key system for the entire 68 doors.

Dr Sciriha insisted that it was a general principle of law that it was his client who had a juridical interest to appeal from decisions that were to his disadvantage and not the other party. He contended that the appellants had no '*locus standi*' in the proceedings because their juridical interest was different. Dr Sciriha said that the appeal should have been based on different reasons, such as, that their offer was more credible or that it was more economically favourable. The lawyer claimed that the general principles of law were also binding on the PCAB, and therefore they should deliberate on whether the PCAB should give right to a third party to defend a mistake which affected his client's offer.

The recommended tenderer's legal representative said that both the Adjudication Board and the technical advisor did not have any concern on the quality of the product offered by Sun Aluminium Ltd. He pointed out that the PCAB could not assume the role of the technical advisor and alter such an opinion in view of the technical competence deemed necessary to do so!

Dr Sciriha explained that the law anticipated similar situations where discrepancies were found in the BOQs, so much so that the Adjudication Board had altered the amount in accordance with the applicable rate and quantity as well as correcting the total price in accordance with the provisions of clause 1.18.2 and 2.08.2 of the tender conditions.

Sun Aluminium Ltd's legal advisor emphasised that the Adjudication Board's decision was final unless the affected tenderer objected to such alterations because the last sentence of these clauses stipulate that '*The Tender price so corrected shall be considered as binding*'. Therefore, he claimed that the tender dossier was contractually binding on both the tenderer and the client.

Dr Sciriha said that Mifsud Aluminium Ltd's appeal was not based on the lowest price but on the economically advantageous offer since in their reasoned letter of objection the appellants stated that

'The role of the Committee is not only that of recommending the cheapest offer but also the most advantageous after considering the prices quoted for the items requested to ensure that the State is getting not only good value for money but also good quality products and service.'

He contended that this appeal should have been legally based in accordance with Regulation 27 (3) of LN 177/2005 wherein it was stipulated that:

'Contracting authorities shall determine the award of public contracts on the following criteria:
(a) the most economically advantageous offer; or
(b) the lowest price offered compliant with the tender specifications.'

He explained that the law stipulated ‘the most economically advantageous’ or the ‘lowest price’ because there could be instances where one criteria could be more favourable than the other.

The recommended tenderer’s legal representative said that, in their reasoned letter of objection, the appellants asked the ‘*the General Contracts Committee to reconsider the recommendations made.*’ He maintained that in the prevailing circumstances the appeal should not have been referred to the PCAB because it was not the General Contracts Committee. As a consequence, in its deliberations, the PCAB should first stipulate whether the appeal was filed before the appropriate tribunal and since its functions were governed by the provisions of Regulation 33(2) of LN 177/2005 which stipulated that:

‘It shall be the function of the Board to hear and determine complaints submitted by any person having or having had an interest in obtaining a particular public supply, public service or public works contract and who has been or risks being harmed by an alleged infringement by those authorities listed in Schedule 1 and whose value exceeds Lm 20,000, in accordance with the procedures laid down in Parts XII and XIII.’

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, first through their formal letter of objection and later in terms of their ‘reasoned letter of objection’ dated 26.03.2007, and also through their verbal submissions presented during the public hearing held on 25.04.2007, had objected to the decision taken by the General Contracts to award the tender to Messrs Sun Aluminium Ltd.;
- 2 having noted the appellants’ claim regarding the fact that despite quoting the lowest price, their offer was not accepted and that an offer submitted by another tenderer which was dearer was awarded the tender;
- 3 having considered that during the public hearing all witnesses, including the Chairman of the Adjudication Board, testified that both offers were basically up to specifications and that, as far as quality is concerned, there was no difference between the two offers and that had Messrs Mifsud Aluminium Ltd’s offer been cheaper, the tender would have been awarded to them;
- 4 having also noted the point raised by Dr Sciriha relating to the contents of clause 1.18.2 of the tender dossier which, *inter alia*, stipulated that “*if an error should be found in the summation of the various total amounts entered, the total price inserted in the Tender will be corrected by the Director General (Contracts). The Tender Price so corrected shall be considered as binding.*”

- 5 having taken full cognizance of Dr Sciriha's statement wherein he stated that even if it was determined that there was a mistake, the decision was legally 'binding';
- 6 having reflected on Dr Sciriha's argument which considered the fact that in their reasoned letter of objection, the appellants asked the '*the General Contracts Committee to reconsider the recommendations made.*', maintaining that, in the prevailing circumstances, the appeal should not have been referred to the PCAB once the General Contracts Committee were erroneously referred to in the said letter;
- 7 having also reflected on all the legal provisions and the potential repercussions referred to by Dr Sciriha;
- 8 having also considered the fact that there were instances where the appellants' offers were excessively high and others where they were excessively low;
- 9 having heard Mr Pullicino declaring during the hearing, (a) that the Adjudication Board made an adjustment to the computation as originally submitted by the awarded tenderer, which, ultimately, resulted in the latter's offer being cheaper and (b) this was solely due to compliance requirements with what was stipulated in the tender conditions;
- 10 having acknowledged that the appellants' lawyer remarked that the quantity marked '1' as stated by the appellants referred to the 'master key system' in its entirety including all 68 doors and not one door and, as a consequence, prior to amending the computation methodology, the Adjudication Board was morally bound to clarify via the Contracts Department whether their computation was reflecting what was the precise intention of the tenderer when the latter submitted a price of Lm 200.60 as opposed to Lm 2.95 as subsequently modified by the Adjudication Board;
- 11 having also taken into consideration the fact that, albeit the appellants had refrained from submitting some samples as required by the Tender Document, yet the samples that were not submitted by the appellants were considered as a minor item and that these could have easily been forwarded after the submission of tender;

concludes, that

- a. it is true that it seems justified to state that the Adjudication Board may have had all the legal prerogative to deliberate as it did, yet considering the fact that
 - (1) the awarded tenderer had originally submitted a figure (Lm 200.60) which, mathematically, worked out to be precisely what it was intended to be in the first place;

(2) all witnesses reiterated the fact that there was no difference between the two offers and that had Messrs Mifsud Aluminium Ltd's offer been cheaper, the tender would have been awarded to them, thus indirectly, placing major emphasis on the pivotal role that price had in the adjudication process; and that

(3) in lacking common sense to the extent that, faced with such a situation, the said Adjudication Board did not avail of another legal prerogative that any Board acting in the same scenario would normally resort to, namely that of clarifying any anomalous points via the Contracts Department, in order to elucidate themselves more prior to adjudicating tenders,

the Adjudication Board has given rise to a miscarriage of a transparent, equitable and fair adjudication process;

- b. whilst there is no doubt as to the explicit manner in which clause 1.18.2 states that the *'Tender Price so corrected shall be considered as binding'*, yet one had to consider this statement within the context of procedure being followed in a way that it ensures a transparent and equitable manner and, in the absence of pertinent clarifications, this Board does not feel that the adjudication process as followed in this particular tender ensured absolute presence of transparency and equity; the PCAB also feels that the mistake was not merely one of the summation of the various amounts, as referred to in the Regulation but a more radical one where the two columns, which should have carried a unique price showed different amounts, this could, and in the Board's view should, have alerted the Adjudication Board to seek further clarification.
- c. although the appellants, in their reasoned letter of objection, had erroneously requested *'the General Contracts Committee to reconsider the recommendations made'* yet, the PCAB's function and parameters in which it has to operate are governed by legislation and not by what is textually stated elsewhere, irrespective of whether these are right or wrong in their interpretation of the same legal provisions and, as a consequence, the PCAB does not concur with Dr Sciriha's argument;
- d. Dr Sciriha's claim regarding the validity of the appellants' objection, considering that the issue referred to changes to his clients' computation method rather than anything which emanated from issues concerning the same appellants, would have, all things being equal, been a valid argument to follow. However, in this particular instance, this Board finds that the appellants were, as a matter of fact, directly and negatively effected by the methodology adopted by the Adjudication Board and it seems only obvious that they became a very much interested party indeed.

As a result of the above-mentioned points, this Board upholds the appeal lodged by the appellants and that as a result, apart from nullifying the award previously given, recommends that the award be given to Messrs. Mifsud Aluminium Ltd.

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

09 May 2007