

PUBLIC CONTRACTS APPEALS BOARD

Case 106

Advert No 163/2007 - CT 2194/2007 - DH 1649/2006 Tender for the Provision of Cleaning Services, including labour, training, equipment and materials at Mater Dei Hospital

This call for tenders was published in the Maltese Government Gazette on 13.04.2007 and was issued by the Contracts Department following a request transmitted to the latter by the Ministry of Health, the Elderly and Community Care on 28.02.2007.

Three (3) tenderers submitted their offers.

The closing date for this call for offers was 05.06.2007 and the original global estimated value of the total contract, covering a period of 5 years, was Lm 6,000,000.

An objection was filed on 12.06.2007 by *BCGL Advocates* on behalf of *Servizi Malta Consortium* after the latter were informed that their tender had been disqualified because they had failed to submit a bid-bond which remained valid for a period of twelve months from the closing date of tenders.

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 27.06.2007 to discuss this objection.

Also present for the hearing were:

Servizi Malta Consortium

Dr Andrew Borg Cardona	Legal Representative
Mr John Zarb	
Ms Claudine Sullivan	
Mr Manwel Degiorgio	
Mr Joe Degiorgio	
Mr Jason Degiorgio	

Hospital Cleaning Consortium

Dr Albert Grech	Legal Representative
Dr Stephania Grech	Legal Representative
Mr Yves Debarro	
Mr Morgan Azzopardi	
Mr Simon Turner	

Ministry of Health, the Elderly and Community Care

Mr Joe Degiorgio

Contracts Department

Mr Francis Attard	Director General (Contracts)
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Mr Anthony Cachia
Mr Mario Borg

Director (Operations)

The Chairman commenced proceedings by introducing the case to those present which was followed by an invitation to the appealing party's legal representative, Dr. Andrew Borg Cardona, to present his case in front of the Public Contracts Appeals Board.

Dr Borg Cardona, started by stating that there were various strands which demonstrate that the public interest would be more safeguarded and the EU Competition Policy would be more respected if his clients, Servizi Malta Consortium, were allowed to compete on the merit of the tender. He made reference to various European sentences wherein it was decided that the basic principle in each tender procedure was that during the adjudication process the Authority concerned should identify the most economic advantageous tender.

The appellants' legal representative maintained that, taking into consideration the opening and operational dates of the new hospital, the requirement to submit a Bid Bond that was valid for 12 months from closing date of tender was neither reasonable nor realistic. He claimed that when the tender would be awarded, the date of validity would be immaterial and the Bid Bond would become irrelevant because the Bid Bond was there to guarantee the price up to award of tender, which in this case would surely not take 12 months to decide.

Dr Borg Cardona pointed out that this was not a case where the four Bid Bonds submitted by his clients, forming a consortium, were invalid or not signed by the Banks. He claimed that the only difference was in the date of a particular Bid Bond as compared to the time frame requested in the Tender Document. Dr Borg Cardona stated that if one were to agree on the time frame envisaged in the Tender Document, then this would be tantamount to a deviation of less than 0.5% error factor. The appellants' reiterated that once the bid bond, as submitted, covered more than 99.5% of the stipulated period and, considering the fact that the tender would be awarded months before expiry date, then the five days would be irrelevant. As a consequence, Dr Borg Cardona claimed that the Bid Bonds, as submitted, did materially satisfy the requirements of the Tender Document.

Furthermore the appellants' legal representative claimed that the Tender Document itself was not 100% accurate because he found 12 points of inconsistencies. He insisted that their bid bond should be evaluated with the same level of accuracy.

At this point Dr Borg Cardona made reference to the case of Messrs Rite Mix (Gatt Bros. Ltd) relating to tender CT 377/2006. The lawyer claimed that the Appeals Board had given the benefit of doubt to the appellants because there was an element of inconsistency in the Tender Document. Dr Borg Cardona said that the disqualification of their tender should be reversed because there was an element of inconsistency and inaccuracy in the specimen of the Bid Bond whereby it stipulated that:

'This guarantee expires within twelve (12) calendar months starting on the closing date of the Tender, that is, it is valid for twelve (12) months from the closing date of this Tender at the close of business..'

He explained that this was inconsistent in the sense that the guarantee had to expire either 'within twelve months' or 'valid for twelve months'. Dr Borg Cardona claimed that it is amply clear that the fact that his clients submitted the four bid bonds is proof enough that they had every intention to respect the tender. However, he argued that in spite of the fact that the Tender Document 'per se' was not accurate, tenderers were expected to be accurate.

Mr Anthony Cachia, Director (Operations) at the Department of Contracts, responded by stating that this was a very clear case because the Tender Document specified that '*These Bid Bonds must be valid for a period of twelve calendar months from the date set for the closing dated of tenders*'. He claimed that one of the appellants' Bid Bonds did not meet this requirement because the closing date of the call for offers was 5 June 2007 and the date of the Bid Bond in question expired on 24 May 2008.

The Contracts Department's representative pointed out that the appellants' lawyer had admitted the mistake in one of the Bid Bond and it was this mistake that disqualified them from participating further in the adjudication process. Mr Cachia emphasised that they had legal advice which is more than emphatic with regards to the fact that, as representatives of a Government Department, they were not allowed to interpret what was written in the Tender Document.

When the Chairman of the PCAB made reference to clause 4.1 of the *General Instruction* in the Tender Document which specified that '*In the case of companies applying as a consortium, each company must supply the requested details individually*', Mr Cachia said that, in the case of a consortium, they usually accepted one Bid Bond and usually tenderers submitted a declaration that all partners were 'jointly and severally responsible'. Although Mr Cachia could not confirm whether the appellants had submitted such declaration, he claimed that their contention was not about the partners but on the validity date of one of the Bid Bonds. Mr Cachia added that, if the need arose, the Department of Contracts would call upon all four Bank Guarantees. Dr Borg Cardona clarified that, according to the Commercial Law, in the absence of such declaration it was automatically assumed that each partner was 'jointly and severally liable'. At this stage, it was established that *Hospital Cleaning Consortium*, another participant, had submitted their Bid Bond as a consortium.

In reply to a specific question by the PCAB regarding the alleged inconsistency in the Bid Bond, Mr Cachia said that the particular sentence should be read in its totality whereby it was clearly specified that the Bid Bond had to be valid for 12 months from the closing date of tender. At this point Mr John Zarb, another representative acting on behalf of the appellants, intervened and stated that they had interpreted the wording of the Bid Bond in good faith.

During their intervention, Messrs Joseph Degiorgio and Mario Borg, representatives of the Ministry for Health, the Elderly and Community Care and the Contracts Department respectively, explained that tenderers were requested to submit two Bid Bonds of

Lm 80,000 and Lm 10,000 because the tender consisted of two offers: Offer 'A' for the Provision of Cleaning Services and Offer 'B' for the Supply of Cleaning Materials, Equipment and Training for use by the clients' own cleaners.

Dr Albert Grech, acting as legal representative of Hospital Cleaning Consortium, said that the contract requested certain formalities and these had to be respected. He maintained that the Contracts Department had a valid reason for disqualifying the appellants' offer because, if the need arose, the bank guarantee could not be claimed during the 12 day period, that is, between 24 May 2008 and 6 June 2008. He claimed that, if there was an element of doubt in the first part this was further clarified by the words *'that is, it is valid for twelve (12) months from the closing date of this tender at the close of business.'* He maintained that, in this particular tender, the relative Clause was clear and did not give rise to misinterpretation.

Dr Grech argued that once it had been acknowledged that there was a mistake in the Bid Bond, the appellants should not be allowed to continue in the adjudication process since otherwise they would discriminate against those who had complied with the requirements of the tender. He claimed that the appellants should have examined the documents before presenting them.

In his concluding remarks Dr Borg Cardona asked the Appeals Board to take into consideration (i) the reality of the situation since the 12 months requested were excessive, (ii) the inconsistency in the wording of the specimen of the Bid Bonds, (iii) the fact that the mistake in the date was a minor one and highly irrelevant and (iv) the requirements of competitiveness and transparency in the award of contracts.

On his part, Mr Zarb said that the issue of tenders was intended to safeguard Government's commercial interests and also to procure in a transparent manner and to get the most advantageous and best offers. He concluded by stating that they had been excluded on a small technical error.

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 through their 'reasoned letter of objection' dated 12 June 2007, and also through their verbal submissions presented during the public hearing held on 27.06.2007, had objected to the decision taken by the General Contracts Committee;
- 2 having noted the points raised by appellants regarding EU policy and the most economic advantageous tender (MEAT) principle;

- 3 having reflected on the appellants' claim regarding the fact that the 12 month validity period was considered excessive and irrelevant considering the fact that the opening of the new hospital was scheduled for a much earlier date;
- 4 having also noted the fact that the appellants admitted that the Tender Document was not fully complied with even though they claimed that the mistake committed was very negligible when considered within a wider context;
- 5 having taken full cognizance of the fact that the appellants referred to inconsistencies which rendered the Tender Document not 100% correct either;
- 6 having noted the appellants' reference to a previous appeal heard by the PCAB;
- 7 having also reflected on the point mentioned by representatives of the Contracts Department who stated that they had legal advice whereby they were told that they were not allowed to interpret what is written in a Tender Document but to take facts for what they are;
- 8 having acknowledged the points raised by Dr Grech, especially the issue raised with regards to the phrase 'that is
- 9 having also taken into consideration Mr Zarb's reference to the need to safeguard the Government's commercial interests in procurement procedures,

concludes, that

- a. the appellants' reference to (i) the excessive nature of the time frame / validity envisaged and (ii) the point raised in connection with inconsistencies found by appellants in the Tender Document, should have been addressed prior to submission of tender and addressed to the pertinent forum and not at this stage;
- b. the reference made to a previous ruling given by the same Appeals Board is not valid as the issues discussed then were not within the same context as those discussed in this appeal;
- c. the point raised by Mr Zarb would, under normal circumstances, be one of the most crucial aspects of the whole deliberation process. However, in this particular instance, one should not extend the MEAT and transparency principles beyond the limits within which they are meant to be operative. In the PCAB's opinion, it would be unwise for it to change parameters on the pretext of ensuring principles as, within the same context, this Board holds 'consistency' as highly crucial to ensure an ongoing guarantee of level playing offered to all participants in any tender they participate in. Thus, inconsistent judgements which are meant solely at being more expedient are not

permissible in view of future repercussions which, in the long term, could become hyperbolically uncontrollable and unsustainable;

- d. further to (c) above, as well as in line with Dr Grech's concluding remarks, this Board notes that any doubts which the appellants may have had regarding the time frame involved, these could have been clarified with the Contracts Department prior to submission of tender, albeit, in this particular instance, the PCAB concludes that the terms and conditions as specified in the attachments entitled 'Bid Bond Offer 'A'' and 'Bid Bond Offer 'B'' respectively, as well as in the tender document itself under item 4 – INSTRUCTIONS TO TENDERERS, heading Envelope No. 1, line 7, are emphatic and clear, leaving no space for misinterpretation or misunderstanding of Tender Document requirements;
- e. despite all the good faith demonstrated by the appellants and the bankers of one of four bidders forming part of the consortium, the *onus* of proper submission of documentation to pertinent authorities remains on the tenderer and in this particular instance it is evident that a lapse committed by the Bank was not noticed in time;
- f. there is no reason for this Board to think that the General Contracts Committee did not only carry out the job entrusted to them in an efficient and effective manner, strictly adhering to formal procedures, but also acted in a highly transparent and fair method.

As a result of the above-mentioned points, this Board decides against the appellants and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the appellants in terms of regulation 82, should not be refunded.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

09 July 2007