

PUBLIC CONTRACTS APPEALS BOARD

Case 107

**Adv No CT/WSC/T/95/2006 - CT 2747/2006 – WSC 881/06
Quality Assurance Services for Pipe Networks Infrastructure Extension and
Renewal Project and other Construction Project by Water Services Corporation**

This call for tenders was published in the Maltese Government Gazette and the Official Journal of the European Union on 26.12.2006 and was issued by the Contracts Department following a request transmitted to the latter by the Water Services Corporation on 30.11.2006.

Five (5) tenderers submitted their offers.

The closing date for this call for offers was 15.02.2007 and the original global estimated value of the total contract was Lm 178,000.

An objection was filed on 26.04.2007 by **Cordina Zammit & Associates Ltd** after the latter were informed that their 'tender was not among the selected ones since it has been adjudicated as not complying with the tender specifications because "three of the periti listed as key experts are presently employed at the Malta Transport Authority, with the responsibilities of management and implementation of road projects, on behalf of this public agency". Therefore, their function within the regulator's managerial staff is in breach of the Articles and Clauses on independence, ethics and conflict of interest. Their employment within a public agency is in breach of Clause 9.5 which precludes such engagements'.

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 11.07.2007 to discuss this objection.

Also present for the hearing were:

Cordina Zammit & Associates Ltd

Dr Patrick J Galea.	Legal Representative
Dr Lylia Cordina	Legal Representative
Arch Daniel Cordina	
Arch Gordon Zammit	

Solid Base Laboratory Ltd

Dr James Muscat Azzopardi	Legal Representative
Arch Joe Bugeja	
Mr Gordon Baldacchino	
Mr Paul Bugeja	

S & A Quality Assurance Surveyors Ltd

Ing Emanuel Scerri
Mr Sebastian Brincat

Water Services Corporation

Ing Mark Perez

Adjudication Board

Arch Carmel Ellul	Chairman
Ms Natasha Mallia	Member
Mr Anthony Camilleri	Member

After the Chairman's brief introduction about this case, the legal representatives of *Cordina Zammit & Associates Ltd* were invited to explain the motive leading to their objection.

At the beginning of the hearing, Dr Patrick Galea, legal representative of Cordina Zammit & Associates Ltd, requested a clarification because the appellants were not notified about the presence of other interested parties (except for WSC's representatives). Following these interventions, the PCAB ruled that in view of the fact that this was a public hearing no one was precluded from attending and although the Chairman PCAB asked those present to identify themselves, yet, he sustained that it remains the Appeals Board's prerogative whether one is given a chance to intervene or not. Dr Muscat Azzopardi and Ing Emanuel Scerri, acting as representatives of Solid Base Laboratory Ltd and S & A Quality Assurance Surveyors Ltd respectively, declared their presence and direct interest in these proceedings, stating that the main reason was that both parties were specifically mentioned in the appellants' motivated letter of objection.

Dr Patrick Galea commenced his submission by stating that the tender submitted by Cordina, Zammit & Associates Ltd (CZA) was fully compliant with the tender. He claimed that his clients had been excluded because of alleged 'Conflict of Interest' since the three architects listed as Key Experts were employed with the Malta Transport Authority (ADT). He explained that they were contesting the decision because the Adjudication Board had confused the 'tenderers' with the 'key experts'. The appellants' legal representative said that, if after the award of the contract the need arose, the key experts could be replaced. Furthermore, Dr Galea emphasised that the issue of 'conflict of interest' should arise at a later stage since only *Section A – Instructions to Tenderers* was relevant and applicable at tender evaluation stage.

Dr Galea said that the ADT could have availed itself of other remedies since Article 9.2 under the heading *9 Conflict of Interest* stipulated that '*The Contracting Authority reserves the right to verify that such measures are adequate and may require additional measures to be taken if necessary. The Consultant shall ensure that its staff including its management, are not placed in a situation which could give rise to conflict of interest.*' He maintained that the Key Experts indicated by his clients were experienced in this specific field and that the potential conflict of interest could only arise on the part of Key Experts and not the tenderers. Thus, they believed that the measure of disqualification was unnecessary, extreme and not applicable.

When a member of the PCAB asked about the relevance of Clause 14 (b) to this case, wherein it was specified that '*The tenderer must not be affected by any potential conflict*

of interest and shall have no particular link with other tenderers or parties involved in the project', Dr Lycia Cordina, the other appellants' legal representative, replied that there was no potential conflict of interest because her clients did not have any connections with the contractor carrying out the roadworks, and their role as contractors for WSC would be in the same direction as that of ADT because their function consisted of certifying the quality of works. Also, she presented an extract of the collective agreement (Article 4.5 Extra Work) which demonstrated that government 'architects' were allowed to undertake private work.

When asked to comment on the remarks made in their motivated letter of objection regarding the other interested parties, Dr. Cordina remarked that

(a) Solidbase Laboratory Ltd is itself also a contractor and therefore this may give rise to a conflict of interest. She argued that the tenderer cannot be the testing and inspectorate agency at the same time. The terms of reference of the tender call for transparency and accountability. Therefore, the testing and inspection have to be separate from each other and not executed by the same company, that is, Solidbase Laboratory Limited;

(b) S & A Quality Assurance Surveyors Limited failed to submit the requested signed declaration as indicated in paragraph 4.2 of the tender document. This is evident in the schedule of tenderers where, it is indicated that S & A Quality Assurance Surveyors Limited did not present a signed declaration.

Dr Galea added that there was a potential conflict of interest because Solid Base Laboratory Ltd could not act as an inspection body and at the same time as a certifying body.

Dr Muscat Azzopardi, legal representative of Solid Base Laboratory Ltd, denied such allegations. He explained that if Solid Base Laboratory Ltd were to be awarded the contract it would be the authority concerned that would ask them to test the works carried out by contractors and not the contractors themselves. This was corroborated by Mr Paul Bugeja, also acting on behalf of Solid Base Laboratory Ltd. On the other hand, Architect Carmel Ellul, Chairman of the Adjudication Board, explained that any sampling testing would be carried out according to the Quality Assurance Programme that would be formulated between the WSC and the company concerned before the commencement of works.

With regards to the appellants' comment that Solid Base Laboratory Ltd was 'a profit making entity', Dr Muscat Azzopardi said that they were not a charitable institution and that every tenderer submitted the offer with the intention of making a profit.

Mr Sebastian Balzan, representing S & A Quality Assurance Surveyors Ltd, intervened by stating that they did not submit the signed declaration because they were not a joint venture and that the laboratory was a sub-contractor. Also, he said that the Service Tender Document was required at a later stage.

Architect Ellul, responded to Dr Galea's comments regarding the possibility of replacing the Key Experts after the award of contract by stating that such declaration should have been submitted in writing with the tender and should have also indicated alternative arrangements. Furthermore, the Chairman of the Adjudication Board emphasised that the Key Experts were subject to evaluation according to the *Evaluation Grid* wherein it was indicated that the overall total score for the four (4) Key Experts amounted to 50 out of 100 points. Architect Ellul explained that they were not in a position to grant points to unknown experts and therefore, considering the fact that every tenderer had to obtain at least 80 out of 100 points to qualify for the next stage of adjudication, the appellants' tender still would have been automatically disqualified at a later stage.

Architect Ellul contended that they were of the opinion that there could be a conflict of interest as far as testing and inspections were concerned. Architect Ellul explained that material testing and process' inspection are two distinct areas. This tender involves road trenching and once the works are carried out, the roads have to be restored as before. The three architects are employed with Malta Transport Authority - they cannot be judge and jury at the same time, he claimed.

The PCAB asked Mr. Ellul whether there can be a conflict between the contractors and the quality assurance laboratories. The Chairman of the Adjudication Board said that, as far as they were aware, when they analysed the laboratories indicated by the five bidders, it did not result that the one mentioned by Solid Base Laboratory Ltd formed part of a company which supplied material. Dr Cordina intervened to state that they never said that Solid Base Laboratory Ltd was linked in any way with suppliers of materials because its competence as a laboratory was to test and to certify. However, they were stating that its independence could not be guaranteed because of testing and certifying the same material on behalf of the contractors and the authority concerned.

At this point the PCAB (Mr Muscat) remarked that there would be a conflict of interest if the material was certified by the same laboratory, however, this would not be the case if this was certified by another laboratory.

The Chairman of the Adjudication Board proceeded by explaining that the appellants' tender was not considered eligible for award because three of the *architects* listed as 'key experts' were employed with the ADT which is the regulator and, as a consequence, this meant that their function was in breach of tender clauses dealing with independence, impartiality, conflict of interest and their employment within a public agency. In order to corroborate his argument, Architect Ellul made reference to Clause 9.1 which specified that '*The Consultant shall take all necessary measures to prevent or end any situation that could compromise the impartial and objective performance of the contract*' and to Clause 9.5 where it was stipulated that '*Civil servants and other agents of the public administration of the beneficiary country, regardless of their administrative situation, shall not be recruited as experts in contracts in the beneficiary country*'.

Arch Ellul said that, according to the organisational structure featuring on ADT website, Arch David Vassallo (Key Expert 2) was indicated as the Project Manager (Domestic Projects) who inspected works carried out by contractors on behalf of the Authority. He also questioned whether Architects Daniel Cordina and Gordon Zammit (Key Experts 3 and 4 respectively), as Directors of Cordina Zammit and Associates would be safeguarding the interests of their fulltime employers, namely the Water Services Corporation and ADT respectively.

The Chairman of the Adjudication Board said that two other tenderers were disqualified for breaching Articles and Clauses on independence, ethics and conflict of interest.

At this stage the PCAB Chairman questioned whether it is professionally ethical to have the same person performing a role with the latter judging the same work carried out by no other than oneself. To this effect the PCAB Chairman asked whether the tenderers can judge their own work. Dr. Galea intervened to state that tenderers cannot judge their own works.

The PCAB Chairman reminded those present that the crux of the appeal is that three of the architectural experts are employed with a public entity, in this case, the Malta Transport Authority (ADT). This seemed to be in breach of article 9.5 namely that:

“Civil servants and other agents of the public administration of the beneficiary country, regardless of their administrative situation, shall not be recruited as experts in contracts in the beneficiary country.”

As a consequence, the PCAB, commented the Board’s Chairman, should concentrate on that aspect.

The PCAB also referred to article 14b of the tender wherein it is stated that

“The tenderer must not be affected by any potential conflict of interest and shall have no particular link with other tenderers or parties involved in the project.”

Referring to this particular article, Dr. Cordina sustained that the three experts do not have any links with contractors - their role at the ADT is to certify works. She proceeded by stating that had they been chosen by the WSC, they would have the same role to certify the works. Such scenario would not create any conflict of interest. Dr Cordina commented that the three experts are full time employees with the ADT but they can work privately, quoting Article 6 of their contract of service with the Malta Transport Authority which allows them to execute private work. Furthermore, Article 4.5.1 of the Authority’s *Collective Agreement* signed by the Government and the Parastatal Architects Union confirms this.

Architect Daniel Cordina (Key Expert 2), who was the only witness in this hearing, testified under cross examination by Drs Galea and Cordina respectively, that there was no conflict of interest between the different roles as Key Experts, as ADT employees and

as tenderers. He said that they submitted the tender to act as consultants to provide quality assurance services in respect of trenching works carried out by contractors for the WSC. With regard to the difference between (a) 'quality assurance' and (b) 'quality control', the witness explained that,

a. 'quality assurance' was carried out during the course of works to ensure that it was up to the required standard, whilst

b. 'quality control' was done in a laboratory to test the quality of material.

Architect Cordina claimed that, as far as their tender was concerned, the quality assurance and quality control would be carried out by CSA (Inspection Body) and Carmel Vella Ltd Laboratory (Testing Body), respectively, in order to adhere to the terms of reference dealing with impartiality and independence.

Following this, Architect Cordina outlined the procedure that would be followed during the implementation of the contract which consisted of

- 1 regular site inspections during the course of works,
- 2 collecting material sampling and
- 3 enumerating sampled material to ensure anonymity before sending it for laboratory investigation.

The witnesses proceeded by claiming that the relevant test results would be issued by the above-mentioned laboratory which would then be evaluated and analysed by the key experts who subsequently issue the certificates. Also, all evaluations from field inspections and testing results would be referred to Dr Rueben Borg, Project Manager (Key Expert 1), who would then draw a report. According to Architect Cordina, following this procedure, were the WSC to remain unsatisfied with the findings of the report, they would refer the matter to the ADT for verification purposes. It was also pointed out that ADT would also be sending Field Officers to ensure that works were being carried out according to specifications and, in case that there would still be doubts cast on the relevance and validity of the procedure followed, observations made and conclusions reached to that stage, samples would then be taken for evaluation purposes at the ADT Testing Unit which was under the responsibility of Professor Müller. The witness argued by claiming that this showed that there could be no conflict of interest because the aims of the ADT and the WSC were the same.

With regard to ADT's structure, Architect Cordina remarked that it was a big organisation with different divisions/ units, such as, licensing, buses, roads, major projects, domestic projects, testing, trenching and maintenance. He pointed out that, in spite of the fact that three out of four Key Experts (Architects David Vassallo and Daniel Cordina – Assistant Managers Projects and Architect Gordon Zammit – Manager Projects) were employed with ADT, no conflict of interest should arise because they worked at the Domestic Projects Unit and the tender under reference fell under the responsibility of the Trenching Unit.

At this stage the PCAB questioned this reasoning claiming that an employee was part of the entire organisation and not part of a Division within the Organisation, in this case the ADT. Furthermore, the PCAB argued that an employee is paid by the Organisation and not the Division. Reacting to this claim, the same witness stated that they could not be assigned to carry out work in another unit unless they submitted a specific application for the post. As a matter of fact, he said that both Architect Vassallo and himself, did not apply for a managerial post in another unit being fully aware that this post would have given rise to a conflict of interest.

Answering a specific question by Architect Ellul, the witness said that C Vella Ltd was not a supplier of material. However, when asked by Dr Muscat Azzopardi to state whether they had any connection with one of the most influential suppliers on the island, the reply given was in the affirmative.

Then, the Chairman of the Adjudication Board presented two documents regarding permit numbers 1687/2005 and 0148/2007 respectively which showed that Architect Daniel Cordina was involved in the vetting of applications for permits submitted by contractors for reinstatement of roads after trenching works. The witness intervened quickly by stating that he was no longer responsible for such work and this was presently being carried out by Architect Edwin Micallef.

When asked by a member of the PCAB about the method of communication between the various Directorates such as management meetings, Architect Cordina said that only coordination meetings were held within the Roads Directorate.

Another member of the PCAB referred Architect Cordina to Clause 9.5. The witness confirmed that albeit he was an employee within a public agency, yet he maintained that according to Clause 9.2, if the Contracting Authority had any doubt, the Consultant could nominate other experts. Here, the PCAB drew his attention to the fact that that Clause 9.5 precluded the engagement of experts who were employed within a public agency. However, Dr Galea insisted that there would be no conflict of interest because their roles within the ADT and as tenderers would be in a different capacity.

The Chairman PCAB asked Architect Ellul whether there were other tenderers who have been disqualified and, if so, for what reasons. Mr. Ellul reported that there were other tenderers who were also disqualified as they were also found in breach of article 9.5. Mr. Ellul commented that there were incidents where the WSC disagreed with the ADT. Mr. Ellul claimed that whoever is being employed and paid by WSC has to be loyal to the Organisation.

Replying to another question by the PCAB's Chairman wherein he asked Architect Cordina whether he considers himself as a public servant, Mr Cordina quoted article 9.2, namely

“... .. the Consultant shall replace, immediately and without compensation from the Contracting Authority, any member of its staff exposed to such a situation.”

A member of the PCAB remarked that it seems that albeit Mr. Cordina was aware of Article 9.5, yet he ignored it. On the same subject the PCAB Chairman commented that the PCAB feels that article 9.5 is very clear, i.e. irrespective from the fact that the Malta Transport Authority does not hinder its officials from executing private work, yet clause 9.5 clearly states that public servants shall not be recruited as experts.

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 26.04.2007, and also through their verbal submissions presented during the public hearing held on 11.07.2007, had objected to the decision taken by the General Contracts Committee;
2. having noted the fact that the appellants were *inter alia* contesting the decision because the Adjudication Board had confused the ‘tenderers’ with the ‘key experts’;
3. having reflected on Architect Ellul’s comments regarding the appellants’ claim in respect of the possibility of *Key Experts* being replaced after the award of contract. Of particular relevance were (i) the points raised by the Chairman of the Adjudication Board concerning the fact that any declaration by appellants should have been submitted in writing with the tender and should have also indicated alternative arrangements; (b) the pertinent remarks relating to the fact that the Adjudication Board were not in a position to grant points to unknown experts;
4. having also noted the Chairman of the Adjudication Board’s comments regarding the fact that the appellants’ tender was not considered eligible for award because three of the *architects* listed as ‘key experts’ were employed with the ADT which is the regulator and, as a consequence, this meant that their function was in breach of tender clauses dealing with independence, impartiality, conflict of interest and their employment within a public agency, particularly Clauses 9.1 and 9.5 of the Tender Document’s *General Conditions for Service Contracts*.
5. having taken full cognizance of the appellants’ claim that albeit the three experts are full time employees with the ADT, yet they can work privately, quoting Article 6 of their contract of service with the Malta Transport Authority which allows them to execute private work;
6. having also taken into consideration the procedure involved leading to the ultimate issue of official certificates;

7. having reflected on the appellants' perception of organisational structures and the connection between Divisions / Units and the Organisation as a whole;
8. having also considered the fact that according to the Chairman of the Adjudication Board there were other tenderers who were also disqualified as they were also found in breach of article 9.5

concludes, that

- a) the Tender Document, is evidently clear in its terms and conditions which *inter alia*, state that "the tenderer must not be affected by any potential conflict of interest and shall have no particular link with other tenderers or parties involved in the project" - terms and conditions which in the PCAB's opinion have not been satisfied by appellants;
- b) it is immaterial whether the Malta Transport Authority (ADT) approves that its officials execute private work or not as the major issue in this particular tender seems to be more whether the condition imposed by the Contracting Authority in article 9.5 of the Tender Document's *General Conditions for Service Contracts* is satisfied or not, a condition which, as expressed, leaves no room for misinterpretation stating that public servants shall not be recruited as experts;
- c) the arguments raised by the appellants were not convincing and based on a timid attempt at justifying the evident unsuitability of appellants to participate in this particular tender as key experts in view of the potential conflict of interest and direct link with other tenderers or parties involved in the project;
- d) the PCAB is of the opinion that an employee is primarily employed and ultimately paid by the Organisation albeit his daily functions may relate to a particular Division within the Organisation, and, as a consequence, it is simply considered too much of a frivolous argument for anyone to try to distinguish between the two just for the sake of trying to modify what is highly perceived as normal and accepted by everyone to be as such.

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

02 August 2007