

PUBLIC CONTRACTS APPEALS BOARD

Case 108 and Case 109

CT 2099/2006; Advert Notice CT 166/2006; MTA 005/2006 Tender for Chauffeur Driven Transportation Services in Malta and Gozo for a period of 2 years

This call for tenders was published in the Maltese Government Gazette on 09.05.2006 and was issued by the Contracts Department following a request transmitted to the latter by the Malta Tourism Authority on 14.02.2006.

Three (3) tenderers submitted their offers.

The closing date for this call for offers was 04.07.2006 and the original global estimated value of the total contract (covering two years) was Lm 100,000.

Two Objections were filed separately in connection with this tender by (i) **Zarb Coaches Ltd** and (ii) **Frank's Garage Ltd** after it had come to their knowledge that it had been decided to cancel the tender in caption and to issue a fresh call for 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 25.07.2007 to discuss this objection.

Also present for the hearing were:

Zarb Coaches Ltd

Dr Massimo Vella
Mr Emanuel Zarb

Legal Advisor

Frank's Garage Ltd

Dr Mario Scerri
Mr Frank Refalo

Legal Advisor

Malta Tourism Authority (MTA)

Mr Sam Mifsud
Mr Patrick Attard

Chairman
Procurement Manager

MTA's Tender Committee

Dr Joe Zammit Maempel
Mr Carmel Portell
Mr Anthony Cachia
Mr Charles Visanich

Chairman
Member
Member
Member

Contracts Department

Mr Francis Attard

Director General (Contracts)

At the commencement of the public hearing the Chairman PCAB gave a brief introduction about the two objections which concerned the same tender. Both appellants were requested to explain separately the reasons that prompted them for filing their objections. The appellants' submissions were followed by MTA's response and the witnesses' testimonies.

Dr Massimo Vella, acting as legal representative to Zarb Coaches Ltd who tendered for the provision of chauffeur driven transportation services in Malta, said that his clients failed to understand why it was decided to issue a fresh call considering the fact that the appellants had satisfied all the requirements of the tender and their offer was cheaper than that of the other applicant, namely John's Garage.

Dr Vella explained that the tender documentation created contractual obligations between the contracting authority and the tenderer. The appellants' lawyer claimed that since the tender document did not provide anything about a fresh call then they should proceed with the award of contract. However, he maintained that, without prejudice to the above, no fresh call should be issued unless for justified reasons.

Dr Vella pointed out that the decision to issue a fresh call was only published on the Contracts Department's Notice Board on 21 February 2007 and that his clients were not provided with the precise reason/s for such a decision being taken by the pertinent authorities.

The appellants' lawyer also argued that his clients would be prejudiced by the decision to issue a fresh call because the rates quoted in their financial offer had already been published and exposed to prospective bidders.

Dr Mario Scerri, legal representative of Frank's Garage Ltd, the only tenderer who tendered for the provision of the same services in Gozo, concurred with the position taken by the other appellants due to the fact that their offer conformed also with all of the tender's conditions and, whilst appealing, yet it was surprising to them that, to date, they had not been made aware as to the real reason why their offer had been rejected.

Dr Scerri also remarked on the fact that his clients' prices had been made published and exposed to the scrutiny of existing as well as potential competition. He emphasised that, although Frank's Garage Ltd was the only tenderer, the rates offered were undoubtedly very competitive because, independently from this contract, MTA continued to make use of their services in Gozo.

Furthermore, Dr Scerri contended that there was no reason to invalidate the tender once their Guarantee continued to be extended.

Dr Joe Zammit Maempel, Chairman of the Tenders' Committee at the MTA, responded by stating that the appellants, namely, Zarb Coaches Ltd and Frank's Garage Ltd, were the current contractors for the provision of such services in Malta and Gozo respectively, and therefore, it was the Guarantee of this contract that was being renewed and not that of

the tender under reference. It was established by those present that, once the tender in caption had not been awarded, it would be the Bid Bond that is being extended.

With regard to Frank's Garage Ltd's submission, Dr Zammit Maempel said that their tender had been rejected because the General Contracts Committee (GCC) had advised them, through one of the member of the Tenders' Committee, that once they did not quote for all items in the *Schedule of Prices* as requested in the tender document, their offer was to be considered invalid and therefore could not be awarded the contract. It was remarked that Clause 4.18 of the tender document specified that:

'Prospective bidders are invited to fill in whichever Schedule of Prices is of interest to their company. It is extremely important for bidders to note however that the Schedule of Prices they choose to tender for should be completed in full, and that bids will be automatically disqualified if any requested rates are omitted from the respective Schedule of Prices (ex. It is not possible to quote only for coaches and not for minivans or taxis in either Section A or B).'

At this point, Frank's Garage Ltd's representatives remarked that, unlike in Malta, the Gozo Bus Owners' Association (GBOA) did not operate night tours in Gozo but only half day tours, namely

- a. the *morning tours* which are held either between 09.00 hrs / 09.45 hrs and 16.30 hrs / 17.00 hrs,
- and
- b. the *afternoon tours* which are held between 15.30 hrs and 22.30 hrs, respectively.

The appellants emphasised that there was one rate for all the coaches' transportation services in Gozo and that, as a consequence, the GBOA did not offer a different rate for such tours. Frank's Garage Ltd's representatives added that last year the MTA made use of two coaches only.

Dr. Zammit Maempel intervened to claim that Dr. Scerri's client could have indicated a price for night tours, considering that the *Gozo Channel* now operates even at night time. Once the item had been left blank, he argued, should the MTA request that service, the bidder could ask for any price for that service.

When the appellants' representatives claimed that the *Schedule of Prices* was not applicable for Gozo, the PCAB drew their attention that if the tender was anomalous for Gozo they should have requested a clarification *ab initio* so that in case it was established that their claim was justified, the competent authority would have been in a position to rectify the position by way of an 'addendum'. It was also pointed out that the *onus* of compliance fell on the tenderer and not on the contracting authority.

Continuing, Dr Zammit Maempel said that as regards Zarb Coaches Ltd's offer was concerned these were disqualified because the rates quoted in their offer were drastically high when compared with the adjusted rates of the previous contract. Here, it was clarified that, following a specific request received from the contractors, MTA had agreed to revise the contracted rates due to the increase in fuel prices. Dr Zammit Maempel said that the Tenders Committee advised the MTA Board not to award the tender for the provision of transportation services in Malta because the increase in the quoted rates was not justified as the surcharge had already been absorbed in the revised rates. It was stated that some items were increased by 137% and that, on average, the increase was 45.72%. Furthermore, it was pointed out that the MTA had to operate within a budget. Dr Zammit Maempel explained that they had recommended to issue of a fresh call and to allow prospective bidders to tender for each category separately.

With regard to contractual obligations, the Chairman Tenders' Committee remarked that Clause 4.26 specified that '*The Authority reserves the right to refuse even the most advantageous offer.*'

In reply to a specific question by the PCAB, Dr Zammit Maempel said that it was the competence of the Department of Contracts to inform the tenderers about the reasons for their disqualification.

During these proceedings Mr Francis Attard, Director General (Contracts), Mr Sam Mifsud, MTA Chairman and Mr Patrick Attard, MTA Procurement Manager, were called to take the witness stand. They gave their testimony under oath.

On cross examination by the PCAB, Mr Attard testified that it was an established procedure that at the opening sessions, tenders were scheduled and the names of bidders and relative prices were published on the Contracts Department's Notice Board. He emphasised that although the prices were published, the contract was not awarded to that tenderer who had submitted the cheapest offer because it was also indispensable for all tenders to be compliant with the tender conditions and specifications.

Mr Attard explained that, in this particular case, the tenders were first evaluated by the MTA's adjudication board and, subsequently, their recommendations were referred to the General Contracts Committee. He said that none of the bidders satisfied the tender conditions in their entirety and therefore they had no alternative but to cancel the tendering process and to issue a fresh call in accordance with normal praxis. He added that although at one stage the MTA had recommended that the contract for transportation services in Malta and Gozo be awarded to Zarb Coaches Ltd and to Frank's Garage Ltd respectively, they still decided to reject such offers because both tenders were not compliant.

Here, the PCAB's Chairman drew Mr Attard's attention to the fact that this version was quite different from that given by Dr Zammit Maempel. In actual fact, after checking the relevant documentation in file, Mr Attard clarified that Zarb Coaches Ltd's tender was rejected not because their offer was not compliant as inadvertently stated earlier but due

to the fact that the rates quoted were excessively high. He confirmed that in the case of Gozo, Frank's Garage Ltd's tender was not accepted because they did not fill in all the rates as requested in the tender conditions and therefore they could not accept such offer.

When asked to state whether the General Contracts Committee had analysed the rates submitted, Mr Attard replied in the affirmative and said that the issue was discussed during a meeting held on 23 January 2007. He said that the Committee requested more information about

- a. the frequency of use of the outgoing contract
- b. the total value utilised on the outgoing contract *and*
- c. a comprehensive table showing comparisons between the rates of the outgoing contract and those submitted by Zarb Coaches for this tender.

However, while on 28 September 2006, MTA had recommended that none of the offers received were to be accepted, surprisingly, on 4 Jan 2007 it was declared that the rates were considered acceptable. Mr Attard said that in view of these two contradicting documents received from the contracting authority, they felt that these provided minimal comfort to give them a solid foundation upon which they could base their deliberation. Faced with such an anomalous scenario the Contracts Committee felt that it was not considered appropriate for them to award the contract.

Following this statement, the PCAB stated that it was of the opinion that, once these two documents were received from the same Authority, it appeared that there could have been a rethinking rather than a contradiction. As a consequence, in hindsight, one would be tempted to think that it would have been better had the Contracts Committee referred back to the MTA the issue for clarification since the latter could have had valid reasons to change its decision. Here, Mr Attard remarked that Min 29 in CT 2099/2006 confirmed that the Contracts Committee had discussed the issue on 20 February 2007 and subsequently it was decided to cancel the tender and to issue a fresh call.

In reply to a specific question by the PCAB, Mr Attard said that there was no particular decision not to inform the appellants about the reasons as to why it was decided to issue a fresh call.

When asked by Dr Vella to state whether the Contracts Committee had compared quoted rates with the market rates, the Director of Contracts replied that under normal circumstances it was the Contracting Authority's responsibility to carry out such an exercise.

In reply to Mr Patrick Attard's question regarding the acceptance of his recommendations rather than those of the other three MTA high officials, the DG (Contracts) said that they only took into consideration the fact that such documents were sent by the same organization.

When Mr Sam Mifsud, the MTA Chairman took the witness stand, he was cross-examination by the PCAB. He testified that the tender in question was issued before he was appointed as the MTA's Chairman, i.e. on 1 September 2006. He remarked also that, later on during the same month, the entire Board had resigned and the MTA was left without a Board for two whole months. Furthermore, Mr Jeffrey Cutajar's employment as Director (Marketing) with MTA was also terminated in the meantime. He said that at that time they gave priority to marketing Malta abroad rather than to tenders because their prime objective was to lure more tourists to our island. However, the witness claimed that when the new Board was appointed, it analysed the Tenders Committee's report and the offers submitted by Zarb Coaches Ltd and Frank's Garage Ltd. Mr Mifsud explained that in spite of the contents of the e-mail dated 28 September 2006, they still decided to issue the letter dated 4 January 2007 because the Tenders Committee had compared the tenderers' quoted rates with the previous revised contracted rates while the MTA Board had compared them with the 'market prices' being paid by operators in the private sector.

The witness said that he had discussed the matter with Mr Peter Portelli, Permanent Secretary Ministry for Tourism, and Mr David Mifsud, the MTA's CEO at the time, in December 2006 and they issued the letter in January 2007. The Authority's Chairman contended that if they were asked by the Contracts Committee about the alleged "u-turn", they would have explained and clarified the matter and would have also stood by their decision as stated in their letter dated 4 January 2007. In reply to a specific question asked by the PCAB, the MTA's Chairman said that he was in a position to make such comparisons because he had his own company and they used such services more than the same Authority.

The third and last witness to take the stand was Mr Patrick Attard, Procurement Manager at the MTA. On cross examination by the PCAB, Mr Attard testified that the information included in his e-mail of the 6 February 2007 was submitted following a request received from the Contracts Department. He said that the value of the outgoing contract was based on actual figures paid and that the comparison exercise was carried out between the rates of the outgoing contract and those submitted in Zarb Coaches Ltd's tender. Furthermore, the witness confirmed that, at present, such transportation services were being given by both appellants and that, as far as he was aware, the rates that were being paid were the same rates proposed in the appellants' respective offers. However, he maintained that the contract was awarded to them on the basis of price and, this, after they had asked for quotations from major transport service providers.

In his concluding remarks Dr Vella said that from the outcome of these proceedings it resulted that his client's offer was compliant and that, on the basis of Mr Patrick Attard's testimony, the recommendations included in his e-mail of the 28 September 2006 should not be taken into consideration because they did not base their decision on the market rates. He contended that it had been established that the MTA Board had confirmed that the rates quoted by his client were competitive and comparable with the market rates. The appellants' lawyer also remarked that, in the *interim*, Zarb Coaches Ltd were still providing the service at the same rates proposed in the tender and these were still the

cheapest on the market. Furthermore, Dr Vella said that from the testimony given by the Contracts Department's representative it was established that when the Contracts Committee took the decision, they did not consider the market rates and also ignored the latest recommendation of the Contracting Authority.

Mr Patrick Attard clarified that his e-mail of the 28 September 2006 was sent after obtaining the recommendations of the Tenders Committee and the approval of the previous MTA Board.

Dr Scerri said that they interpreted Clause 4.18 to mean that bidders had to quote for all categories (coaches, minibuses and taxis) and did not need to quote for each item under all categories. He insisted that once the GBOA operated one service for coaches in Gozo, then the tariff quoted by his client should be considered applicable for all types of services.

Dr Zammit Maempel said that after the issue of the tenders by the Department of Contracts, the tenders received would be evaluated by the Committee he chairs and, subsequent to this, their recommendations would be forwarded to the MTA Board. Dr Zammit Maempel emphasised that from this stage onwards the Committee members would not know whether their recommendations would have been actually been accepted.

He acknowledged that the MTA Chairman was in a better position to decide because when he tried to obtain the market rates, all efforts made proved to no avail. As a consequence, during the evaluation process, the Tenders Committee could only compare the rates quoted by the bidders with the previous contract. Furthermore, Dr Zammit Maempel pointed out that he could not consult Mr Mifsud about the matter because during the evaluation process Mr Mifsud was not yet involved with the MTA. He proceeded by stating that when, at the time, he spoke to Mr Romwald Lungaro Mifsud, the previous Chairman of the Authority, it transpired that such information was not available. He claimed that the Tenders Committee recommended to the main Board to retain the current tenderer at the current rate and that if this was not acceptable the Board should ask for quotations from at least three service providers.

At this stage Mr Sam Mifsud intervened to state that every month three operators are called for an update of the rates and, invariably, Messrs Zarb Coaches Ltd always end up the cheapest of the three.

Dr Zammit Maempel declared that during these proceedings he heard a lot of new developments which he was not aware of because he did not know what happened after the last discussion on 12 September 2006. With reference to the letter dated 4 January 2007 which was signed by the Permanent Secretary Ministry for Tourism, the MTA Chairman and the Authority's CEO, he believed that they had carried out their work with responsibility and that they were at an advantage because they were in possession of information which was not available to the Tenders' Committee. Dr Zammit Maempel reiterated that the Contracts Committee had advised that due to the fact that Zarb Coaches

Ltd's offer was not compliant with Clause 4.18 the tender could not be awarded. He said that, as far as the Gozo contract was concerned, the issue was technical and legal.

Mr Francis Attard insisted that on the basis of what had been stated during this hearing, he believed that the Contract Committee's decision regarding the cancellation and re-issue of tender is still the most valid and credible option. He claimed that in his opinion there was lack of credibility on the part of the Contracting Authority because whilst, initially, it was declared that the rates were considered "drastically higher than the present ones", two months later the same rates were considered "both feasible and comparable to what is actually on the market now". The Director General (Contracts) maintained it was still very difficult for the Contracts' Committee to accept the MTA's recommendations.

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 letters of objection' dated 01.03.2007 (Zarb Coaches Ltd) and 06.03.2007 (Frank's Garage Ltd) respectively, and also through their verbal submissions presented during the public hearing held on 25.07.2007, had objected to the decision taken by the General Contracts Committee;
2. having noted the fact that both appellants contend that they have satisfied tender conditions and, as a consequence, there is no need for a fresh call;
3. having reflected on both the arguments raised by appellants as well as those brought to the attention of those present by the Chairman of the Tender Committee relating to contractual obligations;
4. having also noted the fact that, to date, both appellants were not given specific reasons why their respective offers were not found to be acceptable;
5. having taken full cognizance of the argument raised by both appellants as regards the fact that their prices had been made published and exposed to the scrutiny of existing as well as potential competition;
6. having also taken into consideration the fact that with regards to the situation currently prevailing in Gozo, wherein only one rate was applicable for all the coaches' transportation services and that, as a consequence, the GBOA did not offer a different rate for such tours;
7. having also considered the fact that the Tenders Committee had advised the MTA Board not to award the tender for the provision of transportation services in Malta because the increase in the quoted rates was not justified as the surcharge had already been absorbed in the revised rates, stating that whilst there were some items which increased by 137%, on average, the increase was 45.72%;

8. having also reflected on the testimony given by the DG Contracts who, *inter alia*, said that in spite of the fact that the prices were published, the contract was not awarded to that tenderer who had submitted the cheapest offer because it was also indispensable for all tenders to be compliant with the tender conditions and specifications and, according to the Chairman of the Contracts Committee both appellants' offer fell short of full compliance either through excessive prices offered or due to the lack of full disclosure of prices for all transportation services as requested in the Tender document;
9. also noted the fact that whilst at one point, according to the Chairman of the Contracts Committee a proper analysis of the rates submitted was conducted, particularly in view of further clarifications sought after a meeting held with the contracting authority's representatives on 23 January 2007, yet when asked by Dr Vella to state whether the Contracts Committee had compared quoted rates with the market rates, the Director of Contracts replied that under normal circumstances it was the Contracting Authority's responsibility to carry out such an exercise;
10. having taken cognizance of the fact that whilst initially the MTA had recommended that none of the offers received were to be accepted, yet, subsequently, this decision was reversed and the same rates became acceptable;
11. having noted the claim made by the MTA's Chairman wherein it was stated that in spite of the contents of the e-mail dated 28 September 2006, senior MTA and Ministry officials still decided to issue the letter dated 4 January 2007 because they argued that the Tenders Committee had compared the tenderers' quoted rates with the previous revised contracted rates while the MTA Board had compared them with the 'market prices' being paid by operators in the private sector;
12. having taken note of the way regular market research is conducted by the MTA with regards to periodical checks on applicable rates, an exercise which is carried out by three operators being contacted by phone every month and following which, invariably, Messrs Zarb Coaches Ltd always end up the cheapest of the three;
13. having observed Mr Patrick Attard's change of position when he stated that the recommendations included in his e-mail of the 28 September 2006 should not be taken into consideration because they did not reflect the prevailing market rates;
14. having heard the Tenders' Committee's Chairman state that the Permanent Secretary Ministry for Tourism, the MTA Chairman and the Authority's CEO were in possession of information which was not available to the Tenders' Committee;

concludes, that

re: appeal lodged by Zarb Coaches Ltd

- a. the Contracts Committee were procedurally amiss and this Board feels that the least such Committee could have done was to discuss the content and the relevance of the letter signed by the MTA's Chairman and CEO and the Ministry's Permanent Secretary respectively; this would have been a more credible exercise despite the fact that, following this clarification exercise, the Contracts Committee could have still maintained its previous stand;
- b. the procedure adopted by the MTA to obtain updated quotations is highly irregular. Such quotations should be obtained in a sealed envelope and opened, concurrently, on a particular date and at a particular time - proper audit trails and transparent praxis conducted in an equitable manner where no one could be assumed to have a potential advantage is very much the foundation, the basis, of public procurement;
- c. this Board is not satisfied that the Maltese taxpayer is getting the best value for money and, under these circumstances, one has to ensure that procedure, once meticulously followed, would provide a more transparent way of reaching the same conclusions.

As a result of the above mentioned points and prior to taking a final decision on this case, the PCAB directs that the Contracts Committee should first seek from the MTA officials the workings which formed the basis upon which a decision was made by the contracting authority.

This Board further decides that the deposit submitted by appellants should be kept on hold until a final decision by the PCAB is taken.

Furthermore,

re: appeal lodged by Frank's Garage Ltd

the PCAB concludes that

- a. a tenderer is expected to strictly abide by a Tender document's specifications and that should such tenderer have any doubt, it is considered appropriate for one to seek clarification in regard before formally submitting an offer;
- b. appellants have erroneously assumed that the request made in the Tender document by the Contracting Authority for a full completion of details requested was being adhered to;
- c. in these circumstances, the Contracts Committee has simply followed normal praxis rightly giving due importance to Clause 4.18 of the Tender Document

As a result of the above-mentioned points, this Board decides against the appellants, Frank's Garage Ltd.

In terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the appellants in terms of regulation 83, should be refunded as this Board acknowledges that this objection was not filed in a frivolous manner.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

17 August 2007