

PUBLIC CONTRACTS APPEALS BOARD

Cases 98 and 99

CT 2530/2006 - Advert Notice CT 377/2006; FTS C 15-06 Tender for the Construction of A New Secondary School at Mosta (Ta' okrija)

This call for tenders was originally published in the Maltese Government Gazette on 10.10.2006 and was issued by the Contracts Department following a request transmitted to the latter by the Foundation for Tomorrow's Schools on 11.08.2006.

The closing date (following extension) for this call for offers was 12.12.2006 and the global estimated value of the total contract was Lm 1,407,265.

Nine (9) different tenderers' offers were considered by the Adjudication Board.

Soon after being informed that they had failed to comply with Clause 1.14.1 of the tender document due to their failure to submit a bid-bond which remains valid for a period of six months from the closing date set for the submission of tenders, Messrs *Ritemix (Gatt Bros) Ltd* and *AX Construction Ltd* respectively, filed two separate objections (dated 20.12.2006: Ritemix (Gatt Bros) Ltd – and 21.12.2006: AX Construction Ltd) with the Department of Contracts contesting the decisions taken.

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 02.02.2007 to discuss this objection.

Also present for the hearing were:

Ritemix (Gatt Bros) Ltd

Dr Adrian Delia
Dr John L. Gauci
Mr Carmelo Gatt

Legal Advisor
Legal Advisor

AX Construction Ltd

Dr David Wain
Mr Angelo Xuereb

Legal Advisor

Foundation for Tomorrow's Schools

Arch Andrew Ellul

Contracts Department

Mr Anthony Cachia
Mr Mario Borg

Other interested parties present

Mr Josef Cachia
Dr Aldo Vella LL.D.

Elbros Construction Ltd
Vassallo Builders Ltd

The PCAB's Chairman commenced proceedings by asking interested parties whether they would find any objection with the Board conducting two hearing sessions concurrently in view of the fact that both appeals concerned the same objection relating to the same tender. All parties replied positively to the said proposal.

Before proceeding with the actual hearing, on Dr Adrian Delia's request, Dr Aldo Vella and Mr Josef Cachia, representing Vassallo Builders Ltd and Elbros Construction Ltd respectively, declared their interest in this case.

Subsequently, Dr Vella, raised a point of order stating that the objection filed by AX Construction Ltd was not accompanied by the requested deposit of Lm 25,000 but by one of Lm 7,000. Dr David Wain, representing AX Construction Ltd, one of the appellants, explained that his clients had earlier contested the requested deposit because the amount of Lm 25,000 by far exceeded the 0.5% of the estimated tender value. In actual fact, even the Department of Contracts acknowledged the mistake and reduced the stated amount accordingly. Dr Delia confirmed that when his clients were formally presenting their objection accompanied with a deposit of Lm 25,000, they received a fax from the Department of Contracts informing them that 'due to an oversight the stated amount of Lm 25,000 for an eventual lodging of an objection should have read Lm 7000' and therefore the amount on their notice of objection was amended accordingly. Dr Vella responded that he had raised the issue because they did not have any information about these developments and declared that he was satisfied with the explanations given.

At this stage, the appellants' representatives were invited to explain the motive leading to their respective objections. These explanations were followed by the intervention of the other interested parties' representatives as well as the testimonies given by the Department of Contracts' representatives, namely Messrs Anthony Cachia and Mario Borg.

Dr Wain started by stating that the reason for the disqualification of his clients' bid as given by the Director General (Contracts) in the letter dated 12 December 2006 was that AX Construction Ltd had failed to comply with Clause 1.14.1 of the tender document due to their "failure to submit a bid-bond which remains valid for a period of six months from the closing date set for the submission of tenders." However, he pointed out that Clause 1.14.1 of the Tender Document specified that a ".. Bid Bond must be valid for a period of six months from the date set for the submission of tenders". Dr Wain said that the wording quoted by the Director General (Contracts) in his letter dated 12 December 2006 was significantly different from that contained in Clause 1.14.1 of the tender document. AX Construction Ltd's representative insisted that there was no particular date set for the submission of tenders but an expiry date.

Dr Delia, legal representative to Ritemix (Gatt Bros) Ltd added that the refusal was specifically because they were in breach of Clause 1.14.1 which stipulated that the bid bond had to be valid for six months from the date set for the submission of tender. He said that his perspective was slightly different than the one previously expressed by Dr Wain, in a way that, according to Dr Delia, there was no date set but a period for the

submission of tenders. The said period started from 14th November 2006 (which according to him was the publication date of tender) until the 12th December 2006 (regarded by the appellants as the closing date of tender). Dr Delia claimed that in the refusal letter the Contracts Department mentioned “closing date set” but in the tender document reference was made to a period. He insisted that in the advertisement notice there was no closing date but a submission period. Dr Delia contended that the Contracts Department had misquoted Clause 1.14.1.

When he was referred to the specimen of the Bid Bond (Annex V) wherein it was indicated that this ‘guarantee expires within six (6) calendar months starting on the closing date of tender’, Dr Delia replied by stating that this document was in direct contradiction to Clause 14.1.1 which was the only reason given for the disqualification of their offer.

Dr Vella intervened and remarked that the scope of the Bid Bond was to ensure that a Tenderer would not withdraw the offer during the adjudication process. He claimed that, on the basis of the submissions made by the appellants’ representatives, it would be illogical to have a number of tenders with bid bonds having different expiry dates. Thus, Dr Vella contended that it was evident that the expiry period of different bid bonds was to be linked with the closing date of the tender.

Furthermore, Vassallo Builders Ltd’s lawyer contended that clause 1.14.1 should be considered in its entirety because it was also stipulated that ‘*Each tender must be accompanied by a valid and original Bid Bond issued by a Maltese Bank to the amount of Twenty-one Thousand Malta Liri (Lm 21,000) in the form of the attached specimen Bid Bond*’ wherein it was clearly specified that ‘*This guarantee expires within six (6) calendar months starting on the closing date of tender, that is it is valid for six (6) calendar months from the closing date of this tender*’. He pointed out that AX Construction Ltd’s bid bond was valid up to 23 May 2007. Dr Vella claimed that the final date for the submission of tenders was subsequently extended up to 12 December 2006 and that all prospective bidders were notified accordingly.

Mr Angelo Xuereb intervened to explain that this situation occurred because when the closing date of tender was extended to 12 December 2006, the Bid Bond was already available before the original closing date of tender, i.e. 23 November 2006. On the same issue Dr Delia intervened to state that the bid bond presented by his clients would have expired on 7 June 2007 because it was made available 5 days before the last date they could submit the tender, namely 12 December 2006. However, Dr Delia pointed out that the bid bond would be replaced by a performance bond once a tender was accepted.

With regard to AX Construction Ltd’s letter of objection dated 20 December 2006 wherein it was stated that, when the closing date of tender was extended to 12 December 2006 the Contracts Department did not indicate that the Bid Bond had to be extended, Dr Vella said that tenderers were asked to extend their Bid Bond not before closing date of tender but when more time was required for the award of the contract.

Mr Josef Cachia, representing Elbros Construction Ltd, intervened to remark that when, on another occasion, the Company he represents did submit a tender for the Construction of a Secondary School at Ta' Karwija, on that occasion their bid was actually disqualified because their *Bid Bond* had an incorrect expiry date. The PCAB observed that, in the circumstance, Elbros Construction Ltd could have availed themselves of their right to appeal, since they had failed to do so the PCAB cannot take the plea in consideration at this stage.

In reply to a specific question by the PCAB, Mr Mario Borg, testifying on behalf of the Contracts Committee, declared that, as far as the Contracts Department is concerned, 'the date set for the submission of tender' and the 'closing date of tender' are considered to be referring to the same thing. However, Dr Delia reiterated that there was one closing date of tender and various "submission dates" of tender.

On cross examination by the appellants' lawyers, Mr Anthony Cachia, representing the Contracts Department, claimed that every tenderer had the opportunity to submit the tender up to the closing date which was the last date for the submission of tender, that is the 12 December 2006 and therefore tenders submitted before closing date were accepted. He contended that the appellants' offers were rejected because they failed to submit a bid bond which remained valid for a period of six months from the closing date of tender. Mr Cachia said that the other seven (7) tenderers submitted a Bid Bond with the correct expiry date.

When asked to state whether the "date of submission of tender" and the "closing date of tender" were the same, the reply given was in the negative. However, the witness later maintained that the "date set for the submission of tender" was the same as "the closing date of tender".

Mr Cachia declared also that up to the original closing date of tender, namely the 23rd November 2006, no offers were received and he confirmed that all prospective bidders were notified about the extension of the closing date of tender. The Department's representative contended that, according to standard practice, the Contracts Department never notified tenderers to extend their Bid Bond before closing date of tender even when this was extended. The witness argued that, at tendering stage, it was the responsibility of the tenderers to extend the expiry date of their Bid Bond. Mr Cachia concluded his testimony by stating that the tenderers were asked to extend their Bid Bond if, at the adjudication stage, more time was required for the contract to be awarded.

In his concluding remarks Dr Wain submitted that bidders were regulated and bound by the wording of the particular clause in the tender document and not by the Department's interpretation.

Dr Delia concluded by stating that the Contracts Department should have changed the wording of the tender by clearly stating that the Bid Bond had to be valid for six months from either the 'final date for submission of tender' or the 'closing date of tender'. He reiterated that the wording of the actual tender document indicated that the Bid Bond was

required to be valid for six (6) months from any of the date between the published and the closing dates of tender.

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

This Board,

- 1 having noted that the appellants, in terms of their 'reasoned letter of objection' dated 20.12.2006: Ritemix (Gatt Bros) Ltd – and 21.12.2006: AX Construction Ltd respectively, and also through their verbal submissions presented during the public hearing held on 02.02.2007, had objected to the decisions taken by the General Contracts Committee;
- 2 having noted Dr Wain's issues raised with respect to the ambiguous nature of some of the conditions referred to in the tender document;
- 3 having taken note of Dr Delia's reference to a contradiction between Annex V of the *Bid Bond* and Clause 14.1.1, specifically quoted by the Contracts Department as the reason leading to the ultimate disqualification of appellants;
- 4 whilst acknowledging that, 'ceteris paribus', Dr Vella's argument regarding the illogical implication of different bid bonds having different expiry dates, the PCAB, however, also acknowledges the argument raised by appellants with regards to possible confusion brought about as a result of ambiguous declarations;
- 5 having considered the points raised by officials from the Contracts Department

concludes, that the Contracting Authority may have, inadvertently, misguided tenderers as a result of incongruous statements of terms and conditions resulting in potential ambiguity.

As a result of the above-mentioned points, this Board decides that, in the circumstance, this Board feels that it would be prudent to give the benefit of the doubt to appellants and so decides in their favour, recommending that a higher degree of care be given by contracting authorities to ensure that similar ambiguities do not recur in the future.

Finally, in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the appellants in terms of regulation 82, should be refunded.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

26 February 2007