

## **PUBLIC CONTRACTS APPEALS BOARD**

### **Case No. 117**

#### **RE: Advert No 370/2007 - CT 2347/2007, UM 1224 - Procurement of an Integrated University Information System for the University of Malta.**

This call for tenders was published in the Maltese Government Gazette and the Official Journal of the European Communities on 23.10.2007 and was issued by the Contracts Department following a request transmitted to the latter by the University of Malta on 14.05.2007.

The closing date for this call for offers was 18.12.2007 and the estimated contract value was Lm 472,000 inclusive of VAT.

Four (4) different tenderers submitted their offers.

Following receipt of notification from the General Contracts Committee (GCC) wherein they were informed that their ' tender has been disqualified due to the fact that the bid bond submitted with the said offer is not in accordance with requisites set out in the tender dossier', Messrs Agresso Ltd filed an objection on 21.12.2007 against the said decision.

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 the 25<sup>th</sup> January 2008 to discuss this objection.

Present for the hearing were:

#### **Agresso Ltd**

Dr Duncan Borg Myatt

Legal Representative

#### **University of Malta**

Mr Karm Saliba

Head Purchasing

Mr Mark Debono

Mr Saviour Zammit

#### **Department of Contracts**

Mr Francis Attard

Director General (Contracts)

Mr Mario Borg

Asst. Director, Post Contracts

After the Chairman's brief introduction, Messrs *Agresso Ltd's* (the appellants) legal representative was invited to explain the motive which led to his clients' objection.

Dr Duncan Borg Myatt, representing the appellants, started by stating that on 18 December 2007 his clients were informed via fax that their '*tender has been disqualified due to the fact that the bid bond submitted with the said offer is not in accordance with the requisites set out in the tender dossier*'. However, he said that *Agresso Ltd* were never officially given a specific reason as to why their Bid Bond was considered incorrect even though he had requested and was still requesting the Contracting Authority to provide his clients with such reason/s.

At this stage Dr Borg Myatt sustained that with regards to the *Bid Bond* submitted by his clients, this was submitted according to the tender dossier which also included the requested amount and *validity period* stipulated in the tender document.

Mr Karm Saliba, representing the University of Malta, explained that this tender, the value of which exceeded Lm 20,000, was coordinated by the Contracts Department and, as a consequence, the information requested had to be given by the latter. He pointed out that at the opening of tenders they were informed that the Bid Bond was not being accepted because it included a declaration that the guarantee being offered '*shall be governed by English law*'. Mr Saliba informed those present that the Evaluation Committee members were informed that for a *Bid Bond* to be valid it had to be in conformity with Maltese legislation.

Mr Mario Borg, representing the Department of Contracts, was then called by the PCAB to testify under oath.

The Department of Contracts' representative explained that this tender was issued under the *Three Package Procedure*, and therefore they started with the opening of the first package (*Bid Bond*). He said that on a previous instruction given by the Appeals Board, it was specifically stipulated in the tender dossier that the *Bid Bond* had to be submitted '*in the form of the specimen Bid Bond attached to this document*' (*Clause 4.1 2<sup>nd</sup> Para*). He said that the tenderer was not disqualified because of the validity period from the closing date of tender but due to the fact that it was declared that the '*guarantee shall be governed by English Law.*' He acknowledged that probably, through an oversight, they did not communicate the reason, however, even when they informed *Agresso Ltd* that their tender had been disqualified, no such request, namely for a reason to be formally given, was received from appellants.

The Chairman, PCAB remarked that apparently some form of communication was exchanged with *Agresso Ltd* because on 21 December 2007 Mr Nick Gibson wrote a letter to the Department of Contracts wherein it was stated that:

*'Following your recent fax dated 19<sup>th</sup> December 2007 we wish to appeal against the decision to reject our tender for a new Finance and HR/Payroll system at the University of Malta.*

*We are totally committed to the tender process with the University and have no intention of withdrawing during the process. The wording of the Bid Bond that we submitted was amended by our UK bank to comply with UK banking regulations and to, in their opinion, read more clearly. We are told that any*

*Bid Bond signed by a UK bank would need to have the judiciary authority clearly stated. As both the UK and Malta are members of the EU they assumed that English Law would be acceptable.'*

and

*'We resubmit the Bid Bond from Ing Bank with the wording as requested in the tender plus a reference to English or EU Law.'*

Dr Borg Myatt responded by stating that the *Bid Bond* was regulated by Clause 4.1 which specified that it had to be submitted in the form of the (a) specimen attached to the tender *dossier*, (b) requested amount and (c) validity period. He pointed out that there was a discrepancy in the tender document since under clause 4.1 it was indicated that the *Bid Bond* had to be valid for a period of five calendar months from the closing date of the tender and in the template it was stated that the '*guarantee expires within one hundred and five months starting on the closing date of tender.*'

Here, Mr Borg acknowledged this mistake, however he said that it was also specifically indicated that the *Bid Bond* had to be valid up to 28 April 2008.

Continuing, the appellants' legal representative reiterated that Agresso Ltd had complied with all the requirements of the tender *dossier*. Dr Borg Myatt said that the tender document did not specify by which law the *Bid Bond* had to be regulated. The lawyer argued that, although it was acknowledged that the services provided in Malta had to be governed by Maltese Law, it was not possible for a *Bid Bond* issued by a UK Bank to be regulated by Maltese Law because the relationship between the company and the bank issuing the *Bid Bond* had to be governed by laws of the state concerned. Dr Borg Myatt stressed that in the tender document it was stipulated that '*Each Tender must be accompanied by a valid and original Bid Bond issued by a Bank licensed by a recognized Financial Regulator in the country where the company is located.*' He maintained that on the basis of this clause, Agresso Ltd had no option but to submit a *Bid Bond* issued by a UK Bank. They had a certification that the Bank which issued the *Bid Bond* was registered with the Financial Services in England and regulated by the British Financial Regulations. He claimed that the Department of Contracts and the University of Malta must be satisfied that the *Bid Bond* submitted had complied with the financial and validity period requirements of the tender and that it was specified in the tender dossier that an offer would be disqualified if it was not accompanied by the mandatory *Bid Bond*.

Mr Borg sustained that the *Bid Bond* was not submitted according to the template and that it should not have been indicated by which law the guarantee would be governed. The Chairman, PCAB drew the attention of those present that, even if it was not specified, the *Bid Bond* would still be binding by the laws of that country where it was issued and that the Banks were regulated by the laws of that country where they operate. "As a consequence", the PCAB Chairman proceeded, "the fact that the *Bid Bond* submitted by the appellants' Bank in the UK stated that the guarantee being offered '*shall be governed by English law*', should be regarded as a futile additional piece of information in view of its automatic application regardless of whether this is stated or not."

When the PCAB questioned whether it was the Maltese Law or EU Law that was binding and whether the Maltese Law was in conformity with EU Law, Mr Francis Attard, Director General (Contracts) said that, as far as he was aware, all Maltese laws conformed with EU laws particularly on areas regulated by directives issued on banking operations. He explained that the *Bid Bond* was not accepted because (i) the bank guarantee submitted by the appellants was different from the template attached to the tender *dossier* and (ii) they required a guarantee that, in their opinion, best safeguarded Government's interests.

In response to Mr Borg's remarks, the PCAB said that if they had doubts on whether Government's interests were being safeguarded or not, it would have been advisable for them to first seek apposite legal advice.

At this stage the public hearing was brought to a close and the PCAB proceed with the deliberation before reaching its decision.

This Board,

- having noted that the appellants, in terms of their 'motivated letter of objection' dated 21.12.2007, and also through their verbal submissions presented during the public hearing held on the 25.01.2008, had objected to the decision taken by the General Contracts Committee;
- having considered that the Bid Bond in question included a declaration by the issuing UK bank wherein it was stated that the guarantee being offered '*shall be governed by English law*';
- having noted that the Tender Document specified that the Bid Bond was required to be '*issued by a Bank licensed by a recognized Financial Regulator in the country where the company is located*';
- having noted the submission of the Contract Department's representative that it seems that for a *Bid Bond* to be valid it has to be in conformity with Maltese legislation;
- having also noted the appellants' legal advisor's claim that the tender document did not specify by which law the *Bid Bond* had to be regulated;
- having also taken cognizance of the fact that it was not possible for a *Bid Bond* issued by a UK Bank to be regulated by Maltese Law because the relationship between the company and the bank issuing the Bid Bond had to be governed by laws of the state concerned;
- having noted Mr Borg's claim that the *Bid Bond* was not submitted according to the template as presented in the tender document;
- having taken into consideration Mr Attard's statement as regards the fact that, as far as he was aware, all Maltese laws conformed with EU laws particularly on areas regulated by directives issued on banking operations;

- having reflected on Mr Attard's statement relating to the fact that, *inter alia*, the *Bid Bond* was not accepted because the General Contracts Committee required a guarantee that, in their opinion, best safeguarded Government's interests

reached the following conclusions, namely:

1. The Evaluation Committee and the General Contracts Committee had to be pragmatic when interpreting basic regulatory requirements, irrespective of where these originate from, especially when it is already established that all Maltese laws conform with EU laws particularly on areas regulated by directives issued on banking operations - this applies more strongly when the specifications in the Tender Document tend to deliver contradictory messages as in this case;
2. The PCAB feels that with regards the issue of the Government's interests being best 'safeguarded', it seems that both the Evaluation Committee and the General Contracts Committee were excessively cautious in their evaluation and omitted to take legal advice which could have given them comfort in this matter, particularly, when one considers that, according to the DG Contracts himself, all Maltese laws conform with EU laws especially on areas regulated by directives issued on banking operations.

As a consequence of (1) to (2) above this Board finds in favour of appellants and recommends that the Evaluation Committee, once again, admits the tender as submitted by the appellants for further evaluation in the rest of the adjudication process.

In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the appellants should be refunded.

Alfred R Triganza  
Chairman

Anthony Pavia  
Member

Edwin Muscat  
Member

*11 February 2008*