

PUBLIC CONTRACTS APPEALS BOARD

Case No. 120

CT 2018/2008 - MTA/713/2007

Tender for 'Design and Construction of Stand at ITB Berlin - Germany for a one year period 2008'

This call for tenders was published in the Government Gazette on 14.12.2007.

The closing date for this call for offers was 04.01.2008.

Given that the original estimate was below the Lm 20,000 threshold stipulated in the Public Contracts Regulations, the tender was published as a departmental call.

Two (2) different tenderers submitted their offers.

Following the publication of the Notification of Recommended Tenderers, Messrs *Zaffarese Exhibitions & Events Ltd* filed an objection on 04.02.2008 against the intended awarding of the tender in caption to Messrs *Casapinta Design Group Ltd*.

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 20.02.2008 to discuss this objection.

Present for the hearing were:

Zaffarese Exhibitions & Events Ltd

Mr Thomas Farrugia	Managing Director
Mr Benny Zaffarese	

Casapinta Design Group Ltd

Mr Damian Casapinta	General Manager
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Malta Tourism Authority

Dr Michael Psaila	Legal Representative
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Evaluation Committee

Mr Carlo Micallef	Chairman
Mr Patrick Attard	Member

Department of Contracts

Mr Francis Attard	Director General (Contracts)
Mr Mario Borg	Asst Director, Post Contracts

After the Chairman's brief introduction, the appellant, namely Mr Benny Zaffarese, acting on behalf of Zaffarese Exhibitions & Events Ltd, was invited to explain the motive which led to their objection.

Mr Zaffarese commenced his intervention by stating that the objection was lodged for various reasons. First and foremost, the appellants' representative contended that the tender in question should not have been issued by the Malta Tourism Authority but by the Department of Contracts, and this, in accordance with the procurement procedures outlined in Regulation 22 under Part III – Rules governing public contracts whose value exceeds Lm 20,000 but does not exceed the threshold of the Public Contracts Regulations, 2005. The reason given by Mr Zaffarese was that the offer recommended for award amounted to Lm 38,000.

Mr Zaffarese claimed that the estimated value was not specified in the tender document and that when the Malta Tourism Authority was asked by another tenderer to give an indication of the budget allocated for this tender it refused to give such information. At this point, the PCAB requested the appellants' representative to explain how he had come to the conclusion that the tender value exceeded Lm 20,000. The reply given by Mr Zaffarese was that the previous ITB tender, which had the same specifications but with less materials/items, was estimated at Lm 54,000 for three years – Lm 18,000 each year. Furthermore, he said that in spite of the fact that he had drawn the attention of the Malta Tourism Authority and the Contracts Department, respectively, that the value of this tender exceeded Lm 20,000, the Malta Tourism Authority still proceeded with the issue of the tender.

Mr Zaffarese continued by claiming that the tender was not adjudicated in a fair and just manner, alleging that they were penalised because the images presented were '*inter alia*' not mounted. Also, he contended that no points should have been given for creativity, corporate image and designs because the designs and all detailed specifications were provided by the same Contracting Authority. The appellants' representative insisted that the specifications allowed no leeway for creativity. At this point Mr Zaffarese stated that the reasons given by the Contracts Department's official as to why their offer was rejected were different from those formally given by the Malta Tourism Authority's Chairman because, whilst the first informed them that their offer was classified, the latter stated that the appellants' offer was not compliant. Mr Zaffarese argued that if their offer was not compliant they should have disqualified their offer and proceeded with the evaluation of the other tenders.

Mr Zaffarese said that the award of the said tender was based on the most economically advantageous offer. He said that Regulation 46 of the above mentioned regulations specified that:

'(1) Where the criterion for the award of the contract is that of the most economically advantageous tender, contracting authorities may authorise tenderers to submit variants.

(2) (a) Contracting authorities shall indicate in the contract notice whether or not they authorise variants; variants shall not be authorised without this indications.'

He continued by pointing out that, in this tender, the Malta Tourism Authority did not indicate that tenderers could offer similar items as they did in previous tenders but stated that participants had to abide by the tender specifications.

In reply to specific questions by PCAB members, the appellants' representative said that (i) as far as the design was concerned, the Contracting Authority gave participants limited discretion because these were informed that the Authority's preference is naturally to have it as close as possible to the design' and (ii) the appellant Company was fully compliant with the requirements of the tender dossier.

Mr Zaffarese declared that they submitted three offers (Option 1 – Lm 19,962, Option 2 – Lm 26,000 and Option 3 – Lm 66,542) and confirmed that only the latter was fully compliant. He claimed that they offered similar furniture not only because of price but also because it was impossible to carry out such works within the stipulated time frame. He explained that in their bid they also indicated that they required 30 days to carry out and complete the services covered in this tender. At this stage, Mr Zaffarese questioned whether the stand could be completed in time once the award process was suspended in view of the appeal.

In response to Mr Zaffarese's remark that this tender had many contradicting elements, the PCAB said that if the appellant Company had any problems regarding the contents of the tender they should have either (a) raised such issues with the Contracting Authority concerned before the closing date of the tender or (b) refrained from participating. It was explained that, at this stage, appellants could not object with the PCAB on issues that were equitable to each prospective tenderer. Mr Zaffarese's attention was also drawn to the fact that, in spite of the alleged contradicting elements, they still managed to offer all that was requested at a price of Lm 66,000.

Dr Michael Psaila, the Malta Tourism Authority's legal representative, responded by stating that in spite of the appellants' complaints, tenderers were still in a position to satisfy all the tender conditions. He said that the appellants themselves declared that their third option was compliant with the tender specifications. Dr Psaila proceeded by clarifying that the appellants' bid was compliant as far as the design was concerned but it did not include all the required equipment.

Dr Psaila drew the PCAB's attention to the fact that the Malta Tourism Authority issued a departmental tender and this was solely attributed to the fact that, at preparation stage, it did not anticipate that the value of the tender would exceed Lm 20,000. He explained that, in accordance with the requirements of the procurement procedure regulations, when it was noticed that all offers received were in excess of Lm 20,000, the Malta Tourism Authority referred the file to the Department of Contracts together with the Authority's Evaluation Committee's recommendation. The Authority's legal advisor emphasised that it was the General Contracts Committee which ultimately authorised the award of the tender and not the Malta Tourism Authority.

Dr Psaila pointed out that there was an element of creativity because in Appendix 2, 'Stand appearance', it was stated that *'Please note that the two above images provide a general appearance of the stand and are not portraying the actual plan of the stand'*.

The first witness to take the stand was Mr Carlo Micallef, Chairman of the Evaluation Committee, who commenced his intervention by stating that the other Committee members were Mr Joseph Galea (Director, International Marketing - based in Germany) and Mr Patrick Attard (Procurement Manager).

With regard to the allegation in the appellants' reasoned letter of objection that '*MTA shows lack of experience in evaluating the tenders*', the witness pointed out that Mr J Galea had 15 years experience in participating at the ITB and he had 11 years experience with the Authority apart from having been involved in the evaluation of various similar tenders.

Mr Micallef said that Malta Tourism Authority engaged an international company to provide the designs since they wanted to change Malta's image abroad. He also said that the ITB Berlin was the biggest and the most important international fair as regards the tourism industry.

On cross examination by the PCAB, Mr Micallef testified that Casapinta Design Group Ltd's recommended offer was fully compliant with the tender specifications and that they showed all the furniture that was going to be used on the stand. With regard to the appellants' offers, the witness said that 'Option 3' was the closest to their requirements, yet it was still short of AV equipment, lacked details and did not show what type of similar furniture that was being offered. Furthermore it was confirmed that although both tenderers met the basic requirements of the tender, Zaffarese Exhibitions & Events Ltd bid (valued at Lm 66,542) was much more expensive than that of Casapinta Design Group Ltd (valued at Lm 30,799.69).

The Chairman of the Evaluation Committee sustained that there was an element of creativity because prospective tenderers had to adopt the design within the stand space available.

The following table referred to during the hearing by the Chairman of the Evaluation Committee, shows the points given by the Committee in accordance with the criteria indicated in the Evaluation Matrix published with the tender document:

Name of Tenderer	Understanding of project & Quality of Proposal	Creativity	Price	Technical Specifications	MTA Corporate Image	Supplier's Credentials	Total
Out of	25%	20%	33%	12%	5%	5%	100%
Zaffarese Exhibitions & Events Ltd (Option 3)	15	12	8	8	2	4	49
Casapinta Design Group Ltd (Option 2)	22	18	15	11	4	4	74

Reacting to an earlier remark passed by the appellants' representative, Mr Micallef denied that the Committee had penalised the appellants because the latter presented the images on foam boards.

The same witness also said that the points reduced for not submitting the CV's were negligible and that such document was required to ensure that the job was entrusted to competent persons. Mr Micallef explained that in the report presented to the General Contracts Committee they wanted to highlight in their remarks what was actually submitted by each tenderer. The PCAB intervened to point out that it was the prerogative of the Contracting Authority to request whatever information it deemed necessary.

In reply to a specific question by the PCAB, the witness said that (i) he could not state whether the difference in price was related to furniture because they did not submit a cost breakdown as costs were submitted as a lump sum and (ii) the difference in price did not justify a clarification because Casapinta Design Group Ltd's recommended offer conformed to the tender requirements in all aspects, including the required equipment.

When it was noticed by the PCAB that Mr Zaffarese was quoting from the Evaluation Committee's report, his attention was drawn to the fact that although they had a right to know the reasons why their offer was rejected, they should not have been given a photocopy of the original report.

Dr Psaila verbalised that Mr Zaffarese was cross-examining Mr Micallef on the basis of an internal document which was not supposed to be in his possession.

When Mr Zaffarese asked Mr Micallef to confirm that subcontracting was not allowed under this contract, the PCAB drew his attention to the fact that *Clause 7.9.1 Sub-Contracting of Services* stipulated that sub-contracting could be resorted to under the proviso that the contractor obtained prior '*written consent of the Director of Malta Tourism Authority, Malta*'.

Mr Zaffarese alleged that the Malta Tourism Authority's tenders were not always assessed on uniform criteria. He said that, for example, the design for the *Fitur Fair* was accepted even though it was completely different from that requested. The PCAB pointed out that it was only concerned with this particular tender and that this was not the forum to raise such issues.

When Mr Zaffarese tabled a copy of an e-mail sent by the Chairman of the Malta Tourism Authority, his attention was drawn by the PCAB to the fact that the reason given to him, which, quoting '*ad litteram*', stated

'that your offer was rejected was that it was not the cheapest, fully technically compliant offer received by us'

was in full corroboration with what was stated during these proceedings since it was established that they had two offers which were both compliant but one was substantially cheaper than the other. Mr Zaffarese insisted that if their offer was not fully compliant the Evaluation Committee should not have given them any points.

Mr Francis Attard, Director General Contracts, another witness who was summoned to the Stand, explained that, in this case, they were informed that following the issue of a Departmental Tender the offers received were over Lm 20,000. He sustained that, in the prevailing circumstances, the tender could not be awarded by the Contracting

Authority, that is the Malta Tourism Authority and that the offers had to be referred to the Department of Contracts in order to proceed with the normal procedure. The DG (Contracts) said that, in this case, the General Contracts Committee evaluated the Malta Tourism Authority's evaluation report and acted on its recommendations as per established procedure. He declared that this was not the first instance that they had that had fallen under this procedure and that contracts exceeding Lm 20,000 could only be awarded by the General Contracts Committee.

In reply to a specific remark by Mr Zaffarese, Mr Attard said that the discrepancy between the estimated value of tender and the offer recommended for award was irrelevant because in such instances the most important thing was that the issue of tenders was given the necessary publicity in order to ensure that it was open to competition. He sustained that in this case the tender was duly published in the Government Gazette. Nowadays, the Gazette is also published online and he was aware that it has a readership amongst European contractors.

Mr Zaffarese made reference to the PCAB Case 27 wherein in his testimony Mr Edwin Zarb (former Director, General Contracts) ...

'declared that in terms of the regulations, once the value exceeded Lm 20,000, the tender should have been issued by the Contracts Department and should have been opened in the presence of the Contracts Committee. However, he said that he arrived at the decision to allow the tendering process to continue after taking into consideration the urgency of the matter and the fact that MTA had previously been under Schedule 3, which meant that they were authorised to issue tenders on their own account. The alternative would have been to suspend everything and re-issue the tender.'

In his concluding remarks Mr Zaffarese reiterated that (i) on the basis of Regulation 22 the tender was irregularly issued by the Malta Tourism Authority (ii) once the tenderers were provided with the designs and technical specifications, the criteria adjudicated upon were irrelevant and no points should have been given (iii) he agreed that, if two offers were fully compliant, a tender should be awarded to the cheaper one but under the proviso that this was issued and adjudicated by the Contracts Department (iv) once it was determined that following the issue of Departmental Tenders all bids received were over Lm20,000, then the tendering process should have been stopped and (v) the Contracting Authorities should not be allowed to issue tenders that exceeded the limit otherwise the tendering process could be abused.

Dr Psaila concluded by emphasising that the Malta Tourism Authority adhered to the general procurement regulations. He sustained that when the Malta Tourism Authority received the bids and noticed that all offers exceeded the amount of Lm 20,000, they referred the file to the Department of Contracts and it was the General Contracts Committee which awarded the contract and not Malta Tourism Authority. However, Mr Zaffarese insisted that it was referred to the General Contracts Committee after it was adjudicated by the Malta Tourism Authority.

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

This Board,

- having noted that the appellants, in terms of their ‘motivated letter of objection’ dated 08.02.2008, and also through their verbal submissions presented during the public hearing held on the 20.02.2008, had objected to the decision taken by the General Contracts Committee;
- having taken note of (a) the fact that appellants claimed that the Malta Tourism Authority should not have issued the said call in view of the fact that its value resulted to be in excess of the Lm 20,000 threshold contemplated in the pertinent legal provision and (b) the DG Contracts’ testimony on subject matter;
- having noted the fact that whilst (a) appellants alleged that they were unfairly penalised for presenting images which, ‘inter alia’, were not mounted, (b) Mr Micallef denied that the Committee had penalised the appellants because the latter presented the images on foam boards;
- having also noted the fact that appellants claimed that no points should have been given for creativity, corporate image and designs in view of the fact that tender specifications allowed no leeway for creativity. Also, in this context, the PCAB has also taken note of the Evaluation Committee’s Chairman who said that there was an element of creativity because prospective tenderers had to adopt the design within the stand space available;
- having during the hearing established that through the appellants’ own admission (a) as far as design is concerned, the Contracting Authority gave participants limited discretion because the Malta Tourism Authority preferred designs submitted to be particularly faithful to their own requirements as specified in the tender document and (b) in its opinion, the appellant Company was fully compliant with the requirements of the tender dossier only with regards to the third option submitted out of the three options submitted by the same appellants;
- having also reflected on the appellants’ claim that the Evaluation Committee members lacked the necessary experience to evaluate tenders;
- having taken cognizance of the fact that Mr Micallef stated that whilst the recommended tenderers’ offer was fully compliant with the tender specifications, yet the offer submitted by the appellant Company, namely *Option 3*, albeit it was the closest to the specifications as contemplated in the tender documents, yet, it still lacked details such as those relating to the personal CVs, the AV equipment as well as the precise type of furniture that was being offered;
- having noted Mr. Zaffarese’s own admission that only his option 3 was fully compliant with the specifications of the tender document and even then this lacked the required AV equipment;
- having also established that, although the appellant Company was claiming that subcontracting was not allowed in this tender specifications, yet, Clause 7.9.1 ‘Sub-Contracting of Services’, clearly stipulates that sub-contracting could be

resorted to under the proviso that the contractor obtained prior '*written consent of the Director of Malta Tourism Authority, Malta*';

reached the following conclusions, namely the PCAB

1. is of the opinion that considering the way things progressed, the decision taken by the Director of Contracts to award the tender, following the referral to him of such Tender by the Malta Tourism Authority thereby acknowledging that in the meantime the parameters for the tender to be considered as a departmental tender had changed, was correct;
2. feels that if the appellant Company had any problems regarding the contents of the tender they should have either (a) raised such issues with the Contracting Authority concerned before the closing date of the Tender or (b) refrained from participating;
3. contends that the appellants have lodged an appeal which is primarily aimed at stalling progress being fully aware that it is not normal praxis for bidders to make a formal objection based on issues and conditions considered to be anything but discriminatory;
4. considers the fact that, despite all the appellants' claims that the Tender document presented certain difficulties that were almost impossible to overcome, Messrs Zaffarese Exhibitions & Events Ltd still managed to submit a proposal, albeit at a higher price than that of the recommend tenderer's, thus implying that it all boiled down to an Evaluation Committee evaluating similar, reasonably considered, compliant offers but whose price tag varied considerably. Undoubtedly, the PCAB, considering these circumstances, can only acknowledge the responsible behaviour demonstrated throughout the evaluation process placing particular emphasis on price issues which varied substantially between the offer of the awarded tenderer and the one submitted by the appellant Company;
5. concurs with Mr Micallef who stated that, although the Committee could not state whether the difference in price was related to furniture or not as the appellant Company did not have a cost breakdown in view of the fact that costs were submitted as a lump sum, yet, the same Committee did not see it worthwhile clarifying anything in regard considering the high price differential between offers in question, namely that of the awarded tenderer and the one pertaining to the appellant.

In consequence to (1) to (5) above, the appellants' objection to the decision, reached by the General Contracts Committee, to award the contract to Messrs Casapinta Design Group Ltd., cannot be upheld by this Board.

Finally, this Board recommends that the deposit submitted by the appellants in terms of the Public Contracts Regulations, 2005, should not be refunded.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member