

PUBLIC CONTRACTS APPEALS BOARD

Case No. 125

Adv No 390/2007 - CT 2637/2007 - W el. Comm 3/2007

Tender for the Supply and Installation of Mechanical and Electrical Services for John Paul II Block, St Vincent de Paule, Elderly Residence Luqa

This call for tenders was published in the Government Gazette on 09.11.2007.

The closing date for this call for offers was 20.12.2007 and the estimated contract value was Lm 962,000.

Seven (7) different tenderers initially submitted their offers but only four (4) were allowed to proceed to the following stage which related to technical compliance.

Following the publication of the Notification of Recommended Tenderers, *Messrs Panta Contracting Ltd* filed an objection on 04.02.2008 after the latter was informed by the General Contracts Committee that their offer was not among the selected ones.

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 23.04.2008 to discuss this objection.

Present for the hearing were:

Panta Contracting Ltd

Dr Lawrence Degabriele Legal Representative
Mr Henry Attard
Mr Anthony John Borg

Titan International Ltd

Mr Chris Vella
Mr Saviour Abela

Central Power Installation Ltd

Mr Dimitri Petchenkine
Mr Bernard Grech

Elderly and Community Care Department

Dr Stephanie Xuereb Director

Adjudication Board

Mr J Rapinett Chairman
Eng R Curmi Member
Mr G Cutajar Member

After the Chairman's brief introduction, the representatives of Panta Contracting Ltd were invited to explain the motive leading to their objection.

Dr Lawrence Degabriele, acting as legal representative to Panta Contracting Ltd, said that this appeal should be considered in the context of a previous tender. He said that subsequently, a fresh call for tenders was issued and this was a replica of the original tender. Dr Degabriele said that the appellants failed to understand how his clients' second offer was eliminated considering the fact that (i) in the first tender there had never been any indication of disqualification or non-compliance (ii) on the technical aspect both tenders were identical and (iii) their second bid included also all the technical information requested during the evaluation of the first tender.

At this stage, the Chairman PCAB, after consulting the other two members of the Appeals Board, explained that the procedure adopted so far by the Board was that they only considered grievances pertaining to the tender under review. As a consequence, any reference made to previous tenders would not be taken into consideration. It was also stated that the role of the PCAB was to ensure that the tendering and adjudication process of the said tender was carried out in a transparent manner and that the offers were compliant with what was requested in this same tender.

Dr Degabriele clarified that he was not making a comparative analysis with previous tenders but he was just referring to a tender which, for unknown reasons, was discontinued and subsequently re-issued. The lawyer said that he only intended to make his submissions within the parameters of the grievances indicated in their letter of objection wherein reference was also made to the first call for tenders. He maintained that these two tenders were so much related that those tenderers who had purchased the tender document in respect of the first call were not asked to pay again when collecting tender documents relating to the fresh call.

At this point Mr Francis Attard, Director General (Contracts) was asked to take the witness stand.

In reply to a specific question by the PCAB as to whether the tenderers who had submitted a bid for the original call were exempted to pay for the tender document of the fresh call, Mr Attard testified that the praxis at the Department of Contract was that requests for refunds were not accepted in those instances where a tenderer who had already purchased a tender document with the intention of tendering decided not to submit an offer. The same witness, however, maintained that the relative amount would normally be retained on account and made use of when the tenderer concerned purchased another tender document.

Towards the end of the proceedings Mr Attard confirmed that all tenderers who had bought the tender documents in respect of Advert 173/2007 (1st Call) and collected a tender document in respect of Advert 390/2007 (2nd Call) were exempted from paying for the tender document in respect of the 2nd issue.

Mr J Rapinett, Chairman of the Adjudication Board, said that amongst the important points that the original call deviated from the fresh call were (a) the 'Evaluation Criteria' and (b) the request for the submission of samples. Ing Renzo Curmi, a

member of the Adjudication Board, added that the technical specifications of the 1st and 2nd call for tenders were the same but the tender document as a whole was different.

Continuing, Mr Rapinett explained that in the first call they asked the General Contracts Committee (GCC) to give them permission to seek administrative and technical clarification from the two tenderers. He said that, however, in view of the fact that none of the tenders were administratively 'fully' compliant, they were instructed not to continue with the evaluation process and were also informed that the tender was to be withheld and that a fresh call for this tender had to be issued. At this point, Dr Degabriele intervened to state that they received the technical clarifications before the cancellation of the tender.

During the proceedings it was established that no clarifications were sought in the 2nd call for tenders.

After these introductory comments, the PCAB started with the analysis of the appellants' offer.

On cross examination by the PCAB, Mr Rapinett declared that the appellants' offer and that of another tenderer were rejected because the fire doors offered were rated at 60 minutes instead of the 120 minutes indicated in the tender specifications. He referred to Vol 1 Sec 5 of the tender document which specified that

'An admissible tender is one which conforms to the requirements and specifications described in the tender document with no substantial deviations or reservations. Substantial deviations and reservations are those which in any way influence the scope, quality or execution of works, or restrict the right of the Contracting Authority or the obligations of the tenderer under the contract in a manner inconsistent with the tender documents, or rectification of which would unfairly affect the competitive position of other tenderers presenting admissible tenders.'

The Chairman of the Adjudication Board argued also that if these two tenders were allowed to proceed to the opening of the financial offers, they would have had an unfair advantage on others because the difference in price between 60 and 120 minutes rated fire doors was in the region of Lm 28,000.

Mr Rapinett claimed that in the covering letter of their second tender, the appellants acknowledged in writing that their fire doors were not technically compliant.

With regard to telephone sets, Mr Rapinett claimed that there was a mistake in the appellants' letter of objection because they did not request 'proprietary' items but requested that the telephone sets be compatible with the existing PABX. Mr Rapinett claimed that the appellants could have asked for the pertinent specification of existing PABX so that they would be in a position to provide compatible telephone sets.

As far as the granite tops were concerned, Mr Rapinett declared that the specifications were indicated on the plans attached with the tender document. He said that if the

appellants' considered that the plans were not clear they should have requested a clarification.

Engineer Curmi added that they did not make any technical comment on the telephone sets and the granite tops because in the tenderer's covering letter the appellants clearly indicated that they did not quote for these items.

It was also highlighted that from the three issues mentioned in the appellants' objection, namely the (i) fire doors, (ii) telephone sets and (iii) granite top, the first was the most crucial because of the security and safety of the elderly residing there. The Chairman of the Adjudication Board said that they would give 90%, 5% and 5% weighting respectively to issues (i), (ii) and (iii) mentioned earlier.

Replying to a specific question by the PCAB as to why Panta Contracting Ltd had offered fire resistant doors having a fire rating of 60 minutes instead of 120 minutes, Mr Henry Attard admitted they had made a mistake. He explained that their electrical and mechanical estimators, through an oversight, thought that the fire resisting doors had to be made of timber and so they offered wooden doors. In actual fact the description of the fire doors under Item 23.1.1 of the Bill of Quantities read 'Fire door sets FD120S, single leaf finished in timber veneer.'

Mr Attard clarified that in their covering letter they explained that they did not quote for granite tops because they had not been issued with technical specifications. As far as the telephone sets were concerned, the appellants' representative said that, in their opinion, it would have been better for the Department to acquire these sets from the same supplier of the existing telephone system.

Dr Degabriele said that the whole argument was that, once the fire doors offered were not compliant with the tender's technical specifications, their bid should have been disqualified. However, the lawyer contended that the fact that the Adjudication Board had sought clarifications on other technical issues and did not receive any adverse remarks on the telephone sets and the granite tops, and were not informed that the fire doors did not meet the specifications, they were given the impression that their first offer, as far as these items were concerned, was accepted.

The PCAB remarked that, in this particular instance, there appeared to be a scenario wherein the appellants were somewhat conditioned by the fact that the fresh call was actually a continuation of the previous tender. However, it was explained that in public procurement every tender had to be considered on its own merits. Furthermore, it was stated the specifications laid down in the 'Tender Document' must be respected and that this time round the appellants should not have repeated the same mistakes as those committed in the previous tender.

Dr Degabriele clarified that the appellants' staff member who had read the specifications had understood that the Company had to offer timber doors and therefore, knowing that fire resisting wooden doors of 120 minute rating did not exist, they indicated that the fire resisting timber doors would have a 60 minute rating while the steel doors were quoted at 120 minute rating as specified in the tender specifications.

At this point, Engineer Curmi explained that in the industry there were two types of doors –either a door finished in timber veneer or a door finished in steel – and in the specifications they were referring to the finish and not the core of the doors (Bill of Quantity – Fire Doors Installation Item 23.1.1 specified ‘*Fire door sets FD120S, single leaf finished in timber veneer*’).

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 05.02.2008, and also through their verbal submissions presented during the public hearing held on the 23.04.2008, had objected to the decision taken by the General Contracts Committee;
- having taken note that the objection was based on the contention that this objection should be considered together with the events regarding the previous tender which had been annulled;
- having observed that, in line with normal praxis, this Board only considered grievances pertaining to the tender under review and, as a consequence, would not deliberate or, as a matter of fact, consider, any reference made to previous tenders;
- having established that no clarifications were sought in the 2nd call for tenders;
- having also noted the that the appellants’ offer and that of another tenderer were rejected because the fire doors offered were rated at 60 minutes instead of the 120 minutes as indicated in the tender specifications and as specifically referred to in Vol 1 Sec 5 of the tender document;
- having also taken cognizance of the fact that when replying to a specific question by the PCAB as to why *Panta Contracting Ltd* had offered fire resistant doors having a fire rating of 60 minutes instead of 120 minutes, Mr Henry Attard admitted they had made a mistake, explaining further that their electrical and mechanical estimators, through an oversight, thought that the fire resisting doors had to be made of timber and so they offered wooden doors;
- having taken into consideration the fact that the ‘fire resistant doors’ within the context of the entire tender document (specifications) had by far the highest weight as regards the level of importance, a fact which was specifically stated by Engineer Curmi and which no party present during the hearing denied;
- having reflected on Dr Degabriele’s claim that his clients’ staff member had understood that the Company had to offer timber doors and therefore, knowing that fire resisting wooden doors of 120 minute rating did not exist, he recommended a solution which went against the tender requirements;

- having also taken into consideration Engineer Curmi's explanation which related to the fact that in the industry there were two types of doors –either a door finished in timber veneer or a door finished in steel;

reached the following conclusions, namely:

1. the appellants were highly conditioned by their understanding that the fresh call was actually a re-issue of the previous tender, so much so that they desisted from ensuring that, in certain cases, clarifications could have been made to ensure compliance to tender specifications;
2. when filing the objection, the appellants were fully aware that, all in all, their failure to be taken further into consideration by the Adjudication Board was due to an erroneous decision taken by the same firm to offer something which was not in line with tender specifications. As a consequence, the same objection was made in a highly frivolous manner.

As a consequence of (1) to (2) above this Board finds against appellants.

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 not be refunded.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

05 May 2008