

## PUBLIC CONTRACTS APPEALS BOARD

### Case No. 126

**CT 2570/07 - M/043/05**

**Tender for the Supply, Delivery and Installation of 5 in number Floating Pontoon for Ta' Xbiex/Msida and Mgarr Gozo Marinas**

This call for tenders was published in the Government Gazette.

The closing date for this call for offers was 08.11.2007 and the estimated contract value was Lm 36,000.

Three (3) different tenderers submitted their offers.

Following the publication of the Notification of Recommended Tenderers, *Messrs Filati Ltd.* filed an objection on 25.02.2008 against the intended award of the tender in caption to *Messrs International Machinery 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 23.04.2008 to discuss this objection.

Present for the hearing were:

**Filati Ltd**

Dr Michael Psaila  
Mr Ludwig Camilleri

Legal Representative  
Director

**Malta Maritime Authority**

Mr Kevin Brincat  
Mr Emmanuel Scerri

Maintenance Manager  
Consultant Engineer

**International Machinery Ltd**

Mr Saviour Coppini  
Mr Charles Ellul

Engineer

After the Chairman's brief introduction, the appellants, namely Filati Ltd, represented during the hearing by Dr Michael Psaila, were invited to explain the motive which led to their objection.

Dr Psaila stated that their objection revolved around the Contracts Department's decision, following recommendations by the Adjudicating Board of the Malta Maritime Authority (MMA), to rank the offer made by his clients, i.e. Filati Ltd, second as it was considered non-compliant with the requested specifications. Those attending the hearing were told that this information was conveyed verbally to the appellants by Mr Borg from the Contracts Department.

The appellants' legal advisor maintained that his clients' tender submissions were in line with what was requested and he substantiated his claim by pointing out that:

- item no 2 of the Bill of Quantities No 2 at Volume 6 of the tender document stated that a 12m pontoon was being requested and that his clients had signed this document knowing that they had to supply a 12m pontoon;
- there was a declaration by his clients that they would supply a product according to the specifications requested;
- his clients had already supplied a 12m pontoon to the Malta Maritime Authority for the Mgarr Gozo Marina and Dr Psaila stressed that one couldn't be more compliant when his clients were offering the same 12m pontoon which the Malta Maritime Authority was already making use of. The appellants' legal advisor claimed that, in this instance, not even a sample was required;
- the price quoted by his clients was the cheapest, his clients had not been informed that their tender had been disqualified, but were informed that their offer was ranked second as it was found non-compliant with the specifications requested without any clarifications having been sought by the Malta Maritime Authority;
- Filati Ltd had been informed that the tender process was going to take more time than expected and it was asked to extend its bid bond which request was interpreted by his clients to mean that their bid was still under consideration;
- in a previous tender issued by the Malta Maritime Authority for a 12m pontoon, Filati Ltd had offered this same product and, following clarifications sought by the Malta Maritime Authority, Filati Ltd was awarded the tender and it delivered a 12m pontoon which was, in fact, being used at Mgarr Gozo Marina.

At this stage, the Chairman PCAB placed emphasis on the fact that, as far as its role is concerned, in this particular hearing, in line with normal praxis, it would have only deliberated on issues related to this particular tender.

The Chairman PCAB noted that, *prima facie*, the major issue revolved round the fact that the Malta Maritime Authority was requesting 12m pontoons whereas the

technical document submitted by Filati Ltd referred to an 11.5m pontoon, with the Malta Maritime Authority Adjudicating Board claiming that, given the circumstances, they could only evaluate the tender on the documentation presented.

Dr Psaila acknowledged that there was a contradiction in the sense that the technical document submitted by his clients referred to an 11.5m pontoon whereas at clause 4 of Vol 5 of the Tender Specifications (pg 6) and at item 2 of Bill No 2 of Vol 6 it was indicated that a 12m was being requested. Dr Psaila added that his clients signed the tender document and declared that they would supply the goods with the specifications requested. The appellants' legal advisor concluded that in case of such conflict one would have expected the Malta Maritime Authority to seek clarifications as it did in a previous tendering process when they had offered a similar pontoon.

Mr Kevin Brincat, Maintenance Manager at the Malta Maritime Authority, stated that the technical document regarding the pontoon offered by Filati Ltd was not submitted with the respective tender but the Malta Maritime Authority requested it to assess whether what was being offered conformed to what they were requesting. Mr Brincat explained that, apart from the fact that the length of the pontoon was 11.5m instead of 12m, there were other differences, such as, the width was 2.55m instead of 2.35m, the freeboard was 0.60m instead of 0.55m and the work load was 180 kg/m sq instead of 200 kg/m sq as evidenced from the tender specifications and the technical specifications submitted by Filati Ltd.

Mr Brincat remarked that, in the tender document, the Malta Maritime Authority made it clear that a number of pontoon sections were going to be used to replace damaged ones at the Ta' Xbiex/Msida and Mgarr Gozo Marinas. The Contracting Authority's representative informed that between 90 to 95% of the pontoons that the Malta Maritime Authority had were of the Italian make 'Ingemar' and these were the ones which required replacement and not the pontoon supplied and installed by Filati Ltd at Mgarr Marina in 2005 which was still relatively new.

Mr Brincat explained that since Filati Ltd had indicated that it was going to supply a pontoon similar to the one it had installed at pier I at the Mgarr Gozo Marina, then it was clear to the Authority that it would not have fitted to the other pontoon sections in terms of length, width, height and connectivity. Mr Brincat said that, on a previous occasion, the Malta Maritime Authority had accepted the offer submitted by Filati Ltd because they needed to replace one whole pontoon which was damaged by a storm and so it was a, sort of, stand alone pontoon and there was no need to connect it with other pontoon sections having different specifications as was the situation under consideration.

At this stage, the PCAB asked Mr Brincat if it could be the case that since the Malta Maritime Authority needed to replace sections of a particular type of pontoon (Ingemar model / type), the specifications were drawn up in such a way that only that particular pontoon would be acceptable; in other words, whether the specifications requested could effectively lead to a 'direct order'.

Mr Brincat replied that they needed an *Ingemar* pontoon or a compatible one.

Mr Emmanuel Scerri, consultant engineer with the Malta Maritime Authority, explained that there was another bid but, since this was much higher in price and the Adjudication Board had a cheaper one that was compliant, then there was no point or need for them to take the said bid into consideration. He further explained that he had to technically evaluate the pontoon offered by Filati Ltd by the technical document the tenderer had submitted as well as the specifications contained in the accompanying documents. According to Mr Scerri, these documents did not conform, in many an aspect, to the specifications requested in the Contracting Authority's official tender document, such as, the length, width, freeboard, rolling safety and risk assessments.

Mr Scerri stated that pontoons were mass produced and manufacturers could produce pontoons of various sizes depending on demand. Mr Scerri concluded that Ingemar happened to be geared for producing 12m pontoons but there could be other firms or makes.

Mr Brincat remarked that the type of pontoon sections that they requested could even be manufactured locally by, say, Malta Drydocks or Cassar Shipyard or Messrs Bezzina.

Dr Psaila, intervened to remark that, once it was so clear to Mr Brincat that the product offered by his clients did not comply with the specifications, he could not understand why his clients' tender was not rejected in the first place but, instead, his clients were asked to extend their bid bond and their bid was eventually ranked second.

Mr Brincat stated that the Adjudication Board did not disqualify the tender submitted by Filati Ltd because, ultimately, it was the Contracts Department that awarded or rejected a tender and so they left that at the discretion of the Contracts Department. Mr Brincat added that, if the successful tenderer would have failed to execute the contract, then the Malta Maritime Authority would have informed the second tenderer, namely Filati Ltd, that its offer would be accepted if it will comply with the specifications requested in the tender. At this point, the PCAB Chairman remarked that, under normal circumstances, the Contracts Department acts on the recommendation/s tendered by the adjudicating boards and is not left to decide on issues, particularly, if these are relatively technical in nature.

The Chairman PCAB, stated that, for transparency's sake, he had to ask why the Malta Maritime Authority had sought clarifications from the recommended tenderer, International Machinery Ltd, but did not ask for clarifications from the appellants, Filati Ltd. He went on to question, for example, why did the Malta Maritime Authority ask International Machinery Ltd to clarify differences about the freeboard and on the other hand Filati Ltd were not asked to explain the differences in the measurements they quoted and so forth.

Mr Brincat said that while he appreciated the PCAB's line of reasoning, on the other hand, as far as the Malta Maritime Authority was concerned the case was quite simple in the sense that both tenderers indicated that they would supply the same type of pontoon that both of them had already installed at the Malta Maritime Authority marinas with the difference that the pontoon that had been supplied by Filati Ltd

would certainly not comply with the specifications requested whereas the *Ingemar* type pontoon that had been supplied by International Machinery Ltd was fully compliant. Mr Brincat remarked that had Filati Ltd undertaken to modify the pontoon it offered to fit the tender specifications and had that been backed by appropriate technical documentation, something which Filati Ltd didn't do, then there would have been scope for the Malta Maritime Authority to seek clarifications.

Mr Saviour Coppini, representing International Machinery Ltd, intervened by saying that while he appreciated all that was being said, however, one thing needed to be made clear. Mr Coppini stated that through its letter dated 17<sup>th</sup> January 2008 the Malta Maritime Authority wished to clarify the measurement of the 'freeboard' because they requested one of 0.55m while his company had offered one of 0.75m. Mr Coppini explained that, in its bid, International Machinery Ltd had given the freeboard's measurement reflecting the state of the pontoon when the latter was not loaded. Messrs International Machinery Ltd's representative stated that, technically, one had to consider such measurement to be its constant / actual 'measurement'. The Malta Maritime Authority requested the 'freeboard' measurement when the pontoon was loaded, which measurement had to take into account the type of chains that the pontoon was moored with. For instance, continued Mr Coppini, if one used heavy chains to moor the pontoon then it would sink deeper than if it were moored with lighter chains. Mr Coppini stated that his Company did confirm to the Malta Maritime Authority that once moored with a certain type of chain then the pontoon they were offering would comply with the 'freeboard' measurement requested in the tender specifications.

Mr Coppini also declared that they did not in any way deviate from the tender specifications but they submitted an exhaustive explanation to the clarification requested by the Malta Maritime Authority.

Mr Coppini stressed that the 'freeboard' was very important because if a pontoon was made of sections having different 'freeboard' measurements then one would end up with a pontoon having an uneven surface and that was unacceptable.

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 29.02.2008, 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 considered that the major issue revolved round the fact that the Malta Maritime Authority was requesting 12m pontoons whereas the technical document submitted by Filati Ltd, the appellants, referred to an 11.5m pontoon;
- having noted that the appellants' claim that they would have expected the Malta Maritime Authority to seek clarifications once the latter realised that the

bidder (the appellants) had submitted supporting technical documentation bearing a pontoon with a measurement not as the one that was requested in the tender specifications;

- having also noted Mr Brincat's comments which, *inter alia*, stated that apart from the fact that the length of the pontoon was 11.5m instead of 12m, there were other differences, such as, the width was 2.55m instead of 2.35m, the freeboard was 0.60m instead of 0.55m and the work load was 180 kg/m sq instead of 200 kg/m sq as evidenced from the tender specifications and the technical specifications submitted by Filati Ltd;
- having also taken cognizance of the fact that 90 to 95% of the pontoons that the Malta Maritime Authority had were of the Italian make 'Ingemar' and these were the ones which required replacement and not the pontoon which was previously supplied and installed by Filati Ltd at Mgarr Marina in 2005 and which was also being indicated that the same firm would be supplying and installing for the Ta' Xbiex/Msida floating pontoon;
- having taken into consideration (a) Mr Brincat's claim that the Contracting Authority needed an *Ingemar* pontoon or a compatible one, as well as, (b) Mr Scerri's statement which referred to the fact that pontoons were mass produced and manufacturers could produce pontoons of various sizes depending on demand, concluding that, although *Ingemar* happened to be geared for producing 12m pontoons, yet this did not imply that there could not be other firms or makes producing the same type of pontoons;
- having reflected on Mr Brincat's comment which regarding the fact that (a) had Filati Ltd undertaken to modify the pontoon it offered to fit the tender specifications and (b) had that been backed by appropriate technical documentation, something which Filati Ltd didn't do, then there would have been scope for the Malta Maritime Authority to seek clarifications;
- having noted Mr Coppini's viewpoint and observations

reached the following conclusions, namely:

1. albeit the adjudication procedure could have perhaps been attended to in a better manner, yet, this Board acknowledges that clarifications were justifiably made wherever and when these were required;
2. tenderers should ensure that what they are offering is, indeed, in line with what they are being requested to tender for in the formal specifications, terms and conditions;
3. this Board is satisfied that, given the circumstances, it was not more pertinent and justified for the Contracting Authority to opt for a 'direct order' as it has been established that customised measurements and parallel imports are possible and easily accessible as a way forward;

4. this Board feels that the appellants were simply hasty and, presumably, conditioned by previously awarded bid/s, in offering something which was not what was required by the Contracting Authority in this particular instance, especially, when the floating pontoon in question, structurally, pertained to the type as previously supplied by *Ingemar* (Italian).

As a consequence of (1) to (4) 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

*28 May 2008*