

PUBLIC CONTRACTS APPEALS BOARD

Case No. 136

Advert. No. 141/2008 - CT 2167/2008

Tender for the Construction, Finishes and Building Services at an Independent Living Centre at Hal Far Adult Training Centre

This call for tenders was, for a contracted value of € 666,480 was published in the Government Gazette on 17.06.2008. The (extended) closing date for this call for offers was 26.08.2008.

Three (3) different tenderers submitted their offers.

After having been informed that their offer had *"failed to meet the administrative requirements since"* they *"did not submit Successful Completion Certificate for all works whose value exceeded € 1,000,000"*, C & F Building Contractors Ltd filed an objection on 02.10.2008.

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 12.11.2008 to discuss this objection.

Present for the hearing were:

C & F Building Contractors Ltd

Dr Kenneth Grima Legal Representative
Architect Claude Mallia

Asfaltar Ltd

Dr Franco Galea Legal Representative
Mr Paul Magro

National Commission Persons with Disability

Ms Vicky Gauci Member
Ms Anne-Marie Callus Member

Department of Contracts

Mr Francis Attard Director General (Contracts)

After the Chairman's brief introduction, Dr Kenneth Grima, legal representative of C & F Building Contractors Ltd, the appellant Company, commenced his submission by stating that his client decided to file this objection after receiving a letter dated 1 October 2008 from the Department of Contracts wherein the Company was informed that the tender it had submitted had "*failed to meet the administrative requirements since*" it "*did not submit the Successful Completion Certificate for all works whose value exceeded €1,000,000.*"

Dr Grima made reference to a letter dated 1 September 2008 wherein the National Commission Persons with Disability requested C & F Building Contractors Ltd to submit additional information regarding projects "*whose value is over €1,000,000*". In this letter it was also stated that:

During the first meeting our Evaluation Committee checked the tender dossiers for their administrative compliance.

In order for it to reach its decision about the administrative and technical compliance of these three tenders, the Evaluation Committee is seeking further information in connection with Article 4.2 Paragraph 6 of the Instructions to Tenderers. This paragraph reads as follows:

"They [the company submitting the tender] must provide a list of the works carried out over the past three years, accompanied by certificates of satisfactory execution for the most important works. These certificates shall indicate the value, date and site of the works and shall specify whether they were carried out according to the rules of the trade and properly completed."

The appellants' legal representative sustained that it was the tender dossier that regulated what should be submitted by a tenderer and not the Evaluation Committee. He contended that the law stated that the tenderers had to provide a list of works carried out over so many years that were the most important. Here, Dr Grima emphasised also that it was the entity submitting the tender that decided which works were considered the most important and not the Evaluation Committee. He argued that, apparently, there was a misinterpretation of "*...the most important works*" because someone had decided that this meant those projects "*...whose value exceeded €1,000,000*". Hence, Dr Grima claimed that the interpretation of the most important works was decided unilaterally and incorrectly by somebody in breach of the law, that is, the tender conditions. He continued by stating that C & F Building Contractors Ltd had submitted a list of projects that were carried out over a number of years and which had a value of *circa* € 2m and € 5m. He argued that C & F Building Contractors Ltd did not need to submit certificates of satisfactory completion for all those "*projects whose value is over €1,000,000*" because its most important projects were those which had a value of between *circa* € 3m and € 5m and for which it had forwarded the required certificates of satisfactory completion. As a consequence, Dr Grima claimed that C & F Building Contractors Ltd's offer should not have been rejected.

Dr Grima then explained that C & F Building Contractors Ltd had submitted a list of contracts with their offer and in the 2nd column they indicated the total value of works

carried out. At this point, Architect Claude Mallia, also representing the appellant Company, intervened by adding that the word 'Yes' in the last column meant that the final acceptance certificate had been issued.

In reply to specific questions by the PCAB regarding the remarks against Items 2, 4, 5 and 13 on the list attached to the Secretary Evaluation Committee's letter dated 1 Sept 2008, Architect Mallia explained that, with regard to the first item, as already explained in their reply dated 1 Sept 2008, the amount on the certificate did not tally with that on the schedule because, when the former was issued, certain variation had not yet been approved while, in respect of the other three items, at the time of submission of tender, respective works were still in progress. However, he declared that they had submitted nine (9) completion certificates with their offer.

When the PCAB asked about the reply given to the National Commission Persons with Disability's letter dated 1 September 2008, where they were requested to provide the required information by Tuesday 9th September 2008, Dr Grima said that on 1 Sept 2008 C & F Building Contractors Ltd replied that:

'Regretfully, notwithstanding that the projects were finished to the satisfaction of the client and that the full due amount was certified and paid for, we are not in possession of your requested extra documentation. Since it is not customary to issue such documentation on completion of the project, it is very hard, or practically impossible, to convince the clients' consultants to issue the said certificates.'

He said that in this letter they explained why the certificates were not available. Dr Grima elaborated that when they asked architects to issue certificates of satisfactory completion they did not do so and the reason given was that these were not necessary once they had already issued certifications of final bills which were paid. Dr Grima argued that, once a contractor was paid, it meant that the client was satisfied with the execution of completed works otherwise the Company would not have been paid. Dr Grima pointed out that C & F Building Contractors Ltd did not submit the required completion certificates not because the projects were not satisfactorily completed but because of failure on the part of some Government or private architect/ project manager to present a completion certificate. Furthermore, he said that it was also common practice that the certification of a final bill by an architect responsible for a particular project was equivalent to certificate of satisfactory completion.

When the appellants' attention was drawn to the fact that they had answered to the National Commission Persons with Disability's letter on the same day, Dr Grima replied that this did not mean that they did not try to obtain such certificates. He explained that, actually, his client had already made such efforts before submitting their offer but, unfortunately, these were unsuccessful. However, the appellants' legal representative reiterated that

- (i) the submission of information regarding projects "*whose value is over €1,000,000*" was not a requirement in the tender dossier but it was requested by the Evaluation Committee, *and*

- (ii) it was the tenderer that decided which were the most important works and not the Evaluation Committee.

In reply to a specific question by the PCAB, Dr Grima said that the budget available for this tender was approximately € 667,000 and the fact that C & F Building Contractors Ltd had successfully carried out many other Government projects whose value were much higher than € 1m showed that the authorities were aware of his client's capabilities.

At this point the Chairman PCAB said that his understanding was that the reason given to disqualify the appellants' tender was that it failed to submit *Successful Completion Certificates* for all works whose value exceeded € 1m. He said that it appeared that, once the number of projects to be submitted by tenderers was not specified in the tender dossier, they had a situation where the appellants would not have been penalised if they submitted a shorter list of projects but which was still accompanied with all relative certificates. Furthermore, it was stated that, hypothetically, it seemed that the Evaluation Committee had argued that a tenderer who would have submitted a list of only, say, 4 projects valued at € 1.5m each and supported by four certificates, would have been favourably considered and allowed to proceed in the evaluation process. However, following the same line of thought, one would be correct to argue that the same Evaluation Committee would have, on the other hand, rejected a tenderer's bid had the latter, hypothetically, provided, say, nine certificates only for some 30 projects mentioned in the submission even if these were valued at € 3m each. Needless to say, argued the PCAB's Chairman, this way of evaluating would be highly incorrect.

Whilst the appellants' representatives concurred with this argument, Arch Mallia also stated that once, under Section 4.6.4.2 of Form 4.6.4, it was stated that a tenderer was expected to "*attach ... available references and certificates from the relevant Contracting Authorities*", a tenderer did not need to provide such certificates if these were not available. Furthermore, Dr Grima said that, by this statement, the Contracting Authority was acknowledging that certain certificates could not be made available.

Ms Vicky Gauci, a member of the Evaluation Committee and Project Leader, explained that three tenderers had submitted their offer in this particular call. She said that, after checking the offers for their administrative compliance, the Evaluation Committee, after obtaining approval from the Department of Contracts, sought clarifications from the tenderers because all of them had something missing (such as satisfactory completion certificates) or because amounts did not tally.

At this stage, Ms Anne-Marie Callus, another member of the Evaluation Committee, was asked to take the witness stand. She gave her testimony under oath.

After making reference to tender dossier's clause 4.2 para 6 which stipulated that the tenderers "*must provide a list of the works carried out over the past three years, accompanied by certificates of satisfactory execution for the most important works*", on the Chairman PCAB's specific request Ms Callus gave the following breakdown in respect of each tenderer's offer:

	Number of Projects over €1m (Claims for works carried out)	Number of Accompanied Certificates	Value of works carried out as indicated on Certificates (in Millions)
Asfaltar	7	7	€12+ €6 + €3 +€2, €1+ €1 + €1
Polidano	5	5	€9+ €6 + €3 +€2 + €4
C&F	9	0	Not applicable

At this point, Arch Mallia declared that, contrary to what was stated by the witness, C & F Building Contractors Ltd had submitted with their original offer nine (9) letters of satisfactory execution of works, the respective values of which were approximately €1.9m, €1.5m, €5m, €5m, €1.8m, €8m, €2.5m, ~~€2m~~ €2.3m.

Dr Franco Galea, legal representative of Asfaltar Ltd, intervened by stating that, in their letter dated 1 Sept 2008 the appellants themselves had confirmed that it was not possible for them to submit the requested satisfactory completion certificates.

At this point, Arch Mallia informed those present that he had brought copies of the letters which C & F Building Contractors Ltd had submitted with the offer.

Subsequently, when these were shown to Ms Callus, she confirmed that the majority of these documents would have been acceptable.

During this verification exercise

- (i) it was not understood why the document in respect of Project No 11 (Serenity Wards – SVDP) was indicated as if it was not submitted
- (ii) Arch Mallia clarified that the description of works in respect of warehouse, showroom and offices at B’Kara in the document signed by Arch Stephen A Mangion referred to Project No 7 – Charles Degiorgio Ltd
- (iii) Ms Callus said that, in respect of a letter regarding Foster Clark Ltd’s Project, she would have sought advice from their technical advisor Ms Rita Sant A&CE, because it was only indicated that relative works had been carried out and therefore it was not known whether these were completed satisfactorily or not.

At this stage, the PCAB gave C & F Building Contractors Ltd’s original offer to Ms Callus, who confirmed that all the documents shown by Arch Mallia had corroborated with those included in the appellants’ offer.

Here, the Chairman PCAB reiterated that, apparently, the Evaluation Committee argued and decided to accept the offers of those tenderers who submitted satisfactory completion certificates in respect of all listed projects and to reject the offer of that tenderer who did not submit all the certificates in respect of listed projects even though the latter submitted more of such listed projects. The PCAB was of the opinion that a tenderer should not be excluded for such reasons.

At this point, Ms Gauci said that their decision was based on the advice given by the Department of Contracts. However, when Ms Gauci testified under oath, she clarified that Mr Bernard Bartolo from the Department of Contracts had only told them that they could ask for further clarifications. The witness confirmed that it was the Evaluation Committee that recommended the exclusion of the appellants' offer and the reason given was that the reply given was deemed unsatisfactory.

In his concluding remarks, Dr Galea, representing Asfaltar Ltd, said that on the basis of the argument brought forward by appellants' legal representative, who considered the most important works according to their value, they should have, at least, submitted the completion certificates thereof. Dr Galea invited the PCAB to carry out an exercise and analyse the declaration made by the appellants and he was convinced that it would result that even those of the highest value were not submitted.

With regard to what had been stated by the appellants' legal representative regarding certification of works and completion certificates, Dr Galea said that these were two distinct documents because the former was issued by an architect for payment purposes and the latter was issued when a project was taken-over by the client.

As regards the reason given regarding the item 'amounts do not tally', Dr Galea claimed that, if there was a variation, they should have, at least, indicated the amount paid.

Finally, Dr Galea contended that the issue that could have preoccupied the Evaluation Committee most was the fact that the appellants had made a declaration in their offer that the take-over certificates had been issued but, when asked to provide a number of these certificates, it transpired that these certificates were not available. Asfaltar Ltd's legal representative maintained that, furthermore, any communication exchanged between the appellants and the architects regarding the completion certificates should have been supported by written documentation. He pointed out that the difference between the appellant Company and the other two tenderers was that the latter had provided what was declared in their offer and the former did not provide the required certificates when asked to do so by the Evaluation Committee.

Dr Grima said that the general principle of a tender is to (a) encourage as many as interested parties possible to participate and (b) select that tenderer who is considered as the most competent and who would be submitting the cheapest offer. He claimed that, as a consequence, the Director of Contracts, the Evaluation Committee and the PCAB should not find something trivial to disqualify a tenderer because, otherwise, it would not be possible to obtain the best service at the cheapest price. Dr Grima sustained that, if a tenderer had all the necessary experience and was capable in carrying out similar works, then such tenderer should be allowed to proceed to the next stage of the evaluation process.

Dr Grima argued that the more competitors one has to choose from during the financial evaluation process, the greater the possibility for one to obtain a cheaper price. Needless to say, stated Dr Grima, this would increase the chance of one getting better value for money.

At this stage, the appellants' legal representative argued that the fact that the nine *satisfactory completion certificates* submitted by C & F Building Contractors Ltd had certified more than € 23 million worth of contracts undertaken by the appellant Company in three years, proved that his clients were capable of carrying out such a project whose estimated value was, approximately, merely € 600,000.

Dr Grima claimed that albeit they did not provide the completion certificates of all projects, yet they still submitted more than the other two tenderers. Furthermore, he contended that C & F Building Contractors Ltd were rejected on the basis of an invented clause which was not found in the tender dossier since in the tender dossier they were not required to provide certificates of projects whose value was over € 1 million but '*certificates of satisfactory execution for the most important works*'. He emphasised that competition should not be restricted because of a trivial interpretation issue.

Dr Galea responded by stating that what was being stated by his colleague did not do justice towards the evaluation process because the Evaluation Committee gave the tenderers the opportunity to submit the requested declarations but the appellant Company refused this chance and didn't comply. He reiterated that, unlike the appellants, the other two bidders submitted all the certificates as declared in their tender.

Ms Callus said that the Contracting authority set the threshold of € 1 million because they did want bidders to provide certificates of substantial projects only. She claimed that the Evaluation Committee did not want to know only that they were awarded contracts but they wanted to establish that such projects had been satisfactory completed.

In reply to a specific question by the PCAB, Mr Francis Attard, Director General Contracts, replied that the responsibility of the General Contracts Committee was to ensure that the reports submitted by the Evaluation Committees were consistent and that it was the Evaluation Committee that was responsible for the adjudication of the tenders and not the General Contracts Committee.

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 13.10.2008, and also through their verbal submissions presented during the public hearing held on the 12.11.2008, had objected to the decision taken by the General Contracts Committee;
- having noted the appellant Company's argument that once a contractor is paid this would automatically imply that the client is satisfied with the execution of completed works otherwise the Company would not pay;
- having also noted that Dr Grima pointed out that C & F Building Contractors Ltd did not submit the required completion certificates not because the projects were not

satisfactorily completed but because of failure on the part of some Government or private Architect / Project Manager to present a completion certificate;

- having also heard the appellants' legal advisor's argument relating to the fact that (a) the submission of information regarding projects "*whose value is over €1,000,000*" was not a requirement in the tender dossier but it was requested by the Evaluation Committee, and (b) it was the tenderer that decided which are the most important works and not the Evaluation Committee;
- having also taken cognizance of the fact that, according to Architect Mallia, C & F Building Contractors Ltd's original offer included nine (9) letters of satisfactory execution of works with values ranging between €1.5m and €5m;
- having taken note of Dr Galea's arguments;
- having noted statements made by both Ms Callus and Ms Gauci, particularly Ms Callus confirming that the majority of the supporting documents provided by the appellant Company with the latter's original offer would have been acceptable;
- having noted a lack of clear and objective evaluation techniques in the Evaluation Committee's *modus operandi*;

reached the following conclusions, namely:

1. The PCAB feels that the Evaluation Committee acted beyond its remit when it requested additional information regarding projects "*whose value is over €1,000,000*" as it is the tender document which should regulate what should be submitted by a tenderer and not the Evaluation Committee. Furthermore, this Board would like to remark that such praxis is very dangerous and should not be encouraged;
2. The PCAB fails to understand the reason why, whilst the Evaluation Committee decided to accept the offers of those tenderers who submitted satisfactory completion certificates in respect of all listed projects, yet it rejected the offer of that tenderer who did not submit all the certificates in respect of listed projects even though the latter submitted more of such listed projects;
3. This Board finds that the appellant Company's track record, as proven by the documents submitted, is, in the context of this tender, enough to enable the Company to be reinstated in the rest of the evaluation process along with other qualifying bids.

As a consequence of (1) to (3) above this Board finds in favour of the appellant Company.

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

4 December 2008