

PUBLIC CONTRACTS APPEALS BOARD

Case No. 140

Advert No. CT2520/2007 UM 1229

Tender for the Supply and Installation of Electrical, Mechanical and Extra Low Voltage Services for the Extension of the Rector's Office at the Administration Building, University of Malta.

This call for tenders was, for a contracted value of € 117,479.62 was published in the Government Gazette on 18.07.2008. The closing date for this call for offers was 28.08.2008.

Five (5) different tenderers submitted their offers.

On 22.10.2008 Central Power Installations (CPI) Ltd filed an objection following their disqualification of its offer in respect of the tender in caption after being considered administratively non-compliant.

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 17.12.2008 to discuss this objection.

Present for the hearing were:

Central Power Installations (CPI) Ltd

Dr Kenneth Grima	Legal representative
Mr Dimitri Petchenkine	Representative
Mr Bernard Grech	Representative
Mr Mario Vella	Representative

Megaline (M&E) Ltd

Mr George Xuereb	Consultant
Mr Emanuel Abela	Managing Director
Mr Joseph J. Vassallo	Engineer
Dr Matthew Brincat	Representative

University of Malta - Adjudication Board

Ms Charlotte Attard	Chairperson
Eng. Jonathan Bonett	Member
Mr Christopher Spiteri A & CE	Member
Mr John Busuttill	Member
Mr Karm Saliba	Secretary

Department of Contracts

Mr Francis Attard	Director General
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After the Chairman's brief introduction, Dr Kenneth Grima, legal advisor of Messrs Central Power Installations Ltd, the appellant Company, was invited to explain the motive of his objection. This was followed by interventions by the Chairperson and Secretary of the Adjudication Board and by the representative of Messrs Megaline (M&E) Ltd, the recommended tenderer.

Dr Grima commenced his intervention by explaining that the appellants were technically qualified as, over the years, they had executed a number of similar public contracts and, in this instance, they had also submitted a very competitive price. He added that, also, on such many previous occasions, the very same members, more or less, sitting on the General Contracts Committee who were deliberating on this tender, had found today's appellant Company as being suitable, technically and financially.

The appellants' legal advisor declared that he found it hard to understand how the Contracts Committee could reject the appellants for failing to submit the audited accounts for the year 2004 when, on other occasions, the same Committee had awarded them several contracts. Following an exchange of views between the Chairman PCAB, Dr Grima and the Chairperson of the Adjudication Board, it emerged that CPI Ltd had submitted the audited accounts for 2006 which also incorporated the accounts of 2005. Dr Grima did not contest the fact that his client failed to submit the 2004 audited accounts and remarked that this must have happened through an oversight. Dr Grima claimed that a set of the audited accounts of public companies was deposited at the Malta Financial Services Authority (MFSA) and, therefore, these accounts were in the public domain, such that anyone could check them out. At this point Dr Grima argued that when the Adjudication Board did not find the 2004 audited accounts in the documentation submitted by CPI Ltd, the Adjudication Board could have easily checked with the MFSA, even over the phone, about the matter, especially when refraining to do so could have led to the disbursement of more public funds than required to obtain the same service.

The Chairman, PCAB, remarked that this document was clearly requested in the tender and the Adjudication Board should not be expected to do the work that should have been done by the tenderer.

Dr Grima pointed out that his argument centred on the fact that the tender document did not stipulate that, if a tenderer did not present the entire documentation, that tenderer should be disqualified. He added that the tender document stipulated that the offer submitted by the tenderer should have no substantial deviations or reservations. At that stage, Dr Grima quoted from page 20 as to what was meant by substantial deviations and reservations:

28.2 *An admissible Tender is one which conforms to the requirements and specifications described in the tender documents with no substantial deviations or reservations. Substantial deviations and reservations are those which:*

28.2.1 *- in any way influence the scope, quality or execution of works, or*

28.2.2 *- restrict the rights of the Contracting Authority or the obligations of the Tenderer under the Contract in a manner inconsistent with the tender documents, or*

28.2.3 *- rectification of which would unfairly affect the competitive position of other Tenderers presenting admissible tenders.*

Dr Grima claimed that the non-submission of the 2004 audited accounts by his client did not give the appellants any advantage over the other bidders and neither did it introduce any restrictions to the contracting authority. Dr Grima maintained that a tenderer should, for example, definitely be disqualified in cases where serious shortcomings are committed, such as instances where the tenderer would, deliberately, leave something out or give ambiguous information such that, later on, the said tenderer would be able to, say, alter or try to change the price or contents of the tender - in other words the overall substance.

Yet, continued the appellants' legal advisor, in this instance, there were only minor shortcomings committed by the appellants which should not have led to elimination. Dr Grima contended that the omission committed by his client was irrelevant in the light of these provisions and it, therefore, followed that his client's bid was compliant and that the Adjudication Board did not act correctly when it rejected the latter's offer.

At this stage, with regard to Volume 1 Section 4.4.4 (at page 46), the Chairman PCAB asked whether the 'current year' in the grid referred to 2007 or to 2008. Following an exchange of views, it was generally recognised that since the tender was drawn up in 2007, although having the closing date in August 2008, the 'current year' referred to 2007, in respect of which no audited accounts could be presented, and the 'last year', 'year -1' and 'year -2' referred to 2004/5/6 in respect of which the audited accounts were specifically requested.

Dr Grima pointed out that, according to his client's submission, the table in Section 4.4.4 of Form 4.4 was entirely filled in with 2007 taken as the 'current year' and the previous three years referring to 2004/5/6. He added that, according to the tender document, the audited accounts were required to extract the data with regard to 'total assets', 'total liabilities' 'net value' and so forth. Dr Grima stated that his client did in fact quote all the figures for 2004 required in the grid but the same tenderer did not submit the audited accounts for 2004, something which Dr Grima conceded that his client should have done but somehow did not.

Dr Grima contended that his client gave all the figures requested in section 4.4.4, even for 2004, that showed the financial position of the Company and that his client had executed other public contracts and, as a result, it was not correct to consider the non-submission of the 2004 audited accounts as a valid reason to disqualify his client and to award the tender at a price higher than that offered by his client. He added that the Adjudication Board could have checked the 2004 figures given by his client, either by asking CPI Ltd to submit the 2004 audited accounts, or else, by checking with the MFSA because that information was in the public domain.

Dr Grima reiterated that this omission on the part of his client was irrelevant and compared the situation to that of an examiner failing a student for obtaining 99% instead of 100% of the marks. Dr Grima stated that, according to the tender document, the important factors were (i) that a tenderer was technically competent, (ii) that the offer had the lowest price and (iii) that a tender was compliant unless it was substantially non-compliant.

Ms Charlotte Attard, Chairperson of the Adjudication Board, representing the University of Malta, remarked that Dr Grima had just stated that his client did not submit the 2004 audited accounts through an oversight, whereas in page 3 of his letter of objection Dr Grima had stated:

What is the use of knowing that a particular company may have had a not so healthy balance of payments in 2004 but had a healthy one in 2005/6/7 when the tender in question was issued in 2007 and which had to be performed in 2008.

Ms Attard explained that they had requested the audited accounts for the years 2004/5/6 because the tender document was prepared in 2007.

Ms Attard added that when it came to the administrative compliance grid it resulted that four out of the five bids submitted were not entirely administratively compliant and, hence, they were discarded.

Mr Karm Saliba, the Adjudication Board's secretary, explained that

- two tenderers, including the appellant Company, did not submit all the audited accounts requested
- another did not furnish the forms 4.6.1 and 4.6.3 *and*
- the other tenderer did not furnish the form 4.6.3 and the statement of exclusion criteria.

With regard to the claim by Dr Grima that the Adjudication Board should have sought a clarification with regard to his client's omission, Mr Saliba pointed out that, according to the Public Contracts Regulations, clarifications were to be sought only on information already submitted by tenderers but which was not clear enough and that the regulations did not allow such Board to request tenderers to submit documents that should have been submitted in the first place.

The Chairman, PCAB observed that, it has been established that the appellant Company had submitted all figures required in the grid but the figures quoted in respect of 2004 could not be corroborated with the audited accounts as these were not formally provided. He proceeded by asking whether this was a case where a clarification would have been justified.

Mr Saliba insisted that the 2004 audited accounts were not submitted and therefore the appellants did not qualify administratively.

The Chairman PCAB stated that the appellant Company did furnish all the financial figures requested and all that was needed was to confirm those amounts with the audited financial statements. He added that, if contacted, the tenderer could have forwarded the audited accounts within the hour. The Chairman declared that a clarification was one thing and conducting negotiations was another because the latter could lead to modifications. He said that he was making these observations while thinking aloud and the point that he wished to make was that, perhaps, there was room for one to exercise a measure of discretion in this case.

Mr Saliba stated that the instructions that they had were in the sense that if a document was not submitted the Adjudication Board could not ask for it. The Chairman PCAB remarked that when seeking guidance from the Contracts Department one should furnish that Department with background information and not simply ask what should be done in case a requested document was not submitted.

The Chairman PCAB stressed that he was expressing this view because the appellant tenderer had submitted the requested financial data. Needless to say, continued the PCAB Chairman, had the appellant Company not submitted those figures anywhere in the tender document's specified grid, then, that would have merited outright disqualification, of course.

Ms Attard explained that she could confirm the figures in respect of 'last year' and 'year -1' against the set of audited accounts submitted by the appellants which included the years 2005 and 2006 but she could not confirm the figures in respect of 'year -2' which referred to 2004.

The Chairman PCAB opined that the Adjudication Board could have confirmed the figures that it had in hand with the tenderer, who in all probability had the 2004 accounts readily available, and that would not have amounted to negotiation or to altering any given information.

The Chairman PCAB expressed his conviction that the Adjudication Board did not act the way it did, maliciously, but solely in order to follow certain parameters. Yet, stated the PCAB Chairman, he considered that there were certain occasions that called for some more 'transparent' flexibility.

At this stage Ms Attard remarked that since the appellants' offer had been discarded at administrative compliance stage, their offer was not evaluated technically. In this regard, the Chairman PCAB explained that the PCAB was not concerned with the technical evaluation but it had to establish whether it was correct to eliminate the appellant Company as administratively non-compliant for not submitting the 2004 audited accounts when, as a matter of fact, they had submitted the relevant 2004 figures.

Mr George Xuereb, in his capacity of consultant to Megaline (M&E) Ltd - the only tenderer that qualified administratively and the recommended tenderer - repeated the quote already cited by Ms Attard earlier on from page 3 of the appellants' letter of objection whereby the appellant Company questioned the relevance of submitting the 2004 audited accounts.

Mr Xuereb added that in his forty-five years experience in this line of business he had learned that once a document was requested it meant that the document was relevant and, therefore, one had to submit the documentation or else face elimination.

Mr Xuereb declared that he was against the Adjudication Board seeking clarifications of this kind as that could well end up into negotiations taking place between the Board and the tenderer concerned.

Mr Xuereb pointed out that his client was recommended for the award of this tender and in case the appellant would be readmitted in the tendering process, something which he obviously did not recommend, consideration had to be given to the fact that all the figures and prices have been disclosed. The Chairman PCAB assured Mr Xuereb that this commercial aspect will be taken into consideration during the Board's deliberation on the merits of this particular objection.

Dr Grima concluded that the reason behind his objecting was for the PCAB to rule that his client was, in fact, administratively compliant and that, as a result, the appellants should be readmitted in that tendering process. Dr Grima ruled out the need to issue a fresh call for tenders and contended that, since his client was the only one that filed an appeal, he expected that only two tenderers would be contesting the award of this tender. At this point, Mr Xuereb aired the view that since there could be other tenderers that were disqualified for the same reason that was communicated to the appellant Company, then it could be the case that even those tenderers would be readmitted in the tendering process.

The Chairman PCAB observed that the points that were being raised fell within the realm of how the PCAB ought to make its deliberations on this case and he, therefore, asked the parties present to refrain from trying to influence the PCAB by such comments.

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 03.11.2008 and also through their verbal submissions presented during the public hearing held on the 17.12.2008, had objected to the decision taken by the General Contracts Committee;
- having taken note of Dr Grima's line of defence, particularly the issues relating to the fact that:
 - in his opinion, appellants were technically qualified as, over the years, they had executed a number of similar public contracts;
 - on many previous occasions, the very same members, more or less, sitting on the General Contracts Committee who were deliberating on this tender, had found today's appellant Company as being suitable, technically and financially;
 - his client did actually fail to submit the 2004 audited accounts adding that this must have happened through an oversight;
 - regardless of the previous admission of failure to non-submission of the 2004 audited accounts, the Adjudication Board could have easily checked with the MFSA, even over the phone, to corroborate the figures submitted by the appellant Company in the latter's offer;
 - in this instance, there were only minor shortcomings committed by the appellants which should not have led to elimination;

- his client did, in fact, quote all the figures for 2004 required in the grid but the same tenderer did not submit the audited accounts for 2004, something which Dr Grima conceded that his client should have done but somehow did not;
 - the fact that the Adjudication Board could have checked the 2004 figures given by his client by asking CPI Ltd to submit the 2004 audited accounts;
- having also taken note of the fact that it was generally recognised that since the tender was drawn up in 2007, although having the closing date in August 2008, the ‘current year’ referred to 2007, in respect of which no audited accounts could be presented, and the ‘last year’, ‘year -1’ and ‘year -2’ referred to 2004/5/6 in respect of which the audited accounts were specifically requested;
 - having heard Ms Attard state that they had requested the audited accounts for the years 2004/5/6 because the tender document was prepared in 2007;
 - having also taken note of Mr Saliba’s opinion on issues relating to ‘clarifications’ and his insistence on the fact that the 2004 audited accounts were not submitted by the appellant Company and, as consequence of which, the appellants did not qualify administratively;
 - having (the PCAB) publicly observed that a ‘clarification’ was one thing and conducting ‘negotiations’ was another because the latter could lead to modifications;
 - having observed that the appellant Company had submitted all figures required in the grid but the figures quoted in respect of 2004 could not be corroborated with the audited accounts as these were not formally provided;
 - having acknowledged that had the appellant Company not submitted those figures anywhere in the tender document’s specified grid, then, that would have, undoubtedly, merited outright disqualification;
 - having taken cognizance of the fact that it seemed evident that the Adjudication Board was highly bureaucratic and less sensible, largely due to inexperience but definitely not due to ill intent

reached the following conclusions, namely:

1. The PCAB, unreservedly, declares that an Adjudication Board should not be expected to do the work that should be attended to by a participating tenderer;
2. The PCAB concludes that the Adjudication Board members evaluating this tender could have been more practical, apart from logical, as one fails to understand how a tenderer could be seen as not administratively compliant when the 2004 financial figures were submitted in the grid but not supported by the audited accounts, a copy of which, in this Board’s

opinion, could have been on the Adjudication Board's desk within a short time – an action which could have enabled the Adjudication Board to corroborate, or otherwise, whether the figures submitted by the said tenderer (the appellant Company) were correct or not;

3. The PCAB also concludes that some Adjudication Board members are still very much confused as to what constitutes a 'clarification' vis-à-vis a 'modification', as well as, what could really lead to a 'negotiation' and this particular case was one of those instances where 'templates' and 'pre-fixed mind sets' prevailed over 'logic' and pragmatism;
4. The PCAB concludes that the appellant Company has been erroneously disqualified as its offer in respect of the tender in caption is, in this Board's opinion, to be considered as administratively compliant.

As a consequence of (1) to (4) above this Board finds in favour of appellants.

This Board also recommends that the appellant Company should be re-instated in the adjudication process together with the previously recommended tenderer, namely, Messrs Megaline (M&E) Ltd.

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

29 December 2008