

PUBLIC CONTRACTS APPEALS BOARD

Case No. 141

CT 2479/2008

Negotiated Procedure for the Publicity Campaign for and Marketing of the Employment Aid Programme

This call for tenders for a contracted value of € 28,994 (Lot 1) and € 159,006 (Lot 2) was published in the Government Gazette on 7 October 2008. The closing date for this call for offers was 21 October 2008.

Two (2) different tenderers submitted their offers.

Following the publication of the 'Notification of Recommended Tenderers', on 4 December 2008, Messrs Outlook Coop Ltd filed an objection against the decision taken by the General Contracts Committee to award the tender in caption to Messrs JP Advertising Ltd / Impetus Europe Consulting Group.

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 hearing on 16 January 2009 to discuss this objection.

Present for the hearing were:

Outlook Coop Ltd

Mr David Bezzina
Mr Godfrey Kenely

Evaluation Committee - Employment and Training Corporation (ETC)

Mr William Spiteri	Chairman
Mr Felix Borg	Member
Mr Martin Casha	Secretary

JP Advertising Ltd / Impetus Europe Consulting Group Ltd

Ms Melina Gove
Mr Adrian Fabri
Mr Melvin Cuschieri

Department of Contracts

Mr Francis Attard	Director General
Mr Bernard Bartolo	Assistant Director, EU Related Procurement
Mr Nicholas Aquilina	Assistant Principal

HSBC

Mr Silvano Pullicino	Manager
Mr Marco Saliba	Team Leader

After the Chairman's brief introduction, the representatives of Outlook Coop Ltd, the appellant Company, were invited to explain the motive of their objection.

Mr Godfrey Kenely, representing Outlook Coop Ltd, informed the PCAB that their objection concerned two aspects of the tender documentation.

Mr Kenely explained that at a meeting held on 7 October 2008, Mr Bernard Bartolo, Assistant Director at the Contracts Department, had been specifically asked if there was the need to present a new tender guarantee and Mr Bartolo had instructed them to change the reference number of the original tender guarantee and to extend its expiry date. Mr Kenely further explained that these instructions were communicated to their bankers, HSBC. He added that HSBC had informed Outlook Coop Ltd that it was their practice to inform the Contracts Department, by way of letter, with the change in reference number and the extension of the expiry date of the tender guarantee. The same appellant Company's representative then stated that Mr Nicholas Aquilina, an official of the Contracts Department, had informed them over the phone that the department had received the new bid bond and that was also confirmed by Mr Bartolo of the same department.

At this point Mr Kenely stated that he could not recall the exact date when these Contracts Department officials had communicated this information to his firm.

Mr Kenely conceded that the service tender submission 'form' that they submitted was not signed however he felt that they should object in this regard contending that these same declarations and signatures were given in other sections of the tender documentation and, more importantly, since this was a negotiated procedure they had already given this information to the contracting authority in their original submission. He added that they had to re-submit this information because there was a change in the budget of this tender and in the timeframe to execute the services.

Mr David Bezzina, also representing the appellants, admitted that whilst it was true that the service tender submission 'form' submitted by his firm had not been signed, yet, the contracting authority had this information as it was submitted with their original bid. He added that he was aware that, in spite of the fact that this was a negotiated tender, yet it was not a continuation of the original tender. Mr Bezzina declared that they were not contesting the price or any other aspect of the tender but the fact that they were not allowed to compete because of an administrative shortcoming.

Mr William Spiteri, Chairman of the Evaluation Committee, explained that two offers were received and that when the Committee was compiling the *Administrative Grid* it transpired that the offer made by Outlook Coop Ltd was not accompanied by the required bid bond and that the service tender submission 'form' had not been signed. He sustained that the Evaluation Committee arrived at this decision on the basis of the following tender conditions:

- clause 4 *All tenders submitted must comply with the requirements in the tender dossier and comprise an original and valid tender guarantee (Bid Bond);*

clause 4.2 (4) *The contracting authority reserves the right to disqualify any Tenderer who fails to submit any of the documents requested or to submit incomplete or unsigned documents; and the Service Tender Submission Form: One signed original of this tender submission form (including) must be supplied together with three copies.*

Mr Spiteri concluded that in view of these shortcomings, the Evaluation Committee, unanimously, agreed that the offer by Outlook Coop Ltd should be rejected at the administrative evaluation stage.

Mr Kenely interjected to remark that they did not submit the tender guarantee with the tender documentation because they were informed that HSBC itself would inform the Contracts Department of the change in reference number and the extension of the validity date of the tender guarantee, in fact, Outlook Coop Ltd had submitted with its offer the letter they had sent to HSBC conveying these instructions.

At this stage it was noted that:

- (i) the letter of Outlook Coop Ltd to HSBC was dated 16 October 2008;
- (ii) the letter of HSBC to the Contracts Department informing them of the changes effected with regard to the change in reference number and expiry date extension was dated 17 October 2008;
- (iii) the closing date of the tender was 21 October 2008, and
- (iv) HSBC letter had reached the Contracts Department on the 27 October 2008 as demonstrated by the official stamp thereon.

The PCAB moved on to establish when the tender guarantee did actually reach the Contracts Department.

Mr Nicholas Aquilina, a Contracts Department's official, under oath, declared that according to the Department's registry, the original letter sent by HSBC was received on 27 October 2008 as evidenced by the official stamp thereon. He added that it was normal procedure that letters were marked 'received' on the same day that they actually reach the Department. Mr Aquilina referred to the letter of objection by Outlook Coop Ltd dated 4 December 2008 wherein it was stated that he, Mr Aquilina, had phoned Outlook Coop Ltd to confirm the receipt of the new bid bond. Mr Aquilina declared that:

- (i) it was not part of his duties to communicate by phone such information to tenderers
- (ii) he did not phone Outlook Coop Ltd as was being alleged but it could be that Outlook Coop Ltd had phoned him and he confirmed but, then again, he could not have confirmed the receipt of a document when that document had not been received by the Department by that time. Mr Aquilina remarked that, usually, a bid bond was submitted as part of the

tender documentation and not by mail and he added that since he did not work at the Department's registry he could not tell how the registry conducted its business. However, continued Mr Aquilina, it was very unlikely that a letter would be stamped as 'received' ten days after it reached the Department.

Mr Francis Attard, Director General (Contracts), under oath, outlined the general procedure how the registry handled the correspondence received by the Department and confirmed that it was normal practice for registry officers to stamp and register letters on the same day of receipt. He added that it was not the norm to retain the envelopes of letters received.

Mr Silvano Pullicino, an HSBC Bank Manager, was asked by the PCAB whether there were instances when an HSBC letter reached its destination 10 days after its date; in other words, whether letters were dispatched to their destination by HSBC on the same day, or else, days later. Mr Pullicino, under oath, declared that as far as he was aware, at HSBC they had no such problem and that letters were usually sent on the same day or, the most, on the following day, depending on the time of day that the Bank received the instructions from the client. Mr Pullicino added that it was the norm that unless the client instructed the Bank that one would be picking up such a letter, then the Bank would send the letter to its destination and that was the instance under reference otherwise the Bank would not have mailed the letter to the Contracts Department.

Mr Kenely explained that they did not send a fresh letter of guarantee because they had been instructed to amend the existing one and hence on the 16 October 2008 they instructed the Bank to effect the required amendments to the letter of guarantee. He claimed that there was no element of negligence on their part.

The Chairman, PCAB, remarked that the Evaluation Committee had to decide on the documentation available and, in this case, it resulted that the offer of Outlook Coop Ltd was not accompanied by a valid tender guarantee, whereas, the tender submission 'form' was submitted unsigned. He added that, in this particular instance, HSBC was contending that it sent the letter on the 17 October 2008 whereas the Department of Contracts had stamped the letter as having been received on the 27 October 2008 which meant that on the closing date of the tender, i.e. the 21 October 2008, the contracting authority did not have a valid letter of guarantee in respect of Outlook Coop Ltd.

The PCAB observed that, with regard to the Service Tender Submission 'Form', no one was contesting the fact that it was submitted without the required signature, that the document was a mandatory requirement in this tender and that it was an important element of the tender documentation.

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

This Board,

- having noted that the appellants, in terms of their ‘motivated letter of objection’ dated 4 December 2008, and also through their verbal submissions presented during the public hearing held on 16 January 2009 had objected to the decision taken by the General Contracts Committee;
- having noted Mr Kenely’s concession that the service tender submission form that the Co-Operative had submitted was not signed albeit the Co-Operative’s administration was fully aware of the fact that (a) this was a mandatory requirement and ((b) in spite of the fact that this was a negotiated tender, yet it was not a continuation of the original tender;
- having established that the appellant Company’s major disgruntlement was attributed to the fact that they were not allowed to compete because they fell short of properly submitting the requested documentation in the mandatory format;
- having also taken note of the Chairman of the Evaluation Committee’s explanation regarding the reason as to why the appellant Company had failed to comply with tender specifications;
- having noted that the appellant Company’s representative had stated that HSBC had informed them that they would have notified the Contracts Department of the change in reference number and the extension of the validity date of the tender guarantee;
- having taken cognisance of the fact that HSBC’s letter had apparently reached the Contracts Department some six days after the actual closing date of the tender;
- having noted the various declarations made under oath by representatives of all interested parties, particularly those made by DG Contracts, as well as, Mr Pullicino, with regard to the actual procedure normally followed in so far as dispatch, receipt and eventual formal registration of all correspondence;
- having noted the different views expressed by both the appellant Company’s representatives and Mr Aquilina as regards their telephone conversation’s real scope, the actual originator of the call and the details of the said conversation,

reached the following conclusions, namely:

1. The PCAB argues that, whilst not fully in a position to establish the real reason as to whether (a) a letter was actually sent by HSBC to the Contracts Department on the same day that the said letter’s date is suggesting, *or* (b) whether the same letter was actually received by the Contracts Department on the day it was rubber stamped by the Contracts Department’s Registry *or* (c) whether it was Maltapost plc’s fault due to an excessive delay, yet it feels that, under the circumstances, it has to give the benefit of the doubt to the Contracts Department as it considers that an oversight could, possibly, delay a dispatch

of a letter rather than a formal rubber stamping by a Department's Registry. Furthermore, to date, Maltapost plc's service is considered to be efficient thus strongly reducing the possibility that a letter sent on 17 October 2008 could have only reached somewhere else in Malta on 27 October 2008;

2. The PCAB feels that, regardless of (1) above, the public admission made by the appellants' representatives that the service tender submission form they had submitted had not been signed by them despite the fact that they were fully aware of the fact that this was a mandatory requirement, is grave enough to warrant outright rejection of this objection.

As a consequence of (1) to (2) above this Board finds against 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 not be refunded.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

26 January 2009