

## **PUBLIC CONTRACTS APPEALS BOARD**

### **Case No. 142**

**CT2463/2008 MTA 732/2008**

#### **Tender for the Design and Construction of a Modular Stand for ITB and IMEX Fairs in Germany for a two year period 2009-10**

This call for tenders was, for a contracted value of € 200,000 (covering a two year period) was originally published in the Government Gazette on 28.10.2008. The closing date for this call for offers was 25.11.2008.

Two (2) different tenderers submitted their offers.

Following the publication of the 'Notification of Recommended Tenderers', Zaffarese Exhibitions and Events Ltd (ZEE LTD) filed an objection on 15.01.2009 against the award of the tender in caption to Malta Fairs and Convention Centre (MFCC)

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 05.03.2009 to discuss this objection.

Present for the hearing were:

#### **Zaffarese Exhibitions and Events Ltd (ZEE Ltd)**

Mr Benny Zaffarese	Manager
Dr David Farrugia Sacco	Legal Representative
Mr Thomas Farrugia	Director

#### **Malta Tourism Authority (MTA)**

Mr Josef Formosa Gauci	CEO and Chairman Adjudicating Board
Mr John Maestre	Manager MTA and Member of the Adjudicating Board
Mr Patrick Attard	Procurement Officer
Dr Michael Psaila	Legal Advisor

#### **Malta Fairs and Convention Centre (MFCC)**

Mr Reuben Caruana	Managing Director
Dr Godfrey Mifsud	Legal Advisor

#### **Casapinta Design Group Ltd**

Mr Tonio Casapinta	Managing Director
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#### **Department of Contracts**

Mr Francis Attard	Director General
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During the Chairman's brief introduction, he informed those present that the reason that this case was called at short notice arose from the fact the term of the Public Contracts Appeals Board had expired and, therefore, it could not function for a certain period of time until it was formally reconstituted or reappointed, something which took place only recently.

Mr Benny Zaffarese, representing the appellant Company, Zaffarese Exhibitions and Events Ltd (ZEE Ltd), was invited to explain the motives of his objection. This was followed by interventions by the representatives of the Malta Tourism Authority, the Adjudicating Board, Casapinta Design Group Ltd and the Department of Contracts.

Mr Zaffarese referred to the reasoned letter of objection dated 23<sup>rd</sup> January 2009, where three main areas were appealed against, namely, the

- (i) price
- (ii) issue of *addenda* beyond the date stipulated in the tender regulations and
- (iii) alleged unfounded and discriminatory remarks expressed in the evaluation report with regard to his offer

Mr Zaffarese remarked that the tender was awarded for the total price of €129,100. He went on to explain that this tender covered two participations at two different international exhibitions held in Germany, namely the ITB and the IMEX, and, according to his interpretation of the schedule of tenders displayed in the notice of the Department of Contracts on the 25 November 2008, the awarded tenderer had quoted the following prices:

	Item 1 (ITB)		Item 2 (IMEX)	
	1 <sup>st</sup> Yr	2 <sup>nd</sup> Yr	1 <sup>st</sup> Yr	2 <sup>nd</sup> Yr
With raised flooring	74,150	30,075	54,950	27,475
Without raised flooring	70,550	35,275	52,550	26,275

At this point, the Chairman PCAB, drew the attention of Mr Zaffarese that the figures that he was quoting did not tally with those in the bills of quantities submitted by MFCC and, following a verification exercise between the original submission made by MFCC and the original 'Schedule of Tenders', it transpired that the figures quoted by Mr Zaffarese in respect of the 2<sup>nd</sup> year, which reflected the amounts shown in the second line of the schedule in respect of Tenderer No. 1 MFCC, did not feature in the bills of quantities drawn up by MFCC.

Mr Francis Attard, Director General (Contracts Department), explained under oath that the schedule of tenders was drawn up by the Contracts Department Committee at tender opening stage and that, at that time, none of the committee members were present at the department. However, Mr Attard confirmed that the document that Mr Zaffarese was quoting from was a true copy of the original schedule of tenders that was displayed on the department's notice board. Mr Attard went on to compare the figures quoted by MFCC in its original submission with the figures shown on the schedule of tenders in respect of Tenderer no. 1, namely, MFCC, and he confirmed that the figures shown in the first line of the schedule tallied with the amounts quoted in the bills of quantities submitted by MFCC. Albeit, according to Mr Attard, it was evident that these figures covered the two-year period indicated in the tender, yet, he

Deleted: Zaffarese

could not tell what the figures shown in the second line of the schedule, namely, €30,075; €35,275; €27,475; €26,275 and €4,700, represented.

Mr Patrick Attard, Procurement Officer (MTA), formally testified that the tender was issued for two fairs, namely, ITB and IMEX, for two years, and that tenderers were required to submit a quote for each fair, one quote 'including' and another quote 'excluding' the *raised flooring*. He added that the tenderers were not required to quote a price for the first year and a separate price for the second year. Mr Attard remarked that two tenders were submitted, one by MFCC, which quoted for both fairs, and the other tender comprised an offer by ZEE Ltd for ITB and an offer by Casapinta Design Group for IMEX.

Mr Attard (MTA) stated that, in his opinion, it was quite clear that the prices included in the evaluation report reflected the prices quoted by MFCC in its original submission.

The same witness proceeded by testifying that he could not tell what the amounts listed in the schedule of tenders against Tenderer no.1 (second line) – which, during the hearing it transpired that Mr Zaffarese had interpreted them to refer to the second year of the two-year period covered by this tender - represented.

At this stage the Chairman, PCAB, quoted from a letter dated 21<sup>st</sup> November 2008 signed by ZEE Ltd and Casapinta Design Group, stating that the latter will be the lead contractor in respect of the ITB 2009/10 and ZEE Ltd will be the lead contractor in respect of IMEX 2009/10.

Mr Zaffarese stated that, on this particular issue, the Department of Contracts had advised them that if, eventually, they would be awarded the tender they will have to enter into a joint venture. It was, therefore, established that, as things stood, technically ZEE Ltd was responsible for his bid for IMEX and Casapinta Design Group was responsible for ITB, so much so, that the latter chose to withdraw his appeal.

Mr Tonio Casapinta, acting on behalf of Casapinta Design Group, declared under oath that his firm was the lead contractor for ITB and ZEE Ltd was the lead contractor for IMEX. He also confirmed that the advice they were given by the Contracts Department was in the sense that, if they were awarded the tender, they would have to enter into a joint venture. He also confirmed that two tender forms were submitted, one signed by Casapinta Design Group and one by ZEE Ltd, but under one covering letter. Mr Casapinta explained that he had withdrawn his appeal for commercial reasons.

Mr Josef Formosa Gauci, Chief Executive Officer of MTA and Chairman Adjudicating Board, took the stand and gave his testimony under oath. He explained that the bids received had been referred to the experts of the Malta Tourism Authority (MTA) in Germany and that the decisive aspect in the award of this tender was the wide variation in the prices offered, namely €74,150 for ITB and €54,950 for IMEX, totalling €129,100, quoted by MFCC, against the €128,000 and €6,300, totalling €229,200 quoted by ZEE Ltd and Casapinta Design Group. He added that, according to the tender document, this contract covered a period of two years, namely 2009/10.

Mr Formosa Gauci confirmed that the Adjudicating Board compiled the prices from the bids received and not from the Schedule of Tenders.

The Chairman, PCAB, remarked that, although the ‘Schedule of Tenders’ contained amounts which one could not establish what they represented and, as a consequence, to a certain extent, that schedule could have been misleading, yet, it was becoming quite clear to one and sundry that the original offers submitted by the tenderers – which were the basis upon which the Adjudicating Board drew up its report – amply demonstrated that the appellant Company was not discriminated against because its offer was much higher than that of MFCC.

Dr David Farrugia Sacco, legal advisor to the appellant Company, requested a short suspension of the proceedings to consult with his client. On the resumption of the proceedings, Dr Farrugia Sacco pointed out that the ‘Schedule of Tenders’ was misleading in certain respects and that his client had based his appeal with regard to price on that information. The Chairman, PCAB, stated that, in his opinion, the ‘Schedule of Tenders’ failed to reflect clearly the original offers. Yet, he also said that it was made clear that this fact had no bearing on the Adjudicating Board’s deliberations with regard to prices.

With regards to the issue of *addenda* beyond the date stipulated in the tender regulations, Mr Zaffarese cited para. 2.4.2, which stated that:

*No addenda will be issued later than six days prior to the date of receipt of tenders except an addendum postponing the date for receipt of tenders or withdrawing the request for tenders*

The appellants’ representative pointed out that this provision was not adhered to as an *addendum* was issued four days before the closing date.

The PCAB drew the attention of Mr Zaffarese that, even if what he was claiming was correct, the fact was that the appellant Company had carried on with its participation in this tendering process despite of the fact that it had the opportunity to show its concern in regard on receipt of the *addendum*, namely, prior to the closing date of tenders and not after the tender had been awarded. The Chairman, PCAB, remarked that, strictly speaking, this was not a matter that should be dealt with by the PCAB at this stage but that the appellants should have dealt with it with the Department of Contracts at the opportune time, earlier on in the process.

When the floor started discussing Mr Zaffarese’s claim regarding the alleged unfounded/discriminatory remarks in the evaluation report relating to certain issues of ZEE Ltd’s offer, the appellant Company’s representative pinpointed the following:

- (a) “rigging: although required in the tender document it is not indicated whether rigging is needed to suspend the border *facia* and revolving cube”

Mr Zaffarese stated that this was not the case as in the bills of quantities he had indicated that nine such things were required.

- (b) “the bar area presented could take only 8 stools whereas normally there were 10”

Mr Zaffarese claimed that in the bills of quantities he had indicated that all the stools were there and even the pictures that he submitted indicated 10 stools as requested.

- (c) “no suggestion is made to integrate the requested infopoint into the stand design”

Mr Zaffarese explained that the tender indicated that one ‘may’ submit the above mentioned request, yet it was optional for one to give this information and that was so because this matter had to be worked out with the supplier of the audio-visual items

- (d) “no separate offer is given for AV equipment although this was required in the tender”

Mr Zaffarese claimed that points had been deducted in his respect because of these adverse comments and that he did not consider that fair in his regard.

Mr Formosa Gauci intervened to explain that the overall result of the adjudication process was a combination of a number of considerations. He added that these remarks were made by the technical officers and that, from the technical point of view, the offer submitted by Casapinta/Zaffarese was considered superior to that of MFCC as reflected in the evaluation grid, namely, 63 points against 60.75. Notwithstanding, the MTA’s CEO remarked that these were minor issues.

The attention of Mr Zaffarese was drawn to the fact that certain

- (i) technical information, such as the cupboards and the material of the relief structure and its realisation, had to be included in the bills of quantities and that it was not sufficient to reproduce them on pictures or by claiming that they would be the same as those used in previous fairs,

and

- (ii) shortcomings found in ZEE Ltd’s submission were mitigated by superior items found in the submission of Casapinta Design Group, as in the case of the ‘layout’

Dr Michael Psaila, MTA’s legal advisor, remarked that what has been said during the hearing demonstrated that the adjudicating board had performed its work properly and had recommended the award of the tender to the most economically advantageous bidder and, as a consequence, its decision should stand. He also remarked that the reasoned letter of objection was submitted late by ZEE Ltd. Dr Psaila observed that the other two bidders had made a separate bid and that they submitted two separate appeals and therefore, the fact that one of them has withdrawn its objection had rendered the appeal lodged by ZEE Ltd null.

The Authority's legal advisor argued also that Mr Zafferese had made no representations that he would execute the part of the tender in respect of which the offer was made by Casapinta Design Group.

Dr Farrugia Sacco remarked that during the hearing there emerged a number of inconsistencies, especially in the schedule of tenders, and so the objection raised by his client could not be termed frivolous. He also asked the PCAB to consider whether certain aspects of this tendering process should be re-examined on the basis of the evidence given by his client. Dr Farrugia Sacco contended that once the tender submitted jointly by his client and Casapinta Design Group was considered admissible in one covering letter, then one should not discard it at a later stage. Dr Farrugia Sacco argued that his client had made it clear that he had tendered for a particular fair however, if the appeal were to be upheld, there was nothing that would preclude Casapinta Design Group from executing its part of the contract.

Notwithstanding what Dr Farrugia Sacco had just stated, the Chairman PCAB noted that, at a certain stage, the two bidders, namely, the appellants and Casapinta Design Group, had acted as one, whereas, at a later stage, these two bidders acted separately as demonstrated by the fact that Casapinta Design Group withdrew its complaint whilst the appellant Company did not.

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 'reasoned letter of objection' dated 23.01.2009, and also through their verbal submissions presented during the public hearing held on the 5.03.2009, had objected to the decision taken by the General Contracts Committee;
- having taken note of all the documentation presented;
- having during the public hearing heard and, subsequently, thoroughly deliberated upon, all points raised by all witnesses and other interested parties' representatives;
- having noted that with regards to the issue of price, as remarked during the hearing, the PCAB feels that the 'Schedule of Tenders' contained amounts which one could not establish what they represented and, as a consequence, to a certain extent, that schedule, as publicly displayed, could have been misleading;
- having ascertained that the Adjudicating Board's recommendations were not based upon the erroneous 'Schedule of Tenders' but on the bidders' offer as contained in their submitted tender
- having also noted that the appellant Company argued that para 2.4.2 was not adhered to in view of the fact that an *addendum* was issued four days before the closing date;
- having also taken cognizance of Mr Zafferese's claim the alleged unfounded/discriminatory remarks in the evaluation report relating to certain issues of his Company's offer;

- having taken into consideration the appellant Company's reasoning with regards to the points which would have been otherwise awarded to them had their offer been fairly judged;
- having reflected on the remarks made during the hearing by the MTA's CEO who explained to those present that the overall result of the adjudication process was a combination of a number of considerations made by the same Board, including the fact that the same appellant Company's technical capability was considered superior to MFCC as reflected in the evaluation grid;
- having also reflected on the Adjudicating Board's Chairman's claim that shortcomings found in the appellant Company's submission were mitigated by superior items found in the submission of Casapinta Design Group

reached the following conclusions, namely, the PCAB

1. is of the opinion that, despite any possible misleading representation of the actual offers submitted in the 'Schedule of Tenders', which, according to the same PCAB, renders the appeal lodged by appellants to be anything but frivolous, yet, it is also quite clear that the original offers submitted by the participating tenderers demonstrated that the appellant Company's price offer was much higher than that of MFCC;
2. is also of the opinion that, despite the appellant Company's claim that para 2.4.2 was not adhered to as an *addendum* was issued four days before the closing date, yet the PCAB feels that the fact remained that the appellant company had proceeded with its participation in this tendering process notwithstanding that it had the opportunity to show its concern in regard on receipt of the *addendum*, namely, prior to the closing date of tenders and not after the tender had been awarded;
3. considers that the reasoning behind the appellant Company's calculation of its technical score does not hold in view of the fact that during the hearing it was stipulated that remarks made by the Adjudicating Board were regarded by the appellants as being derogatory when this was not the case at all, let alone such remarks leading the adjudicators to give a lower score;
4. feels that the Adjudicating Board had performed its work properly and had recommended the award of the tender to the most economically advantageous bidder and, as a consequence, its decision should stand.

As a consequence of (1) to (4) above this Board finds against the appellant Company.

Due to the fact that this Board does not consider the appeal lodged by appellants to have been frivolous, it recommends that the deposit submitted by the said appellants be refunded in its entirety.

Alfred R Triganza  
Chairman

Anthony Pavia  
Member

Edwin Muscat  
Member

10 March 2009