

PUBLIC CONTRACTS APPEALS BOARD

Case No. 147

Advert No. 155/2008 - CT2225/2008 - DH 1504/2007
Tender for the Construction of a Blood Transfusion Centre at Notabile Road, Attard

This call for tenders, covering a two year period contract, was published in the Government Gazette on 11.02.2008.

The closing date for this call for offers was 04.09.2008 and the estimated contract value was € 2,015,211.

Five (5) different tenderers submitted their offers.

Following receipt of notification that their offer could not be considered further in the opening of Envelope 3 as it was adjudicated as being not administratively compliant Messrs Elbros Construction Ltd filed an objection on 03.03.2009 against the decision taken in regard by the General Contracts Committee.

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 14.04.2009 to discuss this objection.

Present for the hearing were:

Elbros Construction Ltd

Dr Franco Vassallo	Legal Representative
Dr Daniele Cop	Legal Representative
Mr Jimmy Calleja	

Evaluation Committee

Dr Alex Aquilina	Chairperson
Mr Paul Mercieca	Member
Architect Robert Borg Hayman	Member
Ms J Grioli	Member
Ms Phyllis Mercieca	Member

Blockrete Ltd

Dr Joseph Fenech	Legal Representative
Mr Edgar Caruana Montaldo	
Mr Daniel Portelli	

Department of Contracts

Mr Francis Attard	Director General
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At the request of Dr Franco Vassallo, legal representative of Elbros Construction Ltd, and with the concurrence of those present at the hearing, including the contracting authority, the PCAB agreed that the hearing would be conducted in English so that Dr Daniele Cop could follow the proceedings.

After the Chairman's brief introduction, the appellant was invited to explain the motives of the objection.

Dr Vassallo explained that the facts behind his client's objection were as follows:

(i) on the 25th February 2009, Elbros Construction Ltd was informed that its tender was disqualified because the Insurance Declaration Form submitted in envelope 2 had the words "all Clauses of this Contract particularly" crossed out; and

(ii) the advice that the Department of Contracts gave to the adjudication committee was that the crossing out of the words "all Clauses of this Contract particularly" in the Insurance Declaration Form was not acceptable and that it rendered the appellant's offer administratively non-compliant.

Dr Vassallo contended that the crossing off of superfluous data should not lead to disqualification and that a witness would at a later stage demonstrate that the actual format of the form in question was misleading and flawed.

Dr Daniele Cop, on behalf of Elbros Construction Ltd, added that the deletion of the words mentioned above did not affect the submission made by her client in the sense that it had no bearing on the technical and financial capabilities of her client to carry out the project. She argued that the fact that the insurance company crossed out the words in question could be interpreted as a diligent measure by the person who filled in the form because it was not usual practice for insurance companies to go through the entire tender document – because at that stage it was not yet a contract – in order to fill in the form whereby it would certify that it would insure the bidder on being awarded the tender.

Architect Robert Borg Hayman, member of the adjudication committee, explained that the reason for the disqualification of the appellants' tender was because the crossing out of the words "all Clauses of this Contract particularly" amounted to a change in the Insurance Form which formed part of the specification and conditions of the tender. He then went on to quote from clause 4.3:

4.3 Tenders shall be considered irregular and therefore rejected for the following reasons inter alia:

v. if the tenderer changes any of the conditions of the contract;

Mr Robert Borg Hayman added that the appellant's contention that the wording of the form in question was misleading could have been sorted out had the appellant sought a clarification at the opportune time.

The Chairman PCAB asked whether the crossing out of the words in question had in fact altered the substance of the purpose behind the filling in of the Insurance Form.

Mr Robert Borg Hayman remarked that the *Insurance Form* laid down, among other things, that the insurer had to confirm that he had examined all clauses of the contract particularly clause 4.12.

The PCAB observed that at that stage there was no contract but a tender document.

Mr Paul Mercieca, member of the adjudication committee, explained that the evaluation committee had to follow the evaluation criteria set out in the tender document and one of those criteria, namely 4.3 (v) laid down that a tender was to be considered irregular if any of the tender conditions were altered.

The Chairman PCAB asked if an insurance company was supposed to pre-empt a contract that did not exist because, at that stage, one was not dealing with a contract but with a tender document. He added that the terminology, such as the terms 'contract' and 'agency', used in the insurance form were not correct.

Dr Vassallo informed the PCAB that he was going to call as witness Mr Joseph Avellino, chartered insurer and chief underwriter at Middlesea Insurance plc – who was also the person who signed the *insurance form* presented by the appellant Company - to demonstrate that an incorrect and misleading form was included in the tender document. He added that the *insurance form* was outdated as it made reference to an insurance 'agency' instead of 'company' since the term agency had been discarded with the setting up of Middlesea Insurance plc way back in 1981. Dr Vassallo argued that it was not within the responsibility of the insurance company to read the contract because if the insurance company would declare that it had read the contract and made the searches the insurance company could be held liable if something wrong cropped up later on (even if this were not related to the insurance policy as such). Dr Vassallo reiterated that the form as presented was misleading and that Mr Avellino did the right thing to effect the deletion in question. Dr Vassallo remarked that he was sure that these errors were committed by omission and not by commission.

At this stage Mr Avellino informed the PCAB that he was also the Chairman of the 'General Sector' within the *Malta Insurance Association* that represented the commercial matters related to insurance players in the local market. Mr Avellino explained that this issue first came to the attention of the Malta Insurance Association in 2004 in connection with a government contract and he recalled that then two points were raised, (i) the reference to an insurance 'agency' instead of 'company' which had to be deleted because the company he represented issued insurance in its own name and did not represent any other entity and (ii) the requirement for the insurance company to examine all the clauses of the contract. Mr Avellino declared that his organisation never officially informed the contracting authorities about these shortcomings and further stated that the *Malta Insurance Association* could not instruct its members not to sign forms similar to the one under consideration because it could be the case that an insurance company wanted to exceed its obligations in order to suit or to please its client. Mr Avellino remarked that Middlesea Insurance plc would never confirm reading all the contract conditions and that is applied not

only to contractor's insurance but also to property insurance, house loans and the like because Middlesea Insurance plc would not assume responsibility for things that were not in the realm of the insurance business.

Mr Avellino confirmed that the issue about this kind of insurance form never came up again before the Malta Insurance Association after 2004 but he could not state, there and then, whether the 2004 contract that he referred to was awarded or rejected because of the insurance form.

Mr Avellino contended that he, on behalf of Middlesea Insurance plc, corrected the insurance form because it was outdated but went on to confirm that he had examined clause 4.12 of the tender document which specifically dealt with the 'Insurance Policy' and further confirmed that should the tenderer be awarded this contract his firm would issue the relevant insurance policies according.

Dr Franco Vassallo observed that in his opinion even the use of the term 'examined' was rather too onerous.

Dr Alex Aquilina, chairman of the adjudication committee, explained that (a) the tender specifications were drawn up by a private (external) consultant (b) the adjudication committee had to abide by the evaluation criteria set out in the tender document and (iii) the adjudication committee had sought the advice to the Contracts Department on this issue.

The Chairman PCAB noted that in the circumstances it was not blaming the adjudication committee for having acted the way it did because evidently it could not have acted otherwise. He added that it would appear that this was another case of cut and paste whereby forms were transposed from one tender document to another without anyone having gone through the substance and the relevance of such forms in that particular tender issued at that particular time.

Mr Francis Attard, Director General (Contracts), under oath stated that as a general rule the Contracts Department expected the tenderer to accept all the specifications and conditions of the tender document and that it was not acceptable for anyone to either cross out or alter, in any manner, any part of the tender document. Mr Attard confirmed that prior to the publication of the tender, the contracting authority submitted the tender document for vetting by the Contracts Department.

The Chairman PCAB remarked that if a tender form did not, '*a priori*', make sense, one would have expected the Contracts Department not to simply rubberstamp the document but to filter it and, if need be, to amend it and not always expect the bidders to pinpoint the shortcomings. He declared that he fully agreed with Mr Attard that tenderers should not be allowed to alter the tender specifications and conditions but, on the other hand, one had to ascertain that the documentation was presented properly. The Chairman PCAB observed that in this case it would appear that Mr Avellino, an expert in the field of insurance business, knew his job well such that he amended the form so as not to exceed his professional competence.

Mr Attard stated that as far as the Department of Contracts was concerned, the local competent regulatory authority with regard to insurance business in Malta was the

Malta Financial Services Authority (MFSA) and no other organisation. Mr Attard added that as far as he could recall the MFSA had never raised any queries with his department with regard to this insurance form and that that was the first time that this difficulty was raised. Mr Attard stated that the decision by Contracts to endorse the recommendation of the adjudication committee to disqualify the appellant was not reached from a technical insurance point of view but disqualification was arrived at purely on administrative compliance considerations and hence no need was felt to seek the advice of MFSA.

At this stage Mr Avellino confirmed that the Malta Insurance Association did not refer this insurance form to the MFSA and remarked that probably it had never been brought to the attention of the MFSA otherwise MFSA would have objected to it.

Dr Vassallo maintained that notwithstanding what Mr Attard had just said, in the sense that the Department of Contracts did not tolerate the deletion of any part of the tender document, the same department did allow the crossing out of the term 'agent' on the insurance form. On his part Mr Attard stated that he stood to differ on the point raised by Dr Vassallo.

The PCAB noted that what had to be clearly established was whether the deletion effected by the appellant in the insurance form prejudiced in any way the insurance cover that the tenderer was requested to provide.

The Chairman PCAB observed that the Contracts Department did not feel very much concerned about the validity of the tender document as long as the contracting authority was happy with it. He added that the major concern of the Contracts Department was that the bidders abided by the tender conditions and that if something was wrong with the tender document that would crop up at a later stage. The Chairman PCAB remarked that in that scenario, a bidder could end up being disqualified due to the incompetence of others and that was something that the PCAB had to be concerned with so as to ascertain a level playing field to all bidders and to ensure that all the bidders were treated in a just manner. In this particular case, the PCAB deemed that the part of the insurance form that had been crossed out by the appellant did not alter the substance of the tender specifications and conditions.

Mr Avellino reiterated that an insurance company could insure a contract or a property without going through all the merits of the contract because the insurance company was concerned with material facts related to insurance matters, such as, the sum insured, third parties and sub-contractors.

Chairman PCAB agreed that the insurance company was only concerned with matters dealing with the insurance policy, that is, matters which fell within the competence of an insurance company, and certainly not with other issues, such as, data protection, irregular tenders, confidentiality and the like. He added that if an insurance company were to sign the insurance form as it was presented, that insurance firm would have acted *ultra vires*, ie outside its competence because it was not licensed to do so.

Dr Franco Vassallo, upheld the general principle that tenderers should not be allowed to alter or to amend in any way the tender document. However, he contended that if a form was fundamentally flawed – he did not allege any bad faith here – it would have

been incorrect for any person to sign it in a nonchalant manner. Dr Vassallo added that the main witness, Mr Avellino, an expert in the field of insurance business, had declared under oath that the requirement arising from the words that had been crossed out on the insurance form did not lie within the responsibility of an insurance company. Dr Vassallo concluded that the insurance form made reference to the contract when, at that stage, there was no contract in place because the definition of a contract was an agreement concluded between parties with legal rights and obligations.

Mr Paul Mercieca, member of the adjudication committee, stated that the adjudication committee had assessed the tender on the evaluation criteria published in the tender document and that it did not debate the legal validity or otherwise of the forms. He added that clause 4.3 (v) laid down that a tender was irregular if the tenderer changes any of the conditions of the contract and that the deletions effected to the insurance form by the appellant amounted to a change in the conditions of the tender and hence the offer had to be rejected.

Dr Alex Aquilina, chairman of the adjudication committee informed the PCAB that the adjudication committee had asked for independent legal advice on this matter but it did not receive any reply.

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 09.03.2009, and also through their verbal submissions presented during the public hearing held on the 14.04.2009, had objected to the decision taken by the General Contracts Committee;
- having considered the appellants’ contention that the (a) crossing off of superfluous data should not lead to disqualification and (b) fact that the insurance company crossed out the words in question could be interpreted as a diligent measure by the person who filled in the form;
- having also considered Dr Cop’s remark relating to the fact that the deletion of the words did not affect the submission made by the appellants in the sense that it had no bearing on their technical and financial capabilities to carry out the project;
- having noted Mr Borg Hayman’s (a) statement regarding the fact that the disqualification of the appellants’ tender was because the crossing out of the words “all Clauses of this Contract particularly” amounted to a change in the *Insurance Form* which formed part of the specification and conditions of the tender and (b) remark that had the appellant Company considered the wording of the *form* in question to be misleading, this could have been sorted out had the appellant Company tried to seek a clarification back then;

- having observed Mr Borg Hayman’s insistence that the *Insurance Form* laid down, among other things, that the insurer had to confirm that he had examined all clauses of the contract, particularly clause 4.12;
- having considered the fact that one of the most important issues for the adjudication committee was its total commitment to ensure that no one would alter the tender conditions;
- having taken note of Mr Avellino’s testimony, considered as a key witness, wherein, *inter alia*, he stated that the *insurance form* was outdated as it made reference to an insurance ‘agency’ instead of ‘company’, explaining that the term agency had been discarded with the setting up of Middlesea Insurance plc way back in 1981;
- having also taken note of Mr Avellino’s statement wherein he declared that in his capacity of Chairman of the ‘General Sector’ within the *Malta Insurance Association*, (a) he still recalls the first time that this same issue (the reference to an insurance ‘agency’ instead of ‘company’), together with the requirement for the insurance company to examine all the clauses of the contract, first came to the attention of the *Malta Insurance Association*, namely, way back in 2004 and (b) he never, either personally, or through the Association, officially informed contracting authorities about these shortcomings, (c) he could not either, personally, or as part of the Association, instruct its members not to sign forms similar to the one under consideration because it could be the case that an insurance company wanted to exceed its obligations in order to suit or to please its client;
- having heard Mr Avellino state under oath that Middlesea Insurance plc would never confirm to reading all the contract conditions because, if it were to do that, it would imply that the Company would be assuming more responsibility than what the same Company would have been legally formed to do;
- having established that acting on behalf of Middlesea Insurance plc, Mr Avellino (a) claimed that he had corrected the insurance form because it was outdated (b) confirmed that he had examined clause 4.12 of the tender document which specifically dealt with the ‘Insurance Policy’, and (c) also confirmed that, should the tenderer be awarded this contract, his firm would issue the relevant insurance policies;
- having also noted Dr Aquilina’s testimony;
- having noted DG Contracts’ claim that the Contracts Department expected the tenderer to accept all the specifications and conditions of the tender document and that it was not acceptable for anyone to either cross out or alter, in any manner, any part of the tender document;
- having also noted the DG Contracts’ confirmation of the fact that prior to the publication of the tender, the contracting authority submitted the tender document for vetting by the Contracts Department;

- having also taken cognizance of Mr Attard's statement wherein he, *inter alia*, maintained that (a) as far as the Department of Contracts was concerned, the local competent regulatory authority with regard to insurance business in Malta was the Malta Financial Services Authority (MFSA) and no other organisation, (b) as far as he could recall, the MFSA had never raised any queries with his department with regard to this *insurance form* and that that was the first time that this difficulty was raised;
- having also noted Mr Avellino's confirmation regarding the fact that the *Malta Insurance Association* never brought to the attention of the MFSA the issue regarding the fact that such *insurance form* being requested was outdated;
- having considered Dr Vassallo's argument relating to the fact that the *insurance form* made reference to the contract when, at that stage, there was no contract in place because the definition of a contract was an agreement concluded between parties with legal rights and obligations

reached the following conclusions, namely:

1. The PCAB agrees with appellant Company that, at this stage, there was no contract but a tender document and that the terms 'contract' and 'agency', used in the *insurance form* were not correct;
2. In view of (1) above, the PCAB recommends that the MFSA's attention should be formally drawn to ensure that the necessary updates to the *forms* are carried out in order to ensure validity of documentation being requested in tender documents;
3. The PCAB feels that this was another case of 'cut and paste' whereby *forms* were transposed from one tender document to another without anyone assuming the responsibility to go through the substance and the relevance of such *forms*;
4. The PCAB concludes that, whilst under no circumstance should any bidder be allowed to cross out or alter any part of the tender document, yet, the PCAB argues that this is an exceptional case in view of the fact that a highly technical insurance expert explained and proved how parts of the *form*, as requested in this particular tender document, were outdated, invalid and, hence, legally irrelevant. Therefore the fact that, in this instance, an expert in the field of insurance business, arbitrarily decided to amend the *form* has to be seen in the light that it was not a question of anyone crossing out or altering a formal document or changing any condition in it but as an attempt to regularise an invalid *form* as presented in the tender document. In so doing, this implied a manifestation of professional competence as a competent person in any field would never assume responsibilities which go beyond his or her corporate remit. As a result, the PCAB agrees that an insurance company should only be concerned with matters dealing with the insurance policy, that is, matters which fell within the competence of an insurance company, and certainly not with other issues, such as, data protection, irregular tenders, confidentiality and the like;

5. The PCAB disagrees with the argument publicly stated by DG Contracts, namely that relating to the fact that the Contracts Department is not generally concerned with the validity of the tender document as long as the contracting authority is satisfied with it. The PCAB argues that this could prove to be both (a) a time wasting exercise with undue delays in the tender adjudication process being experienced as a result of likely resort being for aggrieved bidders to file an objection, and (b) a bidder could end up being disqualified due to the incompetence of others;

As a consequence of (1) to (5) above, this Board finds in favour of the appellant Company.

The Board also recommends that DG Contracts should consult with MFSA to have the relative *form* revised and brought in line with up to date needs.

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

28 April 2009