

## PUBLIC CONTRACTS APPEALS BOARD

### Case No. 150

**Advert No 214/2008 – CT 2461/2006 – UM1162**

**Tender for the Construction of the Computer Services Centre Building, University of Malta**

This call for tenders was, for a contracted value of € 1,175,556.37 was published in the Government Gazette on 10.10.2008. The closing date for this call for offers was 02.12.2008.

Six (6) different tenderers submitted their offers.

On 24.03.2009 AX Construction Ltd filed an objection after being informed that their tender has been adjudicated as “*not administratively 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 22.04.2009 to discuss this objection.

Present for the hearing were:

#### **AX Construction Ltd**

Mr Angelo Xuereb  
Mr Richard Xuereb  
Dr David Wain  
Mr Hans Attard  
Mr John Ellul

#### **University of Malta**

Dr. Oriella Degiovanni	Legal Office
Dr. Charmaine Grech	University Rector's Office Representative

#### **Adjudication Board**

Ms Charlotte Attard	Chairperson
Mr Robert Sultana	Member (Project Leader)
Mr Karm Saliba	Head Procurement Section / Board Secretary

#### **Polidano/Steel Structures Ltd Joint Venture**

Arch Kevin R Abela

#### **Department of Contracts**

Mr Francis Attard	Director General
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After the Chairman's brief introduction, the appellant Company was invited to explain the motives of the objection.

Dr David Wain, legal representative of the said appellants, AX Construction Ltd, commenced his intervention by asking the PCAB how they were going to proceed considering the fact that they mentioned various points in their letter of objection. The Chairman PCAB said that they should start with the issue concerning the disclosure of the price in Envelope No 2.

In his opening statement, Dr Wain made reference to the DG Contracts' letter dated 18 March 2009 wherein it was alleged that the price was disclosed in package 2. He claimed that his client did not include the price in this package. Furthermore, the appellants' lawyer argued that Clause 3.3 of Tenderer's Declaration (s) [page 32 of the tender document] was misleading because a space was left empty for the inclusion of the price of tender. However, he maintained that his client did not include the price therein.

At this point the PCAB drew Dr Wain's attention that the documentation made available to them (which was copied from the original documentation submitted by his client), showed that AX Construction Ltd had included an amount of €1,329,891 in the space allocated for the price of tender.

Following this and in order to elucidate those present about what was actually submitted, the PCAB started calling witnesses to the stand to give evidence.

The first witness to take the stand was Mr John Ellul, who was employed as a Quantity Surveyor with AX Construction Ltd. and who also happens to be the person who had filled in the tender document.

On cross-examination by the PCAB, Mr Ellul confirmed the contents of the *Tenderer's Declaration Form*, including the price. He also declared that this document was inserted in envelope 2.

At this point, the Chairman PCAB quoted from page 18 of the tender document wherein it was stipulated that:

*14.3.3 A financial bid calculated on a basis of DDP for the supplies tendered, including if applicable:*

*14.3.3.1 Tender form and appendix, in accordance with the forms provided in Volume1, Section 2;*

*14.3.3.2 Breakdown of the overall price, in the form provided in Volume 4 (Bill of Quantities);*

*14.3.3.3 Financial identification form;*

*All the above information is to be inserted ONLY in Envelope 3.*

Dr Wain intervened by reiterating that Clause 3.3 in the *Tenderer's Declaration Form* was misleading because there was an empty space wherein the tenderer had to include the price of tender. He argued that, in the prevailing circumstances, the tenderer should be given the benefit of the doubt. The appellant Company's legal representative also alleged that the tender document included conflicting provisions.

On taking the witness stand, Mr Francis Attard, DG Contracts, was asked by Dr Wain to state whether there was any discrepancy between clause 3.3 under the *Tenderer's Declaration Form*, wherein the bidder was requested to include the price of tender and clause no 14.3.3 wherein it was stipulated that "*All above information is to be inserted ONLY in Envelope 3*". The reply given by Mr Attard was in the negative and the reason given was that tenderers were specifically requested to insert the *Tender Form* in Envelope 3.

The last witness in these proceedings was Mr Karm Saliba, Head Procurement – University of Malta and Secretary to the Evaluation Committee.

Replying to a specific question by the PCAB, Mr Saliba said that the bidders had one whole tender document and that it was the responsibility of each tenderer to insert the documentation in the appropriate package/envelope according to instructions given in the tender dossier.

The Chairman PCAB intervened to ask Mr Ellul the same question and his testimony corroborated that given by Mr Saliba. However, Mr Ellul wanted to specify that they had inserted the Bill of Quantities in Envelope 3.

At this point, the Chairman PCAB said that from the above it resulted that it was the bidder who had singled out and extracted the page under reference from the Tender Form Document and inserted it in the wrong envelope.

Replying to further questions by the appellant Company's legal representative, Mr Saliba said that, apart from the price of tender, the *tender form* included also details of the tenderer and a contact person, and under clause 1 of the tenderer's declaration (s) it was specified that:

*'We have examined and accept in full the content of the dossier for invitation to tender No CT 2461/2006 of [../..]. We hereby accept its provisions in their entirety, without reservation or restriction.'*

The witness emphasised that Clause 14.3.3 indicated the information that had to be inserted in Envelope 3.

The Chairman PCAB pointed out that, apart from the instructions to tenderers, even the law stipulated that a tenderer could not divulge the price of the tender before the opening of Envelope 3, that is, as specified in the separate package procedure contained in the

Public Contracts Regulations. It was also remarked that if a tenderer decided to insert such documents also in envelope 2, the price could not be disclosed.

On the other hand, Dr Wain argued that there was the possibility that their tender would have been discarded even if, in a hypothetical case, the *Tenderer's Declaration Form* were inserted in Envelope 3. This was due to the fact that this document did not contain information of a financial nature only.

Mr Saliba said that on the basis of the above-mentioned clause 1 of the tenderer's declaration, if the appellants had examined in full the content of the dossier for invitation to tender, then they would have included the '*Tender form and appendix, in accordance with the forms provided in Volume 1, Section 2*' [from page 29 to page 33 of the tender document] in Envelope 3. Furthermore, in response to Mr Xuereb's remarks, the witness drew his attention that Volume 1 Section 2: Tender Form Appendix to the Tender indicated on page 29 referred to the documents mentioned in clause 14.3.3.1 which had to be inserted in Envelope 3.

Finally, in reply to a specific question by the PCAB, Mr Saliba declared that none of the other five bidders had divulged their tender price in Envelope No 2.

Dr Wain requested the PCAB to continue discussing the other points mentioned in their letter of objection. The PCAB explained that the disclosure of the price before the opening of Envelope 3 was crucial in the process of adjudicating a tender under the 'Separate Package' procedure. It was emphasised that it was indispensable for a tenderer to comply with the provision(s) of the public procurement regulations because, otherwise, they would create a precedent. It was further stated that if the appellants had any doubt regarding certain provisions in the tender document they could have sought clarifications. In view of the above and considering the fact that from the witnesses' testimony it was confirmed that the price of AX Construction Ltd's offer was divulged in Envelope No 2, the PCAB felt that there was no need to continue with the hearing.

Finally, in response to Dr Wain's request to consider the refund of the deposit made by his client, the PCAB drew his attention that under *Part XII Separate packages in tender offer* of the Public Contracts Regulations such deposits could only be refunded if such complaints were decided in the appellants' favour.

At this stage the public hearing was brought to a close.

As a consequence to the above, this Board,

- having noted that the appellants, in terms of their 'motivated letter of objection' dated 24.03.2009 and also through their verbal submissions presented during the public hearing held on the 22.04.2009, had objected to the decision taken by the General Contracts Committee;
- having taken note of Dr Wain's line of defence;

- having considered the issues raised by Mr Saliba;
- having noted the evidence given by Mr Ellul;
- having established that the content of the tender document was amply clear, as evidenced by the fact that none of the other five bidders made the same mistake as the appellant Company;

reached the following conclusions, namely:

1. The PCAB feels that the disclosure of the price before the opening of Envelope 3, as was the case in the appellant Company's tender as originally submitted, goes against both the letter of the law and the spirit of a tender adjudication process as contemplated under the 'Separate Package' procedure;
2. This Board also considers it to be indispensable for any tenderer to comply with all the provision(s) of the public procurement regulations. This Board feels that the said regulations were not observed by the appellant Company and this has been more than manifested during the hearing through the evidence given, as well as, the documentation submitted;

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 be forfeited.

Alfred R Triganza  
Chairman

Anthony Pavia  
Member

Edwin Muscat  
Member

*28 April 2009*