

## PUBLIC CONTRACTS APPEALS BOARD

### Case No. 156

**Advert Notice CT 79/2009; CT 2003/2009; FTS C 02-09**

### **Tender for the External and Internal Plastering and Painting Works at the New Multi Purpose Hall at St. Benedict College, Kirkop**

This call for tenders was, for a contracted estimated value of € 198,414.75 was published in the Government Gazette on 24.02.2009. The closing date for this call for offers was 09.04.2009.

Seven (7) different tenderers submitted their offers.

On 15.05.2009 Mr Louis Borg filed an objection against the intended awarding of the tender in caption to Rite Mix (Gatt Bros) Ltd.

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 1.07.2009 to discuss this objection.

Present for the hearing were:

#### **Louis Borg**

Dr Beppe Fenech Adami LL.D.	Legal Representative
Mr Louis Borg	

#### **Ritemix (Gatt Bros) Ltd**

Dr Adrian Delia LL.D.	Legal Representative
Dr John L. Gauci LL.D.	Legal Representative
Mr George Gatt	
Arch Stuart Azzopardi	

#### **Foundation for Tomorrow's Schools (FTS)**

##### *Adjudication Board*

Mr Charles Farrugia	Chairperson
Mr Chris Pullicino	Member
Mr Ivan Zammit	Member

#### **Contracts Department**

Mr Mario Borg	Asst Director Post Contracts
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The Chairman PCAB commenced proceedings by inviting the appellant's legal representative, Dr Beppe Fenech Adami to briefly explain to those present the motive leading to his client's objection.

Dr Fenech Adami started by stating that the scope of this hearing was to establish whether there was any justification for adjudication board's decision to (a) desist from considering further and (b) disqualify, the tender submitted by his client.

The appellant's legal advisor explained that, on 14 May 2009, Mr Borg (his client) received an e-mail wherein he was informed that his tender had been discarded on the grounds that '*...The tender document was not fully completed to satisfaction*' as a number of documents filed had not been signed and/or filled in.

The appellant's lawyer contended that although some documents had been mistakenly left unsigned and/or unfilled, yet this should not have resulted in the rejection of his client's offer in view of the contents of Clauses 1.18.1 (b) and (f), 1.17.1 and 1.09.1 under Instruction to Tenderers.

He pointed out that Clause 1.18.1 (b) specified that:

*'Tenderers shall be considered irregular and shall be rejected for the following reasons, inter alia:*

*(b) if the Form of Tender is not properly signed'*

At this point, Dr Fenech Adami emphasised that the *Form of Tender* was distinct from the tender document and this distinction was clearly made under Clause 1.09.1. He said that the *Form of Tender* was one of the documents found in the Tender Document and the latter referred to various documents such as the *Form of Tender* itself, *Special Conditions of Contracts* and *General Conditions, Specifications, Bill of Quantities, Drawings* and *Addenda* (if any). He claimed that, in the prevailing circumstances, it was imperative for the PCAB to establish whether the *Form of Tender* was signed, because, if in the affirmative, the offer could not be rejected on the grounds that some other documents were not signed.

Furthermore, Dr Fenech Adami claimed that Clause 1.18.1 (f) specified that a tender should be rejected '*if any schedules are left incomplete and/or if all the technical literature requested is not attached to the tender offer.*'

In claiming that the word used was 'Schedules' and not 'Annexes', the appellant's legal advisor asked the PCAB to establish whether any of the documents that were not signed were 'Schedules' because, in his opinion, none of the said documents were considered as 'Schedules'. As a consequence, he argued that, in his client's opinion, taking into consideration the fact that the above mentioned e-mail referred to 'Annexes' and not 'Schedules', there was no valid reason for his client's offer to be discarded on the basis of Clause 1.18.1 (f).

Dr Fenech Adami quoted from Clause 1.17.1 *Rejection of Tenders* which specified that:

*'The Director General (Contracts) shall have a right to reject any or all tenders and to reject a Tender not accompanied by data required by the Tender Documents or to reject a Tender which is in any way incomplete or irregular.....'*

He explained that, whereas under Clause 1.18.1 the rejection was automatic, in this particular instance, the Director General (Contracts), hereinafter referred as DG (Contracts), had to make a subjective analysis as to whether there were sufficient reasons to reject a tender, with the latter verifying in the process whether the data submitted justified the disqualification of a tender.

Dr Fenech Adami argued that the DG (Contracts) was obliged to analyse whether the missing data was essential and important and whether it had similar weight to a missing signature on a particular document. At this point he queried whether the missing signatures influenced the method of evaluation of the offer. In his opinion, the reasons given did not justify the rejection of their offer.

With regard to the reasoned reply submitted by Rite Mix (Gatt Bros) Ltd, the recommended tender, Dr Fenech Adami said that although they acknowledged that there were missing signatures on some documents, yet, in his opinion, these should not have hindered the DG (Contracts) from choosing the best offer claiming that the offer submitted by Mr Borg was clear and the rates were all listed in the *Bill of Quantities*.

The appellant's lawyer alleged that there were instances where the contracting authority (FTS) had even requested information after some of the tenders would have been awarded. In this context Dr Fenech Adami mentioned the *Tender for Decoration Works at the Secondary School in Verdala* (FTS C 19-06) wherein he proceeded by claiming that, following the award of the said tender, the contractor was requested to submit certain information which was considered useful but not essential for adjudication purposes. He continued by arguing that, in this particular case, the DG (Contracts) was not correct when he failed to consider his client's offer solely on the basis of some missing signatures. Furthermore, Dr Fenech Adami contended that they would have understood such line of action if essential data was found missing. The appellant's lawyer sustained that, in the prevailing circumstances, it was not justified to reject his client's tender (especially when, according to Dr Fenech Adami, such signatures were not specifically requested on such documents) on the basis that documents were not signed by the appellant through a mere oversight.

Mr Chris Pullicino, a member of the Adjudication Board (FTS), responded by stating that he concurred with what was stated by Dr Fenech Adami, in that, basically there were a number of documents that were not signed.

When he was specifically asked by the PCAB to state whether such signatures were mandatory, Mr Pullicino replied that some of the signatures were mandatory whilst others were not. He confirmed that the signature on the *Bill of Quantities* was mandatory while that on the *Bar Chart* was not and that the unsigned *Summary of BOQs* was a Schedule.

Mr Pullicino said that, during the evaluation process, the Board sought guidance from the DG (Contracts) to establish whether the fact that the annexes attached to these documents were unsigned constituted sufficient cause for disqualification in terms of clause 1.18.1 of the tender.

At this point, in replying to a question raised by the PCAB, Mr Pullicino confirmed that the *BOQs* and the *Form of Tender* were signed by Mr Louis Borg, the appellant.

According to Mr Pullicino, the adjudicating board had established that the tender document submitted by Mr Borg was considered not fully completed to its satisfaction since it was noted that the following, namely:

- a. The Summary and Appendix 2 (*Schedule of Rates for Equipment Employed on Day works*) of the Bill of Quantities was not signed
- b. Annex II – Bar Chart, Annex IV - List of Similar or Larger Projects, Annex IX (non-collusive tendering certificate) were not signed
- c. Annex X – Statement on Excluding Circumstances of Regulation 49 of the Public Contracts Regulations 2005 was not signed
- d. Annex XI - Financial Identification Form was neither signed nor filled in.

With regard to the issues raised during the hearing by Mr Pullicino regarding the submission of missing information and instances when their decisions were overruled by the DG (Contracts), his attention was drawn by the PCAB that in this particular case it appeared that no data was missing but signatures, however, if such signatures were mandatory a tenderer could not be asked to sign documents during evaluation process.

Replying to a specific question by the PCAB, Mr Pullicino said that if he were the DG (Contracts) he would have proceeded with the evaluation of the tender even though such documents were not signed.

With regard to the *Financial Identification Form* which was neither signed nor filled in, Dr Pullicino said that, although it was an important document, he, personally, did not consider it that much important.

Mr Charles Farrugia, Chairperson of the Adjudication Board (FTS), said that when they sought guidance from the Contracts Department they were informed that everything was mandatory. His attention was drawn by the PCAB that an Adjudication Board should not seek guidance on something that was mandatory.

Replying to a specific question by the PCAB regarding the *Financial Identification Form*, the Chairperson and Member of the Adjudication Board declared that

- (i) another three tenders were rejected because of this document (it was either left blank and/or without the Bank Stamp and signature of the Bank Representative)

- (ii) this form did not contain information regarding the bidder's financial standing but details regarding the holder's bank account number
- (iii) this form was included in the tender document on the request of the Department of Contracts

The Chairman PCAB said that, in his opinion, during evaluation, the Adjudication Board had to be practical and take into account the significance of documents. He said that he would have understood the rejection of such tenders if something was missing but on the other hand it did not seem justified to discard a tender for one trivial document that was left unsigned.

Dr Adrian Delia, legal representative of Ritemix (Gatt Bros) Ltd, stated that Clauses 1.17.1 *Rejection of Tenders* and 1.18 *Tender Evaluation* were very clear. He sustained that the various documents listed on the *Tender Form*, together with the *Tender Form* itself, had to be sent completed since these were an intrinsic and essential part of both the tender and the *Tender Form*. He explained that the tender document included the *Tender Form* and this Form included Annexes re *Subcontractors List, Bar Chart, Details of Personnel, List of Similar Projects, Occupational Health and Safety Declaration Waiver and Indemnity, Procedure for the submission of appeals, Bid Bond, Performance Bond, Non Collusive Tendering Certificate, Statement on Excluding Circumstances of Regulation 49 of the Public Contracts Regulation 2005* and *Financial Identification Form*. He insisted that once the Schedule and Annexes that were not signed were considered (a) essential and (b) fundamental within the context of the entire tender, it was also reasonable to expect that a corresponding signature on such documents be deemed to be a mandatory requirement. Dr Delia stated that such documents had to be signed for accountability purposes and because tendering was a public and transparent process.

At this point Dr Fenech Adami intervened to reiterate that Clause 1.09 in the Tender Document made a clear distinction between the tender document and the *Form of Tender*. Dr Delia concurred with the fact that Clause 1.09 referred to 'Tender Documents' which included all documents (including Annexes).

During his verbal submission, Dr Delia maintained that, if during the deliberation process, the Adjudication Board might have had any doubt about the rejection of the appellant's offer on the grounds of unsigned documents, the appellant's offer should have still been rejected on the basis of the fact that the *Financial Standing* form was sent unfilled as admitted by the appellant in his reasoned letter of objection. However, he drew the PCAB's attention to the fact the *Bank Stamp + Signature of Bank Representative* and *Date + Signature of Account Holder* were all obligatory as specifically indicated in *Annex XI - Financial Identification Form* itself.

The Chairman PCAB intervened to state that, once these requirements were obligatory, he failed to understand why the Adjudication Board had referred the matter to the DG (Contracts) to seek guidance. Dr Delia remarked that although he understood the PCAB's position, the fact that the Adjudication Board had taken such line of action did not mean that they had made something that was objectively wrong or procedurally incorrect or that they had taken the wrong decision. Dr Delia

maintained that, in the prevailing circumstances, the rejection of the appellant's offer was undisputed, both according to law and the tender conditions.

At this point Mr Mario Borg, Assistant Director Post Contracts, Department of Contracts, was called to the witness stand. He gave his testimony under oath.

On cross-examination by the PCAB, the witness testified that the *Financial Identification Form* was included in the tender documents earlier this year to be in line with EU funded tenders. He said that the scope of this form was to ensure that the tenderer who eventually won the contract held a Bank Account and that the information on this form was required for payment purposes only. He confirmed that it did not indicate the financial standing of tenderers.

The Chairman PCAB said that he was of the opinion that they had to focus on other documents because he believed that, during the adjudication process, consideration should also be given to the aspect of the significance of documents and that a tender should not be rejected on the basis of a particular document whose relevance was minimal.

Dr Delia intervened to point out that, although he agreed that this document might have been unimportant, yet tenderers were obliged to submit this document duly filled in and signed in accordance with the instructions to tenderers and also as specified on the document itself. He said that such requirements could not be contested after the evaluation process. Dr Delia insisted that it was not the tenderer who had to decide which of the documents were important or not but they had to abide by the tender conditions.

The Chairman PCAB said that the fact that a member of the Adjudication Board had earlier declared that, in his opinion, they would have proceeded with the evaluation process of the appellant's offer, prompted some concern as this might imply that the members forming the Adjudication Board may have been unaware of (a) the significance and scope of signatures on such documents and (b) why such signatures were mandatory.

Mr Farrugia intervened by drawing the attention of those present that the conditions regarding obligatory requirements were included in tender documents on the request of the Department of Contracts. In saying so he wanted to place emphasis on the fact that FTS only gave details related to *the Bill of Quantities*. He also said that the Department of Contracts was the body that ensured that tenders were issued according to the procurement regulations.

In reply to a specific question by the PCAB regarding Annex X - *Statement on Excluding Circumstances*, Mr Pullicino said that the signature on this document was indispensable because it included a number of very important declarations and tenderers had to '*certify that the information provided above is accurate and completed to the best of their knowledge and belief.*'

Replying to observations made by the PCAB, he said that the reason as to why he had earlier declared that he would have proceeded with the evaluation of the appellant's

offer was that they had the comfort of the *Tender Form* because, in his opinion, this was binding on everything in the tender dossier.

Dr Fenech Adami intervened by stating that the *Tender Form* was so important and binding that it was the only document mentioned under Clause 1.18.1 whereby it was specifically indicated that tenderers should be considered irregular and should be rejected if this was not properly signed. He pointed out that, as far as other documents (schedules) were concerned, it was only stated that a tender would be rejected if these were left incomplete and not if they were left unsigned.

The Chairman PCAB argued that if a *Tender Form* incorporated everything then he would question the need of signatures on other documents. However, he pointed out that it was neither the participants nor the Adjudication Boards who were to decide which documents were relevant and important because otherwise confusion would prevail.

Dr Delia upheld that the fact that the Adjudication Board had doubts about the acceptance of such document was irrelevant and that the only relevance was whether the final decision was correct and whether the signatures were mandatory.

Dr Fenech Adami reiterated that the tender document clearly stipulated that the only document that had to be properly signed for a tender not to be considered irregular and rejected was the *Form of Tender*, which form was duly signed by Mr Louis Borg.

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 22.05.2009 and also through their verbal submissions presented during the public hearing held on the 01.07.2009, had objected to the decision taken by the General Contracts Committee;
- having taken note of the fact that Mr Borg (the appellant) had received an e-mail from the Department of Contracts wherein he was informed that his tender had been discarded on the grounds that ‘...*The tender document was not fully completed to satisfaction*’ as a number of documents filed had not been signed and/or filled in;
- having also taken note of Dr Fenech Adami’s claim that (a) the *Form of Tender* was distinct from the tender document and that, according to the same lawyer, this distinction was clearly made under Clause 1.09.1, (b) in the prevailing circumstances, it was imperative for the PCAB to establish whether the *Form of Tender* was signed, because, if in the affirmative, the offer could not be rejected on the grounds that some other documents were not signed and (c) since Clause 1.18.1 (f) stipulates that a tender should be rejected ‘*if any schedules are left incomplete and/or if all the technical literature requested is not attached to the tender offer*’ and considering the fact that none of the said documents were considered as ‘Schedules’ but rather ‘Annexes’ then, in these

circumstances, there would have been no valid reason for his client's offer to be discarded on the basis of the said clause;

- having heard the appellant's legal advisor argue that albeit his client acknowledged that there were missing signatures on some documents (which, according to Dr Fenech Adami were evidently not signed by the appellant through a mere oversight), yet, in his opinion, these should not have hindered the DG (Contracts) from choosing the best offer;
- having also heard Mr Pullicino state that (a) some of the signatures were mandatory whilst others were not, (b) during the evaluation process, the Board sought guidance from the DG (Contracts) to establish whether the fact that the annexes attached to these documents were unsigned constituted sufficient cause for disqualification in terms of clause 1.18.1 of the tender, (c) if he were the DG (Contracts) he would have proceeded with the evaluation of the tender even though such documents were not signed, (d) with regard to the *Financial Identification Form*, which was neither signed nor filled in, Mr Pullicino said that, although it was an important document, he, personally, did not consider it that much important and (e) in his opinion, with regards to Annex X - *Statement on Excluding Circumstances*, the signature on this document was indispensable because it included a number of very important declarations and tenderers had to '*certify that the information provided above is accurate and completed to the best of their knowledge and belief*';
- having taken full cognizance of Dr Delia's arguments relating to the fact that (a) once the 'Schedule' and 'Annexes' that were not signed were considered (1) essential and (2) fundamental within the context of the entire tender, it was also reasonable to expect that a corresponding signature on such documents be deemed to be a mandatory requirement, (b) if during the deliberation process, the Adjudication Board might have had any doubt about the rejection of the appellant's offer on the grounds of unsigned documents, the appellant's offer should have still been rejected on the basis of the fact that the *Financial Standing form* was sent unfilled as admitted by the appellant in his reasoned letter of objection, (c) the *Bank Stamp + Signature of Bank Representative* and *Date + Signature of Account Holder* were all obligatory as specifically indicated in *Annex XI - Financial Identification Form* itself and (d) in the prevailing circumstances, the rejection of the appellant's offer was undisputed, both according to law and the tender conditions;
- having also taken note of Mr Mario Borg's reference to the *Financial Identification Form* which was included in the tender documents earlier this year in accordance with EU funded tenders, claiming in the process that the scope of this form was to ensure that (a) the tenderer who eventually won the contract held a Bank Account and (b) that the information on this form was required for payment purposes only and that it did not indicate the financial standing of tenderers;
- having observed during the hearing that a member of the adjudication board had earlier declared that, in his opinion, they would have proceeded with the evaluation process of the appellant's offer, prompted some concern as this

might imply that the members forming the adjudication board may have been unaware of (a) the significance and scope of signatures on such documents and (b) why such signatures were mandatory, especially in view of Mr Pullicino's claim that the reason as to why, during the same hearing, he had declared that he would have proceeded with the evaluation of the appellant's offer was that they had the comfort of the *Tender Form* because, in his opinion, this was binding on everything in the tender dossier;

reached the following conclusions, namely:

1. The PCAB feels that albeit, in this particular instance, no data was missing but there were documents which were supposed to have been signed but were, in actual fact, not signed, yet, if such signatures were mandatory a tenderer could not be asked to sign documents during an evaluation process.
2. The PCAB claims that an adjudication board should not seek guidance from other entities, in this instance the Department of Contracts, on terms and conditions that are mandatory.
3. The PCAB, whilst fully aware that it is being included in the tender document so that the latter will be in line with specifications requested in EU funded tenders, yet the PCAB does not desist from questioning the logical sense in the *Financial Identification Form* being included in the tender document. The PCAB argues that knowing that an entity or an individual holds a bank account is not enough to demonstrate one's financial standing. However, having said so, the PCAB acknowledges that although this document might have been unimportant, yet tenderers were obliged to submit this document duly filled in and signed in accordance with the instructions to tenderers and also as specified on the document itself. The PCAB opines that it is neither the participating tenderers nor the adjudication boards who should decide which documents are relevant and important because otherwise confusion will prevail.

As a consequence of (1) to (3) above this Board finds against appellants.

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 reimbursed.

Alfred R Triganza  
Chairman

Anthony Pavia  
Member

Edwin Muscat  
Member

17 July 2009