

PUBLIC CONTRACTS APPEALS BOARD

Case No. 159

Adv No CT/232/2008; CT/2111/2008

Tender for the Setting up of an Electrical Training Laboratory at MCAST Institute of Electrical & Electronics Engineering Corradino Hill, Paola, Malta

This call for tenders was, for an estimated contracted value of € 339,385 (excluding VAT) was published in the Government Gazette on 31.10.2008. The closing date for this call for offers was 23.12.2008.

Seven (7) different tenderers submitted their offers.

On 20.05.2009 Messrs Elettronica Veneta Spa filed an objection following the decision by the Contracts Department to (a) exclude its offer from the tendering process due to non-compliance with the conditions of tender and (b) cancel the open tender procedure.

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 3.08.2009 to discuss this objection.

Present for the hearing were:

Elettronica Veneta Spa

Dr Adrian Delia	Legal Representative
Eng. Stephen Buttigieg	Representative

Malta College of Arts, Science and Technology (MCAST) - Evaluation Committee:

Architect Deborah Borg	Chairperson
Eng. Mary Grace Cassar	Member
Dr Eng. Edward Gatt	Member
Mr Ronald Curmi	Member

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 Adrian Delia, on behalf of *Elettronica Veneto SpA.*, the appellants, referred to the Contracts Departments' letter dated 13th May 2009, whereby his client was informed that "*The tender submitted*" by his client "*was not compliant since the tender guarantee is governed by Italian Law.*"

Dr Delia noted that the Department of Contracts did not indicate which tender conditions were breached thus rendering his client's offer as non compliant. The appellants' legal advisor added that, in the absence of this information, he was being constrained to prove that his client had in fact provided all that was required. Dr Delia submitted that the tender guarantee was governed by Clause 22 of the tender document which, *inter alia*, read as follows:

"The guarantee must be issued by a local Maltese Bank or a Financial Institution licensed by a recognised Financial Regulator in the Country where the company is located and who assumes responsibility for claims and payment to the amount as stated above."

Dr Delia explained that when one considered the contents of the tender guarantee submitted by his client, one would note that:

- the country of origin was Italy; and
- the Bank in question was the *Cassa di Risparmio del Veneto* which was recognised/licensed by the appropriate financial regulator in Italy

Given that the tender guarantee met the requirements set out in Clause 22, Dr Delia then went on to list a number of infringements which the PCAB had deliberated upon in previous appeals / hearings where the issue, whether directly or indirectly, had involved bank guarantees, bid bonds and so forth and which, however, did not apply in the case of his client. At this point Dr Delia referred particularly to:

- PCAB Case No. 36 ... relating to an instance where the tender guarantee did not cover the period stipulated in the tender dossier;
- PCAB Case No. 68 ... relating to an instance where the expiry date written on the bank guarantee was incorrect thus making it impossible for the Director of Contracts to call upon it;
- PCAB Case No. 46 ... relating to an instance where the bid bond made reference to an entity which was not the actual tenderer;
- PCAB Case No. 96 ... relating to an instance where the bank guarantee was not drawn up in the name of the Director of Contracts *and*

- PCAB Case No. 105 ... relating to an instance when the tenderer limited the discretion of the contracting authority by subjecting payment of bid bond to a condition which was not envisaged in the tender document.

As a result, Dr Delia concluded that the only reason that he could come up with for the exclusion of his client's bid was that the bank guarantee was governed by Italian law. Yet, in spite of this, the appellants' legal advisor was quick to point out that Clause 22 laid down that "*the bank guarantee must be issued by a local Maltese Bank or a Financial Institution licensed by a recognised Financial Regulator in the Country where the company is located...*"

Mr Ronald Curmi, a member of the Evaluation Committee, explained that when the Committee was examining the offers received for administrative compliance it resulted that in the case of the appellants a clause was added on to the template provided for the submission of the tender guarantee which stated that:

"This guarantee is governed by Italian Law; any dispute (that) may arise in connection therewith shall be submitted to the Italian jurisdiction, Padova Court."

Mr Curmi remarked that the Committee sought guidance from the Contracts Department, which advised that the Committee should check if the Italian bank was registered with MFSA and even seek legal advice. He added that on checking on the MFSA's website it transpired that the *Cassa di Risparmio del Veneto* was not registered as a financial institution with MFSA.

Mr Curmi replied that MCAST adopted the standard template furnished by the Department of Contracts.

Dr Delia remarked that Annex VI marked 'Bid Bond' indicated the wording that the guarantee had to include, such as, the name of the bank and of the tenderer, the expiry date and so forth but then each bank had its own standard format how to present such a tender guarantee. Dr Delia added that this Annex was not a 'fill in' form but one had to reproduce one on the bank's letterhead and so on.

The Chairman PCAB referred to Clause 22 and observed that, in this case, one did not have to check with MFSA at all but one had to check with the regulator in the country where the Company was located and, therefore, he asked if the Committee had checked whether this Bank (the *Cassa di Risparmio del Veneto*) was registered as a financial institution with the regulator in Italy. The Chairman PCAB even expressed doubt whether the MFSA could opt not to recognise a financial institution registered in Italy, another EU member state, in virtue of the EU's policy on the freedom of movement of capital, goods and services.

Dr Delia remarked that Clause 22 was not solely limited to EU member states but it was open to all other countries. Moreover, he further argued that, if anything, the MFSA could have been asked to certify whether the financial regulator was a recognised institution and not the Bank itself and he was quick to add that this was not applicable in the case of another EU member state on the basis of mutual recognition.

Architect Deborah Borg, Chairperson of the Evaluation Committee, explained that:

- during the administrative compliance exercise, the Evaluation Committee noted that the appellant Company had added on a clause to the template provided whereby the tender guarantee was going to be governed by Italian Law which addition presented a problem to the Committee;
- the advice given by the Contracts Department was for them to check whether this Italian bank was registered with the MFSA and/or to seek legal advice from the Attorney General;
- on checking with the MFSA, the Committee noted that the Italian Bank in question did not feature among the registered financial institutions on MFSA's website and, as a result, sought advice from their legal adviser, namely from Dr Andrew Borg Cardona, who, in writing advised that:

“... the stipulation that the guarantee submitted by the tenderer is subject to Italian Law is unacceptable and therefore the bid should be rejected”

In response to a direct question put forward by the PCAB as to whether the legal adviser was made aware of the provisions of Clause 22 of the tender document, Architect Borg went through her records and confirmed that what had, in fact, been referred to the legal adviser were only the template provided at Annex VI of the tender document and the tender guarantee submitted by the appellant Company and that Clause 22 was not referred to his attention.

Mr Curmi intervened to state that the Evaluation Committee had endorsed the advice given by Dr Peter Grech (AG's Office) which included

- *that the tenderers were not at liberty to insert choice of law or choice of court clauses in the guarantee when these were not included in the template. A guarantee which includes such unilaterally inserted clauses is therefore unacceptable*

and

- the latter's endorsement of the advice previously given by MCAST's legal adviser (Dr Borg Cardona).

At this point the PCAB ascertained that, as in the case of the legal adviser, the AG's Office was not made aware of the contents of Clause 22 of the tender document and that, as a consequence, the latter had based his advice on the information provided, that is, the template at *Annex VI* and the tender guarantee submitted by the appellant Company.

Dr Delia remarked that his client provided a guarantee by a Bank in Italy which, therefore, had to be licensed by the respective financial regulator. He added that whether the Director of Contracts were to take court action against the Italian Bank in Malta or in Italy made little difference because there was an automatic recognition of judgements.

Mr Francis Attard, Director General (Contracts), under oath, stated that the policy of the Department was to open up the tendering process to allow participation to be as wide as possible from any country and, surely, not limit it to EU member states. He added that Clause 22 was worded in such a way so as to allow a tenderer to present a tender guarantee by a bank from the country that the tenderer operated from. Referring to the case under reference, Mr Attard remarked that the General Contracts Committee (GCC) did not agree with the recommendation that the tenderer should be disqualified on the grounds of including an additional clause whereby the tender guarantee was going to be regulated according to Italian Law and, in fact, the GCC had insisted with the evaluation committee to obtain the advice of the Attorney General, who, subsequently, advised the rejection of the bid submitted by the appellant Company. Mr Attard added that, once the tender was still being adjudicated by the Evaluation Committee, then it was up to that committee to seek advice from the AG's Office to establish whether that tender guarantee was acceptable or not.

The PCAB drew the attention of Mr Attard that, from the evidence given at the hearing, it resulted that both the legal adviser of MCAST and the Attorney General were not given all the information necessary to arrive at their advice, in the sense that their attention was not drawn to the contents of Clause 22.

The Chairman PCAB opined that to disqualify a tenderer simply because that tenderer presented a tender guarantee from a bank located in Italy, which was another EU member state, constituted a barrier to trade.

Dr Delia argued that in such cases, what the contracting authority ought to have been concerned with was that the financial regulator in Italy recognised that financial institution.

The Chairman PCAB remarked that, in the first instance, what should have been done was to verify with the financial regulator in Italy, not with the MFSA, as to whether the Italian Bank (the *Cassa di Risparmio del Veneto*) was licensed because if the MFSA and the Italian regulator enjoyed mutual recognition then the MFSA had to recognise the Italian Bank registered with the Italian regulator.

Dr Delia stated that the Evaluation Committee compared his client's tender guarantee with the template when the tender document indicated that it had to be similar but not

necessarily identical. As a result, Dr Delia suggested that a decision be taken so that if the tender guarantee had to be similar to the template then it had to be so in substance or whether it had to be identical, in which case he envisaged the risk that foreign bidders would not participate.

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 27.05.2009 and also through his verbal submissions presented during the public hearing held on the 3.08.2009, had objected to the decision taken by the General Contracts Committee;
- having taken note of the fact that the formal reason given by the Contracts Department to appellant Company as to why the said Company was excluded from the tender under review was that it “*was not compliant since the tender guarantee is governed by Italian Law*”;
- having also taken cognisance of the fact that Clause 22 of the tender document specified that a guarantee had to be issued “*by a local Maltese Bank or a Financial Institution licensed by a recognised Financial Regulator in the Country where the company is located and who*” would have assumed “*responsibility for claims and payment to the amount as*” previously stated in the same document;
- having also taken note of the fact that the country of origin was Italy and the Bank in question was the *Cassa di Risparmio del Veneto* which, according to the appellants’ legal advisor, was recognised/licensed by the appropriate financial regulator in Italy;
- having also noted Mr Curmi’s comment on the fact that, in the case of the appellants, a clause was added on to the template provided for the submission of the tender guarantee which stated that the guarantee is governed by Italian Law and that any dispute (that) may arise in connection therewith shall be submitted to the Italian jurisdiction, Padova Court;
- having acknowledged that when the Evaluation Committee sought guidance from the Contracts Department the latter advised that the Committee should (a) check if the Italian bank was registered with the MFSA and even (b) seek legal advice;
- having been told by the Evaluation Committee that on checking on the MFSA’s website it transpired that the *Cassa di Risparmio del Veneto* was not registered as a financial institution with MFSA;

- having heard Dr Delia remark that Clause 22 was not solely limited to EU member states but it was open to all other countries and that this same Clause was not applicable in the case of another EU member state on the basis of mutual recognition;
- having taken note of Dr. Delia's statement that whether the Director of Contracts were to take court action against the Italian Bank in Malta or in Italy made little difference because there was an automatic recognition of judgements;
- having also heard Architect Borg's remarks and comments, particularly those relating to the advice sought from the Department of Contracts and other legal advices from the AG's office and their own legal advisor;
- having noted that when, during the hearing, Architect Borg went through her records to refresh her memory, she stated that what had, in fact, been referred to the legal adviser were the template provided at Annex VI of the tender document and the tender guarantee submitted by the appellant Company and that Clause 22 was not referred to his attention;
- having duly considered the DG Contracts' testimony, especially the part relating to the fact wherein he stated that he did not agree with the recommendation that the tenderer should be disqualified on the grounds of the latter having included an additional clause whereby the tender guarantee was going to be regulated according to Italian Law;
- having also considered Dr Delia's statement wherein he said that the Evaluation Committee had compared his client's tender guarantee with the template when the tender document indicated that it had to be similar but not necessarily identical,

reached the following conclusions, namely:

1. The PCAB argues that with regards to Clause 22, the contracting authority did not have to check with the MFSA at all but instead had to check with the regulator in the country where the Company was located;
2. The PCAB is aware of the fact that Dr Borg Cardona was not given all the information necessary by the Evaluation Committee to arrive at his advice, in the sense that his attention was not drawn to the contents of Clause 22 and feels that his advice may have been flawed as it was based on insufficient data. The PCAB does not agree with the latter's advice regarding the fact that, according to the same lawyer, the stipulation that the guarantee submitted by the tenderer is subject to Italian Law is automatically unacceptable and that, as a consequence, the bid should be automatically rejected;

3. The PCAB has the highest respect for conclusions reached by A.G.'s office and, under normal circumstances, would tend to accept as correct the advice given from that office. Once more, however, in this case the advice given was based on deficient information, and, therefore, the PCAB has to be very wary about accepting an advice that may be flawed. The PCAB agrees with Dr Delia's statement that 'whether the Director of Contracts were to take court action against the Italian Bank in Malta or in Italy made little difference because there was an automatic recognition of judgements'. As a result, the condition made in the guarantee, namely that such guarantee is governed by Italian Law, would appear to be rather superfluous but not prejudicial to the guarantee and, on its own, should not be sufficient to stop the guarantee from being accepted.
4. The PCAB feels that the Evaluation Committee and the General Contracts Committee (GCC) have erroneously deliberated upon the issue in giving as reason for the appellant Company's exclusion the fact that the tender submitted by the latter was not compliant "*since the tender guarantee is governed by Italian Law*". The PCAB feels that the argument which should have raised a few eyebrows had to be the fact that the appellant Company had specifically mentioned that in the event that "*any dispute (that) may arise in connection*" with the said tender this "*shall be submitted to the Italian jurisdiction, Padova Court*". The PCAB feels that this additional condition is totally gratuitous and is certainly extraneous to the substance of the guarantee template contained in the Tender Document. The PCAB is fully cognisant of the fact that this was not the official reason given for the disqualification of the appellants' bid. This was a mistake initiated by the Evaluation Committee appointed by the contracting authority and simply rubber-stamped by the General Contracts Committee (GCC). Yet, it is also true that 'two wrongs do not make a right' and this Board (the PCAB) cannot let a precedent be created, if not, solely for the sake of consistency and application of rules and praxis. The PCAB cannot allow that a tenderer (whether Maltese or foreign, whether originating from within the EU or not) dictates to the contracting authority one's own terms and conditions since such tenderers are not at liberty to insert choice of court clauses in a guarantee.

As a consequence of (1) to (4) above this Board finds against the 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 August 2009