

PUBLIC CONTRACTS APPEALS BOARD

Case No. 162

Advert. No. CT/A/08/2009; CT/2108/08; WD/469/2008

Hiring of Self-Drive Cars to the Ministry for Resources and Rural Affairs

This call for tenders was, for a contracted estimated value of € 279,225 was published in the Government Gazette on 9.04.2009. The closing date for this call for offers was 21.05.2009.

Three (3) different tenderers submitted their offers.

On 13.07.2009 Messrs Europcar Malta - Alpine Rent-a-Car Ltd filed an objection against decision to cancel the tendering process and the issue a fresh call for tenders with amended specifications.

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 12.08.2009 to discuss this objection.

Present for the hearing were:

Europcar Malta - Alpine Rent-a-Car Ltd (Europcar)

Dr Francis Zammit Dimech	Legal Representative
Mr Tony Zahra	Representative
Mr Nikki Zahra	Representative

Ministry for Resources and Rural Affairs (MRRA)

Dr Victoria Claire Scerri	Legal Representative
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Evaluation Committee:

Mr Ray Bugeja	Chairperson
Eng. Paul Gatt	Member
Mr Lorry Desira	Member

Department of Contracts

Mr Francis Attard	Director General
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After the Chairman's brief introduction, the appellant Company, Europcar *Malta - Alpine Rent-a-Car Ltd*, hereinafter called 'Europcar', was invited to explain the motives of the objection.

Dr Francis Zammit Dimech, legal advisor to Europcar, explained that his client was informed by the Contracts Department by way of a letter, Reference No. CT/2108/2008 dated 6th July 2009 that the Evaluation Committee had recommended that this tender be cancelled and a fresh tender with amended specifications be issued in the near future.

At this point, Dr Zammit Dimech then referred to *Clause 16*, 'Cancellation of the tender procedure', included in the tender conditions and quoted the following, viz:

"Cancellation may occur where:-

- *the tender procedure has been unsuccessful; i.e. no suitable tender has been received or there is no response at all;*
- *the economic or technical data of the project have been fundamentally altered;*
- *exceptional circumstances or force majeure render normal performance of the contract impossible – the tender document explained such circumstances;*
- *all technical compliant tenders exceed the financial resources available;*
- *there have been irregularities in the procedure, in particular where these have prevented fair competition."*

The appellant Company's legal advisor claimed that the reason given by the contracting authority for the cancellation of the tender did not feature as one of the grounds on which a tender could be cancelled. Dr Zammit Dimech stated that the so-called 'reason' was introduced in an arbitrary manner by someone who decided not to abide by his / her term of reference.

Dr Zammit Dimech added that, in this instance, one was dealing with two types of cars and that, since the issue of the tender, i.e. since April 2009, he is not aware of any drastic changes that have been made to car specifications which would render the issue of this tender irrelevant or inadequate to the requirements of the contracting authority. Dr Zammit Dimech argued that, in these circumstances, the decision to cancel this tender should be declared null as it did not take place in accordance with (a) the conditions of the tender document and (b) the general procurement regulations.

At this point the appellant Company's legal advisor requested information from the contracting authority's representatives on issues which, in his opinion, are of particular relevance in so far as the technical evaluation carried.

Dr Victoria Claire Scerri, legal adviser of the Ministry for Resources and Rural Affairs, the contracting authority, explained that her client was responsible for certain environmental matters and, as a consequence, it wanted to ensure that this call for tenders was in line with the relative EU directives in force.

The Chairman PCAB asked whether within the past few months since the publication of this tender on the 9th April 2009 there have been any drastic or significant changes to environmental issues connected with the call for tenders.

Dr Scerri could not tell when certain EU directives actually came into force and admitted that she was handed over this case only the day before. Dr Scerri contended that, irrespective of EU directives, the contracting authority had the general right to amend certain elements of the project.

Mr Edwin Muscat, a PACB member, remarked that one could not change the tender specifications capriciously.

The Chairman PCAB stated that whilst it was true that the contracting authority had its rights yet it was only fair to also recognise that even tenderers had the right to be protected against arbitrary decisions which could involve them in waste of time and resources.

Dr Scerri referred to clause 16 of the tender conditions and pointed out that it provided that (tender) cancellation may occur where “*the economic or technical data of the project have been fundamentally altered.*”

The Chairman PCAB stressed that the phrase “fundamentally altered” implied that a change had to be a considerable change, adding that environmental considerations in the provision of works and services have been taken into account for a number of years and he could not envisage that anything so significant had taken place with regard to environmental issues concerning cars between the 9th of April and the 6th of July 2009, necessitating the cancellation of the tender.

The Chairman PCAB exclaimed that one should not take the cancellation of a tender lightly or that the contracting authority could cancel it at will because that could give rise to abuse and could even lead to the general public getting the wrong perception as to how public contracts were being dealt with by public entities.

Mr Anthony Pavia, another PCAB member, asked how was it that the person/s responsible for drawing up the tender specifications had not taken into account these environmental considerations that apparently were so important that justified the cancellation of the tender.

Mr Ray Bugeja, chairperson of the evaluation committee, took the stand and, under oath,

- confirmed that three tenders were submitted in response to this call for tenders;
- stated that all three tenderers were compliant with tender specifications;
- informed those present that, after going into the details listed in the tender specifications, the evaluation committee noted that the tender specifications did not cover reference to CO₂ emissions; and
- conceded that CO₂ emissions had been given due consideration by the authorities for the past year or so.

Dr Scerri admitted that it was a state of fact and that there was no denying that this provision had somehow been overlooked but she was quick to add that that was not done capriciously. When the attention of Dr Scerri was drawn to the fact that the tenderers had by then divulged their prices, Dr Scerri replied that she could not understand this argument put forward by the appellant Company in their letter of objection and she went on to quote from the same letter ...

“To reissue a tender ... can only inevitably lead to offering competing tenderers an unfair competitive advantage as a result of their insight into what has already been offered by Europcar – Alpine Rent-a-Car with regard to unit prices for the cars being hired, and other relevant information”

In her opinion something was not quite clear as it so happened that, according to the published schedule, the prices quoted by the appellants were the highest of the three offers received.

Dr Zammit Dimech contended that price was one of the factors considered in awarding a tender because, in the first place, a tender had also to be according to specifications.

The Chairman PCAB remarked that the disadvantage arising from divulging the prices offered applied not only to the appellant Company but also in the case of the other two bidders.

At this stage, the Chairman PCAB observed that environmental issues were becoming part of our culture and that it was inconceivable how the Ministry responsible for certain aspects of the environment became aware of this shortcoming at evaluation / adjudication stage. He recalled that when the last budget was presented, some nine months previous, CO₂ emissions were the basis for calculating the first registration tax in respect of cars.

Mr Bugeja recalled that when the evaluation committee started examining the tender specifications it noted that there was no provision covering CO₂ emissions and, at that stage, the evaluation committee decided to halt the tendering process.

Mr Pavia asked Mr Bugeja whether the evaluation committee had examined the technical aspect of the offers received since it could have been the case that bidder/s could have met the desired levels of CO₂ emissions even if such a requirement was not included in the tender specifications.

Mr Bugeja stated that on noting that the specifications did not provide for CO₂ emissions, he reported this finding to the Ministry's Director General.

Mr Pavia intervened to remark that, in his opinion, this statement contrasted with what Mr Bugeja had stated earlier on in the sense that the three offers were according to specifications as published.

On his part Mr Muscat observed that the evaluation committee was entrusted with the evaluation of the offers received against the published tender specifications and that it was beyond the remit of the same evaluation committee to declare whether the specifications as published were acceptable or not.

Dr Zammit Dimech exclaimed that Mr Bugeja was appointed Chairman of the evaluation committee but such an appointment did not give him or any other committee member the right to examine the tender specifications.

Mr Bugeja was then asked to read out part of the recommendation of the evaluation committee. He obliged by quoting the following, viz:

“The specifications of this tender did not include any reference to CO₂ emissions and green corporate accountability. As these are considered as green initiatives that MRRA encourages, the call for this tender has been rejected so that a new call will be issued that will include specifications relating to these issues.”

PCAB members remarked that one of the tests carried out on a vehicle as part of the Vehicle Roadworthiness Test (VRT) was precisely that concerning CO₂ emissions and, therefore, one could not envisage that tenderers would offer vehicles without the VRT certificate.

The Chairman PCAB said that it appeared that the evaluation committee had acted beyond its terms of reference because all that it had to do was to evaluate and adjudicate the offers received against the published tender specifications.

Mr Bugeja remarked that the evaluation committee only made a recommendation for the cancellation of the tender but the ultimate decision rested with the Director General.

Mr Pavia expressed the view that since one of the tests that a car had to undergo as part of the VRT concerned CO₂ emissions, there appeared to be no further need for for the level CO₂ emitted by the cars being offered in response to the tender to be covered in

specifications. In reply to this, Mr Bugeja remarked that, eventually and gradually, cars were going to be subjected to stricter CO₂ emissions tests.

Dr Zammit Dimech said that during the hearing it had been established that the evaluation committee had recommended that the tender should be cancelled. He asked if the evaluation committee had arrived at that recommendation after taking into consideration clause 16 of the tender conditions. Mr Bugeja could not recall if the committee had read out clause 16 in its entirety. Dr Zammit Dimech then read out the second bullet point of clause 16:

“The economic or technical data of the project have been fundamentally altered...”

and after pointing out that the owner of the project was the MRRA, he asked Mr Bugeja whether anyone had informed the evaluation committee that the project had been “fundamentally altered”. Mr Bugeja answered in the negative and, consequently, Dr Zammit Dimech asked Mr Bugeja how was it that the evaluation committee recommended that the technical data of the project should be altered.

The Chairman PCAB opined that the contracting authority could have perhaps issued a notice to all three bidders to indicate the CO₂ emissions level/s thus putting all three bidders at a level playing field and then the evaluation committee would have taken into account the bidders’ response in its deliberations thereby avoiding the loss of time and resources that the cancellation of the tender would bring about.

Dr Zammit Dimech stressed, once again, that whether the technical data of the project should be fundamentally altered or not was an issue that had to be dealt with by the contracting authority and not by the evaluation committee as laid down in clause 16 which stipulated the circumstances which warranted the cancellation of the tender. He added that only two months had passed between tender publication and tender cancellation and that the reason given to justify the cancellation of the tender, i.e. CO₂ emissions, had already been debated in public for a number of years and had even been reflected in the last budget.

The Chairman PCAB observed that from the published schedule of tenders the appellant Company knew that its offer was the highest of the three but it still decided to lodge the appeal. Mr Zahra, representing Europcar, informed the PCAB that, according to the information that he had, his offer ranked second in terms of prices and he further stated that the lowest bidder could not supply the vehicles within the 30 days stipulated in the tender. As a matter of fact, he continued, the cheapest bidder required three months to provide the service requested. The Chairman PCAB insisted that according to the published schedule the appellant Company had offered the highest price. Dr Zammit Dimech remarked that besides the price one had to take into account the tender specifications. The appellants’ legal advisor added that this appeal concerned only the cancellation of the tender since that was the only reason communicated to his client.

However, he proceeded, should it be decided not to cancel the tender then one still had the right to lodge another appeal should there be grounds that deserved such action.

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 13.07.2009 and also through their verbal submissions presented during the public hearing held on the 12.08.2009, had objected to the decision taken by the General Contracts Committee;
- having taken note of Dr Zammit Dimech’s reference to Clause 16 of the tender document which lists reasons for cancellation of tender procedure and his claim which related to the fact that the reason given by the contracting authority for the cancellation of the tender did not feature as one of the grounds on which a tender could be cancelled;
- having also taken note of the appellant Company’s observation that no significant changes to environmental issues have been recorded since the publication of this tender on the 9th April 2009 thus rendering the stand taken by the evaluation committee to recommend a cancellation of this tender more unacceptable;
- having heard the contracting authority’s legal advisor (a) state that the contracting authority had the general right to amend certain elements of the project and (b) refer to clause 16 of the tender conditions pointing out that this clause provided that (tender) cancellation may occur where “*the economic or technical data of the project have been fundamentally altered.*”;
- having also heard Mr Bugeja give his reasons as to why the evaluation committee recommended that this tender be cancelled, particularly, due to the fact that after going into the details listed in the tender specifications, the committee noted that the tender specifications did not cover reference to CO₂ emissions;
- having taken full cognizance of Dr Scerri’s admittance that it was a state of fact and that there was no denying that any reference to CO₂ emissions had somehow been overlooked in the tender document’s specifications, terms and conditions;
- having also taken note of the fact that, when specifically asked whether the evaluation committee had examined the technical aspect of the offers received, since it could have been the case that bidder/s could have met the desired levels of CO₂ emissions even if such a requirement was not included in the tender specifications, the evaluation committee’s chairperson replied that once the committee noticed that no reference was made in the tender document to CO₂

emissions, all was rendered futile, hence the committee's immediate recommendation to the contracting authority's management to cancel the tender;

- having taken note of Dr Zammit Dimech's contention that in recommending the cancellation of the tender the evaluation committee had acted 'ultra vires';
- having heard comments relating to the fact that since one of the tests that a car had to undergo as part of the VRT concerned CO₂ emissions, there appeared to be no need for other tests of the same kind and that, as a consequence, the inclusion of a clause specifically mentioning CO₂ emissions, albeit helpful, was by no means pivotal as it was a condition which was operative 'sine qua non', regardless of whether it was mentioned or not;

reached the following conclusions, namely:

1. The PCAB feels that, whilst it is true that the contracting authority has its rights, yet it is only fair to also recognise that even tenderers have the right to be protected against arbitrary decisions taken elsewhere. The PCAB cannot allow scenarios where contracting authorities become totally oblivious of the fact that participating tenderers, generally, incur considerable preparatory costs when compiling an offer. In this context, the PCAB concludes that each party had rights and obligations which needed to be strictly observed and adhered to.
2. The PCAB feels that the phrase "fundamentally altered" implied that a change had to be a considerable change and that due to the fact that environmental considerations in the provision of works and services have been taken into account for a number of years, the PCAB cannot envisage that anything so significant has taken place with regard to environmental issues concerning cars between the 9th of April and the 6th of July 2009, necessitating the cancellation of the tender. Indeed, the representatives of the contracting authority were unable to point out any such issues when asked to do so.
3. The PCAB agrees with the appellant Company's legal representative who argued that the fact that when one is entrusted with membership in an evaluation committee, this did not, automatically, give one the right to (a) examine the tender specifications; (b) recommend that the tender in question be cancelled and that (c) future tender specifications should be altered. It is agreed that, in doing so, an evaluation committee would be acting '*ultra vires*'.
4. The PCAB opines that only two months had passed between tender publication and tender cancellation and that the reason given to justify the cancellation of the tender, i.e. CO₂ emissions, had already been debated in public for a number of years and had even been reflected in the last budget. As a consequence, the PCAB feels that such a recommendation did not fall within the list mentioned in Clause 16 of the tender document which highlighted the procedure for cancellation of tender, namely where "*Cancellation may occur*"

As a consequence of (1) to (4) above this Board finds in favour of 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 reimbursed.

Also, the PCAB suggests that the contracting authority in question proceeds with the adjudication of this tender by (a) re-admitting all participating tenderers and (b) ensuring that vehicles being offered by all three participating tenderers contemplate the existing legal safeguards in respect of CO2 emission levels.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

17 August 2009