

PUBLIC CONTRACTS APPEALS BOARD

Case No. 170

CT/2286/2009 - Advert No. 213/2009; KMS/TEN/11/2009 Tender for Artificial Ground Surface at the Mosta Football Ground

This call for tenders which was for a contracted estimated value of € 250,000 was published in the Government Gazette on 09.06.2009. The closing date for this call for offers was 04.08.2009.

Five (5) different tenderers submitted their offers.

On 28.09.2009 *Messrs 240 Ltd* filed an objection against the decision by the Contracts Department to disqualify all tenderers on being found non-compliant and, as a consequence, to cancel the call for the tender in caption.

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 11.11.2009 to discuss this objection.

Present for the hearing were:

240 Ltd

Dr John Gauci	Legal Representative
Mr David Bonnici	Representative
Mr Desmond Mizzi	Representative

Kunsill Malti għall-iSport (KMS)

Dr Peter Fenech	Legal Representative
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Adjudication Board

Mr George Gafa	Chairman
Mr Joe Cassar	CEO (KMS) and Member
Mr Idan Azzopardi	Secretary

Contracts Department

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.

At the start of the hearing, it was observed that the objection was based on the shortcomings which the adjudication board listed in its report against the submission made by 240 Ltd and it was, therefore, decided to tackle these points in the order indicated in the adjudication report:

Registered Office of Company given instead of main office on site including storage area

Dr John Gauci, legal representative of 240 Ltd, referred to page 8 of the tender document article 4.1, namely that "*All tenderers must supply the following information and documents with their tenders*" and then to bullet 5 under 4.1.6 (page 9) which requested "*information regarding the proposed site office, if any (Form 4.6.3)*". Dr Gauci contended that the term 'if any' was a clear indication that this requirement was optional because it was not considered indispensable to have a site office to lay the turf of one football pitch. Dr Gauci claimed that a tenderer could not be disqualified for choosing not to submit an optional requirement.

Dr Peter Fenech, legal representative of *Kunsill Malti għall-iSport* (KMS), the contracting authority, referred to Volume 1 section 4.6.3 (1) which stated that "*State the proposed location of your main office on the site, storage area etc. (sketches to be attached as required).*"

The PCAB observed that this requirement was mentioned in two different parts of the tender document with one clearly indicating that the site office was 'optional'. The PCAB opined that, considering the size of the project, the appellants decided that it did not warrant a site office and that if it was optional in one article then it cannot be mandatory in another article of the same tender document.

Dr Fenech did not insist on this point and asked the PCAB to move to the next issue.

Total value of works the contractor was responsible for, period of contracts and starting dates not provided

Dr Fenech stated that the list of similar works submitted was in respect of Bonnici Bros Ltd, the sub-contractor, and not of 240 Ltd. He referred to the second bullet of section 4.1.6. (page 9) which, among other things, stated that:

The tenderer must also submit a comprehensive method statement with drawings if necessary, showing the methods by which he proposes to carry out the works. In particular the tenderer must indicate the numbers, types

and capacities of the plant and personnel he proposes to use on the major activities of work;

On his part, Dr Gauci quoted from para. 6 of his reasoned letter of objection which referred to clause 4 ‘Information/Documents to be supplied by the Tenderer’ (page 8 of the tender document), particularly, the ‘N.B.’ which stated that “*Experience may be used as a selection criterion but not as an award criterion*”

Dr Gauci remarked that it was very important to point out that the adjudication report contained comments but it did not give the reasons for exclusion of the apposite participating tenderer. He contended that experience was to be considered as a selection criterion, i.e. if two tenderers were on equal footing then the experience of one might tip the balance in his favour, but not as an award criterion, i.e. a tenderer could not be excluded on the grounds of experience. That, notwithstanding, Dr Gauci claimed that his client did submit what was requested at 4.6.4 at page 50 of the tender document (page 75 of the appellants’ submission) which requested a “*List of contracts of similar nature and extent performed during the past <insert number> years*”

Dr Gauci remarked that whoever drew up the tender document did not bother to indicate what number of years had to be covered. Dr Gauci stated that his client listed 32 similar projects at page 77 of the submission which included completed projects and works in progress. Dr Gauci explained that the value of works was not indicated because his client was precluded from divulging such information with regard to private contracts while pointing out, once again, that information with regard to experience was ‘optional’.

Dr Fenech contended that this information was requested in the tender document and in the Public Contracts Regulations (51). Dr Fenech said that Bonnici Bros Ltd (the sub-contractor) had filled in all the information requested at 4.6.4.1 however, the Messrs 240 Ltd (the tenderer) referred to an attachment containing a list of works which had certain information missing, such as, the starting date of works.

Dr Gauci rebutted that Bonnici Bros Ltd were in a position to indicate the value of works because the list submitted referred to public contracts.

The Chairman PCAB conceded that the value of works could have been rather sensitive information with regard to private contracts but he failed to see why the start and completion dates of works were not indicated, which data could have been useful to the adjudication board to assess whether the contractor was able to undertake such a contract.

Dr Gauci referred to Regulation 51 (2) which stated that “*the contracting authority may request certificates from the client/s as to whether the works were*

completed in a satisfactory manner.” D Gauci remarked that the contracting authority, apparently, failed to do this. With regard to the start and finish dates, Dr Gauci submitted that such dates were irrelevant because a contractor could have the capacity to finish a job within, say, days, but according to the contract conditions the job had to be carried out over a number of months.

The Chairman PCAB remarked that the appellant Company seemed to have reservations with regard to the submission of this information, which reservations should have been addressed with the contracting authority prior to the closing date of tender.

At this point Dr Gauci reiterated that ‘experience’ was not a criterion for exclusion.

Dr Fenech argued that although it was not an exclusion criterion, that information had to be submitted because it was requested and it was not up to the tenderer to decide what to submit or omit. Dr Fenech also referred to regulation 51 (2) (a) which stated that “*(i) a list of the works carried out over the past five years, accompanied by certificates of satisfactory execution for the most important works*”

Dr Gauci argued that regulation 51 bound the contracting authority to request, if it so needed, a list of information but that did not mean that, if the contracting authority failed to request it, the tenderer was bound to submit that information on its own initiative.

The Chairman PCAB remarked that forms were provided in a tender document to be filled in and, if one conceded that the value of works could have been considered as commercially sensitive information, the other information was not.

Dr Gauci maintained that his client did submit the information and that his client was explaining why certain details were not inserted. He insisted that, even if his client did not provide this information at all, the contracting authority had no right to exclude the said tenderer because it was not an award criterion.

240 Ltd did not provide an outline QAS to be used

Dr Gauci remarked that an outline was requested and referred to page 83, 84 and 85 of his client’s submission where, internationally recognised certificates by LANO Sport NV - a Belgian supplier which was ISO 9001-2000 certified - issued to 240 Ltd, were submitted and which certificates should have set the mind of the contracting authority at rest with regard to quality assurance. He added that, even if the contracting authority requested only an outline, his client submitted an ISO 9001 certification and an 8 year guarantee for the turf offered.

Dr Fenech referred to page 305 of the appellants' submission 'Outline Quality Assurance', particularly to the sentence "*Attached are typical test reports for the materials to be used*". The contracting authority's legal representative remarked that these reports were not made available by Bonnici Bros Ltd whereas no submission was made with regard to 240 Ltd which was the one responsible to lay the turf.

Dr Gauci remarked that the outline quality assurance at page 305 referred to the contractor, which in this case was 240 Ltd – Bonnici Bros Ltd was the sub-contractor specifically charged with the construction of the sub-base. In response to a clarification sought by the Chairman PCAB, Dr Gauci stated that at page 305 Bonnici Bros Ltd were referring to the contractor, i.e. to 240 Ltd.

Mr Desmond Mizzi, also representing the appellant Company, remarked that LANO Sport

- a. was one of the best firms in this line of business
- b. had produced a certificate that the materials that were going to be used had been tested in one of the best laboratories in the world
- c. was even going to certify the works carried by 240 Ltd and Bonnici Bros Ltd *and*
- d. had issued an 8 year guarantee on the turf

Mr Mizzi also stated that the quality assurance issued by LANO Sport covered the whole process.

Bonnici Bros Ltd is only proposing to appoint an H&S Supervisor for sub-base work. 240 Ltd did not submit a 'Health and Safety' programme

Dr Gauci again referred to page 305 of his client's submission which read as follows:

"For the execution of this contract, the contractor will appoint a suitably and experienced Health and Safety (site) Supervisor for the entire project to assume all responsibilities, during the whole project, in accordance with the Health and Safety Act 1 (Chapter 424 of the Laws of Malta).

The Contractor – 240 Ltd - will assume full responsibility for compliance with the Health and Safety Act and the provisions of LN 281 of 2004 with regards to the project and shall comply in full with the provisions of the construction Site Regulations insofar as they apply to the works."

The Chairman PCAB expressed the opinion that, holistically, it appeared that the appellant Company had what was required to undertake these works. However, it seemed that the tender submission at one stage referred to 240 Ltd and, at another,

to Bonnici Bros Ltd which must have been difficult or confusing to the adjudication board to determine who was responsible for what. The Chairman PCAB added that the documentation should have always been in the name of 240 Ltd, which was the contractor and the responsible party, and then 240 Ltd should have had an internal agreement with Bonnici Bros Ltd as its sub-contractor.

Dr Gauci remarked that care had been taken in the use of the terms ‘the contractor’ and the ‘sub-contractor’ and pointed out that the overall responsibility always rested with the contractor. Dr Gauci reported that his client had already been certified by an appropriate body/firm with regard to health and safety.

Dr Fenech complained that the contracting authority was not expected to go through the mind of the contractor so as to decipher its intentions but the contractor was expected to submit a complete and coherent document. Dr Fenech added that what the appellant Company had referred to did not constitute a ‘Health and Safety’ programme.

Dr Gauci remarked that the adjudication board was satisfied with the *Health and Safety Plan* submitted by Bonnici Bros Ltd for sub-base work, so much so, that the only complaint raised by the board referred to 240 Ltd not submitting its own plan.

The contracting authority and the PCAB kept insisting with the appellant Company to exhibit the contractor’s ‘Health and Safety’ programme requested in the tender document.

Dr Gauci contended that the submission at page 305 in fact referred to the contractor, which in this case was 240 Ltd, and that it stated that the contractor was going to abide by regulations with regard to health and safety. As far as Dr Gauci was concerned, the ‘plan’ submitted by his client at page 305 of its submission was an adequate response to the ‘programme’ requested by the contracting authority.

The Chairman PCAB remarked that, in his view, references to ‘Health and Safety’ laws and regulations were not an adequate representation of the programme requested in the tender document and he stated that if the appellant had any difficulty as to what was meant by the ‘programme’ then the same tenderer should have sought pertinent clarifications prior to the closing date of tender.

Bonnici Bros (sub-contractor) did not indicate the types and capacities of the plant and personnel he proposes to use

Dr Gauci referred to page 303 of his client’s tender submission where the following attachments were referred to, namely “list of similar works and company portfolio.”

He added that the company portfolio included a comprehensive list of plant and equipment that Bonnici Bros Ltd was going to use as sub-contractor.

Dr Fenech remarked that, contrary to what Dr Gauci had stated, the company portfolio had not been submitted.

The Chairman PCAB requested the appellant Company to go through its submission and to indicate the company profile / portfolio to the PCAB. Mr Mizzi stated that he assumed that the *company profile / portfolio* had been submitted along with the other papers. He pointed out that his company had submitted its tender documentation properly sealed whereas by then - by the time of the hearing - the submission had been opened and he did not exclude the possibility that the company profile / portfolio got misplaced somewhere.

Duties allocated to employees for this contract not provided

Dr Gauci referred to his clients' submission, particularly

- a. page 44 which showed the *organisational chart form 4.2* with the designation against the proper name of the person concerned;
- b. page 69 'Overview of the Tenderer's Personnel' which indicated the designation and the number of employees in respect of the different categories of personnel *and*
- c. page 70 which indicated, by name and designation, the 'Personnel to be employed on the Contract'

Dr Gauci remarked that the designation of the personnel indicated the duties each one performed and he claimed that the tender document did not distinguish between designation and duties.

Dr Fenech referred to the second bullet of section 4.1.6. at page 9 which, among other things, stated that:

"In particular the tenderer must indicate the numbers, types and capacities of the plant and personnel he proposes to use on the major activities of work."

The Chairman PCAB noted that 4.1.6 did not mention the duties and that, apparently, the tenderer filled in the form provided in the tender document.

Dr Fenech referred also to page 49 of the tender document form 4.6.3 (3) which read

“Attach a critical milestone bar chart (schedule of execution) representing the construction programme and detailing the relevant activities, dates, allocation of labour and plant resources, etc.”

Moreover, Dr Fenech referred to the third bullet of section 4.1.6 at page 9, namely, *“a graphic work schedule (bar chart) showing in outline times and duties allocated for employees for this contract.”* Dr Fenech insisted that the adjudication board could not trace this document in the appellants’ submission. Dr Gauci reiterated that page 44 displayed the outline of the duties of personnel and page 69 showed the designation and the relative number of personnel.

The Chairman PCAB remarked that at page 44 one found an *organisational chart* and that the information found at page 69 did not describe the duties. He added that there was a difference between the ‘designation’ and the ‘duties’ attached to that designation because, for example, a Chief Executive Officer of a large company did not, necessarily, perform the same duties of a Chief Executive Officer managing a small company due to the difference in staff complement, organisational structure and level of operations.

Dr Gauci explained that this contract involved the laying of turf and that his client had indicated which personnel were going to be detailed on this particular job. Dr Gauci maintained that his client had submitted enough information to satisfy the request of the contracting authority with regard to the duties allocated for employees for this contract.

Dr Fenech explained that article 14.3 at pages 13 and 14 of the tender document required that *“the tender must comprise the following duly completed documents”*, among them, the forms at Volume 1 section 4.

Documentation submitted not numbered

Dr Fenech remarked that the numbering of the documentation was not a fundamental issue but, once the adjudication board noted it, then it was decided that it should be included in the evaluation report.

There was general agreement that this was not an issue for exclusion and it was therefore left at that.

In his concluding remarks, Dr Gauci concluded that, from the hearing, it emerged that his client had submitted the information requested in the tender document even though there might have been instances when the information was not presented as and where it should have been presented. The appellants’ legal advisor pointed out that out of the seven items listed by the adjudication board

- (i) the last item was discarded
- (ii) other items were found/traced in his client's submission
- (iii) the site office was optional *and*
- (iv) the contractor's experience was not considered as an exclusion criterion according to the tender document itself.

In the light of this and in view of certain deficiencies in the tender document itself, Dr Gauci concluded that the PCAB should reinstate his client in the tendering process.

On his part, Dr Fenech disagreed with Dr Gauci in the sense that, among other things, the 'Health and Safety' programme and the *Quality Assurance System* were not submitted at all by the appellant Company. He added that the adjudication board was not expected to read between the lines and to interpret the tenderer's intentions but the adjudication board was expected to evaluate according to what was submitted against what was requested in the tender document. Dr Fenech contended that all the information requested had to be submitted because even if some of the information was not considered as an award criterion, it could have been requested to assist the adjudication board in its work. Dr Fenech pointed out that none of the tenderers were found compliant and that the only option which remained possible was either for the contracting authority to issue another call for tenders or for the same authority to resort to the negotiated procedure.

At this point the Chairman PCAB referred to and quoted the concluding paragraph of the adjudication report, viz:

"The Chairman and members of the Evaluation Committee agreed and decided that as none of the submitted offers were fully compliant with the tender's conditions and specifications, this tender is to be cancelled and a negotiated procedure with the current bidders should be initiated. However, we have to point out that the lack of compliance with administrative requirements resulted due to the fact that an EU template format was being used for such a project which does not constitute such detailed administrative requirements."

The PCAB's Chairman remarked that it appeared that these tender specifications and conditions were applicable in the same measure regardless of the size of the football ground being considered. He expressed the view that the fact that none of the five bidders were found compliant could mean either (a) that none of them was up to standard to undertake this contract or (b) that the tender document was not properly drawn up.

At this point, the Chairman PCAB remarked that, not solely attributable to this particular appeal, it is becoming increasingly popular for contracting authorities to recommend that a whole process be cancelled with the stroke of a pen, and this, in full disregard of the fact that, similar to the contracting authority in question in so far as the tender specifications, terms and conditions, any participating tenderer would have incurred related expenses and allocated labour hours to prepare the tender submission. The Chairman PCAB expressed the view that it is becoming increasingly evident that there is something wrong somewhere and that one had to endeavour to rectify matters because,

unless really necessary, it was not ideal for contracting authorities to shift from a tendering process to a negotiated procedure.

Mr Francis Attard, Director General (Contracts), was called to the witness stand to explain, under oath, the negotiated procedure. Mr Attard stated that:

- i) a tender briefing would take place where the contracting authority would explain to all participating tenderers the shortcomings (in general terms) it would have encountered in evaluating the offers received – in the process, each tenderer would realise, *per se*, where one would have gone wrong in one's submission;
- ii) all participating tenderers would be handed a tender document, usually the same original document, and they would be given 15 days within which to submit their offer; *and*
- iii) the tenderers would have the right to alter their original bid, even the price, but that does not, necessarily, mean that the price has to go up

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 'reasoned letter of objection' dated 01.10.2009 and also through their verbal submissions presented during the public hearing held on the 11.09.2009, had objected to the decision taken by the General Contracts Committee;
- having taken note of all the arguments raised by both the appellant Company and the contracting authority in respect of the following issues, namely:
 1. *Registered Office of Company given instead of main office on site including storage area*, particularly, (a) the appellant Company's claim that a tenderer could not be disqualified for choosing not to submit an optional requirement – such requirement was mentioned in two different parts of the tender document with one clearly indicating that the site office was 'optional', (b) considering the size of the ground in question this did not warrant a site office and (c) the fact that, during the same hearing, the contracting authority's legal advisor advised those present that he was not going to insist on this issue and that he was thus accepting the appellant Company's reasoning as justified;
 2. *Total value of works the contractor was responsible for, period of contracts and starting dates not provided*, particularly, the fact that (a) the list of similar works submitted was in respect of Bonnici Bros Ltd, the sub-contractor, and not of 240 Ltd, the tenderer, (b) Dr Gauci's insistence on the fact that page 8 of the tender document, particularly, the 'N.B.' stated that "*Experience may*

be used as a selection criterion but not as an award criterion”, (c) Dr Fenech argued that although it was not an exclusion criterion, that information had to be submitted because it was requested and it was not up to the tenderer to decide what to submit or omit, (d) Dr Gauci’s admittance that, whilst his client had listed 32 similar projects at page 77 of the submission which included completed projects and works in progress, yet the appellant Company decided not to divulge any information with regard to private deals entered into, and (e) Dr Gauci’s claim that, contrary to his client, namely 240 Ltd, Bonnici Bros Ltd, the sub-contractor, was in a position to indicate the value of works because the list submitted referred to public contracts

3. *240 Ltd did not provide an outline QAS to be used*, particularly, (a) the certificates (ISO 9001-2000) submitted by LANO Sport NV - a Belgian supplier, (b) the appellant Company’s principals’ 8 year guarantee for the turf offered covering the whole process, and (c) the fact that the adjudicating board disregarded the certificates provided by the appellant Company’s principals
4. *Bonnici Bros Ltd is only proposing to appoint an H&S Supervisor for sub-base work. 240 Ltd did not submit a ‘Health and Safety’ programme*, particularly, the fact that (a) the appellant Company had stated that “*The Contractor – 240 Ltd - will assume full responsibility for compliance with the Health and Safety Act and the provisions of LN 281 of 2004 with regards to the project and shall comply in full with the provisions of the construction Site Regulations insofar as they apply to the works*”, (b) upon having the contracting authority insisting with the appellant Company to exhibit the ‘Health and Safety’ programme requested in the tender document the appellants stated that the ‘plan’ submitted at page 305 of their submission was an adequate response to the ‘programme’ requested by the contracting authority and (c) it seemed that the tender submission at one stage referred to 240 Ltd and, at another, to Bonnici Bros Ltd, which must have been difficult or confusing to the adjudication board to determine who was responsible for what.
5. *Bonnici Bros (sub-contractor) did not indicate the types and capacities of the plant and personnel he proposes to use*, particularly, the fact that (a) whilst the appellant Company referred to a “list of similar works and company portfolio”, adding that the company portfolio included a comprehensive list of plant and equipment that Bonnici Bros Ltd was going to use as sub-contractor, the contracting authority remarked that the appellant company portfolio was not submitted at all and (b) Mr Mizzi stated that he assumed that the *company profile / portfolio* had been submitted along with the other papers
6. *Duties allocated to employees for this contract not provided*, particularly, the fact that whilst (a) the appellant Company’s legal advisor claimed that the designation of the personnel indicated the duties each one performed claiming that the tender document did not distinguish between designation and duties and that this contract involved the laying of turf and that his client had

indicated which personnel were going to be detailed on this particular job, yet (b) at page 44 one could find an *organisational chart* but it was also a fact that the information found at page 69 did not describe the duties attached to that designation

7. *Documentation submitted not numbered*, particularly, the fact that, according to the same contracting authority, the numbering of the documentation was not a fundamental issue but, once the adjudication board noted it, then it was decided that it should be included in the evaluation report. However, it was also agreed that this was not an issue for exclusion and it was therefore left at that.

- having also taken note of Dr Fenech's concluding remarks relating to the fact that none of the tenderers were found compliant and that the only option which remained possible was either for the contracting authority to issue another call for tenders or for the same authority to resort to the negotiated procedure

reached the following conclusions, namely:

1. The PCAB feels that this particular tender's specifications were too onerous for this type of project reflecting in a highly rigid assessment of issues which seemingly, occasionally, went somewhat overboard (main office on site, numbering of documentation, total disregard to internationally approved certificates, and so forth)
2. The PCAB also feels that given that, in some way or other, pertinent details were included in the appellant Company's tender, albeit, admittedly, not necessarily in the form requested, yet, the PCAB concludes that the appellant Company's offer was substantially compliant

As a consequence of (1) to (2) above this Board finds in favour of the appellant Company and recommends that (a) the said appellant Company be reinstated in the tendering process and that (b) the decision taken by the General Contracts Committee (GCC) to open a negotiated procedure be revoked.

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.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

20 November 2009