

PUBLIC CONTRACTS APPEALS BOARD

Case No. 177

CT/2321/2009 - Advert. No. A/034/2009

Service Tender for the Planning, Design and Organisation of a Music Concert and Information Event in Malta and Gozo

This call for tenders with an estimated value of €220,000 + VAT was published in the Government Gazette on 31.07.2009. The closing date for this call for offers was 10.09.2009.

Two (2) different tenderers submitted their offers.

On 02.11.2009 Messrs *Red Ads Co. Ltd.* filed an objection against the decision by the Contracts Department to cancel the tender in caption since all offers were found administratively non-compliant.

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Carmel Esposito, respectively, acting as members, convened a public hearing on 09.12.2009 to discuss this objection.

Present for the hearing were:

Red Ads Co Ltd (Red Ltd)

Dr Tanya Sciberras Camilleri	Legal Representative
Mr Peter Busuttil	Representative

Planning and Priorities Co-ordination Division (PPCD)

Ms Marlene Bonnici	Director General
Mr Stephen Calleja	Director

Adjudication Board:

Ms Sandra Borg	Chairperson
Ms Alison Dato Mallia	Member
Ms Jeanette Busuttil	Member
Ms Denise Fiorentino	Member

After the Chairman's brief introduction, Red Ads Co. Ltd was invited to explain the motives of the objection.

Dr Tanya Sciberras Camilleri, legal representative of Red Ads Co. Ltd, the appellant Company, explained that by letter dated 21st October 2009 her client was informed that the:

- i. *evaluation committee has recommended that since none of the submitted offers were administratively non-compliant, this tender is to be cancelled.*

Dr Sciberras Camilleri remarked that this meant that all the tenders were, in fact, compliant and hence it followed that the tender should not be cancelled

- ii. *Financial Identification Form did not have the obligatory signature of the account holder:*

Dr Sciberras Camilleri conceded that the signature was not on the document but she was quick to add that the financial identification form was issued by the Bank. Dr Sciberras Camilleri questioned the relevance of the account holder's signature on this document claiming that its absence did not cast any doubt on the validity of the document or on the correctness of the tender documentation as a whole. Dr Sciberras Camilleri referred to article 6 of the tender conditions whereby the tenderer was assuming all the obligations of the contract for a period of 150 days and she argued that it was this commitment/declaration that bound the tenderer and not the signature on the financial identification form which signature she termed as superfluous for the purpose of evaluating the tender.

Ms Marlene Bonnici, Director General PPCD, whilst pointing out that the HSBC letter was also undated, yet confirmed that the document had been submitted by the appellant Company with the original tender submission.

Dr Sciberras Camilleri recalled two cases where tenders were evaluated throughout when the financial identification form did not have the account holder's signature or the date as demonstrated in attachments to her reasoned letter of objection.

The Chairman PCAB remarked that this question had already surfaced before the PCAB and the Director of Contracts had then stated that the signed financial identification form was a requirement dictated by the EU. He recalled that a question was then raised as to what would happen if the contractor decided to change the account number in question after the submission of an offer. The reply given at the time, stated the PCAB Chairman, was inconclusive.

Dr Sciberras Camilleri pointed out that, as far as she was aware, the EU was striving to simplify the tendering process and not to render it more complex. She added that nothing

prevented her client from changing the bank account soon after the submission of the signed financial identification form. Dr Sciberras Camilleri reiterated that the tenderer was bound by the conditions of the tender for a period of 150 days. She even recounted previous comments made by the PCAB in the case CT/2608/2008 which stated that “*some evaluating committees were being excessively cautious to the extent that common sense does not prevail giving rise to anomalous decisions which are causing delays in the adjudication process ...*”

The appellant Company’s legal advisor stated that she expected that if her client’s objection would not be upheld by the PCAB, the deposit made by her client would be refunded on the basis of the contradiction stated by the Contracts Department in its letter of the 21st October 2009 cited earlier on at the hearing.

Mr Peter Busuttil, also representing the appellant Company, *Red Ads Co. Ltd*, stated that albeit, normally, they would submit a signed financial identification form, yet, it often happened that the bank would prefer not to use the form attached to the tender dossier because the boxes were considered inadequate to insert the account number and instead the bank issued a letter under its own letterhead for the same purpose.

Ms Bonnici confirmed that the letter by HSBC formed part of the original tender documentation submitted by the appellant Company. Ms Bonnici added that, as obliged to do, the Bank official rubber-stamped and signed the form. In the case of the account holder only the signature appeared to be obligatory.

Ms Bonnici remarked that the Director of Contracts must have had valid reasons to include this requirement and she added that she had been dealing with EU tenders since 1996 and recalled that this same requirement was found in the External Aid Contracts Regulations of the EU.

The Chairman PCAB remarked that, in his opinion, in this case the signature of the bank carried more weight than the signature of the account holder. The Chairman PCAB noted that the participating tenderer (i) bound itself with the tender conditions and (ii) submitted a letter by the Bank, even if not signed by the account holder, and, as a consequence, the said tenderer had submitted enough evidence to demonstrate that it was a *bona fide* bidder. At this point the PCAB remarked that the letter submitted by HSBC did provide financial identification with regard to the bidder.

Ms Bonnici agreed with reservations in the sense that the letter was undated and therefore it could not be established when it was actually issued by the bank. She even observed that the HSBC letter submitted with this tender was identical to the one that the appellant attached with the reasoned letter of objection which the appellant stated that it referred to another case (reasoned letter of objection, second para. of (a) under (ii) ‘The obligatory signature of the account holder’ referred).

Mr Anthony Pavia, PCAB member, remarked that it appeared that the account details were required to effect payment to the contractor and not to demand payment from the

contractor. The Chairman PCAB failed to understand how a tenderer could be excluded on these grounds when

- a. the participating tenderer could change its account any time after the submission of the tender documentation *and*
- b. when the contracting authority was only going to effect payments into the contractor's account.

Ms Sandra Borg, Chairperson of the Adjudicating Board, remarked that the tender dossier stipulated that requirement and the board could not overlook a mandatory requirement especially in the case of a contract funded by the EU. At this point Ms Bonnici intervened to state that in the case of contracts funded by the EU no one would take the risk of overlooking EU requirements as that would jeopardise the claim for EU funds.

The Chairman PCAB expressed the view that an official letter by the Bank, the source of information as far as bank accounts were concerned, indicating all the details of the account, was equally valid with or without the signature of the account holder.

Ms Bonnici reminded those present that the Bank letter was not dated and, therefore, one could not ascertain the date of issue of the letter. Dr Sciberras Camilleri protested that the reason for exclusion was the absence of the signature and not the date. Ms Bonnici replied that was so because the signature was obligatory whereas the date was not. With regard to pragmatism, Ms Bonnici maintained that EU demanded full adherence to tender conditions otherwise EU funds would be withheld.

At this point Ms Bonnici stated that she was in favour of removing certain rigidities and certain formalities so as to render the tendering process smoother and more efficient.

Dr Sciberras Camilleri remarked that if one was going to focus on formalities then she would insist that, according to the wording of the letter sent by the Contracts Department, her client's offer was compliant even if the department did not intend issuing that statement.

At this point of the hearing Ms Bonnici informed the PCAB that the service requested in the tender in question was attached to a certain date, i.e. the 31.10.2009 / 01.11.2009. Ms Bonnici explained that, according to Regulation 1828/06, government was bound to organise an annual information event and this tender was issued in respect of the 2009 event. She informed the PCAB that (a) the date of tender publication was 31.07.2009 (b) the closing date of tender was 10.09. 2009 and (c) the tenderer was bound by a period of 150 days during within which such tenderer could be requested to deliver the service.

The Chairman PCAB observed that the contracting department had set the 10.09.2009 as the closing date of the tender, i.e. almost 9 months into the year, and that it was then expected that, within a matter of six weeks, the tender would be adjudicated and the service delivered, in the process overlooking the possibility that an appeal could be

lodged. He noted that the way the issue of this tender had been managed indicated that there was a problem with the timeframe.

Ms Bonnici stated that the organisation of such an event involved a chain of actions and that the department had been working on the tender dossier which was eventually presented to the Department of Contracts in May and which was published by the same department in July. She could not explain the time gap between May and July however she stated that, from past experience, it was considered possible to organise the event even if the tender was issued in July. Ms Bonnici informed the PCAB that the 2009 event was organised on the 1st and 4th December 2009 taking the form of a conference – service obtained through quotations - instead of the previously planned concert. She added that the EU did not stipulate the kind of event that had to be organised but left that up to individual member states.

Dr Sciberras Camilleri argued that if the event had been postponed to say, the 15th December 2009, her client would have been in a position to render the service because the appellant was still bound by the 150 days stipulated in the tender. She considered it unfair on her client that the event had already taken place when the tendering process was still in course. Mr Busuttill informed the PCAB that to organise such a concert the organiser had to enter into a number of agreements/undertakings with singers and other performers to secure their services on the stipulated date/s.

The Chairman PCAB remarked that as things stood, the PCAB was being asked to decide on a service tender when the service requested was no longer required because the event had already taken place in the form of a conference and that there was no intention to organise the originally planned concert. He also conceded that, on the other hand, the appellant had every right to lodge an appeal because it was part of the tendering process. The Chairman PCAB called on the contracting department to focus more on the timeframe when drawing up future tender conditions and specifications because that aspect was within its control.

Ms Borg informed the PCAB that the only other bidder was also found administratively non-compliant because the Company did not submit the electronic/soft copy of the tender as stipulated in section 4 sub-section 4.2 (4) at page 6 of the tender document. She added that in that case the bidder was rejected on the advice of the Contracts Department.

The Chairman PCAB remarked that the PCAB had already issued a decision where it was declared that the soft copy, which was a recent technological development, was meant to corroborate the hard copy and not to replace the hard copy and that, in case of a conflict between the two, the signed hard copy prevailed. He explained that the soft copy could be used, for example, to verify something which was not clearly printed on the hard copy.

In line with remarks referring to previous decisions, the Chairman PCAB explained that albeit the PCAB, an autonomous body, was entitled to make recommendations to enhance the tendering process, yet, actual corrective measures had to be taken by government departments, e.g. the Contracts Department.

Ms Bonnici recalled a case where one page of the hard copy of the tender submission was found blank, presumably the result of a printing or a photocopying error, whereas the soft copy was submitted in its entirety and the department had decided to continue with the tendering process and to implement the project. She recounted that it later happened that both the local and the EU Commission auditors disqualified the project from being eligible to EU funding.

The Chairman PCAB acknowledged the point made by the contracting department and added that it proved that, after all, what mattered most was the hard copy and not the soft copy.

The PCAB stated that, whilst it did not lay any blame on the adjudicating board once these minor aspects had been listed as mandatory requirements in the tender document, yet it expressed the view that bidders were being disqualified on minor and/or trivial infringements and that bidders were being frustrated and discouraged from participating in public tenders in view of prevailing state of affairs.

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 02.11.2009 and also through their verbal submissions presented during the public hearing held on the 09.12.2009, had objected to the decision taken by the General Contracts Committee;
- having taken note of the appellant Company’s legal advisor who remarked that in view of the fact that the evaluation committee had recommended that since none of the submitted offers were administratively non-compliant the tender in question had to be cancelled, meaning that all the tenders were, in fact, compliant and hence it followed that the tender should not have been cancelled;
- having also taken note of the fact that, whilst the appellant did concede that the ‘*Financial Identification Form*’ was not actually signed by the same appellant, the account holder, yet, the appellants’ legal representative claimed that it was also a fact that the ‘*Financial Identification Form*’ was issued by the Bank, on the latter’s letterhead;
- having heard Dr Sciberras Camilleri questioning the relevance of the account holder’s signature on this document claiming that its absence did not cast any doubt on the validity of the document or on the correctness of the tender documentation as a whole, especially when one considers that the tenderer was assuming all the obligations of the contract for a period of 150 days with the same

legal advisor arguing that it was this commitment/declaration that bound the tenderer and not the signature on the '*Financial Identification Form*';

- having also noted Ms Bonnici's remarks including the fact that (a) the Director of Contracts must have had valid reasons to include this requirement, namely the '*Financial Identification Form*' and (b) albeit the HSBC's letter was submitted by the appellant Company with the original tender submission yet the said letter was, however, undated;
- having considered Dr Sciberras Camilleri's remark that nothing prevented her client from changing the bank account soon after the submission of the signed '*Financial Identification Form*';
- having considered further its own remark made during the hearing relating to the fact that it appeared that the account details were required for the contracting authority to effect payment to the contractor and not to demand payment from the contractor;
- having taken full cognizance of both Ms Bonnici's and Ms Borg's remarks relating to the fact that, in the case of contracts funded by the EU, although these were both in favour of removing certain rigidities and certain formalities so as to render the tendering process smoother and more efficient, yet Ms Bonnici proceeded by stating that no one would take the risk of overlooking EU requirements as that would jeopardise the claim for EU funds, especially when one considers the fact that the EU could withhold EU funds in case of non-adherence to terms and conditions. Such was the scenario, Ms Bonnici claimed, in a case where one page of the hard copy of the tender submission was found blank, presumably the result of a printing or a photocopying error, whereas the soft copy was submitted in its entirety and the department had decided to continue with the tendering process and to implement the project, a decision which was not agreed to by both the local and the EU Commission auditors who ended up disqualifying the project from being eligible to EU funding;
- having deliberated upon the fact that, according to Ms Bonnici, (a) by virtue of Regulation 1828/06, government was bound to organise an annual information event and this tender was issued in respect of the 2009 event and (b) the date of the publication of tender was 31.07.2009 ... the closing date of tender was 10.09.2009 and ... the tenderer was bound by a period of 150 days within which such tenderer could be requested to deliver the service;
- having also reflected on Ms Bonnici's claim that, regardless of the decision taken by this Board, all was rendered superfluous in view of the fact that the service requested in the tender in question was attached to a certain date, i.e. the 31.10.2009 / 01.11.2009 which lapsed in the meantime, so much so that the 2009 event was organised on the 1st and 4th December 2009 taking the form of a

conference – service obtained through quotations - instead of the previously planned concert,

reached the following conclusions, namely:

1. The PCAB opines that, in this particular instance, albeit not strictly in full conformity with the apposite template as included in the tender document, yet it has been more than amply demonstrated that the participating tenderer had bound itself in *bona fide* with the tender conditions by submitting a letter issued by the Bank which, even though undated, was still an official document sent by the financial institution which, ultimately, had absolute control over account numbers and pertinent customer identification, regardless of whether an ancillary form is signed as a declaration by an account holder or not.
2. The PCAB feels that, in this particular instance, the '*Financial Identification Form*', albeit important, was, nevertheless, less pivotal in safeguarding the contracting authority's interest considering that, in this particular case, the contracting authority was only going to effect payments into the contractor's account and, as a consequence, it was in the tenderer's own interest to provide the right account details and own identification status.
3. The PCAB is concerned that its decision has been rendered futile as it was being asked to decide on a tender relating to a rendering of a service when the service requested was no longer required because the event had already taken place in the form of a conference and that there was no intention for such a service to be organised as originally planned.
4. The PCAB is deeply concerned by the lack of planning demonstrated by both the contracting authority and the Department of Contracts wherein these failed to properly liaise together to ensure that deadlines are observed. Furthermore, this Board considers it inconceivable for a contracting entity and the Contracts department to set a deadline for the closing of the call for offers for a date, nine months well into a calendar year, and then expect a tender to be evaluated and awarded within a matter of six weeks with the service provided only a few weeks thereafter and, all this, without due consideration being given to the fact that any participating tenderer could have exercised its right to lodge an appeal at any stage of the adjudication process thus delaying the original, intended, time frame.
5. The PCAB is also concerned with the fact that it seems that certain adjudication processes are, seemingly, being carried out based on fear of possible repercussions rather than based on evaluation of overall adherence to standard recognised procurement regulations which are, generally, more concerned with the offer's substantiality and, all things being equal, with the most economically advantageous offer, rather than as to whether a requirement has been substantially fulfilled on a specific template or via some other format. It is the PCAB's opinion that such '*modus operandi*' may lead to the rendering of an adjudicating process

to be (a) highly bureaucratic, (b) extremely costly for a participating tenderer to participate in when considering the opportunity costs involved and (c) counter productive as many potential bidders may end up discouraged from participating in similar public tenders.

As a consequence of (1) to (5) above this Board, whilst acknowledging the fact that its decision has been rendered anachronistic considering the fact that it is not possible, at this juncture, for this Board to recommend remedial action in favour of the appellant considering the lapse of time and scope, still morally finds in favour of the appellant Company.

Also, the PCAB calls on (a) the contracting authority to place major emphasis in the future on the timeframe when drawing up future tender conditions and specifications ensuring that all potential phases in any adjudicating process are contemplated and (b) the Contracts Department to ensure that such formalities are not overlooked so as to avoid such an awkward situation from repeating itself.

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

Carmel Esposito
Member

16 December 2009