

## PUBLIC CONTRACTS APPEALS BOARD

### Case No. 184

**Advert No. CT A/037/2009; CT/2036/2009**

**Tender for Construction Works in conjunction with the Embellishment of Promenade and Creation of a Panoramic Coastal Walkway, St Paul's Bay**

The closing date for this call for tenders which was for a contracted estimated value of € 1,593,000 was 20.10.2009

Four (4) different tenderers submitted their offers.

On 30.11.2009 *Messrs Bonnici Bros Ltd* filed an objection against the decision taken by the Contracts Department to disqualify its offer on being found technically non-compliant.

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 12.01.2010 to discuss this objection.

Present for the hearing were:

**Messrs Bonnici Bros. Ltd**

Dr John L. Gauci  
Mr Emanuel Bonnici  
Mr David Bonnici

Legal Representative  
Representative  
Architect/engineer

**paveCON Joint Venture**

Dr Kenneth Grima  
Mr Paul Magro  
Ms Sandra Magro  
Ms Itiana Schembri  
Mr Anton Schembri

Legal Representative  
Representative  
Architect  
Representative  
Representative

**Malta Tourism Authority (MTA)**

Dr Frank Testa

Legal Representative

***Adjudication Board***

Mr Kevin Fsadni  
Mr Francis Albani

Architect and Member  
Member

**Department of Contracts**

Mr Francis Attard

Director General (Contracts)

After the Chairman's brief introduction the appellant was invited to explain the motives of the objection.

Dr John Gauci, representing Messrs Bonnici Bros. Ltd, the appellant Company, explained that his client's objection concerned its exclusion from the tendering process by the Contracts Department for being not technically compliant.

He then proceeded to quote from Department of Contracts' letter dated 25<sup>th</sup> November 2009:

*“Although having the technical capacity and the quality to undertake the works, you have decided not to accept the proposed design for the cantilevered balcony and, on your own admission (page 551), you proposed a variant solution (an alternative).”*

Dr Gauci contended that Bonnici Bros Ltd did not propose any variant solution because it was aware that such alternatives were not allowed. He then quoted article 71 (1) of the tender document, viz:

*“The detailing and method of erection of the projecting balcony indicated in the drawings shall be respected by the contractor. All details and drawings are to be submitted with the tender – pages 881 to 890 of the tender submission referred to his client's drawings.”*

Dr Gauci maintained that one could not depart from certain aspects of the tender, e.g. with regard to the loads that the balcony should sustain, as those would amount to variants and went on to declare that the design submitted by his client respected all the load factors.

Dr Gauci then referred also to Clarification No. 3 dated 12<sup>th</sup> October 2009 which, inter alia, stated that:

*“(6) ... It was highlighted that although the overall appearance of the Panoramic Coastal Walkway should be as shown on the provided drawings, the dimensions provided are not binding. However, prospective bidders should provide a complete erection methodology of this Panoramic Coastal Walkway including a structural design from a structural engineer. No variant solutions are allowed.”*

Dr Gauci argued that a lot of aspects of the tender were left up to the bidders to address in an arbitrary manner so long as they respected the overall appearance. He then referred back to article 71.1 which stated that:

*“The design, dimensions, sections, materials and components specified in the drawings shall be respected.”*

Dr Gauci remarked that in his client's submission it was stated that:

*“... This is being done keeping the general appearance and functionality of the structure as proposed in the tender document.”*

Dr Gauci's interpretation of 'variant solutions' that were not allowed as per article 71.1 concerned the loads and the wind force that the structure should sustain, which factors were being catered for in the design submitted by his client.

Mr Kevin Fsadni an architect by profession, apart from being a member of the Evaluation Board, explained that the contracting authority received two administratively compliant bids including that of the appellant which was found technically valid but was found non-compliant with regard to the projecting balcony. He referred to article 71.1 - already quoted above - and observed that tenderers were required to submit the details of how this structure was to be erected. Mr Fsadni remarked that the contracting authority had furnished the design with the tender dossier and requested the bidders to submit the detailing of that design and to confirm things through calculations. Mr Fsadni then quoted from the appellant Company's submission:

*"Upon reviewing and studying the designs of the cantilevered balcony as supplied with the tender document, it was decided that an alternative approach would be taken in our proposal for a design of this structure. This is being done keeping the general appearance and functionality of the structure as proposed in the tender document. All finishing; including railing, wood decking and seating will be kept as similar as possible to those in the tender document drawings in order to keep with the overall design of the works. As part of this document we are attaching preliminary sketches of our design, showing elements to be used, method of construction and assembly procedure."*

Mr Fsadni remarked that the design involved the structure, the materials, the sections and so forth. He added that the design in the tender document depicted steel sections projecting outwards whereas the design submitted by the appellants referred to steel sections filled with concrete which altered the very nature of the sections.

Dr Frank Testa, MTA's legal representative intervened to explain that article 71.1 clearly stated that *"the design dimensions, sections, materials and components specified in the drawings shall be respected"*, whereas, in its tender submission, the appellant Company stated that *"it was decided that an alternative approach would be taken in"* its *"proposal for a design of this structure"*. He contended that the bidders were requested to provide the detailing but not the design.

Eng. David Bonnici, also representing the appellant Company, remarked that in the appellant's submission (page 551) it was stated that *"... This is being done keeping the general appearance and functionality of the structure as proposed....and ... to keep with the overall design of the works."* Eng. Bonnici maintained that Bonnici Bros Ltd had submitted what was requested in the tender and claimed that a structure could be erected in various ways and that was the reason why the detailing was left in the hands on the bidders.

Mr Fsadni informed the PCAB that, according to the architects of the contracting authority, the steel sections were totally different from those provided in the tender dossier because the appellant Company proposed a *corbel* (Definition: ... a stone or

timber projection from a wall to support something) made of a steel profile filled in with concrete whereas the tender requested steel sections. He added that this altered also the overall appearance of the structure.

Dr Gauci kept on insisting that, according to the Clarification No. 3, the detailing and the dimensions were left up to the bidder and, at this point, the appellants' legal advisor queried if and where the tenderer was specifically asked not to alter the corbel or certain steel sections.

Mr Fsadni explained that the contracting authority was going to tolerate certain departures from the dimensions given in the tender dossier provided that the overall design was respected. He argued that it would have been a different scenario had the appellants confirmed the design provided by the contracting authority and added its option as an alternative. However, Mr Fsadni continued by stating that that was not the case since the appellant Company only proposed its alternative which represented a clear departure from the requested design.

At this point Mr Fsadni invited the PCAB to visually compare the design provided with the tender document with the design submitted by the appellant Company. The PCAB noted that what the appellants were proposing differed from what the contracting authority was requesting.

Dr Gauci referred to sub-articles 71.3, 71.4 and 71.5 which indicated that the calculations and drawings were to be submitted by the contractor to the supervisor, that is, after the award of the tender. Dr Gauci explained that his client's proposal offered an improved product *vis-à-vis* that presented in the tender dossier as stated in the submission (para. 2 of pg 551) – *“This design has been adopted in order to improve deflection, frequency response (due to the large cantilever) and corrosion design.”*

Dr Testa did not contest the argument as to whether the appellant Company's proposal could have been superior to that provided by the contracting authority but reiterated that the fact remained that the proposed design was different from the one requested.

Dr Kenneth Grima, representing paveCOM Joint Venture, an interested party, remarked that an alternative and a variant were one and the same thing and that the appellant Company took it upon itself to propose its own design, irrespective of what the contracting authority requested in the tender dossier.

Dr Grima contended that (i) an alternative design was not permitted according to the tender conditions and (ii) the appellant Company's proposal involved the use of iron and concrete which was definitely much cheaper than the design requested by the contracting authority which consisted of steel sections only and he, therefore, argued that should the appellants' alternative design be accepted, then a bidder who faithfully provided what the tender dossier requested would be penalised as its offer would certainly be more expensive than the appellants'. Dr Grima reminded the PCAB that the tenderer was not at liberty to change the materials. He conceded that the contracting authority would have settled for something *quasi*-similar with limited variations but it would certainly not settle for an alternative design. Dr Grima

remarked that the alternative proposed by the appellant Company could be cheaper and just as good or even better but one could not allow the goal posts to be shifted after the closing date of the tender as that would be detrimental to the other bidders.

Dr Gauci rebutted that

- (i) the financial offers were not yet known
- (ii) the leeway granted to the bidders had not been quantified in the tender document but stressed that the detailing was left entirely up to the bidders so long as the structure would withstand the loads indicated in the tender

*and*

- (iii) what his client proposed did not amount to an alternative

Mr Fsadni explained that the requested detailing required the bidder to confirm the sections and their mounting together according to the design specifications given and then the contracting authority would examine that detailing with a certain degree of tolerance. He added that what the appellant Company proposed did not involve detailing but it amounted to a change in sections and materials which, in turn, affected the design itself.

On his part Dr Gauci remarked that the tender document specified at Article 71 that certain details were left up to the bidder at tendering stage whereas, other aspects, such as calculations, were left up to the contractor, in consultation with the supervisor, after the award of the tender. He contended that what his client submitted was in line with the tender specifications and with the subsequent clarifications and that the overall appearance of the structure had been respected claiming that only the approach was changed and not the design. Dr Gauci suggested that, perhaps, the tender document should have specified the extent up to which changes would be permitted.

Dr Testa argued that the tender dossier was quite clear in the sense that the details were left up to the bidder provided that the design, materials, sections, dimensions and components shall be respected and that no variations were allowed. He stressed that the parameters were there and that the appellants chose to go beyond the established limits.

Dr Grima reiterated that the appellants did not change the details but the design and, once again, quoted what the appellant Company had stated in its submissions, namely:

*“Upon reviewing and studying the designs of the cantilevered balcony as supplied with the tender document, it was decided that an alternative approach would be taken in our proposal for a design of the structure.”*

He added that the appellants changed the materials, the sections and, consequently, the design and, in so doing, would come up with a cheaper product.

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 30.11.2009 and also through their verbal submissions presented during the public hearing held on the 12.02.2010, had objected to the decision taken by the General Contracts Committee;
- having taken note of the appellants’ legal representative’s claims that (a) despite what the Director of Contracts had stated in his letter dated 25<sup>th</sup> November 2009, his clients, Bonnici Bros Ltd did not propose any variant solution because it was aware that such alternatives were not allowed, (b) one could not depart from certain aspects of the tender, e.g. with regard to the loads that the balcony should sustain, as those would amount to variants, (c) a lot of aspects of the tender were left up to the bidders to address in an arbitrary manner so long as they respected the overall appearance, (d) whilst the tender document stated in 71.1 that “*The design, dimensions, sections, materials and components specified in the drawings shall be respected*” his client’s submission stated that “... *This is being done keeping the general appearance and functionality of the structure as proposed in the tender document.*”, (e) nowhere were the tenderers specifically asked not to alter the corbel or certain steel sections, (f) his client’s proposal offered an improved product *vis-à-vis* that presented in the tender dossier as stated in the submission and (g) only the approach was changed and not the design
- having also taken note of Mr Fsadni’s - an architect by profession and a member of the Evaluation Board - intervention wherein, *inter alia*, he (a) stated that whilst the appellant’s bid was found technically valid, yet was found non-compliant with regard to the projecting balcony in view of the fact that, whereas the tender document depicted steel sections projecting outwards, the design submitted by the appellants referred to steel sections filled with concrete which altered the very nature of the sections, (b) contended that the contracting authority was going to tolerate certain departures from the dimensions given in the tender dossier provided that the overall design was respected, (c) claimed that, according to the architects of the contracting authority, the steel sections were totally different from those provided in the tender dossier because the appellant Company proposed a *corbel* - a stone or timber projection from a wall to support something - made of a steel profile filled in with concrete whereas the tender requested steel sections, an issue which also altered the overall appearance of the structure and (d) argued that the requested detailing required the bidder to confirm the sections and their mounting together according to the design specifications given and then the contracting authority would examine that detailing with a certain degree of tolerance, adding that what the appellant Company proposed did not involve detailing but it amounted to a change in sections and materials which, in turn, affected the design itself;
- having, during the hearing, the members of this Board personally examined and compared the design as included in the tender document with the design as submitted by the appellant Company;

- having heard Dr Testa, MTA’s legal representative, (a) contend that the bidders were requested to provide the detailing but not the design, (b) argue that he did not contest whether the appellant Company’s proposal could have been superior to that provided by the contracting authority whilst reiterating that the fact remained that the proposed design was different from the one requested and (c) argue that the tender dossier was quite clear in the sense that the details were left up to the bidder provided that the design, materials, sections, dimensions and components shall be respected and that no variations were allowed placing emphasis on the fact that the parameters were there and that the appellants chose to go beyond the established limits;
- having also heard Dr Grima, legal representative of an interested party, paveCOM Joint Venture, contend that (a) an alternative design was not permitted according to the tender conditions and (b) the appellant Company’s proposal involved the use of iron and concrete which was definitely much cheaper than the design requested by the contracting authority which only consisted of steel sections;

reached the following conclusions, namely:

1. The PCAB notes that the appellant Company only proposed its alternative which represented a clear departure from the requested design;
2. The PCAB agrees with the argument that the issue could have been different had the appellants confirmed the design provided by the contacting authority adding its option as an alternative;
3. The PCAB acknowledges that, upon inspection during the said hearing of designs as requested by contracting authority compared with those submitted by the appellant Company, the PCAB noted that what the appellants were proposing differed from what the contracting authority was requesting, in that steel sections were proposed to be replaced by iron casings filled with concrete;

As a consequence of (1) to (3) above this Board finds against 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 not be reimbursed.

Alfred R Triganza  
Chairman

Anthony Pavia  
Member

Edwin Muscat  
Member

*11 March 2010*