

PUBLIC CONTRACTS APPEALS BOARD

Case No. 193

CT/2404/2009: Advert CT/327/2009; HAA 24/2009

Finishing of Residential Block at 49 Lion Street and 47 & 56 Argotti Street Floriana

This call for tenders with an estimated value of €787,386 was originally published in the Government Gazette on 21.08.2009. The closing date for this call for offers was 01.10.2009.

Six (6) different tenderers submitted their offers.

On 24.01.2010 Messrs Project Technik / Mr Kurt Abela filed an objection against the decision taken by the Contracts Department to disqualify his offer for being administratively non-compliant.

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Edwin Muscat and Mr Carmel Esposito, respectively, acting as members convened a public hearing on 07.04.2010 to discuss this objection.

Present for the hearing were:

Project Technik

Mr Kurt Abela	Sole Trader
Dr Kenneth Grima	Legal Representative
Mr Paul Abela	

Schembri Barbro Ltd

Dr John Bonello	Legal Representative
Mr Anton Schembri	Representative
Mr Simon Schembri	Representative

Housing Authority

Mr Aldo Ellul	Financial Controller
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Evaluation Board

Architect Sandra Magro	Chairperson
Architect David Farrugia	Member
Mr Charles Vella	Member

Contracts Department

Mr Francis Attard	Director General
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N.B

Camray Co. Ltd

No representative turned up

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

Dr Kenneth Grima, Project Technik's legal advisor, submitted that the reason given by the Contracts Department for the rejection of his client's offer was the non-submission of various documents as explained hereunder:

Appendix 7 General Conditions Governing Employment and Appendix 8 the Sample Performance Bond

Dr Grima explained that these two appendices did not form part of the tender dossier which his client obtained/procured from the contracting authority and, as a result, he contended that his client and, for all that matters, all the other bidders, should not be expected to submit documents which were not part of the tender document. Dr Grima also submitted that as a double check he looked up this tender document on the internet and he could not trace the two appendices in question. The appellants' lawyer remarked that these appendices referred to general conditions which also reflected themselves in the laws of Malta.

Architect Sandra Magro, chairperson of the Evaluation Board, remarked that the two appendices referred to by the appellants did form an integral part of the tender document, so much so, that they were submitted by other bidders. She added that the appendices were to be submitted with the offer as they were, i.e. the bidders were not requested to give any information or to sign them. She explained that tenderers were expected to re-submit the tender document in its entirety as a sign that they had accepted it as it was. She agreed that in signing the *Tenderer's Declaration* the tenderer would have already accepted the provisions of the tender in their entirety, without reservation or restriction. She remarked that in the 'contents' the tender document did indicate Appendices 7 and 8 and, therefore, the tenderer could have asked the contracting authority about them.

Mr Kurt Abela, in his name and acting on behalf of Project Technik, the appellants, under oath, confirmed that the tender document he obtained from the Contracts Department did not contain Appendices 7 and 8, and that he had signed the *Tenderer's Declaration* whereby he accepted all the tender conditions.

The General Conditions of Contract

Dr Grima submitted that the same arguments applied to the non-submission of the general conditions of contract except that, in this case, his client was in fact in possession of these conditions but, somehow, failed to submit them with his offer. Dr Grima conceded that section 4.3 did indicate that the conditions of contract were one of the documents that had to be submitted in Envelope 2. He added that once his client had signed the *Tenderer's Declaration* thereby accepting all the tender conditions, part of which were the general tender conditions, and once the bidder was not asked to provide any input or to specifically sign them, then the submission of the general conditions of tender with the offer was almost irrelevant.

Mr Abela confirmed that the general conditions were not submitted with his offer through an oversight and added that he did not have to add any information or to sign it but simply to submit them as presented in the tender dossier.

Non-submission of Appendices 4.1 to 4.5

Dr Grima explained that the appendices in question were the following: App 4.1 – Financial Identification Form, App 4.2 – Power of Attorney, App 4.3 – Financial Statement, App 4.4 – Litigation History and App 4.5 – Sub-Contracting. He submitted that, in most instances, these appendices referred to a limited liability company whereas his client was a sole trader and, hence, he could not submit certain information, e.g. the share capital or the audited accounts, but he added that his client did however submit his income tax returns as a self-employed along with the list of works he had performed over the previous three years.

Dr Grima maintained that his client had submitted all these appendices duly filled in according to his circumstances, i.e. being a sole trader, and displayed copies of the appendices drawn up by his client. Dr Grima said that he interpreted the term - ‘not submitted’ - as ‘not filled in’ ... in line with what the contracting authority had requested, namely with the details relative to a limited liability company, something which his client could not have done as a sole trader.

Architect Magro informed the PCAB that it was not a question that the appellant had failed to submit the information as requested but the question was that the appellant did not submit these appendices at all.

Mr Edwin Muscat, PCAB member, remarked that it could be the case that the appellant had included these appendices in the 3rd envelope rather than in the 2nd envelope as required.

Mr Abela, the appellant, was presented with the original documentation that he had submitted in envelope 2 and on examining the contents he confirmed that he could not trace Appendices 4.1 to 4.5. Mr Abela did not exclude the possibility that these appendices were mistakenly inserted in envelope 3 instead of in envelope 2.

At that stage it was established that one could not open envelope 3 with a view to ascertaining whether it contained the appendices in question. Moreover, Mr Francis Attard, Director General (Contracts), submitted that, according to regulations, if a tenderer was eliminated at some early stage then the envelopes submitted by the same tenderer in respect of subsequent stages could not be opened and, for example, if this case were to be decided against appellant, then his third envelope would not be opened but would remain sealed at the Contracts Department.

With regards to ‘Submission of Tenderer’s Declaration in Envelope 2 instead of in Envelope 3’ Architect Magro pointed out that the evaluation board had, in fact, found in Envelope 2 the *Tenderer’s Declaration*, which included the total price offered by the appellant, along with the *Tender Form* which should have been inserted in

Envelope 3. She added that it was clearly indicated that tenderers had to insert these documents in Envelope 3.

The Chairman PCAB remarked that the submission of the *Tenderer's Declaration* - which included the total price quoted in Envelope 2 instead of in Envelope 3 - *per se*, offered sufficient ground to disqualify the appellant and certainly a more serious shortcoming on the part of the appellant than those listed in the letter of rejection.

Dr Grima contended that what Ms Magro had just stated was not one of the reasons given for the rejection of his client's offer and added that the appeal had to deal with the reasons for rejection communicated to his client. Dr Grima argued that it was not admissible to include fresh accusations at that stage because he had based the defence of his client's case according to the reasons for disqualification quoted by the Department of Contracts.

Mr Attard, under oath, submitted that at the time of the opening of Envelope 2 the Contracts Committee had noted that the bidder had divulged the price he offered, something which he was required to do in Envelope 3. He added that it was normal procedure that in such a case the evaluation of the documentation submitted in Envelope 2 still had to be carried out.

The Chairman PCAB remarked that one would have expected the evaluation board to include in its report the fact that the appellant had divulged the price offered in Envelope 2 instead of in Envelope 3 and that reason would have been sufficient for the outright exclusion of the appellant. He added that this was a crucial aspect of the 3 package tendering system and it should have led to outright disqualification.

Dr Grima submitted that had he known of this shortcoming on the part of his client he would have advised his client not to lodge the appeal.

The Chairman PCAB agreed that the PCAB had to stick to its terms of reference however justice had to be done with regard to those tenderers who, scrupulously, followed the tendering process as against those who did not. He added that the PCAB was going to do its part and then other quarters had to do their part too.

Dr John Bonello, representing Schembri Barbros Ltd, an interested party, raised the question that in his reasoned letter of objection Dr Grima had referred to his client as Mr Kurt Abela trading in the name of Project Technik. He therefore contended that even if the Tenderer's Declaration had been inserted in the correct envelope it would have been null because it was in the name of Project Technik, which was neither a body corporate nor a person. He claimed that, since the appeal was lodged in terms of Regulation 82, the reasons for objecting should have been given in the notice of objection itself and not in a separate (reasoned) letter. Dr Bonello added that a sole trader was not exempted from filling in appendices 4.1 to 4.5.

Dr Grima maintained that the fact that his client, Mr Kurt Abela, used the trade name of Project Technik did not alter anything because all the tender documentation was signed by Mr Kurt Abela.

Architect Magro explained that the evaluation board had to draw up a report for each stage of the evaluation process and, in fact, the appellant was found to be administratively non-compliant and, as a result, the evaluation board did not have to evaluate the appellant from the technical aspect. She confirmed that the evaluation report did not include the fact that in Envelope 2 the appellant had divulged the total price he offered.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 29.01.2010 and also through their verbal submissions presented during the public hearing held on the 7.04.2010, had objected to the decision taken by the General Contracts Committee;
- having taken note of issues relating to *Appendix 7 General Conditions Governing Employment and Appendix 8 the Sample Performance Bond*, particularly, the fact that whilst (a) Mr Abela stated under oath that the tender document he obtained from the Contracts Department did not contain Appendices 7 and 8, and that he had signed the *Tenderer’s Declaration* whereby he accepted all the tender conditions, yet, (b) Architect Magro argued that in the ‘contents’ the tender document did indicate Appendices 7 and 8 and, therefore, the tenderer could have asked the contracting authority about them;
- having also taken note of the issues raised in connection with *The General Conditions of Contract*, particularly, wherein Dr Grima, the appellants’ legal representative, (a) admitted that albeit his client was in fact in possession of these conditions yet, somehow, he failed to submit them with his offer and (b) contended that once his client had signed the *Tenderer’s Declaration* thereby accepting all the tender conditions, part of which were the general tender conditions, and once the bidder was not asked to provide any input or to specifically sign them, then the submission of the general conditions of tender with the offer was almost irrelevant;
- having also deliberated upon the points discussed relating to the *Non-submission of Appendices 4.1 to 4.5*, especially, those brought forward by Dr Grima regarding the fact that (a) whilst, in most instances, these appendices referred to a limited liability company whereas his client was a sole trader and, hence, he could not submit certain information, e.g. the share capital or the audited accounts, yet (b) his client did however submit his income tax returns as a self-employed along with the list of works he had performed over the previous three years;
- having further deliberated on the fact that with regards to the *Non-submission of Appendices 4.1 to 4.5*, Ms Magro placed emphasis on the fact that it was not a question that the appellant had failed to submit the information as requested but the question was that the appellant did not submit these appendices at all;

- having also taken note of the fact that, when presented with the original documentation that he had submitted in envelope 2, Mr Abela could not trace Appendices 4.1 to 4.5;
- having taken full cognizance of Architect Magro's reference to the fact that the evaluation board had, in fact, found in Envelope 2 the *Tenderer's Declaration*, which included the total price offered by the appellant, along with the *Tender Form* which should have been inserted in Envelope 3, adding that this happened despite the fact that it was clearly indicated that tenderers had to insert these documents in Envelope 3;
- having, despite of the fact that it was not officially stated as being one of the reasons given for the rejection of the appellant's offer, also deliberated on the fact that the submission of the *Tenderer's Declaration* - which included the total price quoted in Envelope 2 instead of in Envelope 3 - *per se*, should have offered more reason for the appellant's offer to be disqualified;
- having reflected on the fact that (a) Mr Attard had admitted that at the time of the opening of Envelope 2 the General Contracts Committee had noted that the bidder had divulged the price he offered, something which he was required to do in Envelope 3, adding that it was normal procedure that, in such a case, the evaluation of the documentation submitted in Envelope 2 still had to be carried out and (b) Architect Magro confirmed during the hearing that the evaluation report did not include the fact that in Envelope 2 the appellant had divulged the total price he offered;
- having considered the appellant's legal advisor's remark wherein he stated that had he known of his client's shortcoming, namely that had divulged the price offered in Envelope 2 instead of in Envelope 3, he would have advised his client not to lodge the appeal,

reached the following conclusions, namely:

1. The PCAB feels that, albeit the appellant claimed that the tender document he obtained from the Contracts Department did not contain Appendices 7 and 8, yet, considering that the content page indicated such appendices should have given him enough reason to seek apposite clarification.
2. The PCAB opines that, despite the fact that the appellant stated that he was in possession of *The General Conditions of Contract*, yet, it was also a fact – corroborated by own admission – that the appellant failed to submit them with his offer.
3. The PCAB argues that, with regards to the *Non-submission of Appendices 4.1 to 4.5*, the fact that such appendices were mostly applicable in instances where the tenderer was a limited liability company, could have led the appellant to feel that these were not applicable in his particular case, thus refraining from submitting these appendices at all. In this instance the PCAB opines that the appellant's claim is justified.

4. The PCAB, however, feels that, whilst (a) it is a fact that the appellant was not also officially disqualified due to the fact that the evaluation board had, in fact, found in Envelope 2 the *Tenderer's Declaration*, which included the total price offered by the appellant, along with the *Tender Form* which should have been inserted in Envelope 3, yet, (b) the PCAB cannot disregard the fact that justice has to be carried out with regard to those tenderers who, scrupulously, followed the tendering process as against those who did not. The PCAB feels that, during the hearing, enough evidence was brought to the attention of those present that the appellant contravened a cardinal element in the three envelope system rendering such system futile. The PCAB does not feel that such a public manifestation of basic non adherence to regulations should be condoned. The PCAB argues that, amongst its salient scope for being formally constituted, it has to ensure that the procedure followed in any adjudicating process is transparent, equitable and in total adherence to public procurement regulations. As a consequence, were it to disregard the fact that the appellant failed to observe such a crucial aspect of the three envelope system the PCAB would itself be refraining from its own remit rendering such a process anything but equitable as well as irregular.

As a consequence of (1) (2) and (4) above this Board finds against the appellant Company.

As a result, in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the appellant Company should not be reimbursed.

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmel J Esposito
Member

26.04.2010