

## PUBLIC CONTRACTS APPEALS BOARD

### Case No. 195

**CT/2673/2009; Advert CT/428/2009; FTS C11-09**

### **Tender for the Floor/Wall Tiling, Marble and Granite Works at the New Boys' Secondary School, Mosta, Ta' Zokrija**

This call for tenders with an estimated value of €818,990 was originally published in the Government Gazette on 13.11.2009. The closing date for this call for offers was 05.01.2010.

Eight (8) different tenderers submitted their offers.

On 01.02.2010 Messrs Vella Falzon Building Supplies Ltd filed an objection following the decision of the Contracts Department to disqualify its offer for being administratively 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 21.04.2010 to discuss this objection.

Present for the hearing were:

#### **Messrs Vella Falzon Building Supplies Ltd (Messrs Vella Falzon)**

Dr Nicolai Vella Falzon	Legal Representative
Mr Alexis Vella Falzon	Representative

#### **Schembri Barbros Ltd**

Dr John Bonello	Legal Representative
Mr Anton Schembri	Representative

#### **Camray Co. Ltd**

Mr Brian Miller	Representative
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#### **Foundation for Tomorrow's Schools**

Mr Loenord Zammit	Technical Adviser
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#### **Evaluation Board**

Mr Charles Farrugia	Chairman
Mr Andrew Ellul	Member
Mr Ivan Zammit	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.

Dr Nicolai Vella Falzon, legal advisor of Messrs Vella Falzon, explained that his client's offer had been rejected as administratively non-compliant for two reasons, namely,

- (i) failure to submit Volume 2 Section 5 'Non Collusive Tendering Certificate' filled in and signed and
- (ii) failure to submit samples of polished granite and flamed-surface by the closing time of the tender.

*(i) failure to submit Volume 2 Section 5 'Non Collusive Tendering Certificate' filled in and signed*

Dr Vella Falzon explained that this certificate had in fact been submitted and that the tenderer was not required to fill in anything but he simply had to sign it. Dr Vella Falzon conceded that, through an oversight, this certificate had not been signed and was quick to add that his client never had any difficulty to sign this 'Non Collusive Tendering Certificate' and, in fact, he was ready to sign it as he had the opportunity to do in the case of other tenders. The appellants' legal representative reiterated that it was simply an error of omission and to corroborate his views he submitted the following legal arguments:

- (a) the Minister of Finance, the Economy and Investment had announced a few weeks previously that, henceforth, such mere errors of omission should not lead to outright tender rejection but that the Department of Contracts had to exercise its discretion with a view to allow as wide a competition as possible in the award of public tenders so as to obtain better value for money. He added that, according to the new guidelines, a tenderer was to be given two days to rectify minor shortcomings such as the one under consideration
- (b) Article 27.1 of the tender document provided that ... "*Tenders which are incomplete, conditional, illegible, obscure or contain unrequested additions or other irregularities may be rejected*" (emphasis added). Dr Vella Falzon admitted that his client's bid was, at most, incomplete because of a minor shortcoming. However, he continued that the term 'may' afforded the Director of Contracts a measure of discretion in the sense that rejection was not outright and that a tenderer could have been given the chance to rectify such minor errors of omission. He explained that this certificate constituted a declaration by the bidder against price fixing and against arrangements with other persons binding them to refrain from tendering and the like. Dr Vella Falzon agreed that albeit the submission of this certificate was mandatory otherwise the tenderer could have opted to leave it out, yet he lamented that the Department of Contracts failed to exercise its discretion for the sake of justice and equity.

At this stage the Chairman PCAB questioned the purpose of the certificate ‘*per se*’ in the sense that nobody would expect a participating tenderer to declare out of his own free will that he was involved in any price fixing and the like.

- (c) Article 28.2 of the tender document outlined what constituted an ‘admissible tender’, namely stating that “*an admissible tender is one which conforms to the requirements and specifications described in the tender documents with no substantial deviations or reservations. Substantial deviations and reservations are those which (28.2.1) in any way influence the scope, quality or execution of the works, or (28.2.2) restricts the rights of the Central Government Authority, the contracting authority or the obligations of the Tenderer under the contract in a manner inconsistent with the tender document, or (28.2.3) rectification of which unfairly affect the competitive position of other Tenderers presenting admissible tenders*”.

Dr Vella Falzon claimed that, in this case, the failure to sign this certificate was neither substantial nor did it in any way affect the competitiveness of the other bidders. Moreover, Dr Vella Falzon referred to ECJ Case 76/81 decided in 1982 (Transporoute Case) which clearly indicated that the aim of the Public Sector Directive was “*to protect tenderers against arbitrariness on the part of the authority awarding the contracts ... to exclude the possibility that a (contracting authority) may choose to be guided by other than economic considerations*”.

*On checking with the original tender submission made by Messrs Vella Falzon it was confirmed that this certificate had been submitted but without the required signature.*

*(i) failure to submit samples of polished granite and flamed-surface by the closing time of the tender*

Dr Vella Falzon remarked that these two samples were not requested in the original tender document but were included in a variation dated the 22<sup>nd</sup> December 2009 and had to be submitted by 10am of 5<sup>th</sup> January 2010, i.e. the closing date/time of the tender. He added that his client had submitted all the samples requested in the original tender. Dr Vella Falzon claimed that his client had not received a letter or an email informing him of this variation. He added that his client learned of this variation on the 5<sup>th</sup> January 2010, following the Christmas shutdown, on checking the Contracts Department’s website. Dr Vella Falzon then quoted from Article 10.2 of the tender document: *Each modification published will constitute a part of the tender document and be sent, in writing, to all known tenderers.* He claimed that the Contracts Department was aware of the participating tenderers because, on acquiring the tender document, each prospective bidder had to give the contract details. Dr Vella Falzon maintained that the contracting authority failed to inform his client in writing of this variation and, as a consequence, it could not reject its offer for the late delivery of the samples – at 10.45 hrs instead of at 10.00 hrs – as required in that variation.

Mr Ivan Zammit, Secretary of the adjudication board, remarked that an email had been sent to the appellant Company on the 22<sup>nd</sup> December 2009 on the email address pb@vellafalzon.com.

Mr Alexis Vella Falzon, also representing the appellant Company, under oath, gave the following evidence, namely that:

- a. his firm had been on Christmas shutdown from the 22<sup>nd</sup> December till the 5<sup>th</sup> January and that Ms Patrizia Borg, one of his employees and to whom the contracting authority claimed to have sent the email with the variation, did not have access to emails from outside the firm's premises
- b. during the shutdown the company's servers would be down and hence it could be the case that the contracting authority had received an 'undelivered' notice
- c. he had been informed of this variation on 5<sup>th</sup> January 2010 by Ms Borg on checking the website of the Contracts Department
- d. had the contracting authority contacted him on his email address - avf@vellafalzon.com - as indicated in the tender submission, it would have been relayed to his mobile. At this point, Mr Vella Falzon's attention was drawn to the fact that such information was not available to the contacting authority prior to the closing (opening) date of the tender
- e. as far as he was aware, the tender document had been picked up by one of his employees, Mr Charles Fenech – this was confirmed by the signature on the relevant Contracts Department receipt
- f. he considered the addendum (received prior to the tender closing date) as an integral part of the original tender
- g. his company had purchased the tender document, filled it in and submitted the samples with the clear intention of participating in this tendering process
- h. although Ms Borg, one of his employees - responsible for the compilation of the paperwork of this tender - might have included the addendum in tender submission – which on checking the appellant Company's submission it was confirmed that the addendum had been included - the crux of the matter had to do with the timing

On his part, Mr Charles Farrugia, Chairman of the adjudication board, remarked that the two samples that were delivered late related to non-slip tiles specifically designed for outdoor use. He added that the contracting authority was not present when the tender box was opened and that it was not obliged to be present at that stage.

The Chairman PCAB expressed the opinion that although the contracting authority was not obliged to do so, yet, as the owner of the tender, it was in its interest to follow the different stages of the tendering process, including the tender opening stage.

Mr Zammit exhibited a copy of the original submission of the appellants on which it was indicated in pencil 'replaced by addenda attached previous' which indicated that the appellant Company was aware of this addendum.

*On checking the original tender submission it turned out that there was the same note in pencil on the addendum referred to by Mr Zammit but in the absence of a signature thereon the PCAB had no option but to discard that evidence.*

Mr Farrugia explained that, on the 5<sup>th</sup> January 2010, the appellants' deliveryman called on three separate occasions, namely, twice before the closing time (10.00 hrs), when he delivered the samples requested in the original tender and the third time at 10.45 hrs when he delivered the samples requested in the addendum. Mr Farrugia remarked that the adjudication board had to abide by the rules and that, at that stage, the appellant Company had been adjudicated administratively and, on being found non-compliant, they could not evaluate the Company's offer technically. He stated that it was not correct for one to declare that the adjudication board disqualified a tenderer because, usually, the tenderer disqualified itself by presenting a non-compliant tender submission.

Mr Francis Attard, Director General (Contracts), under oath, gave the following evidence, namely, that:

- a. although it was not so in this case, in recent calls for tenders a standard provision was being included in the tender document which spelled out that it was the responsibility of the tenderer to keep himself up-to-date on the tendering process by following the website of the Contracts Department
- b. the *Non Collusive Tendering Certificate* had been included in the tender document for the past three years or so on the suggestion of the European Commission and that the department attached a degree of importance to the submission of this document
- c. confirmed that, prior to Malta's accession to the EU, this same certificate used to be requested in the case of EU financed tenders and that, presently, this certificate was requested throughout the European Union
- d. apart from the general declaration requested from the tenderer in the initial part of the tender *dossier*, the contracting authority also, specifically, requested the submission of the *Non Collusive Tendering Certificate* as a mandatory requirement
- e. the stand taken by the Contracts Department was that the non-submission of mandatory documents would lead to tender rejection and, to his recollection, there were instances when tenders were rejected for the non-submission of the *Non Collusive Tendering Certificate*
- f. the amendments to the tendering process announced by the Minister of Finance were applicable to tenders which had the closing date after the relevant information session, i.e. after the 12<sup>th</sup> March 2010

- g. one of the changes introduced referred to a case where a tenderer would have been found administratively non-compliant, such as failure to sign a form or a certificate, in which case the Contracts Department would request the tenderer to rectify the shortcoming within two days against the fee of €50
- h. at law, the General Contracts Committee was responsible for the opening of the tenders and for drawing up the relative schedule of tenders and, therefore, the presence of the contracting authority at that particular stage was considered of minor relevance
- i. the evaluation and rejection of tenders was the realm of the contracting authority which included the adjudication board
- j. it had become standard procedure in the case of tenders the value of which exceeded the € 0.5m to request tenderers to submit certain certificates, e.g. from (1) the *Inland Revenue Department* that they had no tax arrears or from (2) the *Law Courts* that there were no bankruptcy proceedings in course in their regard, and so forth.

At this stage the Chairman PCAB intervened to draw a distinction between requesting a certificate from the tax authorities or from the Law Courts which could be corroborated and a certificate of non-collusion from the tenderer himself which one could not corroborate.

Dr John Bonello, legal representative of Barbros Ltd, remarked that, on one hand, a false declaration is considered a criminal offence which carried up to a two-year jail sentence while, on the other hand, it is not considered a criminal offence if someone fails to submit what one is obliged to submit in a mandatory manner – hence the need for the submission of all mandatory certificates including all purposely requested information, concluded Dr Bonello.

Mr Zammit referred to articles 14.3, 14.3.2.8 and 14.4 of the tender document which clearly requested the submission, among other things, of the *Non Collusive Tendering Certificate* duly signed and the submission of samples in terms of article 4.1.

Dr Vella Falzon argued that the term ‘must’ at article 4.1 was a clear indication that the failure by this client to sign the *Non Collusive Tendering Certificate* rendered the appellants’ submission ‘incomplete’ and hence the Department of Contracts was bound to use or could have used the discretion contemplated in article 27.1. for the sake of proportionality, equity and justice.

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 01.02.2010 and also through their verbal submissions presented during the public hearing held on the 21.04.2010, had objected to the decision taken by the General Contracts Committee;

- having taken note of the appellant Company’s representatives claims including, *inter alia*, the fact that (a) the ‘Non Collusive Tendering Certificate’ was submitted by the appellants and that tenderers were not required to fill in anything but had simply to sign it, (b) through an oversight, they did not sign the said certificate, (c) recent changes to local procurement procedures contemplated that mere errors of omission should not lead to outright tender rejection but that the Department of Contracts had to exercise its discretion with a view to allow as wide a competition as possible, (d) Article 27.1 of the tender document provided that ... “*Tenders which are incomplete, conditional, illegible, obscure or contain unrequested additions or other irregularities may be rejected*” placing emphasis on the fact that the term ‘may’ afforded the Director of Contracts a measure of discretion in the sense that rejection was not outright and that a tenderer could have been given the chance to rectify such minor errors of omission, (e) the failure to sign the ‘Non Collusive Tendering Certificate’ was neither substantial nor did it in any way affect the competitiveness of the other bidders, (f) the samples referred to by the Department of Contracts as being one of two reasons why the appellants’ offer was adjudicated to be administratively non-compliant were not requested in the original tender document but were included in a variation dated the 22<sup>nd</sup> December 2009 and had to be submitted by 10am of 5<sup>th</sup> January 2010, i.e. the closing date/time of the tender, (g) the appellant Company learned of this variation on the 5<sup>th</sup> January 2010, following the Christmas shutdown, on checking the Contracts Department’s website, (h) the contracting authority failed to inform the appellants in writing of this variation and, as a consequence, it could not reject their offer for the late delivery of the samples – at 10.45 hrs instead of at 10.00 hrs – as required in that variation and (i) the term ‘must’ at article 4.1 was a clear indication that the failure by the appellant Company to sign the *Non Collusive Tendering Certificate* rendered the appellants’ submission ‘incomplete’ and hence the Department of Contracts was bound to use or could have used the discretion contemplated in article 27.1. for the sake of proportionality, equity and justice;
- having also taken note of the reference made by the appellants’ legal advisor to ECJ Case 76/81 decided in 1982 (Transporoute Case);
- having taken note of the fact that (a) the Secretary of the adjudication board stated that an email had been sent to the appellant Company on the 22<sup>nd</sup> December 2009 on the email address pb@vellafalzon.com and (b) Mr Vella Falzon’s claim that his firm had been on Christmas shutdown from the 22<sup>nd</sup> December till the 5<sup>th</sup> January and that Ms Patrizia Borg, one of his employees and to whom the contracting authority claimed to have sent the email with the variation, did not have access to emails from outside the firm’s premises, this being the reason why he was only informed by Ms Borg of the variation on the 5<sup>th</sup> January 2010 when the latter checked the website of the Contracts Department;
- having heard Mr Farrugia state that (a) on the 5<sup>th</sup> January 2010, the appellants’ deliveryman called on three separate occasions, namely, twice before the closing time (10.00 hrs), when he delivered the samples requested in the original tender and the third time at 10.45 hrs when he delivered the samples

requested in the addendum and (b) the adjudication board had to abide by the rules and that, at that stage, the appellant Company had been adjudicated administratively and, on being found non-compliant (third sample delivered after 10.00 hrs), it could not evaluate the Company's offer technically;

- having further deliberated on the DG Contracts evidence, particularly the reference made to the fact that (a) apart from the general declaration requested from the tenderer in the initial part of the tender *dossier*, the contracting authority also, specifically, requested the submission of the *Non Collusive Tendering Certificate* as a mandatory requirement and (b) the amendments to the tendering process announced by the Minister of Finance were applicable to tenders which had the closing date after the relevant information session, i.e. after the 12<sup>th</sup> March 2010;
- having also taken note of Dr Bonello's remark relating to instances where declarations may be considered to be false thus being considered as a criminal offense;

reached the following conclusions, namely:

1. The PCAB feels that the issue relating to the submission of samples could have easily been resolved in time through proper communication between recipient of samples (contracting authority) and tenderer's representative. The PCAB has taken cognizance of the fact that before the closing time (10.00 hrs), the tenderer's representative had already gone twice to submit samples to fulfil obligations. On this issue the PCAB favourably accepts the appellant Company's reason for filing the appeal.
2. The PCAB, however, contends that mandatory certificates have to be duly filled and signed as required. Whilst it is a fact that recent changes to local procurement procedures contemplated that errors of omission should not lead to outright tender rejection, yet, the conditions prevailing at the time of this particular call still fell within the 'old' legal provisions. The PCAB notes that it is a fact that the amendments to the tendering process announced by the Minister of Finance were applicable to tenders which had the closing date after the relevant information session, i.e. after the 12<sup>th</sup> March 2010 and, as is known, the closing date of this tender was 5<sup>th</sup> January 2010. This Board also cannot accept the argument that, since the appellants claimed that the 'Non Collusive Tendering Certificate' was neither substantial nor, in any way, affect the competitiveness of the other bidders, one could become oblivious of the fact that the tender *dossier* regarded this certificate as mandatory.
3. Furthermore, the PCAB cannot find in favour of the appellant Company who, arbitrarily, decided that the submission in question is 'incomplete', (PCAB) arguing that tenderers do not have the right to pick what they consider to be pertinent but, simply, they are required to abide by tender conditions '*sine qua non*'.

As a consequence of '2' and '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

*26.04.2010*