

## PUBLIC CONTRACTS APPEALS BOARD

### Case No. 196

#### GHRC 007/2009

#### Tender for the Installation of Lifts at the 'Banca Giuratale', Valletta

This call for tenders was originally published in the Government Gazette on 30.09.2009. The closing date for this call for offers was 28.10.2009.

Four (4) different tenderers submitted five (5) offers.

On 23.11.2009 *Messrs Panta Marketing and Services Ltd* filed an objection against the intended award of the tender in caption to *Messrs Titan International Ltd*.

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 Panta Marketing and Services Ltd**

Mr Charles Barbara	Manager
Mr Frans Borg	Representative

#### **Titan International Ltd**

Dr Louis Thompson	Legal Representative
Mr Steve Vella	Representative

#### **Grand Harbour Regeneration Corporation (GHRC)**

Engineer Silvio Aquilina	Technical Adviser
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#### **Evaluation Board**

Mr Chris Paris	Chairman
Mr Damien Vella Lenicker	Member and A&CE
Mr Mario Sammut	Member
Mr Antoine Portelli	Member
Mr Ray 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.

Mr Charles Barbara, representing Messrs Panta Marketing and Services Ltd, the appellants, explained that their objection was based on three points, namely:

(i) *Discrepancies in Published Results*

According to Mr Barbara, in the 'Schedule of Tenders' published on the 29<sup>th</sup> October 2009 four valid offers were listed whereas in the subsequent 'Notice of Award of Tender' published on 16<sup>th</sup> November 2009 five offers were listed with Titan International Ltd, the recommended tenderer, offering two separate options. Mr Barbara contended that normal practice had it that different options submitted by the same tenderer were listed as separate offers.

Mr Chris Paris, Chairman of the adjudication board and CEO of Grand Harbour Regeneration Corporation, the contracting authority, explained that the 'Schedule of Tenders' was meant to display the tenderers who had participated in this call for tenders - with no prices divulged - whereas the 'Notice of Award of Tender' was meant to display the number of offers received with the price quoted against each one of them.

The Chairman PCAB drew the attention of Mr Paris that according to the heading given to the schedule it should have displayed the number of offers received – i.e. 5 offers - otherwise to display the tenderers the schedule should have been titled 'Schedule of Tenderers' – 4 tenderers in all.

Mr Paris conceded that perhaps the way the schedule had been titled was not very appropriate but he assured those present that the adjudication board had no intention to mislead anyone but that this shortcoming was the result of inexperience on similar matters on the part of the adjudication board.

(ii) *Specifications*

At this stage Mr Barbara declared that this aspect of the objection amounted to an assumption on their part or, as he put it, that they had 'sufficient reason to believe' that the equipment offered by the recommended tenderer did not comply with specifications.

The Chairman PCAB intervened to remark that, in the absence of concrete proof, the PCAB could not consider this aspect of the objection because arguments based on a series of assumptions would amount to a 'fishing expedition', something which the PCAB did not allow.

Mr Barbara admitted that he did not possess any proof regarding this allegation.

Mr Paris declared that the adjudication board, acting on the advice of the technical adviser, had carried out the technical evaluation of the offer submitted by the recommended tenderer.

The Chairman PCAB expressed the opinion that, generally speaking, the PCAB is always against an adjudication board relying on the advice of a sole technical person because that would defeat the purpose of appointing a board to evaluate a tender and, as a consequence, he suggested that, preferably, there ought to be more than one technical opinion.

Mr Damien Vella Lenicker, A&CE and member of the adjudication board, remarked that the technical adviser was asked to draw up a technical report, which report was then taken into consideration by the adjudication board in its deliberations. Mr Paris said that the contracting authority expected its technical adviser to act professionally and declared that the technical adviser had signed the appropriate disclaimer form.

(iii) *Tendering Opening Stage Not Conducted in Public*

Mr Barbara claimed that the tender opening process did not take place in public as was the norm. He stated that other competing tenderers had informed him that when they had asked whether they could be present for the tender opening stage they were informed that there was no need for them to be present for the opening of the tenders since the relative schedule of tenders would eventually be displayed on the notice board. Mr Barbara retained that it was against normal practice not to open the tenders in public.

On his part, Mr Paris declared that the closing time of the tender was at noon and soon after they opened the tender box to check the number of bids received. Mr Paris informed those present that none of the bidders and no one from the general public happened to be present when the tender box was opened. Mr Paris categorically denied that anyone had asked him to be present for the tender opening process or that he somehow refused such requests.

Mr Francis Attard, Director General (Contracts), remarked that, usually, the tender box was opened right after the closing time of the tender.

Mr Frans Borg, also representing the appellant Company, stated that he had delivered the tender submission just before tender closing time and added that he did not ask anyone if he could attend to the tender opening process.

Mr Barbara reiterated that another tenderer participating in this call for tenders had informed him that when he asked whether he could stay on to watch over the tender opening process he was informed that the tenders were going to be opened at a later stage.

The Chairman PCAB stated that tenderers had every right to be present when the tenders were opened and that he preferred that tender boxes were opened

right after the closing time rather than at a later stage. The Chairman remarked that the PCAB could not give much weight to the information that the appellant Company claimed to have obtained from another tenderer - to 'second hand information' - and it would have been preferable had the other tenderer lodged an objection in this regard in its own name.

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 03.12.2009 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 Mr Barbara's (a) contention that normal practice had it that different options submitted by the same tenderer have to be listed as separate offers and not as was originally stated by the contracting authority in the 'Schedule of Tenders' dated 29.10.2009, (b) claim - which remained unsubstantiated - as far as the appellant Company's assumption that that they had 'sufficient reason to believe' that the equipment offered by the recommended tenderer did not comply with specifications and (c) claim that the tender opening process did not take place in public as was the norm and that other competing tenderers had informed him that when they had asked whether they could be present for the tender opening stage they were informed that there was no need for them to be present for the opening of the tenders since the relative schedule of tenders would eventually be displayed on the notice board;
- having also taken note of Mr Paris' (a) clarification as to the genuine mistake in the content listed in the 'Schedule of Tenders' which should have read 'Schedule of Tenderers' instead, (b) claim that the adjudication board, acting on the advice of the technical adviser, had carried out the technical evaluation of the offer submitted by the recommended tenderer, (c) declaration that that the closing time of the tender was at noon and, in line with praxis adopted by the Department of Contracts, soon after they opened the tender box to check the number of bids received being fully cognizant of the fact that the general public - including tenderers, of course - were aware of the fact that they could attend to the opening of tender boxes and (d) statement wherein he denied that anyone had asked him to be present for the tender opening process or that he somehow refused such requests;
- having heard Mr Vella Lenicker state that a technical adviser was asked to draw up a technical report, which report was then taken into consideration by the adjudication board in its deliberations;

reached the following conclusions, namely:

1. The PCAB feels that the fact that the contracting authority had erroneously titled a particular schedule as 'Schedule of Tenders' instead of 'Schedule of

Tenderers' was a genuine mistake and that, overall, such mistake did not adversely reflect in any way on the adjudication board's 'modus operandi' adopted in reaching its decision following evaluation of alternatives presented.

2. The PCAB argues that, in the absence of concrete proof, it cannot consider the objection raised by the appellant Company with regard to the fact that they claimed that they had 'sufficient reason to believe' that the equipment offered by the recommended tenderer did not comply with specifications. The PCAB contends that arguments based on a series of assumptions would amount to a 'fishing expedition', something which the PCAB never allows.
3. The PCAB also feels that the tender opening process did take place in line with normal praxis.

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

26.04.2010