

PUBLIC CONTRACTS APPEALS BOARD

Case No. 206

CT/2499/2009 Advert No CT/245/2009; MTA 754/2009

Service Tender – Design and Construction of Stands at International Travel and Tourism Fairs for a Two Year Period 2010-2011 under a Framework Agreement

This call for tenders was published in the Government Gazette on 11 December 2009. The closing date for this call for offers with an estimated value of € 596,000 was 2 February 2010.

Four (4) tenderers had submitted their offers

Malta Fairs and Convention Centre (MFCC) filed an objection on the 7 April 2010 against the decision of the Contracts Department to disqualify its offer for being considered administratively non-compliant.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Anthony Pavia and Mr. Carmel J Esposito as members convened a public hearing on Wednesday, 7 July 2010 to discuss this objection.

Present for the hearing were:

Malta Fairs and Convention Centre (MFCC)

Mr Edward Zammit	General Manager
Mr Godwin Caruana	Representative

Casapinta Design Group

Mr Tonio Casapinta	Representative
Mr Damian Casapinta	Representative

Malta Tourism Authority (MTA)

Dr Michael Psaila	Legal Representative
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Evaluation Board

Mr Josef Formosa Gauci	Chairman
Mr Francis Albani	Evaluator
Ms Suzanne Cassar Dimech	Evaluator
Ms Patricia Attard	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 motive/s of the objection.

Mr Edward Zammit, authorised representative of the Malta Fairs and Convention Centre (MFCC), the appellant Company, made it clear that his firm's objection did not concern the fact that the tender was going to be awarded to Casapinta Design Group but the objection was against the decision of the adjudication board to declare his offer as non-compliant on administrative grounds. Mr Zammit found it odd that, a number of days following the closing date of the tender, his firm had been called upon to make a presentation on its proposal and then the bid was adjudicated administratively non-compliant. The appellants' representative went on to state that the reason given for the exclusion of the Company's offer was the non-submission of an appropriate statement from the bank which, in his view, was a rather minor infringement given that his firm had submitted its audited accounts as lodged with the Malta Financial Services Authority.

Mr Zammit conceded that both the 'bank statement' and the 'professional indemnity insurance' were mandatory requirements and he even acknowledged that, through an oversight, these documents had not been submitted.

Dr Michael Psaila, legal representative of the Malta Tourism Authority (MTA), referred to his letter dated 19th May 2010 and remarked that, during the adjudication process, it transpired that this mandatory requirement had not been furnished by the appellant Company, a fact which was not being contested by the appellants and, as a result, the adjudication board had no option but to consider the Malta Fairs and Convention Centre's bid as administratively non-compliant. Dr Psaila argued that the bank statement was considered an important document that would have aided the contracting authority in assessing the financial standing of the tenderer. Dr Psaila went on to cite the relevant clause in the tender document, i.e.:

Clause 3 (c) of the 'Instructions to Tenderers' stated that:

"Selection Criteria:

Article 50 – Evidence of Financial and Economic Standing

(1) Proof of economic operator's economic and financial stability by supplying the following:

- (i) appropriate statements from banks, or where appropriate a professional indemnity insurance;*
- (ii) the presentation of balance sheets or abridged audited accounts for the years 2006, 2007 and extracts of 2008".*

Dr Psaila remarked that whereas (i) provided an option of either a bank statement or an insurance, the requirements at (i) and (ii) were both mandatory in the sense that the submission of the audited accounts did not do away with the presentation of the bank statement or the professional indemnity insurance.

Dr Psaila informed those present that the presentation was made on the 16th of February, 2010 or five days following the opening of tenders and hence the bids had not been examined for administrative compliance by that time.

Mr Josef Formosa Gauci, Chairman of the Adjudication Board, explained that one of the firms had requested to make a presentation about the product it was offering and the contracting authority decided, with the concurrence of the other participating tenderers, to offer the same opportunity to all the bidders.

Mr Zammit stated that the bank reference letter dated 25th January 2010 which he had attached to the reasoned letter of objection had not been presented with his original tender submission. The Chairman PCAB pointed out that this admission by the appellant Company's representative did not correspond to the declaration he made in paragraph (i) of his reasoned letter of objection.

Dr Psaila concluded that the fact was that the appellants had failed to produce a document which was a mandatory requirement.

The Chairman PCAB remarked that the recent amendments to the procurement regulations, which took into account the non-submission of certain documents in the original tender submission, were not in force at the time this tender was issued and adjudicated.

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 07.04.2010 and also through their verbal submissions presented during the public hearing held on 07.07.2010, had objected to the decision taken by the General Contracts Committee;
- having taken note of the appellant Company's General Manager's (a) claim that the reason given for the exclusion of the Company's offer was the non-submission of an appropriate statement from the bank which, in his view, was a rather minor infringement given that his firm had submitted its audited accounts as lodged with the Malta Financial Services Authority, (b) admission that both the 'bank statement' and the 'professional indemnity insurance' were mandatory requirements that, through an oversight, these documents had not been submitted and (c) declaration that the bank reference letter dated 25th January 2010 which he had attached to the reasoned letter of objection had not been presented with his original tender submission ;
- having also taken note of the contracting authority's legal advisor who, *inter alia*, stated that (a) during the adjudication process, it transpired that both the 'bank statement' and the 'professional indemnity insurance' had not been submitted by the appellant Company thus, as a consequence, the appellants' bid being rendered as administratively non-compliant and (b) the bank statement was considered an important document that would have aided the

contracting authority in assessing the financial standing of the tenderer and that the submission of the audited accounts did not do away with the presentation of the bank statement or the professional indemnity insurance;

reached the following conclusions, namely:

1. The PCAB cannot disregard the fact that, through the appellant Company's own submission, it was a fact that the latter had overlooked a mandatory requirement such as the one necessitating the submission of both the 'bank statement' and the 'professional indemnity insurance'
2. The PCAB feels that the appellant Company's attempt to try to score points by resorting to include in their reasoned letter of objection a bank reference letter dated 25th January 2010 which, by the appellant Company's own representative's admission, had not been presented with the original tender submission, to be in bad taste and unacceptable
3. The PCAB acknowledges that, whilst it is not permissible for a tenderer to select what to submit or not, yet, it is also equally not tolerable for repeated claims of oversights, regardless of whether these were carried out in good faith or not, to be acceptable during an evaluation / adjudication process.

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 said appellants should not be reimbursed.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Carmel J Esposito
Member

16 July 2010