

PUBLIC CONTRACTS APPEALS BOARD

Case No. 228

Adv. CT 352/2009; CT/2240/2009

Service Tender for Restoration Works to Birgu Landfront Fortifications BRG 06

This call for tenders was published in the Government Gazette on 1 September 2009. The closing date for this call for offers was 22 October 2009.

The estimated value of this tender was Euro 645,000 (exclusive of VAT).

Five (5) tenderers submitted their offers.

Schembri Barbros Ltd filed an objection on the 23 July 2010 following the decision by the Contracts Department to award the tender in caption to *Polidano Bros Ltd*.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Carmel J Esposito as members convened a public hearing on Monday, 4 October 2010 to discuss this objection.

Present for the hearing were:

Schembri Barbros Ltd

Dr John Bonello
Mr Anton Schembri

Legal Representative
Representative

Polidano Bros Ltd

Dr Jesmond Manicaro

Legal Representative

Ministry for Resources and Rural Affairs (MRRA)

Dr Victoria Scerri

Legal Representative

Adjudicating Board

Dr Albert Caruana
Mr Joseph Casaletto

Chairman
Secretary

Department of Contracts

Mr Francis Attard

Director General (Contracts)

After the Chairman's brief introduction as to how the hearing was going to be conducted, the appellant was invited to explain the motive/s of the objection.

Dr John Bonello, legal representative of Schembri Barbros Ltd, claimed that Polidano Bros Ltd was not in a position to produce their accounts in the form requested in the tender document and the reason for that was that Polidano Bros Ltd did not have audited accounts for the years 2006,2007 and 2008 so much so that the last set of audited accounts submitted by Polidano Bros Ltd to the Malta Financial Services Authority (MFSA) at the time of the tender submission – closing date of 22nd October 2009 – was for the year 2004. At this point Dr Bonello submitted a document downloaded from the website of MFSA to this effect whilst adding that during the summer of 2010 Polidano Bros Ltd did submit a set of audited accounts to the MFSA.

Dr Albert Caruana, chairman of the adjudicating committee, referred to *Clause 4.1.2.of Section 1* entitled 'Instructions to Tenderers' which provided as follows:

“Evidence of financial and economic standing in accordance with Article 50 of LN1 77/2005 showing that the liquid assets and access to credit facilities are adequate for this contract, confirmed by financial statements for 2006, 2007 and 2008 verified by a certified accountant. In the case of companies established during the dates indicated, only the available financial statements will be required. This evidence must be provided using Form 4.4, Financial Statement, Volume 1, Section 4 of the tender documents. A statement by a recognised bank certifying credit facilities of at least € 100,000 for the duration of the project should also be enclosed.”

Dr Caruana remarked that the tender document required accounts verified by a certified public accountant and Clause 4.1.3 requested the financial projections for the two years ahead, which was also provided, and therefore the submission by Polidano Bros Ltd was considered in order from this point of view.

Dr Victoria Scerri, legal representative of the Ministry for Resources and Rural Affairs (MRRA), said that the regulations did not provide solely for a set of audited accounts but it provided a choice in terms of accounting documentation that could be requested.

Dr Jesmond Manicaro, legal representative of Polidano Bros Ltd, objected to Dr Bonello's request to examine the accounts of Polidano Bros Ltd and to the appellants' representative's attitude of casting doubts on his client's submission.

At that stage, Dr Bonello made reference to Case No. 189 which, he claimed, had identical characteristics, and quoted PCAB conclusion no. 3:

“The PCAB opines that (a) an accountant, per se, could not certify that the accounts gave a true and fair view of the financial situation of the company but that it was the auditor who could issue such certification and (b) unless otherwise instructed by or agreed upon with the contracting authority, a financial statement should always be submitted in its entirety in the same format as provided to MFSA.”

The Chairman PCAB pointed out that the PCAB had to go through Case No. 189 to check the circumstances of that particular case and thus verify if it had the same characteristics as the case in hand.

Dr Manicaro remarked that the pertinent regulation was not exhaustive but was rather general so much so that it provided various options whereby the contracting authority could ascertain the financial standing of the bidder, such as:

“51. (2) Evidence of the economic operators’ technical abilities may be furnished by one or more of the following means according to the nature, quantity or importance, and use of the works, supplies or services:”

Dr Manicaro insisted that his client had abided by all the requisites emanating from the tender document.

At the request of Dr Bonello, the PCAB verified from the submission of Polidano Bros Ltd that (i) the accounts submitted were in respect of 2006, 2007 and 2008 and (ii) these accounts were signed by a certified public account. The PCAB also verified that Schembri Barbros Ltd had submitted its audited accounts.

Dr Bonello then referred once again to PCAB Case No. 189 (page 5) and quoted as follows:

“Dr Scicluna Cassar quoted section 4.1.2 (page 7):

“Evidence of financial and economic standing in accordance with Article 50 of LN 177/2005 showing that the liquid assets and access to credit facilities are adequate for this contract, confirmed by a financial statement for the years 2005, 2006 and 2007 verified by a certified accountant...”

Dr Scicluna Cassar explained that, in the 2005 financial statements, the appellant indicated in the contents page, reference to pages 1 to 33 but, in fact, submitted only pages 1 to 21 thereby omitting, intentionally or not, the ‘notes to the financial statements’ and ‘the auditor’s report’. She added that the same applied to the financial statements presented for 2006 and 2007.

The Chairman PCAB remarked that a financial statement should always be submitted in its entirety. He added that in accounting practice the accounts were verified not by an accountant but by an auditor and that the auditor could even qualify those accounts by adding his remarks thereon.”

Dr Bonello pointed out that Clause 4.1.2 was the same both in this case and in Case No. 189. Dr Bonello argued that, given the identical features of these two cases, what the PCAB had pronounced with regard to Case No. 189 ought to also apply to this case.

Dr Scerri insisted that the adjudicating board had carried out its evaluation in accordance with the provisions of the tender document.

On his part, Mr Francis Attard, Director General (Contracts), under oath, remarked that:

- *'financial statements for 2006, 2007 and 2008 verified by a certified accountant'* in Clause 4.1.2 of the tender document meant that a certified public accountant and holder of the warrant required by law had to verify that the information given in the accounts was correct;
- as far as he was aware, the verification requested in Clause 4.1.2 was part of the accounting process and not of an audit process;
- the decision of the PCAB applied solely to that particular case and to that particular tender and that it was not applicable to all tenders; *and*
- with regard to Case No. 189, as in any other case, the Contracts Department had acted on the conclusions reached by the PCAB but he could not recall if action was taken with regard to the recommendations made by the PCAB in that case.

The Chairman PCAB intervened to remark that, with regard to the recommendations made by the PCAB, it was expected that the entities concerned would act to rectify the shortcomings otherwise the same mistakes would keep on repeating themselves.

Dr Manicaro pointed out that an accountant had to act in accordance with the warrant that he held because the accountant in fact carried out a public function as his title suggested 'certified public accountant'. Dr Manicaro then quoted from Regulation 50 as follows:

"50. (1) Proof of economic operator's economic and financial standing may, as a general rule, be furnished inter alia, by one or more of the following:

(a) appropriate statements from banks, or where appropriate, evidence of relevant professional indemnity insurance;

(b) the presentation of balance-sheets or extracts therefrom, where publication of the balance sheets is required under company law in the country in which the economic operator is established;

(c) a statement of the economic operator's overall turnover and, where appropriate its turnover in respect of the products, works or services to which the contract relates for the three previous financial years depending on the date on which the economic operator was set up or the economic operator started trading, as far as the information on these turnovers is available.

(4) Contracting authorities shall specify in the contract notice or in the invitation to tender, which references mentioned in subregulation (1) have been chosen and which must be provided, and of any others it deems fit."

Dr Manicaro stated that the very wording of the article and in particular the subparagraph (4) thereof showed that the list of references mentioned there was not exhaustive and that the contracting authority did exactly what was required in

Regulation 50 (1) and (4), namely the contracting authority had to choose from the references mentioned or to specify from others that it deemed fit and in this case it had opted for “*financial statement for the years 2006, 2007 and 2008 verified by a certified accountant ..*”.

Dr Manicaro remarked that his client had been awarded a good number of tenders on the presentation of these accounts.

Dr Bonello insisted that this was the same situation as that encountered in Case No. 189 and, as a consequence, he expected the PCAB to act consistently. Dr Bonello did not contest the statement by Polidano Bros Ltd that it had been awarded tenders on the basis of the accounts as presented in the case in hand, however, it was also true that in Case No. 189 the PCAB did not find these accounts acceptable and had decided against Polidano Bros Ltd.

Dr Bonello also casted doubts as to whether the accountant who verified these accounts was in the employ of the appellant. The Chairman PCAB remarked that a warranted accountant had to act professionally and ethically and not act blindly according to the instructions given by his employer.

Dr Scerri disagreed that the facts of this case were identical to those of Case No. 189 especially with regard to the issue of the financial statements. Dr Scerri stated that she had no doubt that any chartered accountant could in fact verify the financial statements.

Dr Manicaro stated that the rule of precedent could not apply when the facts of one case were different from those of the other case.

Dr Bonello insisted that in Case No. 189 the PCAB had decided on the same text as that of Clause 4.1.2 included in this tender document.

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 27 July 2010 and also through their verbal submissions presented during the public hearing held on 4 October 2010 had objected to the decision taken by the General Contracts Committee;
- having taken note of the appellants’ (a) claim that Polidano Bros Ltd was not in a position to produce their accounts in the form requested in the tender document due to the fact that these did not have audited accounts for the years 2006, 2007 and 2008 so much so that the last set of audited accounts submitted by Polidano Bros Ltd to the Malta Financial Services Authority (MFSA) at the time of the tender submission – closing date of 22nd October 2009 – was for the year 2004 and (b) reference to Case No. 189, in particular to Clause 4.1.2 which the appellants considered to be the same and thus, equally applicable, to both references;

- having also taken note of the contracting authority's representative's (a) remark in respect of the fact that the tender document required accounts verified by a certified public accountant and Clause 4.1.3 requested the financial projections for the two years ahead, which was also provided, and therefore the submission by Polidano Bros Ltd was considered in order from this point of view, (b) reference to the fact that the regulations did not provide solely for a set of audited accounts but it provided a choice in terms of accounting documentation that could be requested and (c) insistence that the adjudicating board had carried out its evaluation in accordance with the provisions of the tender document;
- having taken cognizance of Polidano Bros Ltd's legal representative's (a) remark that the pertinent regulation was not exhaustive but was rather general so much so that it provided various options whereby the contracting authority could ascertain the financial standing of the bidder, (b) insistence that his client had abided by all the requisites emanating from the tender document and (c) reference to the fact that the rule of precedent could not apply when the facts of one case were different from those of the other case
- having also noted DG (Contracts) testimony

reached the following conclusions, namely:

1. With reference to the claim made by the appellant company that Polidano Bros Ltd was not in a position to produce their accounts in the form requested in the tender document due to the fact that these did not have audited accounts for the years 2006, 2007 and 2008, the PCAB notes that
 - (a) the tender document required *inter alia* that accounts be verified by a certified public accountant
 - (b) reference was made by the appellant company to case no. 189, in particular to Clause 4.1.2, which the appellants considered to be the same and thus, equally applicable, to both references, namely case no. 189 and this case under review (i.e. case no. 228).

In its decision relating to case no. 189 this Board had opined that an accountant, *per se*, could not certify that the accounts gave a true and fair view of the financial situation of the company but that it was the auditor who could issue such certification. Whilst maintaining its stand on this issue - albeit one has to recognise that, technically, an auditor is also an accountant by profession and this is where a *lacuna* in the terminology used in tender specifications could arise unless specifically stated - yet one has to bear in mind that all that is decided upon in a case has to be taken within the context of the case being discussed. In the case discussed in case no. 189, in the 2005 financial statements, the appellant company had indicated in the contents page, reference to pages 1 to 33 but, in fact, submitted only pages 1 to 21 thereby omitting, intentionally or not, the 'notes to the financial statements' and 'the auditor's report'. This scenario repeated itself in the financial statements presented for 2006 and 2007.

Yet, in the case being addressed in this decision relevant to case no. 228, this Board notes that the adjudicating board remarked that the tender document required accounts verified by a certified public accountant and Clause 4.1.3 requested the financial projections for the two years ahead, which was also provided, and, as a result, the submission by Polidano Bros Ltd was considered in order from this point of view. It transpired that the focus, as placed in this tender by the contracting authority, was more on (a) the evidence of financial and economic standing in accordance with Article 50 of LN1 77/2005 showing that the liquid assets and access to credit facilities are adequate for this contract and (b) that a statement provided by a recognised bank certifying credit facilities of at least € 100,000 for the duration of the project had to be enclosed. In other words, the submission of the accounts was only meant to corroborate but not to be regarded as a ‘sine qua non’ as substantiated by the remark passed by the contracting authority’s representative wherein it was stated that the pertinent regulation was not exhaustive but was rather general, so much so that it provided various options whereby the contracting authority could ascertain the financial standing of the bidder.

This Board recognises that a contracting authority may avail of whatever tool it desires to ensure that it has the right operational, commercial and administrative comfort when deliberating on the merits of the participating tenderers. The PCAB cannot re-design what would have been the primary scope of the contracting authority. The PCAB’s remit is to ensure that all offers submitted by all participating tenderers are equally, objectively and fairly analysed. This Board is fully cognisant of the fact that what may be of utmost relevance to one contracting authority may simply be one of a sequence to another contracting authority.

2. The PCAB rejects the claim made by the appellant company’s representatives that in Case No. 189 the PCAB did not find these accounts acceptable and had decided against Polidano Bros Ltd.

This Board would like to place emphasis on the fact that, amongst other things, the PCAB had “opined” that an accountant, *per se*, could not certify that the accounts gave a true and fair view of the financial situation of the company but that it was the auditor who could issue such certification. However, this was not the only issue that was considered by this Board. Other, perhaps, more pivotal issues included the fact that:

- a. unless otherwise instructed by or agreed upon with the contracting authority, a financial statement should always be submitted in its entirety in the same format as provided to MFSA. The PCAB was very much concerned by the fact that in the 2005 financial statements, the appellant company had indicated in the contents page, reference to pages 1 to 33 but, in fact, submitted only pages 1 to 21
- b. irrespective of the fact as to whether the appellant Company had submitted all the drawings in its original submission, if the tender were to be awarded to the said appellant Company, the latter would have been bound only by the 8 drawings that it would have submitted and not by the 21 drawings provided as

requested in the tender document with the PCAB being fully aware that these drawings were mandatory requirements

As a consequence of (1) to (2) 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

Edwin Muscat
Member

Carmel J Esposito
Member

18 November 2010