

## **PUBLIC CONTRACTS APPEALS BOARD**

### **Case No. 250**

#### **CT/2123/2010 - Adv No CT/115/2010**

#### **Tender for Trenching, Cable Laying and Electrical Switchgear at Carlo Diacono Girls Junior Lyceum Zejtun**

This call for tenders was published in the Government Gazette on 14<sup>th</sup> May 2010. The closing date for this call for offers with a department estimate of €110,811.75 was 6<sup>th</sup> July 2010.

Seven (7) tenderers had originally submitted their offers

CE Installations Ltd filed an objection on 16<sup>th</sup> September 2010 against the decision by the Contracts Department to disqualify its offer on being found administratively non-compliant and to recommend the award of tender to Philip Agius & Sons 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 Wednesday, 19<sup>th</sup> January 2011 to discuss this objection.

Present for the hearing were:

#### **CE Installations Ltd**

Dr Mark Mifsud Cutajar	Legal Representative
Mr Mark Camilleri	Representative
Mr Alex Muscat	Representative

#### **Philip Agius & Sons Ltd**

Mr Mario Agius	Representative
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#### **Foundation for Tomorrows' Schools (FTS)**

#### **Evaluation Board**

Mr Charles Farrugia	Chairman
Mr Ivan Zammit	Secretary
Mr Chris Pullicino	Member
Mr Andrew Ellul	Member
Mr Leonard Zammit	Member

#### **Department of Contracts**

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 its objection.

Dr Mark Mifsud Cutajar, legal representative of CE Installations Ltd, stated that by way of an email dated 9<sup>th</sup> September 2010 sent by the Contracts Department his clients were informed that their tender submission was found administratively non-compliant as it did not meet the minimum qualification criteria described in Clause 6 of Volume 1, Section 1. Dr Mifsud Cutajar remarked that the main reason for rejection was the non submission of the company's audited accounts for the previous three years.

At this point the appellant company's legal representative made the following submission:

- the company was legally formed in March of 2009 and, as a consequence, it was not possible for management to present the audited accounts for the previous three years;
- Clause 5 of the tender document dealing with 'Eligibility' did not require that the bidder had to be a company registered three years prior to the date of issue of the tender and, therefore, the contracting authority was not legally correct to reject his clients' offer for the non submission of the audited accounts for the previous three years since the company had been set up in 2009; *and*
- whilst he could not recall that his client had formally sought a clarification as to what could be submitted in lieu of the company's audited accounts, yet, his clients did submit the income tax returns of Mr Mark Camilleri, one of the company's shareholders, which he deemed were more relevant than, say, a bank statement.

The Chairman Public Contracts Appeals Board remarked that the tender was submitted by the company and not in the name of any individual shareholder of the company and, as a result, the appellant company should have sought the advice of the Contracts Department on this issue because, ultimately, it was the responsibility of the tenderer to ascertain that its submission was presented in order.

Mr Alex Muscat, also representing the appellant company, explained that the issue relating to the absence of the company's audited accounts for the previous three years was discussed with a representative of the Contracts Department - Ms Jacqueline Gili - who advised that one could submit the personal accounts of shareholder/s but she also added that, ultimately, it was up to the evaluating board to determine if such documents would suffice. Mr Muscat remarked that the personal accounts submitted were those of Mr Mark Camilleri, who was one of the two company directors and who had been operating as a sole trader in this sector for about 14 years. The same company representative further stated that, as soon as the audited accounts for the first year were prepared, they were made available to the contracting authority.

Mr Charles Farrugia, chairman of the evaluating board, contributed the following remarks:

- Clause 16.1 stipulated that '*The tender must comprise the following duly completed documents, inserted in a single, sealed envelope*', however the appellant company had

failed to submit the audited accounts of the previous three years as laid down in Clause 16.1 (c) (ii) and so the bid was considered administratively non-compliant as had been indicated in the relative administrative compliance grid;

- the absence of these mandatory documents rendered the appellant company ineligible to participate in the tendering process;
- when the appellant company encountered this difficulty in meeting the mandatory requirements Mr Farrugia opined that its management should have sought a clarification to sort it out prior to submitting its tender submission;
- Mr Mark Camilleri – one of the company’s directors - had omitted certain information in the Financial Statement Form 4.7, e.g. the working capital, assets and liabilities, and it was further noted that the data referred to his personal financial situation so much so that the figures were extrapolated from his income tax return statements for 2006, 2007 and 2008: *and*
- the first set of accounts was approved by the company’s directors on 3<sup>rd</sup> September 2010 whereas the appellant company had two working days following the receipt of letter 15<sup>th</sup> July 2010 to rectify its shortcomings.

The Chairman Public Contracts Appeals Board noted that, the way the tender document was drafted it meant that companies that had not been set up for 3 years were, effectively, precluded from participating and proceeded by stating that, such a barrier, prima facia, amounted to discrimination.

Mr Francis Attard, Director General (Contracts), remarked that last year the tendering procedure was modified in a way that the bidder was given the opportunity to rectify certain, not all, shortcomings in one’s tender submission within two working days from being so notified and against the payment of €50. He added that the bidder had to put the documents being submitted by way of rectification along with the receipt of the €50 penalty in a sealed envelope and deposit it in the tender box the contents of which would then be opened and endorsed by the members of the General Contracts Committee.

Mr Attard remarked that contracting authorities requested past audited accounts for the purpose of ensuring that participating bidders had the necessary resources to carry out the contract.

The Chairman Public Contracts Appeals Board remarked that, at this point, one was not debating the right of the contracting authority to ascertain that the selected bidder had the resources required to execute the contract but one had to consider whether it was correct to exclude from the tendering process all the companies that had not been set up for at least 3 years. He added that, if anything, the disqualification of bidders for lack of resources had to follow some kind of evaluation process.

The Chairman Public Contracts Appeals Board noted that by way of a letter dated 15<sup>th</sup> July 2010 the Contracts Department notified the appellant company to rectify the following administrative shortcomings:

- i) Form 4.3 – Power of Attorney Form marked ‘Not Applicable’ and thus unacceptable *and*
- ii) Financial Statement Form 4.7 of Volume 1 Section 4 had not been signed in the required format and the declaration submitted from the certified auditor was not acceptable.

The Chairman Public Contracts Appeals Board pointed out that no reference was made at that stage to the non submission of the audited accounts and hence the appellant company was not made aware of this shortcoming even if in the company’s circumstances it was not possible to rectify it.

Mr Ivan Zammit, secretary to the adjudicating board, noted that the letter issued by Contracts Department did not faithfully reflect the evaluation report.

Mr Farrugia stated that the General Contracts Committee issued clear instructions that if the bidder did not submit mandatory documents then that bidder had to be disqualified.

Mr Francis Attard corroborated this and he further stated that, in such a case, the General Contracts Committee considered the bidder as ineligible to participate in the tendering process. Mr Attard remarked that, in a case as the one under examination, the bidder concerned, the appellant company, ought to have asked for a clarification from the contracting authority prior to submitting its bid once it was aware that its particular circumstances did not allow it to fulfil all mandatory criteria.

The Chairman Public Contracts Appeals Board expressed the opinion that, once a company was properly set up, it could not be precluded from tendering on the sole pretext that it had not been set up for 3 years or more but it had to be evaluated on its own merits. He cited the example of a person with adequate financial resources and sufficient experience who decided to part with a company to set up his own company and, in the process, transferring his knowhow and resources to the new company which, nevertheless, would not have a track record of its own. The Chairman Public Contracts Appeals Board remarked that ‘audited accounts’ was one of the tools whereby one could assess the standing of a company but there were other aspects that one could also take into consideration.

Mr Farrugia commented that this tender was open to sole traders and, had Mr Camilleri tendered as a sole trader, the documents submitted in his personal capacity would have been taken into account but the fact was that the appellant company tendered as a company. At this point, albeit Mr Farrugia rendered the company’s submission as ineligible, yet he stated that this mandatory requirement had since been removed from the tender document.

The Chairman Public Contracts Appeals Board opined that, in this case, it appeared that the appellant company had been put at a disadvantage for having transformed its operational set up from that of a sole trader into a limited liability company.

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 16<sup>th</sup> September 2010 and also through their verbal submissions presented during the hearing held on 19<sup>th</sup> January 2011, had objected to the decision taken by the pertinent authorities;
- having noted the appellant company’s representatives’ (a) reference to the fact that the main reason for the company’s rejection of offer submitted was the non submission of the company’s audited accounts for the previous three years, (b) argument sustained that since the company was legally formed in March of 2009 it was not possible for management to present the audited accounts for the previous three years, (c) reference to the fact that Clause 5 of the tender document dealing with ‘Eligibility’ did not require that the bidder had to be a company registered three years prior to the date of issue of the tender and, as a consequence, the contracting authority was not legally correct to reject its offer for the non submission of the audited accounts for the previous three years since the company had been set up in 2009, (d) claim that in lieu of the company’s audited accounts the income tax returns of Mr Mark Camilleri, one of the company’s shareholders who had been operating as a sole trader in this sector for about 14 years, was submitted and (e) reference to the fact that, as soon as the audited accounts for the first year were prepared, they were made available to the contracting authority;
- having considered the contracting authority’s (a) reference to the fact that Clause 16.1 stipulated that ‘*The tender must comprise the following duly completed documents, inserted in a single, sealed envelope*’, however the appellant company had failed to submit the audited accounts of the previous three years as laid down in Clause 16.1 (c) (ii) and so the bid was considered administratively non-compliant as had been indicated in the relative administrative compliance grid, (b) claim that the absence of these mandatory documents rendered the appellant company ineligible to participate in the tendering process, (c) reference to the issue that, apart from the fact that Mr Mark Camilleri – one of the company’s directors - had omitted certain information in the Financial Statement Form 4.7, e.g. the working capital, assets and liabilities, it was further noted that the data referred to his personal financial situation so much so that the figures were extrapolated from his income tax return statements for 2006, 2007 and 2008, (d) argued that the first set of accounts was approved by the company’s directors on 3<sup>rd</sup> September 2010 whereas the appellant company had two working days following the receipt of letter 15<sup>th</sup> July 2010 to rectify its shortcomings, (e) reference to the fact that the letter issued by Contracts Department did not faithfully reflect the evaluation report, (f) reference to the fact that the General Contracts Committee issued clear instructions that if the bidder did not submit mandatory documents then that bidder had to be disqualified, (g) claim that this tender was open to sole traders and, had Mr Camilleri tendered as a sole trader, the documents submitted in his personal capacity would have been taken into account but the fact was that the appellant company tendered as a company and (h) reference to the fact that the company’s submission was rendered ineligible, yet it was stated that this mandatory requirement had since been removed from the tender document;

- having also considered Mr Attard's testimony, especially (a) the fact that, in similar instances, the General Contracts Committee considered the bidder as ineligible to participate in the tendering process and (b) his argument that, in a case as the one under examination, the bidder concerned, the appellant company, ought to have asked for a clarification from the contracting authority prior to submitting its bid once it was aware that its particular circumstances did not allow it to fulfil all mandatory criteria,

reached the following conclusions, namely:

1. The Public Contracts Appeals Board opines that the tender was submitted by the company and not in the name of any individual shareholder of the company and, as a result, the appellant company should have sought the advice of the Contracts Department on this issue because, ultimately, it was the responsibility of the tenderer to ascertain that its submission was presented in order.
2. The Public Contracts Appeals Board feels, however, that the way the tender document was drafted implied that companies that had not been set up for 3 years were, effectively, precluded from participating and this Board opines that such a barrier, prima facia, amounts to discrimination - the disqualification of bidders for lack of resources had to follow some kind of evaluation process. The Public Contracts Appeals Board further feels that, once a company was properly set up, it could not be precluded from tendering on the sole pretext that it had not been set up for 3 years or more but it had to be evaluated on its own merits - 'audited accounts' was one of the tools whereby one could assess the standing of a company but there were other aspects that one could also take into consideration.
3. The Public Contracts Appeals Board cannot but, once again, note that there seems to be little effort made to ensure that evaluation reports are faithfully reflected in the letters of exclusion sent by the Contracts Department.
4. The Public Contracts Appeals Board concludes that, in this case, it appeared that the appellant company had been put at a disadvantage for having transformed its operational set up from that of a sole trader into a limited liability company.

In view of the above this Board finds in favour of the appellant company and also recommends that the deposit paid by the appellants should be reimbursed.

Alfred R Triganza  
Chairman

Edwin Muscat  
Member

Carmel J Esposito  
Member

*16 February 2011*