

PUBLIC CONTRACTS APPEALS BOARD

Case No. 254

CT/2646/2009 Adv No CT/122/2010

Tender for Refurbishment Works for the Valletta Breakwaters, Malta

This call for tenders was published in the Government Gazette on 25th May 2010. The closing date for this call for offers with a department estimate of €1,050,000 (excluding VAT) was 15th July 2010.

Four (4) tenderers had originally submitted their offers

Messrs Marinelli Costruzioni SpA Ltd filed an objection on 18th November 2010 against the decisions taken by the Contracts Department to (a) disqualify its offer since it could not be considered financially and (b) cancel the tender and initiate a negotiated procedure.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Joseph Croker as members convened a public hearing on Friday, 28th January 2011 to discuss this objection.

Present for the hearing were:

Marinelli Costruzioni Ltd

Dr Franco Galea	Legal Representative
Mr Maurizio Savoca Corona	Project Manager

Transport Malta (TM)

Dr Joseph Camilleri	Legal Representative
---------------------	----------------------

Foundation for Tomorrows' Schools (FTS)

Evaluation Board

Dr Robert Vassallo	Member
Mr Charles Abela	Member
Mr Ray Zammit	Member
Mr Josef Mercieca	Secretary

Department of Contracts

Mr Anthony Cachia	Director
Mr Mario Borg	Assistant Director

After the Chairman's brief introduction, the appellant company was invited to explain the motives of its objection.

Dr Franco Galea, legal representative of Marinelli Costruzioni Ltd, the appellant company, stated that by way of a letter dated 10th November 2010 and sent by the Contracts Department to his client the latter was informed that its tender submission could not be considered from the financial perspective and that the tender was being cancelled and a negotiated procedure initiated. Dr Galea listed the following two reasons - for the rejection of the appellant company's offer - given by the adjudicating board and the Contracts Department:-

i) A gross discount of 23% (€283,974.10) was submitted that was not however absorbed in the rates of the BOQs as required by Article 17.5 of the ITT. In terms of Article 16.1 of the ITT this cannot be rectified. Financial Bid is administratively non-compliant.

Dr Galea gave the following explanations:

- he confirmed that the total price submitted in his client's offer was that of €1,234, 670 exclusive of VAT and taxes but granting a 23% discount equivalent to €283,974.10 and, as a consequence, the final total price was that of €950,695.90 exclusive of VAT and taxes as per bill of quantities;
- the declaration by the adjudicating board that no rectification could be made referred to clause 16.1 note 3 thereof which stated that *"No rectification shall be allowed. Only clarifications on the submitted information may be requested."* He contended that that limitation was limited to clause 16 and did not apply to the other clauses; and
- Clause 17.5 stated that *"If the tenderer offers a discount, the discount must be absorbed in the rates of the Bill of Quantities/Financial Statement."* The bill of quantities in the tender document did not feature a column wherein to indicate the discounted prices and what his client did was to grant a 23% discount on all the items and, therefore, he considered it logical that each and every rate/price in the bill of quantities was discounted by 23%. Dr Galea added that were the tenderer to indicate the discounted price against each and every item then there would be no purpose in offering/displaying the discount as only the discounted rates would have featured in the bill of quantities.

Dr Joseph Camilleri, legal representative of the contracting authority, namely Transport Malta, remarked that the instructions to tender clearly stated that the discount had to be absorbed in the quoted price and that was the reason why there was no appropriate column for that purpose because the tenderer was expected to submit the price of each item already discounted. He added that a general discount did not necessarily mean that each and every item was discounted at the same rate and that would have presented problems later on during the execution of the contract and in the case of variations.

The Chairman Public Contracts Appeals Board observed that the point raised by Dr Camilleri would have been valid had the appellant company offered a discount only in terms of a total amount because that would have presented a problem as to how to

distribute that amount among the items in the bill of quantities but once the discount granted amounted to a constant percentage then it was clear that the 23% discount applied equally to all items.

ii) Bidder put down in the BOQ the figure of €950,695.90 as being the Grand Total Exclusive of VAT, other taxes and duties and Inclusive of Discount. In the Tender Form (Volume 1 Section 2) the bidder put down the same figure of €950,695.90 as being Inclusive of VAT, duties, other taxes and any discounts. In terms of Article 17.2 of the ITT, the Bidder did not provide a corresponding breakdown of this price as submitted in the BOQ. Technically the bidder has quoted two prices (one in the BOQs and one in the Tender Form) that are different from each other putting the Evaluation Committee in a position of not being able to assess the offer.

Dr Galea ...

- remarked that his client had clearly indicated that the final total price was of €950,695.90 exclusive of VAT and taxes;
- remarked that Clause 17.2 stated that *“The tenderer must provide a breakdown of the overall price in Euro (€)”*;
- expressed the view that considering that in the bill of quantities there was quoted the price of €950,695.90 exclusive of VAT, other taxes and duties and inclusive of discount and in the tender form there was the amount of €950,695.90 inclusive of VAT, other taxes and duties and any discounts, warranted a clarification on the part of the adjudicating board, the matter could have even been rectified through the provisions of clause 31 – Correction of Errors - which stated as follows:

“31.1 Admissible tenders will be checked for arithmetical errors by the Evaluation Committee. Errors will be corrected as follows:

(a) where there is a discrepancy between amounts in figures and in words, the amount in words will prevail;

(b) where there is a discrepancy between a unit price and the total amount derived from the multiplication of the unit price and the quantity, the unit price as quoted will prevail.

31.2 The amount stated in the tender will be adjusted by the Evaluation Committee in the event of error, and the tenderer will be bound by that adjusted amount. In this regard, the Evaluation Committee shall seek the prior approval of the General Contracts Committee to communicate the revised price to the tenderer. If the tenderer does not accept the adjustment, his tender will be rejected and his tender guarantee forfeited.

31.3 When analysing the tender, the evaluation committee will determine the final tender price after adjusting it on the basis of Clause 31.1.”

According to this mechanism the adjudicating board would have checked the price given in the tender form against the one in the bill of quantities and, if those two prices differed, then the price in the bill of quantities would prevail and the

contracting authority would be obliged to contact the tenderer to confirm the price resulting in the bill of quantities or otherwise to face the consequences.

With regard to which took preference between unit price and total price, clause 1.3 of the tender document stated that “*This is a unit price (Bill of Quantities) contract*” and, furthermore, clause 31.1 (b) quoted earlier on, also gave the unit price precedence over the total amount.

Finally, it was argued that according to the order of precedence of contract documents listed at Article 3 of Volume 2 Section 3 ‘Special Conditions’ (pg 60 of the tender dossier) the bill of quantities is listed at ‘(f)’ whereas the *tender form* is listed soon after at ‘(g)’. That was additional evidence that the bill of quantities should be given preference over the tender form.

Dr Robert Vassallo, a member of the adjudicating board, stated that the adjudicating board wanted comfort from the Contracts Department with regard to the issue that the appellant company presented two different prices. He added that the adjudicating board agreed with the advice given by the General Contracts Committee because it was customary that the tender form should prevail over any other document.

The Chairman Public Contracts Appeals Board remarked that amendments introduced to public procurement regulations in mid-2010 enabled contracting authorities to seek certain clarifications.

Dr Camilleri opined that it was reasonable for the adjudicating board to be weary of this fact given that it involved the financial aspect of the tender because clarifications with regard to price could lead to alterations being made to the price.

Once again the Chairman Public Contracts Appeals Board, whilst sharing Dr Camilleri’s preoccupation in normal circumstances, yet opined that the particular circumstances of this case could have warranted a different approach.

Dr Galea remarked that, apart from recourse to clarification, he wanted to stress the point that the tender document itself presented a remedy for this kind of situation in the sense that it gave the bill of quantities precedence over the *tender form*. He added that, in this case, things were even clearer because it concerned only the VAT element. Dr Galea stated that when there was a discrepancy in the workings and/or addition of the rates in the bill of quantities such that the total amount would result greater than the total price quoted in the *tender form*, the contracting authority had to correct the latter even if that would result in the bid being no longer the cheapest. He said that the same procedure would apply if the resulting total of bill of quantities would be lesser than that in the *tender form*.

The Chairman Public Contracts Appeals Board reflected on the fact that from the workings in the bill of quantities it was quite clear that the amount of €950,695.90 was exclusive of VAT whereas in the tender form the same price was being indicated by the bidder, admittedly by error, as inclusive of VAT and he opined that such a situation deserved

a clarification.

Dr Camilleri pointed out that a clarification had to be sought following directions from the Department of Contracts and, in this case, the advice from the Contracts Department was that the offer could not be considered financially.

Mr Anthony Cachia, Director, Contracts Department, under oath, gave the following evidence:

- normal practice had it that when a tenderer quoted two different prices there was a provision that stated that no clarifications should be sought on the issue of price and in such an instance the General Contracts Committee would decide as it had decided in this case;
- clarifying issues concerning price could easily lead to price adjustment;
- the order of precedence listed in Art. 3 – *Order of precedence of contract documents* - referred to the documents that would make up the contract but did not concern the evaluation stage of the tender process;
- given that this appeared to be a genuine case the Department of Contracts, probably, was not happy to reject the offer in question. Nevertheless, for the sake of equal treatment to all tenders and in all cases, there was no alternative but to discard the offer;
- in the case of a mistake in the bill of quantities that would result in a price different from that quoted in the *tender form*, which was the one featured in the schedule of prices, the tenderer would have to be consulted as to whether he accepted the new price and if the bidder confirmed then the price in the *tender form* would be amended accordingly and if one refused the new price then one's offer would be discarded; and
- the example cited concerned a correction to the bill of quantities arising from an arithmetical mistake whereas, in the case in hand, there was no such arithmetical mistake.

The Chairman Public Contracts Appeals Board remarked that the case cited as an example was a case where effectively, two prices were quoted in the same tender submission and, as a result, there too existed the possibility that the tenderer would take the opportunity to amend the price originally submitted. He added that there appeared to be an anomaly in the sense that in one case the tenderer would be approached, with the prior approval of the General Contracts Committee, with a view to confirming the new price emerging from the corrected bill of quantities, even if the variation would be significant, whereas, in the case in hand, it was retained that the tenderer could not be approached so as to confirm that the price in the *tender form* should have read exclusive of VAT as that indicated in the bill of quantities. The Chairman Public Contracts Appeals Board did appreciate and agreed entirely that it was dangerous to meddle with the price but, on the other hand, it appeared that an evident

mistake in the bill of quantities was subject to correction but a mistake in the price in the *tender form* was not subject to correction, no matter how trivial the mistake might be.

Dr Galea reiterated that Art. 31.1 and 31.2 quoted earlier on confirmed that the price in the bill of quantities prevailed at all times over that in the *tender form* and elsewhere in the tender document and that it was that price which was binding. Dr Galea mentioned that the prices against each item in the bill of quantities were arrived at on the basis of further workings which formed part of the tender submission.

Dr Camilleri stated that this was not a case where the price in the *tender form* did not reflect that in the bill of quantities but it was a case where the figures did match with the difference being that one was inclusive of VAT and the other was exclusive of VAT. He added that not any mistake in the bill of quantities was rectifiable but it was limited to arithmetical errors. He remarked that, for instance, one could not correct the unit price of an item but one could correct errors in the addition or multiplication and the result would, effectively, be the new price of the offer as provided for in the tender conditions. Dr Camilleri maintained that in this case it was not a matter of arithmetical errors. Whilst holding the view that the order of precedence listed in Art. 3 of the *Special Conditions* referred to the contract stage and not to the adjudication stage, yet the contracting authority's legal advisor conceded that the tender document did not indicate that the *tender form* took precedence over the bill of quantities.

At this point Mr Cachia remarked that ...

- the Contracts Department held that the price quoted in the *tender form* was the one which the tenderer would bind oneself within the contract and that the bill of quantities was meant to explain how that total amount was arrived at and that was the reason why corrections were permitted to the bill of quantities;
- at the beginning of the process, the price in the *tender form* and the total price of the bill of quantities, even if errors in its workings would eventually come to light, had to match and in the case in hand the two prices did not match because one included VAT and the other excluded VAT;
- clause 16.1 (f) referred to the *tender form* and the bill of quantities and that note 3 - applicable to clause 16.1 - stated that no rectification shall be allowed but only clarifications on the submitted information may be requested;
- the General Contracts Committee sometimes had to disqualify a bid even when it was evident that a genuine mistake had been committed and it did so for the sake of fairness with regard to those bidders who submitted a complete and correct tender submission. In this case it was up to the General Contracts Committee to decide whether to allow a clarification or not.

Dr Camilleri remarked that clause 31.1 of the request to tender expressly regulated what type of corrections could be made to the price, namely arithmetical errors only as well as other considerations that went beyond that could not be taken into account by the adjudicating

board.

The Public Contracts Appeals Board noted that it was rather unfair on the appellant company, who had committed a relatively minor error in its tender submission, to be treated at par with other tenderers, who might have failed on more substantial issues, in the negotiated procedure besides the fact that the prices of certain tenderers have, meantime, been divulged.

Dr Camilleri pointed out that one of the bidders, namely, Road Network Joint Venture, was excluded because it did not fill in the price in the *tender form* which shortcoming was considered serious enough to lead to disqualification.

Finally, in response to Dr Galea's inquiry as to the reasons why the tender was recommended for cancellation, Dr Camilleri stated that none of the bidders were found to be fully compliant.

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 18th November 2010 and also through their verbal submissions presented during the hearing held on 28th 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 they were informed that their tender submission could not be considered from the financial perspective due to the fact that a gross discount of 23% (€283,974.10) was submitted and which was not, however, absorbed in the rates of the BOQs as required by Article 17.5 of the ITT rendering the submission as administratively non-compliant and that the tender was being cancelled and a negotiated procedure initiated, (b) confirmation that the total price submitted in the company's offer was that of €1,234,670 exclusive of VAT and taxes but granting a 23% discount equivalent to €283,974.10 and, as a consequence, the final total price was that of €950,695.90 exclusive of VAT and taxes as per bill of quantities, (c) claim that the declaration by the adjudicating board that no rectification could be made referred to clause 16.1 note 3 thereof which stated that "*No rectification shall be allowed. Only clarifications on the submitted information may be requested*", (d) claim that the tender document did not feature a column wherein to indicate the discounted prices and what the appellant company did was to grant a 23% discount on all the items deeming it logical that each and every rate/price in the bill of quantities was discounted by 23%, (e) remark that the company had clearly indicated that the final total price was of €950,695.90 exclusive of VAT and taxes, (f) remarked that considering that in the bill of quantities there was quoted the price of €950,695.90 exclusive of VAT, other taxes and duties and inclusive of discount and in the tender form there was the amount of €950,695.90 inclusive of VAT, other taxes and duties and any discounts, warranted a clarification on the part of the adjudicating board, the matter could have even been rectified through the provisions of clause 31 – Correction of Errors, (g) claim that clause 31 the adjudicating board would check the price given in the tender form against the one in the bill of quantities and, if those two prices differ, then the price in the bill of quantities would prevail and the contracting authority would be

obliged to contact the tenderer to confirm the price resulting in the bill of quantities or otherwise to face the consequences, **(h)** claim that with regard to which took preference between unit price and total price, clause 1.3 of the tender document stated that “*This is a unit price (Bill of Quantities) contract*” and, furthermore, clause 31.1 *(b)* quoted earlier on, also gave the unit price precedence over the total amount and **(i)** argument that according to the order of precedence of contract documents listed at Article 3 of Volume 2 Section 3 ‘Special Conditions’ (pg 60 of the tender dossier) the bill of quantities is listed at ‘*f*’ whereas the *tender form* is listed soon after at ‘*g*’;

- having considered the contracting authority’s **(a)** remark that the instructions to tender clearly stated that the discount had to be absorbed in the quoted price and that was the reason why there was no appropriate column for that purpose because the tenderer was expected to submit the price of each item already discounted, **(b)** claim that a general discount did not necessarily mean that each and every item was discounted at the same rate and that would have presented problems later on during the execution of the contract and in the case of variations, **(c)** reference to the fact that clarifications with regard to price could lead to alterations being made to the price, **(d)** claim that this was not a case where the price in the *tender form* did not reflect that in the bill of quantities but it was a case where the figures did match with the difference being that one was inclusive of VAT and the other was exclusive of VAT, **(e)** remark that not any mistake in the bill of quantities was rectifiable but it was limited to arithmetical errors and this case did not reflect any mathematical errors, **(f)** remark that the order of precedence listed in Art. 3 of the *Special Conditions* referred to the contract stage and not to the adjudication stage and **(g)** concession that the tender document did not indicate that the *tender form* took precedence over the bill of quantities:
- having taken particular note of Mr Cachia’s testimony, especially the reference made to the fact that **(a)** the normal practice had it that when a tenderer quoted two different prices there was a provision that stated that no clarifications should be sought on the issue of price and in such an instance the General Contracts Committee would decide as it had decided in this case, **(b)** clarifications issues concerning price could easily lead to price adjustment, **(c)** the order of precedence listed in Art. 3 – *Order of precedence of contract documents* - referred to the documents that would make up the contract but did not concern the evaluation stage of the tender process, **(d)** given that this appeared to be a genuine case, the Department of Contracts, probably, was not happy to reject the offer in question but, for the sake of equal treatment to all tenders and in all cases, there was no alternative but to discard the offer, **(e)** in the case of a mistake in the bill of quantities that would result in a price different from that quoted in the *tender form*, which was the one featured in the schedule of prices, the tenderer would have to be consulted as to whether he accepted the new price and if the bidder confirmed then the price in the *tender form* would be amended accordingly and if one refused the new price then one’s offer would be discarded, **(f)** the example cited concerned a correction to the bill of quantities arising from an arithmetical mistake whereas, in the case in hand, there was no such arithmetical mistake and **(g)** the Contracts Department held that the price quoted in the *tender form* was the one which the tenderer would bind oneself within the contract and that the bill of quantities was meant to explain how that total amount was arrived at and that was the reason why corrections were permitted to the bill of quantities,

reached the following conclusions, namely:

1. The Public Contracts Appeals Board observes that, with regard to the point raised by the contracting authority's representatives relating to the fact that the discount had to be absorbed in the quoted price, this Board concludes that this argument would have been valid had the appellant company offered a discount only in terms of a total amount because that would have presented a problem as to how one could distribute that amount among the items in the bill of quantities but, once the discount granted amounted to a constant percentage, then it was clear that the 23% discount applied equally to all items.
2. The Public Contracts Appeals Board places emphasis on the fact that amendments introduced to public procurement regulations in mid-2010 enabled contracting authorities to seek certain clarifications and, in this particular circumstance, this Board cannot but reflect that, given the fact that from the workings in the bill of quantities, it seems considerably clear that the amount of €950,695.90 was exclusive of VAT whereas, in the *tender form*, the same price was being indicated by the bidder as inclusive of VAT. The PCAB opines that, *prima facie*, such a situation may have, quite pragmatically, deserved a clarification in line with amendments introduced to public procurement regulations in 2010. The Public Contracts Appeals Board is also fully cognisant of the fact that, whilst, ironically, it seems that an evident mistake in the bill of quantities is subject to correction, a mistake in the price in the *tender form* is not subject to a similar correction, no matter how trivial the mistake might be. Nevertheless, in regard to the issues just referred to, it is also a fact that, all in all, this Board acknowledges that it is extremely dangerous for one to meddle with prices during an evaluation process and, as a consequence, this Board cannot but note Mr Cachia's testimony that, basically, an evaluation board has to remain in full congruence with normal tender evaluations and ensure that the evaluation and adjudication process reflect utmost transparency devoid of any possible trace of third party influence on possible amendments required at specific junctures of the said process.
3. As a consequence to the above, this Board agrees with the conclusion reached by the evaluation board and decides against the appellant company.

In line with legal provisions, the Public Contracts Appeals Board also recommends that the deposit paid by the appellants should not be reimbursed.

Alfred R Triganza
Chairman

Edwin Muscat
Member

Joseph Croker
Member

16 February 2011