

## **PUBLIC CONTRACTS APPEALS BOARD**

**Case No 317**

**CT/2734/2009 Adv No CT/064/2010**

**Service Tender for the Supply, Delivery, Installation and Commissioning of various Lecture/Tutorial Room Furniture, Seating and Equipment for the Junior College Building Extension at the University of Malta**

This call for tenders was published in the Government Gazette on 26<sup>th</sup> February 2010. The closing date for this call for tenders was 20<sup>th</sup> April, 2010.

The estimated value of this tender ( Lot 1 only ) was Euro 140,207.45.

On 12<sup>th</sup> May, 2011, Messrs FX Borg Furniture Ltd filed an objection against the decision by the Contracts Department to recommend the award of this tender (Lot 1 only) to Messrs Krea ( Malta ) Ltd

The Public Contracts Appeals Board, composed of Mr Edwin Muscat as Acting Chairman, and Mr Carmel Esposito and Mr Joseph Croker as members, convened a public hearing on Monday, 8<sup>th</sup> August, 2011 to consider this objection.

Present for the hearing were:

**FX Borg Furniture Ltd (FXB Ltd)**

Dr Kris Borg	Legal Representative
Mr Joseph Borg	Representative

**Krea (Malta) Ltd**

Dr William Cuschieri	Legal Representative
Mr Christopher Gauci	Representative
Ms Marthese Aquilina	Representative

**University of Malta (UoM)**

**Evaluation Committee**

Mr Tonio Mallia	Chairman
Ms Sonia Zammit	Secretary

After the A/Chairman's brief introduction, the appellants were invited to explain the motives of their objection.

**Dr Kris Borg, legal representative of FX Borg Furniture Ltd**, referred to Public Contracts Appeals Board's Case No 262 where a decision was taken by the Board to allow Krea ( Malta ) Ltd to participate in the tendering process notwithstanding the fact that that company had not complied with the submission of the new Tender Form as directed in Clarification Letter No 1 issued on 25<sup>th</sup> March 2010. He asked that, in view of the fact that the Public Contracts Appeals Board had already expressed on this issue in the appeal filed by Krea ( Malta ) Ltd, whether the same members were to sit on the adjudication of his client's appeal or not. On being informed that there was no reason why the PCAB, as composed ( there was a change of Chairman, as the one who had chaired the previous hearing was, at the time, away from Malta) shall not hear and decide upon this case, Dr Borg added, that once such members decided on hearing this appeal, he was formally registering his objection as there would be a serious breach of the principle of natural justice – *nemo potest iudex in causa propria potest* – a law doctrine which held that a contract could not adversely affect the right of one who was not a party to that contract – since it concerned an appeal by Krea (Malta) Ltd and his client had nothing to do with that appeal.

At that point, the Acting Chairman PCAB intervened to clarify that the issue concerning the new tender form had already been decided upon and that the PCAB had no intention whatsoever to revisit that aspect of the appeal

**Dr William Cuschieri, legal representative of Krea (Malta) Ltd**, disagreed with appellants' legal representative in the sense that the issue regarding the tender form had already been decided upon and closed -- *res judicata*. Moreover, appellants had the opportunity to voice their concerns at the hearing held on the 23<sup>rd</sup> February 2011. They could even have challenged the decision of the PCAB in court.

The second ground on which FX Borg Furniture Ltd based their appeal concerned their insistence that the offer made by the preferred bidder was administratively and technically non-compliant. **Dr Kris Borg, on behalf of FX Borg Furniture Ltd**, submitted that:

- i. the original specifications of the tender required that the material had to be "cherry veneer or approved alternative". Subsequently, in virtue of Clarification Letter No 1 dated 25<sup>th</sup> March, 2010, a modification was introduced to the tender document through the answers to questions No 3 to No 5, to the effect that the words " or approved alternative" was deemed to be deleted and the material to satisfy tender criteria changed from "cherry veneer" to "beech veneer"
- ii. his client, along with another tenderer, had submitted offers in line with the specifications as amended by Clarification No. 1, i.e. offering 'beech veneer', whereas, he claimed, the recommended tenderer submitted his offer according to the original tender specifications, i.e. cherry veneer or approved alternatives;

- iii. his client and the recommended tenderer were not competing on a level playing field since their offers referred to different specifications so much so that had his client known that he could submit an alternative to beech veneer then his quote would have been much cheaper than the one he submitted for beech veneer;
- iv. the decision handed down by the PCAB on the 7<sup>th</sup> March 2011 seemed to have been motivated by the fact that the contracting authority should not fork out more funds than necessary once, in essence, the tender form included in the original tender document contained the same information required in the ‘amended’ tender form, however, it now transpired that the recommended tenderer was not the cheapest bidder and, moreover, he was going to provide an inferior product; and
- v. it also appeared that in compiling his tender submission the recommended bidder did not take into account the instructions issued in the clarification letter so much so that his client had reason to believe that the product offered by the recommended tenderer was not ‘beech veneer’ and if that were to be confirmed by the PCAB then the recommended offer would have to be discarded as in breach of specifications and technically non-compliant.

In his intervention, **Dr Cuschieri**, on behalf of the recommended tenderer, reiterated the following:

- a. there was no reason why the PCAB, as composed, should not hear and decide upon the issue/s that were being raised by the appellant;
- b. there was one bid cheaper than that submitted by his client however it was not the appellants’ and that cheapest bidder failed or chose not to file an objection; and
- c. in his tender submission, his client had offered beech veneer as requested in the call for tenders.

**Mr Christopher Gauci, general manager of Krea (Malta) Ltd**, stated that although his company had submitted original tender forms rather than the “ new” forms, throughout his tender submission, reference was always made to beech veneer even though he had also submitted samples of cherry veneer. He confirmed that there was practically no variation in the price of beech and cherry veneers.

**Mr Tonio Mallia, chairman of the evaluation board**, remarked that the issue leading to the change in the specifications of the material had arisen during the clarification meeting that the contracting authority held with prospective bidders where the term ‘or approved alternatives’ was deleted in the light of the provisions of clause 1.6 of the ‘Instructions to Tenderers’ which allowed no variants. He also confirmed that Krea (Malta) Ltd had offered beech veneer. He then displayed samples provided by Krea (Malta) Ltd. These samples, which represented both beech as well as cherry veneers, were examined by both the PCAB members as well as by the appellants themselves. Following the viewing of these samples, the latter refrained from raising any further issues.

At that point, the hearing was brought to a close

This Board,

- having noted that the appellants, in terms of their “ reasoned letter of objection” dated 12<sup>th</sup> May 2011 and also through their verbal submissions presented during the hearing held on 8<sup>th</sup> August 2011 , had objected to the decision taken by the pertinent authorities;
- having heard the complaint raised by Dr Kris Borg, legal representative for the appellant who, inter alia, objected to the decision taken by the PCAB following an appeal raised by Krea (Malta) Ltd on the same tender and who queried whether the same members of the PCAB were to sit on the adjudication of his client’s appeal;
- having considered Dr Borg’s formal objection that once the same PCAB members (except for the Chairman, who happened to be away from Malta and who was being replaced by the Acting Chairman), decided on hearing his client’s appeal, he was registering a formal objection on the grounds that there was going to be a serious breach of the principle of natural justice – *nemo potest iudex in causa propria potest*.
- having considered Dr Borg’s further reasons that the preferred bidders’ offer should have been rejected on the grounds that it was both administratively and technically non-compliant because (i) the material of the furniture they were offering could not have satisfied the tender requirements once they offered the original tender form rather than the “new form” as per Clarification No 1 which provided for “beech veneer” instead of “cherry veneer or approved alternatives”, (ii) that his client and the recommended bidder were not competing on a level playing field since their offers referred to different specifications ( according to Dr Borg, his client had reason to belief that Krea (Malta) Ltd, were not offering beech veneer), (iii)his client’s offer was in line with the specifications as amended by the Clarification No 1, whereas the recommended tenderer submitted his offer according to the original tender specifications, and (iv) the recommended bidder’s offer was not the cheapest.
- having considered Dr William Cuschieri’s submissions, namely (i) that the issue regarding the tender form had already been decided upon and closed –*res judicata*— following the public hearing held on 23<sup>rd</sup> February, 2011; (ii) that following that hearing, appellants could have voiced their concerns and even challenged the PCAB’s decision in court; (iii) there was no reason why the PCAB, as composed, should not hear and decide upon this case; (iv) acknowledged that there was one bid which was cheaper than that of his client ( which was not the appellants’), and that that bidder failed or chose not to file an objection, and (v) his client had offered beech veneer as required in Clarification No 1
- having considered Mr Christopher Gauci’s (general manager of Krea (Malta) Ltd ) submissions that (i) his company had offered beech veneer even though he had also submitted samples of cherry veneer, and (ii) there was practically no variation in the price of beech and cherry veneers.
- having also considered the submissions made by Mr Tonio Mallia, chairman of the evaluation board who (i) explained what led his Board issue the clarifications, and (ii) confirmed that Krea (Malta) Ltd had, in fact, offered beech veneer as required in the tender document as per clarification No 1, and (iii) exhibited samples provided by Krea (Malta) Ltd, which were examined by both PCAB members as well as by appellants

reached the following conclusions, namely

1. The Public Contracts Appeals Board cannot accept to re-open a case that had already been decided upon by the same Board. Hence, appellants' objection to the decision taken by the PCAB following the appeal raised by Krea (Malta) Ltd was unacceptable. The Board feels that FXB Furniture Ltd should have voiced their concerns and objections during that hearing or else they could have challenged the PCAB's decision in the Courts of Law.
2. Regarding appellants' objection to the same PCAB members ( who decided on Krea's case) from hearing their appeal, the PCAB feels that there was no valid reason why they should not, more so, when the place of chairman was taken up by an acting chairman because the chairman happened to be away from Malta at the time. Moreover, the PCAB always insists that every case is decided on its own merits. In the previous case, the Board heard and decided upon the appeal raised by Krea (Malta) Ltd. Appellants' objections were different from those raised by Krea (Malta) Ltd and from the Board's point of view it was considered to be a different case.
3. The Public Contracts Appeals Board feels that appellants' major objection was based on the assumption that once Krea (Malta) Ltd submitted original tender form, they must have offered "cherry veneer or approved alternatives" in line with the provisions of that form, and not "beech veneer" as required in the "new" tender form as per Clarification No 1. This assumption was proved to be wrong, when during the hearing, it emerged that the recommended bidder did, in fact, offer beech veneer. This was eventually confirmed by the Chairman of the adjudication board who also exhibited the samples offered by Krea (Malta) Ltd.

In view of the above, the Board finds against appellant company and directs that the deposit submitted by same be forfeited in favour of Government.

Edwin Muscat  
A/Chairman

Carmel Esposito  
Member

Joseph Croker  
Member