

PUBLIC CONTRACTS REVIEW BOARD

Case No. 285

CT/3079/2010 - Adv No CT/007/2011

National Flood Relief Project (NFRP) - Tender for the Design and Building of Storm Water Tunnel at Zebbug

This call for tenders was published in the Government Gazette on 18th January 2011. The closing date for this call with an estimated budget of € 3,907,489 was 10th March 2011.

Five (5) tenderers submitted their offers.

Ballut Blocks Services Ltd filed an objection on 18th March 2011 against the decision by the Contracts Department to disqualify its bid as the offer was not received in accordance with the conditions specified in the tender dossier since it consisted only of 'Package 2'.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr. Carmel Esposito and Mr Joseph Croker as members convened a public hearing on Monday, 29th April 2011 to discuss this objection.

Present for the hearing were:

Ballut Block Services Ltd

Dr Massimo Vella
Mr Paul Vella

Legal Representative
Representative

BST JV

Perit Mark John Scicluna

Representative

Rockcut Ltd

BM Tunnel JV

Marino JV

] Informed but no representative turned up
] at the hearing

Ministry for Resources and Rural Affairs (MRRA)

Architect Carmel Mifsud Borg

Director General

Department of Contracts

Mr Francis Attard
Mr Mario Borg

Director General
Assistant Director

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

Dr Massimo Vella, legal representative of Ballut Blocks Services Ltd, the appellant company, stated that by way of an email dated 10th March 2011 sent by the Contracts Department to his client, the latter was informed that his company's tender submission had been rejected as it did not conform to the conditions specified in the tender document as it consisted only of Package 2.

Dr Vella went on to furnish the following explanations:-

- i. this was a three package tender procedure, whereby three separate packages had to be submitted as original along with a copy thereof;
- ii. the outer envelope which contained the original and the copy was labelled 'Package No. 2' and this, he conceded, was an oversight on the part of the appellant;
- iii. this oversight on the part of the tenderer was trivial and the question arose as to whether (a) a tender submission ought to be rejected for such a trivial oversight and (b) one had to seek an acceptable remedy;
- iv. in a case decided upon by the European Court of Justice (ECJ) on the 27th September 2002, Case T-211/02, *Tideland Signal Limited vs. the Commission of the European Communities in the Court of First Instance*, the ECJ established a general principle in the sense that where there had been an obvious error in a bid it was disproportionate and unlawful not to seek a clarification and permit a correction;
- v. the principles set out by the ECJ were applicable throughout the EU, including Malta;
- vi. the appellant company was not requesting any corrections whatsoever to be made to its tender submission but it was simply requesting the opening up of the package marked 'original' where one would find the three separate packages requested in the call for tenders and, likewise, with regard to the envelope marked 'copy'; and
- vii. the purpose of the appeal lodged by his client was to draw the attention of the contracting authority of this oversight, minor error, which, in no way, did it influence or alter the contents of the original tender submission made by his client.

Mr Francis Attard, Director General (Contracts), explained that:-

- a) this was a three package tender;
- b) the package delivered to the Contracts Department with the label bearing the address of the Department of Contracts, the CT file and CT advert numbers together with the name of the bidder had been opened and therein there were two packages each bearing the title of the call for tenders, the CT file number and both marked 'Package 2' with one marked 'original' and the other marked 'copy';

- c) the tender document clearly specified that the tender had to be submitted in three separate packages and, since the appellant only submitted 'Package 2' without 'Packages 1 and 3', then the tendering process with regard to the appellant company's bid had to be terminated; and
- d) it would have been irregular had the Department of Contracts opened Package 2 without first tracing Package 1 and opening it.

Dr Vella referred, once again, to the decision of the ECJ where he claimed that it was decided that the Commission of the European Communities had been bound to seek clarifications on a minor error – apparently an error in a date - in a tender and by failing to do so it had committed a manifest error of assessment and, accordingly, the decision rejecting the applicant's tender was annulled.

Dr Vella remarked that, in the circumstances prevailing at the tender opening stage, the Department of Contracts acted correctly but, through this appeal hearing, a clarification was being furnished by his client as to the error committed in the way the tender submission had been packed up and presented and, as a result, on the basis of the ECJ's judgement cited above, it was reasonable to request the re-instatement of his client's bid in the tendering process.

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 March 2011 and also through their verbal submissions presented during the hearing held on 29th April 2011, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant company's representatives' claims and observations, particularly, the references made to the fact that (a) the company's tender submission had been rejected as it did not conform to the conditions specified in the tender document as it consisted only of Package 2, (b) this was a three package tender procedure, whereby three separate packages had to be submitted as original along with a copy thereof, (c) through an oversight, the outer envelope which contained the original and the copy was labelled 'Package No. 2', (d) apart from the said oversight being considered by the same appellant company as trivial, the latter also questioned as to whether (1) a tender submission ought to be rejected for such a trivial oversight and (2) one had to seek an acceptable remedy, (e) the principles set out by the ECJ (Case T-211/02, *Tideland Signal Limited vs. the Commission of the European Communities in the Court of First Instance*) were applicable throughout the EU, including Malta, (f) the appellant company was not requesting any corrections whatsoever to be made to its tender submission but it was simply requesting the opening up of the package marked 'original' where one would find the three separate packages requested in the call for tenders and, likewise, with regard to the envelope marked 'copy' and (g) albeit no one was questioning, that in the circumstances prevailing at the tender opening stage, the Department of Contracts had acted correctly, yet, the purpose of the appeal lodged by the appellant company was to

draw the attention of the contracting authority of this oversight, minor error, which, in no way, did it influence or alter the contents of the original tender submission made;

- having considered the Director General (Contracts) rendering of events which led to the opinion that (a) since the tender document clearly specified that the tender had to be submitted in three separate packages and (b) since the appellant only submitted 'Package 2' without 'Packages 1 and 3', then the tendering process with regard to the appellant company's bid had to be terminated and (c) it would have been irregular had the Department of Contracts opened Package 2 without first tracing Package 1 and opening it,

reached the following conclusions, namely:

1. The Public Contracts Review Board considers that, in the circumstances prevailing at the tender opening stage, the Department of Contracts acted correctly.
2. The Public Contracts Review Board, however, agrees with the appellant company that, apart from the said oversight being considered as trivial, this Board opines that a tender submission should not be rejected for such a genuine oversight the direct effect of which does not, in any way, alter the transparent and equitable adjudication process.
3. The Public Contracts Review Board concludes that in opting to file an objection, the appellant company was not requesting any corrections whatsoever to be made to its tender submission but it was simply requesting the opening up of the package marked 'original' where one would find the three separate packages requested in the call for tenders and, likewise, with regard to the envelope marked 'copy'.

In view of the above this Board finds in favour of appellant company. Furthermore, this Board recommends that (a) the deposit paid by the appellants should be reimbursed and that (b) the same appellant company's bid should be reinstated in the evaluation process for further consideration.

The Public Contracts Review Board would like to emphasise that all further deliberation by the evaluation board should be carried out without any prejudice regarding possible future oversights and possible lack of adherence by appellant tendering company to tender specifications and conditions.

Alfred R Triganza
Chairman

Carmel Esposito
Member

Joseph Croker
Member

12 May 2011