

PUBLIC CONTRACTS REVIEW BOARD

Case No. 473

CT/2074/2012; MRRA/W/189/2010/3

Tender for the Construction and Finishing of a raised Water Polo Pitch at Birzebbugia

This call for tenders was published in the Government Gazette on the 13th April 2012. The closing date for this call with an estimated budget of € 1,554,268 (incl. VAT) was the 14th June 2012.

Four (4) tenderers submitted their offers.

Acquatics Joint Venture filed an objection on the 26th September 2012 against the decision of Contracts Department to recommend the award of the tender to Ballut Blocks Services Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Joseph Croker and Mr Carmel Esposito as members convened a public hearing on Friday, 19th October 2012 to discuss this objection.

Present for the hearing were:

Acquatics Joint Venture

Dr Roderick Zammit Pace	Legal Representative
Mr Johann Farrugia	Representative
Mrs Itiana Abela	Representative

Ballut Blocks Services Ltd

Dr Massimo Vella	Legal Representative
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Ministry for Resources and Rural Affairs

Dr Victoria Scerri	Legal Representative
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Evaluation Board

Architect Ray Farrugia	Chairman
Mr Patrick Gixti Soler	Member
Mr John Farrugia	Member
Mr Joseph Casaletto	Secretary



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

Dr Roderick Zammit Pace, legal representative of Acquatics Joint Venture, the appellant, made the following submissions:

- i. by letter dated 18th September 2012 his client was informed that the joint venture's tender was not successful because it was not the cheapest technically compliant and that the award was recommended in favour of Ballut Blocks Services Ltd;
- ii. the offer made by Ballut Blocks Services Limited was defective because the Tender Form did not feature the total price of the tender as required in para. 3 Section C of the Tenderer's Declaration;
- iii. in its letter of reply the recommended tenderer did not contest the fact that the price was missing in the Tender Form and argued that one could find the price in the bill of quantities;
- iv. the requirement to fill in the price in the Tender Form emerged from para. 3 of the same Tender Form and clauses 16.1 (f), 27.1 'Opening of Tenders', 30.2, 30.3 and 32.1 of the tender document;
- v. this requirement was quite significant because, by signing the tender form, the tenderer would be binding oneself by the price and the other tender conditions;
- vi. in its letter of reply the recommended tenderer:-
 - a. referred to the Public Contracts Review Board case no 285 (CT/3079/2010) – which was a 3 package tender where the three envelopes were inserted into envelope 2 which remained unopened at the start of the evaluation process - in which case the Public Contracts Review Board, whilst it upheld the objection by re-admitting the offer in the tendering process, yet it had remarked that the decision was without prejudice regarding possible future oversights and possible lack of adherence by appellant tendering company to tender specifications and conditions;
 - b. referred to the case *Tideland vs the Commission* (T-211/02) which concerned the extension of the tendering period;
 - c. did not state that a rectification or clarification was required in this case once one could find the price in the bill of quantities and he was correct at that because as per note 3 to clause 16.1, reproduced in para. 11 of the Tender Form, no rectification was allowed with regard to the Tender Form;



- vii. referred to case nos. 124, 156 and 205 where the Public Contracts Review Board, invariably, ruled that the Tender Form was a mandatory requirement and had to be submitted in a clear and complete manner;
 - viii. the same view had been held by the Contracts Department in case CT/3102/2010 where it decided that the offer was administratively non-compliant since it did not include in the Tender Form the amount being tendered;
 - ix. it was not sufficient to claim that the price had been quoted elsewhere in the tender submission, such as in the bill of quantities, because, nonetheless, the Tender Form had to be filled in its entirety;
 - x. this shortcoming on the part of the recommended tenderer had rendered the contracting authority unable to publicly display the offer on the 'Schedule of Prices' at tender opening stage so much so that the Contracts Department had inserted against Ballut Blocks Services Ltd the note which read 'Financial offer, no amount submitted on the Tender Form';
- and
- xi. this omission led to lack of transparency during the evaluation process because it was not publicly available right after the tender opening stage

Architect Ray Farrugia, chairman of the evaluation board, remarked that:-

- a. it was true that, in the case of the recommended tenderer, the Tender Form submitted did not feature the total price of the offer as required at para. 3;
- b. the evaluation board had discussed this issue at length in view of the very particular wording of this tender form, which he never came across before, which read as follows "*The total price of our tender b/f from Financial Bid Summary Grand Total A to J (inclusive of duties, VAT, other taxes and any discounts) is*";
- c. A to J represented all the items in the bill of quantities, which, in the case of the recommended tenderer was properly and completely filled in;
- d. an important initial task undertaken by the evaluation board was to check the bill of quantities for any arithmetical errors as per section 31 of the tender document and it was that price – not the one in the tender form - which would, eventually, feature in the letter of acceptance and in the contract;
- e. of the four bidders participating in this tendering process only in the appellant joint venture's case there was the need to effect a slight correction to the price in the bill of quantities;
- f. one could perhaps question the need for the tenderer to quote the price in the Tender Form because, as per clause 31.2, it was the corrected price in the bill of quantities that mattered and, in fact, the tenderer would have to either



accept the adjusted price, according to the bill of quantities or else have the tender disqualified and the tender guarantee forfeited;

and

- g. whilst it was correct to state that, taken in isolation, the Tender Form of the recommended tenderer was deficient, yet, when considering the tender submission in its entirety then a different picture emerged and that was how the evaluation board reached its conclusion that it could not discard the offer submitted by Ballut Blocks Services Ltd.

Mr Johann Farrugia, also representing the appellant joint venture, remarked that the fact that the price offered had not been publicly displayed along with those of the other bidders rendered the process not as transparent as it should have been.

Dr Massimo Vella, legal representative of the recommended tenderer, made the following counter submissions:-

- i. referred to the decision of the Court of First Instance of the European Court of Justice in the case Tideland Signal Limited v. The Commission of the European Communities (Case T-211/02) where it was established 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. To this extent it would also be unlawful, in such circumstances, to disqualify a bid on the mere basis of such an obvious error;
- ii. a decision of the European Court of Justice overrode any provisions of the tender document which did not conform to that decision;
- iii. whilst it was a fact that, in this case, the omission of the price in the tender form was, evidently, a genuine mistake, yet it was not a material mistake because the price could be established and verified from the breakdown given in the bill of quantities, which total price, after having been checked arithmetically, would be the binding price;
- iv. transparency was not, in any way, compromised in this particular instance because the tender submission was in a sealed envelope and the price correctly given in the bill of quantities besides the availability of the unopened copy of the tender submission held by the contracting authority;
- v. once it has been established that the appellant joint venture had committed an arithmetical mistake, even if a small one, in the bill of quantities such that it did not match the price given in the tender form, one could ask what was the difference between a tender form having an incorrect price and a tender form without the total price, because if one were to go strictly by the formalities then the tender form of the appellant joint venture was incorrectly submitted and equally defective;
- vi. on the other hand, if one were to consider the tender submission in its entirety then one would rest on the total price of the bill of quantities and



that would fill the gap in his client's tender form and would also replace the appellant tenderer's incorrect price in the bidder's tender form;

- vii. if one were to consider that the price in the bill of quantities should prevail, then his client's price was the cheapest and if, on the other hand, one were to consider that the price in the tender form should prevail then his client had omitted the price while the appellant joint venture had submitted an incorrect price – one could have even inserted a '0' for a price - and in both cases it was not allowed to make a rectification to the tender form;

and

- viii. therefore, in the light of the above, especially the European Court of Justice Tideland ruling, the contracting authority had acted correctly in considering his client's offer.

The Chairman Public Contracts Review Board made the following observations:-

- a. para. 1 of the Tenderer's Declaration stated, among other things, that

"We hereby accept the contents thereto in their entirety, without reservation or restriction. We also understand that any disagreement, contradiction, alteration or deviation shall lead to our tender offer not being considered any further";

- b. one could question whether, for evaluation purposes, it made any difference having a tender form without the total price and having a tender form with an incorrect price but which could be corrected as per section 31 of the tender document;
- c. whilst it appeared that the ruling in the *Tideland* Case obliged the contracting authority to seek a clarification yet, in this case, a clarification on submitted information was not possible in view of the fact that the recommended tendering company submitted no information on the price in its tender form;

and

- d. the main issue that one had to deal with was whether the evaluation had to be carried out holistically or on a document by document basis, besides, having to evaluate the requirement and purpose of the tenderer's declaration which formed part of the tender form.

Architect Farrugia stressed that the fact that para. 3 of the tender form made a direct linkage between the price in the tender form and the price in the bill of quantities such that the former had to be 'brought forward' from the bill of quantities.

Dr Zammit Pace concluded that:-

- i. the Tideland Case did not establish anything with regard to missing information in the tender form, such as the total price, but it dealt specifically with the extension of the tendering period and the ruling held that, prior to disqualification, the contracting authority had to ask a clarification to sort out an evident mistake or ambiguity;
- ii. the Tideland Case did not imply that any missing information could be settled by asking for a clarification or rectification;
- iii. arithmetical errors were extensively catered for under section 31 of the tender document;
- iv. the tenderer's declaration itself stated, among other things, that any alteration or deviation would lead to the tender offer not being considered any further. Furthermore, clause 11(e) grouped together the tender form and the financial offer/bill of quantities whilst clause 12 stated that *"I acknowledge that the Central Government Authority and/or contracting authority shall request rectifications in respect of incomplete/non-submission information pertinent to the documentation listed in clauses 11 (a), (b) and (c) of this tender form – that excluded para. 11 (e) which referred to the tender form and financial offer/bill of quantities"*;

and

- v. as a consequence of the absence, particularly, of the total price in the tender form, at tender opening stage the contracting authority was unable to follow the established procedure of displaying in public all the offers received and that did not contribute to the level of transparency required in public procurement as per Reg. 11 of the Public Procurement Regulations which provided as follows:-

"(3) The meetings of the Contracts Committees shall be open to the public during the opening of bids. The list of tenders received, together with the respective prices, except offers submitted in terms of regulation 33, shall be given publicity by the Director immediately after their opening and scheduling".

Dr Victoria Scerri, legal representative of the contracting authority, concluded that:-

- a. the tenderer's declaration itself at para. 1 declared that:

"We have examined and accept in full and in its entirety, the content of this tender document.."

- b. in this case there was an evident link between the tender form and the bill of quantities so much so that the total price required at para. 3 of the tender form had to be brought forward from the bill of quantities and at para. 11 (e) these two were referred to collectively and therefore put on the same footing;



and

- c. with regard to arithmetical errors, the tender document provided at per clause 31.2 that the corrected price in the bill of quantities prevailed over the tender form and even in case the prices in the tender form and the bill of quantities did not match, apart from arithmetical errors, still the price in the bill of quantities prevailed, which, in this case was correctly provided by the recommended tenderer.

At this point the hearing came to a close.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated the 25th September 2012 and also through their verbal submissions presented during the hearing held on the 19th October 2012, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by letter dated 18th September 2012 the appellant joint venture was informed that its tender was not successful because it was not the cheapest technically compliant and that the award was recommended in favour of Ballut Blocks Services Ltd, (b) the offer made by Ballut Blocks Services Limited was defective because the 'Tender Form' did not feature the total price of the tender as required in para. 3 Section C of the Tenderer's Declaration, (c) in its letter of reply the recommended tenderer did not contest the fact that the price was missing in the 'Tender Form' and argued that one could find the price in the bill of quantities, (d) the requirement to fill in the price in the 'Tender Form' emerged from para. 3 of the same 'Tender Form' and clauses 16.1 (f), 27.1 'Opening of Tenders', 30.2, 30.3 and 32.1 of the tender document, (e) this requirement was quite significant because, by signing the 'Tender Form', the tenderer would be binding oneself by the price and the other tender conditions, (f) in its letter of reply the recommended tenderer (1) in the Public Contracts Review Board case no 285 (CT/3079/2010) – which was a 3 package tender where the three envelopes were inserted into envelope 2 which remained unopened at the start of the evaluation process - in which case the Public Contracts Review Board, whilst it upheld the objection by re-admitting the offer in the tendering process, yet it had remarked that the decision was without prejudice regarding possible future oversights and possible lack of adherence by appellant tendering company to tender specifications and conditions, (2) reference was made to the case *Tideland vs the Commission* (T-211/02) which concerned the extension of the tendering period, (3) did not state that a rectification or clarification was required in this case once one could find the price in the bill of quantities and he was correct at that because as per note 3 to clause 16.1, reproduced in para. 11 of the 'Tender Form', no rectification was allowed with regard to the 'Tender Form', (g) in case nos. 124, 156 and 205 where the Public Contracts Review Board, invariably, ruled that the 'Tender Form' was a mandatory requirement and had to be submitted in a clear and complete manner, (h) the same view had been held by the Contracts Department in case CT/3102/2010 where it decided that the offer was administratively non-compliant since it did not include in the 'Tender Form' the amount being tendered, (i) it was not sufficient for one to claim that the price had been quoted elsewhere in the tender submission, such as in the bill of quantities, because, nonetheless, the 'Tender Form'



had to be filled in its entirety, (j) this shortcoming on the part of the recommended tenderer had rendered the contracting authority unable to publicly display the offer on the 'Schedule of Prices' at tender opening stage so much so that the Contracts Department had inserted against Ballut Blocks Services Ltd the note which read 'Financial offer, no amount submitted on the Tender Form', (k) this omission led to lack of transparency during the evaluation process because it was not publicly available right after the tender opening stage, (l) the fact that the price offered had not been publicly displayed along with those of the other bidders rendered the process not as transparent as it should have been, (m) in conclusion (•) the Tideland Case did not establish anything with regard to missing information in the tender form, such as the total price, but it dealt specifically with the extension of the tendering period and the ruling held that, prior to disqualification, the contracting authority had to ask a clarification to sort out an evident mistake or ambiguity, (•) the Tideland Case did not imply that any missing information could be settled by asking for a clarification or rectification, (•) arithmetical errors were extensively catered for under section 31 of the tender document, (•) the tenderer's declaration itself stated, among other things, that any alteration or deviation would lead to the tender offer not being considered any further, (•) furthermore, clause 11(e) grouped together the tender form and the financial offer/bill of quantities whilst clause 12 stated that "*I acknowledge that the Central Government Authority and/or contracting authority shall request rectifications in respect of incomplete/non-submission information pertinent to the documentation listed in clauses 11 (a), (b) and (c) of this tender form – that excluded para. 11 (e) which referred to the 'Tender Form' and financial offer/bill of quantities*" and (•) as a consequence of the absence, particularly, of the total price in the 'Tender Form', at tender opening stage the contracting authority was unable to follow the established procedure of displaying in public all the offers received and that did not contribute to the level of transparency required in public procurement as per Reg. 11 of the Public Procurement Regulations which provided that "(3) *The meetings of the Contracts Committees shall be open to the public during the opening of bids. The list of tenders received, together with the respective prices, except offers submitted in terms of regulation 33, shall be given publicity by the Director immediately after their opening and scheduling*";

- having considered the contracting authority's representative's reference to the fact that (a) it was true that, in the case of the recommended tenderer, the 'Tender Form' submitted did not feature the total price of the offer as required at para. 3, (b) the evaluation board had discussed this issue at length in view of the very particular wording of this 'Tender Form', which the chairman of the evaluation board had, personally, never come across before, which read as follows "*The total price of our tender b/f from Financial Bid Summary Grand Total A to J (inclusive of duties, VAT, other taxes and any discounts) is*", (c) A to J represented all the items in the bill of quantities, which, in the case of the recommended tenderer was properly and completely filled in, (d) an important initial task undertaken by the evaluation board was to check the bill of quantities for any arithmetical errors as per section 31 of the tender document and it was that price – not the one in the 'Tender Form' - which would, eventually, feature in the letter of acceptance and in the contract, (e) of the four bidders participating in this tendering process only in the appellant joint venture's case there was the need to effect a slight correction to the price in the bill of quantities, (f) one could perhaps question the need for the tenderer to quote the price in the 'Tender Form' because, as per clause 31.2, it was the corrected price in the bill of quantities that mattered and, in fact, the tenderer would have to either accept the adjusted price, according to the bill of quantities or else have the tender disqualified

and the tender guarantee forfeited, (g) whilst it was correct to state that, taken in isolation, the 'Tender Form' of the recommended tenderer was deficient, yet, when considering the tender submission in its entirety then a different picture emerged and that was how the evaluation board reached its conclusion that it could not discard the offer submitted by Ballut Blocks Services Ltd and (h) para. 3 of the tender form made a direct linkage between the price in the tender form and the price in the bill of quantities such that the former had to be 'brought forward' from the bill of quantities;

- having considered the recommended tenderer's representative's reference to the fact that (a) referred to the decision of the Court of First Instance of the European Court of Justice in the case *Tideland Signal Limited v. The Commission of the European Communities* (Case T-211/02) where it was established 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. To this extent it would also be unlawful, in such circumstances, to disqualify a bid on the mere basis of such an obvious error, (b) a decision of the European Court of Justice overrode any provisions of the tender document which did not conform to that decision, (c) whilst it was a fact that, in this case, the omission of the price in the tender form was, evidently, a genuine mistake, yet it was not a material mistake because the price could be established and verified from the breakdown given in the bill of quantities, which total price, after having been checked arithmetically, would be the binding price, (d) transparency was not, in any way, compromised in this particular instance because the tender submission was in a sealed envelope and the price correctly given in the bill of quantities besides the availability of the unopened copy of the tender submission held by the contracting authority, (e) once it has been established that the appellant joint venture had committed an arithmetical mistake, even if a small one, in the bill of quantities such that it did not match the price given in the tender form, one could ask what was the difference between a 'Tender Form' having an incorrect price and a 'Tender Form' without the total price, because if one were to go strictly by the formalities then the 'Tender Form' of the appellant joint venture was incorrectly submitted and equally defective, (f) on the other hand, if one were to consider the tender submission in its entirety then one would rest on the total price of the bill of quantities and that would fill the gap in the recommended tenderer's 'Tender Form' and would also replace the appellant tenderer's incorrect price in the bidder's 'Tender Form', (g) if one were to consider that the price in the bill of quantities should prevail, then the recommended tenderer's price was the cheapest and if, on the other hand, one were to consider that the price in the 'Tender Form' should prevail then the recommended tenderer had omitted the price while the appellant joint venture had submitted an incorrect price – one could have even inserted a '0' for a price - and in both cases it was not allowed to make a rectification to the 'Tender Form' and (h) therefore, in the light of the above, especially the European Court of Justice *Tideland* ruling, the contracting authority had acted correctly in favourably considering the recommended tenderer's offer,

reached the following conclusions, namely:

1. The Public Contracts Review Board opines that (a) the offer made by Ballut Blocks Services Limited was defective because the 'Tender Form' did not feature the total price of the tender as required in para. 3 Section C of the *Tenderer's Declaration* and (b) the requirement to fill in the price in the 'Tender Form' emerged from para. 3 of the same 'Tender Form' and clauses 16.1 (f), 27.1 'Opening of Tenders',

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30.2, 30.3 and 32.1 of the tender document. This Board agrees that this requirement was quite significant because, by signing the 'Tender Form', the tenderer would be binding oneself by the price and the other tender conditions. In Case No. 124 CT 2609/07 - DH/87/07 - *Tender for the Supply of Eggs to All Hospitals and Institutions in Malta* (dated 5th May 2008) the Public Contracts Appeals Board had, *inter alia*, concluded, that "the submission of the 'Tender Form' was a mandatory requirement and, undoubtedly, the awarded tenderer was not in full compliance of this same requirement". Moreover, this Board fully concurs with the view held by the Contracts Department in case CT/3102/2010 where it was decided that the offer was administratively non-compliant since it did not include in the 'Tender Form' the amount being tendered.

2. The Public Contracts Review Board feels that in para. 1 of the *Tenderer's Declaration* which, among other things, states that "*We hereby accept the contents thereto in their entirety, without reservation or restriction. We also understand that any disagreement, contradiction, alteration or deviation shall lead to our tender offer not being considered any further*", the word "deviation" is applicable in this instance. This Board concludes that the recommended tenderer has deviated from the tender document's specifications in so far as fulfilment of requirements is concerned considering that the recommended tenderer did not submit any information relating to price in the 'Tender Form'.
3. This Board also opines that whilst, from what had been stated during the hearing, it appeared that the ruling in the *Tideland* Case obliged the contracting authority to seek a clarification yet, in the tender under review, a clarification on submitted information was not possible in view of the fact that the recommended tendering company submitted no information on the price in its 'Tender Form'.

In view of the above, this Board finds in favour of the appellant company and, apart from recommending that the appellant company's bid be reintegrated in the evaluation process, also recommends that the deposit paid by the same appellant for the appeal to be lodged should be reimbursed.

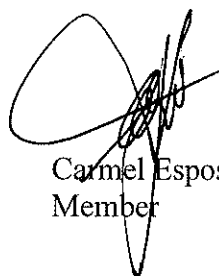
Furthermore, this Board recommends that the evaluation board should take remedial action to ensure that only compliant bidders remain eligible for further consideration.



Alfred R Triganza
Chairman



Joseph Croker
Member



Carmel Esposito
Member

26 October 2012