

PUBLIC CONTRACTS REVIEW BOARD

Case No. 516

CT/2074/2012

Tender for the Construction and Finishing of a Raised Water Polo Pitch at B'Bugia

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 was the 14th June 2012.

Three (3) tenderers submitted their offers.

Ballut Blocks Services Ltd filed an objection on the 29th November 2012 against the decision of the Contracts Department to disqualify its offer as administratively non-compliant and to recommend the award of tender to Messrs Aquatics Joint Venture.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Joseph Croker and Mr Carmel Esposito as members convened a public hearing on Wednesday, 30th January 2013 to discuss this objection.

Present for the hearing were:

Ballut Blocks Services Ltd

Dr Massimo Vella	Legal Representative
Mr Paul Vella	Director

Messrs Aquatics Joint Venture

Dr Roderick Zammit Pace	Legal Representative
Ms Itiana Abela	Representative
Mr Benny Muscat	Representative
Mr Johann Farrugia	Representative

B'Bugia Aquatic Sports Club

Mr Joe Esposito	Representative
Mr George Farrugia	Representative

Ministry for Resources and Rural Affairs

Dr Victoria Scerri	Legal Representative
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Evaluation Board

Architect Ray Farrugia	Chairman
Mr Patrick Girxti Soler	Member
Ms Janice Borg	Member
Mr John Farrugia	Member
Mr Joseph Casaletto	Secretary

Contracts Department

Mr Nicholas Aquilina

Representative

After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of the company's objection because, according to the Public Contracts Review Board, it had already decided on the merits of this case and that, subsequently, the same appellant company had exercised its right of appeal from that Public Contracts Review Board decision before the Court of Appeal.

Dr Massimo Vella, legal representative of Ballut Blocks Services Ltd, the appellant company, made the following submissions:

- i. by letter dated the 20th November 2012 the appellant company was informed that its offer was not administratively compliant because it did not enter the financial amount in the 'Tender Form';
- ii. albeit, originally, this tender was recommended for award to the appellant company, Ballut Blocks Services Ltd, yet, following the objection filed by Aquatics Joint Venture concerning a deficiency in the appellant company's tender form the Public Contracts Review Board, as composed at this hearing, had decided that the appellant company's bid had to be disqualified and that the bid of Aquatics Joint Venture had to be reintegrated in the tendering process;
- iii. subsequently, on the 20th November 2012, the adjudicating board acted on the decision taken by the Public Contracts Review Board in that it awarded the tender to Aquatics Joint Venture while rejecting Ballut Blocks Services Ltd's bid as administratively non-compliant;
- iv. the appellant company had to lodge this appeal to contest the award of the tender to Aquatics Joint Venture otherwise, unless that award decision was appealed it would become final and it would prejudice its appeal presently before the Courts;
- v. in this appeal, the appellant company was requesting the Public Contracts Review Board to quash the decision dated 20th November 2012, whereby the contracting authority awarded the tender to Aquatics Joint Venture, and that the tender be awarded to Ballut Blocks Services Ltd;
- vi. once this appeal was going to be dealt with by the Public Contracts Review Board composed of the same members who had decided upon case no. 473, the merits of which were identical to those of the present appeal, it was being submitted that the Public Contracts Review Board as composed ought to abstain from hearing this appeal so as to follow the Court practice whereby a magistrate or a judge could not preside over the appeal contesting his first decision, all the more so when this practice had been introduced following a ruling by the European Court of Human Rights in Strasbourg;
- vii. the decision to disqualify the appellant company's offer was in breach of EC Directive 2004/18/EC in that it violated the principle of proportionality such

that the shortcoming in his client's tender form, which, effectively, amounted to a formality, did not preclude the contracting authority from determining the price quoted by the appellant company and that rendered the measure taken to disqualify Ballut Blocks Services Ltd disproportionate;

and

- viii. after all, the Tender Form submitted by Aquatics Joint Venture included an erroneous amount which, for all intents and purposes, rendered its tender submission defective.

The Chairman Public Contracts Review Board expressed the following views:-

- a. there was only one Public Contracts Review Board constituted of a chairman and two members with a substitute member;
- b. once this appeal was based on the same grounds as those of case no. 473, then the Public Contracts Review Board has already decided on the merits of the case and, as a consequence, the Public Contracts Review Board could not decide on this second appeal because that would amount to a review of its first decision;
- c. it was up to the courts to deal with this case at this juncture;

and

- d. there were other instances where the Public Contracts Review Board presided over two or even three appeals on the same case but in each case there would be fresh grounds for objection, namely once on administrative shortcomings, then on technical shortcomings and then on the award criteria.

Dr Vella reiterated that, in his view, it was necessary for the appellant company to lodge this appeal, namely to contest the award of the tender in favour of Aquatics Joint Venture, otherwise, in the absence of such an appeal, that award would become final and would prejudice its court case because the merit of the court case would be exhausted.

The Chairman Public Contracts Review Board reminded the appellant that Reg. 85 (5) of the Public Procurement Regulations provided, among other things, that '*Such recourse – before the Court of Appeal - shall not however delay the Director of Contracts or the Head of a contracting authority from implementing the Review Board's final decision.*'

Dr Roderick Zammit Pace, on behalf of the recommended tenderer, expressed the following views:-

- i. agreed with the views expressed by the Chairman Public Contracts Review Board in the sense that this Board could not decide on the same merits decided upon in case no. 473 and the same appellant company's legal representative admitted this when he asked the Public Contracts Review Board, as composed, to abstain from hearing the present appeal;

- ii. Ballut Blocks Services Ltd has lodged an appeal before the Court of Appeal on the same grounds as those of case no. 473 and, as a result, one had to question the need for the appellant company to lodge this appeal in the first place;
 - iii. at this stage, the Public Contracts Review Board's decision on case no. 473 was final and had to be acted upon as provided for in Reg. 85 (5) and, in the meantime, the appellant company had to wait for the outcome of the case it has pending before the Court;
- and
- iv. whilst, the purpose of this appeal was to stop the award of the tender until such time that the Court of Appeal would decide on the appellant company's case, yet, the regulations did not provide for this eventuality and neither did it permit the Public Contracts Review Board to decide a case twice on the same merits.

At this point the hearing came to a close.

This Board,

- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated 29th November 2012 and also through its representatives verbal submissions presented during the hearing held on the 30th January 2013, 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 the 20th November 2012 the appellant company was informed that its offer was not administratively compliant because it did not enter the financial amount in the 'Tender Form', (b) albeit, originally, this tender was recommended for award to the appellant company, Ballut Blocks Services Ltd, yet, following the objection filed by Aquatics Joint Venture concerning a deficiency in the appellant company's tender form, the Public Contracts Review Board, as composed at this hearing, had decided that the appellant company's bid had to be disqualified and that the bid of Aquatics Joint Venture had to be reintegrated in the tendering process, (c) subsequently, on the 20th November 2012, the adjudicating board acted on the decision taken by the Public Contracts Review Board in that it awarded the tender to Aquatics Joint Venture while rejecting Ballut Blocks Services Ltd's bid as administratively non-compliant, (d) the appellant company had to lodge this appeal to contest the award of the tender to Aquatics Joint Venture otherwise, unless that award decision was appealed, it would become final and it would prejudice its appeal presently before the Courts, (e) in this appeal, the appellant company was requesting the Public Contracts Review Board to quash the decision dated 20th November 2012, whereby the contracting authority awarded the tender to Aquatics Joint Venture, and that the tender be awarded to Ballut Blocks Services Ltd, (f) once this appeal was going to be dealt with by the Public Contracts Review Board composed of the same members who had decided upon case no. 473, the merits of which were identical to those of the present appeal, it was being submitted that the Public Contracts Review Board as composed ought to abstain from hearing this appeal so as to follow the Court

practice whereby a magistrate or a judge could not preside over the appeal contesting his first decision, all the more so when this practice had been introduced following a ruling by the European Court of Human Rights in Strasbourg, (g) the decision to disqualify the appellant company's offer was in breach of EC Directive 2004/18/EC in that it violated the principle of proportionality such that the shortcoming in his client's tender form, which, effectively, amounted to a formality, did not preclude the contracting authority from determining the price quoted by the appellant company and that rendered the measure taken to disqualify Ballut Blocks Services Ltd disproportionate, (h) after all, the 'tender form' submitted by Aquatics Joint Venture included an erroneous amount which, for all intents and purposes, rendered its tender submission defective and (i) it was necessary for the appellant company to lodge this appeal, namely to contest the award of the tender in favour of Aquatics Joint Venture, otherwise, in the absence of such an appeal, that award would become final and would prejudice its court case because the merit of the court case would be exhausted;

- having also considered the recommended tenderer's reference to the fact that, (a) this party agreed with the views expressed by the Public Contracts Review Board in the sense that this Board could not decide on the same merits decided upon in case no. 473 and the same appellant company's legal representative admitted this when he asked the Public Contracts Review Board, as composed, to abstain from hearing the present appeal, (b) Ballut Blocks Services Ltd has lodged an appeal before the Court of Appeal on the same grounds as those of case no. 473 and, as a result, one had to question the need for the appellant company to lodge this appeal in the first place, (c) at this stage, the Public Contracts Review Board's decision on case no. 473 was final and had to be acted upon as provided for in Reg. 85 (5) and, in the meantime, the appellant company had to wait for the outcome of the case it has pending before the Court and (d) whilst, the purpose of this appeal was to stop the award of the tender until such time that the Court of Appeal would decide on the appellant company's case, yet, the regulations did not provide for this eventuality and neither did it permit the Public Contracts Review Board to decide a case twice on the same merits,

reached the following conclusions, namely:

1. The Public Contracts Review Board establishes that, once this appeal was based on the same grounds as those of case no. 473, then this meant that the Public Contracts Review Board has already decided on the merits of the case and, as a consequence, the Public Contracts Review Board could not decide on this second appeal because that would amount to a review of its first decision. This Board contends that the Public Contracts Review Board's decision on case no. 473 was final and had to be acted upon as provided for in Reg. 85 (5) of the Public Procurement Regulations which, among other things, states that '*Such recourse – before the Court of Appeal - shall not however delay the Director of Contracts or the Head of a contracting authority from implementing the Review Board's final decision.*'
2. The Public Contracts Review Board cannot but demonstrate its reservations as to the real scope which prompted the appellant company to decide to file this appeal considering the fact that the same appellant company has to wait for the outcome of the case it has pending before the Court of Appeal. As a result, following a

thorough deliberation of submissions made by the appellant company, this Board concludes that the nature of this appeal was, intrinsically, frivolous.

In view of the above this Board finds against the appellant company and recommends that the deposit paid by the same company for the appeal to be lodged should not be reimbursed.

Alfred R Triganza
Chairman

Joseph Croker
Member

Carmel Esposito
Member

6 February 2013