

PUBLIC CONTRACTS REVIEW BOARD

Case 1066 – CT 2183/2016 – Provision of Seaman Services to Work on Board Gozo Channel (Operations) Limited Vessels (Framework Agreement)

The Publication Date of the Call for Tenders was 7 October 2016 whilst the Closing Date for Call of Tenders was 17 November 2016. The Estimated Value of the Tender, (Exclusive of VAT) was € 2,280,000.

Two (2) Bidders have submitted offers for this Tender.

On 23 June 2017, Ozo Marine Joint Venture filed an Objection against the decision of Gozo Channel (Operations) Limited to cancel the Tender against a deposit of € 17,100.

On 13 July 2017, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

Appellant – Ozo Marine Joint Venture

Mr Fabio Muscat	Representative
Mr Mario Muscat	Representative
Dr Tonio Cachia	Legal Representative

Contracting Authority – Gozo Channel (Operations) Limited

Mr John Muscat	Secretary, Evaluation Board
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Department of Contracts

Dr Christopher Mizzi	Legal Representative
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Dr Christopher Mizzi, the Legal Representative for the Department of Contracts, opened by noting that any reference made to Ozo Gozo Ltd in the Reasoned Letter of Reply dated 11 July 2017 should be reverted to Ozo Marine Joint Venture who were the actual Bidders for this Tender.

Dr Tonio Cachia, the Legal Representative for Ozo Marine Joint Venture opened by saying that this Tender following another case discussed previously by the Public Contracts Review Board as diversely composed. When the contract was going to be signed, his clients have received a Letter from the Department of Contracts saying that there was a problem regarding the Bid Bond.

Ozo Marine Joint Venture was formed from two companies, Ozo Gozo Ltd and Ozo Malta Ltd and the former was featuring everywhere in the Bid, continued Dr Cachia. That was the reason why even in their Letter of Objection, the company Ozo Gozo Ltd was used.

The Chairman of the Public Contracts Review Board, Dr Anthony Cassar, said that this Board accepted this mistake and that the discussion was about the cancellation of the Tender.

Dr Tonio Cachia, the Legal Representative for Ozo Marine Joint Venture, then referred to the Letter of Rejection issued by the Department of Contracts on 16 June 2017 where *inter alia* it was stated that,

“The bid bond received by Ozo Gozo Ltd was submitted in the name of Ozo Malta Ltd only and not on behalf of the joint venture (Ozo Marine). As bid bond only identifies Ozo Malta Ltd as the entity issuing the Bid Bond and not the Joint Venture, this Bid Bond is incorrect and cannot be considered further, (as bid bond must be issued on behalf of the joint venture).”

As a statement of fact, continued the Appellant’s Legal Representative, the Bid was made from the Joint Venture which has no legal personality since it was formed from two different companies. The Bid Bond was issued on behalf of Ozo Malta Ltd, one of the companies involved in the Joint Venture. There was no problem with the Bid Bond, which could be cashed by the Department of Contracts at their convenience.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board remarked that the Bid Bond should have been issued by the Joint Venture. Ozo Gozo Ltd was one of the members of the Joint Venture. If an offer was submitted by a party to the Joint Venture, the latter should feature in the Bank Guarantee.

Dr Tonio Cachia, the Legal Representative for Ozo Marine Joint Venture, said that it was not a third party who issued the Bid Bond.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board submitted that a Joint Venture is an entity in itself because otherwise it could not have submitted a Bid for the Tender. The Bid Bond should be issued from either the Bidder or one of the Bidders on behalf of the Joint Venture.

Dr Tonio Cachia, the Legal Representative for Ozo Marine Joint Venture, said that the Letter of Rejection issued by the Department of Contracts on 16 June 2017 said that the Bid Bond had to be issued by Ozo Gozo Ltd and not by Ozo Malta Ltd.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board countered that this does not refer to the Joint Venture in question.

Dr Tonio Cachia, the Legal Representative for Ozo Marine Joint Venture replied that in this case there was no third party since Ozo Gozo Ltd features in all processes of the Bid.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts, pointed out that if one had to see the Opening Schedule of Offers, the profile used was the one by Ozo Gozo Ltd.

Dr Tonio Cachia, the Legal Representative for Ozo Marine Joint Venture said that their argument was that at the end of the whole process for which they were recommended for award, instead of getting the contract for signatures, they were notified that their Bid was rejected and this was not right. The discussion was about one of the parties who feature in the Joint Venture. Even if one had to open a bank account, it will be issued not in the name of the Joint Venture but in the name of the parties taking part in it.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board countered that this Board disagrees with the latter statements since if a Joint Venture has submitted an offer; therefore somebody has made a Bid.

Dr Tonio Cachia, the Appellant's Legal Representative said that since a Joint Venture does not have a C number, it does not have a legal personality neither.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts said that the profile which was used was the one for Ozo Gozo Ltd although in reality it was the Joint Venture who submitted the offer. If the submission involved a Joint Venture, therefore at the end of the day the profile used was by Ozo Gozo Ltd whilst the Bid Bond was issued by Ozo Malta Ltd.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board noted that Gozo Channel (Operations) Ltd has cancelled this Tender when they got to know about the confusion which there was.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts submitted that it would have been better if this mishap was noted earlier. There were other sentences which were decided by both the Public Contracts Review Board and the Hon. Court of Appeal which agreed with the stance taken by the Contracting Authority.

Once the Director General (Contracts) caught a mistake in the Tender, he has every right to cancel it. In this case we had a problem in the Bid Bond and in a previous similar case; a party from a Joint Venture has issued a Bank Guarantee on his behalf and the Public Contracts Review Board has agreed with all the arguments presented by the Department of Contracts.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board added that the Bank Guarantee should have been issued by one of the parties on behalf of the Joint Venture.

Mr Mario Muscat, on behalf of Ozo Marine Joint Venture said that the Bid Bond was addressed to the Department of Contracts and therefore since he had stakes in both Ozo Malta Ltd and Ozo Gozo Ltd it would affect him on both sides. Mr Muscat asked whether the money would have been withdrawn in the case that he was not interested any more in these companies.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts replied that in the affirmative if it did not exceed the 90 day period.

Mr Mario Muscat, on behalf of Ozo Marine Joint Venture said that technically he was ready to sign the contract. Mr Muscat alleged that the Contracting Authority was hiding behind a technicality because if one had to check with the Malta Financial Services Authority, one had to see that the Companies in question were his.

At this point, Dr Christopher Mizzi, the Legal Representative for the Department of Contracts presented a decision issued by the Public Contracts Review Board as diversely composed, namely Case 1043 issued on 9 May 2017 and Appeal 312/2016 before the Hon Court of Appeal issued on 15 December 2016 to substantiate the previous arguments issued by the Contracting Authority.

Dr Tonio Cachia, the Legal Representative for Ozo Marine Joint Venture added that these documents were not relevant to the case discussed.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts countered that the cases presented were relevant with regards to the Bid Bond issue.

Dr Tonio Cachia, the Appellant's Legal Representative added that he agreed with Dr Mizzi that the Director General (Contracts) can cancel the Tender but not to displace the blame on the Bidder.

Mr Mario Muscat, on behalf of Ozo Marine Joint Venture, concluded that he expected the money put on the Bid Bond to be refunded since it was not fair to lose money for a technicality.

At this stage, the Public Hearing was adjourned to Friday 21 July 2017 at 09:00 wherein the Public Contracts Review Board will transmit the decision taken for this Objection verbally and then distribute a hard copy of the same to all parties concerned.

This Board,

Having noted this Objection filed by Ozo Gozo Ltd (herein after referred to as the Appellant) on 23 June 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference CT 2183/2016

listed as Case No 1066 in the records of the Public Contracts Review Board, awarded by Gozo Channel (Operations) Ltd (herein after referred to as the Contracting Authority).

Appearing for the Appellant: Dr Tonio Cachia

Appearing for the Contracting Authority: Dr Christopher Mizzi

Whereby, the Appellant contends that:

- a) His main contention is that although the Tender was rightly awarded to him, the Contracting Authority cancelled the Tender quoting reasons referring to the Bid Bond, the latter of which was not contested neither during Evaluation nor during Award Stage;**

- b) The Appellant also maintains that his Bond was valid as it was issued in favour of the Department of Contracts, even though the Bank Guarantee was not issued by the Joint Venture itself.**

This Board also noted the Contracting Authority’s “*Letter of Reply*” dated 11 July 2017 and its verbal submissions during the Public Hearing held on 13 July 2017, in that:

- a) Gozo Channel (Operations) Ltd referred to the confusion of names in this Tender. It also emphasized the fact that the Director of Contracts is obliged to cancel the Award of a Tender should he finds that during the Evaluation Process an error has occurred which in turn effected the Award Process. In this regard, the Contracting Authority insists that it had acted within the parameters of the Public Procurement Regulations.**

This Board has also taken note of the documents submitted by the Department of Contracts which consisted of:

- i) Appeal 312/2016 issued by the Hon Court of Appeal on 15 December 2016;**
- ii) Case 1043 issued by the Public Contracts Review Board on 9 May 2017.**

This Board, after having considered the merits of this case, arrived at the following conclusions:

- 1. From the submissions made and from the examination of the relative documentation, this Board opines that the two issues at stake are, “*The Cancellation of the Tender*” and “*The Bid Bond*”, which shall be considered in the following order:**

a) The Cancellation of the Tender

This Board notes that this Objection was made on behalf of Ozo Marine Joint Venture, the actual Bidder, whilst the reply to the Objection makes reference to Ozo Gozo Ltd, one of the members of the Joint Venture. This inadvertent error was however clarified by the Contracting Authority, so that, it is being established and confirmed that the actual Bidder was Ozo Marine Joint Venture.

This Board would like to respectfully refer to Clauses 18.1 and 18.3 of the “*General Rules Governing Tenders*” version 1.14 issued by the Department of Contracts on 4 January 2016 which state:

Clause 18.1

“The Contracting Authority reserves the right to accede or reject any Tender and/or to cancel the whole Tender procedure and reject all Tenders. The Contracting Authority reserves the right to initiate a new invitation to Tender.”

Clause 18.3

“Cancellation may occur where:

- a) The Tender Procedure has been unsuccessful, namely where no qualitatively or financially worthwhile Tender has been received or there has been no response at all;*
- b) The economic or Technical Parameters of the project have been fundamentally altered;*
- c) Exceptional circumstances or force majeure render normal performance of the project impossible;*

- d) All Technically compliant Tenders exceed the financial resources available;*
- e) There have been irregularities in the procedure, in particular where these have prevented fair competition;*
- f) The duration of the evaluation has exceeded the stipulated time limit in Article 8 of the “General Rules Governing Tendering”*

From the above mentioned clauses, it is ample clear that Gozo Channel (Operations) Ltd can cancel the Tender prior to award and that the circumstances where such cancellation may occur are also specified.

In this particular case, Clause 18.3 (e) applies, in that, during the Evaluation Stage, the Bid Bond presented by the Appellant was not issued by the Joint Venture but by one of its members. On close examination of the Bid Bond itself, this fact was overlooked by the Evaluation Board and when the Contracting Authority noticed such oversight, it cancelled the Tender.

In this regard, this Board would like to point out that the Tendering Process is finalised through the signing of the Contract of Award and not before. The Contracting Authority has the right to cancel the Award and the Tender itself upon detecting such a deficiency in the Evaluation Procedure and therefore, this Board upholds the decision taken by Gozo Channel (Operations) Ltd to cancel the Tender

b) The Bid Bond

The main cause why the Tender was cancelled was due to the fact that the Bank Guarantee was not issued by the Bidder himself, i.e. the Joint Venture. This Board acknowledges the fact that although such a Joint Venture is not registered and has no identification number; an agreement exists between the members of the Group which is formed for the purpose of:

i) Submitting an Offer;

ii) Carry out the Tendered Works should it be awarded the Tender.

Therefore, the Joint Venture is given a name and in this case it was known as “*Ozo Marine Joint Venture*”. This is shown in the Joint Venture Agreement as such and therefore the official Bidder to this Tender is the Joint Venture and not one or any of its members.

This Board has always maintained that in such cases where Joint Ventures are concerned, it is usual and practical for one of the members known to banks to issue such a Bank Guarantee. However, the format presented by Ozo Marine Joint Venture does not give any relevance to the Awarded Tender and the successful Applicant.

As has been decided on similar cases, this Board is aware that no commercial Bank would grant the facility for a temporary group carrying out works, but as is customary, banks will issue a guarantee backed by one of the members of the Joint Venture on behalf of the latter with particular reference to the Tendered Works awarded.

In this particular format, the Bid Bond should suffice, however this was not acted upon by Ozo Marine Joint Venture. In this

regard, this Board does not uphold the contention that the Bid Bond presented by the Appellant had any direct correlation with the Tendered Works.

In view of the above, this Board confirms that:

- i) The decision of Gozo Channel (Operations) Ltd to cancel the Tender is upheld;**
- ii) Gozo Channel (Operations) Ltd is to release the Bid Bond presented by Ozo Marine Joint Venture**
- iii) The deposit paid by Ozo Marine Joint Venture is to be fully refunded.**

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member

21 July 2017