

PUBLIC CONTRACTS APPEALS BOARD

Case No. 68

CT 2432/2005 Advert No 274/2005 - Service tender for the Projects Management (Out Sourced) for works at Hal Far Industrial Park

This call for tenders, published in the Maltese Government Gazette on 19.08.2005 was issued by the Contracts Department following a request transmitted to the latter by the Ministry for Investment, Industry and Information Technology.

The closing date for this call for offers with a global estimated value of contract being Lm 80,269 (excluding VAT) was 06.10.2005.

An Evaluation Board consisting of Messrs.

Mr Joseph Gerada	Chairperson
Mr Louis Casha	Secretary
Mr Gorg Cilia	Evaluator
Mr John Rizzo Naudi	Evaluator
Mr Ray Vella	Evaluator

was appointed to analyse a total of three offers submitted by the same number of tenderers.

Following receipt of a formal notification, dated 20.01.2006, from the DG (Contracts) whereby they were informed that the tender was being awarded to *Architect Marvin Ellul, Messrs Design & Technical Resources Ltd* filed an objection on 04.02.2006.

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Edwin Muscat, respectively, acting as members, convened a public hearing on 08.03.2006 to discuss this objection.

Present for the hearing were:

Design & Technical Resources Ltd	Dr Norval Desira		
	Arch Robert Sant		
	Arch Etienne Magri		
	Ms Vivienne Psaila		
Architect Marvin Ellul	Dr Karl Briffa		
	Dr Mario Demarco		
	Arch Marvin Ellul		
Evaluation Committee	Mr Joseph Gerada	-	Chairperson
	Mr Louis Casha	-	Secretary
	Mr Gorg Cilia		
	Mr John Rizzo Naudi		
	Mr Raymond Vella		

The representatives of Design & Technical Resources Ltd, the appellants, were invited to explain in brief the motive leading to their objection.

Dr Norval Desira, acting as legal representative, started by stating that on 20 January 2006 the Director General (Contracts) informed his clients that the tender submitted by them was not successful because they had an invalid Bank Guarantee. It transpired that their tender was rejected because of a typing error as the expiry date of the bid bond was erroneously dated 3 January 2005 instead of 3 January 2006. Dr Desira contended that, once the Bank Guarantee was issued on 1 October 2005 it did not make sense to issue a Bank Guarantee which expired on 3 January 2005. He explained that as soon as this mistake was identified at the opening session of the tenders, the Bank communicated verbally with the Director General (Contracts) and soon after produced an amended 'guarantee form'. Furthermore, Dr Desira argued that, in view of the fact that the bid offered by his client was Lm 30,000 cheaper than the chosen one, it was to be considered highly illogical that a simple clerical error should end up penalising the nation's coffers with such a substantial amount.

Dr Desira also rebutted various points raised in the reasoned letter of reply written by Dr Karl Briffa on behalf of his client, Architect Marvin Ellul. He contended that Case No 46 - CT 2616/2004 relating to the *Tender for the reconstruction and upgrading of San Lawrenz to Rabat* was a completely different case because in that case, without entering into the merit of the decision, the Bank Guarantee was considered invalid as it was not issued in favour of the tenderer.

The appellants' legal representative contended that it was incorrect to state that the bid bond should have been valid for a total of one hundred and fifty (150) days instead of ninety (90) days because *Clause 4.1 Tender Guarantee* specified that it 'must remain valid for 90 days being the period of validity of the tender.' He maintained that this point was amplified under *Clause 6 Period during which tenders are binding* wherein it was stipulated that 'Tenderers are bound by their tenders for 90 days after the deadline for the submission of tenders' and the 'selected tenderer must maintain its tender for a further 60 days from the date of notification that its tender has been recommended for the award by the Evaluation Committee.' Therefore, it was clear that, according to the 'Instruction to tenderers' the tender guarantee had to remain valid for 90 days and not 150 days.

Dr Desira said that it was also incorrect to state that the financial bid had to be placed in a separate envelope because in *Clause 8 Submission of tenders* it was stipulated that 'The financial bid must be placed in a sealed envelope with the technical bid and tender guarantee.' Furthermore, he pointed out that the reason given by the Director General (Contracts) for rejecting the tender was not because the financial offer was not presented in a separate envelope but because the Bank Guarantee was invalid. Tenderers were not obliged to submit their tender in three separate envelopes because it was issued under the *Single Envelope System*.

Dr Desira submitted that, apart from the error in the date of their bid bond, there were a number of other mistakes in this tender, such as, in the name of the company and

reference number on the Department of Contracts' letter dated 20th January, 2006 and the form used at the tender opening session. However, he maintained that certain mistakes were admissible particularly if these were not the result of negligence.

Dr Briffa responded by stating that, irrespective of whether the mistake in the date was attributed to the bidder or not, the fact remained that, once the bid bond referred to a preceding date, the Director General (Contracts) would not have been able to exercise his rights to withdraw payment of the guarantee from the bank upon request. He contended that even if the date were correct, the period of validity covered by the bid bond was eighty nine (89) days because the validity of ninety (90) days from the 6th October 2005 (6th October should not be included) would expire on the 4th January 2006 and not on the 3rd January 2006. The lawyer claimed that the mistake was the result of insufficient attention by the tenderer and this could not be attributed to the bank because it was the responsibility of the tenderer to check the details before presenting the document.

With reference to Dr Desira's argument about the price, Dr Briffa contended that this was not the only element that had to be taken into consideration in the evaluation and awarding of tenders. He reiterated that the issue of price was irrelevant because the tender submitted by the appellants did not fulfil the minimum requirements for the acceptance of tender. He claimed that the objection raised by Messrs Design and Technical Resources Ltd should not be considered because the Bank Guarantee was not valid.

Although at first the PCAB expressed its desire to summon as witnesses Dr Michael Borg Costanzi – Head Legal Office BOV and Mr Joe Baldacchino BOV Sta Venera Branch, after the testimony given by the other witnesses, the PCAB declared their testimony was no longer required due to the fact that certain issues which had previously been unclear had been duly clarified throughout the hearing and, as a consequence, the Board decided that they were in possession of enough material to enable them to conduct a proper deliberation process.

At this stage, Mr Edwin Zarb (DG, Contracts) was called to the witness stand by the PCAB who asked him to give his opinion as to the issue in question relating to this particular objection being raised by appellants.

Mr Zarb stated that with regards to the form 'SUMMARY OF TENDERS RECEIVED', he stated that, apparently, the officers from the Department present during the opening erroneously used the incorrect form, the one that was used for the *Three Envelope System* and not for the *Single Envelope System*. Furthermore, he explained that, to his knowledge, the indicated tenders were rejected not because the financial offer was not submitted in a separate envelope but because the tender Bank Guarantee was not valid.

Mr Zarb also confirmed that the above-mentioned document was published on the Contracts Department's notice board on 6 October 2005.

The Director General (Contracts) clarified that it is correct to say that on 6 October 2005 it had been indicated that the appellants' offer was rejected, as far as the Single Envelope System was concerned. However the official information to tenderers could only be given following the Contracts Committee's decision after the evaluation report was accepted by the same Committee, that is, on the award of contract. Furthermore, he also wanted to draw the attention of those present that in the procedure indicated in the *Public Procurement Regulations* it was specified that tenderers who felt aggrieved by a proposed award of contract could file a 'notice of objection' within fourteen working days of the publication of the decision. He explained that the procedure of the *Three Envelope System* was different because tenderers were officially informed of the decision leading to the discarding of any tender during any stage of the process and any complaint had to be made within four working days from the date of notifications of the decision.

During cross-examination, Mr Joseph M Gerada, Chairperson of the Evaluation Committee, testified that at the tender opening session they used the 'SUMMARY OF TENDERS RECEIVED' and 'LIST OF TENDERERS' REPRESENTATIVES' forms that were provided by the representative at the Department of Contracts. He confirmed that the offers submitted by Design & Technical Resources Ltd and Bezzina & Cole Ltd were rejected because they had an invalid Bank Guarantee and not because of the Separate Envelope System. He explained that they could not accept the bid bond because the document presented showed that the expiry date was incorrect.

On cross-examination, Architect Etienne Magri, also representing the appellants, testified that the Bank Guarantee was not submitted directly by the Bank to the Department of Contracts but it was annexed with the tender document. He declared that apart from the fact that there was an amount of money held at the Bank readily available, the validity of the bid bond was effective from starting date until expiry date.

Dr Desira said that the Bank Guarantee dated 1 October 2005 specified that:

"At the request of the Tenderer, we, Bank of Valletta p.l.c., hereby guarantee to pay you on demand a maximum sum of One Thousand Six Hundred Five Maltese Liri and 00 cents, Lm1,605.00 in the event that the Tenderer withdraws its tender before the expiry date or in the event that the Tenderer fails to sign the contract and provide the Performance Bond, if called upon to do so in accordance with the tender conditions or in the event that the Tenderer otherwise fails to fulfil its obligations under the tender conditions.

It is understood that this Guarantee will become payable on your first written demand which must be sent to the Bank's Trade Finance Centre at 229, Fleur de Lys Road, Sta Vanera, BKR 09, MALTA, accompanied by this document, and it shall not be incumbent upon us to verify whether such demand is justified."

Dr Demarco said that, irrespective of whether the mistake was made by the bank or the tenderer, the fact remained that the Department of Contracts could not submit a valid claim on the bid bond as presented by the appellants because on the face of it the performance guarantee was not valid. Furthermore the bid bond had to cover a period of 150 days because Annex VI of the tender *dossier* required that the release of the guarantee by the bank would only occur '*within sixty days of the expiry of the tender validity period*' which was 90 days and also because the deadlines indicated in the 'INSTRUCTIONS TO TENDERERS' the contract had to be signed by 6 March 2006. Dr Demarco maintained that the tender guarantee should have been valid up to 4 Jan 2006 and not 3 January 2006.

Dr Desira rebutted Dr Demarco's concluding remarks by stating that since the Bank did not issue a new guarantee but extended the validity of the guarantee up to 3 January 2006, it was automatically acknowledging that it was not invalid. He pointed out that Clause 6 specified that it was only the successful tenderer who was obliged to '*maintain its tender for a further 60 days from the date of notification that its tender has been recommended for the award by the Evaluation Committee*'. However, such obligation would not remain binding on unsuccessful tenderers because under Clause 4.1 it was specified that the Tender Guarantee '*must remain valid for 90 days being the period of validity of the tender.*' With regard to the last point mentioned by Dr Demarco, Dr Desira claimed that once the bid bond was valid this could easily be rectified by requesting an extension.

At this stage, the public hearing was brought to a close and the PCAB proceeded with its deliberations before reaching its decision.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated 04.02.2006 and also through their verbal submissions presented during the public hearing held on 8th March, 2006, had objected to the decision taken by the General Contracts Committee, formally communicated via a letter, informing them that the tender submitted by them was not successful;
- having noted the appellants' legal advisor claim that their offer was rejected because of a genuine typing error as the expiry date of the bid bond was erroneously dated 3 January 2005 instead of 3 January 2006;
- having also noted Dr Desira's point relating to the fact that, once the Bank Guarantee was issued on 1 October 2005, it did not make sense to issue a Bank Guarantee which expired on 3 January 2005;
- having considered Dr Briffa and Dr Demarco's arguments which focused on the fact that, irrespective of whether the mistake in the date was attributed to the bidder or not, the fact remained that, once the bid bond referred to a preceding date, the Director General (Contracts) would not have been able to exercise his rights to withdraw payment of the guarantee from the bank upon request;

- having also observed that the reason given by the Director General (Contracts) for rejecting the tender was not because the financial offer was not presented in a separate envelope but because the Bank Guarantee was invalid, which was fully congruent with the reason given during the hearing by Mr Gerada;
- having heard the argument put by Dr Desira that certain mistakes should be admissible *particularly if these were not the result of negligence*;
- having taken cognizance of and concurred with Dr Desira's reasoning with regards to the reference made to Case No 46 - CT 2616/2004, relating to the *Tender for the reconstruction and upgrading of San Lawrenz to Rabat*, which, as claimed, was completely irrelevant because in that case the Bank Guarantee was considered invalid as it was not issued in favour of the tenderer

reached the following conclusions:-

- The Public Contract Appeals Board has always insisted that it is incumbent on the tenderers to ensure that maximum attention should be given to present the correct documentation as requested in the Tender Document and has always frowned upon the instances of incorrect documentation submitted because of insufficient attention given by the tenderers;
- The Public Contract Appeals Board agrees with the point raised by the beneficiaries' lawyer, namely, that, as genuine as it could possibly be, the mistake in the date of the tender guarantee by the bank was the result of insufficient attention by the tenderer and which could not be attributed to the bank because it remains always the ultimate responsibility of the tenderer to check the details before presenting a document to third parties;

In consequence to the above, the appellants' objection to the decision reached by the General Contracts Committee to award the Contract to *Architect Marvin Ellul* cannot be upheld by this Board.

Furthermore, in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by appellants in terms of regulation 83, should not be refunded.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

March 29, 2006