

## PUBLIC CONTRACTS APPEALS BOARD

### Case No. 194

**CT/2173/2008; Advert CT/250/2008**

#### **Period Contract for the Handling and Compaction of Permitted Waste Delivered to Ghallis Landfill and to Undertake other Works within the Maghtab Environment Complex**

This call for tenders with an estimated value of €1,071,513 was originally published in the Government Gazette on 05.12.2008. The closing date for this call for offers was 15.01.2009.

Three (3) different tenderers submitted their offers.

On 22.01.2010 Messrs Polidano Brothers Ltd filed an objection against the intended award by the Contracts Department of the tender in caption to Messrs Bonnici Brothers Ltd.

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Edwin Muscat and Mr Carmel Esposito, respectively, acting as members convened a public hearing on 07.04.2010 to discuss this objection.

Present for the hearing were:

#### **Polidano Brothers Ltd**

Dr Jesmond Manicaro	Legal Representative
Mr Paul Polidano	Representative
Mr Joseph Cachia	Representative

#### **Bonnici Brothers Ltd**

Dr Adrian Delia	Legal Representative
Dr John L Gauci	Legal Representative
Mr Mario Bonnici	Representative
Mr Reuben Aquilina	Architect

#### **WasteServ Malta Ltd**

Dr Victor Scerri	Legal Representative
------------------	----------------------

#### **Evaluation Board**

Eng. Mario Agius	Evaluator
Mr Joseph Mifsud	Evaluator

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

Dr Jesmond Manicaro, legal representative of Polidano Brothers Ltd, explained that this was a three package tender and then went on to quote from a letter dated 22<sup>nd</sup> September 2009 which his client received from the Contracts Department as follows:

*"..... the General Contracts Committee has recommended that unless any objection is received the financial proposals (prices) relative to the tenders which qualified for this stage are to be opened on Thursday, 1<sup>st</sup> October 2009 after 10.00 a.m. at the Committee Room of the Contracts Department. Your tender has been adjudicated as complying with the tender specifications. If you wish, you may be present for the opening of said prices."*

Dr Manicaro remarked that this meant that his client's offer had qualified from both the first and second packages. He then went on to quote from a Contracts Department letter dated 14<sup>th</sup> January 2010 wherein his client was informed as follows:

*"... I regret to inform you that the tender submitted by you was not successful as you did not submit the required appendix to tender for a work's contract."*

Dr Manicaro claimed that, at 'package 3' stage, the evaluation board had to deal solely with the issue of price and that the previous two stages had been satisfactorily concluded as far as his client was concerned. He contended that his client had submitted the *Appendix to Tender for a Work's Contract* and went on to state that one only had to fill in (i) the name and address of the tenderer – which had already been given elsewhere in the tender submission and (ii) the name and address of the representative of the contracting authority, namely the final beneficiary. Dr Manicaro considered the filling in of this 'appendix' as trivial.

Dr Victor Scerri, legal representative of WasteServ Ltd, did not contend the fact that the appellants had been found compliant in envelopes 1 and 2 but stressed that the *Appendix to Tender for a Work's Contract (Appendix to Volume 1)* was found missing in Envelope 3. Dr Scerri pointed out that, contrary to what the appellants had just claimed, the 'appendix' in question included relevant information such as the 'deadline for notice to commence'; the 'period of access to the site'; 'the amount of third party insurance' and others. Dr Scerri referred to sections 14.3, 14.3.3.1 and 14.4 at pages 12 and 13 of the tender document which clearly indicated that this document was to be inserted only in Envelope 3 and that the document was a mandatory requirement.

On his part, Dr Adrian Delia, acting as legal advisor of Bonnici Brothers Ltd, agreed that the appellant Company was evidently compliant as far as Envelopes 1 and 2 were concerned but disagreed with the statement of the appellants that Envelope 3 only dealt with the price because that envelope had also to contain other information, including the 'appendix' in question. Dr Delia remarked that it was amply clear that this 'appendix' was mandatory and that it had to be inserted in Envelope 3. He recalled that the PCAB had handed down several decisions with regard to missing forms and information which necessitated mandatory requirements. Dr Delia added

that, contrary to what had been alleged by the appellants, the ‘appendix’ in question was indeed relevant. Dr Delia referred to the ‘Note’ on this ‘Appendix’ which read: (*Tenderers are required to fill in the blank spaces in this Appendix*) and, while he acknowledged that some of the information had been given, other data had to be filled in by the tenderers.

Dr Manicaro held the view that the only part of the ‘appendix’ which was marked ‘To be completed by the tenderer’ was the ‘name and address of the tenderer’ and argued that he could not give, for instance, ‘the deadline for notice to commence’ and the ‘period of performance’. Dr Manicaro maintained that most of the information was furnished by the contracting authority in the tender *dossier*. Dr Delia intervened to argue that, according to the note on the ‘appendix’, the blank spaces had to be filled in by the tenderer and that it was not up to the tenderer to decide not to fill them in.

The Chairman PCAB remarked that he found it hard to understand that the contracting authority would furnish a 2-3 page ‘appendix’ for the tenderer to fill in only his ‘name and address’ and opined that, in case of doubt, the tenderer ought to have sought a clarification.

Dr Manicaro remarked that when Envelope 3 was opened and his clients’ offer turned out to be the cheapest, the appellants received the notice that their bid had been disqualified. He added that the information requested in this ‘appendix’ had already been made available in Envelope 2. Dr Manicaro maintained that the reason given for exclusion was the non-submission of the ‘appendix’ to tender for a works contract and not whether it was filled in or not and, strictly speaking, what he was out to prove was that his client did submit the ‘appendix’ as all other considerations were secondary to this primary issue. He contended that, according to the documentation available at his clients’ end, it was evident that this ‘appendix’ had been submitted.

The Chairman PCAB opined that the appellant Company had misinterpreted the contents of this ‘appendix’ because it was evident that there was certain information that had to be given by the tenderer irrespective of whether one could find that same information elsewhere in the tender documentation. He remarked that a tenderer did not only have to submit the information but also that the latter had to submit it in the manner requested by the contracting authority.

Mr Mario Agius, an engineer and member of the evaluation board, under oath, stated that:

- he was not responsible for the compilation of the tender document;
- certain information requested in the ‘appendix’ did not apply to the contract in question, such as, the ‘amount of insurance for design’ because the contracting authority was not proposing any design;
- the ‘deadline for notice to commence’ was already established by the contracting authority in the tender *dossier* and the tenderer was expected to confirm that, along with other similar given information;

- this ‘appendix’ did not provide any additional information that was not already available to the contracting authority; and
- the evaluation board disqualified the appellants simply because they did not submit this ‘appendix’

At this point Dr Delia went through some of the items mentioned in the said ‘appendix’ and discussed them with Eng. Agius. The following salient observations were made, viz:

Deadline for notice to commence

Eng. Agius stated that the tender document stipulated a mobilisation period not exceeding 4 weeks. Dr Delia contended that the tender document often indicated the minimum requirement and submitted a case where a tenderer indicated a mobilisation period of, say, 1 week instead of 4 weeks, and asked Eng. Agius if he would consider that as new and relevant information. Replying to this question Eng. Agius remarked that if a tenderer did not indicate a mobilisation period then he would have considered it as if the tenderer was going to adhere to the period stipulated in the tender *dossier* because the tenderer would have signed the declaration form (at page 3) accepting in full and without restrictions the special and general conditions governing this contract.

Dr Delia intervened to note that the same declaration stated that ‘Failure to submit a tender containing all the required information and documentation with the deadline specified may (‘may’) lead to the rejection of the tender.

Period of Performance

Eng. Agius referred to section 1.2 of Volume 3 (page 129) which read as follows:

*The duration of this contract shall be subject to termination upon the award of Contract Package 2A of the Integrated Solid Wastes Management Project, or up to a maximum period of 36 months, whichever is the earlier.*

Period of access to the site

Eng. Agius opined that this referred to the time when the contractor could enter the site and remarked that section 3.2.1 at page 131 which laid down the times during which the *Maghtab Environmental Complex* was open.

Dr Delia opined that the hearing was departing from the terms of reference and jurisprudence in the sense that the main concern was whether it was mandatory to submit this ‘appendix’ in Envelope 3 or not, an ‘appendix’ which had been demonstrated that it had not been submitted. Dr Delia recalled that the PCAB had decided on several occasions that a mandatory document had to be provided irrespective of the importance attached to by the tenderer.

The Chairman PCAB remarked that the PCAB was consistent in its decisions and that was why he started questioning whether this ‘appendix’ represented a synopsis of what had already been laid down in the tender document or else provided by the tenderer or if such ‘appendix’ gave the tenderer the opportunity to propose something over and above the minimum stipulated which, in turn, would demonstrate the level of efficiency of the contractor. He added that it was a fact that the submission of the ‘appendix’ was mandatory.

Dr Delia agreed that the ‘appendix’ gave the tenderer the chance either to confirm the minimum requirements set in the tender *dossier* or else to quote better terms than those laid down in the tender. However, he stressed that it was not up to the tenderer to opt not to submit a document and the least he could have done was (a) to repeat what he had already stated elsewhere in his submission or (ii) to indicate non-applicability. Dr Delia remarked that his client had submitted the ‘appendix’ in question and, evidently, it was properly filled because the contracting authority had not raised any queries in that regard. Dr Delia made a legal point in the sense that what had to be decided upon was whether the mandatory document had been submitted because other issues regarding the information given therein were secondary issues. He argued that it had already been demonstrated that, with regard to the ‘deadline for notice to commence’, a tenderer could have submitted information different from that indicated in the tender and, as a consequence, it could not be taken for granted that the ‘appendix’ provided irrelevant information.

The Chairman PCAB asked Eng. Agius what the adjudication board expected for an answer from the tenderers in respect of the following items that featured in the ‘appendix’, namely,

- *Member of dispute-settlement committee (if not agreed) to be nominated by*  
Eng Agius replied that the nomination would be made by the contracting authority’
- *Number of arbitrators*  
Eng. Agius replied the number was decided by the contracting authority
- *Limit of liquidated damages for delay*  
Eng. Agius said that this was established by the contracting authority and that the tenderer was not in a position to propose otherwise
- *Deadline for submission of programme*  
Eng. Agius said the tenderer was not in a position to propose other than what had been given in the tender document
- *Period of access to the site*  
Eng. Agius referred to section 3.2.1 at page 131 of the tender document which stipulated the opening and closing times of the *Maghtab Environment Complex*

Eng. Agius agreed with the observation of the Chairman PCAB that the ‘appendix’ in question may not have been meant to yield information different from that laid down elsewhere in the tender document.

Dr Delia remarked that it would be dangerous to allow tenderers to decide which mandatory documentation was important and worth submitting and which was not. Dr Delia did acknowledge that, recently, there had been a review of the internal policy of the Contracts Department. However, he added that the case under review was not affected by the said amendments in the sense that a tenderer still had to submit mandatory information.

Dr Manicaro remarked that the European Court of Justice had pointed out that what was fundamental or not fundamental to the tendering process depended on whether a tenderer would gain any material advantage over the other competing bidders. On the other hand, Dr Delia stated that the observance of equal treatment of tenderers required that all tenderers comply with the tender conditions so as to ensure an objective comparison of the tenders submitted by the various tenderers.

Dr Delia reiterated that with regard to the item ‘deadline for notice to commence’ it was demonstrated that it could have provided fresh and relevant information and that it would have served for comparative purposes. He remarked that in public procurement, the procedure played a crucial part in order to ensure transparency and consistency as otherwise confusion would reign if it were left up to tenderers to decide on the requirements of the contracting authority.

Dr Manicaro agreed with Dr Delia’s submissions but added that, besides procedural issues, our Law Courts also considered the element of equity. He added that one of the aims of the Public Contracts Regulations was to exclude the possibility that a contracting authority would choose to be guided by other than economic considerations. Dr Manicaro argued that, in this tendering process, phases 1 and 2 had been concluded and one had moved on to phase 3 where the main consideration was the price.

The Chairman PCAB informed those present that the original submission with regard to Envelope 2 was unavailable at the moment so it cannot be ascertained if the said appendix was erroneously submitted in that envelope or not. In any case, even if it were, it would not make any difference to the outcome of this appeal.

Mr Paul Polidano, also representing Polidano Brothers Ltd, remarked that his firm had been involved in the running of this facility for the previous five years and, to his recollection, they have been rendering a good service.

Dr Scerri remarked that one had to keep in view that the adjudication board had to abide by the established procedure otherwise if the adjudication board had overlooked the non-submission of this ‘appendix’ by the appellant Company it was most likely that the case would have ended up before the PCAB just the same with the PCAB finding against the adjudication board for having gone ahead with the award in the absence of this mandatory document.

The Chairman PCAB remarked that an issue of concern was the inclusion in the tender dossier of mandatory requirements which, on closer examination, would turn out to be not that crucial or irrelevant to our specific circumstances. He opined that more often than not this was the result of 'cut and paste' exercises which did not reflect local realities.

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 28.01.2010 and also through their verbal submissions presented during the public hearing held on the 7.04.2010, had objected to the decision taken by the General Contracts Committee;
- having taken note of the appellants' claim that (a) at 'package 3' stage, the evaluation board had to deal solely with the issue of price and that the previous two stages had been satisfactorily concluded, (b) it had submitted the *Appendix to Tender for a Work's Contract* containing information that was given elsewhere – in Envelope 2 - in the tender submission, (c) the only part of the 'appendix' which was marked 'To be completed by the tenderer' was the 'name and address of the tenderer' and that most of the information was furnished by the contracting authority in the tender *dossier*, (d) what was fundamental or not fundamental to the tendering process depended on whether a tenderer would gain any material advantage over the other competing bidders and (e) besides procedural issues, our Law Courts also considered the element of equity ;
- having also taken note of Dr Scerri's comment regarding the fact that (a) albeit it was a fact that the appellants had been found compliant in envelopes 1 and 2, yet, similarly, it was also a fact that *Appendix to Tender for a Work's Contract (Appendix to Volume I)* was found missing in Envelope 3, (b) the tender document clearly indicated that this document was mandatory and that it had to be inserted only in Envelope 3 and (c) one had to keep in view that the adjudication board had to abide by the established procedure otherwise if the adjudication board had overlooked the non-submission of this 'appendix' by the appellant Company it was most likely that the case would have ended up before the PCAB just the same with the PCAB finding against the adjudication board for having gone ahead with the award in the absence of this mandatory document;
- having heard Dr Delia state that (a) he disagreed with the statement of the appellants that Envelope 3 only dealt with the price because that envelope had also to contain other information, including the 'appendix' in question, (b) it was a fact that the submission of this certificate, duly signed, was mandatory, (c) the tender dossier was clear in stating that this 'appendix' had to be inserted in Envelope 3, (d) he disagreed with the appellants' argument that this 'appendix' was irrelevant, (e) according to the note on the 'appendix', the blank spaces had to be filled in by the tenderer and that it was not up to the tenderer to decide not to fill them in, (f) the declaration through which a tenderer declares that one accepts in full and without restrictions the special and general conditions governing this contract also states that 'Failure to submit a tender containing all the required information and documentation with the deadline specified may ('may') lead to the rejection of the tender', (g) the 'appendix' gave the tenderer the chance either to confirm the minimum requirements set in the tender *dossier* or else to quote better terms than those laid down in the tender and (h) the observance of equal treatment of tenderers required that all tenderers comply with the

tender conditions so as to ensure an objective comparison of the tenders submitted by the various tenderers;

- having further deliberated on Mr Agius' evidence, particularly, (a) his overall concern about the relevance of most of the content of the said 'appendix' and (b) his argument that if a tenderer indicates a mobilisation period of, say, 1 week instead of 4 weeks, he would consider it as if the tenderer is going to adhere to the period stipulated in the tender *dossier* in view of the fact that the tenderer in question would also be signing the declaration form accepting in full and without restrictions the special and general conditions governing this contract;

reached the following conclusions, namely:

1. The PCAB fails to understand how the appellant Company could arbitrarily decide what to (a) submit or not without even daring to seek formal clarifications from pertinent authorities and (b) fill in the apposite 'appendix' provided in the same tender.
2. The PCAB also fails to comprehend as to how contents listed in a mandatory document can be overlooked by a tenderer, even though these may be considered of little or no relevance or significance at all, and this without, minimally, attempting at questioning the fact as to why a contracting authority would include in the tender dossier a 2-3 page document to be filled in by all tenderers specifying that its duly filled submission is mandatory.
3. The PCAB argues that both the appellant Company and Mr Agius seem to have misinterpreted the contents of this 'appendix' because it was evident that there was certain information that had to be given - beyond the information covered by the general declaration form wherein a tenderer accepts in full and without restrictions the special and general conditions governing this contract - by the tenderer irrespective of whether one could find that same information elsewhere in the tender documentation. It is also evident that the purpose of this 'appendix' was to give the tenderer the opportunity to propose something over and above the minimum stipulated - hence why such document is considered as *fundamental* and *material* - whilst, at the same time, demonstrating the level of efficiency of the said tenderer.
4. Whilst acknowledging that there has recently been a review of the internal policy of the Contracts Department, yet the PCAB agrees with the point raised by Dr Delia that the case under review was not affected by the said amendments.

As a consequence of (1) to (4) above this Board finds against the appellant.

In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the appellants should not be reimbursed.

Alfred R Triganza  
Chairman

Edwin Muscat  
Member

Carmel J Esposito  
Member

26.04.2010