

## **PUBLIC CONTRACTS APPEALS BOARD**

### **Case No. 30**

#### **CT 2278/03, Advertisement 214/03, GPS 68.335.TO3.BM - Supply of Immunoassay kits with equipment on loan**

This call for tenders, published in the Government Gazette on the 18.07.2003 was issued by the Contracts Department following a formal request received on 15.05.2003 by the latter from the Government Pharmaceutical Services (GPS).

The global estimated value of the contract in question covering a period of three years was Lm 550,676.

The closing date for this call for offers was 23.09.2003.

The Government Pharmaceutical Services appointed an Adjudication Board consisting of

- a. Ms M Dowling (Chairperson)
- b. Ms A Sciortino (Member)
- c. Dr G Buhagiar (Member)
- d. Mr C Buttigieg (Member)
- e. Prof A Cilia Vincenti (Member)

to analyse a total of five offers submitted by tenderers.

Following the recommendation by the Adjudication Board on 17.01.2005 to the Contracts Committee for the tender to be awarded to Messrs Technoline Limited, Messrs V.J. Salomone Marketing Ltd filed a Notice of Objection on 07.02.2005 against the said award.

The Public Contracts Appeals Board (PCAB) composed of Mr. Alfred Triganza (Chairman), Mr Anthony Pavia and Mr Edwin Muscat, respectively, acting as members, convened a public hearing on 30.03.2005 to discuss this objection.

Present for the hearings were:

#### **V.J. Salomone Marketing Ltd**

Mr Victor Galea Salomone – Executive Director  
Dr Roderick Zammit Pace – Legal Adviser  
Dr Francis Galea Salomone

#### **Technoline Ltd**

Mr Simon Cusens – Managing Director  
Dr Nicolai Vella Falzon – Legal Adviser

#### **Government Pharmaceutical Services**

Ms Anna Debattista (Director GPS)  
Ms Valerie Schembri

#### **Adjudication Board**

Ms Miriam Dowling - Chairperson  
Ms Carmen Buttigieg  
Dr Gerald Buhagiar  
Ms Annalise Sciortino

Dr Roderick Zammit Pace, the appellant's legal representative, commenced his intervention by stating that his client's objection was based on issues relating to price as well as the manner in which Technoline Limited's offer was submitted.

He claimed that the offer submitted by Technoline Ltd did not ensure the best value for money at the lowest possible cost. Dr Zammit Pace said that the offer submitted by V J Salomone Marketing Ltd, which included a data management system supplied by OMNILAB Srl., amounted to US\$ 710,513, whilst that submitted by Technoline Ltd amounted to US\$ 803,474.19, which was the amount published in the Department of Contracts' notice dated 2 February 2005. The appellant's representative tabled a copy of this document during the hearing. Dr Zammit Pace contended that, when compared like with like, the offer submitted by V J Salomone Marketing Ltd was lower than that submitted by Technoline Ltd by US\$ 92,961. In this respect, the offer submitted by his client was more economically advantageous and, by far, more cost effective to Malta's central Government.

Dr Zammit Pace said that Condition 3 of the tender's "Specifications and Conditions" stipulated that each "*tenderer shall quote separate unit prices as stipulated on the schedule attached*". He said that V J Salomone Marketing Ltd conformed to this requisite as they quoted separate unit prices exclusive of VAT, customs duty and levy. On the other hand Technoline Ltd. quoted a total cost for the various units, which was inclusive of VAT, customs duty and levy.

Furthermore Condition No 1 specified that, "*The quantity indicated above is the actual quantity utilised over the last 12 months. It is therefore to be clearly understood that the quantity purchased by Government during the 36 month contract period may vary according to the needs of the Department depending on the actual consumption of the item.*"

The appellant's legal representative argued that, in the prevailing circumstances, it was impossible for the GPS to accurately determine the Government's cost of actual quantities required and unit prices. On the other hand, the manner in which VJ Salomone Marketing Ltd presented their offer made it easy for GPS to arrive at the global price.

Dr Zammit Pace continued by stating that tenderers were requested to submit unit prices so that GPS would be in a better position to evaluate offers at adjudication stage and also to ensure that, irrespective of the VAT and Customs Duty rates and actual consumption, GPS would still be in a position to determine the actual unit prices.

The appellant also alleged that Technoline Ltd.'s offer was incomplete because it appeared that they failed to quote for the "three analysers on loan", the Data Management System and relative hardware such as printers and photocopy papers as requested in the specifications and conditions.

Mr Victor Galea Salomone, another representative of the appellant company, claimed that he took the initiative to compute again the value of both tenders, basing his calculations on the quantities indicated in Technoline Ltd.'s offer. According to Mr Galea Salomone, the total cost of his Company's offer amounted to US\$710,513 with the cost of reagents, including the 5% VAT, amounting to US\$ 670,877, whilst the cost of the hardware, UPS, LIS, computers, printers and consumables, which bore 18% VAT, reached US\$ 39,636.

The same representative said that the quotation submitted by his Company was on a 'per test' basis contended that it was much easier to arrive at the global figure. He was of the opinion that it was difficult for GPS to compare like with like because both tenderers in question computed their unit prices differently. Furthermore, he alleged that Technoline Ltd.'s offer did not include hardware for UPSs and the laboratory information system (LIS).

Also, Mr Galea Salomone said that prior to 1 May 2004, reagents had a Customs tariff of 7.6% and were not subject to VAT while consumables were subject to a 7.6% Customs tariff and 15% VAT. He insisted that Technoline Ltd should not have included 15% VAT on reagents once they were not subject to VAT. Furthermore, the appellant claimed that his Company wanted to ascertain that global prices were computed correctly because he was of the opinion that, in view of Technoline Ltd.'s submission, it was difficult to compute.

Dr Nicolai Vella Falzon, Technoline Ltd.'s legal representative, stated that the amount of US\$803,474, as originally quoted by his client, was calculated in a different scenario. He said that when this call for offers was published, the rate of VAT and Customs Duty were 15% and 8.1% respectively and that they applied such rates on all items quoted in their tender. He claimed that the actual price of their tender, based on today's VAT and Customs Duty rates, amounted to US\$678,000. This was arrived at after deducting the 15% VAT and 8.1% Duty and adding the present rate of 5% VAT. Thus their tender was cheaper than the price of US\$ 710,513 quoted by V J Salomone Marketing Ltd.

Technoline Ltd.'s legal representative said that in view of the fact that V J Salomone Marketing Ltd had submitted separate prices for hardware they did not comply with the schedule. He said that Technoline Ltd.'s offer followed exactly the schedule as specified in condition 3 as tenderers were requested to submit "*separate unit prices as stipulated on the schedule attached for the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> year respectively*". He said that Technoline Ltd also abided by the instructions indicated on the schedule wherein tenderers were asked to quote for "*Unit Price delivered to stores/site inclusive of VAT, Customs Duty and levy if any.*" Furthermore, according to clause 10 of the tender document "*All accessories and consumables required for the operation and maintenance of the analysers during the contract period must be included with the quote for the kits.*" He said that Technoline Ltd. had absorbed the cost of hardware with unit prices and therefore it was easier for GPS to arrive at the global amount. Nevertheless, there was no need to know the price per unit because their global price was cheaper.

Finally he declared that, contrary to what was stated by the appellant's representatives, their offer included the three fully automated immunoassay analysers on loan, hardware and photocopy paper and also a 'Data Management System'.

During her testimony, Ms Anna Debattista, Director GPS, explained that actual prices were not changed at the adjudication stage. She declared that the recommended price was different from the original offer due to the fact that the VAT and Customs Duty rates applicable at the closing date of tender (year 2003) had since been changed. Furthermore, she confirmed that the price included in Technoline Ltd's last recommendation amounted to US\$ 673,396.46 and not US\$803,474.19 as published by the Contracts Department in their public notice dated 2 February 2005.

Apart from the fact that the GPS had a *Schedule Price Section* to check relative tender prices, Ms Debattista also declared that all offers were compared on a level playing field basis. Furthermore, prices of each tender were worked out on the estimated annual consumption and that prices are always determined on the scenario prevailing at a particular moment in time. The witness also claimed that in view of the fact that this tender was based on the three-package system, GPS officials evaluated the specifications before proceeding with the opening of the *price* envelope. In the evaluation exercise, they compared the global offers and the global prices and recommended the cheapest acceptable offer that was according to specifications.

Ms Debattista said that if the letter of acceptance would eventually be issued, the value thereof would reflect the prices as computed by the Scheduling Section, amounting to a total cost of US\$ 673,396.46.

During her evidence and cross-examination, Ms Valerie Schembri (Scheduling Section GPS), testified that her Unit carried out workings on a *pro-rata* basis according to estimated consumption because suppliers quoted for various quantities. They applied the rates of exchange as quoted by the financial authorities on 31 August 2004, including 5% VAT.

With regard to Technoline Ltd.'s offer she said that the price of US\$ 673,396.46 was arrived at after reducing the Customs duty from 8.1% to 0% and VAT from 15% to 5%. As regards V J Salomone Marketing Ltd's offer, she said that they added 5% VAT because their offer was exclusive of VAT. Their offer, which consisted of two options, amounted to US\$ 689,241 (Option 1) and US\$ 721,442 (Option 2) respectively.

Mr Anthony Borg, from the Department of Contracts, testified that the amount included in the Department's notification dated 02.02.2005, represented Technoline Ltd.'s original offer of US\$ 803,474.19. He said that the Contracts Department quoted this amount to be consistent with the amount already included and published in the schedule of tenders. Mr Borg confirmed that the recommended price amounted to US\$ 673,396.46 according to the Health Department's computations with amendments to VAT, Customs duty and quantities (according to bills of quantity).

However, Mr Borg confirmed that the actual published price remained US\$ 803,474.19 in spite of the fact that the Department of Contracts was aware of the price ultimately recommended for acceptance, namely US\$ 673,396.46.

At this stage, this Board intervened and queried the anomalous scenario created by the fact that the Department of Contracts was not proactive enough to update a public notification even though it was aware that the information originally provided was not definite at the time and presently deemed to be no longer correct.

In his concluding statement, Dr Zammit Pace said that his client decided to file the objection on the grounds that the price factor being appealed against was the one originally publicly notified by the Department of Contracts. However, the appellant's legal representative, proceeded by contending that it is awkward for his client to come across a different scenario with regard to the price the tender was actually awarded for, ironically, during the public hearing session convened to discuss an objection based on the consideration of different parameters.

Having considered the above, this Board took particular note of the fact that the correct, and lower, prices for each of the three years of the tender time frame as recommended by the Adjudication Board in their document dated 17.01.2005 and the price of the awarded tender as publicly notified by the Department of Contracts on 02.02.2005 were different.

This Board examined the reasons brought forward by the representative of the Contracts Department as to why only the original price as quoted by the tenderer was quoted, i.e. to ensure that no member of the public would be led to think that there had been any meddling with the prices. The Board may agree that this could be a good reason for the procedure as adopted by the Department of Contract. However this procedure has proven to produce unwanted results as witnessed by the present appeal. The Board feels that this could have been avoided easily if only a footnote had been included in the public notice that the quoted prices of all tenders had been adjusted to reflect the new taxation domain and strongly suggests that the Department would act accordingly if similar cases should arise in future.

Following a thorough consideration of all the points mentioned above, the Public Contracts Appeals Board feels that the Government Pharmaceutical Services had acted correctly in this

case and therefore decided to reconfirm the recommendation made by the Adjudication Board, namely for the tender to be awarded to Technoline Ltd.

While rejecting the appeal lodged by V J Salomone Marketing Ltd, this Board feels that the objection made was not of a frivolous nature and as a consequence decided that the appellant should be reimbursed the full amount paid in lodging the claim.

Furthermore, this Board makes it amply clear that it is considered not informative enough for recommended prices to be publicly notified solely in a foreign currency. This Board thus recommends that prices should also be translated into local currency denomination in order to ensure absolute transparency and avoid possible different interpretations in currency translation exercises.

**Alfred Triganza**  
Chairman

**Anthony Pavia**  
Member

**Edwin Muscat**  
Member

*18 April 2005*