

PUBLIC CONTRACTS APPEALS BOARD

Case No. 57

CT 2286/05, Advert No 257/2005 - Procurement of Hoists for Dry Standing Facilities at Kavallerizza - Marsaxlokk

This call for offers, which was published in the Government Gazette on the 9 August 2005, was issued by the Contracts Department following a formal request received from the Fisheries Conservation and Control Division.

The estimated cost of this tender was Lm 427,350 excluding VAT.

The closing date of this tender was 11 October 2005.

In total, four (4) offers were submitted by tenderers on closing date for submission of offers.

Following notification to Messrs MSD (Darlington) Limited by the Contracts Committee that their tender had been disqualified because they had “failed to comply with the terms of Part XII of Legal Notice No 177 of the Public Contracts Regulations 2005 by disclosing” their financial proposal, the same Company filed a formal reasoned letter of objection on 24 October 2005 against such decision.

The Public Contracts Appeals Board (PCAB) made up of Mr. Alfred Triganza (Chairman), with Mr Anthony Pavia and Mr Maurice Caruana, respectively, acting as members, convened a public hearing on 14 December 2005 to discuss this objection.

Also present for the hearing were:

MSD (Darlington) Limited

Profs Ian Refalo

Dr Roderick Zammit Pace

Fisheries Conservation and Control

Dr Anthony Gruppetta (Director General)

Mr Marco Cassar (Project Leader)

Witness

Mr Edwin Zarb (Director General Contracts)

After the Chairman's brief introduction MSD (Darlington) Ltd.'s representatives were invited to explain in brief the motive of their objection.

Prof. Ian Refalo, representing the appellants, started by stating that his client had submitted the tender in a sealed envelope containing separate packages as required by Regulation 82 (1) of the General Contracts Regulations 2005 and that each of the three packages included the documentation requested. Dr Refalo explained that MSD (Darlington) Ltd submitted two options and that they had included the price not only in Package Three (Financial Offer) but also in Package Two (Technical Specifications). He claimed that this was done to facilitate matters and to avoid confusion. At this point, Profs Refalo showed the PCAB copies of the documents in respect of the technical specifications of Options 1 and 2 and said that the price was indicated only in the first page of these documents. When this PCAB remarked that this could influence the Board's decision, Prof Refalo replied by stating that, if this were the case, the Board could easily exclude that extra page and evaluate the technical specifications only. Moreover, the appellants' lawyer claimed that at Stage Two the price was irrelevant because the only evaluation made was to stipulate whether the tenderers' technical submissions satisfied the technical requirement of the tender or not. Prof Refalo argued that at that stage no comparison between offers was made because the only comparison made between tenderers was that of the prices at Stage Three.

Prof Refalo pointed out that his clients' tender was disqualified not because they failed to submit the requested information but simply because an item of information contained in one package was also included in another package. He argued that, once the regulations did not prohibit information set out in one package from being included also in another then it was permissible for additional information to be included in any of the packages. He insisted that such additional information in package two should not have lead to the disqualification of their tender because in this particular tender it was not specified that tenderers would be disqualified if the price was indicated in Package Two. Furthermore, he argued that, if this document was included in that package where it was not requested, then his clients' tender should not have been disqualified but rather should have had the information considered irrelevant at that stage simply ignored. The appellant's legal representative said that the Department's decision to disqualify his clients' tender for the reasons stated was manifestly unreasonable and unjustified.

Dr Anthony Gruppetta, representing the Fisheries Conservation and Control Unit began his response by stating that the Three Package system was used for all tenders with an estimated value of over Lm250,000 and that the procedure was laid down in the Public Contracts Regulations, wherein tenderers were requested to submit the *bid bond* in Package One, the *technical specifications* in Package Two and the *financial offer* in Package Three. He explained that the financial offer of each tender was opened only after it was found to be technically compliant and valid.

Dr Gruppetta declared that the appellants' offer was disqualified by the Department of Contracts because the bidder included the price in Package Two. When the PCAB asked him to state whether it was specifically stated in the tender document that the tender would be disqualified if the financial offer were to be included in Package Two, he replied by stating that he preferred if this question were to be addressed to the Contracts Department's representative.

Mr Edwin Zarb, Director General Contracts, was called to the witness stand.

Replying to the same question asked to Dr Gruppetta, Mr Zarb said that alternatively it was specified that the financial offer should be included in Envelope No 3. The Director General Contracts explained that since this tender was a three package system, tenderers were requested to submit the bid bond, the technical specifications and the financial offer in Packages One, Two and Three respectively as indicated hereunder:

The tender conditions stipulate that tenders shall only qualify for consideration if they are submitted in separate packages as follows:

Package One: An original and valid tender bond (Bid Bond), duly executed in the form, for the amount and for the validity Period stipulated in the official tender document;

Package Two: Technical specifications including supportive literature, details, designs, samples and any other matter as requested in the tender documents; *and*

Package Three: Completed price schedules and, or bills of quantities, form of tender, payment terms or other financial arrangements; any covering letter which may provide other pertinent details of a commercial nature.

In the process of adjudicating the tender, the packages for all tenderers are to be opened in public and in the sequence enumerated in the immediately preceding sub-regulation. When at any stage, any tenderer fails to comply with the tendering procedural requirements and, or with the specifications, the remaining packages in his tender offer are to be discarded unopened.

Mr Zarb said that the scope behind the three package system was that the prices would not be disclosed before the financial package was opened. If this were to be the case then the procedure could easily adopt a one-package system.

Profs Refalo intervened and pointed out that in other tenders it was clearly specified in bold that if any indication of pricing were to be found in Envelopes No 1 and No 2, the tender involved would be disqualified. He argued that, once in this case such note was not included, then it was immaterial whether one were to include the price in package two or not. The PCAB commented that it did not see relevance of writing such a note in the tender document once the procedure was already specified in the regulations. Following this comment, Profs Refalo replied that he did not think that this was superfluous because he presumed that the technical people who evaluated the offer in Envelope No 2 were not the same persons who opened the offers. Consequently, he maintained that, if the page containing the price was considered 'extra', then there was no need for the same page to be handed over to the evaluators.

At this point, Dr Gruppetta clarified that the offers were opened by the whole Evaluation Committee, including the evaluators. Also he confirmed that the financial offers were evaluated by the same persons who evaluated technical specifications. Furthermore, he exhibited an extract of the tender document containing the description of the technical specifications. The PCAB pointed out that in clauses 11.1

and 11.2 of the tender document it was clearly explained what the technical and financial bids should consist of respectively and that under the former clause it was not indicated that tenderers should include the financial consideration.

During his intervention, Dr Roderick Zammit Pace said that the three package system had an administrative function and that their interpretation should not be construed to misinterpret the Department's policy, because in previous tenders the instructions not to include any prices in package two were written in bold.

Prof Refalo said that, in view of the fact that in certain tenders it was specifically indicated that tenders would be disqualified and in this tender it was not specifically indicated that they would be disqualified, any tenderer could have easily been misled in how one was expected to interpret such issue.

Dr Gruppetta emphasised that all tenders were expected to follow a standard procedure as stipulated in clause 11, 'Content of Tenders', namely that 'All tenders submitted must comply with Part XII of the Public Contracts Regulations 2005.' Apart from this he explained that the regulations specified what should be done rather than what should not be done.

In his concluding remarks Dr Gruppetta said that five offers were submitted for this contract. He said that all tenderers, with the exception of one who had two offers (Lot 1 and Lot 2), were all disqualified either because of the tender guarantee and/or disclosure of prices.

Profs Refalo concluded by stating that the PCAB could easily instruct the evaluators to ignore the document containing the prices during their technical evaluation of the offers.

At this stage, the public hearing was concluded and the PCAB proceeded with its deliberations before reaching its decision.

The Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated 24th October, 2005, had objected to the decision taken by the General Contracts Committee communicated to them in terms of the letter dated 17th October, 2005, informing them that the tender submitted by them was disqualified because they had "*.....failed to comply with the terms of Part XII of Legal Notice No. 177 of the Public Contracts Regulations 2005 by disclosing (his) financial proposal*";
- having considered appellants' contention in their motivated letter and also during their verbal submissions presented during the public hearing held on the 14th December, 2005, that they had complied fully with the statutory provisions under reference and that, consequently, the disqualification of the tender was unfounded;
- having noted that appellants' contestations were based on their insistence that they had faithfully interpreted the instructions given to tenderers in terms of regulations 82 (1) (a), (b) and (c) of the Public Contracts Regulations, 2005

(Legal Notice No. 177 of 2005) since, according to them, the inclusion of their financial quotation in “Package Two” and their detailed terms of their financial offer in “Package Three”, did not, *per se*, constitute a breach of the provisions of the said regulation;

- having examined appellants’ reasoning to the effect that, once nowhere is it stated in the regulations under reference that prospective tenderers are precluded from quoting directly or indirectly any financial terms either in “Package One” (regulation 82 (1) (a)) or “Package Two” (regulation 82 (1) (b)), they had not infringed the said regulations;
- having also heard their argument that whenever such preclusion was specifically intended, it was clearly stated and printed in bold in the related tender documents and that, therefore, according to them, by implication, in this particular instance, the preclusion did not apply;
- having also heard the verbal evidence given under oath by the Director General (Contracts) who explained the procedure that was expected to be invariably followed by tenderers in fulfilment of the obligations emerging from the statutory provisions regulating the “separate packages” arrangement, namely, regulations 82 (1) (a), (b) and (c), as well as the praxis that has been in operation in compliance with these provisions

reached the following conclusions:

1. The instructions which were expected to be followed by tenderers regarding the presentation of the three separate tender packages in terms of regulations 82 (1) (a), (b) and (c) of the Public Contracts Regulations, 2005 (Legal Notice No. 177 of 2005) were clear and not subject to possible different interpretations;
2. It is evident from the provisions of regulation 82 (2) that the overall purpose of the three separate packages system, is to ensure that the adjudication process applicable in the case of tenderers with an estimated value of over Lm250,000, is conducted through a sequenced three-phase arrangement, and “*When at any stage, any tenderer fails to comply with the tendering procedural requirements and, or with the specifications, the remaining packages in his tender offer are to be discarded unopened*”;
3. The inclusion of the appellants’ financial quotation in “Package Two” and their detailed terms of their financial offer in “Package Three”, did in fact constitute a breach of the ‘*procedural requirements*’ of the said regulations;

Consequent to (1), (2) and (3), the Board upholds the decision taken by the Contracts Committee that appellants’ tender should be disqualified.

The Board has therefore decided to reject the appeal and has also concluded that the deposit paid by Appellant in conjunction with this appeal cannot be refunded.

During its considerations the Board examined in particular the appellants’ assertion that in various tender documents there is included a condition as quoted in paragraph

2 of these conclusions. The Board feels that once the necessary legislation is already present in this regard, any similar conditions which may be repeated in the tender documents are considered superfluous and, as is the case here, may lead to misunderstandings. It is therefore recommended that for the avoidance of doubt, all tendering entities should be advised not to include such clauses in their tender documents.

Alfred R. Triganza
Chairman

Anthony Pavia
Member

Maurice Caruana
Member

30 December 2005