

PUBLIC CONTRACTS APPEALS BOARD

Case 78

**Advert No 233/2005, CT 2347/2005; Nat Lib File No Foo1/o5 – SEM/EDX
Tender for the supply, installation and commissioning of a SCANNING
ELECTRON MICROSCOPE and ENERGY DISPERSIVE X-Ray ANALYSER**

This call for tenders, published in the Maltese Government Gazette on 19.07.2005, was issued by the Contracts Department following a request transmitted to the latter on 25.05.2005 by the Malta National Laboratory.

The closing date for this call for offers was 27.09.2005 and the global estimated value of the contract was Lm 85,000.

Four (4) different tenderers submitted their offers.

Following the publication of the *Notification of Recommended Tenderers*, Messrs **E. J. Busuttil Ltd** filed an objection on 10.04.06 against the intended award of the said tender to Messrs **Assing SpA. Roma** (Lm 111,618).

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 12.05.2006 to discuss this objection.

Present for the hearing were:

E. J. Busuttil Ltd

Mr Edwin Busuttil	Managing Director
Mr Bill Key	Sales and Marketing Manager, <i>Obducat CamScan Ltd</i>
Dr Josette Attard	Legal Representative

Assing SpA. Roma

Mr Massimo del Marro	Sales Director
Dr Nicolai Vella Falzon	Legal Representative
Mr Ivan Vassallo	
Mr Stephen Debono	
Mr Adriano Sbaraglia	

Adjudication Board

Mr Mario Mifsud
Ing Alan Abela
Dr Jeremy J DeBono

After the Chairman PCAB's brief introduction, the representatives of E. J. Busuttill Ltd were invited to explain the motive leading to their objection.

Dr Josette Attard, E. J. Busuttill Ltd's legal representative, started by stating that in their main objection dated 28 March 2006 the manufacturer Obducat CamScan Ltd declared that their offer was fully compliant with the tender specifications and that the only problem was the price. She claimed that, whilst her client offered the best machine available to them, yet, had they realised that they could have tendered with a machine that had lesser specifications but which was cheaper, they would have had no problem with this either. Furthermore, she maintained that they did not know whether Assing SpA, Rome's offer was compliant with the specifications because they did not know what type of model was offered. She alleged that they had some specifications missing as well as changes in the specifications.

Dr Nicolai Vella Falzon, legal representative of Assing SpA, Roma, responded by stating that the appellants' arguments made during these proceedings, as well as, Obducat CamScan Ltd's letter dated 28 March 2006 wherein it was stated that '*as experts in the forensic laboratory business, we are always willing to supply lower cost instruments capable of carrying out similar procedures*', implied that the appellants were attempting to submit an alternative offer or to vary the tender offer at appeal's stage.

With regards to the changes in specifications, Dr Vella Falzon clarified that in actual fact this was a clarification letter which was sent by the Department of Contracts to all prospective tenderers on 16th August 2005. At this stage the appellants' representatives confirmed to all those present that they had received that correspondence.

Dr Vella Falzon declared that his clients' offer was Euro 33,000 cheaper than that submitted by the appellants. He claimed that, according to the tender document, the price was an important consideration in the evaluation process because the proposals were evaluated on the basis of the following criteria:

Compliance to Mandatory Specifications	45%
Price	45%
Company Background and Financial Stability	10%

Dr Vella Falzon maintained that the appellants' allegations that his clients' offer was not compliant were unfounded because their offer had already been assessed by a specifically appointed technical committee and recommended for award. He contended that Assing SpA Roma's offer was completely up to specifications and that it was not the PCAB's role to substitute the technical board and re-examine the offers because they had already passed through that process.

Mr Mario Mifsud, a technical member of Adjudicating Board, confirmed that the recommended tenderer's offer was according to specifications. When Dr Attard asked the witness to state whether *Item 2.4 Precision Eucentric Stage* was fully compliant with specifications, the reply given was in the affirmative. However, when

Mr Mifsud was asked by Mr Bill Key, Sales and Marketing Manager, Obducat CamScan Ltd, to state whether the recommended tenderer offered the *true eucentric* or *compucentric* stage, the reply given was that they confirmed that it was *compucentric*.

At this point, Mr Edwin Busuttill intervened by stating that although they were not given the opportunity to see exactly what Assing SpA Roma had offered, Obducat CamScan Ltd complied fully with the specifications because these reflected their principals' specifications which are considered as unique. The PCAB pointed out that this could imply that there was no scope in issuing a tender because in the circumstances other tenderers would be precluded from submitting an offer.

When the PCAB referred the witness to the grid containing the marks given to tenderers for the mandatory specifications, wherein it was indicated that Zeiss (offered by Assing SpA Roma) and CamScan (offered E. J. Busuttill Ltd) obtained 45 and 41.81 respectively out of 45 percentage points, Mr Mifsud replied that both tenderers complied with specifications.

Then, the PCAB called Ing Alan Abela to take the stand because Mr Mifsud declared that the latter was in a better position to answer questions relating to technical specifications.

On cross-examination by the PCAB, Ing Abela was asked to explain on what basis were the points given to tenderers according to the established award criteria, namely specifications, price, company background and financial stability.

4.2.1 Specifications:

The witness explained that for the *Mandatory Specifications* they gave full marks to the tenderer whose specifications were superior to those requested and lesser marks to others. As an example he made specific reference to item 2.7.2 – *Magnification* and stated that, although they were all according to specifications, they gave more points to tenderers who offered higher magnification. Mr Key intervened and stated that they had offered exactly what was requested and that the Magnification offered was fully compliant with the tender specifications. However, Ing Abela pointed out that all the tenderers' technical specifications were very close and this was reflected in the marks obtained by each tenderer. He said that had a tender not been compliant such offer would have been disqualified in the first place. The fact that it was not disqualified, continued Ing Abela, clearly implied that basic specification requirements were fully complied with.

4.2.2 Price

As regards the price, Ing Abela said that Assing SpA, Roma scored better than E. J. Busuttill Ltd because they had a cheaper offer.

While Ing Abela was being asked by the PCAB to explain how the Evaluation Board accorded the points awarded for price to each tenderer, Mr Mifsud intervened to state

that the marks were worked out proportionately by the Department of Contracts (*vide* last paragraph of letter dated 27 February 2006), who indicated them in pencil on their report dated 23 February 2006.

On the insistence of the PCAB, Ing Abela explained that this was worked out via the use of the following formula, namely by dividing the cheapest price offered with the price offered by each tenderer and the resulting answer was subsequently multiplied by 45.

The representatives of the appellants did not offer any comments regarding this procedure.

The outcome of this exercise was as follows:

	Tendered Prices	
	Lm (Exl VAT)	Marks
Marletta Enterprises	105,221	45.0
Assing SpA Roma	111,618	42.4
E J Busuttill Ltd	125,840	37.6
Cherubino Ltd	139,750	33.9

4.2.3 Companies Background and Financial Stability

When asked by the PCAB to explain how they evaluated the 10% allocated for Company background and financials' stability, Ing Abela said that they took into consideration each company's history, that is, date of establishment and their share capital turnover. He pointed out that they compared the tendering companies because they were after their relationship with the tenderer once the contract would be signed with the company submitting the tender. Thus, Ing Abela confirmed that they did not compare the financial stability of Assing SpA Roma with Obduct Camscan Ltd but with that of E J Busuttill Ltd because the former were the manufacturers and not the tenderers.

On cross examination by the PCAB on these evaluation criteria, Ing Abela clarified that the percentage points indicated in the Board's reports dated 23 February 2006 and 15 March 2006 respectively were different due to the fact that, originally, they based the rating on the '*after sales service*'.

In his concluding remarks, Mr Busuttill insisted that they believed that they were fully compliant with the specifications because they offered exactly what was requested and they believed that the other party did not.

Mr Key said that he was still concerned about the technical specifications because he could not understand why they obtained fewer points than the recommended tenderer.

Dr Attard said that if their client knew exactly what the Department wanted they would have offered another model which was cheaper.

Dr Vella Falzon said that albeit the whole issue was that the offers submitted by both tenderers were compliant with the technical specifications, yet, it was established that Assing SpA, Roma's offer was better and even cheaper than that of E. J. Busuttil Ltd. Thus, he contended that the Adjudication Board took a reasonable and responsible decision. Finally, Dr Vella Falzon said that according to their letter of objection the appellants were trying to make an alternative offer, however, he insisted that this was not the appropriate forum to do so.

Mr Bill Key categorically denied this statement.

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 28.03.2006, and also through their verbal submissions presented during the public hearing held on 12.05.2006, 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 considered appellants' claim that albeit their offer was fully compliant with the tender specifications and that the only problem was the price, yet had they realised that they could have tendered with a machine that had lesser specifications but which was cheaper, they would have had no problem with this either;
- having also noted both (a) the appellants' remark which related to the fact that they did not know whether *Assing SpA, Rome's* offer was compliant with the specifications because they were unaware as to what type of model was being offered, alleging that the Italian Company had some specifications missing as well as changes in the specifications and (b) Mr Mifsud's confirmation, stated under oath, that the recommended tenderer's offer was according to specifications, a point corroborated by Ing Abela who stated that had a tender not been compliant such offer would have been disqualified in the first place and that the fact that it was not disqualified clearly implied that basic specification requirements were fully complied with.;
- having also considered the fact that, according to Dr Vella Falzon, his clients' offer was Euro 33,000 cheaper than that submitted by the appellants, claiming that, in accordance with the tender document, the price was an important consideration in the evaluation process;
- having taken cognizance of the procedure followed for points to be given to tenderers, namely by evaluating specifications, price, company background and financial stability;

- having noted that the appellants did not object to the formula which was used by the evaluation board to establish the price preferences, which formula had a significant bearing in this case;
- having agreed to the appropriateness of the methodology adopted in so far as ‘specifications’ and ‘price’ are concerned whilst pronouncing reservations as regards the way a Company’s background and financial stability were assessed in view of the fact that comparison was not made, for example, solely between manufacturers but between a manufacturer and a local agent which, albeit not the case in this tender, yet, in other circumstances, could have had easily been influenced the proceedings;

reached the following conclusions:-

1. Both tenders were technically compliant and properly evaluated.
2. The appellants could have easily sought clarification, at a much earlier stage in the tender adjudication process, regarding the possibility for them to tender with a machine that had lesser specifications but which was cheaper.
3. The financial metrics are considered appropriate since these reflect a proper mathematical *modus operandi* in similar scenarios.
4. The PCAB does not agree with the way Companies were compared as regards their respective background and financial stability. However, in this particular tender, this issue cannot be seen as having been a determining factor considering the fact that, whilst the variance (Company evaluation) between awardee’s mark and that of the appellants was 3%, the overall adjudication marks were 97.4% and 86.41% respectively, a far greater disparity.

Pursuant to (1) to (4) above, this Board cannot uphold the appeal lodged by the appellants.

In view of the above and 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

May30, 2006