

PUBLIC CONTRACTS APPEALS BOARD

Case 87

CT 2151/2005: Advert No. CT 73/2005: Tender for the Design, Supply, Installation, Testing and Commissioning of Slaughter-Line Equipment and Ancillary Services at the Civil Abattoir, Xewkija, Gozo.

This call for tenders was published in the Maltese Government Gazette and the EU Official Journal on 22.03.2005 and was issued by the Contracts Department following a request transmitted to the latter on 23.02.2005 by the Ministry for Gozo.

The closing date for this call for offers was 17.05.2005 and the global estimated value of the contract was Lm 428,050

Six (6) different tenderers submitted their offers.

Following the publication of the *Notification of Recommended Tenderers*, Messrs General Maintenance Ltd filed an objection on 20.06.2006 after being informed that their 'tender is not among the selected ones since it has been adjudicated as not complying in full with the tender specifications.'

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 26.07.2006 to discuss this objection.

Present for the hearing were:

General Maintenance Ltd

Dr Franco Vassallo
Mr Jimmy Calleja
Mr Marco Camilleri

Legal Representative

Camray Ltd

Mr Brian Miller
Mr Mike Mifsud

Ministry for Gozo

Mr Joseph Portelli
Dr Tatiane Cassar

Legal Representative

Adjudication Board

Dr Frank Galea
Ing. Lawrence Curmi
Ing. Saviour Debrincat
Mr Carmel Portelli
Ms Maryanne Pace

Chairperson

Following the Chairman's brief introduction, General Maintenance Ltd's legal representative was invited to explain the motive leading to his clients' objection.

Dr Franco Vassallo, the appellants' legal representative, started by stating that his clients were informed that their offer was not among the selected ones because it had been adjudicated as not complying in full with the tender specifications. He contended that his client's offer should have never been excluded for this reason considering the fact that the tender document was generic. Apart from this, Dr Vassallo pointed out that during the evaluation process, various clarification meetings were held and that the appellants had always submitted explanations and furnished the Adjudication Board with all the necessary information.

The appellants' lawyer explained that from the Contracts Department's file it transpired that only four items under *Schedule 1 – Slaughter-line equipment* (Clause 1.6.3.2 Carcass Splitting; Clause 1.7.2.8 Stainless Steel Working Platforms; Clause 9.1.11 – Conveyer Control and Clause 1.05.1 – Sandwich Panels floor finishing) and another six items under *Schedule 2 – Ancillary Services* (Clause 2.5.1.1.1 Energy Meter, Clause 2.5.1.1.2 Transient Over Voltage Protection Module, Clause 6 Hot/Cold Water Plumbing, Clause 7.7 Screen System, Clause 9 Steam System and Clause 12 Ventilation System) were indicated as not compliant with the specifications. Dr Vassallo contended that the Adjudication Board could have never stated that they were not up to specs once they guaranteed that they were going to provide such items up to the required standards. Furthermore, he emphasised that their equipment was according to EU specifications, the offer submitted was a proven system and the Adjudication Board knew that they had experience on similar contract as sub-contractors.

Dr Vassallo insisted that it was not reasonable and fair to exclude a tenderer considering the fact that their offer was 95% up to specifications and only 5% non compliant and, this, on minor items. He went on to argue that such line of action would penalise the contracting authority itself because it would be restricting its offers in the selection process.

He concluded by stating that his clients felt that once they had submitted all the necessary information to fulfil the requirements of the tender, they should have been considered as eligible participants for the financial stage.

Dr Tatiane Cassar, legal representative of the Ministry for Gozo, rebutted the appellants' statement by stating that she did not agree that the tender was generic because there were specifications for each item. Furthermore, she contended that the tenders needed to achieve 100% compliance with the technical specification to proceed to financial stage.

Dr Frank Galea and Ing Lawrence Curmi, Chairman and Member of the Adjudication Board respectively, gave their testimony under oath.

Dr Galea said that the Board arrived at its decision after making a technical evaluation of the documents received. He explained that two out of five offers received were not considered as valid because the tenderers indicated their prices in Envelope 2 of their

submission while the other three bids did not have enough information. As a consequence, the Adjudication Board requested various clarifications in order to give the latter tenderers the opportunity to be in conformity with the technical specifications.

At this point, Ing Curmi clarified that during the evaluation process, they always kept the Department of Contracts informed with the situation and informed them about the level of conformity (in percentile terms) obtained by each tenderer in respect of specifications.

Ing Curmi stated that they also requested authorisation from the Director of Contracts to seek further clarifications from the said bidders.

Intervening on this specific issue, the PCAB made reference to a letter dated 27 March 2006 which was sent by the Adjudication Board to General Maintenance Ltd wherein it was stated:

'Kindly note that the adjudicating board is giving you the opportunity to affect changes to your original submission to get in line with the requirements of the tender documents...'

The Chairman, Adjudication Board, sought confirmation from witnesses representing the Adjudication Board that the same letter was sent to the other bidders and, therefore, there was a level playing field.

Following receipt of this confirmation, however, the PCAB drew the witnesses' attention that they were not seeking clarification but encouraging tenderers to change their bids. Particular reservation was taken by the PCAB in regard to the extent that such a scenario was inadmissible and contrary to the principles of the procurement regulations.

In reply to a specific question by the PCAB, Ing Curmi confirmed that the Department of Contracts had told them to ask the tenderers to submit further technical clarifications as well as additional literature and that no changes were to be effected. When the witness said that they had informed the tenderers that *'The bid price submitted in Envelope 3 remains unchanged'*, his attention was drawn to the fact that changes were not attributable solely to price but also to the technical specifications. At this juncture, it was declared that the level of conformity of General Maintenance Ltd in respect of the technical specifications *Slaughter-line and ancillary equipment* was originally only 5%.

Having witnessed these proceedings, the PCAB decided to conclude the session at that point, considering that, in view of the prevailing circumstances, they had no alternative but to annul the whole tendering process.

Dr Vassallo intervened to claim that, as a direct consequence of this decision, his clients, the appellants, should be refunded with the full deposit paid upon lodging the objection.

In view of the above, especially its decision to consider this tender as annulled, and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the appellants should be refunded.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

August 23, 2006