

## PUBLIC CONTRACTS APPEALS BOARD

### Case 88

#### CT 2561/2005 – Advert No 201/205

#### Pre-Qualification Phase of the Tender for the Supply of Surgical Instruments to Mater Dei Hospital

This call for tenders was published in the Maltese Government Gazette and the EU Official Journal on 16 December, 2005 and was issued by the Contracts Department following a request received from the Foundation for Medical Services (FMS) on 21 October, 2005.

The closing date for this call for offers was 7 February 2006 and the global estimated value of the contract was Lm 750,000.

Fifteen (15) different tenderers submitted their offers.

Following receipt of formal notification from the Department of Contracts wherein it was stated their submission was '*not among the selected ones since it has been adjudicated as not complying with the pre-qualification requirements*', Messrs Cherubino Ltd, the appellants, filed an objection on 22 June 2006.

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 23.08.2006 to discuss this objection.

Present for the hearing were:

#### **Cherubino Ltd**

Dr Adrian Delia	Legal Representative
Dr Marcello Basile Cherubino	
Mr David Basile Cherubino	
Mr Francis Basile Cherubino	
Mr John L. Gauci	

#### **Foundation for Medical Services (FMS) - Evaluation Committee**

Mr Tonio Mallia	Chairperson
Mr Mark Bonanno	Member
Mrs Rose Bonanno	Member
Mr Mario Sant	Member
Mr George Fenech	Member

Soon after the Chairman PCAB's brief introduction, the appellants' (*Cherubino Ltd*) legal advisor, Dr Adrian Delia, started his intervention by stating that according to the Evaluation Committee's report, his clients were disqualified because

*'the manufacturer categorically declared that no samples would be provided during the selection process but only after being awarded the Tender and only at a cost. Provision of samples was a prerequisite for the pre-qualification and will be crucial at the selection phase, thus this proposal is not acceptable for the purpose of this Tender. In this instance again, the committee decided and agreed to exclude the company from further participation in the tender'.*

He contended that this statement was factually and completely incorrect because in their letter of 1 February 2006, *Nopa Instruments* (the manufacturer) had confirmed that *'we are in conditions to supply the requested samples of our surgical product range in case we shall be awarded with the specific order.'* Furthermore, he maintained that in the pre-qualification document under point (j) of clause III.3.4 Technical Capacity – means of proof required, candidates were not required to provide samples of the manufacturing Company but a *'Confirmation that sample of any instrument requested can be provided'*.

Moreover, Dr Delia argued that in view of the fact that *Nopa Instruments'* above-mentioned letter was exclusively addressed to *Cherubino Ltd*, the word *'customer'* in the statement *'the cost of these samples will have to be beared by the customer'* should not have been interpreted to refer to the Client, who, in terms of the Pre-Qualification Document, is defined as the Foundation for Medical Services (FMS), but to the appellants. Thus, this meant that relative costs incurred would be borne by *Cherubino Ltd* and not by the Client (FMS). Also, the lawyer claimed that the phrase *'in case we shall be awarded with the specific order'* was wrongly interpreted by the Evaluation Committee because *Nopa Instruments* did not declare that they would provide the samples after being awarded the Tender. He maintained that there was a difference between *'awarded with specific order'* and *'awarded the tender'*. Also, Dr Delia emphasised that *Nopa Instrument* could have never been awarded the tender for the simple reason that they were not the tenderers.

He explained that this tender consisted of a vast range of equipment and the contents of their (*Nopa Instruments*) letter confirmed that they had the ability to provide samples. Dr Delia concurred with the Chairman Evaluation Committee's letter of reply dated 16 August 2006 wherein it was stated that *'a sample is provided to illustrate the items being purchased and to provide the prospective purchaser with an example for evaluation before the transaction or the actual purchase takes place and not after the award of the tender'*. He failed to understand how the Evaluation Committee understood that the sample would be provided after the selection process.

Dr Delia contended that the Evaluation Committee gave an incorrect interpretation of the manufacturer's letter and that if they had doubts regarding the identification of the 'customer' and the samples' costs they should have asked for clarifications. The appellants' legal representative presented a document dated 22 August 2006 from *Nopa Instruments* to *Cherubino Ltd* wherein it was explained that:

*'we make reference to our letter to your goodselves dated 01.02.2006. We wish to confirm and clarify that we are able and willing to supply the required*

*samples of our surgical instrument product range upon your placing a specific order for the particular product/s.*

*We know that the samples would be required for an evaluation at a pre-award stage of the tender, as is common practice in such large tenders for the furnishing of instruments for the whole Hospital. This also clearly shows that samples are provided against specific requests as the tender is large and the range enormously vast.*

*We shall, as usual, charge you, Cherubino Ltd. with the cost of the samples requested against each request.'*

Finally, in his introductory submission, Dr Delia remarked that in their letter of reply, the Evaluation Committee, after analysing the objection, had prepared the decision. He said that, apparently, the Evaluation Committee did not know that it was the main function of the Public Contracts Appeals Board to decide on the appellants' objection.

Mr Tonio Mallia, Chairman of the Evaluation Committee, responded by categorically denying that they wanted, in any way, to assume the PCAB's role. He claimed that they simply wanted to defend the case and to prove that the appellants were not unjustly disqualified.

Mr Mallia declared that the Evaluation Committee never contested the objector's ability to provide samples. In their letter Nopa Instruments clearly stated that:

*'concerning the actual public Tender for the Mater Dei Hospital we confirm that we are in conditions to supply the requested samples of our surgical instruments product range in case we shall be awarded with the specific order.*

*The cost of these samples will have to be beared by the customer.'*

The Chairman, Evaluation Committee contended that if Nopa Instruments' letter was intended only to cover the relationship between the manufacturer and the objector, then the submission of such document would have been irrelevant and superfluous for evaluation purposes. Mr Mallia insisted that the statement regarding the provision of samples conveyed a clear message and therefore there was no need to ask for clarifications. He claimed that the provision of samples at a cost and after the selection/ evaluation process was not acceptable for the Evaluation Committee.

Mr Mark Bonanno, a member of the Evaluation Committee, in his brief intervention, reiterated that the declaration by Nopa Instrument was so clear that they did not need to seek clarifications and that they never contested the objector's ability to supply the samples.

Then, on the PCAB's request, Mr Mallia took the witness stand to give his testimony under oath.

On cross-examination by Dr Delia, Mr Mallia confirmed that:

- Cherubino Ltd had been disqualified due to Nopa Instruments' letter dated 1 February 2006, because it was declared that the samples would only be

provided at award stage and at a cost.

- According to Clause III 3.4.J the manufacturing company only needed to confirm that samples of any instrument requested could be provided.
- The Evaluation Committee never contested the objector's ability to provide samples.

When Mr Mallia said that a sample was part of an item which was provided so that an evaluator could know what would be purchased, Dr Delia intervened by stating that in the prevailing circumstances it was known that a sample could never be something that could be purchased.

In reply to a specific question by the PCAB, the witness said that a client was a repetitive customer and a customer was a one-time buyer who in this case was the hospital. Dr Delia insisted that according to the pre-qualification document the Client was expressly defined as the Foundation for Medical Services (FMS). The PCAB said that the hospital was the place where the instruments would be used and not the client. However, Mr Mallia explained that when the new hospital will be opened it would fall under the responsibility of the Mater Dei Hospital Management.

During his testimony, Mr Mallia said that, during their evaluation, the Evaluation Committee only asked for clarifications in respect of documents which were not clear. Also, he declared that the tender was submitted by Cherubino Ltd and that it was imperative for samples to be submitted free of charge and before evaluation.

In his concluding remarks, Dr Delia reiterated that the letter was submitted solely to prove their ability to provide the samples as required in the pre-qualification document. He maintained that if the Evaluation Committee had doubts about the cost of the samples and any other pivotal issues they should have asked for clarifications. The appellants' lawyer said that if such a line of action would have been taken, Cherubino Ltd would have given the explanation as indicated in Nopa Instruments' letter dated 22 August 2006.

Mr Mallia concluded by insisting that it was not the Evaluation Committee's fault that they understood Nopa Instruments' letter as explained in their report because it was clearly stated that samples would be submitted at a cost and after the award. He said that if Nopa Instruments' latter document was presented with the tender document they would have had no problem whatsoever to consider the appellants amongst the qualified bidders.

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 motivated 'letter of objection' dated 27<sup>th</sup> June 2006, and also through their verbal submissions presented during the public hearing held on the 23 August 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 the reasons which lead to the appellants' objection;
- having also noted the appellants' explanation regarding the difference between the client and the customer and the issue as to who will pay for the samples and at what stage were the same samples required by the contracting authority;
- having also considered the appellants' lawyer's claim regarding the phrase '*in case we shall be awarded with the specific order*' considered by the latter as having been wrongly interpreted by the Evaluation Committee as appellants' suppliers never declared that they would provide the samples after being awarded the Tender;
- having reflected on the point raised by appellants that *Nopa Instrument* could have never been awarded the tender for the simple reason that they were not the tenderers;
- having heard Mr Mallia confirm that Cherubino Ltd's offer was disqualified because of Nopa Instruments' letter dated 1 February 2006, in which it was stated that the samples would only be provided at award stage and at a cost;
- having also heard both Mr Mallia and Mr Bonanno declare that the Evaluation Committee never contested the appellants' ability to provide samples;
- having taken cognisance of the remark passed by Mr Mallia which maintained that if Nopa Instruments' letter were intended only to cover the relationship between the manufacturer and the appellants, then one has to question the submission of such a document in the appellants' offer;
- having established that the Evaluation Committee never sought clarification from the appellants regarding the submission of samples and the question relating to apposite cost even though they were taking into a consideration a letter addressed to the tenderers from their supplier;
- having reflected on the Evaluation Committee's erroneous interpretation of 'client' vis-à-vis 'customer' in more than one instance, namely, the relationship between (i) *Nopa Instrument* and *Cherubino Ltd* and (ii) the *Foundation for Medical Services* (FMS) and *Mater Dei Hospital*

reached the following conclusions, namely that

1. the Evaluation Committee never contested the appellants' ability to provide samples;
2. albeit they could have easily been misled by the inclusion in the offer of a letter addressed to a third party (the appellants), it is clear that the Evaluation Committee never sought clarification from the appellants regarding the submission of samples and the question relating to apposite cost even though they were taking into consideration such letter addressed to the tenderers from their supplier;

3. a clarification process could have cleared all the misunderstandings and made the interpretation of facts unequivocal to all parties concerned.

In view of (1) to (3) above, this Board finds in favour of appellants and in terms of the Public Contracts Regulations, 2005, this Board recommends that the appellants be reinstated in the evaluation process and that the deposit submitted by same objectors should be refunded.

**Alfred R Triganza**  
Chairman

**Anthony Pavia**  
Member

**Maurice Caruana**  
Member

*13 September 2006*