

PUBLIC CONTRACTS APPEALS BOARD

Case 62 and Case 63

CT 2279/2005 – Advert No 215/2005: Supply, Delivery, Installation and Commissioning of Laboratory Furniture and Equipment at the National Blood Transfusion and Blood Donation Centres G'Mangia (Lots 1 and 2)

This call for tenders, published in the Maltese Government Gazette on 24.06.2005 was issued by the Contracts Department following a request transmitted to the latter by the Ministry for Health, Elderly and Community Care.

The closing date for this call for offers was 18.08.2005 and the global estimated value of contract (Lots 1 to 4) was Euro 542,000 (approx. Lm 223,000).

The Ministry of Health appointed an Evaluation Committee consisting of:

Mr Joseph Galea	- Chairperson
Dr Nadine Delicata	- Secretary
Mr Paul Mercieca	- Member
Dr Alex Aquilina	- Member
Mr Mario Fava	- Member

to analyse a total of three (3) offers – Lot No.1 and two (2) offers – Lot No. 2 respectively, submitted by different tenderers.

Following receipt dated 18.11.2005 of a formal notification from the DG (Contracts) whereby they were informed that their offers submitted for Lot 1 and Lot 2 were not successful because these were not technically compliant Messrs Cherubino Ltd filed two objections on 09.12.2005 covering Lots 1 and 2 respectively.

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 08.02.2006 to discuss this objection.

Present for the hearing were:

Cherubino Ltd

Dr Marcello Basile Cherubino M.D., MBS, MIM - Managing Director
Mr Neville Borg
Mr Clive Muscat
Dr Adrian Delia
Dr Anita Fenech
Dr John L. Gauci

Ministry of Health/Evaluation Committee

Mr Joseph Galea - Chairperson
Mr Paul Mercieca - Member
Dr Alex Aquilina - Member

Mr Mario Fava - Member

Contracts Department

Mr Denis Attard

At the commencement of the public hearing, the Chairman PCAB put forward the idea that considering element of analogy that existed between the objections scheduled to be heard separately during the course of the day, as well as the fact that both objectives were filed by the same appellants, the Board was of the opinion that the two appeals could be heard concurrently. All parties agreed to proposal. However, as the types of items of both lots were different (Lot 1 relates to 'Furniture' and Lot 2 relates to 'Machinery'), it was agreed that specific technical issues relating to each item should be treated separately.

At this stage, Messrs. Cherubino Ltd's representatives were invited to explain what lead to their objections.

Dr Anita Fenech, the appellants' legal representative stated that they lodged their objections after receiving the Director General Contracts's letter dated 18 November 2005 which stated that, *'Thank you for participating in the above-mentioned tender procedure. However, I regret to inform you that the tender submitted by you for Lot 1 (2 options), 2 and 4 was not successful because your offer was not technically compliant.'* She said that they were not contesting the decision regarding Lot 4. Her clients were of the opinion that their offers for Lot 1 (Furniture) and Lot 2 (Machinery) were technically compliant. She explained that in the tender dossier it was specified that, *'A tender is deemed to comply if it satisfies all the conditions, procedures and specifications in the tender dossier without substantially departing from or attaching restrictions to them.'* Moreover, Dr Fenech said that under clause 20 of the tender dossier "*substantial departures and restrictions*" were defined as being *'those which affect the scope, quality and execution of the contract, differ widely from the terms of the tender dossier, limit the rights of the Contracting Authority or the tenderer's obligations under the contract or distort competition for tenderers whose tenders do comply.'* She insisted that none of these criteria had been infringed because her clients always abided by the tenders' conditions. At this point the lawyer asked the Evaluation Board to indicate why her clients' offers were adjudicated as technically non-compliant and where they did not comply with the above mentioned criteria.

Mr Joseph Galea, Chairperson of the Evaluation Committee, said that they would exhibit documents and provide information to demonstrate why Cherubino Ltd's offers were considered technically non-compliant and where they departed from the terms of the tender dossier.

When Mr Paul Mercieca, another member of the Evaluation Committee, took the witness stand he made reference to various issues where the offer submitted by Messrs Cherubino Ltd's was deemed to be non compliant, particularly, with reference to *'Warranty'*, *'Insurance'*, *'Compliance Certificates'* and *'Technical Specifications'*?

'Warranty'

Mr Mercieca said that none of the lots offered by the appellants were covered by the two year warranty period as specified in the tender dossier. Apart from this in Lot 2 they offered an optional after sales service charge of Lm8 *per* hour which was not according to tender's conditions.

Dr Delia explained that the civil law provided that the purchase of movable items would be covered by a two year guarantee even if the relative warranty was not given in writing. As a consequence, he contended that the interests of the contracting authority were always legally safeguarded.

Dr Fenech claimed that the option of Lm8 *per* hour was offered additionally by her clients.

'Insurance'

Mr Mercieca said that Cherubino Ltd did not provide any of the three types of insurance policies indicated in the tender dossier, namely, 'cover up and protect'; 'all risk'; and 'third party'.

Dr Delia pointed out that in Article 13 of the special conditions it was specified that the '*Above mentioned insurance policies are to be made with Lots 1, 3 and 4 only and are to be presented before the start of works*'. Therefore, at tendering stage, they were not obliged to present the insurance policy. He explained that this was purposely done because an insurance policy could only be issued to a contractor after the award of a tender.

'Compliance Certificates'

Mr Mercieca stated that the appellants did not submit the requested compliance certificates to prove that the furniture (Lot 1) was in compliance with the relevant European Standards or equivalent.

Dr Fenech claimed that, although Cherubino Ltd did not submit stand-alone certificates, in the manufacturers' brochures which were submitted with their offer, reference was made to such certifications. Mr Mercieca rebutted by stating that the Evaluation Committee did not accept brochures for such purposes because in the tender specifications, tenderers were clearly requested to submit Compliance Certificates and not leaflets. In reply to a specific question by the PCAB, the witness confirmed that a written declaration or declarations by the manufacturer/s would have been acceptable.

'Technical Specifications'

Lot 1 – 'Furniture'

Mr Mercieca claimed that Cherubino Ltd's offer for Lot 1 - '*Furniture*' was so meagre and lacked relative information that it was not possible for the Evaluation Committee to arrive at any conclusions. As a consequence, such offer could not be considered further. During his testimony, the witness highlighted the following divergences from the published technical specifications:

- handles of cupboards and drawers were not flush;
- the internal chambers of the safety cabinets were not made as specifically requested;
- the *laboratory* bench tops and desks were not supported on C-shaped frames;
- the thickness of the *Epoxy Resin* worktops of the laboratory benches supplied by the appellants was 25mm and not 35mm;
- no samples were submitted for the water and electrical fitting which had to be used on the *laboratory* benches and for stainless steel worktops of benches;
- no literature/information was submitted in respect of various items, including the ergonomic laboratory chairs, stainless steel trolleys, recycling unit, stainless steel worktops of laboratory benches;
- a number of documents were not supplied at all.

'Handles'

Cherubino Ltd's representatives confirmed that they offered normal handles instead of the requested flush ones. However, they were of the opinion that this was not an important requirement. In reply to a specific question by the PCAB, Mr Mercieca declared that if this were the only non-compliant item in the whole lot they would have accepted their offer.

'Worktops'

Dr Fenech contended that according to evaluation check-list for Lot 1 the worktops for laboratory benches were to be made of *Epoxy Resin* or 'stainless steel' and that no samples were requested for the latter type of worktops. Mr Mercieca clarified that they requested two types of surfaces - *Epoxy Resin* and stainless steel and in the Bill of Quantities they specified which laboratory benches had to be supplied with Epoxy Resin worktops and those with stainless steel worktops. As regards the submission of samples, Mr Mercieca made reference to *Clause 2.0 SUPPLY OF DOCUMENTS* of the tender dossier wherein it was specified that '*The following documents and samples are to be supplied with the offer*' including '*Samples of bench top in epoxy resin (or approved equivalent) in different colours and in stainless steel.*'

Dr Cherubino said that according to EU standards the accepted average thickness of worktops was 25mm. He maintained that they were asking for something which

normally was not available so much so that none of the other tenderers submitted such worktops with the required thickness. However, Mr Mercieca explained that the specifications were taken from a similar tender issued by University of Malta. Furthermore, he pointed out that such worktops could be custom-made because the resin was an artificial material.

'Recycling Unit'

With regard to the lack of literature submitted in respect of the recycling unit, Mr Neville Borg, another representative acting on behalf of the appellants, claimed that they gave extensive information of the parts submitted. However, Mr Mercieca maintained that they requested the brochure of the technical literature because they wanted to know how the system functioned.

'Ergonomic Laboratory Chairs'

Mr Borg claimed that the chair featuring in the picture on the OMEGA 10 brochure was the item that was offered by Cherubino Ltd. On examining such document, the PCAB noted that the chair was not included in the design. Mr Mercieca said that they had to assume that it was being offered because no reference was made to the chair in the OMEGA 10 brochure.

'C-Shape Frames'

Cherubino Ltd's representatives confirmed that they did not offer *laboratory* bench tops and desks supported on C-Shape Frames as requested in the specifications but they submitted a different type of metal frame supports.

LOT 2 – 'Machinery'

'Loader of flow cytometer'

Mr Mercieca said that the technical specifications of Lot 2 – Machinery stipulated that the flow cytometer should have an automated sample loader. He claimed that in their letter of objection the appellants confirmed that although the loader was available they did not include it with their offer. He contended that this was considered a major component of the equipment.

Mr Borg testified that Cherubino Ltd did not offer the loader because when they contacted their foreign company they were informed that the automated loader could not be used on such application. Mr Mercieca pointed out that they did not indicate one application but a range of applications. In fact the specifications stipulated that the cytometer

'shall be capable of analysing cells and their components and will be used mainly for the following applications:

- 1. Enumeration of residual white cells in leucodepleted blood products*
- 2. Platelet study*

However, the flow cytometer offered should be an open system with the potential to add more applications and components.'

Furthermore, it was stated that other tenderers had offered the loader and that the appellants did not highlight any restrictions on the use thereof.

'RAM'

Mr Mercieca said that according to technical specifications the flow cytometer had to be accompanied by a computer workstation with maximum memory capacity of "*at least*" 1GB RAM. This was found to be technically non-compliant because Cherubino Ltd offered 512MB DDR RAM. Although this was confirmed by Cherubino Ltd's representatives, Dr Fenech maintained that the English was not clear because it was either "*maximum*" or "*at least*".

'Start-up Reagents'

Mr Mercieca said that the specification for the start-up reagents stipulated that '*Test kits/ reagents must provide for a no-lyse, and no-wash, whole blood format in order to minimize operator hands-on time and manipulation.*' However, he acknowledged that although the appellants offered a 'lyse and no wash system', the divergence was not substantial.

During his testimony Mr Mercieca emphasised that the Evaluation Board arrived at the conclusion that the appellants' offer was technically non-compliant after assessing each lot holistically.

In her concluding remarks, Dr Fenech said that in spite of the fact that their two objections were heard in one sitting it was imperative that these were decided upon separately. She claimed that from the points raised during this hearing it resulted that Cherubino Ltd had submitted what was clearly requested. Finally, the appellants' lawyer contended that there were no major deviations from the specifications that affected the scope, quality or execution of the contract.

Mr Mercieca said that he was concerned about the fact most of the items were considered minor by the appellant. As an example, he mentioned the fact that the loader (Lot 2) was very expensive. Furthermore, the Evaluation Committee did not consider that the divergences were minor because, technically, under Lot 1 Cherubino Ltd offered different items from what were requested, such as, the C-Shape Frames.

During the hearing, the PCAB pointed out that there was lack of communication on the part of the appellant and that there were certain points which should have necessitated clarifications by the Evaluation Committee at the tendering stage. However the same argument also applies to the tenderer since if any doubts had arisen about any item of specification this could have been clarified before the closing of the tender.

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 15th December, 2005, and also through their verbal submissions presented during the public hearing held on the 8th February, 2006 had objected to the decision taken by the General Contracts Committee communicated to them in terms of the letter dated 18.11.2005, informing them that the tenders submitted by them were not in compliance with technical specifications;
- having established that appellants had repeatedly offered items which they knew ‘*ab initio*’ that these were not according to tender document requirements (e.g. ‘handles’, ‘worktops’, ‘recycling unit’, ‘C-Shape Frames’) or else have, notwithstanding, refrained from offering items at all (e.g. ‘Loader of flow cytometer’) albeit highly cognizant of the fact that these items formed part of the tender requirements;
- having noted that appellants assumed that just because a chair was in an illustrated product catalogue the Evaluation Committee had to assume that this chair was part of the offer without giving precise specifications for it;
- having also noted that a key witness representing the Evaluation Committee stated that despite they felt quite comfortable with the term regarding ‘maximum’ and ‘at least’, yet, in hindsight, one could possibly argue that the use of this term could have been the subject of misinterpretation by third parties;
- having heard that the Evaluation Committee would agree with the fact that although the appellants offered a ‘*lyse and no wash system*’, yet, the departure from what the Tender document intended to specify was not deemed to be substantial;
- having ascertained that the Evaluation Committee’s ‘*modus operandi*’ predominantly reflected a holistic assessment approach

reached the following conclusions:-

1. the arguments raised by the appellants during the hearing were not convincing;
2. the appellants' insistence to offer what their principals could supply them with irrespective of whether such items would be according to tender specifications or not, was an attitude which went against normal praxis and considered to be time wasting to all parties concerned;
3. the methodology adopted by the Evaluation Committee was in line with normal praxis;
4. In consequence to 1, 2 and 3 above, the appellants' objections (*Lot 1 - 'Furniture'* and *Lot 2 - 'Machinery'*) to the decisions reached by the General Contracts Committee to deny Messrs Cherubino Ltd from being considered further as regards this particular tender (Lots 1 and 2) are not upheld.

Furthermore, 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

20th February, 2006