

PUBLIC CONTRACTS APPEALS BOARD

Case 105

Advert No 114/2007 - CT 2115/2007 - GPS 76003/t/05pr: Supply of Orthotics

This call for tenders was published in the Maltese Government Gazette and the European Journal on 09.03.2007 and was issued by the Contracts Department following a request transmitted to the latter by the Government Pharmaceutical Services (GPS).

Only one (1) tenderer submitted an offer.

The closing date for this call for offers was 03.05.2007 and the original global estimated value of the total contract covering a period of three consecutive years was Lm 300,000.

Messrs Orthotic Services Ltd filed an objection on 08.05.2007 after being informed that their offer had been disqualified because their Bankers submitted a 'Bid Bond' containing restrictions that were not acceptable and not in conformity to Clause 3 and to the specimen shown in the tender document.

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 06.06.2007 to discuss this objection.

Also present for the hearing were:

Orthotic Services Ltd

Mr John Young

Managing Director

Mr Victor Froggatt

Works Manager / Clinical Technician

Government Pharmaceutical Services

Ms Isabelle Grima

Assistant Director

Ms Miriam Dowling

Contracts Department

Mr Anthony Cachia

Director (Operations)

Following the Chairman's brief introduction regarding this particular objection, the appellants' representatives, *Orthotic Services Ltd*, were invited to explain the motive leading to their objection.

Mr John Young, Managing Director – Orthotic Services Ltd, started by stating that their Company had been successfully supplying this product to Malta for the last seven years.

Mr Young went on to explain that they had a *bid bond* currently in place of about Lm 17,000 but this was in connection with this particular tender. He claimed that, as far as this tender was concerned, everything was filled in correctly, except for the wording of the *bid bond*. However, he maintained that they had subsequent meetings with their Bankers in the UK who agreed to issue a new guarantee through Bank of Valletta according to the required wording.

Mr Anthony Cachia, representing the Department of Contracts, declared that this tender was published under the *Three Package Procedure*, wherein package '1' included the *Bid Bond*, package '2' incorporated all *technical details* relevant to their offer and package '3' contained the *price* of the tender. He said that the said packages were opened in the same numeric sequence and, as a consequence, once the appellants' bid was disqualified after the opening of the first package, it could not be confirmed whether the others were filled in according to the requirements of the tender because these were still sealed.

Mr Cachia explained that the appellants' offer was disqualified because the *Bid Bond* contained restrictions that were not acceptable and in conformity with (a) 'Clause 3' and (b) to the specimen of the *Bid Bond* shown in the tender document. He claimed that the appellants' Bank in the UK had placed a condition whereby it was stated that

'.. on receipt of your first demand in writing over original handwritten signature(s), accompanied by your signed statement certifying that the Seller is in breach of his/ her obligations under the tender conditions ...'

and that

'this guarantee shall be governed by English Law.'

The Department of Contracts' representative maintained that the specimen of the *Bid Bond* attached to the tender document was very clear and bidders could have just copied it and signed it. He said that the most crucial quote in this document was that the *'guarantee becomes payable on your first demand and it shall not be incumbent upon us to verify whether such demand is justified.'*

Also, in his intervention, Mr Cachia pointed out that no changes could be permitted after the opening of the tenders' packages.

In reply to a specific question by Mr Young, Mr Cachia said that the most important thing for the EU was that the tendering procedures were carried out in a fair and

transparent manner and that the tender conditions were set by the Contracting Authority concerned and not the EU.

Finally, when Mr Victor Froggatt, another representative appearing on behalf of the appellant Company, asked the PCAB as to whether the samples that were submitted with their offer, considered to be rather expensive as some of them were specifically designed and manufactured for this particular tender, could be returned, his attention was drawn to the fact that it was beyond the PCAB's responsibility to decide on the issue and that he may refer the matter to the pertinent Contracting Authority.

During the proceedings, the PCAB pointed out that it was the duty of the tendering company to check that all pertinent documents submitted with offers were according to the requirement of the tender conditions.

At this stage the hearing came to a close and the PCAB members proceeded with their deliberations before reaching their decision.

This Board,

- 1 having noted that the appellants, first through their formal letter of objection and dated 08.05.2007, and also through their verbal submissions presented during the public hearing held on 06.06.2007, had objected to the decision taken by the General Contracts Committee;
- 2 having noted the wording of all documentation submitted, particularly the *Tender Document*;
- 3 having considered the points raised by the Contracts Department's representative;

concludes, that it is

- a. not permissible for any entity to alter terms and conditions stipulated in a local tender document compiled by a local entity;
- b. not permissible for terms and conditions in any document to be negotiated after the submission of an offer and this in order to align with terms and conditions which were amply clear at tendering stage;
- c. normal praxis for a bidder to seek clarifications prior to submitting an offer rather than first altering parameters and then seeking redress after matters are not to one's liking;
- d. not permissible for any appellant to argue that since their bid was the only one submitted then the Contracting Authority, the Contracts Committee as well as the PCAB should be more lenient and pragmatic in their approach as formalities remain as such under all circumstances despite the number of

participants. As a matter of fact, if any pertinent authority should ever contemplate to change the goal posts dependent on the number of participants it would be setting an undesirable precedent and thereby causing a huge public disservice.

As a result of the above-mentioned points, this Board decides against the appellants and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the appellants in terms of regulation 82, should not be refunded.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

26 June 2007