

## PUBLIC CONTRACTS APPEALS BOARD

### Case No. 112

#### **Advert No C/T/A 2/2007 - CT 2767/2006 Tender for the Supply, Delivery, Installation and Commissioning of kitchen/restaurant equipment to ITS School, Qala, Gozo**

This call for tenders was published in the Maltese Government Gazette and the Official Journal of the European Communities on 27.04.2007 and was issued by the Contracts Department following a request transmitted to the latter by the Ministry for Gozo.

The closing date for this call for offers was 12.06.2007 and the estimated contract value was Lm 86,610 excluding VAT (2004 – 2006 budget).

Five (5) different tenderers submitted their offers.

Following the decision taken by the General Contracts Committee (GCC) to cancel the tender relating to the subject in the above-mentioned caption arguing, *inter alia*, that “no offer was fully compliant”, Messrs ***E.C.B Hotel & Catering Equipment Limited*** filed an objection on 18.09.2007 against the said decision.

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 two public hearings on the 17<sup>th</sup> and 22<sup>nd</sup> October 2007, respectively, to discuss this objection.

Present for the hearing were:

#### **E.C.B. Hotel & Catering Equipment Limited**

Dr. Richard Sladden	Legal advisor
Mr. Mario Cutajar	Director
Mr. John Cutajar	Director

#### **Ministry for Gozo**

Mr. Joseph Micallef	Permanent Secretary
Dr. Tatiana Cassar	Legal Officer
Mr. John Cassar	Technical Advisor

#### **Adjudication Board**

Mr. John Cremona	Chairperson
Arch. Peter Zammit	Member
Ms Daniela Sabino	Secretary

#### **Department of Contracts**

Mr. Francis Attard	Director General
Mr. Anthony Fava	Director Compliance

#### **Planning and Priorities Co-ordination Division**

Ms. Gabby Mallia	Senior Programme Manager
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After the Chairman PCAB's brief introduction regarding the case under review, the appellants' (Messrs *E.C.B Hotel & Catering Equipment*) legal representative, Dr Richard Sladden, was invited to explain the motive which led to his clients' objection.

Dr. Sladden commenced his intervention by stating that his clients' offer had all the essential requirements of the tender and that any variations did not substantially depart or fundamentally change what was requested in the tender. The lawyer insisted that the presence of the technical person was indispensable in order to indicate and to explain where and why their offer was not compliant. Furthermore he remarked that his clients' offer was the cheapest of all the submitted bids by approximately Lm 10,000. Dr Sladden claimed that in the instructions to tenderers it was specified that the tender had to be awarded to the cheapest technically compliant offer. The appellants' lawyer finally reiterated that his clients' bid was technically compliant and the cheapest.

In reply to the PCAB remark as to whether his clients' bid was essentially or fully compliant, Dr. Sladden said that any variations were minimal and beneficial to the contracting authority. Also he said that as per minutes of the clarification meeting held on the 18<sup>th</sup> May 2007, it was confirmed in writing (answer to question 1.10 refers) that "*sizes specified in the BOQ must be respected to reasonable tolerances. Items such as sinks which come in standard sizes must exactly match specs*". Dr. Sladden concluded his opening intervention by claiming that they were against the initiation of the negotiated procedure due to the fact that the financial element of their bid was known and therefore they were insisting that the financial offers should not be changed.

Dr. Tatiana Cassar, Legal Advisor to the Contracting Party, referred to clause 20 *Evaluation of tenders* of the tender document which stipulated that the Adjudication Board had to examine whether the tenders were administratively compliant or not. She said that, contrary to what was required under sub-article 4 of clause 3.6, none of the appellants' documents/literature was original or signed. She claimed that in spite of the fact that during the adjudication stage the appellants were asked to submit a complete list of the requested documents, some of them were still missing, others were not original (J10) or did not match with the description (H1). The lawyer contended that E.C.B. Hotel & Catering Equipment Limited failed also administratively in the Financial Capability since they did not submit '*a statement of the economic operator's overall turnover for the last three years, these being 2003/2004/2005*' as stipulated under the same clause.

With regard to the appellants' claim that the variations were minimal and, therefore, did not substantially depart and did not fundamentally alter the said requirements, Dr Cassar claimed that in the appellants' offer there were considerable shortcomings when compared with the specifications indicated in the Bills of Quantity (BOQ) of the tender document. She maintained that whilst substantial variations were noticed in the measurements of some items (such as B8 - knee-operated wash-hand basin 500x500x350 and 'B1' - sink unit x 2 bowls 400x700x850 in the BOQ and the sizes of the appellants' items were 400x310x300 and 2400x700x850 respectively), others did not even match with description (such as *square bowl* instead of *round bowl* - 'B5'). Also, other items were not even included in their offer (such as 'F1' - *Shelf* and 'F3' - *Swivel*). Furthermore, in the appellants' offer it was not specified whether the items

were “brushed” as indicated against each item in the BOQ. She claimed that this feature was important because such items would not be easily scratched or dented.

The Contracting Authority’s representative said that when all these items are considered as a whole, the ‘kitchen’ as requested in the tender document would have been drastically different from that being offered by the appellants.

With regard to the appellants’ claim that they had the cheapest offer, Dr. Cassar made reference to Clause 20 of the tender document, wherein it was stipulated that the financial evaluation would be carried out only in respect of those offers that were deemed to be administratively compliant and subsequently technically compliant. She claimed that the appellants’ offer was neither administratively nor technically compliant and therefore in spite of the fact that they had the cheapest offer the tender could not be awarded to them.

Dr. Sladden responded that this was the first time that his clients were hearing such shortcomings and it was for this reason that they requested a list of items showing where they were not compliant with the tender specifications. He claimed that in their opinion this tender was not cancelled on the basis of the procedure specified under *Clause 25 – Cancellation of the tender procedure*.

In reply to a specific question by the PCAB, Dr Cassar declared that all other offers were not compliant. The PCAB claimed that in the prevailing circumstances it had to be established where and why none of the offers was compliant with the tender requirements and whether the specifications were reasonable and attainable. At this point, Dr Sladden intervened to remark that all the bidders were companies that had extensive experience in this field.

Mr John Cremona, Chairman of the Adjudication Board, stated that the role of the Board was to evaluate the offers in accordance with the conditions as stipulated in the tender document. He proceeded to explain that, after the submission of tenders and after obtaining permission from the General Contracts Committee, all bidders were approached to submit original literature that was signed by the manufacturers as stipulated under clause 3.6 (4) of the *Instructions to Tenderers*. He declared that in spite of the fact that, in their majority, the tenderers satisfied this requirement, they still lacked to supply all the information requested.

When the PCAB asked Mr Cremona to state whether the Board had drawn up a comparative technical compliance grid that included all tenders and items in the BOQ, the reply given was in the negative. He explained that they evaluated each tender on its own merits and that the tender could not be awarded because none of them was administratively fully compliant with its requirements.

The Chairman of the Adjudication Board remarked that they did not recommend the re-issue of the tender but the opening of a negotiated procedure so that the bidders would be given a chance to adapt to the requirements set in the tender document.

Mr Cremona said that following the administrative evaluation it carried out a preliminary evaluation of the technical submissions and found that all three tenderers had several items which did not totally comply with the tender requirement particularly with regards to measurements and finish.

At this point the PCAB suspended the sitting to enable its members to discuss a few issues raised until then.

After resuming with the hearing, the PCAB ruled that the Adjudication Board should compile a comparative technical evaluation grid since this was considered indispensable for deliberation purposes. The PCAB requested the Board to include all bidders and the specification of all the items indicated in the BOQ and to indicate against each item submitted by the respective bidders which of them were compliant or not. This grid had to be completed and sent (in soft copy) to the Secretary, PCAB by 15.00 hrs of Friday 19<sup>th</sup> October 2007. Meantime, the latter was directed to forward the same documentation to the Chairman and Members of the PCAB and the appellants.

Architect Peter Zammit, a member of the Adjudication Board, intervened by pointing out that the kitchen infrastructure was already completed and, due to the fact that the building had space limitations, the equipment had to fit within the space available. Furthermore, he said that as a consequence they were not in a position to alter specifications. At this point the PCAB asked the appellants' representatives to state whether at tender submission stage his Company had taken into consideration the building structure. Mr Mario Cutajar, Director E.C.B. Hotel and Catering Equipment Limited replied that the items offered were in conformity with the measurements provided.

Continuing, Architect Zammit said that during the evaluation stage, in reply to a specific question by the Adjudication Board, the Department of Contracts said that the offers had to be fully compliant with all the requirements of the tender. He explained that, originally, the Adjudicating Board was in favour of initiating discussions with the tenderer who submitted the cheapest technically compliant offer but this was refused by the General Contracts Committee (GCC).

Mr. Francis Attard, Director General (Contracts) was then called to take the witness stand. On cross-examination by the PCAB, he testified that whilst he could not recall whether a specific request was made to start discussions with the cheapest tenderer, yet, even if this were to be the case, such request could not be accepted because the regulations had specific provisions for such instances known as 'negotiating procedures'. He explained that during the "negotiating procedures" all tenderers whose offers were deemed to be administratively and technically not compliant would be given another chance to rectify the deficiencies by adapting their submissions with the tender requirements. Mr Attard emphasised that the tender price was not negotiable. He said that when a negotiated procedure was resorted to, each bidder was still required to submit a fresh tender with new specifications in the Contracts Department's tender box. The Director General (Contracts) remarked that, in those instances where the Adjudication Board reported that none of the offers was administratively and/or technically fully compliant with the tender requirements, the GCC would have no alternative but to cancel such tenders. He explained that in this particular case, they received a specific request from the Ministry for Gozo and they authorised the latter to initiate a negotiated procedure with all the bidders as stipulated in Regulation 65 of the Public Contracts Regulations and in accordance with EU Directives.

Mr. Zammit intervened and remarked that this was the second time that this tender was being issued and this was being done so with the same specifications!

The PCAB remarked that it was no wonder that offers were also not compliant in the second issue! The PCAB further remarked that as things stood, it was very doubtful whether at planning stage any consideration would have been given to (i) the equipment that was available on the market and (ii) whether the building could technically house the required equipment. Furthermore, the PCAB declared that it failed to understand why the tender was issued with the same specifications considering the fact that none of the tenderers had complied with such specifications. The Chairman, PCAB said that in this particular case the scope of a 'negotiated procedure' was very doubtful and, in the prevailing circumstances, the technical compliance grid was even more necessary.

At this stage the hearing was adjourned to Monday 22<sup>nd</sup> October 2007 at 16.30 hrs.

Following the resumption of proceedings as previously scheduled, the PCAB informed those present that the Chairman of the Adjudication Board had provided a 'technical evaluation' comparative grid of all the technical specifications in respect of all five tenders together with a covering letter. On taking the witness stand, Mr Cremona explained that they had indicated those items which either were not technically compliant or had slight variations with the original tender dossier. He confirmed that blank spaces meant that the items were fully compliant. He explained that the technical grid had only been compiled following the request of the PCAB because previously the adjudication had been carried out only up to and regarding the administrative details.

On cross-examination by the PCAB, Mr Cremona testified that against some of the items under the Tenderers' specifications they included the remark '*Description as per model financial offer not as per Technical Specifications*' because tenderers were requested to provide technical and financial submissions as per Annexes II and III respectively. He explained that the *Model Financial Offer* included all the items indicated in the technical specifications but with an abridged description and therefore this meant that if the tenderers submitted the items according to the Model Financial Offer and not according to the technical specifications then such offers were not considered acceptable.

Mr Cremona said that once the tenderers failed in the administrative stage, the Adjudication Board could not proceed to the technical evaluation. He said that this was the reason why the technical grid was not drawn up. The tenderers were required to submit the "audited accounts" and "a statement of the economic operator's overall turnover" for the years 2003/2004/2005, a list of related contracts and other pertinent information. He confirmed that all tenderers failed on the clause wherein they were required to submit original literature that was to be signed by the manufacturer of the equipment. The Chairman of the Adjudication Board said that although they requested the three tenderers that were within the budget to provide them with the literature as requested in the tender, yet, they still failed to submit all the required documentation. He said that in view of the tender's requirements photocopies of leaflets/ brochures could not be accepted and therefore the Board could not proceed with the evaluation process. Mr Cremona said that once they were not

administratively fully compliant they requested the initiation of negotiated procedure to enable the three bidders to adapt with the requirements of clause 3.6 (4).

Mr. Cremona admitted that, during the evaluation of the first tender, the Board did not put a lot of weight on clause 3.6 (4) namely that *‘original data sheets issued by the manufacturer of the equipment, the authenticity of which must be certified by the manufacturer. Such data sheets must clearly show the particular item to be supplied, in accordance with the item requested in the technical specifications attached to this tender, such as but not limited to dimensions material, finishes etc.’* Here, Dr. Sladden intervened and publicly noted why this time around the Board was insisting on this clause.

The PCAB referred the witness to *Clause 20 Evaluation of tenders* with regard to the concept of substantial compliance and asked Mr Cremona to state whether in his opinion those bidders who failed to submit original data sheets had “substantially departed from the tender requisites”. The Chairman of the Adjudication Board replied by quoting Clause 3.6 which specified that:

*‘All contractors will be reviewed financially and technically to determine their capabilities in delivering the works. The bidder is to submit the relevant information required in this tender document including the following list in order to allow the panel to assess financially and technically his capabilities. The following criteria will be adopted for technical compliance and failure to comply with these criteria will result in rejection of the tender.’*

At this point the Chairman of the Adjudication Board agreed with the PCAB’s view that the three bidders who were within budget were administratively almost fully compliant and that the only item that they failed to comply with was that they submitted photocopies of documentation that were not signed by the manufacturers.

The Director General (Contracts) emphasised that it was important to make a clear distinction between unclear information submitted by the tenderers and missing documentation that was specifically requested in the tender dossier. He said that the first was a question of clarification while in the latter case such offers could not be considered administratively compliant. The witness claimed that if the tender required an original document and tenderer/s submitted photocopies then such offer/s could not be considered as compliant and therefore this would be considered as “a substantial departure from the tender requisites”.

Dr Cassar intervened and agreed with Mr Attard that the appellants had substantially departed from the requirements of the tender dossier.

In reply to a specific question by the PCAB as to why they did not comply with the requirement of the tender as far as the original and signed documentation was concerned, Mr Cutajar, representing the appellants, said that some of their suppliers questioned why these were required and their main supplier did not even have a catalogue or leaflets. The appellant insisted that they should not be discriminated and lose a tender simply because they did not supply the original leaflets. He confirmed that they had provided photocopies of almost all items and that these were signed by the manufacturers. Here, the PCAB pointed out that it understood that such requirement was included to ensure their reliability and that these were intended to

assist the adjudicator during the evaluation process, however, it had to be determined also whether this was a substantial element to disqualify offers. Furthermore, the PCAB argued that on the basis of the fact that it was not always possible for suppliers to furnish tenderers with originally signed documentation, it seemed also logical for one to assume that such requisite would still not be complied with if negotiation procedures were to be opened with tenderers.

On further cross-examination by the PCAB, Mr Cremona explained that in spite of the fact that in the Administrative Compliance Grid they had indicated that three offers were acceptable, they were also drawing the attention of the Contracts Department that the relative bidders did not submit all the required documentation. Mr Cremona said that when they recommended the opening of negotiated procedure their intention was to proceed with an evaluation of tenders even if tenderers did not comply fully with the administrative requirements.

The PCAB remarked that they failed to understand why the Adjudication Board recommended the opening of a 'negotiated procedure' once three out of five tenders were considered substantially acceptable and in fact were clearly noted as such on the board's report. The PCAB was of the opinion that once the board clearly felt that the tenders could have been accepted they should have drawn this to the attention of the Contracts Committee and recommended that in spite of their shortcomings they could still accept such offers.

Mr Cremona agreed with the PCAB's views stating that, whilst the Evaluation Board was convinced that the offers submitted were substantially acceptable, they needed the comfort of the GCC. The Chairman of the Adjudication Board added that if they were told that photocopies would have been acceptable they would have considered such offers as being compliant albeit they would have still needed the official endorsement of the Department of Contracts.

At this stage the public hearing was brought to a close and the PCAB proceed with the deliberation before reaching its decision.

This Board,

- having noted that the appellants, in terms of their 'motivated letter of objection' dated 18.09.2007, and also through their verbal submissions presented during the public hearings held on the 17<sup>th</sup> and the 22<sup>nd</sup> October 2007 respectively, had objected to the decision taken by the General Contracts Committee;
- having considered that Dr. Sladden stated that his clients' offer had all the essential requirements of the tender and that any variations did not substantially depart or fundamentally change what was requested in the tender and that he also remarked that his clients' offer was the cheapest of all the submitted bids by approximately Lm 10,000;
- having noted Dr Cassar's comments regarding the fact that in the offers submitted (a) substantial variations were noticed in the measurements of some items, (b) others did not even match with description, whilst (c) other items were not even included in the respective offers.

- having noted that Architect Zammit, a member of the Adjudication Board, pointed out that the kitchen infrastructure was already completed and, due to the fact that the building had space limitations, the equipment had to fit within the space available;
- having also taken into consideration that in reply to a specific question by the PCAB, Dr Cassar declared that all other offers were not compliant;
- having considered that when the PCAB asked Mr Cremona to state whether the Board had drawn up a comparative technical compliance grid that included all tenders and items in the BOQ, the reply given was in the negative;
- having heard the Chairman of the Adjudication Board state that the said Board did not recommend the re-issue of the tender but the opening of a ‘negotiated procedure’ so that the bidders would be given a chance to adapt to the requirements set in the tender document and this following Mr Zammit’s own admission that this was the second time that this tender was being issued and always including the same specifications;
- having considered that the outcome of a negotiated procedure would most probably not have yielded any different result from the present situation;
- having considered that Mr. Cremona admitted that, during the evaluation of the first tender, the Board did not put a lot of weight on clause 3.6 (4) which required, *inter alia*, the need for a certificate of authenticity to be issued by the manufacturer in respect of the equipment’s *original data sheets*;
- having noted that Architect Zammit explained that, originally, the Adjudicating Board was in favour of initiating discussions with the tenderer who submitted the cheapest technically compliant offer but this was refused by the General Contracts Committee (GCC);
- having thoroughly considered the explanation, the personal interpretation of legal parameters, the significance and potential implications of Mr Attard’s testimony, including that relating to the distinction to be made between ‘unclear information submitted by the tenderers’ and ‘missing documentation’, as well as, the same witness’s viewpoint concerning the interpretation of “a substantial departure from the tender requisites”;
- having considered that the Chairman of the Adjudication Board agreed with the PCAB’s view that the three bidders who were within budget were, administratively, almost fully compliant and that the only item that they failed to comply with was when they submitted photocopies of unsigned documentation by the manufacturers;

reached the following conclusions, namely:

1. the Adjudication Board had to be pragmatic and should have insisted in obtaining any pertinent documentation that was necessary and useful by seeking

simple clarifications rather than to complicate matters further by resorting to a ‘negotiated procedure’;

2. the PCAB feels that the GCC, prior to agreeing on a ‘negotiated procedure’, should have, at least, queried why, in spite of the fact that in the Administrative Compliance Grid the Adjudication Board had indicated that three offers were acceptable, yet, the same Board was concurrently, in a seemingly contradictory manner, drawing the attention of the GCC that the relative bidders did not submit all the required documentation. The PCAB also observes that the Adjudication Board should have specified in their report that in spite of their shortcomings in certain offers they could still accept them;

As a consequence of (1) to (2) above this Board finds in favour of appellants and recommends that the Adjudication Board continues the adjudication process by analysing the technical aspect of the three offers considered acceptable.

In view of the above 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

*26 November 2007*