

PUBLIC CONTRACTS APPEALS BOARD

Case No. 116

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 originally 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 in respect of the 2004-2006 budget.

Five (5) different tenderers submitted their offers.

Following the decision taken by the General Contracts Committee (GCC) to award this tender to Messrs Oztiryakiler Madeni Esya, Messrs *E.C.B Hotel & Catering Equipment Limited* filed an objection on 27.12.2007 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 a public hearing on the 25th January 2008 to discuss this objection.

Present for the hearing were:

E.C.B. Hotel & Catering Equipment Limited

Dr. Sandra Sladden	Lawyer
Mr. Mario Cutajar	Director
Mr. John Cutajar	Director

Ostiryakiler Madeni Esya

Mr Ibrahim Ozen	Export Area Manager
Mr Noel Frendo Jones	Local Representative

Ministry for Gozo

Mr. Joseph Micallef	Permanent Secretary
Dr. Tatianne Cassar	Legal Officer
Ms Rita Cutajar	Director EU Affairs
Mr. John Cassar	Technical Advisor

Adjudication Board

Mr. John Cremona	Chairperson
Ms. Daniela Sabrino	Secretary

Department of Contracts

Mr. Francis Attard	Director General (Contracts)
Mr. Mario Borg	Asst. Director

After the Chairman PCAB's brief introduction, the appellants' representatives, namely, E.C.B. Hotel & Catering Equipment Limited, were invited to explain the motive which led to their objection.

Mr Mario Cutajar, one of the appellants' directors, started by stating that they were initially informed that their tender was not successful because their offer was not the cheapest one. However, Mr Cutajar said that following the filing of their objection, they were told that their offer was not accepted because it was not 'the cheapest technically compliant offer.'

During his opening statement, Mr Cutajar presented the PCAB with two plans (a) to show that the equipment offered fitted exactly the building where they were to be delivered and installed, and (b) prove that they did not substantially depart from what was requested in the tender dossier.

Mr Cutajar said that the Adjudication Board indicated that 33 out of 62 items of equipment offered by the ECB were not compliant with the technical specifications because they were 'not brushed'. The appellants' representative maintained that this was not true because in the catering trade all equipment was considered automatically 'brushed'. He declared that all catering equipment which was marked 'not brushed' in the Evaluation Board's Report was in actual fact all 'brushed'.

The same appellants' representative also commented on the Board's remark that the sinks offered (Items B1 to B8) had 'no splash back'. As far as dimensions were concerned, Mr Cutajar sustained that the variations were minimal apart from the fact that they were generally more beneficial to the client. He made reference to (i) the height of the cupboards (Items A6 – A9) - 65cm against 60cm and (ii) length of two cupboards (A1 and A2) which were 1m and 1.1m respectively (the standard sizes manufactured by their supplier) as against the 90cm and 1.2m as specifically stated in the tender dossier. With regard to the latter items, Mr Cutajar proceeded by placing major emphasis on the fact that the total lengths of these cupboards were equivalent and that they were not different from what was requested.

Mr Cutajar pointed out that tolerances were acceptable up to certain limits provided that they did not deviate from the project concept. Dr Sandra Sladden, the appellants' legal representative intervened and stated that in the minutes of the clarifications meeting held on the 18 May 2007, it was formally confirmed in writing that the 'sizes specified in the BOQ must be acceptable within reasonable tolerances'. She emphasised that her clients' bid was essentially compliant and, in view of the fact that tolerances were acceptable, such minimal variations did not constitute a substantial departure from the tender requirements. Dr Sladden said that, as a consequence, they failed to understand what the technical problem was.

Dr Titianne Cassar, legal representative of the Ministry for Gozo, said that the issue regarding the "finish" of the items had already been dealt with in the previous appeal (Case No 112) and to substantiate her claim she quoted from the PCAB's decision wherein it was stated that "it was not specified whether the items were "brushed" as indicated against each item in the BOQ.

Mr John Cremona, Chairperson of the Adjudication Board, replied to Mr Cutajar's opening statement by stating that they had never said that the appellants' offer was not

the cheapest one and therefore the first reason given by the Contracts Department was apparently mistaken. He clarified that, in their first recommendation, the Adjudication Board had proposed the opening of negotiations with all the tenderers starting with the cheapest and it was only in their last report that they ended up rejecting the appellants' offer because the latter did not fully comply with the technical specifications.

Mr Cremona proceeded by remarking that the Tender document stipulated that each item had to be brushed. He explained that the appellants had copied all the technical specifications indicated in the tender but repeatedly deleted the word 'brushed'. Replying to a remark by the PCAB, the Chairman Adjudication Board said that they did not even consider seeking any clarification on this particular subject matter for the simple reason that when they checked the documents they did not find the word 'brushed' in the appellants' offer.

At this point Dr Sladden intervened by drawing the attention of those present that her clients had thirty years experience in this trade. Also, the appellants' legal advisor also stated that the 'finish' of all catering equipment was internationally assumed to be 'brushed'. However, the PCAB intervened to remark that it still failed to understand why her clients had repeatedly removed the word 'brushed' from the technical specifications. Mr Cutajar replied that there was no need to write it down because it was taken for granted that all items offered were 'brushed'.

At this point, the PCAB called Mr John Cassar, who apart from being the Head of School of the Institute for Tourism Studies (ITS) in Gozo, was also the person who drew the technical specifications of this.

On cross examination by the PCAB, the witness testified that apart from 'brushed' items, there were also 'polished' ones. Mr Cassar explained that he was instructed to write clear specifications. He said that the word 'brushed' was included against each item of equipment to eliminate doubts and to ensure that no 'polished' items were offered. He acknowledged that nowadays the norm was that all catering equipment is 'brushed', however, if they did not specifically indicate that such equipment had to be 'brushed', there was the possibility that prospective bidders might offer 'polished' items.

Mr Cassar confirmed that that 'brushed' items were more durable/ hard-wearing than 'polished' ones. When asked by the PCAB to state whether 'brushed' items were more expensive than 'polished' ones and whether the difference in the 'finish' could have reflected in the price, the witness said that he was not in a position to answer.

The witness contended that it was indispensable for tenderers to fully comply with the dimensions indicated in the tender specifications because of (i) space limitations (ii) health and safety of students and (iii) other equipment that was already available.

At this point, Dr Tatianne Cassar indicated some items where the appellants had substantially departed from the measurements given in the tender dossier, namely:

Item	BOQ (Tender)	ECB's offer
E3	600 x 400 x 600	390 x 610 x 730
B8	500x500x350	400x310x300
B1	400 x 700 x 850	2400x700x850

In reply to Mr Cutajar's remark regarding the dimensions of Item B1, Mr Cremona clarified that in the *Annex* attached to their report they indicated that there was a 'mistake in Tender doc' and therefore the measurements should have been 2400 x 700 x 850. With regard to Item B8, Mr Cremona pointed out that this item was found to be not compliant not only on the basis of dimensions but also because it had 'no mixer, bottle trap 40mm, no splash back'. Furthermore, he said that most of the discrepancies in the measurements were found in the appellants' offer. Mr Cutajar replied that knee-operated sinks (B8) did not have mixers but a standard spout. He acknowledged that the sink offered was smaller but was (a) big enough for washing of hands, (b) of good quality, (c) with splash back and (d) safer for students.

In reply to specific questions by the PCAB, Mr Cremona declared that when he specifically asked the technical members of the Adjudication Board, namely Architect Peter Zammit and Messrs Teddy Cammilleri (ITS) and Mario Sammut (ITS), respectively, to state whether the variations of the items offered by E.C.B. Hotel & Catering Equipment Limited were within reasonable tolerances, the reply given was in the negative. He said that they unanimously agreed that such departures from the tender specifications were not acceptable. He also explained that the fact that there were more than one tenderer who submitted their offer was a proof that all the items requested were not attributable to any particular manufacturer/ supplier. Mr Cassar added that although the items were made from the same material (alloy) which was imported from India, everyone had the same possibility to tender. He declared that they requested specific specifications to meet their specific requirements.

Mr John Cutajar remarked that the leaflets, which were presented with their offer, indicated that all items offers had 'satin' finish which was the same as 'brushed'.

Then it was the turn of Mr Ibrahim Ozen, Export Area Manager of the recommended tenderer, to take the witness stand. He gave his testimony after signing a written declaration that he would remain faithful to the truth.

On cross-examination by the PCAB, Mr Ozen explained that their company was based in Turkey and they had a custom-made factory in Russia. He said that they had a representative in Malta who informed them about the issue of such tenders and another one that provided logistics and maintenance support (*Forestals*).

He claimed that the raw material of manufactured items could either be 'polished' or else 'brushed' through the application of an additional process which resulted in an increase of the price of the items. The reason given as to why they complied fully with the technical specification was that they had a manufacturing factory which produced custom-made items, that is, they produced products according to the specifications given. He declared that they could produce any item according to their clients' requirements.

Mr Ozen declared that they were not the only firm that could manufacture custom-made products but they were the only one which could manufacture the full range of products. He confirmed that anyone could place an order with them even ECB. Furthermore, he said that many companies in Europe manufactured standard products in mass but their organisation produced custom made products.

Replying to a specific question by the PCAB, Mr Ozen said that when a customer placed an order for catering equipment, they would normally consider them as 'brushed'.

When Mr Cutajar referred the witness to Item J2 (electric refrigerated counter), claiming that it was impossible for a 1 door compartment, 4 drawers (super imposed) and one motor to be fitted in 1.5m, Mr Ozen said that he would need to refer to the catalogue. However, he said that they would consider everything that made technical and commercial sense.

In his concluding remarks, Mr Mario Cutajar sustained that any variations were to the Contracting Authority's advantage and he mentioned the following items as examples:

Item	BOQ (Tender)	ECB's offer	Remarks
F1	80x40x40	80x40x45	Heavy Duty
C5	table	stand	More stable and safe
Cold Room	29m ³	30m ³	

Mr Cremona pointed out that such items did not match with tender specifications. However, Mr Cutajar insisted that everything they offered fitted the dimensions of the kitchen, the variations were minimal, the items offered were of a higher quality and to the advantage of the Contracting Authority.

Dr Tatianne Cassar concluded by stating that the items offered by the appellants were of a detriment rather than a benefit to her clients.

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 07.01.2008, and also through their verbal submissions presented during the public hearing held on the 25th January 2008, had objected to the decision taken by the General Contracts Committee;
- having considered issues concerning compliance with tender specifications with regards to the need for equipment supplied to be '*brushed*' as presented during the hearing by Messrs Cutajar, Cremona, Cassar, Ozen and Drs Cassar and Sladden respectively, particularly (i) the use of the word 'brushed' in the tender document: (ii) the repeated deleting of the word '*brushed*' from the appellants' bid; (iii) the assumption said to have been made by appellants that all catering equipment being supplied on the market today is expected to be '*brushed*'; (iv) the differences and

similarities between the terms '*brushed*', '*polished*' and '*satın finished*'; and (v) the claim made by the successful bidder that export orders received are generally assumed as referring to 'brushed' equipment;

- having noted observations made with regards to the extent of 'reasonable tolerances' as allowed in the BOQ following the clarification meeting of the 18th May 2007 as well as both (i) Dr Cassar's point regarding the fact that the appellants had substantially departed from such tolerances, as well as (ii) Mr Cutajar's explanation as to why, and in which instances, it was decided by appellant Company that different dimensions would be offered;
- having taken note that in the tender submission of the appellants, while they had faithfully copied all the specifications regarding the steel items, they had *repeatedly* left out or deleted, whether knowingly or not, the requirement that such items should be brushed;
- noting also Mr. Ozen's statement that as the brushing process was an additional one, this necessarily increases the prices of the goods concerned;
- having also noted Mr Cassar's remark regarding the fact that it was indispensable for tenderers to fully comply with the dimensions indicated in the tender specifications because of (i) space limitations (ii) health and safety of students and (iii) other equipment that was already available;
- having established that, regardless of the previous requirement, according to Mr Cremona, the technical members of the Adjudication Board, namely Architect Peter Zammit and Messrs Teddy Cammilleri (ITS) and Mario Sammut (ITS), respectively, had state that the variations of the items offered by the appellant Company were not within 'reasonable tolerances';
- having taken full cognizance of the fact that, during the hearing, Mr Ozen declared his company would be providing custom made products and therefore 100% compliant with the tender requirements, and that whilst it was true that they were not the only firm that could manufacture custom-made products, yet it was also true that Messrs *Ostiryakiler Madeni Esya* was the only Company which could manufacture the full range of products;
- having also heard Mr Ozen state that anyone could place an order with them even the appellant Company,

reached the following conclusions, namely:

1. The Adjudication Board, albeit not necessarily expected to do so but largely due to the various contradictory interpretations given with regards to the need for a Company to declare that equipment being supplied is 'brushed', could have simply clarified the issue with interested parties, although it must be admitted that once all the relevant specifications had been faithfully copied by the appellants with the repeated exception of the word 'brushed' this must have confused, at the very least, the issue considerably;

2. The PCAB favourably considers the right of a Contracting Authority to decide its own terms and parameters. As a consequence, unless these are specifically defined and stated as such as to favour any particular bid, which instance has not been proven to be an issue in this particular tender, the PCAB cannot allow for a bidder to change such parameters according to what his principals are in a position to supply, disregarding in the process what the Contracting Authority is really willing to consider and as clearly specified in the tender document;
3. Further to (2) above, the PCAB notes that the appellant Company could have easily contacted similar Companies to that of the awarded Company to secure custom-made products which could fit the specifications as requested by the Contracting Authority in the tender document.

As a consequence of (1) to (3) above this Board finds against appellants and recommends that the Adjudication Board continues with the award of this tender to Messrs Oztiryakiler Madeni ESYA.

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 not be refunded.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

11 February 2008