

PUBLIC CONTRACTS APPEALS BOARD

Case No. 124

CT 2609/07 - DH/87/07

Tender for the Supply of Eggs to All Hospitals and Institutions in Malta

This call for tenders was published in the Government Gazette on 09.11.2007.

The closing date for this call for offers was 20.12.2007 and the estimated contract value was Lm 36,000.

Two (2) different tenderers submitted their offers.

Following the publication of the Notification of Recommended Tenderers, *Messrs Anglu Xerri Ltd* filed an objection on 28.01.2008 against the intended award of the tender in caption to *Mr Christopher Cortis*.

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 18.04.2008 to discuss this objection.

Present for the hearing were:

Anglu Xerri Ltd.

Dr Anna Mallia
Mr Mario Xerri

Legal Representative

Mr Christopher Cortis

Mr Christopher Cortis

Recommended Tenderer

Evaluation Committee

Mr J. Degiorgio
Ms J Grioli
Ms R Tirckett

Chairman
Member
Member

Department of Contracts

Mr Francis Attard

Director General (Contracts)

After the Chairman's brief introduction, Dr Anna Mallia, acting as legal advisor to Anglu Xerri Ltd, was invited to explain the motive leading to her clients' objection.

Dr Mallia argued that Mr Christopher Cortis did not submit the 'Tender Form', which was required in the tender, particularly, in article 11.2 (d) which stated that the tenderer had to fill in *Annex V*. Furthermore, the appellants' legal representative stated that since no legal entity/entities was/were identified in the 'Tender Form', *Annex V* was not valid and the tender submitted by Mr Cortis could not be considered, having defaulted from the tender requirements.

At this stage Dr Mallia continued by claiming that, albeit the Evaluation Committee had to be satisfied that Mr Cortis had submitted all that was requested in the tender document, yet one has to wonder how this could have been so, especially when, without prejudice, one still has to question whether Mr Cortis could prove that he had a trading licence and a VAT number in his name.

Dr Mallia stated that the main bone of contention was the 'Schedule of Tenders' published by the Department of Contracts where it was indicated that Mr Cortis had not submitted the 'Tender Form'. Dr Mallia maintained that once Mr Cortis had failed to submit *Form D* titled 'Tender Form for A Supply Contract' – page 57 of the tender document – his tender should not have been considered for award.

At this stage Dr Mallia referred the PCAB to the following articles under 'Instructions to Tenderers':

- Article 10.3 which, among other things, stated that *all tenders, including annexes and all supporting documents, must be submitted in a sealed envelope/package/s bearing ...*
- Article 11.1 which stated that *all tenders submitted must comply with the requirements in the tender dossier ..., and*
- Article 20.1 which, among other things, stated that *if a tender does not comply with the tender dossier, it will be rejected immediately and may not subsequently be made to comply by correcting it or withdrawing the departure or restriction*

Mr Joseph Degiorgio, Chairman of the Evaluation Committee, stated that if this were a departmental call for tenders, the department would have opened the tenders and the tender by Mr Cortis would have been rejected by the department because it was not accompanied by all the documentation requested. He further explained that this tender was issued by the Contracts Department and once the Contracts Department did not reject Mr Cortis' tender but referred both bids received to the Evaluation Committee, then the same Committee assumed that it had to consider both bids.

Mr Degiorgio remarked that this was the first case of its kind that he came across while adjudicating tenders and added that this misunderstanding was probably the result of lack of communication between the Evaluation Committee and the Contracts Department.

Dr Anna Mallia, stated that, always acting on behalf of the appellants, she had informed the Director General (Contracts) that Mr Cortis did not submit *Form D*, namely the ‘Tender Form’, with his bid.

Mr Francis Attard, the Director General (Contracts) was then called to give evidence.

At this stage, the PCAB asked Mr Attard whose responsibility was it to check the documentation submitted by tenderers and to assess which tender/s should be disqualified at tender opening stage.

Mr Francis Attard, Director General (Contracts), stated under oath, that the role of the Department of Contracts at tender opening stage was to record what it received and to publish that information but then it was up to the Evaluation Committee / Adjudication Board to assess whether the tenders received were compliant or not. According to DG Contracts this was the normal procedure followed.

Mr Attard added that it was only in the case of the so-called ‘three package’ tenders that the Department of Contracts could disqualify a tender at tender opening stage, quoting as an example a scenario wherein, say, a bid bond submitted was not valid.

Testifying under oath, Mr Christopher Cortis confirmed that he had not submitted the ‘Tender Form’ and that he must have overlooked it.

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 01.02.2008, and also through their verbal submissions presented during the public hearing held on the 18.04.2008, had objected to the decision taken by the General Contracts Committee;
- having considered the points raised by the appellants’ legal advisor, particularly the one relating to the fact that Mr Cortis did not submit *Form D*, namely the ‘Tender Form’, with his bid;
- having noted the significance of Articles 10.3, 11.1, 11.2 and 20.1 respectively;
- having taken cognizance of Mr Degiorgio’s remark that if this were a departmental call for tenders, the department would have opened the tenders and the tender by Mr Cortis would have been rejected by the department because it was not accompanied by all the documentation requested;
- having taken note of the DG Contracts’ testimony;
- having heard Mr Christopher Cortis admit that he had not submitted the ‘Tender Form’ and that he must have overlooked it,

reached the following conclusions, namely:

1. this Board attributes this erroneous decision by the Evaluation Committee / General Contracts Committee to a misunderstanding which probably originated as a result of lack of communication between the Evaluation Committee and the Contracts Department;
2. the submission of the 'Tender Form' was a mandatory requirement and, undoubtedly, the awarded tenderer was not in full compliance of this same requirement.

As a consequence of (1) to (2) above this Board finds in favour of appellants and recommends that the Evaluation Committee re-assesses its conclusions.

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

05 May 2008