

PUBLIC CONTRACTS APPEALS BOARD

Case No. 127

CT 2188/2006 – Adv. No. 131/2006 – GPS 07207TO500

Tender for the Supply of Medical Oxygen to be filled in Cylinders - Health Division

This call for tenders was published in the Government Gazette on 18.04.2006.

The closing date for this call for offers was 08.06.2006.

Two (2) different tenderers submitted their offers.

Following the publication of the Notification of Recommended Tenderers, *Messrs Multigas Ltd.* filed an objection on 14.03.2008 after the latter was informed by the Government Pharmaceutical Services (GPS) of the Health Division about the General Contracts Committee's decision to cancel the tender and to issue a new call.

Poligas Ltd registered as an interested party in this matter. As a matter of fact, on 17.03.2008, the Company appealed against the General Contracts Committee's decision to cancel the call for tenders.

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 28.05.2008 to discuss this objection.

Present for the hearing were:

Multigas Ltd

Dr Joseph Caruana Scicluna

Mr Vincent Bartolo

Legal Representative

Technical Representative

Government Pharmaceutical Services (GPS)

Ms Anna Debattista

Ms Isabelle Grima

Director

Assistant Director

Poligas Ltd

Dr Joseph Said

Mr Victor Fenech

Legal Representative

Department of Contracts

Mr Francis Attard

Mr Mario Borg

Director General (Contracts)

Asst Director, Post Contracts

After the Chairman's brief introduction, Dr Joseph Caruana Scicluna, representing Multigas Ltd, the appellant Company, was invited to explain the motive of the objection. This was followed by interventions by representatives of the Government Pharmaceutical Services (GPS), the contracting authority, and Poligas Ltd, which had registered as an interested party in this tender.

Dr Joseph Caruana Scicluna explained that:-

- Multigas Ltd had submitted a bid in connection with the call for tenders for the supply of Gaseous Medical Oxygen in Cylinders to the Health Division which had the closing date set for the 8th June 2006;
- The Government Pharmaceutical Services (GPS) had sought various clarifications from Multigas Ltd in connection with this tender and that his client had always furnished the information requested;
- On the 5th March 2008, Multigas Ltd was notified by the Contracts Department that the tender process was being cancelled and that a fresh call was going to be issued. The reasons given for this measure were the following:
 - since the issue of the tender in 2006 procurement requirements had changed due to the different needs of Mater Dei Hospital (MDH), and
 - the updating of the policy of MDH for the dispensing of domiciliary oxygen cylinders, which service was to be incorporated in the updated tender specifications;

Dr Caruana Scicluna drew the attention of the Public Contracts Appeals Board (PCAB) to the first para. of page 2 of the Tender Specifications and Conditions which, among other things, stated that

Both the current consumption and the number of annual refills according to cylinders size are in terms of current health care set-up i.e. with SLH (St Luke Hospital) as the main client requesting such refills. The annual consumption is liable to change once the main operations within SLH migrate to Mater Dei Hospital.

Dr Caruana Scicluna therefore contended that the tender document already contemplated eventual changes in consumption needs as a consequence of the migration to MDH and therefore the contracting authority could not cite this as the main reason for cancelling the tender.

He added that both tenderers were prepared to carry on with the tendering process.

Mr Vincent Bartolo, intervening on behalf of Multigas Ltd, stated that in the tenders issued there was always a standard condition indicating that requirements might change. Yet, Mr Bartolo proceeded, that it was also equally a fact that, in this particular tender, this aspect was more accentuated by reference being made to possible changes in procurement requirements due to the migration to MDH. Mr

Bartolo added that these changes were not going to influence the offer Multigas Ltd made in respect of this tender.

The Chairman, PCAB, asked whether that meant that Multigas Ltd had anticipated the changes which the GPS has identified as reasons for tender cancellation.

Mr Bartolo remarked that, presently, Multigas Ltd was providing these services to GPS through two contracts which were now going to be incorporated into one tender. Moreover, the present tender conditions were very similar to those of the tender under consideration except for domiciliary cylinders. He added that Multigas Ltd were aware of these conditions and of possible changes because they have been delivering these supplies to the Health Department for a number of years and they have even supplied MDH during and after the migration process under the conditions of the contracts issued in respect of SLH. Mr Bartolo stressed that Multigas Ltd had accepted the tender conditions.

Ms Anna Debattista, Director, Government Pharmaceutical Services, explained that the tender under consideration had 8th June 2006 as its closing date and two offers were submitted, one by Multigas Ltd and the other by Poligas Ltd. Up to the closing date both tenderers did not satisfy all the tender conditions and that was the reason why the tender was not awarded earlier. Ms Debattista added that they did not cancel this call for tenders because it was issued following a decision in July 2005 by the Public Contracts Appeals Board to an objection that had been raised by Poligas Ltd to a similar tender. Ms Debattista stated that, on that occasion, none of the bidders had their product registered by the closing date and the contract was awarded to Multigas Ltd on the basis of article 20 of the 'Medicines Act' since gaseous medical oxygen was considered a life saving supply. In that instance, Poligas Ltd had objected to the acceptance by the General Contracts Committee of the request by Multigas Ltd to extend the contract to 36 months once Multigas Ltd had in the meantime obtained the market authorisation licence. In July 2005, the PCAB had ruled that that tender was to be awarded for a period of 12 months only.

At this juncture, the Chairman PCAB remarked that the PCAB had considered one year as adequate time for both bidders to register their product and to compete on a level playing field. However, the Chairman PCAB noted that, evidently, that contract had been extended on several occasions for a period of two years. The Chairman PCAB added that in his opinion the decision to issue another tender after a two-year evaluation process was obscene.

Ms Anna Debattista stated that it was unfortunate that the process took two years. However, it was not their intention to ignore the decision of the PCAB. She continued by saying that a lot of work was done between the closing date in June 2006 and the end of 2007, in fact, the engineer submitted the first report in August 2006 where he listed a series of shortcomings on the part of both tenderers, mostly technical requirements, such as their non-compliance with Legal Notice 331 of 2002. From the medical point of view Ms Debattista reported that Multigas Ltd had the wholesaler's licence and the market authorisation licence in place whereas Poligas Ltd had the wholesaler's licence but did not have the market authorisation licence - the latter was issued to Poligas Ltd in 2007.

In response to questions put forward by the PCAB's Chairman, Ms Debattista stated that the Malta Medicines Authority issued market authorisation licences and that of Multigas Ltd was issued on the 1st of August 2005 while that of Poligas Ltd was issued on the 14th June 2007. She added that at the closing date of tender both tenderers had deficiencies of a technical nature.

The Chairman PCAB noticed that Multigas Ltd appeared to be compliant with regard to the first tender and non-compliant with this tender. The PCAB also observed that, in the meantime, the contract with Multigas Ltd continued to be extended and that GPS kept the tender process going for about two years. Ms Debattista replied that (i) in the tender under consideration specific reference was made for the first time to compliance with Legal Notice 331 of 2002, (ii) the contract with Multigas Ltd was extended because they needed a supplier of this vital item and (iii) unfortunately, the tender process prolonged itself, however, there were other issues.

At this stage, the Chairman PCAB interjected by saying that before moving on to other issues he had to stress that the PCAB was above the General Contracts Committee. Therefore, it was intolerable that a decision taken by the PCAB was being ignored and others were taking decisions behind the back of the PCAB. The Chairman added that as things turned out, the 2005 decision of the PCAB, whereby the contract was to be awarded to Multigas Ltd for one year and not for three years, was to no effect as that one-year contract kept on being extended for a further two years. The PCAB had its valid reasons for arriving at that decision and if there was any abuse – which one believed there was not in this case – or even a perception of abuse, it was allowed to persist for two years, in other words, what the PCAB had sought to avoid in 2005 was in fact left to perpetuate itself. Besides seeking the advice and decision of the Contracts Department, the contracting authority should have also consulted with the PCAB once the recommendations to extend the contract were deviating from the ruling handed down by the PCAB. The decision given by the PCAB was overruled by the Contracts Department and that was intolerable. The Chairman argued that the inefficiencies of the departments had neutralised the decision of the PCAB whereas such inefficiencies should not have been tolerated but pressure should have been exerted to have the checklist cleared by the time stipulated in the PCAB ruling, namely, one year.

Ms Debattista reiterated that by the closing date none of these two tenderers were compliant and it was only in the latter part of 2007 that they became compliant.

Mr Victor Fenech, acting on behalf of Poligas Ltd, stated that they had a provisional marketing authorisation issued by the Health Department which ceased to be valid on the 31st December 2006. When asked by the PCAB, Mr Fenech could not furnish the commencement date of this provisional marketing authorisation.

Ms Debattista reported that the GPS had to adjudicate on the documents submitted by tenderers with their offer and with their offer Poligas Ltd had quoted a reference number of a marketing authorisation which number could not be found on the website of the regulatory authority.

Mr Bartolo declared that at the closing date of the tender only Multigas Ltd was in line with the tender requirements and added that he did not know why the tender was

not adjudicated. With regard to the extension of contract, he stated that they were against such extensions and in fact, whereas the Department of Health used to request six months extensions they used to agree to one month extensions and only following authorisation by the Contracts Department. With regard to the tender condition that cylinders were to conform to Legal Notice No. 331 of 2002, Mr Bartolo maintained that Multigas Ltd were in fact compliant and to clarify the query raised by the engineer in the beginning of 2007 they approached the Malta Standards Authority which confirmed that Multigas Ltd did comply with LN 331 of 2002.

The Chairman PCAB stated that the Contracts Department could not go against the PCAB ruling and neither could the Health Division which recommended such extensions to the Contracts Department.

The PCAB put a set of question as to why the GPS was recommending the cancellation of the tender when both tenderers became compliant following two years of correspondence and clarifications instead of adjudicating the tender. If the tender had to be cancelled that should have taken place right after the closing date when all tenderers were considered non-compliant and not at the stage when the contracting authority – with the concurrence of the Contracts Department - had managed to bring both contractors in line with the tender specifications following such a lengthy process.

Ms Debattista reiterated that, at the time the tender closed, none of the tenderers satisfied the tender conditions and, after seeking the advice of the Contracts Department, the GPS undertook the exercise to clarify the list of shortcomings drawn up by their technical officers. Eventually, when the tenderers satisfied the tender specifications, the GPS went back to the Contracts Department with the recommendation to cancel the tender and to issue a fresh one for the reasons already mentioned.

Again, the Chairman remarked that the PCAB had the same functions as a court of justice and therefore its decisions were to be abided with. It was unacceptable that things took three years to conclude with the consequence that, at the end, one ended up back to the starting point which could have led to condoning an abuse or if someone stood to gain from this procrastination that someone continued to enjoy the benefits. The Chairman added that the contracting authority should have known that the migration to MDH was imminent whereas the question of domiciliary cylinders was not that crucial and could have been included in the checklist. The Chairman stated that the PCAB had its valid reasons when it arrived at its decision and what took place after the expiry of the one year indicated in the ruling of the PCAB was *ultra vires*.

Ms Debattista stated that she did not contest what the PCAB was saying and given the benefit of hindsight one realised that perhaps things should not have taken that long. However, she argued that the GPS had no control on the correctness of the documents submitted by tenderers, a lot of work and consultations with the Contracts Department were carried out and the GPS could not arrive at a final recommendation unless the technical officers were comfortable with the state of things.

The PCAB asked Mr Francis Attard, Director General (Contracts) and Ms Debattista a set of questions in connection with the actions taken beyond the one year limit established by the PCAB, especially when the first report was drawn up by the engineer in August 2006, i.e. one year after the ruling of the PCAB and that the final decision of the contracting authority was taken late in 2007.

Under oath, Mr Attard stated that he was appointed DG (Contracts) in January 2007 and so he was unaware of what happened before that date. Regarding the extension of contracts, Mr Attard stated that, as a rule, the Contracts Department took a strong stand against extensions and, when granted, this invariably happened following recommendations by the contracting authority.

Ms Debattista quoted as follows from her report dated 27th February 2008:

“The call for tenders had a closing date of the 8th of June 2006.

As may be ascertained the offers submitted via this tender were thoroughly evaluated by all relevant personnel. The following facts are being highlighted:

1) Neither of the two tenders, T 1 and T2, satisfied published tender requirements by the closing date for the submission of offers;

2) Following meeting held with T1 and T2 and specific requests for clarifications both tenderers are now acceptable to the Ministry of Health;

3) During the adjudication processes, procurement requirements have changed due to different requirement of main Client for these cylinders previously SLH and since November 2007 Mater Dei Hospital;

4) Additionally in view of updated MDH policy regarding dispensing of domiciliary oxygen cylinders – which service is now being given via MDH only during the night (from 1900 to 0006hrs) and during specific out-of-hours on Saturdays and Public Holidays (from 1400 to 0006hrs) (remaining hours being catered for by same tenderer as for other oxygen cylinder sizes), such a service must now form part of updated tender specifications.

For all the above reasons, I am of the considered opinion that a fresh call with the updated requirements and inclusion of the additional service required is to be processed. In the meantime an urgent request for Financial Authority is concurrently being sought via the Procurement Department so that quotations are obtained since the last contract has expired and there are other potentially acceptable and cheaper supplies now available.”

Ms Debattista added that a call for quotations was published in the Government Gazette with the closing date of 29th May 2008, namely, the day after this public hearing was held. When asked to explain this development and whether the ruling of the PCAB featured anywhere in this equation, Ms Debattista reported that since

- a. the tender under reference had not been concluded, and

- b. the tender documentation was not correctly and fully submitted by tenderers,

the GPS was continuously resorting to contract extensions and that by then they had the updated tender specifications. As a consequence, the GPS concluded to seek financial authority to issue a call for quotations to bridge the gap.

The Chairman PCAB reminded Ms Dabattista that the actions taken after the lapse of the 12-month period stipulated by the PCAB were *ultra vires* and, at this point, he quoted from the pertinent decision of the 1st August 2005, that the Board:

“reached the conclusion that the decision taken by the Director General (Contracts) to extend the contract period “for 1 year only, as published in the notice dated 9th Feb 2005 by “a further two years at the same rates and conditions” as quoted in letter of Acceptance dated 7th April 2005 addressed to Multigas Ltd, was not in accordance with the stipulated conditions of the tender, in so far as (a) the contract period award options and (b) the contract period extension modalities are concerned (namely, clauses 3 and 4 of the “specifications & Conditions” of the Tender) and, in consequence, the Board decided to uphold the appellant’s objection to the decision taken to extend the period contract from one year to three years in terms of the 5th paragraph of the Letter of Acceptance issue on 7th April 2005”.

The Chairman added that to make matters worse, the tender issued in August 2005 was being recommended for cancellation and a new one was being issued without the PCAB having ever been consulted.

The Director General (Contracts) reported that his department acted on the recommendations of the GPS. The Chairman PCAB intervened to draw Mr Attard’s attention to the fact that, although he was appointed to his present post in January 2007, yet, he should have asked if there were any decisions on this tender, assuming that this is always the case in similar circumstances. Furthermore, continued the Chairman PCAB, the General Contracts Committee (GCC) should have questioned the recommendations of the contracting authority and not rubberstamp them. The Chairman PCAB added that, once the timeframe set by the PCAB was not met, a direct order could have been issued – a way forward which is considered a prerogative of the contracting authority. This would have ensured, stated the Chairman PCAB, the supply of this vital item until the contracting authority got things in order. Yet, in so doing, the ruling of the PCAB would have been honoured because, under no circumstances, should a tender document take three years to be finalised.

Ms Debattista made it clear that it was never their intention to ignore the decision taken by the PCAB in August 2005.

Dr Caruana Scicluna maintained that his client, Multigas Ltd, was compliant with the tender specifications from the beginning, whereas, Poligas Ltd did not have the marketing authorisation at the closing date of the tender. Dr Caruana Scicluna added that the PCAB should not be influenced by the fact that the contracting authority decided to issue a call for quotations.

Mr Bartolo intervened to stress that with the time taken to seek clarifications, Poligas Ltd, their competitor, had been given the chance to become compliant.

Dr Joseph Said remarked that his client, Poligas Ltd, could not understand why this tender had not been adjudicated and awarded giving his client some point for concern in view of the fact that Multigas Ltd, their competitor, carried on with its operations while they were kept waiting on the side. Dr Said contended that, in spite of what the representatives of Multigas Ltd were saying, Poligas Ltd could have provided whatever was requested in the tender. He also declared that Poligas Ltd was definitely against the cancellation of the tender.

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 20.03.2008, and also through their verbal submissions presented during the public hearing held on the 28.05.2008, had objected to the decision taken by the General Contracts Committee;
- having taken note that Dr Caruana Scicluna’s contention that the tender document already contemplated eventual changes in consumption needs as a consequence of the migration to MDH and therefore the contracting authority could not cite this as the main reason for cancelling the tender;
- having observed that Mr Bartolo stated that in the tenders issued there was always a standard condition indicating that requirements might change and that in this particular tender, this aspect was more accentuated by reference being made to possible changes in procurement requirements due to the migration to MDH;
- having also noted Ms Debattista’s claim that up to the closing date (08.06.2006) both tenderers did not satisfy all the tender conditions and that was the reason why the tender was not awarded earlier;
- having also taken cognizance of the fact that in July 2005, the PCAB had ruled that that tender was to be awarded for a period of 12 months only;
- having already pronounced itself that in its ruling relating to the appeal lodged in 2005, the PCAB had its valid reasons when it arrived at its decision and what took place after the expiry of the one year indicated in the ruling of the PCAB was beyond the scope contemplated in the sentence given by this Board way back in July 2005;
- having taken into consideration the fact that during the hearing Ms Debattista stated that (i) she did not contest what the PCAB was saying, and (ii) given the benefit of hindsight one realised that perhaps things should not have taken that long;

reached the following conclusions, namely:

1. Whilst recognising that Ms Debattista herself stated during the hearing that it was unfortunate that the process took two years, yet the PCAB feels that the decision to issue another tender after a two year evaluation process was totally unacceptable. This Board strongly deplores the amateurish way that both the contracting authority and, more so, the Contacts Department allowed such procedure to drag on for three years to, ironically, conclude with a decision being taken for all to revert back to starting point. In line with this state of affairs, this Board cannot but question the competence shown by the public entities involved in this particular tender, especially after having noted the time frames allowed for the procedure to come to a conclusion namely, *inter alia*, when the first report was drawn up by the engineer in August 2006, namely one year after the ruling of the PCAB and when the final decision of the contracting authority was taken, i.e. late in 2007;
2. The PCAB's rulings are totally binding on the General Contracts Committee (GCC). As a result, it is intolerable that a decision taken by the PCAB was ignored and this Board cannot but censure the DG (Contracts Department) as well as the Director, General Pharmaceutical Services (GPS) for acting in such a manner allowing an anomalous scenario to persist for two years beyond the limit imposed by a sentence issued by this Board in 2005. Furthermore, this Board, also within this context, finds that the ineffectiveness and inefficiency shown by the contracting authority and the Contacts Department have managed to neutralise the decision taken almost three years before by this Board;
3. This Board contends that whilst the actions taken after the lapse of the 12-month period stipulated by the PCAB in its decision of the 1st August 2005 were *ultra vires*, to make matters worse, the tender issued in August 2005 was being recommended for cancellation and a new one was being issued without the PCAB's decision being in any way considered in the decision making process;
4. Further to (2) above, this Board cannot accept the public disclaimer made by the DG Contracts wherein the latter stated that he was appointed DG (Contracts) in January 2007 and so he was unaware of what happened before that date. This stand is largely due to the fact that, if this Board were to accept such disclaimers, it would be exposing itself to an unlimited extent of lack of adherence to previous judgements taken by this Board in view of someone new at the helm not going through the file history, considered in administrative terms as the normal and simplest of praxis to be followed;
5. The PCAB feels that if the tender had to be cancelled that should have taken place right after the closing date when all tenderers were considered non-compliant and not at the stage when the contracting authority – with the concurrence of the Contracts Department - had managed to bring both contractors in line with the tender specifications following such a lengthy process;

6. This Board feels that the contracting authority should have known that the migration to Mater Dei Hospital (MDH) was imminent whereas the question of domiciliary cylinders was not that crucial and could have been included in the checklist;

As a consequence of (1) to (6) above this Board

- (i) finds in favour of the appellants;
- (ii) recommends that the contracting authority cancels the call for quotations published in the Government Gazette on 29.05.2006;
- (iii) recommends that the contracting authority proceeds with the adjudication rather than the cancellation of the call for quotations whose closing date was 08.06.2006

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 June 2008