

PUBLIC CONTRACTS APPEALS BOARD

Case No. 134

CT 2253/07 – Adv No 308/07 – GPS 68333 T O7 BM

Tender for the Supply of Chemistry Reagents with Equipment on Loan

This call for tenders was, for a contracted value of € 1,682,113 (approximately, Lm 722,131) was published in the Government Gazette on 28.07.2007. The closing date for this call covering a period of 36 months for offers was 13.11.2007.

Four (4) different tenderers had submitted their offers.

Following formal notification sent to *Olympus Italia Srl* referring the latter to the decision taken by the General Contracts Committee to disqualify the said Company's offer for the supply of 'Chemistry Reagents with Equipment on Loan' since it was considered as not being administratively compliant and, as a consequence, it could not qualify for the third stage, namely, the opening of their financial proposal, the same Company filed an objection against such 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 22.10.2008 to discuss this objection.

Present for the hearing were:

Olympus Italia Srl

Dr Lorna Mifsud Cachia	Legal Adviser
Dr Josette Attard	Legal Adviser
Mr Francesco Moretti	Olympus Italia Srl Representative
Mr Edwin Busutil	Managing Director, E.J. Busutil Ltd

Government Pharmaceutical Services

Ms Anna Debattista	Director
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Government Pharmaceutical Services (Adjudication Board)

Ms M Dowling	Chairperson
Dr Gerald Buhagiar	Consultant in charge
C Calamatta	Technical Specifier
C Buttigieg	Member

Vivian Corp. Ltd

Ms Joanne Cremona

Contracts Department

Mr Francis Attard	Director General
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After the Chairman's brief introduction, Dr Lorna Mifsud Cachia, representing Olympus Italia Srl, was invited to explain the motive of the objection.

At the request of Dr Mifsud Cachia the hearing took place in English so that Mr Francesco Moretti, representative of Olympus Italia Srl, would be able to follow the proceedings.

Dr Mifsud Cachia started by requesting to know the precise reasons why the tender submitted by Olympus Italia Srl had been rejected because, in its letter dated 3rd September 2008, the only reason given by the Contracts Department for the rejection of the tender was that:

'However, your tender is not among the selected ones since it has been adjudicated as technically non-compliant.'

Dr Mifsud Cachia made reference also to a letter dated 22nd September 2008 wherein the Department of Contracts had made it clear to Olympus Italia Srl that its appeal had to be sufficiently motivated. At that point she quoted para. 3 and 4 from the said letter:

In view of the foregoing, a detailed formal letter is expected to reach the Department of Contracts within 3 days from receipt of this notification.

Failure to submit such Reasoned Letter of Objection may lead to automatic disqualification of your appeal.

The appellant Company's legal representative sustained that, in order to be able to formulate better its appeal, it was imperative for Olympus Italia Srl to know the reasons behind that decision.

Dr Mifsud Cachia then referred to the Contracts Department's letter, dated 9th September 2008, which had attached to it an extract from the Board's Adjudication Report concerning the disqualification of her client's offer, which, among other things stated that:

Reply to clarifications as per Red 42c was not satisfactory.

She argued that if there were any internal documents containing the reasons why the tender was deemed technically non-compliant, such documents should have been forwarded to her client so as the latter would have been in a better position to prepare a proper appeal. At this point she cited one of the rules of natural justice: *audi alteram partem*, namely 'let the other side be heard'.

Dr Mifsud Cachia maintained that the clarifications requested by the Contracts Department on 12th May 2008 had been exhaustively answered by her client on the 27th May 2008 and, as a consequence, the question that remained regarded the reasons why the tender by Olympus Italia Srl had been adjudicated as technically non-compliant.

The Chairman PCAB remarked that when one referred to an internal document, then that document had to be made available to the other party.

Ms Anne Debattista, Director GPS, intervened to state that, as a matter of clarification, it was pertinent to draw the attention of those present to the fact that it was the Contracts Department that corresponded with the appellant Company and, therefore, any clarification as to why certain papers were not referred to Olympus Italia Srl had to be directed to members representing the said Department.

Moreover, Ms Debattista informed the PCAB that four offers were received in response to this call for tenders and that Dr Gerald Buhagiar, consultant, was going to explain in detail which aspects of the appellant Company's offer were deemed to be non-compliant with the published tender conditions.

Dr Buhagiar, consultant in charge of the Biochemistry Section at Mater Dei Hospital, explained that in this tender there were listed a number of *analytes*, all of which had to be provided. Moreover, in conformity with biochemical practice, one required controls so that one could verify that the results that one produced were analytically correct and meaningful to the patient. Dr Buhagiar submitted that one of the items on that list as originally supplied by appellant Company, referred to *ammonia*. Dr Buhagiar stated that, *inter alia*, no quality control was being offered and, worse still, there was no calibrator.

The Head of the Biochemistry Section at Mater Dei Hospital stressed that the Contracting Authority's main priority was that the instrumentation provided would produce results that would be meaningful to the patient. However, without calibrators and without proper control material, he saw no way how one could produce a meaningful *ammonia* result. This requirement was a must on the list of the department's requirements and when the Adjudication Board asked for a clarification as to what the multi-parametric calibrators and control materials consisted of, again, the *ammonia* was not listed and, as a result, it was felt that the appellant Company's offer could not be accepted.

Dr Buhagiar conceded that in all fairness, they could have written to the tenderer once again to seek further clarifications but he said that one had to appreciate that this tendering process had already taken about two years and that the department was running on an extended contract which was not going to be extended further by the Ministry of Finance. Besides, continued Dr Buhagiar, apart from the delays in publishing and so forth, there was also the migration from St. Luke's Hospital to Mater Dei Hospital. Therefore, the department was running on borrowed time and it did not have either the time, or the luxury, to write again, particularly, in light of the fact that there were other bidders that, *ab initio*, met all the contractual requirements.

Dr Buhagiar indicated that there were other shortcomings, like the water storage, but the *ammonia* was the most serious shortcoming. In the light of all this, the department decided to reject the offer by Olympus Italia Srl.

The Chairman of the PCAB asked how much did the time element influence their adjudication, namely, had the tender not been overdue and had the migration to Mater

Dei Hospital not been an issue, would the Adjudication Board have taken the time to seek further clarifications.

Dr Buhagiar replied that time had always proved to be an issue, not just in this tender but in every other tender that he had adjudicated. He added that the three package procedure and other aspects of the system had rendered the process a complex one such that not even two years seemed to be enough. Therefore, the element of time had become crucial and if there were satisfactory replies from other tenderers then he would have been happy to move on. Dr Buhagiar reiterated that the Ministry of Finance had, repeatedly, informed them that they were not prepared to grant the Contracting Authority another extension to the current contract and that meant that no tests, such as kidney or cholesterol tests could be carried out which, in turn, implies that the hospital could, effectively, be forced to close down.

The Chairman, PCAB appreciated the concern expressed by Dr Buhagiar but, on the other hand, he opined that the PCAB's primary concern was that any tendering process had to be fair and transparent to all tenderers and that a tenderer could not be penalised because of deficiencies in the system. At this stage the PCAB's Chairman placed major emphasis on the fact that, regardless, under no circumstance whatsoever, no tendering process should take two years to follow its bureaucratic 'iter'.

Dr Buhagiar stated that, had they had the time, they would have sought further clarifications from Olympus Italia Srl but, in this case, time did not permit that. He added that, in this case, there were four tenderers, some of whom offered more than one option. Also, Dr Buhagiar remarked, two tenderers, i.e. Olympus Italia Srl and Cherubino Ltd, were dropped, whereas V. J. Salamone Mark Ltd and Vivian Corp. Ltd met the requirements and, consequently, were recommended to proceed to the third stage.

Dr Mifsud Cachia observed that in spite of the fact that the Contracting Authority was always in a race against time, yet her client could not suffer the consequences of that. Moreover, the appellant Company's legal representative contended that her client had already replied to the technical clarifications and that was why she was asking for the reasons that led to her client's offer being deemed non-compliant so that she would be in a position to rebut their decision. She added that her client should have been given the opportunity and the time to answer to the points that were being raised by Dr Buhagiar.

Dr Buhagiar argued that the appellant Company's representatives were sidetracking the main issue in the sense that the *ammonia* issue was a mandatory requirement and, therefore, it should have been there without the need to ask for clarifications. The full list requested was not met because the *ammonia* was missing.

To questions put by the PCAB, Dr Mifsud Cachia remarked that if Dr Buhagiar was making reference to para. 15.9 of the tender specifications, then the answers were provided as per points 2 and 3. Dr Mifsud Cachia maintained that no specific clarification was sought about *ammonia* and that the mandatory requirements were addressed in the original submission.

At this stage the PCAB stressed the need for one to establish whether all the mandatory requirements at Section 15.6 of the tender document were met or not.

Dr Mifsud Cachia replied in the affirmative.

Dr Buhagiar remarked that section 15.6 referred to a list of mandatory items, of which, *ammonia* was one of them. He added that when the Adjudication Board looked at the technical data sheet submitted by Olympus Italia Srl they noted a section titled *Additional Equipment Required but Not Provided* and that included *ammonia standard(s)* and *normal and abnormal assayed control material*. Dr Buhagiar continued that the indication was that some of the items listed in section 15.6, such as calibrators, *ammonia* standards and the control sera, were not going to be provided. He added that the documentation they were supplied with did not tally and so, by way of clarification, they asked a general question to see what they were going to be provided with. Dr Buhagiar remarked that, when they examined the reply given by the appellant Company, no mention was made of both the *ammonia* calibrators, as well as, the control materials and so they considered that the offer was not up to the standards required.

Dr Mifsud Cachia rebutted that the list of items requested in section 15.6 was answered in the sense that all the material that was being requested in the tender was going to be provided. With regard to what was requested, i.e., *'tenderer is required to confirm that any shortfall of items will be supplied at no extra cost'*, Dr Mifsud Cachia maintained that Olympus Italia Srl answered that in para. 3 of its reply to the clarifications sought by stating that, *any shortfall of items due to calculation errors by Olympus Italia will be provided at no additional cost*. Dr Mifsud Cachia said that her client gave a general reply to a general question.

At that stage, Dr Mifsud Cachia quoted the proviso to regulation 82 (2) of the Public Contracts Regulations which stated that:

...any contracting authority shall have the right to seek clarifications on points of a technical nature to enable a proper evaluation of any tender, which, however, would at that stage have already been declared to be basically compliant.

Dr Mifsud Cachia contended that if the tender submitted by her client was found to violate any of the mandatory requirements then no clarifications should have been sought in the first place and that it, therefore, followed that, once there was a request for clarifications, then the tender submitted by her client was basically compliant. Dr Mifsud Cachia remarked that, if in its request for clarifications, the Contracting Authority had made a specific reference to *ammonia*, then her client would have had no problem to submit a specific answer in that respect.

Mr Francesco Moretti, representing Olympus Italia Srl, stated that (a) section 15.9 of the tender document provided that controls and calibrators had to be provided free of charge and (b) the Company he represented had answered that it would be providing them free of charge. He added that had, on the 12th May 2008, the Contracting Authority inserted a specific clarification about *ammonia*, then his company would

have found no problem to answer it. Mr Moretti explained that some companies supplied these items as stand alone but his company supplied them together.

Dr Buhagiar replied that the supplier submitted a technical data document where it was clearly indicated that additional equipment required, such as calibrators and control materials, was not being provided. He said that he was rather surprised that a prestigious company like Olympus Italia Srl did not meet what was standard practice because one could not use a kit without a calibrator to verify if results were correct or not.

Dr Mifsud Cachia again invoked the provisions of Reg. 82 (2) of the Public Contracts Regulations with regard to mandatory requirements. Moreover, she agreed that there was a conflict between what was submitted in the tender documentation in respect of section 15.9 and what was indicated in the technical data sheet with regard to *ammonia*. On the other hand, she wondered why no clarification had been sought on that point when clarifications were sought on other aspects. Dr Mifsud Cachia argued that the tender was not in breach of mandatory requirements otherwise no clarifications would have been sought. She contended that it would be unjust to stick to what the technical data sheet was indicating while ignoring what was stated in the other tender documentation.

Ms Debattista intervened to clarify that, albeit it was the Department of Health that published the specifications and the conditions of the tender, yet, it was then the responsibility of prospective tenderers to ensure that they satisfy the requirements set by the Department.

The Department of Health's Director added that in spite of the fact that it is just for one to expect that things should be clear *a priori*, yet, when the Department's technical people went through these complicated documents they concluded that things were not clear and so they sought clarifications and they did that in good faith. She concluded that it was not the role of the Department to do the work expected of the tenderer and it should not be said that no clarifications should have been sought.

Dr Buhagiar observed that the other tenderers provided the evaluators with clear documentation and this unlike in the case of the appellant Company where such documentation was not clear. As an example Dr Buhagiar drew the attention of all those present about the *analytes* which were covered by the multi-parametric calibrators and the control serum and urine control materials and for which clarifications were sought from the tenderer.

Dr Mifsud Cachia clarified that she did not mean that clarifications should never have been sought but what she meant was that, according to law, once clarifications were sought, the argument that the tender was in breach of mandatory requirements did not hold water. Besides, Dr Mifsud Cachia contended that, if a conflict in the documentation was noted, it should have been easy to include it along with the other clarifications that were sought by the Department. The appellants' legal representative added that that was her client's position from a legal point of view. Dr Mifsud Cachia remarked that her client's submissions at the hearing were not technically complete since her client came to the hearing without knowing the technical reasons why the tender had been rejected.

Ms Debattista observed that the appellant Company seemed to imply that the Department should have read all the documentation and then, somehow, conclude that the technical data sheet should not have been submitted with the tender. Ms Debattista remarked that the Adjudication Board had to conclude whether the appellant Company's offer was clear or not when, in the first place, all the offers should be as clear as crystal.

Dr Mifsud Cachia reiterated her stand that if the Department felt that it should reject her client's tender on that point then it should have sought a specific clarification on it.

The Chairman, PCAB observed that for the sake of fairness and transparency one had to give the tenderer specific reason/s why his or her tender had been rejected. He added that, on the other hand, giving generic answers was likewise not commendable.

Dr Buhagiar informed the PCAB that whilst the issue concerning *ammonia* was the most serious one to be deliberated upon, yet, there were others issues such as the one relating to the water storage. He explained that these analysers, like all others, necessitated a huge amount of water consumption and that the water had to be highly refined. Dr Buhagiar explained that the production of highly refined water involved a process and so storage for a week's supply was deemed necessary. He added that the appellants made no reference to water storage facilities and when asked to clarify that point the appellant Company's reply was not according to specifications. Dr Buhagiar remarked that, in their work, having no water was like having no electricity.

Dr Buhagiar explained that tap water was passed through a reverse osmosis system, which was provided by Mater Dei Hospital on site. However, such water was still not good enough in terms of quality and so it had to go through filters and deionisers. He continued that the appellant Company appeared to be offering one deioniser column and one cartridge whereas the Company had to provide one of each of the four instruments. Moreover, Olympus Italia Srl made no reference to water storage. Dr Buhagiar stated that the tenderer eventually clarified in a satisfactory way that a deioniser column and a cartridge for each instrument would be provided but gave no details of the water consumption of the instruments and about the water storage facilities for reverse osmosis water. He added that, again, they felt that this did not meet their requirements. Dr Buhagiar also confirmed that this was part of the tender specifications.

Mr Moretti, representing appellants, agreed that water was mandatory in such cases and added that the equipment was going to be supplied with a deioniser complete with all the consumable filters for the period of the tender which was to run for 3 years. Mr Moretti noted that it was at a later stage that they were asked about water storage. Furthermore, his Company, continued Mr Moretti, agreed to provide for that too even if a week's supply was considered to be on the high side.

Dr Buhagiar remarked that in its reply Olympus Italia Srl said that it would provide a storage container for raw water at no extra cost. He added that raw water meant tap water but they required storage for refined water and at that point he quoted the clarification requested:

Can tenderer specify that water storage facilities for reverse osmosis water are to be provided and that he will provide facilities for 1 week's storage of water at no extra cost...

Dr Buhagiar said that it was made very clear that what they asked for was storage of refined water and not of water that still had to be refined.

To a question put forward by the PCAB, Dr Buhagiar replied that in the tender document they asked for adequate storage but in the clarification they asked for one week storage in order to explain what was meant by 'adequate'. He confirmed that this clarification was sought from all the tenderers and all of them complied except for the appellant Company.

Mr Moretti explained that wherever they supplied this equipment they connected the tap water to the deioniser and so he could not understand why they had to supply storage for pure water which then still had to be deionised.

Dr Buhagiar explained that when they issue tender specifications those were intended for suppliers in general and not for someone in particular. He added that considering the fact that different instrumentations have different requirements they needed high quality water. Dr Buhagiar knew through experience that when one used a deioniser column that connected directly to tap water then the chances were that one would have a high consumption of deioniser columns and that would actually slow down the laboratory because one had to change the deioniser and the plumbing after which one had to let things settle with the consequence that the particular instrument would have to remain idle for a while. As a consequence, Dr Buhagiar said that they preferred to run high quality water through the deioniser column because in that way one would hardly ever have to change the deioniser and, thus, all the instruments would remain functional. Dr Buhagiar said that he could appreciate that others might work in a different way but, over time, they have found this method very useful and have applied these criteria with all prospective suppliers. Dr Buhagiar argued that the fact that the tenderer did not understand exactly why the Department wanted to work in that manner did not justify the decision by the tenderer not to supply what was requested of him.

On cross examination, Dr Buhagiar explained that they requested water storage in section 18 of the tender document and that the question was not that the tenderer did not indicate the means to produce high quality water but the issue was that the tenderer did not provide water storage facilities and when asked to clarify that point the tenderer provided a storage container for raw water.

Dr Mifsud Cachia commented that her client was going to provide a storage container for raw water at no extra cost and that was an adequate answer because the equipment offered did not require what was being requested. She then made reference to some of the wording used in clause 18 which read:

In case the offered equipment and methodologies require the use of high quality RO and/or deionised water for the running of the system, tenderer

must provide all the quality water requirements to ensure continuous functionality of the four offered instruments.

The appellant Company's lawyer maintained that the key point was that what was being offered by her client ensured the continuous functionality of the offered instruments.

The Chairman, PCAB remarked that the tender referred to high quality water and not to raw water. The Chairman asked for a clarification as to whether water storage facilities were still required given the type of equipment offered by the appellant Company.

Dr Buhagiar explained that the water supply was critically important and that was why they requested storage facilities equivalent to a week's supply of high quality water because when something breaks down and, for example, a mechanical part is not available locally, the chances were that perhaps not even one week would be sufficient. Yet, Dr Buhagiar stated that the Department was trying to be reasonable when requesting, at least, a week's storage (supply).

Dr Mifsud Cachia contended that the Department did not indicate that water storage was critically important but that the key requirement in the tender was to provide all the quality requirements to ensure continuous functionality of the four instruments offered. Dr Mifsud Cachia then noticed that water storage was mentioned as an 'either/or' option in section 18 of the tender conditions and quoted:

either (a) supply all such high quality water requirements to all four analysers including adequate storage and plumbing facilities for the duration of the tender,

or else, (b) supply, maintain and service the required RO and/or deioniser equipment that provides all the quality water requirements for the duration of the contract.

The PCAB noted also that option (a) in section 18 stipulated *including adequate storage* whereas option (b) did not indicate storage and asked if that meant that option (b) did not necessitate adequate storage facilities. The PCAB remarked that if water storage was required in both cases then it should have been stipulated in both instances otherwise, as it was presented, it was left open to different interpretations.

Dr Buhagiar explained that if the government supply of water was interrupted or a piece of equipment broke down then water storage was required to maintain a continuous supply of refined water. Dr Buhagiar remarked that option (a) actually referred to the case where a supplier would bring in a bowser of high quality water which was produced on a different site to fill the storage tank at the laboratory, whereas, option (b) referred to a situation where the supplier produced high quality water on site. Dr Bugahiar further explained that if there were any misunderstandings in this regard these were addressed in the clarification sought by the Department where tenderer was asked to specify the provision of an adequate water supply of appropriate quality. Dr Buhagiar stated that the appellant Company replied that a storage container would be provided for raw water. Asked by the PCAB to do so, Dr

Buhagiar could not confirm whether a storage tank for raw water was adequate to store refined water because that depended on the quality of the tank otherwise there would be the possibility that the refined water could get contaminated.

Dr Mifsud Cachia insisted that the information given by her client with regard to water storage was compliant.

At this stage, the Olympus Italia Srl's legal representative pointed out the importance of (i) applying the law with regard to the fact that clarifications had been sought from her client, (ii) considering the explanations furnished by her client to those clarifications, and (iii) considering the manner in which her client was informed about the rejection of the tender. Dr Mifsud Cachia concluded that on the basis of all the arguments that had been presented at the hearing it emerged that Olympus Italia Srl had provided enough information to enable it to participate in the next stage of the tendering process, namely, the opening of the third envelope.

When asked by the PCAB, Government Pharmaceutical Services (PGS) had no further remarks to submit.

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

This Board,

- having noted that the appellants, in terms of their 'motivated letter of objection' dated 30.09.2008, and also through their verbal submissions presented during the public hearing held on the 22.10.2008, had objected to the decision taken by the General Contracts Committee;
- having noted the appellant Company's representative's remark relating to the fact that if there were any internal documents containing the reasons why the tender was deemed technically non-compliant, such documents should have been forwarded to her client so as the latter would have been in a better position to prepare a proper appeal;
- having considered Ms Debattista's claim wherein she stated that any clarification as to why certain papers were not referred to Olympus Italia Srl had to be directed to members representing the said Department;
- having taken note of Dr Buhagiar's statement wherein he claimed that with regards to the item 'ammonia' the appellant Company's offer could not be accepted as no quality control was being offered and, worse still, there was no calibrator, and that, according to him, there was no way that a meaningful *ammonia* result could be produced without proper control material;
- having taken note of the fact that time could have influenced the adjudication process considering Dr Buhagiar's concession to the fact that the Adjudication Board could have written again to the tenderer to seek further clarifications but he said that (1) one had to appreciate that this tendering process had already taken about two years, (2) had they had time, the Adjudication Board would

have sought further clarifications from Olympus Italia Srl adding that, in this case, there were four tenderers, some of whom offered more than one option;

- having also taken note of Dr Buhagiar's remark that the department was running (a) on an extended contract which was not going to be extended further by the Ministry of Finance and (b) the risk that no tests, such as kidney or cholesterol tests, could be carried out which, in turn, implies that the hospital could, effectively, be forced to close down;
- having also taken note of the fact that when the PCAB asked whether all the mandatory requirements contemplated in Section 15.6 of the tender document were met or not, (a) Dr Buhagiar remarked that when the Adjudication Board asked a general question to see what the Contracting Authority was going to be provided with the reply received from the appellant company did not mention the *ammonia* calibrators, as well as, the control materials and so they considered that the offer was not up to the standards required whilst (b) the appellants' representative replied in the affirmative stating that her client gave a general reply to a general question in the sense that all the material that was being requested in the tender was going to be provided and that any shortfall of items due to calculation errors by her client would have been provided at no additional cost;
- having taken cognizance of both Dr Mifsud Cachia's observation wherein the latter argued that had the Contracting Authority made a specific reference to *ammonia*, then her client would have had no problem to submit a specific answer in that respect;
- having noted (a) Mr Moretti's intervention regarding the fact that whilst some companies supplied items in question as stand alone yet, his company, supplied them together and that, in his opinion, a simple clarification by the Adjudication Board would have cleared any doubts which could have emanated as a result of the fact that technical data provided by the appellant Company seemed not to, *prima facie*, reflect the claim made in the tender submission (section 15.9), (b) Dr Mifsud Cachia contention that, if a conflict in the documentation was noted, it should have been easy to include it along with the other clarifications that were sought by the Department;
- having considered Dr Buhagiar's points raised in connection with the fact that the appellants made no reference to water storage facilities and that when asked to clarify that point the appellant Company's reply was not according to specifications claiming that whilst the tenderer clarified in a satisfactory way that a deioniser column and a cartridge for each instrument would be provided, yet the Company failed to give details about (a) the water consumption of the instruments and (b) the water storage facilities for reverse osmosis water;
- having noted that whilst (a) Mr Moretti informed those present that the equipment was going to be supplied with a deioniser complete with all the consumable filters for the period of the tender which was to run for 3 years and that, in spite of the fact that, wherever they supplied this equipment, they connected the tap water to the deioniser (a line of reasoning contested by the

appellant Company as it had to supply storage for pure water which then still had to be deionised, (b) the Contracting Authority, represented by Dr Buhagiar, was claiming that albeit it was right for one to state that the appellant Company, namely, Olympus Italia Srl, had confirmed that it would provide a storage container for raw water at no extra cost, yet, the Adjudication Board was made to understand that this implied that by 'raw water' one would be supplied with tap water, which, at the outset, contravened the Authority's specifications as these required storage for refined water and not of water that still had to be refined;

- having noted that, despite reservations manifested by the appellant Company, the latter had formally agreed to guarantee a week's supply of water storage;
- having considered Dr Buhagiar's claim that water supply was critically important and that was why they requested storage facilities equivalent to a week's supply of high quality water, especially when one considers the fact that in case of a breakdown where, say, a mechanical part has to be imported because it would be unavailable locally, the chances may be such that not even a week storage would end up to be sufficient;
- having amply considered both (1) the appellant Company's legal representative's reference to section 18 (a) and (b), particularly (b), as well as Dr Buhagiar's remarks relating to issues connected with the interpretation of this particular clause and (2) the clarifications sought from tenderers during the evaluation stage;

reached the following conclusions, namely:

1. The PCAB acknowledges that a Contracting Authority may have specific requests which, whether justified or not, yet (as long as these are not detailed in a way as to favour any particular tenderer or type of tenderers) one has to fulfil;
2. The PCAB is of the opinion that, in this particular instance, some of the terms and conditions originally contemplated in the tender document were changed by way of clarifications sought by the Contracting Authority, with the said clarifications, more than seemingly, giving rise to further problems with regards to the interpretation of the said changed parameters. In relation to this matter, the PCAB feels that, under normal circumstances, one would have expected that such pivotal issues would have been properly identified and stated in the original tender document itself. Furthermore, the PCAB is of the opinion that the said modifications and clarifications tend to suggest that the person or group of persons entrusted with the drafting of the tender document did not carry out the task to the best of one's capability as, otherwise, what could have been termed as 'obvious' would have been seen so and understood by every bidder right from the start;
3. This Board is not convinced that the Adjudication Board did actually seek to address all possible grey areas directly with the appellant Company in a way that, prior to reaching conclusions, one would have made sure that both sides

were in tune as regards the interpretation and comprehension of ancillary demands being made during the clarification process. The PCAB feels that the Adjudication Board could have acted in a hasty manner in view of the fact that (a) it was pressed for time due to circumstances that were amply discussed during the hearing, as well as, (b) it had other tender submissions which fitted what they were after without the need for further clarifications;

4. This Board feels that, whatever the circumstances surrounding the adjudication process of this tender, one cannot but observe the unnecessary length of time taken by the Contracting Authority to reach its own conclusions which, all things being equal, could have simply been aided by a better drafting of the specifications, a scenario which is becoming a constant recurrence in local public procurement.

As a consequence of (1) to (4) above, in order to ensure that (a) the Contracting Authority will, ultimately, be provided with the services which best suit its needs, as well as, (b) the appellant Company is definitely given sufficient time to convince the Contracting Authority that what it is offering is what the said Authority is actually after, this Board decides that both parties enter into a clarification process within a week from the publication of this decision. It is imperative that this process will be purely one of clarification and that no element of negotiation will take place, i.e. only explanations about what had been included in the original offer and later clarifications should be required and accepted but that no changes will be offered or accepted from what had already been on record. Also, this Board recommends that all discussions will be formally recorded and that the said process will not exceed a period of one month from the date of the first communication.

As a consequence, in this instance, the PCAB finds in favour of the appellant Company.

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

18 November 2008