

PUBLIC CONTRACTS APPEALS BOARD

Case No. 146

Advert. No. 305/2007 - CT2249/2007 – GPS 70664 T07 PT Tender for the Supply of Analysis of Pathological Samples

This call for tenders was, for a contracted value of € 827,596 was published in the Government Gazette on 24.08.2007. The closing date for this call for offers was 16.10.2007.

Four (4) different tenderers had submitted their offers.

Following receipt of notification that their offer could not be considered further in the opening of Envelope 3 as it was adjudicated as being not administratively compliant, Messrs E.J. Busuttil Ltd, on behalf of Centro Analisi Fleming Spa, filed an objection on 19.02.2009 against the decision taken in regard by the General Contracts Committee.

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 07.04.2009 to discuss this objection.

Present for the hearing were:

Centro Analisi Fleming Spa

Dr Lorna Mifsud Cachia	Legal Representative
Dr Josette Attard	Legal Representative
Mr Giovanni Trimboli	Amministratore Delegato
Mr Edwin Busuttil	Managing Director, E.J. Busuttil Ltd

General Health Procurement Services (GHPS)

Ms Anne Debattista	Director, GHPS
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Adjudicating Board

Ms Miriam Dowling	Chairperson
Dr Christopher Barbara	Member and Chairman, Pathology/Consultant Virology Unit
Ms Pamela Caruana	Member / Technical Specifier
Ms Carmen Buttigieg	Member and o/i/c Procurement, Pathology Department

Department of Contracts

Mr Francis Attard	Director General
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At the request of Dr Lorna Mifsud Cachia, legal representative of E.J. Busuttill Ltd /Centro Analisi Fleming Spa, and with the concurrence of those present at the hearing, including the contracting authority, the PCAB agreed that the hearing would be conducted in English so that Mr Giovanni Trimboli, Managing Director of Centro Analisi Fleming Spa, could follow the proceedings.

After the Chairman's brief introduction, the appellant Company was invited to explain the motives which led to their objection.

Dr Lorna Mifsud Cachia explained that her client's objection was based mainly on the contracting authority's contention that her client submitted some information that might not have been clear enough in which case the appellant Company was submitting that clarifications should have been sought by the contracting authority rather than the latter resorting to outright disqualification of her client's bid.

At this stage Dr Mifsud Cachia proceeded by referring to the list of shortcomings pointed out by the Adjudicating Committee in its reports referring to CCPS meetings held on 10th July and 31st October 2008 which had been reproduced in appellant's letter of objection. Following this, the appellant Company's legal advisor went on to refer to page 20 of the 'Special Conditions' of the tender document, particularly to clauses 15.3, 15.4, 15.6 and 15.7 which, Dr Mifsud Cachia contended were specifications inherent to the service that had to be provided through this contract. She added that these clauses were worded in such a manner that they were not expressly requesting any particular information from the tenderer but that the tenderer had to agree with them by signing the tender document. Dr Mifsud Cachia submitted that, consequently, her client could not be disqualified for non submission of information in these respects, if anything, clarifications should have been sought.

The Chairman PCAB read out point (1) of the reasons for exclusion, namely:

Point 1 - No information has been submitted regarding frequency, courier service and consumables for the shipments. Clauses 15.3 to 15.8. Information regarding compliance with our requirements has not been submitted.

The Chairman PCAB asked where was the information regarding frequency, courier service and consumables requested, and if so, where was the relative information given.

Dr Christopher Barbara, a member of the Adjudicating Committee and Chairman Pathology and Consultant Virology Department at Mater Dei Hospital, explained that in this instance they were referring to pathology specimens which were not performed in Malta and hence they had to be referred elsewhere. He added that, with regard to frequency clause 15.3, this stated that:

*The specimens are to be collected by the tenderer from the Pathology Department, St Luke's Hospital, or MDH. The dates for collection will be specified by the Pathology Department, and will be **at least twice weekly**.*

Dr Barbara added that clause 15.4 provided that:

The tenderer is to supply at hi sown cost all necessary shipping containers, insulating material, dry ice, etc necessary for the safe transport and preservation of the samples in transit. All materials for package preparation and transportation is to be supplied by tenderer

Dr Barbara stated that the tenderer did not indicate that these materials would be provided.

Dr Mifsud Cachia contended that with regard to clauses 15.3 and 15.4, unlike in other parts of the tender document, if one were to read them carefully, one would notice that there was no specific request to provide information but that these amounted to a description of the service requested by the contracting authority. She maintained that there was a difference between a description of a service and a request for information. Dr Mifsud Cachia argued that her client should not be penalised for something that one was not requested to submit from the start, adding that this argument applied equally to clauses 15.3, 15.4, 15.6 and 15.7.

Dr Barbara remarked that point 1 of the reasons for exclusion referred also to information not submitted as requested with regard to clause 15.5, particularly to where it was stated that:

...Tenderer is to state how long it will normally take for transportation of samples from Pathology Department Malta to the laboratories where the assays are to be performed.....

Dr Mifsud Cachia stated that albeit her client did not specify this, yet, she pointed out that the same clause 15.5 stated that:

In any case, the samples are to arrive at destination on the same day of collection.

Dr Mifsud Cachia interpreted this to mean that it was not acceptable for a tenderer to do that in more than one day.

The Chairman PCAB observed that a day had 24 hours and that 24 hours was the maximum, however, if a tenderer offered to provide this service in, say, three or 12 hours instead of 24 hours it could make quite a difference to the contracting authority and that was an adjudication benchmark that the Committee had to take into consideration.

Dr Mifsud Cachia conceded that her client did not specify the number of hours, however, since her client was referring also to the technical specifications – Information Sheet C in page 29. Delivery Period’ refers - the contracting authority had the discretion to ask for a clarification.

The PCAB remarked that it was the tenderer that should have asked for a clarification, if there was need for one, because on its part the contracting authority had made a very clear request.

Dr Mifsud Cachia argued that the way clause 15.5 was drafted, her client's interpretation was that it did not matter how long it took for the samples to arrive at destination so long as it did not take more than one day.

Dr Barbara emphasised that clause 15.5 stated '*to the laboratories where the assays are to be performed*'. It is a fact, commented Dr Barbara, that the appellant Company did not perform all the tests itself but some of these tests were taken to France and, as a result, in this particular case, that would have meant that the contracting authority would have wanted and, as a matter of fact, would have placed emphasis on being made aware about the time taken for the said sample/s to be transported from the Pathology Department in Malta to the laboratory performing the assays.

Dr Barbara stressed that the element of time was very important because some specimens, like spinal fluids, were being discarded because of deterioration by the time they arrive for testing. He argued that this issue alone was enough to lead to the disqualification of the tender.

Given that the appellants were already providing this service to the contracting authority, the Chairman PCAB asked whether the decision reached by the Adjudicating Committee was, in any way, influenced by the past performance of the appellant Company. Dr Barbara, categorically, excluded this and added that the specifications were drawn up in order to ensure the delivery of a good and safe service to patients and all that the Adjudicating Committee did was to compare the submissions made by tenderers against the tender specifications.

Point 2 - The laboratory on offer in the tender must have a current accreditation certificate (by CPA U.K. Ltd, College of America Pathologists) or equivalent quality certification. The relevant documentation has not been submitted with the offer.

Point 3 - As per clause 15.11, it was specifically requested that the corresponding accreditation certificates of the individual tests are to be submitted in Envelope 2. These were not provided.

Clause 15.11 stated as follows:

QUALITY MANAGEMENT The laboratory carrying out the tests must have current accreditation certificate (examples: by CPA UK Ltd, College of American Pathologists) or equivalent quality certification. The relevant documentation is to be submitted with the offer.

Furthermore the tenderer is expected to demonstrate the organisation's commitment to quality by providing sufficient to ensure the quality of analysis results.

The corresponding accreditation certificates of the individual tests are to be submitted. (TO BE INSERTED IN ENVELOPE 2)

Dr Mifsud Cachia admitted that this information was omitted in her client's tender. However, the appellant's legal advisor stressed that her client felt that, since they

were the same contracting authority's current suppliers, this requirement was not applicable in his case.

Dr Barbara remarked that such accreditation certificates were renewed on an annual basis and, since the current contract was issued about three or four years ago, a new accreditation certificate was required.

Ms Anne Debattista, Director GHPS, intervened and pointed out that the adjudication process was carried out on the basis of the documentation submitted in relation to the requirements and conditions published for that particular tender.

The Chairman PCAB remarked that the tenderer could not assume anything but the tenderer had to submit the requested information and, if there was the need, the tenderer could have sought clarifications from the contracting authority and not expected the opposite to happen. He stressed that the fact that the bidder was the current supplier should not, in any way, put that bidder in a privileged or advantageous position *vis-à-vis* the other bidders but one had to ensure that there was a level playing field for all.

Point 4 - Re clause 15.14 tenderer gave no information as to which tests are performed in-house and which are forwarded to other laboratories. A complete list of the tests forwarded onto other laboratories should have been submitted. Tenderer should have also provided copies of accreditation certificates of these other laboratories.

The Chairman PCAB read out clause 15.14:

Tenderer must also indicate which tests, from the list above, can be performed in-house and which are forwarded onto other laboratories. Tenderer must provide copies of accreditation certificates of these other laboratories in addition to his own and satisfy clauses 15.5, 15.6, 15.11 and 15.13 in this regard.

The results of tests that have been carried out elsewhere, should carry a stamp or logo indicating the lab-site of analysis.

Dr Mifsud Cachia explained that her client was to perform all the tests in-house, meaning within the laboratories of Centro Analisi Fleming Spa but not necessarily in Malta.

Mr Giovanni Trimboli, representing Centro Analisi Fleming Spa, the appellant Company, stated that the list of tests submitted was the list of tests performed by Centro Analisi Fleming Spa.

The PCAB drew the attention of Mr Trimboli that the tenderer was being asked to consult the list of tests provided in the tender document itself and to indicate which of those tests were going to be carried out in-house or in other laboratories. Mr Trimboli reiterated that the list he submitted referred to the list of tests carried out at Centro Analisi Fleming Spa.

Dr Barbara explained that they required the full list of tests included in the tender document and that, if a tenderer was unable to provide all the tests requested, then the said offer had to be considered as unacceptable in view of the fact that the list of tests was drawn up on the experience gained over the years. Furthermore, in cases where a laboratory is not in a position to carry out certain tests itself, then, it is still in the contracting authority's interest to know to which laboratory such tests would be referred. Dr Barbara said that the tenderer indicated that some tests were not carried out but provided no indication as to which tests were going to be referred to other laboratories.

Point 5 - A specimen of the test request form had to be submitted with the offer in Envelope 2. This has not been submitted.

Dr Mifsud Cachia explained that this was a question of whether one submitted a hard copy or a soft copy of the form requested. She contended that since this was, basically, a request for an electronic system, it was assumed that this requirement was met once this form could be accessed electronically.

Dr Barbara remarked that he would not give much importance to this issue because what mattered most was patient safety rather than the format of the forms. However, he added that this form was requested and that he did not succeed in accessing the form from the CD submitted although he admitted that he was no IT expert.

Point 6 - No local representative has been nominated in the offer. Is there a local representative?

Dr Mifsud Cachia remarked that she could not find where this was requested in the tender document.

Dr Barbara explained that the local representative played the role of collecting the samples and the contracting authority needed to know whether the representative had any medical knowledge. Dr Barbara did not attach much importance to this matter and admitted that it could have been sorted out through a clarification.

Dr Mifsud Cachia maintained that, in her view, there was no serious breach of the specifications laid down in the tender document and that clarifications could have been sought to settle the points mentioned in the reports of the Adjudication Committee. She argued that the Adjudicating Committee should have made recourse to the provisions of Regulation 82 (2) of the Public Contracts Regulations, referring to the right of the contracting authority to seek clarifications, and that the outright rejection of her client's offer was not warranted. Dr Mifsud Cachia concluded that her client was in a position to furnish all the information required if these were asked to do so.

On her part, Ms Debattista quoted the second para. of Regulation 82 (2) of the Public Contracts Regulations, which stated that:

Provided that the Director of Contracts, or, with his authorization, 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.

Ms Debattista remarked that, according to the information submitted, the contracting authority could not adjudicate the offer of the appellant Company as compliant since mandatory requirements were not satisfied. She concluded that these shortcomings occurred in Envelope 2, which was opened because Envelope 1 did contain the required bid bond, however, having been found non-compliant in Envelope 2 the appellant Company's offer was not recommended to move on to the next stage of the tendering process, i.e. the opening of Envelope 3.

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 19.02.2009, and also through their verbal submissions presented during the public hearing held on the 07.04.2009, had objected to the decision taken by the General Contracts Committee;
- having observed that with regards to the information regarding frequency, courier service and consumables requested in the tender document by the contracting authority (a) whilst appellant Company contended that tenderers were not specifically requested to provide information stating also that, for example, albeit they did not specify the precise number of hours that it would normally take for transportation of samples from Pathology Department (Malta) to the laboratories where the assays are to be performed, yet it was stated that "... *in any case, the samples are to arrive at destination on the same day of collection*", (b) Dr Barbara insisted that this was not enough and not in line with what the contracting authority had requested, claiming that, in the case of the appellant Company for instance, it is a fact that the said appellant Company did not perform all the tests itself but some of these tests were taken to France. As a result, proceeded Dr Barbara, in this particular case, that would have meant that the contracting authority would have wanted to be made aware about the time taken for the said sample/s to be transported from the Pathology Department in Malta to the laboratory performing the assays;
- having considered the fact that the appellant Company argued that since Information Sheet C - page 29 ... 'Delivery Period' referred to such requested information, the contracting authority had the discretion to ask for a clarification;
- having taken note of the appellant Company's legal representative's claim that the way clause 15.5 was drafted, her client's interpretation was that it did not matter how long it took for the samples to arrive at destination so long as it did not take more than one day;

- having also taken note of Dr Barbara's counter argument wherein he stated that the element of time was very important because some specimens, like spinal fluids, were being discarded because of deterioration by the time they arrive for testing;
- having heard (a) the appellant Company admit that information requested on pertinent accreditation certificates which had to be submitted in Envelope 2 was omitted in their tender in view of the fact that it was felt that such data was unnecessary in this particular instance due to the fact that they were the same contracting authority's current suppliers, (b) Dr Barbara remark that such accreditation certificates were renewed on an annual basis and, since the current contract was issued about three or four years ago, a new accreditation certificate was required;
- having heard how, with regard to the claim made by the Adjudicating Board that the tenderer gave no information as to which tests are performed in-house and which are forwarded to other laboratories (a) Mr Trimboli stated that the list of tests submitted was the list of tests performed by Centro Analisi Fleming Spa and (b) Dr Barbara explained that – 1. the contracting authority required the full list of tests included in the tender document and that, if a tenderer was unable to provide all the tests requested, then the said offer had to be considered as unacceptable in view of the fact that the list of tests was drawn up on the experience gained over the years, and – 2. the tenderer indicated that some tests were not carried out but provided no indication as to which tests were going to be referred to other laboratories;
- having established that, whilst a couple of other issues were indicated as non-compliant, namely (a) the fact that a specimen of the test request form had to be submitted with the offer in Envelope 2 (not submitted by appellant Company in their tender) and (b) the fact that no representative was nominated in the offer, yet, during the hearing Dr Barbara conceded that, in their deliberation, the Adjudicating Board did not attach much importance to these matters, admitting that these could have been sorted out through a simple clarification;
- having also noted Ms Debattista's remarks

reached the following conclusions, namely:

1. The PCAB concludes that it is a fact that a day had 24 hours. However, it is also a fact that if a tenderer offered to provide this service in, say, three or 12 hours instead of 24 hours it could make quite a difference to the contracting authority apart from to the desired optimal level of testing, and that was an adjudication benchmark that the Committee had to take into consideration;
2. The PCAB, whilst fully concurring with the Adjudicating Board that the tenderer should have given requested information as to which tests are performed in-house and which tests are forwarded to other laboratories, yet, also acknowledges that the appellant Company failed to do so;

3. The PCAB feels that whenever a tenderer, knowingly, fails to submit information considered in the tender document as 'mandatory' then it is only natural that an offer would, most likely, be judged as non compliant. Furthermore, the PCAB argues that the appellant Company should have never assumed anything and that the tenderer had to submit the requested information and that clarifications could have been sought by the tenderer from the contracting authority and, in this case, no one should have expected the opposite, namely the Adjudicating Board to seek any clarification from the tenderer, to happen;
4. The PCAB agrees with the contracting authority that submission of accreditation certificates is mandatory and that Dr Barbara's claim, namely, that in view of the fact that such accreditation certificates were renewed on an annual basis, the fact that the accreditation process as regards the current contract took place some three to four years ago, amply necessitated that a new accreditation certificate be issued this time round;
5. The PCAB concludes that the fact that the bidder was the current supplier should not, in any way, put that bidder in a privileged or advantageous position *vis-à-vis* the other bidders and that one had to ensure that there was a level playing field for all participating tenderers.

As a consequence of (1) to (5) above, this Board finds against 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 not be refunded.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

14 April 2009