

PUBLIC CONTRACTS APPEALS BOARD

Case No. 161

UM//1285/2009

Tender for the Supply, Delivery, Installation and Commissioning of a Gas Chromatograph with flame Ionisation detector and a Gas Chromatograph with Flame Photometric detector for the Chemistry Department – University of Malta

This call for tenders was, for an estimated contracted value of € 50,000 was published in the Government Gazette on 5.09.2008. The closing date for this call for offers was 15.10.2008.

Five (5) different tenderers submitted seven (7) offers.

On 18.06.2009 Messrs Al-Nibras for Science and Technology Ltd filed an objection against the decision by the University of Malta to award the tender in question to Technoline Ltd when it claimed that its offer was the cheapest and compliant with the specifications.

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 12.08.2009 to discuss this objection.

Present for the hearing were:

Al-Nibras for Science and Technology Ltd

Dr Joseph A. Schembri Legal Representative
Mr Roderick Abela Managing Director

University of Malta (UM)

Dr Oriella de Giovanni Legal Representative

Evaluation Committee:

Ms Claudette Attard Chairperson
Mr Elton Baldacchino Member
Mr Karm Saliba Member
Dr Emmanuel Sinagra Technical Adviser

Technoline Ltd

Ms Vanessa Damato Sales Manager
Ms Lorna Micallef Sales Executive
Mr Adrian Balghy Technical Support
Mr Ivan Vassallo Sales & Marketing Manager

Department of Contracts

Mr Mario Borg Assistant Director

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

Dr Joseph Schembri, legal representative of *Al-Nibras for Science and Technology Ltd*, the appellant Company, stated that, till then, his client had not been made aware of the reason/s why the same Company was not awarded this contract.

Mr Roderick Abela, Managing Director of the appellants, intervened to explain that on being informed that this contract was awarded to *Technoline Ltd* he contacted the Contracts Department, adding that he was put telephonically through three different officers, one of whom could have been (though he claimed that he was not absolutely certain) Mr Melvin Cachia. The reason for his phone call was for him to obtain information regarding the said award to Messrs Technoline Ltd. However, according to the appellants' Managing Director, he was verbally informed by the Department official that in order to obtain such information he had to pay € 500. He claimed that, following discussions with his legal advisor, he lodged a formal objection based on what he perceived as being possible reasons, refraining from formally asking for precise reasons from the Department concerned prior to doing so.

At this point, the PCAB intervened and queried how come a participating tenderer was asked to pay money to obtain information so necessary for anyone to establish whether there is scope for crying foul or not.

Mr Abela intervened to state that he was prepared to confirm his claim under oath.

The PCAB requested that Mr Melvin Cachia, an officer attached to the Contracts Department, be summoned to the witness stand to give his version of facts. Following an attempt to establish contact with Mr Cachia, the PCAB was informed that the Department official was on vacation leave and, as a result, could not be called in to give his version on the matter.

The Chairman PCAB queried how was it possible for anyone to lodge an appeal without knowing the reason/s in respect of which he or she was aggrieved!

The PCAB added that a public officer could not compel someone to pay any money to gain access to information (which was, rightfully, always made accessible) prior to lodging an appeal. At this point, the Chairman PCAB noted that this was the first case of its kind encountered by this Board and opined that there must have been some kind of misunderstanding.

Mr Saviour Debono, Secretary of the PCAB, remarked that Mr Abela had contacted him to be furnished with the reasons why he had not been awarded the contract and that he had directed Mr Abela to obtain that information from Mr Melvin Cachia at the Contracts Department. Mr Abela confirmed this and added that, in the week prior to the hearing, all he obtained from Mr Cachia was a fax transmission including a copy of the analysis report.

Mr Abela remarked that this was his first experience as far as filing of appeals is concerned and since he was not conversant with the procedure he resorted to lodging a formal appeal after consulting with his lawyer.

The Chairman PCAB advised Mr Abela that, in future, he should get such instructions / statements (e.g. regarding the need to pay € 500) in writing so that, should the need arise, he would be able to present same as evidence.

Returning to the reason as to why this hearing was being convened, the Chairman PCAB remarked that, admittedly, he was at a loss since the appellant Company had failed to state its grievances and that, as was common knowledge, the PCAB was against anyone using the hearing to embark on any kind of fishing expedition.

Mr Anthony Pavia, a PCAB member, observed that the appellant Company had mentioned two reasons in its letter of objection, namely that (a) this offer was the cheapest and (b) that it was technically compliant.

Ms Claudette Attard, Chairperson of the Evaluation Committee, confirmed that the appellant Company was technically compliant with specifications and that the only issue was the fact that the appellants' offer was not the cheapest.

Dr Joseph Schembri quoted from clause 20 (a) of the General Conditions of Tender (page 5):

“The work shall be delivered to store or site of works, at Malta, all charges paid, including VAT, Customs Import Duty and Levy, if any and insurance. The contractor shall be responsible for all damages or loss in transit from the contractor's work to the store or site or works at Malta, and shall replace, free of cost, all materials that may be broken, damaged or lost in transit as aforesaid.”

As a consequence, Dr Schembri contended that the prices quoted, namely, €16,050, (item 1), €14,800 (item 2) and €25,750 (optional item), were inclusive of VAT.

Mr Karm Saliba, a member of the Evaluation Committee, remarked that the prices quoted by Dr Schembri were those listed on page 12 of his client's submission and pointed out that the said figures were quoted under the column marked 'Price on CIF Malta Basis', with CIF referring meaning *Cost, Insurance and Freight excluding VAT*.

Dr Schembri also quoted condition 9 of the Special Conditions (page 10):

“The attached ‘General Conditions governing the Employment of Labour in Malta’, ‘General condition of Contract for the Supply of Materials and Other Articles’ and the ‘General Conditions for the Execution of Works’ insofar as they are not inconsistent with the above, shall also apply.”

The appellant Company's legal advisor claimed that clause 20 (a) of the 'General Conditions' quoted earlier on should apply, meaning that the prices quoted by his client were inclusive of VAT. He further contended that if, for some reason, the prices quoted by his client on page 12 of his submissions should have been CIF, i.e. without VAT, then those prices should be reduced by 18%, representing VAT thereon.

The PCAB observed that, in the appellants' tender submission, it was quite clear that the prices quoted in the schedule on page 12 were CIF and that there was no indication whatsoever that they were inclusive of VAT.

Ms Attard drew the attention of the PCAB to clause 1.0 of the 'Special Conditions' which, in her opinion, was very clear. The Chairman PCAB read out this condition:

"Tenderers shall quote prices in Euro as indicated in the attached schedule. The amount quoted against each item shall include charges and discounts, and shall not be made subject to trade or currency fluctuations. Installation and commissioning are to be included in the offer together with the overall price of the equipment. All prices are to be on a CIF Malta Basis, but as indicated above, inclusive of installation and commissioning at the University of Malta as applicable."

Dr Schembri again referred to clause 20 (a) of the 'General Conditions' which included VAT in the price. The PCAB remarked that the 'General Conditions' were not in conflict with the 'Special Conditions' because the latter were asking for prices to be quoted CIF whereas the former was referring to work delivery and not how to quote prices.

Ms Attard stated that there were other tenderers who had indicated that their prices were inclusive of VAT.

The Chairman PCAB remarked that if the appellant Company was in doubt or else it felt that there was some kind of contradiction between the 'General' and the 'Special' Conditions, the said Company should have sought the required clarification before the closing date of tender. At this point the Chairman PCAB reiterated that, in his opinion, there was no contradiction between the 'Special Conditions' and the 'General Conditions' and, if anything, the former should override the latter.

Mr Mario Borg, assistant director at the Department of Contracts, was summoned to the witness stand. He stated that the practice followed by the Contracts Department was that when a tenderer verbally asks for information about the rejection of one's offer, the Department would instruct that bidder to put a request in writing following which the Department would give the reason/s for disqualification. Mr Borg added that if the tenderer would then contend that the adjudication committee had made the wrong assessment/decision then the complainant would be advised to lodge a formal appeal against that decision.

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 18.06.2009 and also through his verbal submissions presented during the public hearing held on the 12.08.2009, had objected to the decision taken by the General Contracts Committee;
- having established that the appellant Company claimed that it had not been made aware of the reason/s why it was not awarded this contract;
- having taken note of (a) Mr Abela’s allegation relating to the fact that he was verbally told by a Contracts Department’s official that for him to obtain pertinent information to enable him to assess whether his Company had a reason to lodge a claim against the intended award to another participating tenderer he had to pay €500, (b) Mr Abela’s insistence on the veracity of his claim to the extent that he was willing to confirm all that he had said under oath, and (c) Mr Abela’s statement that he proceeded to lodge a complaint following discussions with his legal advisor;
- having also taken note of Mr Borg’s evidence stated under oath;
- having noted the appellants’ representative state that this was his first experience as far as filing of appeals is concerned;
- having established that the appellant Company’s offer was technically compliant with specifications and that the only issue revolved round the question of whether its offer was the cheapest (as claimed by the appellant Company) or not (as stated by the Evaluation Committee):
- having also heard both the appellants’ interpretation of tender clauses, as well as those stated by the members of the Evaluation Committee, particularly those relating to whether ‘Price on CIF Malta Basis’ implied inclusion of VAT;
- having taken cognisance of the fact that, according to the appellant Company, ‘General Conditions’ supersede ‘Special Conditions’;
- having heard the Chairperson of the Evaluation Committee state that there were other tenderers who had indicated that their prices were inclusive of VAT;

reached the following conclusions, namely:

1. The PCAB, whilst noting that this was the first time since it was constituted that anyone had alleged that one was asked to pay a sum of money to the Department of Contracts to obtain relevant information as to the reasons for (a) either being excluded from a tender or (b) for not being awarded a tender, and taking into consideration that this was the appellant Company’s

Managing Director's first experience as regards filing a similar formal appeal and that he had kept no tangible proof that he was actually told what he was claiming, this Board feels that, under the circumstances, such an incident could have been the result of a misunderstanding of facts and, as a consequence, does not feel that it should pursue the matter further;

2. The PCAB also feels that the 'General Conditions' stipulated in the Tender document were not, at all, in conflict with the 'Special Conditions' because whilst the latter were asking for prices to be quoted CIF, the former were referring to work delivery and not how to quote prices. Also, all things being equal, the PCAB opines that, under normal circumstances, 'Special Conditions', when in conflict with 'General Conditions', should override the latter, otherwise, logically speaking, one would ask "Why should these be referred to as 'Special'?"
3. The PCAB decides that, in its opinion, it was quite clear that the prices quoted in the schedule on page 12 were CIF and that there was no indication whatsoever that they were inclusive of VAT;
4. The PCAB feels that the Evaluation Committee acted in a correct manner and was mathematically and procedurally correct in its interpretation of data made available to it by the appellant Company.

As a consequence of (1) to (4) above this Board finds against the appellants.

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 reimbursed.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

17 August 2009