

## **PUBLIC CONTRACTS APPEALS BOARD**

### **Case No. 176**

#### **CT/2186/2009 - Advert. No. 305/2009 - WD/469/2008 Tender for the Supply of Pitkali Market Software System**

This call for tenders with an estimated value of €140,000 was published in the Government Gazette on 04.08.2009. The closing date for this call for offers was 29.09.2009.

Two (2) different tenderers submitted their offers.

On 02.11.2009 Messrs Loqus Solutions Ltd filed an objection against the decision by the Contracts Department to cancel the call for the tenders in caption after all tenders had been found non-compliant with tender conditions and specifications.

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Carmel Esposito, respectively, acting as members, convened a public hearing on 09.12.2009 to discuss this objection.

Present for the hearing were:

#### **Loqus Solutions Ltd (Loqus Ltd)**

Dr Marthese Portelli	Legal Representative
Mr Martin Scicluna	Representative
Mr Stephen Zammit	Representative

#### **Ministry for Resources and Rural Affairs (MRRA)**

##### **Adjudication Board:**

Mr George Falzon	Chairman
Mr Noel Azzopardi	Member
Mr James Deguara	Member
Mr Jean Paul St John	Member

After the Chairman's brief introduction, Loqus Solutions Ltd's legal representative was invited to explain the motives of the objection.

Dr Marthese Portelli, representing Loqus Ltd, explained that the Contracts Department has listed three issues which led to the exclusion of her client's bid, namely:

*(a) The price schedule is confusing primarily with regards to the meaning/composition of the item quoted as 'Solution' and especially in relation to the other items quoted within the same price schedule.*

Dr Portelli refused the allegation that the price schedule was confusing as her client had filled in Annex C 1 which was furnished with the tender document and as amended in the clarification document (page 82). She insisted that they had quoted a price against each item in the schedule and, as a consequence, she could not understand what the adjudicating board found confusing in that regard

*(b) Bidder failed to quote for hardware and provide the technical information requested, conditioning response 'to provide only the software solution'*

Dr Portelli stated that, in the submission, details were given with regard to the solution software. She added that the provision of hardware was not indicated as a mandatory requirement in the tender document but it laid down as mandatory the submission of specifications of hardware in case the proposed solution required any specific hardware. Dr Portelli pointed out that the title of the call for tenders itself referred to the '*Supply of Pitkali Market Software System*' and it did not mention the supply of hardware.

Dr Portelli referred to page 26 section 3.1 'Business and Functional Requirements' and, specifically, to page 27 which indicated Phases 1 to 3 which did not request the submission of hardware but requested information in case the implementation of the proposed software solution required specific type/s of hardware. Dr Portelli remarked that her client had submitted the requested 'system architecture' at attachment 'F', 'the preferred hardware configuration' at page 98 and 99 and even the 'operating system and database configuration' was provided at page 74. She added that where it was stated that bidders are also required to declare any specific or propriety hardware or specific infrastructure necessary for the implementation, her client submitted that no specific hardware was required to implement the proposed solution.

*(c) Bidder failed to submit Annex C8 'Hosting Questionnaire as per clarification of the 23<sup>rd</sup> September 2009*

Dr Portelli claimed that her client did submit Annex C8 at pages 98 to 106 of the submission which included the specifications of the servers, the number of servers required and also the specifications of a 'sample' server because, she reiterated, the

proposed software solution did not require any particular type/s of server. Dr Portelli maintained that her client had clearly indicated that this would be providing the software solution and that the contracting Department could use the existing hardware or else purchase new hardware of its choice. She added that her client would be prepared to submit hardware specifications but the said client, the appellant Company, did not want to impose any specific hardware on the contracting department because its solution could integrate with any type/s of hardware.

Dr Portelli informed the PCAB that the software solution as proposed was written by her client. Furthermore, added Dr Portelli, the same solution had been used in different countries and presently was available off the shelf.

Mr George Falzon, Chairman of the Adjudicating Board, submitted that:

- (i) with regard to the price schedule, the Board found that the figures quoted did not add up, i.e. the price quoted against 'solution' did not represent the prices against the three bullets that followed – if, he added, in the first instance, they were meant to add up. He added that the adjudicating board found it difficult to interpret the prices and that the Contracts Department had advised the board not to seek any clarifications with regard to the prices

The PCAB perused Annex C1 at page 82 and noted that the bidder had filled in the schedule provided with the tender document and the Chairman PCAB could not understand why the adjudicating board was not allowed to seek a clarification with a view to assist it in interpreting the figures that had already been quoted in the offer – of course, without altering any figures.

Mr Falzon stated that the adjudicating board expected the prices against the three bullets with regard to hardware, operating software and application software to add up to the price quoted for the solution.

Dr Portelli, while admitting that she was not an accountant by profession, recalled that the prices quoted by her client at Annex C1 - totalling €287,840 - were meant to be taken each on its own and that the three sub-divisions (bullets) were meant to add up to the price of the solution.

The PCAB noted that the offer quoted by Loqus Ltd as listed on the *Schedule of Tenders Received* totalled €238,360. Mr Falzon stated that he couldnot tell how the figure of €238,360 in the schedule of tenders was arrived at that was compiled by the Contracts Department at tender opening stage.

The PCAB remarked that it was emerging clearly that both the prices quoted by the appellant Company in Annex C1 and the total listed in the *Schedule of Tenders* required an explanation/clarification and that he failed to understand (a) why no clarification was conceded on the information/prices given by the tenderer in his original submission and

(b) how the adjudicating board could evaluate the offer if it could not interpret a very important aspect such as the prices quoted.

- (ii) Mr Falzon remarked that once the contracting authority requested a quote for the hardware he expected tenderers to submit that quote. He added that it appeared logical to him that tenderers should be asked to quote the price of the hardware that would be required to implement the proposed software solution.

The PCAB pointed out to Mr Falzon that the appellants had clearly indicated that the proposed solution could function on any kind of hardware and hence the bidder was leaving it up to the contracting authority to opt for whatever hardware it desired. Mr Falzon was even asked by the PCAB if the adjudicating board had taken into account and/or accepted the reason given by the appellants for not submitting a quote for the hardware.

Dr Portelli remarked that the hardware was not mandatory so much so that at page 27 clause 3.1.2 'Systems Integration' it was stated that:

*“Bidders are to integrate the proposed IT solution with:*

*Any weighing equipment specified by the MRRA to be able to register the weight of the produce presented at the Market;*

*Any point of Sales equipment as specified by MRRA.  
The IACS system installed at MRRA.....  
The Banks so that payments ...”*

Dr Portelli maintained that those were all items of equipment that had to be provided by the client and, therefore, there was no need for the tenderer to provide for such hardware. She also claimed that her client furnished the items requested at page 28 clause 3.1.4 with regard to architecture, preferred hardware configuration (pages 98 and 99), operating system (page 74) and database configuration. With regard to 'any' technical, specific or propriety hardware and/or specific infrastructure set-up required to implement the IT solution Dr Portelli stated that this was not applicable as the proposed solution did not require anything specific for implementation.

The same argument applied to (a) *declare any specific or propriety hardware or specific infrastructure* and (b) *maintenance and support prices for all hardware*. Dr Portelli referred to page 74 of the submission and pointed out that with regard to 'Hardware and Infrastructural Requirements' they had submitted the server architecture, the specific middleware, operating systems – the Web/Application Server as standalone that can be downgraded to a windows server 2003 web edition. Dr Portelli confirmed that the mandatory information requested at 3.1.5 with regard to system architecture had in fact been submitted.

Mr Falzon referred the PCAB to the last paragraph of 3.1.4 which stated:

*“Bidders shall provide full specifications of the hardware required. THE CONTRACTING AUTHORITY reserves the right not to procure the quoted hardware from the Bidder.”*

Mr Falzon added that no software could function without the necessary hardware.

The PCAB remarked that earlier on the appellants had explained that the proposed solution did not require any specific hardware but could function with any kind of hardware and that, as a result, the contracting authority could opt to purchase any type of hardware. He added that the term ‘any’ used in clause 3.1.4 could not be overlooked.

Mr James Deguara, a member of the adjudicating board, pointed out that ‘any’ referred to *specific or propriety hardware* and not to the hardware proper required to run the system. This necessitated, continued Mr Deguara, that a tenderer was required to quote for the actual hardware and that in case there was no need for specific or propriety hardware then no quote was expected. Mr Deguara conceded that term ‘any’ might have been misused in clause 3.1.4.

The Chairman PCAB observed that the tender specifications were not clear as to whether the hardware specifications were actually required and that also emerged from the title of the tender itself which referred to the supply of a software system and not to the supply of hardware.

Dr Portelli insisted that her client submitted all the information requested even with regard to hosting requirements. She reconfirmed that it was the responsibility of Loqus Ltd to integrate its solution with whatever hardware would be eventually provided by the contracting department as per declaration made in the tender submission. Dr Portelli also pointed out that solution costs referred to the licensing, implementation costs referred to project management and services whereas maintenance and support costs referred to software and not to software and hardware.

The PCAB expressed the view that the tenderer was providing the software as requested in the call for tender itself and was leaving the contracting authority at liberty to purchase whatever hardware it opted for once its solution could be integrated with any kind of hardware. The PCAB added that the terms ‘software’ and ‘hardware’ were quite distinct and one did not automatically include the other.

The PCAB wondered how the adjudicating board could disqualify a bidder on something that the bidder was not requested/bound to supply, in this case, the hardware, when, on the other hand, the bidder submitted all that was requested with regard to the software solution which it had to supply according to this call for tenders. He noted that the hardware was to be supplied by the contracting department and Loqus Ltd felt it up to the contracting department to decide the type and cost of the hardware while indicating that his solution would function on any hardware.

At this stage Dr Portelli referred again to page 27 clause 3.1.2., 'Systems integration', where it was stated that the Ministry for Resources and Rural Affairs was to specify the weighing equipment. Dr Portelli stated that no specifications thereof were provided in the tender document and, as a consequence, the tenderer could not submit any quote in the absence of such basic information.

The Chairman of the Adjudicating Board intervened to remark that the board had nothing to do with the drawing up of the tender specifications.

Dr Portelli concluded that pages 98 and 99 in Annex C8 referred to information with regard to the architecture and design together with the hosting server and the servers for year 1 and 2. Furthermore, page 101 referred to the 'Rack Layout Diagram' where her client inserted a note in the sense that the Company was only supplying the software and the contracting department could provide any kind of hardware once it had the minimum specifications. She added that her client submitted a sample Dell Server which, for all she knew, could have been of any of other make. Mr Falzon confirmed Dr Portelli's statement.

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 02.11.2009 and also through their verbal submissions presented during the public hearing held on the 09.12.2009, had objected to the decision taken by the General Contracts Committee;
- having taken note of the fact that, according to the appellant Company, (a) these had quoted a price against each item in the schedule, (b) the provision of hardware was not indicated as a mandatory requirement in the tender document as the latter solely laid down as mandatory the submission of specifications of hardware in case the proposed solution required any specific hardware - as a result, argued the appellant Company, considering that no specific hardware was required to implement the proposed solution there was no need for them to submit a quote for the hardware, (c) had submitted the requested 'system architecture' (attachment 'F'), 'the preferred hardware configuration' (pages 98 and 99) and even the 'operating system and database configuration' (page 74) and (d) it did submit Annex C8 (pages 98 to 106) which included the specifications of the servers, the number of servers required and also the specifications of a 'sample' server;
- having also taken note of the fact that, contrary to the appellant Company's claim, the adjudication board appointed by the contracting authority argued that (a) albeit, as verbally stated by the appellants' representative, Annex C1 of the appellants' tender submission quoted figures, yet, upon analysis, the adjudication board found that the figures quoted did not add up and, hence, not in a position to be adequately quantified and evaluated and (b) once the contracting authority requested a quote for the

hardware the said authority expected tenderers to submit the apposite quote and this was an issue which, according to the adjudication board, the appellant Company had completely overlooked;

- having heard the appellant Company maintain that, albeit insisting on the fact that the tender document did not request tenderers to do so, yet stated that it would be prepared to submit hardware specifications having only refrained to do so arbitrarily in order not to impose any specific hardware on the contracting department because its solution could integrate with any type/s of hardware;
- having also noted the appellants' representative's statement that the software solution, as proposed, was written by the same appellant Company and that the same solution had been used in different countries and presently was available off the shelf

reached the following conclusions, namely:

1. The PCAB cannot understand why the adjudicating board was not allowed to seek a clarification with a view to assist it in interpreting the figures that had already been quoted in the offer without any figures being effectively altered.
2. The PCAB also opines that the very fact that the price schedule (excluding 'Implementation Services' and 'Training'), as submitted by the tenderer (the appellant Company), amounted to € 272,500 and the official appellants' offer, as listed on the *Schedule of Tenders Received*, totalled €238,360 should have 'per se' necessitated some kind of clarification, especially, when one considers Mr Falzon's admittance that he could not tell how the figure of €238,360 in the schedule of tenders was arrived at as that was compiled by the Contracts Department at tender opening stage.
3. The PCAB feels that the title of the same tender document '*Tender for the Supply of Pitkali Market Software System*' tends to exclude the need for an obligatory quote for hardware and agrees with appellants' position wherein the latter maintained that it was providing the software as requested in the call for tender itself and was leaving the contracting authority at liberty to purchase whatever hardware it opted for once its solution could be integrated with any kind of hardware.

As a consequence of (1) to (3) above this Board finds in favour of the appellant Company and that their offer should be re-considered.

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 reimbursed.

Alfred R Triganza  
Chairman

Anthony Pavia  
Member

Carmel Esposito  
Member

16 December 2009