

PUBLIC CONTRACTS APPEALS BOARD

Case No. 185

M- 454/2009

Tender for the Supply and Maintenance of an Uninterrupted Power Supply (UPS) System

The closing date for this call for tenders, which was published on 03.06.2009 for a contracted estimated value of € 85,000 was 14.07.2009

Six (6) different tenderers submitted their offers.

On 21.10.2009 Messrs **Constant Power Solutions** filed an objection against the Department of Contracts' decision to award the above-mentioned tender to Messrs **Lexcorp Ltd.**

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 12.02.2010 to discuss this objection.

Constant Power Solutions

Mr Alexander German	Representative
Dr Stephen Thake	Legal Representative

Lexcorp Ltd

Mr George Gatt	Managing Director
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Malta Information Technology Agency (MITA)

Dr Pauline Debono	Legal Representative
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Adjudication Board

Mr Wayne Valentine	Chairman
Ms Rosalyn Muscat	Member
Eng. Martin Pizzuto	Member

Department of Contracts

Mr Francis Attard	Director General (Contracts)
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After the Chairman's brief introduction the appellant was invited to explain the motives of the objection.

Dr Stephen Thake, legal advisor to Constant Power Solutions, the appellant Company, explained that his client felt discriminated against in the way points were awarded, as had been indicated in the reasoned letter of objection dated 26th October 2009, especially with regard to the following two aspects, namely that his client

- (i) did not get points for providing extra goods/equipment, when it did provide a sensor and batteries; and
- (ii) lost points with regard to the set up of its business organisation

Dr Thake argued that, albeit his client was the only full-time employee, he was supported by two part-time employees who have been rendering him service for the past ten years. Dr Thake remarked that the size of the organisation did not necessarily matter in this case because larger organisations of, say, 40 employees, had a larger number of clients which used up all their resources, if not overstretching them too, whereas a small set up with a few clients meant that the owner could give his personal attention to all of his clients' needs. The appellant Company's legal advisor submitted that his client, with the support of two part-time employees, was in a position to offer the service required in the tender.

Dr Pauline Debono, representing MITA, observed that:

- (a) the appellant was objecting on 7 out of 51 criteria that the tender was adjudicated upon. As a consequence, she urged the PCAB to look at the overall picture of the adjudication process, including the fact that six bidders had participated in this call, so as to avoid having a distorted picture of the process; and
- (b) the PCAB could not get into the whole adjudication process with the expertise, know-how and detail that that entailed, that is, the PCAB could not substitute the adjudication board but it could only consider whether (1) all the bidders participated on the same level playing field and (2) the process was conducted in a fair and transparent manner. Yet, proceeded Dr Debono, the PCAB could not go into how the points were awarded to each item since it was not in a position to appreciate all the details, technical or otherwise, of the entire process.

The Chairman PCAB intervened and begged to differ on certain aspects raised by Dr Debono at (b) above.

Dr Debono remarked that the evaluation criteria were published in the call for tenders and that the tender was being evaluated on the lines of the 'Most Economically Advantageous Tender' (MEAT) where the price element was allocated 45% of the points and the other 55% were allocated to the capacity of the tenderer to provide the level of service requested and so forth. Dr Debono stressed that MITA requested preventive maintenance on a 24x7 basis and that urgent repairs had to be solved within 8 hours. She referred to page 5 of the adjudication report and drew the

attention of the PCAB that the appellant scored low with regard to his capacity to deliver the service requested - 82 points as against the 145 of the recommended tenderer - because of the following concerns:

- (i) in terms of human resources the appellant offered himself as the only full-timer backed up by two employees already in full-time employment elsewhere (one with Enemalta Corporation). Dr Debono argued that the adjudication board was concerned as to whether the appellant could provide the level of service requested in the tender having only one full-time technician;
- (ii) the lack of experience on the part of the appellant in providing and supporting similar systems; and
- (iii) the financial position of the appellant.

Dr Debono pointed out that, given that this was a tender which was being evaluated on the 'MEAT' concept, the appellant was awarded high marks for quoting the lowest price, i.e. 437.62 points or 70 points more than Lexcorp Ltd (368.01 points), the recommended tenderer, and pointed out that with that high score the appellant ranked second at the end of the adjudication process. Dr Debono explained that the table 'Resume' of Marks' incorporated the standing of the bidder at Part 2, the service requirements at Part 3 and the financial offer at Part 4, and that the table displaying the distribution of marks was published in the tender dossier at page 17.

Mr Alexander German, representing Constant Power Solutions, confirmed that he was the only full-time technical person available round the clock whereas the other two employees were part-timers.

The Chairman PCAB remarked that given that the estimated value of the tender was c. €96,000 over a five year period, from the balance sheet and the profit and loss account presented by the appellant, it appeared to him that the appellant could handle this contract. He also observed that under Part 2, which included financial stability, the appellant scored 82 whereas the recommended bidder scored 145 and asked for an explanation.

Mr Wayne Valentine, Chairman of the Evaluation Board, under oath, gave the following evidence:

- o the estimated value of the tender was €96,000 and represented the one-time purchase of equipment worth €64,000 with the rest covering the maintenance of the system;
- o the appellant made a declaration in his submission that he had no security with regard to his overdraft, provided his house by way of security and by way of performance guarantee provided his parents' company as a joint signatory. Mr Valentine added that the tender document requested, though not listed as one of the mandatory requirements (technical) at page 27 (3.3) of the tender document, the submission of the audited accounts for the past 3 years whereas the appellant submitted his accounts under his own

signature (unaudited). The adjudication board did not disqualify bidders for not submitting audited accounts but only reduced marks accordingly, in this case 2 points were deducted, which issue was not contested by the appellant;

- the difference of 63 points under Part 2 between the appellant and the recommended tenderer resulted from a number of aspects as detailed in the five-page document titled ‘Other Requirements’ attached to the adjudication report. As an example Mr Valentine referred to the fact that the appellant lost 20 points out of the 40 allocated for providing reference sites for the following reasons: (a) appellant indicated only 3 sites where he provided and supported similar equipment, i.e to Enemalta Corporation (DHR (administration) system not the core system of the same entity), Betfair Ltd and a bank even though he supplied - but not supported - such equipment to various other sites. On the other hand the other tenderers provided 8 or 10 such sites. Mr Valentine and Eng. Mark Pizzuto, member of the adjudication board, although conceding that the tender dossier did not specify the number of reference sites requested, yet, they argued that it was in the interest of the tenderers to demonstrate their experience in this field as that that would surely be to their advantage in a competitive process. They added that the adjudication board did not evaluate the references only in terms of the number submitted but also in terms of quality/capacity because the tender specified that, besides being supported, the system had to be greater than 25 KVA;
- he himself had collaborated on other projects with the appellant, e.g. he was the Chairman of the adjudication board when Mr German was awarded the Enemalta Corporation tender, a claim that Mr German confirmed during the same public hearing.

The Chairman PCAB remarked that the main concern of the PCAB was to ensure that the tendering process was fair and transparent. He continued that, whilst the contracting authority had every right to demand additional comfort in terms of financial standing and/or experience on the part of the bidders, yet, it would have been better for the same authority to clearly specify such requirements in the tender document rather than making open-ended requests and to publish in the tender document any ‘internal’ guidelines that would be used at adjudication stage. The Chairman PCAB argued that contractors needed to know exactly what the contracting authority was after so as to determine if they had the capacity to deliver the service at the level required and thus avoid unnecessary loss of time and resources.

The Chairman PCAB then referred Mr Valentine to page 4 of the adjudication report which, inter alia, read “... *More importantly, Lexcorp has offered MITA an excellent and efficient service over the past years*” and asked whether that statement represented a conditioning on the part of the adjudication board since the recommended tenderer was well-known to the contracting authority. Mr Valentine stated that there was no such conditioning on the part of the adjudication board and added that:

- a. the fact that Lexcorp Ltd provided a good service to MITA was to its advantage as much as it would have been to its disadvantage had it provided a poor service to MITA;
- b. Lexcorp Ltd had 14 UPS systems with MITA together with other systems, e.g. at Public Health and Civil Aviation departments; and
- c. apart from Lexcorp Ltd, MITA had also contracted the services of other firms like Sirap Ltd and Elektra Ltd (at Mater Dei) both of them taking part in this same tender being the subject of the same appeal.

Mr Valentine explained the ‘modus operandi’ of the adjudication board in the sense that

- a. two members made their assessment individually and then these individual assessments were thoroughly discussed with the third board member, Ing Martin Pizzuto, an external engineer contracted by MITA, to arrive at the final marks agreed upon by all three board members and
- b. the adjudication board did not evaluate a bidder throughout and then moved on to the next bidder but it evaluated all the tenderers on each and every item at the same time and so all bidders were accumulating marks progressively with each and every item on the evaluation grid.

Mr Valentine remarked that the adjudication board carried out a lengthy process as shown in the detailed tables attached to the report.

Dr Thake observed that the difference between the recommended tenderer and his client was of 7 marks and that, as a result, every point counted.

Mr Valentine explained that the adjudication board was of the opinion that one full-time person could not – and did not provide comfort - maintain a system of 3 UPSs with a preventive maintenance schedule and urgent repairs considering that a

- i. person would inevitably be sick at some time or other and, perhaps, even go abroad and
- ii. fault could take up to 12 hours of work to rectify and that there were instances when it took 3 persons to repair faults on such large systems

Mr Valentine stated that the configuration requested provided for 3 UPSs, 2 in operation and the other one as a sort of stand-by, and that, apart from standing in cases of power failure, this equipment also functioned as a voltage and frequency regulator.

The Chairman of the adjudication board added that the benchmark for resources was 10 points and that the appellant’s claim of having lost 9 points by being awarded 1 point was incorrect because the highest mark given in this regard was 5 and that mark was awarded to 3 bidders, among them Lexcorp Ltd that offered 3 to 5 personnel.

Mr Valentine further explained that the appellant scored 70 points more than the recommended tenderer because he quoted the price of € 64,000 whereas the average price quoted by the other bidders ranged between €89,000 and € 96,000, which meant that the points difference between the appellant and the recommended tenderer in terms of the other tender requirements, apart from the price, amounted to 77 points.

Following a question made by the PCAB, Mr Valentine informed those present that he, together with Eng. Mark Pizzuto, was also involved in the drawing up of the tender document. The PCAB expressed general disapproval that the officers who compiled the tender document were the same officers who were entrusted with the adjudication of the tenders. The Chairman PCAB remarked that this adjudication board appeared to have acted professionally and in good faith but having a situation where one acted as judge and jury at the same time was not ideal at all.

Dr Debono emphasised that since this was a competitive tender it was up to the bidders to present the best picture with regard to their resources and capacity because the adjudication board had the responsibility and the duty to award more points to those tenderers that provided the required or, even exceeded, the peace of mind that they could deliver the service up to the standard requested.

On his part, Dr Thake remarked that the situation was such that the contracting authority was adjudicating, by way of references, a firm which was already providing it with its services. He added that one had to also take into account that his client was a small entity with a small workload - according to the references provided – and, hence, it could cope adequately with its customers whereas a larger entity with, say, 6 employees, but having a larger number of references could find it hard to cope with its workload, it could in fact be overstretched.

Mr German remarked that, through experience, he could say that one person would cope with the maintenance of such UPSs.

Ing Pizzuto informed the hearing that the contracting authority had put a lot of emphasis in the tender dossier that these UPSs were required for extremely critical government departments and for the hospital and, as a consequence, the contracting authority was after a high level of comfort. He added that when one took into consideration the maintenance of such UPSs from the corrective point of view – not from a preventive point of view – he was of the opinion that one person could not cope with any kind of fault that could develop. Mr Pizzuto declared that he had a working relationship with both the appellant and the recommended tenderer and that if he were asked he would have advised the appellant not to participate in this tender. Mr Pizzuto remarked that the adjudication board had looked into the tendering process in a holistic manner and not at any item in particular. Dr Thake intervened to observe that, in spite of all the stress laid on how critical this service was, the adjudication board had allocated to it 10 points out of 1000 points. Mr Valentine continued by explaining that in spite of the fact that in case these UPSs failed MITA had another back up, yet, it was also a fact that, during such instances, it would be running at considerable risk.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 26.10.2009 and also through their verbal submissions presented during the public hearing held on the 12.02.2010, had objected to the decision taken by the General Contracts Committee;
- having taken note of the fact that Constant Power Solutions, the appellant Company (a) felt discriminated against in the way points were awarded, (b) did not get points for providing extra goods/equipment, when it did provide a sensor and batteries, (c) lost points with regard to the set up of its business organisation arguing that larger organisations cannot provide the same personal service and (d) claimed that with the support of two part-time employees, was in a position to offer the service required in the tender;
- having also considered the fact that Mr German was the only full-time employee supported by two part-time employees who have been rendering him service for the past ten years;
- having also taken note of Dr Debono’s intervention, which, inter alia, highlighted the fact that (a) the appellant was objecting on 7 out of 51 criteria that the tender was adjudicated upon, (b) six bidders had participated in this call, (c) MITA requested preventive maintenance on a 24x7 basis and that urgent repairs had to be solved within 8 hours, (d) in terms of human resources the appellant offered himself as the only full-timer backed up by two employees already in full-time employment elsewhere (one with Enemalta Corporation), an issue which caused concern to the adjudication board, (e) the appellant Company demonstrated lack of expertise in providing and supporting similar systems and (f) the appellant’s financial position posed a problem;
- having heard Mr Valentine, Chairman of the Evaluation Board (a) state that the appellant made a declaration in his submission that he had no security with regard to his overdraft, provided his house by way of security and by way of performance guarantee provided his parents’ company as a joint signatory, (b) contend that the difference of 63 points under Part 2 between the appellant and the recommended tenderer resulted from e.g. forfeiting 20 points out of the 40 allocated for providing inferior reference sites, not just in amount of such size but also in terms of quality/capacity because the tender specified that, besides being supported, the system had to be greater than 25 KVA, (c) state that he himself had collaborated on other projects with the appellant, e.g. he was the Chairman of the adjudication board when Mr German was awarded the Enemalta Corporation tender, a claim that Mr German confirmed during the same public hearing, (d) explain the *modus operandi* adopted by the adjudication board, (e) argue that the adjudication board was of the opinion that one full-time person could not maintain a system of 3 UPSs with a preventive maintenance schedule and urgent repairs considering that a person would inevitably be sick at some time or other and, perhaps, even go abroad and a fault could take up to 12 hours of work to rectify and that there were instances when it took 3 persons to repair faults on such large systems, (f) also

argue that, with regards to resources, the appellant's claim of having lost 9 points by being awarded 1 point was incorrect and (g) explain that the appellant scored 70 points more than the recommended tenderer because he quoted the price of € 64,000 whereas the average price quoted by the other bidders ranged between € 89,000 and € 96,000, which meant that the points difference between the appellant and the recommended tenderer in terms of the other tender requirements, apart from the price, amounted to 77 points;

- having considered the fact that page 4 of the adjudication report, *inter alia*, read “... More importantly, Lexcorp has offered MITA an excellent and efficient service over the past years” as well as the explanation given by Mr Valentine in regard;
- having also heard Ing Pizzuto (a) state that the contracting authority had put a lot of emphasis in the tender dossier that these UPSs were required for extremely critical government departments and for the hospital and, as a consequence, the contracting authority was after a high level of comfort, (b) also state that when it took into consideration the maintenance of such UPSs from the corrective point of view – not from a preventive point of view – he was of the opinion that one person could not cope with any kind of fault that could develop and (c) declare that if he were asked he would have advised the appellant not to participate in this tender,

reached the following conclusions, namely:

1. The PCAB feels that officers who compile tender documents should not be the same officers who are entrusted with the adjudication of the tenders;
2. The PCAB also feels that, especially within a MEAT context, it is up to the bidder to present the best picture with regard to one's own resources and capacity;
3. The PCAB opines that UPSs were required for extremely critical government departments and for the hospital and, as a consequence, the contracting authority was after a high level of comfort and, given the circumstances, this Board feels that the adjudication board was correct in maintaining that one person with the back up support of two part-timers will not be able to cope with any kind of fault that may develop.
4. The PCAB, whilst it argues that, albeit it is true that the contracting authority had every right to demand additional comfort in terms of financial standing and/or experience on the part of the bidders, yet, it would have been better for the same authority to clearly specify such requirements in the tender document;
5. The PCAB feels that tenderers needed to know exactly what the contracting authority was after so as to determine if they had the capacity to deliver the service at the level required and thus avoid unnecessary loss of time and resources;

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 feels that since the objection filed by appellant Company was not lodged capriciously, as a consequence, it recommends that the deposit submitted by the appellants should be reimbursed.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

11 March 2010