

PUBLIC CONTRACTS APPEALS BOARD

Case No. 190

Advert No CT 245/2009 - CT 2569/07

Tender for the Supply, Delivery, Installation and Commissioning of a Various Equipment for State Schools Science & Technology Laboratories (Lots 2 and 6)

The closing date for this call for tenders published on 30.06.2009 was 25.08.2009.

Re: Lot 2
Seven (7) different tenderers submitted offers which were considered as administratively and technically compliant

Re: Lot 6
Three (3) different tenderers submitted offers which were considered as administratively and technically compliant

The total amount budgeted for this tender – Lots 1 to 7 - was € 2,489,064 (excluding VAT).

On 18.01.2010 Messrs *Labo-Pharm Ltd* filed an objection against the intended award of the tender in caption (Lots 2 and 6) to *Cherubino 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 05.03.2010 to discuss this objection.

Present for the hearing were:

Labo-Pharm Ltd

Dr Michael Psaila LL.D.	Legal Representative
Dr Simon Tortell LL.D.	Legal Representative
Mr Stephen Debono	

Cherubino Ltd

Dr Adrian Delia LL.D.	Legal Representative
Dr Francis Cherubino LL.D.	
Mr David Basile Cherubino	

Ministry of Education, Culture, Youth and Sport

Dr Stephen Zammit	Legal Representative
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Adjudication Board

Mr Raymond J. Camilleri	Chairperson
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Mr Duncan Pulis
Ms Desiree Scicluna Bugeja
Mr Mario Falzon
Mr Gaetano Bugeja
Mr Franco Costa
Mr Anthony Pace

Secretary
Evaluator
Evaluator
Evaluator
Evaluator
Evaluator

Department of Contracts

Mr Francis Attard

Director General (Contracts)

After the Chairman PCAB's brief introduction about this case the appellant Company's representatives were invited to explain the motives of the objection. This was followed by the intervention of (a) the Ministry of Education, Culture, Youth and Sport's legal representative, (b) the recommended tenderer, namely, Cherubino Ltd and (c) the Director General Contracts.

Dr Michael Psaila, legal representative of Labo-Pharm Ltd, the appellant Company, commenced his intervention by stating that, in their motivated letter of objection dated 21 January 2010, they explained and indicated that at paragraph 'A' of the Instructions to Tenderers, which was in the first page of the tender document under reference, it was clearly specified in bold that:

'Tenderers are expected to examine carefully and comply with all instructions, forms, contract provisions and specifications contained in this tender dossier. Failure to submit a tender containing all the required information and documentation within the deadline will lead to the rejection of the tender'

He continued by saying that, apart from this, under *Clause 11.3 A financial bid calculated on a basis of DDP for the supplies tendered, including if applicable*, which was to be inserted ONLY in Package 3, tenderers were required to submit, *inter alia*:

'(e) the details of the bank account into which the payment shall be made (as per Financial Identification Form attached)'

Furthermore, Dr Psaila, proceeded that, among the items that had to be examined at the administrative compliance stage, were the documentation indicated under clause 11 since the 'Administrative Compliance Grid', required, amongst other things, a reply for its query

"Is documentation complete as per Article 11 Content of tenders of the Instructions to Tenderers? (Y/N)"

He contended also that, in every tender, there was a template of the *Financial Identification Form* which was always indicated as a tender requirement by the Department of Contracts. The appellant Company's lawyer said that, as a matter of fact, there was another appeal regarding a tender in connection with roads where one of the reasons given as to why Polidano Group's offer was rejected was that they did not submit such a document.

At this point his attention was drawn by another interested party's legal representative, namely, Dr Adrian Delia, that this case has not yet been heard by the PCAB, the appellant Company's legal representative explained that he just wanted to highlight the fact that it was clear that it was a standard practice of the Department of Contracts that any document that was requested had to be submitted, otherwise such tender would not be considered as administratively compliant and would be rejected.

He said that, as a matter of fact, as far as Lot 6 was concerned, on the ‘Summary of Tenders Received’ that was signed by the General Contracts Committee and published on the Department of Contracts’ notice board, it was noted that the *Financial Identification Form* pertaining to the recommended tenderer was missing. Dr Psaila also said that, on the Department of Contracts’ website, there was indicated that the *Financial Identification Form* was missing for both Lots 2 and 6.

As a consequence, they were contending that, once the tender requirements were clear and that this document was not submitted as requested, the offer of Cherubino Ltd should not be accepted.

Dr Stephen Zammit, legal representative of the Ministry of Education, Culture, Youth and Sport, commenced his intervention by stating that, from inquiries carried out, it resulted that the *Financial Identification Form* was one of the documents that was presented by Cherubino Ltd and, therefore, they could not understand how it was being stated that it was not submitted. However, in reply to a specific question by the PCAB, Dr Zammit confirmed that this document was inserted in Package 2. He pointed out also that the basis of the appeal was that the *Financial Identification Form* was not submitted.

Dr Psaila intervened by stating that he was confused because the document that was signed and issued by the General Contracts Committee clearly stated that such a document was missing. He said that it was only during these proceedings that they became aware of the fact that this document had been inserted in the wrong package. Furthermore, Dr Psaila explained that they based their appeal on the documentation available. However, he contended that, once it has been declared that the *Financial Identification Form* had been inserted in the wrong package then there was another grievance because Clause 11.3 clearly specified that this document had to be inserted ONLY in Package 3. Dr Psaila maintained that once this document was inserted in Package 2 it should not have been considered admissible.

Dr Adrian Delia, legal representative of Cherubino Ltd, said that, apart from quoting from the article of the ITT mentioned by the appellants, there were other articles which had to be complied with. He said that article 26.2 specified that:

“Payments due by the Contracting Authority shall be made to the bank account mentioned on the financial identification form completed by the Contractor”

Dr Delia emphasised that this referred to the number of the Bank account into which the payment had to be made and not to the ‘financial statement’ or the ‘financial capability’ or the ‘financial position’ or the ‘financial status’ of the tenderer. The recommended tenderer’s legal advisor also pointed out that this had to be submitted by the contractor and not the tenderer, that is, after the award of the contract. He argued that, as a

consequence, this was not a mandatory document that was required under the terms of clause 11.3 referred to by the appellant Company's legal representative.

Dr Delia stated that, as a state of fact, the list indicated under Clause 11.3 was not mandatory because of the words "*including if applicable*". Furthermore, he maintained that no reference was made to the *Financial Identification Form* in the Index of this tender. Dr Delia contended that it was absolutely not true that Package 2 was only "technical" and that Package 3 was only "financial". He said that clause 11.2, which referred to the information that had to be inserted in Package 2 (technical bid) *inter alia* stated that:

e) Contact Details of the Tenderer/s in the duly signed form provided in Annex VII – Details of Bidder

and

f) Information related to the selection criteria as per Article 3.6 of the Instructions to Tenderers.

Messrs Cherubino Ltd's lawyer said that Article 3.6 referred to the 'financial statements' and, in this particular tender, it was specifically requested that such documents were to be submitted in Package 2. He maintained that it could not be argued that a 'financial statement' that included an account number could not be inserted in Package 2.

Dr Delia said that all the arguments brought forward by the appellant Company's legal representative were unfounded because:

- a. the submission of the *financial identification form* was not mandatory;
- b. the *financial identification form* had to be completed by the contractor and not the tenderer;
- c. clause 11.3 quoted by the appellants stated 'if applicable' and
- d. in Package 2, reference was specifically made to Article 3.6 wherein tenderers were requested to submit all financial information.

Dr Delia said that on the basis of appellant Company's argument that financial information had to be inserted in Package 3, with the permission of the PCAB and if considered relevant, he would ask any witness from Labo-Pharm Ltd to state whether the appellants had submitted the financial information in Package 2 because otherwise even they should have been excluded.

Dr Psaila maintained that there was a big difference between a 'financial statement' and the 'financial bid' because the former showed the financial capabilities of the company and the latter was the financial offer in respect of a particular tender. He said that such requirement was so applicable that the Department of Contracts or the Contracting Authority wanted to know in which bank account payments were to be made.

Dr Tortell insisted that this tender stipulated that the details of the bank account had to be inserted ONLY in Package 3. .

At this stage it was decided to call Mr Francis Attard, Director General (Contracts) to the witness stand. He gave his testimony under oath.

On cross examination by the PCAB, Mr Attard testified that the scope of the *financial identification form* was that, if, eventually, the bidder was awarded the contract and, as a result, would need to be paid for works carried out or services rendered, as well as, for supplies provided, the contracting authority would know the details where payments due had to be made. He also confirmed that the *financial identification form* did not show the financial standing or status of the bidder and that it had no bearing on the evaluation process. The Director General (Contracts) said that, according to the Public Contracts Regulations and the tender conditions, the significance of '*financial*' in the context for insertion in Package 3, was the financial offer by which a tenderer would be competing with its rivals for a particular call for tenders.

When specifically asked to state whether the *financial identification form* was part of the financial offer, the reply given by Mr Attard was in the negative. He also said that, normally, the *financial identification form* was requested for submission in Package 2 and therefore, in this tender, they could have made a mistake. It was confirmed that, if the *financial identification form* was missing or displaced, it did not prejudice government's interests and that it was applicable if it was one of the mandatory requirements.

Mr Attard said that the conditions published in a particular tender were pivotal as these were binding. He proceeded by stating that he could not exclude the possibility that in other tenders the *financial identification form* might have been requested for insertion in Package 3 but, normally, it is requested in Package 2.

At this stage, Dr Tortell intervened by insisting that, contrary to what was being stated by the Director General (Contracts), such document was always requested in Package 3 and that it was never requested in Package 2. The appellant Company's lawyer acknowledged that it only included the account number and that its importance was questionable, however, it was not correct to state that, normally, it was requested in Package 2.

Dr Delia said that, in substance, his client did not fail because there was anything that was required for the purpose of evaluation that was not submitted. He said that the evaluation process could have been prejudiced if the price were to be disclosed in Package 2. The lawyer also said that he did not think that his colleague was correct when he said that Package 2 referred to the technical bid only because in this package there was also the administrative compliance, which among other things, apart from the tender price which had to be inserted in Package 3, included the "financial part". At this point, he referred to the above-mentioned Article 3.6 and also Clarification 1 that was issued by the Department of Contracts on the 28 July 2009 that was sought before the submission of the tender wherein it was stated that:

‘The final beneficiary would be ready to accept “Financial Statements” instead of Full Audited Accounts, which Financial Statements would still however, be required to be verified by an independent auditor/accountant...’

and also required

‘An appropriate statement from his bankers, indicating his financial standing would still be required.’

Dr Delia questioned whether the financial statements that were inserted in Package 2 would be considered invalid if these included a bank statement with an account number. He argued that if Package 2 included data that was also requested in Package 2 then it was no longer mandatory to be re-submitted in Package 3.

The Chairman PCAB pointed out that it was the balance of the account that mattered and not the account number because the account number on the *financial identification form* could easily be changed. Furthermore, he said that the choice of words that was being used in the specifications created confusion because it was not possible to establish what was applicable or mandatory. It was also stated that one could not have something which was ‘mandatory’ and ‘if applicable’.

With regard to what was stated by Dr Delia regarding the distinction between a tenderer and a contractor, Dr Psaila said that everyone knew that a tenderer would become a contractor after being awarded the tender and that the contract would be signed with the latter. He said that such details were necessary because, on signing the contract, reference would be made to the information given in the *financial identification form* which in, this particular tender, had to be inserted in Package 3. Dr Tortell emphasized that, under normal circumstances, whenever a tenderer made this type of mistake their tender was disqualified. He said that, earlier on, reference was made to an objection relating to a €40m roads tender because the appellant Company was rejected for the same reason indicated in the Contacts Department’s schedule and website, namely, because they did not submit the *financial identification form*. He reiterated that, although it was acknowledged that, in substance, they did not make a serious mistake, the regulations were identical for everybody and, in this case, all tenderers had to insert the *financial identification form* in Package 3 and not in Package 2.

Continuing with his testimony, Mr Attard said that the General Contracts Committee had followed the same procedure adopted in all other tenders and that it decided to award Lots 2 and 6 to Cherubino Ltd on the basis of the Evaluation Committee’s recommendations. The witness testified that he did not recall that they had discussed the issue regarding the missing *financial identification form* after the receipt of the Evaluation Committee’s report. He emphasized that, although this form was reported missing in Package 3, it was not found missing from the whole offer.

Dr Tortell intervened to point out that on the Department of Contracts' website it had been indicated that the *financial identification form* of Cherubino Ltd was missing from Package 3 because everyone knew that it had to be inserted in this package and not in Package 2.

In his concluding remarks, Dr Delia explained that the *financial identification form* was not inserted in Package 3 because it was part of the documents inserted in Package 2 as specified in clause 11.2 (f) *Information related to the selection criteria as per Article 3.6 of the Instructions to Tenderers*. He reiterated that this document was not even mentioned in the 'Index/Annexes'. The recommended tenderer's lawyer argued that his clients did nothing wrong when they did not re-submit the *financial identification form* in Package 3 once this document had already been inserted in Package 2 and considering the fact that under clause 11.3 it was stated '*if applicable*'.

Dr Tortell concluded by stating that article 3.6 did not specify the account number as specifically requested in the *financial identification form* but requested tenderers to submit copies of audited accounts and the bank reference(s). He contended that, apparently, someone made a mistake by inserting the 'form' in the wrong package and, as a result, such a tender should be declared 'null' once they did not comply with the tender's specific instructions. He agreed that, in substance, this clause was useless but he felt that the PCAB had no alternative in the terms of the conditions of this tender. Dr Tortell said that, albeit the Director General (Contracts) was stating that, normally, this form was requested in Package 2, under clause 11.3 it was clearly specified that "*this information is to be inserted ONLY in Package 3*". As a consequence, he maintained that the arguments brought forward and the clauses referred to by Dr Delia were all irrelevant because the tender conditions did not permit that such a document be inserted in Package 2.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated 18.03.2010 and also through their verbal submissions presented during the public hearing held on the 05.03.2010, had objected to the decision taken by the General Contracts Committee;
- having taken note of the appellant's legal representative's claims regarding the fact that (a) with regards to Lot 6, the 'Summary of Tenders Received' that was signed by the General Contracts Committee and published on the Department of Contracts' notice board, it was noted that the *Financial Identification Form* pertaining to the recommended tenderer was missing, which offer, *sui generis*, should have led to outright rejection, (b) the recommended tenderer's *Financial Identification Form* was inserted in the wrong package, namely 2 instead of 3 as was specifically stated in Clause 11.3 of the Tender document, (c) this tender stipulated that the details of the bank account had to be inserted ONLY in Package 3, (d) there was a big difference between a 'financial statement' and the 'financial bid' because the former showed the financial capabilities of the

company and the latter was the financial offer in respect of a particular tender, (e) contrary to what had been stated by the Director General (Contracts), the *Financial Identification Form* was always requested in Package 3 and that it was never requested in Package 2, (f) although it was acknowledged that, in substance, the appellant Company did not make a serious mistake, the regulations were identical for everybody and, in this case, all tenderers had to insert the *financial identification form* in Package 3 and not in Package 2, so much so that on the Department of Contracts' website it had been indicated that the *financial identification form* of Cherubino Ltd was missing from Package 3 because everyone knew that it had to be inserted in this package and not in Package 2 and (g) the appellants agreed that, in substance, this clause was useless but he felt that the PCAB had no alternative in the terms of the conditions of this tender;

- having taken note of the contracting authority's (a) claim that, from inquiries carried out, it transpired that the recommended tenderer's *Financial Identification Form* was one of the documents that was presented and (b) confirmation that the recommended tenderer's *Financial Identification Form* was inserted in Package 2;
- having also taken note of the recommended tenderer's legal advisor's comments relating to (a) particularly, article 26.2 which, according to the same lawyer, referred to the number of the Bank account into which the payment had to be made – which was not a mandatory document - and not to the 'financial statement' or the 'financial capability' or the 'financial position' or the 'financial status' of the tenderer, (b) the fact that the list indicated under Clause 11.3 was not mandatory because of the words "*including if applicable*", (c) the 'financial statements' wherein these had been specifically requested to be submitted in Package 2 and which, according to the same interested party's lawyer it could not be argued that a 'financial statement' that included an account number could not be inserted in Package 2, (d) the *financial identification form* only included the account number and that its importance was questionable, (e) the fact that the *financial identification form* had to be completed by the contractor and not the tenderer and (f) the fact that , in substance, his client did not fail because there was anything that was required for the purpose of evaluation that was not submitted;
- having heard the DG Contracts (a) state that the scope of the *financial identification form* was that, if, eventually, the bidder was awarded the contract and, as a result, would need to be paid for works carried out or services rendered, as well as, for supplies provided, the contracting authority would know the details where payments due had to be made, (b) confirm that the *financial identification form* did not show the financial standing or status of the bidder and that it did not form part of the financial offer and, as a result, it had no bearing on the evaluation process, (c) state that according to the Public Contracts Regulations and the tender conditions, the significance of '*financial*' in the context for insertion in Package 3, was the financial offer by which a tenderer would be competing with its rivals for

a particular call for tenders, (d) state that, normally, the *financial identification form* was requested for submission in Package 2 and therefore, in this tender, they could have made a mistake, (e) confirm that, if the *financial identification form* were to go missing or be displaced, it would not mean that this would, somehow, prejudice government's interests and (f) state that he could not exclude the possibility that in other tenders the *financial identification form* might have been requested for insertion in Package 3 but, normally, it is requested in Package 2,

reached the following conclusions, namely:

1. The PCAB feels that, in this particular instance, especially in consideration of the DG Contracts' testimony, it has to acknowledge that the contracting authority and the Department of Contracts had made a mistake by referring to the wrong package in the tender conditions. In this context, prior to reaching its decision, the PCAB also reflected on the fact that such a mistake did not in any way disadvantage any of the participating tenderers.
2. Furthermore, this Board feels that the DG Contracts' testimony also provided more than adequate assurances about (a) the significance of the *financial identification form*, (b) the immateriality surrounding the package in which it should be submitted as compared to the need for it to be submitted in whichever package as long as it is submitted and (c) the significance of 'financial' in the context of type of document which needs to be inserted in Package 3 vis-a-vis the 'financial offer' by which a tenderer would be competing with other tenderers for a particular call for tenders - in this instance, this Board concluded that an account number does not, in any way, alter or effect competitive forces.
3. It also agrees with the submission of Dr. Delia that, as requested in the Tender Document, the *financial identification form* was not mandatory.

As a consequence of (1) to (2) 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 be reimbursed since the appeal may have been prompted by misleading information published by the Department of Contracts.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

18March 2010