

PUBLIC CONTRACTS APPEALS BOARD

Case No. 191

CT/2253/2007; Advert CT308/2007 GPS 68.333.T.07.BM Tender of Chemistry Reagents with Equipment on Loan

This call for tenders relating to a contract running for a period of 36 months and with an estimated value of € 1,682,113 (Lm 722,131) was originally published in the Government Gazette on 28.07.2007. The original closing date for this call for offers was 13.11.2007.

Four (4) different tenderers had originally submitted their offers.

On 24.11.2009 Messrs Vivian Corporation Limited filed an objection against the decision taken by the Contracts Department to disqualify its bid for being adjudicated administratively/technically non-compliant since the delivery period was not according to tender specifications and conditions.

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 22.03.2010 to discuss this objection.

Present for the hearing were:

Messrs Vivian Corporation Ltd

Dr Kenneth Grima	Legal Representative
Ms Joanne Cremona	Representative
Ms Denise Borg Manche'	Representative
Mr Gordon Zammit	Representative

Government Pharmaceutical Services

Ms Anne Debattista	Director
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Evaluation Board

Ms Miriam Dowling	Chairperson
Dr Gerald Buhagiar	Consultant in charge
Dr Christopher Barbara	Chairman Pathology
Ms Carmen Buttigieg	Member
Mr Carlo Calamatta	Technical Specifier

Department of Contracts

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

Dr Kenneth Grima, legal representative of Vivian Corporation Ltd, the appellant Company, remarked that, in his view, the case in question ought to be decided upon very rapidly for the following reasons, namely:

- a) it turned out that his client was at one stage adjudicated as compliant. Nevertheless, continued Dr Grima, one year later, following an appeal by one of the two bidders that had been judged non compliant - an appeal that resulted in the readmission of the objecting party following which, technically, there should have been three compliant bidders still in the running - his client was informed that the Company's bid was found to be non-compliant;
- b) what appeared to have happened was that the evaluation board had overlooked something and this aspect came to light at a later stage which prompted the evaluation board to reject his client's offer;
- c) referring to page 4 of the decision dated 18th November 2008 with regard to PCAB Case No. 134 (CT/2253/07) – in respect of the objection raised by Olympus Italia – Dr Grima quoted what Dr Buhagiar had remarked in the sense that *V.J. Salamone Marketing Ltd and Vivian Corporation Ltd met the requirements and, consequently, were recommended to proceed to the third stage.*

Ms Anne Debattista, representing the Government Pharmaceutical Services (GPS), the contracting authority, remarked that the offer presented by the appellants was technically compliant but during the summer of 2009 there cropped up a problem with regard to the delivery period in the sense that the requested delivery period was between 4 to 6 weeks whereas the appellant quoted a delivery period of 6 to 8 weeks for the chemistry reagents. She added that there was no problem with regard to the delivery of the equipment. Ms Debattista, whilst confirming that the appellant Company was found compliant in the first report of the evaluation board, yet, following the first appeal by Olympus Italia, the contracting authority had obtained the clarifications indicated in the sentence handed down by the PCAB and, as a consequence, the evaluation board drew up another (2nd) report which was submitted to the Contracts Committee. She stated that it was at that moment in time, precisely on the 23rd July 2009, that the Contracts Committee referred the file back to the Government Pharmaceutical Services because the delivery period given by the appellants did not correspond to that requested in the tender document.

The Chairman PCAB intervened and stated that he could not comprehend why in 2010 the PCAB was still dealing with the same call for tenders in spite of the fact that it had decided an appeal relating to this same tender way back in 2008! He added that the timeline of events was rather difficult to accept in the sense that the PCAB issued a decision in November 2008, then another evaluation report was sent to the Contracts Department in July 2009 and in March 2010 the PCAB has, once again, been called upon to decide on another appeal, which appeal dealt with the delivery period being 6 to 8 weeks instead of 4 to 6 weeks when this process has been dragging on for a couple of years. The Chairman PCAB remarked that the fact that

the PCAB had given only one week to obtain the necessary clarifications was, *sui generis*, an indication that the clarification requested was not complex in its nature.

Dr Christopher Barbara, Chairman of the Pathology Department, remarked that the call for tenders was issued in February 2007 at the time when St Luke's Hospital was still in operation. He added that when operations moved to Mater Dei Hospital they experienced a complete change in the way tests were carried out and communicated to doctors, a 'modus operandi' which necessitated the introduction of new software which made test results available to doctors online thus eliminating the possibility of errors in transcription. Dr Barbara pointed out that, since 2007, substantial developments had taken place in this field with regard to both quality and price such that the specifications of the tender in question were, at this stage, practically obsolete. Dr Barbara informed the PCAB that in October 2009 a financial authority was issued for the Health Department to contract this service so as to bridge the gap between the previous contract which had expired and this tender which was still in the process. Dr Barbara acknowledged that should this tender be awarded the contracting authority would end up with a 'white elephant'.

The Chairman PCAB remarked that the cancellation of this tender in the prevailing circumstances ought to be an administrative issue and should, therefore, be decided upon by those quarters. He added that the PCAB should not be called upon to decide on an appeal conscious that the service requested in this tender in question was no longer required and would result in a sheer waste of public money.

Dr Gerald Buhagiar, consultant in charge, gave the following evidence:

- the contracting authority never raised any problems with regard to the delivery period of these items because experience had demonstrated that, in practice, the goods were delivered well before the deadline;
- he conceded that a lot of time was wasted in this tendering process and expressed the view that most of it was on the part of the Contracts Department;
- he agreed that it did not make sense to proceed further with this tender and added that, once this call for tenders was still in progress, the department could not initiate another tender incorporating up-to-date specifications;
- the contracting authority had acted upon the decision of the PCAB regarding the first appeal; and
- this was an essential supply contract in the delivery of a public health service and that within a year something had to be done since the bridging contract would expire.

At the request of Mr Francis Attard, Director General Contracts, Dr Buhagiar, Dr Barbara and Ms Debattista furnished the following timeline of events:

- a. the closing date of tender (extended) was 11.12.2007
- b. the first evaluation report was referred to Contracts Department on 14.04.2008

- c. the PCAB decided on the appeal on 18.11.2008 which decision was communicated to the contracting authority on 4.12.2008
- d. on 10.12.2008 the Contracts Committee authorised the contracting authority to seek the clarifications from Olympus Italia
- e. an internal issue arose in the sense that in April 2009, when operations were shifted to Mater Dei Hospital, a new data management software was introduced which software had to be reflected in the tender specifications so as to render possible the interfacing between the hardware and the software
- f. the second adjudication report (incorporating the clarifications) was referred to Contracts Department in mid July 2009
- g. on 23.07.2009 the Contracts Committee raised the issue with regard to the delivery period given by the appellant Company

Dr Barbara stated that in view of the continuous technological developments that take place in this field of science this kind of tender was issued every three years so as to enable the department to obtain the latest technology and consequently provide a better service.

Ms Debattista stated that she had raised with the Contracts Department the question of the length of time being taken up in the processing of tenders in general but not specifically on this particular tender. She informed the PCAB that the estimated price of this tender was Lm 700,000.

The Chairman PCAB informed those present that albeit the PCAB was meant to deal with whether a tendering process was conducted in a correct and transparent manner, yet, in this particular instance, that aspect was, at this stage, irrelevant once the technical experts both agreed that the service originally requested was no longer required since technological developments had rendered it obsolete.

Dr Grima intervened to, *inter alia*, argue that

- (i) his client was compelled to lodge an appeal because its offer was disqualified for being adjudicated non-compliant
- (ii) the terms of reference of the PCAB called upon it to decide on the appeal before it
- (iii) he opined that the PCAB ought to decide in favour of his client thus resulting in the refund of his client's deposit and
- (iv) it was up to other quarters to decide whether it was in the national interest to proceed with this call for tenders or to cancel it

On her part, Ms Debattista explained that the whole process was lengthy and complex because it involved, among others, the financial, technical and administrative aspects, which aspects were not all within her department's control.

Mr Attard shared the view that the whole process was a complex one as it entailed various aspects, stages and departments, e.g. Ministry of Finance, the contracting department and the Contracts Department, and that as a consequence, it was difficult to forecast the time required to process a fresh call for tenders for the provision of this service.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 24.11.2009 and also through their verbal submissions presented during the public hearing held on the 22.03.2010, had objected to the decision taken by the General Contracts Committee;
- having duly noted the points raised by the appellant Company’s legal representative;
- having taken note of the highly unacceptable timeline covering this particular tender reference;
- having also taken note of the lack of administrative co-ordination amongst all interested parties;
- having also thoroughly considered both Dr Barbara’s and Dr Buhagiar’s remarks, especially the one referring to the fact that (a) should this tender be awarded the contracting authority would end up with a ‘white elephant’ and that (b) it did not make sense to proceed further with this tender;
- having heard Dr Buhagiar claim that (a) this particular tender referred to a supply contract relating to the delivery of a very important public health service and (b) within a year, something had to be done since the bridging contract would expire with possible negative consequential circumstances to the entire health system and the corresponding adverse effect on the ultimate patient;

reached the following conclusions, namely:

1. The PCAB feels that a great amount of time has been lost for reasons which are anything but acceptable;
2. The PCAB feels that the issue raised against appellant Company at this juncture denotes that proper analysis was not carried out ‘*ab initio*’;
3. The PCAB argues that, considering what transpired during the hearing, the question of a bid being adjudicated administratively/technically non-compliant since the delivery period was not according to tender specifications and conditions - especially when one takes note of the original date of publication of the said tender (28.07.2007) and the fact that there was already an appeal lodged in connection with this same tender a couple of years ago - has to be

classified as extremely unreasonable and bureaucratic causing complete waste of time and resources;

4. The PCAB also feels that all parties concerned could have acted in a more proactive and less *nonchalant* manner, especially in the light of the fact that, according to one of the expert witnesses, Dr Buhagiar, this tender was very much an essential supply contract in the delivery of a public health service and that, within a year, something had to be done since the bridging contract would expire resulting in a potential complete shutdown in the same service;
5. The PCAB does not feel that it is within the realms of its remit to state that the tender in question is dealing with a 'white elephant'. Yet, the PCAB also feels morally responsible to ensure that public procurement reflects a conscientious, professional, transparent, equitable and responsible undertaking by all interested parties. It is the opinion of the said Board that it can only recommend that public funds will not be allocated to the provision of an obsolete service or product item
6. The PCAB recommends that (a) another call for offers, devoid of all the errors committed in the tender under review, should be re-issued and (b) bearing in mind that the time frame is restricted, all parties should ensure that (1) proper measures should be taken so that a set of specifications, terms and conditions are professionally written with these being followed by an equitable and transparent adjudicating process and (2) an accelerated 'modus operandi' be resorted to in order to ensure timely delivery of pertinent chemistry reagents.

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 J Esposito
Member

22 April 2010