



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

Mr Joseph P. Attard, Managing Director of AFS Ltd, explained that although he submitted the cheapest offer he was informed by the Contracts Department, as per letter dated 26<sup>th</sup> March 2010, that his offer had been rejected because (i) the documentation was incomplete, (ii) the financial capacity of the tenderer was not substantiated and, similarly, (iii) the technical capacity of the tenderer was not fully substantiated.

### **(i) Incomplete Documentation**

Mr Attard claimed that most of the information/literature requested in the tender document had been submitted, albeit he conceded that some information was missing. He stated that the contracting authority requested the literature in respect of all the items included in the bill of quantities, over 300 items of tools, and acknowledged that his firm did not submit the literature in respect of about 10 items thereof.

Eng. Mario Cassar, Chairman of the Evaluation Board, stated that this tender was issued in connection with a *European Social Fund Project* and, as a result, it was issued Europe-wide, so much so, that a tenderer from overseas had submitted his bid. Eng. Cassar remarked that, apart from what the Contracts Department stated in its letter of the 26<sup>th</sup> March 2010 addressed to AFS Ltd, the Evaluation Board had indicated other shortcomings as per page 4 of the evaluation report dated 2<sup>nd</sup> February 2010. He added that the tenderer was asked to submit the technical specifications/literature for each item in the bill of quantities. Mr Cassar remarked that although Mr Attard seemed to imply that the non-submission of the literature in respect of 10 out of 300 items was of little importance, the fact was that there were instances when tenderers had been excluded after being found deficient in only one item.

*On closer examination of the administrative schedule in the evaluation report, it transpired that AFS Ltd failed to submit the detailed description of supplies - i.e. the technical literature of all the equipment outlined in the tender specifications - in respect of about 130 items out of the 320 items requested.*

Eng. Cassar explained that AFS Ltd was disqualified because it did not provide the technical literature on each and every item of tools as requested in the tender document. Mr Cassar added that the technical literature had to be compared with the technical specifications indicated in the tender not only as far as size was concerned but even for the material the tools were made of and such other technical considerations because these were meant for use in the aerospace industry.

Mr Attard remarked that on the 5<sup>th</sup> January 2010, the closing date of the tender, his firm had submitted a declaration which read as follows:

*“With reference to our offer, kindly allow us to point out that we have interpreted the specifications indicated for each item to the best of our knowledge. In the event of award of tender we undertake to rectify any*

*incorrect interpretation by supplying/replacing tool/s to meet end user need without any price change to the one quoted in our tender.”*

Mr Attard added that he had also signed the tender document and that, in so doing, he had undertaken to supply the goods as requested.

Mr Attard remarked that he was offering the same brand of tools offered by Wurth Ltd, another appellant Company, namely, *BAHCO*.

The Chairman PCAB noted that since Wurth Ltd and AFS Ltd were offering the same brand of tools how was it that the former could not cater for two particular items whereas AFS Ltd stated that it could supply the whole range. Mr Attard replied that these items could be supplied from different channels and that the channel he was dealing with had all the range requested and at more advantageous prices.

Eng. Cassar confirmed that, according to the tender conditions, tenderers had to submit the technical literature/data on each and every item requested and failure to do so would have led to disqualification and to a recommendation being made to issue another tender, as had happened in similar previous cases. Eng. Cassar remarked that (a) he was involved in the compilation of the technical specifications of this tender, (b) these technical specifications were standard for the supply of tools for aircraft maintenance and (c) this was not the first instance when they acquired these aviation tools.

The Chairman PCAB expressed his disagreement with an approach that led to the elimination of tenderers from a tendering process even on minor shortcomings with the likely result being that one would end up with only one offer not to mention the waste of time and resources put in by bidders in the compilation of the tender documentation.

Mr Cassar reiterated that, apart from the shortcomings communicated by the Contracts Department to AFS Ltd, the Evaluation Board had listed in its report other shortcomings in respect of AFS Ltd, namely the partial submission of (i) the list of the manufacturer's data sheets and (ii) the financial bid calculated on a basis of DDP for the supplies tendered.

AFS Ltd maintained that although not all the literature had been submitted, however, through the blanket declaration referred to earlier he had undertaken to supply all the items requested by the contracting authority and at the price quoted in his bid. On checking with his catalogue, Mr Attard remarked that in some cases, such as item 93 under 'Mechanics', although the item was marked 'not submitted' by the Evaluation Board, he had, in fact, inserted the reference of the product, admitting also to have failed to indicate the page where the literature was to be found.

The PCAB expressed the view that one should not expect the contracting authority to rely on a bidder's blanket declaration that such bidder would eventually supply the items of the size and quality requested but the contracting authority needed to ensure the size, quality and quantity offered beforehand since the specifications submitted by the tenderer would form an integral part of the contract.

## **(ii) Financial Capacity**

With regard to the issue of financial capacity, Mr Attard stated that from the balance sheet he submitted for 2008 one could note that his firm had financial facilities of up to €1million and, as a result, there was no problem with undertaking this contract for which they quoted the price of about €61,000. Mr Attard, however, confirmed that he had only submitted the balance sheet for 2008 which, in itself, included the 2007 comparative data and, therefore, the financial data he submitted covered 2008 and 2007. At this stage Mr Attard questioned the relevance of financial data relating to four years previous and he even deemed that as outdated data. Mr Edwin Muscat, PCAB member, remarked that the contracting authority had the right to request such information and bidders were expected to comply.

## **(iii) Technical Capacity**

Regarding the aspect of technical capacity, Mr Attard opined that the term ‘aircraft’ used in the title of the tender could have been misleading as one could, perhaps, imagine that these tools were out of the ordinary when, in his own words, a spanner was always a spanner. Mr Attard submitted that the way this call for tenders had been worded allowed for the participation of start-up companies provided that the tenderers delivered the goods.

The Chairman PCAB remarked that the PCAB had to establish whether the way this tender had been worded and issued allowed for as wide a competition as possible. He added that one had to be careful in the preparation and the adjudication of a tender so as not to end up with only one tenderer.

The Chairman PCAB also noted that, with regard to AFS Ltd, the evaluation report stated that *“the technical capacity of the tenderer was not fully substantiated since tenderer did not submit a list of aircraft and, or aviation related supplies and, or works and, or services delivered and, or carried out accompanied by certificates of satisfactory execution.”* He observed that since this call for tenders was open for start-up companies then these could not provide this kind of information. The Chairman PCAB questioned the relevance of asking for a track record in works carried out when one was dealing with the supply of tools and remarked that this could have been another cut-and-paste job from another tender document.

Mr Attard confirmed that he did not submit this information and added that the way this part of the tender was worded rendered it difficult to understand what the contracting authority was really after and, in fact, his firm had indicated to the contracting authority that it had interpreted the specifications to the best of its knowledge.

Eng. Cassar stated that this part of the tender document formed part of a standard template which they obtained from the Contracts Department and he remarked that, when in doubt, tenderers had the opportunity to seek clarifications.

Capt. Raymond Zarb, intervening on behalf of the recommended tenderer, European Pilot Academy Ltd, explained that the aviation industry was regulated by the European Aviation Safety Agency (EASA) both with regard to the training of pilots

and the maintenance of aircraft. He added that the hangers of Air Malta, Lufthansa and Medavia were regularly examined by inspectors of the EASA - the last inspection took place in January 2010 - and such inspections covered also the type and quality of tools used in aircraft maintenance. Furthermore, Capt. Zarb explained that aircraft tools had to be marked with an aircraft symbol and kept in an appropriate toolbox, which was not meant for storage purposes only but, more importantly, after finishing their work, aircraft engineers were obliged to check that all the tools were in place in the respective toolboxes so that none would be left behind in the aircraft since that could prove to be catastrophic. Capt. Zarb remarked that the aviation industry demanded strict compliance to safety rules and one mistake could lead to criminal charges or even to the withdrawal of the licence. Capt. Zarb appreciated the fact that MCAST was regulated under the IAGA\* 147 (International Association of Geomagnetism and Aeronomy) and, hence, it was subject to regular inspections for compliance both from local and overseas regulators.

Capt. Zarb stated that the toolboxes requested in this contract were not found in any hardware store but were manufactured by specialised firms such as BAHCO and SNAP-ON Inc. Capt. Zarb continued that the manufacturers of aviation engines, machines and equipment recommend the type and quality of tools to be used for their maintenance. At this point he drew the attention of the PCAB that there were several international firms which manufactured tools for aviation use and that some of them were from outside the EU, e.g. from the US which is considered to be the leader in the aviation industry.

Capt. Zarb confirmed that he was also offering toolboxes manufactured by BAHCO, a subsidiary of SNAP-ON Inc, i.e. the same brand offered by AFS Ltd and Wurth Ltd. He concluded that he should not be penalised for having submitted a fully compliant tender on time.

Mr Attard conceded that there were a few shortcomings in his tender submission, namely (a) the missing technical literature, (a) the missing 2006 accounts and (c) a missing signature on the *financial identification form* which, in any case, would be of use in case of award of tender. Yet, Mr Attard continued (i) the price he offered was almost half that of that submitted by the recommended tenderer and (ii) his firm had declared that it would supply all the tools requested in the tender and at the quoted price.

In his concluding remarks, the Chairman PCAB observed that although the appellant, Wurth Ltd (another appellant in this tendering process) and the recommended tenderer were all offering BAHCO tools there was quite a difference in the prices quoted as per schedule.

Eng. Cassar remarked that, in order to consider a tender on the basis of price, that tender had first to be adjudicated administratively and technically compliant.

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 09.04.2010 and also through their verbal submissions presented during the public hearing held on 02.06.2010, had objected to the decision taken by the General Contracts Committee;
- having taken note of Mr Attard’s (AFS Ltd) (a) statement wherein he conceded that whilst most of the information/literature requested in the tender document had been submitted by his firm, yet, it was also a fact that some information was missing with respect to some 10 of the 300 items of tools requested in the tender document, (b) declaration that he had, personally, signed the tender document and that, in so doing, he had undertaken to supply the goods as requested, (c) reference to the fact that he was offering the same brand of tools offered by Wurth Ltd, another appellant Company, namely, *BAHCO*, (d) claim that, although not all the literature had been submitted, however, through a blanket declaration he had undertaken to supply all the items requested by the contracting authority and at the price quoted in his bid, (d) claim that, on checking with his catalogue, Mr Attard remarked that in some cases, such as item 93 under ‘Mechanics’, although the item was marked ‘not submitted’ by the Evaluation Board, he had, in fact, inserted the reference of the product, admitting also to have failed to indicate the page where the literature was to be found, (e) although he had failed to submit the 2007 financial results thus eliminating the possibility of enabling the evaluation board to gain indirect access to the 2006 comparative financial results, yet, by the same token, the fact that he submitted the 2008 financial statements this implied that the 2007 were, albeit, indirectly, made available, (f) claim that there is, definitely, no problem with his firm undertaking this contract for which they quoted the price of about €61,000 considering that his firm had financial facilities of up to €1million, (g) submission that the way this call for tenders had been worded allowed for the participation of start-up companies provided that the tenderers delivered the goods, (h) reference to the fact that the price he offered was almost half that of that submitted by the recommended tenderer and (i) reference to the fact that his firm had declared that it would supply all the tools requested in the tender and at the quoted price;
- having also taken note of Mr Cassar’s (a) reference to the fact that the tenderer was disqualified because it did not provide the technical literature on each and every item of tools as requested in the tender document, (b) statement that the technical literature had to be compared with the technical specifications indicated in the tender not only as far as size was concerned but even for the material the tools were made of and such other technical considerations because these were meant for use in the aerospace industry and (c) declaration that he was involved in the compilation of the technical specifications of this tender;
- having established, following a thorough exercise carried out during the hearing by staff members from the Contracts Department’s office, that AFS Ltd, the appellant Company, failed to submit the detailed description of supplies - i.e.

the technical literature of all the equipment outlined in the tender specifications - in respect of about 130 items out of the 320 items requested;

- having taken into consideration Capt Zarb's intervention, particularly, those which referred to (a) the fact that the aviation industry demanded strict compliance to safety rules, (b) the fact that the toolboxes requested in this contract were not found in any hardware store but were manufactured by specialised firms such as BAHCO and SNAP-ON Inc., (c) his confirmation that his firm was also offering toolboxes manufactured by BAHCO, a subsidiary of SNAP-ON Inc, i.e. the same brand offered by AFS Ltd and Wurth Ltd and (d) the fact that his firm should not be penalised for having submitted a fully compliant tender on time;

reached the following conclusions, namely:

1. The PCAB expresses its disagreement with an approach that leads to the elimination of tenderers from a tendering process even on minor shortcomings such as the non submission of literature describing certain tools when the tender specifications themselves are amply clear about what is required to be supplied, with the likely result being that one would end up with only one offer still in the running not to mention the waste of time and resources put in by bidders in the compilation of the tender documentation;
2. The PCAB expresses the view that one should not expect the contracting authority to rely on a bidder's blanket declaration that such bidder would, eventually, supply the items of the size and quality requested
3. The PCAB opines that since the tender document did not specify that a tenderer had to have a considerable amount of related experience in the related industry, so much so that, during the hearing, it was argued that the tender was open for start-up business entities (and confirmed by the Chairman of the evaluation board himself), then one wonders how come the same tender document was asking for information related to 'technical capacity' which only a business entity with a track record could have been, possibly, in a position to provide. Undoubtedly, the fact that the evaluation report stated that "*the technical capacity of the tenderer was not fully substantiated since tenderer did not submit a list of aircraft and, or aviation related supplies and, or works and, or services delivered and, or carried out accompanied by certificates of satisfactory execution*" renders the negative evaluation demonstrated against the appellant Company somewhat excessive
4. The PCAB also notes that the appellant Company is offering the same products supplied by the recommended tenderer. As a consequence, the issue of the missing literature takes a considerable lesser role from a holistic point of view considering that it transpired that the recommended tenderer had confirmed that the said, same, supplier was in a position to provide the product range as requested in the tender document
5. The PCAB acknowledges that the appellant Company has only provided the 2008 financial statements - the latest and more updated set of the three years

requested in the tender document, namely 2006, 2007 and 2008. Yet, it is also a fact that the 2007 comparative figures were, albeit indirectly, made available in the 2008 figures. In this instance, the question of substance over form should have been applied by the evaluation board considering that the evaluation process was not hindered in any way with the availability of the two most recent of the three sets of financial documents being made available

As a consequence of (1) to (5) above this Board finds in favour of the appellant Company and recommends that the appellants' offer be re-integrated in the process for further evaluation.

In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the said appellants should be reimbursed.

Alfred R Triganza  
Chairman

Anthony Pavia  
Member

Edwin Muscat  
Member

*11 June 2010*