

## PUBLIC CONTRACTS APPEALS BOARD

### Case No. 204

**CT/2488/2009; Advert No. 420/2009**

### **Tender for the Supply and Delivery of Aircraft Maintenance Toolboxes at MCAST**

This call for tenders was published in the Government Gazette on 3 November 2009. The closing date for this call for offers with an estimated value of € 149,543 (excl. VAT) was 5 January 2010.

Five (5) Tenderers had submitted their offers

**Wurth Ltd** filed an objection on the 5 April 2010 after its offer had been adjudicated administratively non-compliant.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Anthony Pavia and Mr. Edwin Muscat as members convened a public hearing on Wednesday, 2 June 2010 to discuss this objection.

Present for the hearing were:

#### **Wurth Ltd**

Dr Renald Micallef	Legal Representative
Mr Arthur Calleja	Sales and Finance Manager
Ms Angela Zammit	Managing Director

#### **AFS Ltd**

Mr Joseph P. Attard	Managing Director
---------------------	-------------------

#### **Raymond Zarb obo European Pilot Academy Ltd**

Capt. Raymond Zarb	Representative
Ms Sandra Zarb	Representative

#### **Malta College of Arts, Science and Technology (MCAST) - Evaluation Board**

Eng. Mario Cassar	Chairman
Eng. Martin Mifsud	Evaluator
Mr Alfred Galea	Evaluator
Mr Louis Scicluna	Evaluator
Ms Crisania Gatt	Secretary

#### **Contracts Department**

Mr Francis Attard	Director General
-------------------	------------------

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

Dr Renald Micallef, legal representative of Wurth Ltd, remarked that his client had been disqualified for the following reasons, namely, the fact that the said Company had submitted documentation which was incomplete due to the non-submission of (a) the technical literature in respect of two items, (b) the statement attesting the origin of the supplies, (c) the description of the commercial warranty tendered, (d) the tender form and the non-submission of the balance sheet/accounts for 2006.

**(i) Incomplete Documentation**

(a) *Technical Literature*: Dr Micallef stated that one of the reasons for his client's exclusion was for not having submitted the literature in respect of two items of tools, out of over 300 such items, namely item 103 'flexible workshop mirror' and item 104 'screw removal tool'. Dr Micallef remarked that the reason for this omission on his client's part was simply because the toolboxes the Company supplied did not include these two specific tool items in its range.

Mr Arthur Calleja, representing the appellants, Wurth Ltd, remarked that, apart from being laser engraved, these tool boxes can also be equipped with the facility of photographing the person withdrawing the tool for added accountability with regard to tool handling. Mr Calleja read out a document issued to Wurth Ltd by Lufthansa Technik (Malta) Ltd certifying that Wurth Ltd had been its regular tool supplier since 2007 and that its services were of a high standard. Mr Calleja declared that his firm had already supplied a number of tool boxes to MCAST. He explained that the tool box had to be of the same make as the tools themselves and that in their case the brand offered was BAHCO, a brand that turned out to be the same brand offered by the recommended tenderer and the other appellant in this case.

Eng. Mario Cassar, Chairman of the Evaluation Board, remarked that the tools specifications emanated from the nature of the works that had to be performed, in this case aviation maintenance, and that they were not drawn up to suit the specifications of any one particular manufacturer but these tools could be supplied by various specialised manufacturers.

Eng. Cassar informed those present that this tender was issued in connection with a *European Social Fund Project* and, as a consequence, it was issued Europe wide such that there was even a tenderer from overseas. Eng. Cassar stated that, although this was the first time that they had issued a tender of this sort, MCAST already had similar tool boxes and, to his recollection, they were supplied by Wurth Ltd.

Mr Cassar remarked that (a) he was involved in the compilation of the technical specifications of this tender, (ii) these technical specifications were standard for the supply of tools for aircraft maintenance and (iii) this was not the first instance that MCAST acquired these aviation tools.

Eng. Cassar stated that the tenderer was asked to submit the technical specifications/literature in respect of each item in the bill of quantities and that the

non-submission of literature in respect of any of the items requested would have led to the disqualification of the tenderer concerned.

Eng. Cassar remarked that this tender had to be awarded to one bidder and that it could not be split among more than one bidder. Dr Micallef intervened to point out that there was a reservation to this statement and quoted clause 7.1 (page 5) which stated that:

*“This tender is not divided into lots. Tenders must be for the entirety of the quantities indicated. Nevertheless, the Government reserves the right of accepting any tender wholly or in part, or of dividing the contract among two or more tenderers.”*

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 result 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.

(b) Attesting the origin of the Supplies tendered (or other proofs of origin): Dr Micallef referred to page 166 of his client’s submission which clearly indicated that the supply was of ‘EU origin’.

(c) Commercial Warranty: With regard to the description of the commercial warranty tendered, Dr Micallef referred to the document dated 5<sup>th</sup> January 2010 whereby Wurth Ltd provided an ‘eight-year availability’ and a ‘two-year warranty’. He added that, since his client’s supply was of ‘EU origin’, the pertinent EU directive stipulated that a minimum two-year warranty had to be provided.

(d) Tender Form and Declaration: Dr Micallef confirmed that on delivering the tender documentation they had overlooked the *tender form* including the declaration and, in fact, this was submitted about one hour after the closing time of the tender. Dr Micallef remarked that certain information contained in the tender form and declaration had already been submitted in other sections of the tender documentation and he added that the minor shortcomings on their part did not, in any way, put the other tenderers at a disadvantage nor did they limit the evaluation board in carrying out a proper evaluation of the bid.

Dr Micallef expressed the view that the scope of issuing calls for tenders was to open up for as much competition as possible and in that spirit, one should not eliminate tenderers on grounds of procedure, something which the Ministry of Finance had addressed in March 2010, otherwise the contracting authority stood to lose in terms of quality and price.

## **(ii) Financial Capacity**

Dr Micallef confirmed what had been reported by the evaluation board in the sense that Wurth Ltd submitted the audited accounts in respect of 2007 and 2008, omitting those for 2006. Dr Micallef however pointed out that the 2007 accounts included also the 2006 financial data by way of comparative figures. Dr Micallef, therefore, claimed that, for all intents and purposes, his client had, in fact, submitted the financial data

for the three-year period request, i.e. 2006-2008. He added that one could have also checked the company's accounts lodged with the Malta Financial Services Authority. Dr Micallef pointed out that the accounts of the company he represented indicated that the company had a share capital of about €2.3 million.

Eng. Cassar remarked that clause 3.6 (b) of the instructions to tenderers laid down that the tenderer had to provide the accounts of the three previous financial years.

The Chairman PCAB agreed with what Wurth Ltd was contending that, for evaluation purposes, the contracting authority had at its disposal the financial data of the three years requested.

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.

Dr Micallef stated that the only shortcomings on the part of his client were (a) the omission of items 103 and 104, which were outside their range, and (b) the late delivery of the tender form and declaration in which case most of the information had already been submitted elsewhere in the tender documentation as explained in his letter of objection dated 13<sup>th</sup> April 2010. Dr Micallef stressed that the points raised by

the Evaluation Board with regard to the 'origin of the supplies', the 'warranty' and the '2006 financial data' had, in fact, been provided in the original submission.

Dr Micallef opined that the Evaluation Board acted correctly as far as the procedure was concerned but he reckoned that the same Evaluation Board was rather inflexible in its approach. He cited an instance where the tender document contained an erroneous instruction in the first paragraph of clause 22 (page 11) with regard to the tender guarantee because it stated that '*It must remain valid up to and including the 5<sup>th</sup> January 2010*', which was the closing date of the tender. Dr Micallef stated that, in all fairness, the contracting authority was flexible in that case because it accepted an amended guarantee after the closing date of the tender and he, therefore, expected the same measure of flexibility with regard to the slightly late delivery of the tender form and declaration.

Dr Micallef reported that it was only in October 2009 that the European Pilot Academy Ltd had altered the objects in its memorandum and articles of association so as to enable it to supply aviation tools. He argued that, albeit the recommended tenderer had a lot of experience in aviation matters, it had no track record as a tool supplier.

Mr Calleja summed up that his firm was excluded because it did not supply two out of over 300 tool items, which items were not available in their range, and because the tender form and declaration were submitted one hour or so after the closing time of the tender. He added, however, that by endorsing the first part of the tender document the tenderer bound himself to accept the tender conditions in full.

On his part, Eng. Cassar, while acknowledging the erroneous instruction mentioned by Dr Micallef, he pointed out that on the front page of the tender document it was clearly indicated that the mandatory bid-bond had to remain valid up to 4<sup>th</sup> June 2010. Eng. Cassar remarked that, in this case, the tenderer could have sought a clarification as he did on other aspects of the tender.

Ms Sandra Zarb, intervening on behalf of the recommended tenderer, contended that the tender document was quite clear with regard to mandatory requirements, such as the tender form and declaration and the balance sheets/accounts, and that one could not just overlook such shortcomings.

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 13.04.2010 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 Dr Micallef's (a) statement that one of the reasons for his client's exclusion was for not having submitted the literature in respect of two items of tools, out of over 300 such items, namely item 103 'flexible workshop mirror' and item 104 'screw removal tool' with the appellants' legal

representative claiming that the reason for this omission on his client's part being that the toolboxes the Company supplied did not include these two specific tool items in its range, (b) reference to page 166 of his client's submission which clearly indicated that the supply was of 'EU origin', (c) claim made with regard to the fact that, in his client's opinion, since his client's supply was of 'EU origin', the pertinent EU directive stipulated that a minimum two-year warranty had to be provided, (d) confirmation that, on delivering the tender documentation, they had overlooked the *tender form* including the declaration and, in fact, this was submitted about one hour after the closing time of the tender, (e) comment regarding the fact that certain information contained in the tender form and declaration had already been submitted in other sections of the tender documentation, adding that the minor shortcomings on their part did not, in any way, put the other tenderers at a disadvantage nor did they limit the evaluation board in carrying out a proper evaluation of the bid, (f) confirmation of what had been stated in the evaluation report, namely that Wurth Ltd had submitted the audited accounts in respect of 2007 and 2008 but omitted those for 2006. However, on the same issue, Dr Micallef also drew the attention of those present that the 2007 accounts included also the 2006 financial data by way of comparative figures and that, for all intents and purposes, his client had, in fact, submitted the financial data for the three-year period request, i.e. 2006-2008, (g) reference to the fact that the accounts of the company he represented indicated that the company had a share capital of about €2.3 million and (h) overall comment which stated that, albeit the Evaluation Board had acted correctly as far as the procedure was concerned, yet, in his opinion, the same Evaluation Board was rather inflexible in its approach;

- having also taken note of Mr Calleja's (a) claim that his firm had already supplied a number of tool boxes to MCAST, (b) that the brand (BAHCO) of the tool box under review in this tender was of the same make as the one offered by the recommended tenderer and (c) argument that, whilst it was a fact that his firm had submitted the tender form and declaration one hour or so after the closing time of the tender, yet, in their opinion, by endorsing the first part of the tender document they had bound themselves to accept the tender conditions in full;
- having heard Mr Cassar state that (a) the tools specifications emanated from the nature of the works that had to be performed, in this case aviation maintenance, and that they were not drawn up to suit the specifications of any one particular manufacturer but these tools could be supplied by various specialised manufacturers, (b) although this was the first time that they had issued a tender of this kind, MCAST already had similar tool boxes in stock and, to his recollection, they were supplied by Wurth Ltd and (c) declaration that he was involved in the compilation of the technical specifications of this tender;
- 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;

- taking cognizance also of Ms Zarb's remark wherein she stated that the tender document was quite clear with regard to mandatory requirements, such as the tender form and declaration and the balance sheets/accounts, and that one could not just overlook such shortcomings,

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 also notes that the appellant Company is offering the same products offered by the recommended tenderer. The PCAB observes that, albeit the appellant Company had stated that its supplier was unable to offer items 103 and 104 respectively, yet, the recommended tenderer was offering the same products (BAHCO) supplied by the same supplier and was recorded as stating that his supplier was in a position to offer all the products that the tender document had requested. Anyhow, regardless of this observation, the PCAB opines that the said issue which contributed towards the disqualification of the appellants' offer 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 entire product range as requested in the tender document
3. The PCAB acknowledges that the appellant Company has only provided the 2007 and 2008 financial statements - the latest two and more updated sets of the three years requested in the tender document, namely 2006, 2007 and 2008. Yet, it is also a fact that the 2006 comparative figures were, albeit indirectly, made available in the 2007 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
4. Finally, however, the PCAB feels that the most crucial point in this instance was the late delivery (one hour or so after closing of deadline for submission of tender offer) of the mandatory tender document and declaration form. Whilst it is true that such issues may seem to be trivialities, yet, this Board cannot go beyond its remit and overlook the fact that tender procedures are governed by specific rules and regulations. The 'non' or 'late' submission of

mandatory documents cannot be accepted in principle. New regulations have, since the publication of this call, been introduced to offer a less stringent application of the rules and regulations. However, since this tender falls under the 'old system', the PCAB cannot accept the appellant Company's arguments as far as this particular objection is concerned.

As a consequence of (1) to (4) 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 said appellants should not be reimbursed.

Alfred R Triganza  
Chairman

Anthony Pavia  
Member

Edwin Muscat  
Member

*11 June 2010*