

## PUBLIC CONTRACTS APPEALS BOARD

### Case No. 224

#### **Adv CT 411/2009 - CT 2465/2009 – DH 158/06 Purchase of an Ultrasound Machine for Mater Dei Hospital**

This call for tenders was published in the Government Gazette on 23<sup>rd</sup> October 2009. The closing date for this call for offers was 3<sup>rd</sup> December 2009.

The estimated value of this tender was Euro 150,000.

Five (5) tenderers - submitted nine (9) options.

Jamesco Trading Ltd filed an objection on the 14<sup>th</sup> June 2010 after being informed that *'since none of the submitted offers were fully compliant with the tender's specifications and conditions, this tender is to be cancelled' and that their 'offer was rejected because' they 'did not include the necessary financial standing to safely and reliably enter into and perform a contract of this nature and magnitude as requested under the Selection Criteria in point 1'.*

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Carmel J Esposito as members convened a public hearing on Wednesday, 15 September 2010 to discuss this objection.

Present for the hearing were:

#### **Jamesco Trading Co Ltd**

Dr Nadia Vella B.A., LL.D	Legal Representative
Mr. Luke Vella	
Mr. Philip Chircop.	

#### **Mater Dei Hospital**

Ms Stephanie Abela  
Mr Marnol Sultana

#### ***Adjudicating Board***

Mr Rosario Attard	Chairperson
Ms Marlene Gauci	Secretary
Dr Edward Melillo	Evaluator
Dr David Gatt	Evaluator

#### **Department of Contracts**

Mr Francis Attard	Director General (Contracts)
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After the Chairman's brief introduction as to how the proceedings were going to be conducted, the appellant company's representative was invited to explain the motives of the objection.

Dr Nadia Vella, legal representative of Jamesco Trading Co Ltd, started by making reference to their reasoned letter of objection wherein they specified the two main reasons which led to the filing of their objection.

She said that her clients were informed that their offer was not accepted because they did not include the necessary financial standing. She contended that, contrary to what was stipulated by the law, the tender issued by the Department of Contracts did not indicate which references had to be provided by the tenderer as evidence of his financial standing.

Dr Vella claimed that the law itself laid down a mandatory obligation on the Department of Contracts to specify such references. At this point, the lawyer quoted in full Article 50 (4) of Legal Notice 177 of 2005 which stipulated that:

*“Contracting authorities shall specify in the contract notice or in the invitation to tender, which references mentioned in subregulation (1) have been chosen and which must be provided, and of any others it deems fit.”*

She argued that, due to the fact that they did not specify which references had been chosen and which had to be provided as evidence of their financial standing, the Department of Contracts could not disqualify their offer once (i) they themselves had breached the law and (ii) Jamesco Trading Co Ltd could not provide any reference once these were not even requested.

In reply to a specific question by the PCAB, Dr Vella said that although the words 'financial standing' were included in the tender they did not indicate which of the references specified in the law had to be provided. She said that, as evidence of financial standing, the appellants had submitted the *bid bond* and a list of ultrasound machines that were installed. Following such claim, the appellant company's legal advisor's attention was drawn by the PCAB that the appellants must have wrongly interpreted the term 'financial standing' because it was obvious in the commercial world that this was definitely not a *bid bond* or the installation of such equipment. It was explained that the purpose of the term 'financial standing' was to assess whether a tenderer was financially strong to meet the tender's obligation from a financial aspect only and not from a technical point of view.

With regard to the second ground of their objection, Dr Vella sustained that, from the documents submitted with their tender, the Evaluation Board could have arrived at the conclusion that her client had the necessary financial standing to enter into a contract of this magnitude because it had already installed fourteen (14) such ultrasound machines at Mater Dei Hospital itself and, as far as she was aware, eight of them referred to one contract. She argued that, once her client had the suitable financial standing to install 14 similar ultrasound machines, it was logical that it had the economic standing to install just one machine.

Mr Ronnie Attard, Chairman of the Evaluation Committee, said that according to information made available by Ing Karl Farrugia regarding the machines installed at Mater Dei, the contract was awarded to INSO and that Jamesco Trading Co Ltd were not involved in this matter.

When asked by the PCAB to state what they did expect to receive as evidence of 'financial standing', Mr Attard replied that they would have expected to be provided with pertinent financial instruments such as balance Sheets, profit and loss accounts, and other related financial documents.

Mr Attard also made reference to the *Selection Criteria* and quoted the following from page 72 of the tender document:

*“The Tenderer has the necessary financial standing to safely and reliably enter into and perform a contract of this nature and magnitude.”*

Dr David Gatt intervened by making reference to Article 50 (1) of the Public Contracts Regulation (LN 177 of 2005) which stipulated that:

*“Proof of economic operator’s economic and financial standing may, as a general rule, be furnished inter alia, by one or more of the following:*

*(a) appropriate statements from banks, or where appropriate, evidence of relevant professional indemnity insurance;*

*(b) the presentation of balance-sheets or extracts therefrom, where publication of the balance sheets is required under company law in the country in which the economic operator is established;*

*(c) a statement of the economic operator’s overall turnover and, where appropriate its turnover in respect of the products, works or services to which the contract relates for the three previous financial years depending on the date on which the economic operator was set up or the economic operator started trading, as far as the information on these turnovers is available.”*

Dr Gatt said that for evaluation purposes, as far as the economic and financial standing was concerned, they were prepared to accept any of the above requirements.

Dr Vella rebutted by stating that, contrary to what was stipulated in the above quoted Article 50 (4) of the Public Contracts Regulations, in the tender document it was not specified which references had been chosen and which of them had to be provided. She sustained that, in the prevailing circumstances, her clients were not obliged to provide such documents.

The PCAB drew her attention that they had two options - they could have either not participated in the tendering process, or else, they could have drawn the Contracting Authority’s attention that it was not in a position to participate.

Mr Philip Chircop, representing Jamesco Co Ltd, said that, in his opinion, they had submitted all that was requested in *the Selection Criteria* referred to earlier during the proceedings.

With regard to '*financial standing of this magnitude*', the appellant company's representative pointed out that this tender was issued for only one ultrasound machine and they had installed various similar machines. The PCAB intervened to draw his attention that his company was misinterpreting the term '*financial standing*' because what was being stated referred to was what is commonly known as 'track record'. It was explained that (i) the scope of financial standing in tenders was to evaluate the financial strength of a tenderer in order to establish whether they could fulfill their future obligations and (ii) the financial statements were, primarily, the audited accounts which could also be accompanied by a bank statement.

When Mr Chircop said that they submitted the *bid bond* for future obligations, the PCAB explained that a *bid bond* was a commitment that signified that a tenderer was serious about the bid.

Mr Chircop said that, due to the fact that they had no indication about which documents had to be submitted as evidence of their financial standing, he had submitted what he felt was sufficient. The PCAB drew his attention that this did not mean that he had submitted what was required.

When the appellant company's representative said that he was under the impression that in the tender document it was indicated that a meeting could have been held to rectify their position, his attention was drawn to the fact that such meetings were not possible because these could lead to negotiations. However, the PCAB explained that the procedure permitted tenderers to seek clarifications in writing because in such instances any questions and replies thereto would be disseminated to all participants for purpose of transparency and pertinent level playing field.

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 18 June 2010 and also through their verbal submissions presented during the public hearing held on 16 August 2010 had objected to the decision taken by the General Contracts Committee;
- having taken note of the appellant company's arguments, particularly, those related to the fact that (a) contrary to what was stipulated by the law, the tender issued by the Department of Contracts did not indicate which references had to be provided by the tenderer as evidence of one's financial standing, (b) due to the fact that it did not specify which references had been chosen and which had to be provided as evidence of their financial standing, the Department of Contracts could not disqualify the appellants' offer, (c) as evidence of 'financial standing', the appellants had submitted the *bid bond* and a list of ultrasound machines that were installed, (d) according to the appellant company's legal advisor, once her client had the suitable financial standing to

install 14 similar ultrasound machines, it was logical that it had the economic standing to install just one machine and (e) contrary to what was stipulated in Article 50 (4) of the Public Contracts Regulations, in the tender document it was not specified which references had been chosen and which of them had to be provided proceeding to note that, in the prevailing circumstances, the appellants company was not obliged to provide such documents;

- having also taken note of Mr Ronnie Attard's intervention;
- having also taken cognizance of Dr Gatt's reference to Article 50 (1) of the Public Contracts Regulation (LN 177 of 2005),

reached the following conclusions, namely:

1. The PCAB opines that the appellants have wrongly interpreted the term 'financial standing' because it is obvious that, commercially speaking, such term does not refer to either a *bid bond* or to an installation of some equipment. As a matter of fact, in public procurement, it is widely accepted and commonly understood that the scope of a participating tenderer providing evidence of one's own 'financial standing' is for an evaluation board to be in a position to evaluate the financial strength of a tenderer in order to establish whether the latter could fulfill one's own current and future obligations within the context of the terms of the tender under review. Finally, it is also commonly understood that the 'financial standing' is predominantly assessed through pertinent financial instruments as audited accounts, bank statements and so forth.
2. The PCAB considers that, whilst it remains a democratic right for anyone to seek legal remedy, yet, in this particular instance the lodging of this appeal could have been avoided as it was highly frivolous in nature.

As a consequence of (1) to (2) above this Board finds against the appellants 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

Edwin Muscat  
Member

Carmel J Esposito  
Member

22 September 2010