

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case No. 286**

**Quotation No. 02/2011**

**Quotation for the installation and commissioning of electrical services, hot and cold water distribution systems and fire-fighting equipment for the refurbishment of the operating theatre at the Gozo General Hospital**

The closing date for this call for quotations was 11<sup>th</sup> January 2011 (extended).

A preliminary hearing was called by the Public Contracts Review Board on the 29<sup>th</sup> April 2011 to enable it to consider the complaint raised by Messrs Richard Cauchi Mechanical and Electrical Contractor as to why the company was being excluded from submitting its quote for the above-mentioned works.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr. Carmel Esposito and Mr Joseph Croker as members convened the said public hearing.

Present for the hearing were:

### **Richard Cauchi Mechanical and Electrical Contractor**

Mr Richard Cauchi	Representative
Ing. Renzo Curmi	Representative
Mr Ricardo Cauchi	Representative

### **Ministry for Gozo**

Dr Tatianne Scicluna Cassar	Legal Representative
Ms Rita Cutajar	Director General

### **Evaluation Board**

Mr John Cremona	Chairman
Mr Reno Grech	Secretary
Ing. Franco Cassar	Member
Ing. Saviour Debrincat	Member
Arch. Angelo Portelli	Member

### **Department of Contracts**

Mr Francis Attard	Director General
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After the Chairman's brief introduction, the complainant was invited to explain the reasons that prompted him to lodge this complaint.

Ing. Renzo Curmi, representing Richard Cauchi Mechanical and Electrical Contractor, the complainant, made the following submission:-

- a) by way of background information, the works included in this quotation formed part of a call for tenders – ref. No. CT 3073/2010 – which included other works, e.g. civil works, which tender had been issued three times with bidders invariably having been found non-compliant;
- b) the latest attempt was a negotiated procedure between his client and another contractor and, again, no tenderer turned out to be compliant with his client having failed at the administrative stage since, for the year 2008, his turnover did not exceed the threshold of €600,000 stipulated in the tender;
- c) his client contended that the 2008 turnover did, in fact, reach the threshold requested but he did not object since he was determined to participate in the subsequent call for tenders;
- d) his client then learned, through one of his sub-contractors, that the call for quotations under reference had been issued only for mechanical and electrical works;
- e) the document relative to the call for quotations did not include the administrative requirements - such as the bid bond and the company's turnover in respect of which his client had been previously rejected - that had been requested in the call for tenders;
- f) when his client called to obtain the document in order to submit his quote, he was informed that he could not participate in this call for quotations because in the previous calls for tenders his submission had been repeatedly found to be non-compliant - this stand applied also to the other tenderers who had participated in the previous calls for tenders;
- g) three contractors were approached to participate in this call for quotations but only one had made a submission;
- h) his client had asked the Department of Contracts (1) to confirm whether his client and other contractors that had participated in the previous calls for tenders had been excluded from participating in this call for quotations, (2) if in the affirmative, to provide the reasons for this apparent blacklisting and (3) if in the negative, to give a reasonable timeframe within which his client could make a submission;
- i) in his reply the Director General (Contracts) informed his client that (1) the Ministry for Gozo had issued this tender several times even through a negotiated procedure but no bidder was found to be compliant with tender conditions, (2) since the Ministry for Gozo had to meet certain deadlines, approval for the issue of a direct order had been sought, (3)

in order to ensure fairness the Ministry for Gozo was advised to exclude all those tenderers who had unsuccessfully participated in the previous tender procedure;

- j) it was at this point that his client wrote to the Public Contracts Review Board to go into this matter; and
- k) whereas all the bidders who participated in the various calls for tenders were excluded from the quotation procedure because none of them had previously been found to be technically compliant, in the case of the only contractor who had submitted a quotation it was, apparently, being assumed that he was technically compliant

Dr Tatianne Scicluna Cassar, legal representative of the Ministry for Gozo, remarked that:

- i. no tenderer was compliant in the four attempts made to award the tender for works at the operating theatre of the Gozo General Hospital and among the unsuccessful tenderers there was the complainant either in his own name or as part of a joint venture;
- ii. the complainant had failed in the fourth attempt, the negotiated procedure, because he did not meet the requirements of Art. 6.1.2 of the tender document regarding experience and, specifically, the threshold of €600,000 set for the company's turnover for 2008 even after taking into account such factors as works that were not of a similar nature, works in progress and works executed abroad;
- iii. besides having been found administratively non-compliant, the evaluation board, even though it was not obliged to, went also through the technical aspect of the submission and noted that the complainant was not technically compliant;
- iv. on the 15<sup>th</sup> December 2010 the complainant was informed by the Contracts Department that he was administratively non-compliant and he was given the opportunity to lodge an appeal which he did not take up, something which the complainant admitted and even hinted that he intended to participate in the subsequent call for tenders;
- v. due to the urgency of these works and that EU funds were involved, and given that the four attempts to award this contract had proved unsuccessful, the Ministry for Gozo sought the advice of the Contracts Department which suggested that one should seek market information and then send that information – three contractors were identified to submit quotations - to the Ministry of Finance to issue a direct order;
- vi. the original tender was broken down with the aim of issuing a few quotations retaining the same technical specifications but amending the administrative requirements;
- vii. the complainant was only informed of his administrative shortcomings because, strictly speaking, the adjudication of his submission should have stopped there; and
- viii. the technical deficiencies were not communicated to him

The Chairman Public Contracts Review Board remarked that the way the contracting authority acted, it appeared that, whereas the complainant was made aware of his administrative shortcomings and, as a result, he could have had the opportunity to rectify them in subsequent tenders, yet he was not made aware of his technical deficiencies and so he was not in a position to address them with the result that he continued to present a technically non-compliant submission time and again. He added that it would appear that the complainant was being excluded from participating in the call for quotations not on administrative grounds, because the relevance of the administrative aspect was reduced or eliminated in the call for quotations, but he was being excluded on technical grounds when the contracting authority had never informed the complainant of his technical shortcomings. The Public Contracts Review Board acknowledged the urgency of these works and that four attempts had already been made to award the contract but it insisted that those considerations should not do away with transparency and equity in public procurement.

Ing. Saviour Debrincat, a member of the evaluation board, under oath, declared that:-

- a) the evaluation board had noted that during the last tender procedure the complainant had submitted insufficient information with regard to various items and, as a consequence, the board could not carry out the technical evaluation of his tender submission; and
- b) the evaluation board had nothing to do with the exclusion of the complainant from participating or which contractors were to participate in the call for quotations.

Mr Francis Attard, Director General (Contracts), under oath, remarked that:

- i. the basic principles of public procurement were transparency, fairness and free non-discrimination among economic operators;
- ii. four calls for tenders had failed to produce a successful bidder to undertake these works, including a negotiated procedure which, normally, entailed the summoning of the tenderers who had participated in the previous call for tenders and explaining to them where they had failed with a view to rectifying their mistakes;
- iii. in this case he was not present at the negotiated procedure meeting and, therefore, he could not tell what was actually discussed and/or clarified, namely whether this meeting covered only administrative aspects while it overlooked the technical aspects;
- iv. none of the tenderers had lodged any objection with regard to their disqualification and, given the urgency of the works and that EU funds were involved, the only legal and efficient remedy left available was for the contracting authority to identify a contractor or group of contractors who could undertake these works;
- v. the Department of Contracts feared that, if any of the failed tenderers were to be entrusted to carry out these works or part thereof, then that might have given rise to rumours that a particular tenderer, after failing to secure the contract through a tendering procedure, was given the opportunity to secure the same contract through a direct order; and

- vi. the Public Procurement Regulations did not regulate the manner in which direct orders were given out except that they identified the person who could authorise a direct order, which authority was not vested in the Director of Contracts but in the Ministry of Finance which had its own criteria as to how to establish what procedure had to be followed.

Ms Rita Cutajar, Director General at the Ministry for Gozo, under oath, stated that:-

- a) as part of the negotiated tender procedure the contracting authority had sent for the bidders who had participated in the previous call for tenders and it was explained to the two of them that although both had failed administratively that did not, in any way, mean that they were technically compliant and it was made amply clear to them that they had to check that their fresh tender submission would meet all the tender conditions and specifications; and
- b) it was not explained to them - the bidders who had participated in the previous call for tenders - item by item where they were considered technically deficient but it was stressed that they should review their previous tender submission so as to ascertain that the new submission would, in fact, meet all tender requirements.

The members intervened to explain that, albeit the Public Contracts Review Board did not question the administrative and technical evaluation of the previous calls for tenders, yet they were concerned about the exclusion of the complainant and, for all that matters, also of the other tenderer/s, from participating in the call for quotations because, for all one knew, they might have rectified their previous shortcomings, technical or otherwise.

The Chairman Public Contracts Review Board questioned the rationale behind the exclusion of the complainant from participating in the call for quotations with the reason being his previous technical non-compliance, something which had not been brought to his attention so much so that he was determined to participate in the call for quotations, especially, since his previous administrative shortcomings were no longer an issue.

The other Public Contracts Review Board members added that one had to keep in view that the volume and nature of the works, together with the conditions included in the call for tenders, were different from those that featured in the call for quotations and, as a consequence, the bidders who had participated in the previous tenders should not have been excluded, if anything, if they would be found deficient in any future call they could be excluded once again.

At this point the hearing was brought to a close.

This Board,

- having noted that the complainant, in terms of various correspondence in regard, as well as through their verbal submissions presented during the hearing held on 29<sup>th</sup> April 2011, had objected to the decision taken by the pertinent authority;

- having noted all of the complainant's claims and observations, particularly, the references made to the fact that (a) by way of background information, the works included in this quotation formed part of a call for tenders – ref. No. CT 3073/2010 – which included other works, e.g. civil works, which tender had been issued three times with bidders invariably having been found non-compliant, (b) the latest attempt was a negotiated procedure between the complainant and another contractor and, again, no tenderer turned out to be compliant with the said complainant having failed at the administrative stage since, for the year 2008, his turnover did not exceed the threshold of €600,000 stipulated in the tender, (c) he contended that the 2008 turnover did, in fact, reach the threshold requested but he did not object since he was determined to participate in the subsequent call for tenders, (d) he learned, through one of his sub-contractors, that the call for quotations under reference had been issued only for mechanical and electrical works, (e) the document relative to the call for quotations did not include the administrative requirements such as the bid bond and the company's turnover in respect of which the complainant's bids had been previously rejected, (f) when he called to obtain the document in order to submit his quote, he was informed that he could not participate in this call for quotations because in the previous calls for tenderers his submission had been repeatedly found to be non-compliant, (g) albeit three contractors were approached to participate in this call for quotations yet only one had made a submission and (h) he had asked the Department of Contracts (1) to confirm whether he and other contractors that had participated in the previous calls for tenders had been excluded from participating in this call for quotations, (2) if in the affirmative, to provide the reasons for this apparent blacklisting and (3) if in the negative, to give a reasonable timeframe within which he could make a submission;
- having considered the contracting authority's representative's reference to the fact that (a) no tenderer was compliant in the four attempts made to award the tender for works at the operating theatre of the Gozo General Hospital and among the unsuccessful tenderers there was the complainant either in his own name or as part of a joint venture, (b) the complainant had failed in the fourth attempt, the negotiated procedure, because he did not meet the requirements of Art. 6.1.2 of the tender document regarding experience and, specifically, the threshold of €600,000 set for the company's turnover for 2008 even after taking into account such factors as works that were not of a similar nature, works in progress and works executed abroad, (c) besides having been found administratively non-compliant, the evaluation board, even though it was not obliged to, went also through the technical aspect of the submission and noted that the complainant was not technically compliant, (d) on the 15<sup>th</sup> December 2010 the complainant was informed by the Contracts Department that he was administratively non-compliant and he was given the opportunity to lodge an appeal which he did not take up, something which the complainant admitted and even hinted that he intended to participate in the subsequent call for tenders, (e) due to the urgency of these works and that EU funds were involved, and given that the four attempts to award this contract had proved unsuccessful, the Ministry for Gozo sought the advice of the Contracts Department which suggested that one should seek market information and then send that information, (f) the original tender was broken down with the aim of issuing a few quotations retaining the same technical specifications but amending the administrative requirements, (g) the evaluation board had noted that during the last tender procedure the complainant had submitted insufficient information with regard to various items and, as a consequence, the board could not carry out the technical evaluation of his tender submission, (h) the complainant was only informed of

his administrative shortcomings because, strictly speaking, the adjudication of his submission should have stopped there, (i) the technical deficiencies were not communicated to the complainant, (j) the evaluation board had nothing to do with the exclusion of the complainant from participating or which contractors were to participate in the call for quotations, (k) as part of the negotiated tender procedure the contracting authority had sent for the bidders who had participated in the previous call for tenders and it was explained to the two of them that although both had failed administratively that did not, in any way, mean that they were technically compliant and it was made amply clear to them that they had to check that their fresh tender submission would meet all the tender conditions and specifications and (l) it was not explained to them - the bidders who had participated in the previous call for tenders - item by item where they were considered technically deficient but it was stressed that they should review their previous tender submission so as to ascertain that the new submission would, in fact, meet all tender requirements;

- having also considered the fact that the Director General, Contracts (a) had informed complainant that the Ministry for Gozo had issued this tender several times even through a negotiated procedure but no bidder was found to be compliant with tender conditions, (b) had informed complainant that, since the Ministry for Gozo had to meet certain deadlines a direct order had to be made, (c) had informed complainant that, in order to ensure fairness, he advised the Ministry for Gozo to exclude all those tenderers who had, unsuccessfully, participated in the previous tender procedure, (d) in this case, he was not present at the negotiated procedure meeting and, therefore, he could not tell what was actually discussed and/or clarified, namely whether this meeting covered only administrative aspects while it overlooked the technical aspects, (e) stated that since none of the tenderers had lodged any objection with regard to their disqualification and, given the urgency of the works and that EU funds were involved, the only legal and efficient remedy left available was for the contracting authority to identify a contractor or group of contractors who could undertake these works and (f) stated that the Department of Contracts feared that, if any of the failed tenderers were to be entrusted to carry out these works or part thereof, then that might have given rise to rumours that a particular tenderer, after failing to secure the contract through a tendering procedure, was given the opportunity to secure the same contract through a direct order,

reached the following conclusions, namely:

1. The Public Contracts Review Board concludes that the negotiated procedure should have been more informative thus providing tenderers with a clearer scenario of facts in hand. Undoubtedly, this Board opines, this could have saved one and sundry a considerable amount of valuable time.
2. The Public Contracts Review Board considers that that the way the contracting authority acted, it appeared that, whereas the complainant was made aware of his administrative shortcomings and, as a result, he could have had the opportunity to rectify them in subsequent tenders, yet he was not made aware of his technical deficiencies and so he was not in a position to address them with the result that he continued to present a technically non-compliant submission time and again This Board opines that it appears obvious that the complainant had been erroneously excluded from participating in the call for quotations not on administrative grounds, because the relevance of the administrative

aspect was reduced or eliminated in the call for quotations, but he had been excluded on technical grounds when the contracting authority had never informed the complainant of his technical shortcomings.

3. The Public Contracts Review Board, whilst acknowledging the urgency of these works and that four attempts had already been made to award the contract, yet such considerations should not do away with 'transparency' and 'equitable treatment' in public procurement.
4. The Public Contracts Review Board disagrees with the point raised by DG Contracts relating to the Department of Contracts' concern about the fact that if any of the failed tenderers were to be entrusted to carry out these works or part thereof then that could be interpreted that a particular tenderer, after failing to secure the contract through a tendering procedure, could still be given the opportunity to secure the same contract through a direct order. This Board feel that pure hypothesis on possible third party reaction should not impinge on objective judgement. This Board feels that fear from possible repercussions, whilst partially legitimate from a human perspective, yet should not preclude anyone from being given a fair go. In this particular instance, this Board feels that such fear prompted a hastily taken categorical decision which could still give rise to different so called rumours or misinterpretations.
5. The Public Contracts Review Board agrees with complainant's claim, namely that one had to keep in view that the volume and nature of the works, together with the conditions included in the call for tenders, were different from those that featured in the call for quotations and, as a consequence, the bidders who had participated in the previous tenders should not have been excluded. This Board is of the opinion that if, in a future similar call, such bidders would be found to be deficient they could still be excluded.

In view of the above this Board finds in favour of complainant and recommends that a fresh call for quotations should be issued addressed to (a) all participants that had taken active part in the previous three tenders and negotiated procedure, as well as, (b) the bidders who had been contacted in the call for quotations. Furthermore, this Board insists that, unless there are new developments which need to be addressed, the same terms and conditions of *Call Reference Quotation No. 02/2011* should be applied in the fresh call being recommended by the Public Contracts Review Board.

Alfred R Triganza  
Chairman

Carmel Esposito  
Member

Joseph Croker  
Member

09 May 2011