

PUBLIC CONTRACTS REVIEW BOARD

Case No. 296

DH/3337 /10 Adv No 112/10

Tender for the Supply of Uniforms for Male and Female Nurses

This call for tenders was published in the Government Gazette on 15th October 2010. The closing date for this call with an estimated budget of € 120,000 was 1st December 2010.

Seven (7) tenderers submitted their offers.

Mr Mario Farrugia filed an objection on 27th February 2011 against the decision taken by the Ministry of Health, the Elderly and Community Care to cancel the tender since all the offers, including his offer, were found technically not compliant.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr. Edwin Muscat and Mr Joseph Croker as members convened a public hearing on Wednesday, 1st June 2011 to discuss this objection.

Present for the hearing were:

Mr Mario Farrugia

Dr. Mark Vassallo	Legal Representative
Mr Mario Farrugia	Representative

Ministry of Health, the Elderly and Community Care

Ms Rita Turchett	Representative (Supplies Section, Mater Dei)
Mr Karl Farrugia	Procurement Manager (Mater Dei)

Evaluation Board:

Mr Jesmond Sharples	Chairman
Ms Rita Briffa	Member
Ms Maria Sciberras	Member
Mr Marnol Sultana	Secretary

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

Dr Mark Vassallo, legal representative of Mr Mario Farrugia, the appellant, stated that by letter/email dated 20th April 2011 the Ministry of Health, the Elderly and Community Care informed his client that his offer had been rejected for two main reasons, namely the zip, and the warp and weft of the material.

With regard to the 'zip' Dr Vassallo stated that the contracting authority informed his client that, according to the specifications and conditions, Section 2 'Tunic', of the tender document it stated as follows:

“3 Fastened with concealed open ended zip. Zip must stop four (4) inches above the bottom of the tunic”

Dr Vassallo proceeded by stating that, on checking the sample, the evaluation board found that the zip did not have a stop cover such that the zipper went out of the zip. The appellant's legal representative conceded that the zip of the sample provided by his client did not stop four inches above the bottom but he argued that the tenderer was not bound to supply the goods as per sample submitted so much so that clause 10 of the tender document stated that the *“Health Division reserves the right to make amendments to the style of the uniform during the running of the contract”*

Dr Vassallo referred also to clause 8 (b) which stated that a *“sample uniform for workmanship purposes is also to be submitted”*. At this point the appellant's representative argued that (a) the sample did not have to be strictly in accordance with the tender specifications so much so that the tender document allowed for amendments to be made to the uniform and (b) the fact that the zip did not stop four inches from the bottom was considered a minor infringement that should not lead to the cancellation of the tender.

Mr Mario Farrugia, the appellant, intervened to remark that he had been supplying these uniforms for the previous ten years and that the zip could eventually be easily replaced.

The Chairman Public Contracts Review Board remarked that it had to be acknowledged that the tenderer was bound by the sample that he provided because the evaluation and adjudication would have taken place on the basis of the analysis of that sample. He added that the contracting authority would only accept deliveries according to the approved sample/s and, likewise, the contractor would be obliged to deliver the goods up to the standard of the approved sample, no more and no less.

With regard to the 'warp and weft', Dr Vassallo stated that his client was informed by the contracting authority that whilst the specifications and conditions of the tender document, namely, Section 3 'Material', stipulated that the warp should have been 26 \pm 5% and the weft should have been 21 \pm 5%, yet, in the case of the offer submitted by Mr Farrugia, the warp/weft was of 24s/24s. In this regard Dr Vassallo submitted the following remarks:

- a) his client was advised by his overseas suppliers that the type of material requested in this tender was no longer available;
- b) his client had sought a clarification by way of an email dated 1st November 2010 in order to clarify whether the fabric construction of 'twill 24*24' would be acceptable to the contracting authority; and
- c) in line with email dated 5th November 2010 - which was sent to all tenderers - the contracting authority sent no definite answer but it simply asked bidders to, 'possibly', submit the data sheet of the fabric, which his client complied with by submitting the relative data sheet.

Dr Vassallo observed that in its rulings the Public Contracts Review Board had taken a coherent and consistent stand not to allow tender cancellation on trivial issues.

The Chairman Public Contracts Review Board remarked that if the data sheet was a mandatory requirement then tenderers had to submit it and the term 'possible' used in the reply to the clarification was out of place. The Chairman Public Contracts Review Board added that the appellant expected a clear reply from the contracting authority to his question as to whether the construction of 'twill 24*24' was acceptable, irrespective of whether the answer was in the positive or in negative.

Ms Rita Turchett, representing the contracting authority, explained that in her reply, dated 5th November 2010, to the clarification sought by Mr Farrugia she had requested that, with regard to Clause 3 of the specifications referring to 'Material', the tenderers were to, possibly, submit the technical data sheet of the fabric so that she, not being a technical person, would match the data sheet with the tender specifications to ascertain if 'twill 24*24' was acceptable or not.

Mr Marnol Sultana, secretary to the evaluation board, remarked that all seven tenderers had been disqualified on various and, often, multiple shortcomings such as the non submission of the data sheet and/or sample or that the items offered were, manifestly, not according to specifications as clearly indicated in the evaluation report.

Mr Jesmond Sharples, chairman of the evaluation board, stated that it was his board that had recommended the cancellation of the tender and, contrary to what had been alleged by Dr Vassallo, the recommendation of the evaluation board was not based on trivialities. Mr Sharples gave the following explanations:-

- i. at technical compliance stage, the seven bidders failed on one or more of the criteria;
- ii. these tender specifications were included in previous calls for tenders and they were carefully drawn up to meet the requirements of the contracting authority without going into excessive details, e.g. the kind of yarn to be used and so forth, so as to avoid the possibility that the specifications would favour a particular supplier and lead to the elimination of others;

- iii. certain detail was necessary, for example, details relating to the piping on the collar and the sleeves were needed to enable one to distinguish between the different nursing grades;
- iv. the bidder was not at liberty to discard or alter tender specifications or to suggest one's own specifications;
- v. the two shortcomings on the part of the appellant were:
 - the zip: the contracting authority presented the sample uniforms submitted by the appellant and it was demonstrated to the Public Contracts Review Board that in each case when the zipper was pulled upwards it did not stop at the upper end of the zip but the zipper went out and dislocated itself altogether from the zip and ended up in the hand of the user. Mr Sharples remarked that that, certainly, did not indicate good workmanship and that the Health Department would not expect or allow nurses and midwives to wear uniforms without a properly functioning zip.
 - warp and weft: Mr Sharples explained that the warp was the vertical thread whereas the weft was the horizontal thread that made up the fabric and the relative specifications were detailed so as to ensure that the fabric used would, among other considerations, (a) not be rough but comfortable to wear and work with for long hours, (b) not be transparent such that it would embarrass those who wore these uniforms, and (c) not trap too much air so as not to render them too warm and/or too heavy.

The evaluation board's chairman stressed that a slight departure from the specifications regulating the material would have a bearing on all these considerations that could induce nurses and midwives not to wear the uniforms or even to resort to industrial action. He reiterated that the evaluation board had its good reasons to insist on the 'material' specifications and that its actions were certainly neither irresponsible nor capricious.

As a result, continued Mr Sharples, given that all the bidders were found to be not technically compliant, the evaluation board could not move on to consider the financial aspect of the offers. Furthermore, Mr Sharples argued that it was the main responsibility of the evaluation board to ensure that the recommended tender would be according to tender specifications dismissing the claim that the evaluation board had discarded the appellant's offer on trivial shortcomings.

At this point other issues were discussed including the:

1) Non Submission of Offers for Skirt and Dress

Dr Vassallo stated that his client was also informed that he had not submitted offers for the skirt and the dress and therefore one could not assess their workmanship. Dr Vassallo insisted that his client had submitted these offers and were even acknowledged by the contracting authority.

The evaluation board's secretary confirmed the statement by Dr Vassallo, namely that these offers had, in fact, been submitted by the appellant.

2) DH Circular No. 113/2011

Dr Vassallo made reference to DH Circular No. 113/2011 dated 19th May 2011 under the signature of Mr Joseph Barbieri, Director (Human Resources and Administration) addressed to all nurses and midwives wherein it was stated that the Ministry of Health, the Elderly and Community Care and the Ministry for Gozo had secured the provision of uniforms for all nurses and midwives of all grades and positions working in clinical areas in the Department of Health and in Gozo.

Dr Vassallo remarked that the contracting authority was precluded from entering into a contract with other suppliers once there was a pending appeal in connection with a tender for the supply of the same items.

Mr Sharples remarked that he was detailed to adjudicate the tender in question, which process was concluded in January 2011, and that he had nothing to do with the letter circular which was issued some four months later.

The Chairman, Public Contracts Review Board remarked that the said Board will be looking into this matter.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellant, in terms of their 'reasoned letter of objection' dated 27th February 2011 and also through their verbal submissions presented during the hearing held on 1st June 2011, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant company's representatives' claims and observations, particularly, the references made to the fact that (a) the appellant's offer had been rejected for two main reasons, namely the zip (*on checking the sample, the evaluation board found that the zip did not have a stop cover such that the zipper went out of the zip*), and the warp and weft of the material, (b) while conceding that the zip of the sample provided by his client did not stop four inches above the bottom – which the appellant claimed to be a mere minor infringement - yet, tenderers were not bound to supply the goods as per sample submitted so much so that clause 10 of the tender document stated that the "*Health Division reserves the right to make amendments to the style of the uniform during the running of the contract*", (c) he had been supplying these uniforms for the previous ten years and that the zip could eventually be easily replaced, (d) with regard to the 'warp and weft' the appellant was informed by the contracting authority that whilst the specifications and conditions of the tender document, namely, Section 3 'Material', stipulated that the warp should have been 26 ±5% and the weft should have been 21 ±5%, yet, in the case of the offer submitted by Mr

Farrugia, the warp/weft was of 24s/24s, (e) the appellant was advised by his overseas suppliers that the type of material requested in this tender was no longer available, (f) albeit the appellant had sought a clarification by way of an email dated 1st November 2010 in order to clarify whether the fabric construction of 'twill 24*24' would be acceptable to the contracting authority, yet, in line with email dated 5th November 2010 - which was sent to all tenderers - the contracting authority sent no definite answer but it simply asked bidders to, 'possibly', submit the data sheet of the fabric, which the appellant claimed to have complied with by submitting the relative data sheet (g) in DH Circular No. 113/2011 dated 19th May 2011 under the signature of Mr Joseph Barbieri, Director (Human Resources and Administration) addressed to all nurses and midwives it was stated that the Ministry of Health, the Elderly and Community Care and the Ministry for Gozo had secured the provision of uniforms for all nurses and midwives of all grades and positions working in clinical areas in the Department of Health and in Gozo and (h) DH Circular No. 113/2011 went against public procurement regulations which precluded anyone from entering into a contract with other suppliers once there was a pending appeal in connection with a tender for the supply of the same items.

- having considered the contracting authority's representative's reference to the fact that (a) in Ms Tirchett's reply, dated 5th November 2010, to the clarification sought by Mr Farrugia, she had requested that, with regard to Clause 3 of the specifications referring to 'Material', the tenderers were to, possibly, submit the technical data sheet of the fabric so that she, not being a technical person, would match the data sheet with the tender specifications to ascertain if 'twill 24*24' was acceptable or not, (b) all seven tenderers had been disqualified on various and, often, multiple shortcomings such as the non submission of the data sheet and/or sample or that the items offered were, manifestly, not according to specifications as clearly indicated in the evaluation report, (c) contrary to what had been alleged by the appellant's representatives, the recommendation of the evaluation board was not based on trivialities, (d) these tender specifications were included in previous calls for tenders and they were carefully drawn up to meet the requirements of the contracting authority without going into excessive details, e.g. the kind of yarn to be used and so forth, so as to avoid the possibility that the specifications would favour a particular supplier and lead to the elimination of others, (e) certain detail was necessary, for example, details relating to the piping on the collar and the sleeves were needed to enable one to distinguish between the different nursing grades, (f) the bidder was not at liberty to discard or alter tender specifications or to suggest one's own specifications, (g) the two shortcomings on the part of the appellant were (1) the 'zip' and (2) the 'warp and weft', (h) with regard to the 'zip' the fact that in the samples submitted by appellant when the zipper was pulled upwards it did not stop at the upper end of the zip but the zipper went out and dislocated itself altogether from the zip ending up in the hand of the user did not indicate good workmanship and that the Health Department would not be expected to allow nurses and midwives to wear uniforms without a properly functioning zip, (i) with regard to the 'warp and weft' the relative specifications were detailed so as to ensure that the fabric used would, among other considerations, (1) not be rough but comfortable to wear and work with for long hours, (2) not be transparent such that it would embarrass those who wore these uniforms, and (3) not trap too much air so as not to render them too warm and/or too heavy, (j) a slight departure from the specifications regulating the material would have a bearing on all these considerations that could induce

nurses and midwives not to wear the uniforms or even to resort to industrial action and (k) given that all the bidders were found to be not technically compliant, the evaluation board could not move on to consider the financial aspect of the offers,

reached the following conclusions, namely:

1. The Public Contracts Review Board feels that if the data sheet was a mandatory requirement then tenderers had to submit it and the term 'possible' used in the reply sent by the contracting authority's representative to the clarification sought by the appellant was out of place.
2. This Public Contracts Review Board contends that, albeit not impinging on the outcome of this appeal, yet, the contracting authority acted '*ultra vires*' with regards to DH Circular No. 113/2011 in view of the fact that a contracting authority is precluded from entering into a contract with other suppliers once there is a pending appeal in connection with a tender for the supply of the same items.
3. The Public Contracts Review Board argues that it acknowledges that the appellant was bound by the sample that he provided because the evaluation and adjudication would have eventually taken place on the basis of the analysis of that sample. This Board also remarks in regard that the contracting authority would only accept deliveries according to the approved sample/s and, likewise, the contractor would be obliged to deliver the goods up to the standard of the approved sample, no more and no less.
4. The Public Contracts Review Board members acknowledge the fact that, having themselves viewed during the hearing the samples submitted by the appellant to the contracting authority, the said members cannot but reach the same conclusion, namely that the samples, as submitted, were not according to specifications and, as a result, had no other alternative but to reject the offer as submitted by the appellant. This Board remarks that the onus of having all in order when submitting a tender rests on the participant and not the contracting authority or any of its representatives.

In view of the above this Board finds against the appellant and recommends that the deposit paid by the latter should not be reimbursed.

Alfred R Triganza
Chairman

Edwin Muscat
Member

Joseph Croker
Member

10 June 2011