

PUBLIC CONTRACTS REVIEW BOARD

Case No. 498

CT/3046/2012

Tender for the Supply, Delivery, Installation and Commissioning of Science Equipment and Instrumentation - MCAST

This call for tenders was published in the Government Gazette on the 12th June 2012. The closing date for this call with an estimated budget of € 1,138,198.50 was the 7th August 2012.

Two (2) tenderers submitted their offers.

Labo-Pharm Ltd filed an objection on the 12th October 2012 against the decision of the Contracts Department to recommend the award of the tender to Technoline Ltd – Levo Laboratory Supplies JV.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Joseph Croker and Mr Paul Mifsud as members convened a public hearing on Tuesday, 27th November 2012 to discuss this objection.

Labo-Pharm Ltd

Dr John Gauci	Legal Representative
Mr Stephen Debono	Representative
Mr Frank Galea	Representative

Technoline Ltd – Levo Laboratory Supplies JV

Dr Paul Gonzi	Legal Representative
Mr Ivan Vassallo	Representative
Mr John Attard	Representative
Mr Christopher Bonello	Representative
Mr Simon Cusens	Representative
Mr Adrian Vella	Representative
Mr Joe Vella	Representative
Mr Marc Vella	Representative

Malta College of Arts, Science and Technology

Dr Peter Fenech	Legal Representative
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Evaluation Board

Architect Deborah Borg	Chairperson
Ing. Damien Gatt	Member
Dr Ing. Alex Rizzo	Member
Dr Ing. Stephen Abela	Member
Architect Alexis Inguanez	Secretary



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

Dr John Gauci, legal representative of Labo-Pharm Ltd, the appellant company, submitted that by letter dated 5th October 2012 the Department of Contracts informed the appellant company that its offer was not successful and that the tender was recommended for award to Technoline Ltd – Levo Laboratory Supplies JV. He added that on the 11th October the Department of Contracts further informed the appellant company that its offer was administratively and technically compliant but it was not the cheapest.

A) Fuel Cell

Dr John Gauci also submitted that:-

- i. the recommended offer was not compliant with regard to Clause 1.66.7 since the 'fuel cell' offered was not capable of generating a maximum or near to maximum power of "250W-300W" as stipulated in clause 1.66.5;
 - ii. in order to reach the "250W-300W" the 'fuel cell' or 'generator' had to generate at least 250W;
- and
- iii. the 'fuel cell' offered by the recommended tenderer was 25cm sq which was equivalent to 25W and, as a result, far lower than the maximum or near maximum of 250W-300W set in the tender specifications.

Ing Dr Alex Rizzo, member of the evaluation board, under oath, remarked that:-

- a. the recommended offer included a 25cm sq fuel cell which could generate power up to about 175W;
 - b. the tender document did not set a 'minimum' power but a maximum or near minimum power of 250W-300W and the evaluation board considered 175W as more than adequate;
 - c. one had to keep in mind that the more power that went into the test station the more accelerated would be the wear and tear on the test station which would shorten its life span;
 - d. one of the options proposed by the appellant company included a fuel cell of 50W which the evaluation board considered up to tender specifications even though one could have preferred the 175W fuel cell;
- and
- e. the contracting authority was careful not to fix the power required but to leave a good measure of leeway and one had also to keep in view that the 'fuel cell' was a very minor component or accessory of this equipment.

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Ing Damien Gatt, a member of the evaluation board, under oath, remarked that the automation issue did not arise in the case of the 'fuel cell'.

A) Fuel Cell Test Station System

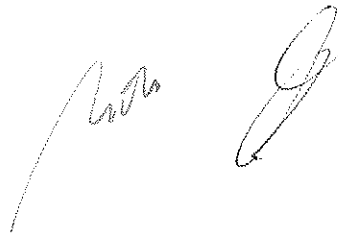
Dr Gauci submitted that:-

- i. the appellant company had reason to believe that the recommended bid was not technically compliant and made particular reference to Clauses 1.66.2, 1.66.5, 1.66.7 and 1.66.8 of Volume 3 'Technical Specifications', which laid down the technical specifications of the single fuel cell test station system;
 - ii. Clause 1.66.2 'Basic minimum features of unit' read as follows:-

“Computer controlled unit (with computer interface) including a control and automation software with very high functionality and user friendly graphical interface; allows computer real time visualisation of all parameters shown in process and system responses; with control of all important fuel cell parameters (including: gas flows in anode and cathode, gas humidification, temperature (cell heating), pressure control), involved in process; with PID controllers for cell endplate heaters or suitable alternatives giving equivalent or better performance; ensures safety with all basic multi-level safety features preferably suitable for unattended operation; to include cell voltage measurement and data acquisition; capable of performing all important fuel cell tests; highly flexible single fuel cell testing”.
 - iii. the recommended bidder did not offer an automated pressure control feature as requested in Clause 1.66.2 and as corroborated by Clause 1.66.8 which laid down that *“Any control which has an option for automatic or manual control, should be provided with automatic control”*;
- and
- iv. although the appellant company was not certain as to the product offered by the recommended tenderer, still the appellant company was well aware of the products available on the market and it was not the latter's intention to embark on any fishing expeditions so much so that the appellant company had raised two specific issues, namely the 'fuel cell' and the 'test station'.

Dr Peter Fenech, legal representative of the Malta College of Arts, Science and Technology, submitted that:-

- a. the appellant company seemed to allege that the technical evaluation carried out by the contracting authority was deficient and reached incorrect conclusions;



- b. whilst the 'test station' was the main item requested in this tender and represented the bulk of the expenditure, the 'fuel cell' was only an accessory the cost of which ran into a few thousand euros;
 - c. the two offers presented by the appellant company and the offer presented by the recommended tenderer were all found compliant with tender specifications;
- and
- d. the technical members sitting on the evaluation board were going to explain and address the technical issues raised by the appellant company.

Ing. Dr Rizzo, under oath, gave the following evidence:-

- i. the test station was the main component and represented practically the whole cost of this project;
 - ii. the technical specifications issued by the manufacturer, BioLogic Science Instruments, provided by the recommended bidder with its original tender submission clearly indicated an '*Automated FCT-50S/Z fuel cell tester with EIS option*' and then listed all the relative functionalities including the 'back pressure control';
- and
- iii. there was other evidence in the manufacturer's technical literature which clearly indicated that the equipment proposed by the recommended tenderer was fully automated.

Dr Gauci pointed out that at tender preparation stage the appellant company had made enquiries with BioLogic Science Instruments and presented the following:-

- email dated 21st July 2012 (closing date of tender 7th August 2012) from Dr Nicolas Portail of BioLogic Science Instruments which stated, among other things, that:

"The specifications of the FCT-50 are OK for the tender requests. However, you have to know that the back pressure is not automatic. In other words, if you can see and register the information about the pressure with the software, you have to manage this one manually";

and

- email dated 26th July 2012 wherein Dr Portail Science from BioLogic Science Instruments confirmed the following about the 'back pressure':

*"Only the monitoring is possible with our system
The control is only manual
We have no option of automatic back pressure.*

It is possible to find systems with automatic back pressure but I am not sure if it is an option or not. Moreover, I am sure that the price will not be the same."

As a consequence Dr Gauci maintained that once the manufacturer, BioLogic Science Instruments, had confirmed to the appellant company that the back pressure control was only manual then that meant that the test station was not fully automated and so non-compliant.

Dr Fenech pointed out that the email dated 26th July 2012 was correct to state that "*It is possible to find systems with automatic back pressure but I am not sure if it is an option or not. Moreover, I am sure that the price will not be the same*" – because, apparently, the recommended tenderer did just that, namely it found an automated system at a higher price.

Ing Dr Rizzo, under oath, remarked that:-

- a. albeit during the evaluation exercise the evaluation board was not in possession of the emails produced by the appellant company's representatives during the hearing, yet, from the technical literature available to it at technical evaluation stage, it was quite clear that the test station was fully automated and among the list of items that it included one found the back pressure control;

and
- b. given the declarations by the manufacturer in the emails that the appellant company presented at the hearing - which were not available at adjudication stage – and the manufacturer's technical specifications available at technical evaluation stage, one would have had doubts as to whether the test station proposed by the recommended bidder was indeed fully automated or not.

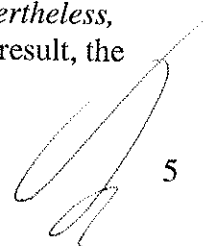
Ing. Damien Gatt, under oath, gave the following evidence:-

- i. once in the software specifications it was stated that "*The temperature, pressure and flow rates of gases and water level are monitored and controlled in the software....*then it certainly followed that the equipment was fully automated with regard to the pressure and it could not be otherwise";

and
- ii. one had to note that reference to 'back pressure control – 0.5 bars manual' was made in the specifications of a 'Semi Automatic Water Filling Kit' which was only one of the options available.

Dr Gauci disagreed with the statements made by Ing. Damien Gatt.

Dr Fenech cited from the second paragraph under 'Automatic Water Filling/Purge', namely "*These new automatic instruments enlarge the FCT range. Nevertheless, existing FTCs can still be upgraded in the factory*". He added that, as a result, the FCT model/range was upgradable to automatic standard.



Dr Paul Gonzi, legal representative of the recommended tenderer, remarked that clause 1.66.1 'Minimum functions' referred to 'highly automated' unit suitable for complete single fuel cell testing and, as a consequence, it was not correct to state that the equipment requested had to be fully automated.

The Chairman Public Contracts Review Board drew the attention of those present to clause 1.66.8, namely '*Any control which has an option for automated or manual control, should be provided with automatic control.*'

The Chairman Public Contracts Review Board argued that whereas the manufacturer's technical literature available at adjudication stage seemed quite clear with regard to the equipment being automated, on the other hand, an official from the same manufacturer, BioLogic, was confirming that the back pressure of FCT-50 was only manual with no automatic option. He added that had the evaluation board been in possession of both versions from the same source it would have perhaps asked for a clarification.

Mr Frank Galea, also on behalf of the appellant company, remarked that, whilst the specifications referred to the 'automated water filling/purge' or 'humidification' which was upgradable, yet the issue under review concerned the 'back pressure control' which was another item.

Dr Gauci remarked that the appellant company had sought clarification from BioLogic Science Instruments as evidenced in the emails it presented at this hearing.

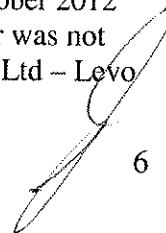
Dr Fenech concluded that it was in the interest of the contracting authority to procure a fully technically compliant science laboratory equipment and, as a result, it was being suggested that the contracting authority would communicate with the manufacturer to clear the 'automation' issue once and for all given the contradictory nature of the various documents emanating from the same source, BioLogic Science Instruments and then report to the Public Contracts Review Board accordingly.

Whilst the Chairman Public Contracts Review Board agreed with the suggestion put forward by Dr Fenech, yet he remarked that the clarification would be sought by the Public Contracts Review Board itself.

At this point the hearing came to a close.

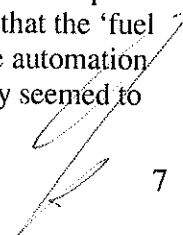
This Board,

- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated the 12th October 2012 and also through its representatives verbal submissions presented during the hearing held on the 27th November 2012, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by letter dated 5th October 2012 the Department of Contracts informed the appellant company that its offer was not successful and that the tender was recommended for award to Technoline Ltd – Levo



Laboratory Supplies JV, (b) on the 11th October the Department of Contracts further informed the appellant company that its offer was administratively and technically compliant but it was not the cheapest, (c) the recommended offer was not compliant with regard to Clause 1.66.7 since the 'fuel cell' offered was not capable of generating a maximum or near to maximum power of "250W-300W" as stipulated in clause 1.66.5, (d) in order to reach the "250W-300W" the 'fuel cell' or 'generator' had to generate at least 250W, (e) the 'fuel cell' offered by the recommended tenderer was 25cm sq which was equivalent to 25W and, as a result, far lower than the maximum or near maximum of 250W-300W set in the tender specifications, (f) the appellant company had reason to believe that the recommended bid was not technically compliant and made particular reference to Clauses 1.66.2, 1.66.5, 1.66.7 and 1.66.8 of Volume 3 'Technical Specifications', which laid down the technical specifications of the single fuel cell test station system, (g) the recommended bidder did not offer an automated pressure control feature as requested in Clause 1.66.2 and as corroborated by Clause 1.66.8 which laid down that "*Any control which has an option for automatic or manual control, should be provided with automatic control*", (h) although the appellant company was not certain as to the product offered by the recommended tenderer, still the appellant company was well aware of the products available on the market and it was not the latter's intention to embark on any fishing expeditions so much so that the appellant company had raised two specific issues, namely the 'fuel cell' and the 'test station', (i) email dated 21st July 2012 (closing date of tender 7th August 2012) from Dr Nicolas Portail of Science Instruments stated, among other things, that "*the specifications of the FCT-50 are OK for the tender requests. However, you have to know that the back pressure is not automatic. In other words, if you can see and register the information about the pressure with the software, you have to manage this one manually*", (j) email dated 26th July 2012 wherein Dr Portail Science Instruments confirmed the following about the 'back pressure', namely that "*Only the monitoring is possible with our system ... The control is only manual ... We have no option of automatic back pressure ... It is possible to find systems with automatic back pressure but I am not sure if it is an option or not. Moreover, I am sure that the price will not be the same*", (k) once the manufacturer, BioLogic Science Instruments, had confirmed to the appellant company that the back pressure control was only manual then that meant that the test station was not fully automated and so non-compliant, (l) whilst the specifications referred to the 'automated water filling/purge' or 'humidification' which was upgradable, yet the issue under review concerned the 'back pressure control' which was another item, and (m) the appellant company had sought clarification from BioLogic Science Instruments as evidenced in the emails it presented at this hearing;

- having considered the contracting authority's representative's reference to the fact that (a) the recommended offer included a 25cm sq fuel cell which could generate power up to about 175W, (b) the tender document did not set a 'minimum' power but a maximum or near minimum power of 250W-300W and the evaluation board considered 175W as more than adequate, (c) one had to keep in mind that the more power that went into the test station the more accelerated would be the wear and tear on the test station which would shorten its life span, (d) one of the options proposed by the appellant company included a fuel cell of 50W which the evaluation board considered up to tender specifications even though one could have preferred the 175W fuel cell, (e) the contracting authority was careful not to fix the power required but to leave a good measure of leeway and one had also to keep in view that the 'fuel cell' was a very minor component or accessory of this equipment, (f) the automation issue did not arise in the case of the 'fuel cell', (g) the appellant company seemed to



allege that the technical evaluation carried out by the contracting authority was deficient and reached incorrect conclusions, (h) whilst the 'test station' was the main item requested in this tender and represented the bulk of the expenditure, the 'fuel cell' was only an accessory the cost of which ran into a few thousand euros, (i) the two offers presented by the appellant company and the offer presented by the recommended tenderer were all found compliant with tender specifications, (j) the test station was the main component and represented practically the whole cost of this project, (k) the technical specifications issued by the manufacturer, BioLogic Science Instruments, provided by the recommended bidder with its original tender submission clearly indicated an '*Automated FCT-50S/Z fuel cell tester with EIS option*' and then listed all the relative functionalities including the 'back pressure control', (l) there was other evidence in the manufacturer's technical literature which clearly indicated that the equipment proposed by the recommended tenderer was fully automated, (m) the email dated 26th July 2012 was correct to state that "*It is possible to find systems with automatic back pressure but I am not sure if it is an option or not. Moreover, I am sure that the price will not be the same*" – because, apparently, the recommended tenderer did just that, namely it found an automated system at a higher price, (n) albeit, during the evaluation exercise, the evaluation board was not in possession of the emails produced by the appellant company's representatives during the hearing, yet, from the technical literature available to it at technical evaluation stage, it was quite clear that the test station was fully automated and, among the list of items that it included, one found the back pressure control, (o) given the declarations by the manufacturer in the emails that the appellant company presented at the hearing - which were not available at adjudication stage – and the manufacturer's technical specifications available at technical evaluation stage, one would have had doubts as to whether the test station proposed by the recommended bidder was indeed fully automated or not, (p) once in the software specifications it was stated that "*The temperature, pressure and flow rates of gases and water level are monitored and controlled in the software....then it certainly followed that the equipment was fully automated with regard to the pressure and it could not be otherwise*", (q) one had to note that reference to 'back pressure control – 0.5 bars manual' was made in the specifications of a 'Semi Automatic Water Filling Kit' which was only one of the options available and (r) from the second paragraph under 'Automatic Water Filling/Purge', namely "*These new automatic instruments enlarge the FCT range. Nevertheless, existing FTCs can still be upgraded in the factory*" it was argued that, as a result, the FCT model/range was upgradable to automatic standard;

- having also considered the recommended tenderer's representative's reference to the fact that clause 1.66.1 'Minimum functions' referred to 'highly automated' unit suitable for complete single fuel cell testing and, as a consequence, it was not correct to state that the equipment requested had to be 'fully automated',

reached the following conclusions, namely:

1. The Public Contracts Review Board argued that, whereas the manufacturer's technical literature available at adjudication stage seemed quite clear with regard to the equipment being automated, on the other hand, an official from the same manufacturer, BioLogic, was also confirming that the back pressure of FCT-50 was only manual with no automatic option. This Board feels that had the evaluation board been in possession of both versions from the same source it would have, perhaps, asked for a clarification. It was with this in mind that the Public Contracts Review Board decided to seek further official clarification in regard from the same supplier.

On Thursday, December 06, 2012 12:01 PM, this Board received the following formal explanation via email from Mr Hervé BONIN, European Sales Manager & Support, Bio-Logic SAS:

QUOTE

Our FCT-50S/Z Fuel cell station is said automated as it can run some long term testing on a PEMFC (ageing), thanks to the automatic built water filling & purging system.


All parameters for a test are set by software automatically or regulated by FC-Lab Software.

The back pressure is set manually on the front panel (for both gas line with a view of the exact value adjusted into the software), and once done, it is regulated by the software into the unit and the measurement loop for the time duration requested by the user for the test.

UNQUOTE

2. The Public Contracts Review Board took full cognisance of the fact that clause 1.66.1 'Minimum functions' referred to 'highly automated' unit suitable for complete single fuel cell testing and it feels that it was not correct for one to state that the equipment requested had to be 'fully automated'. As a result, this Board feels that the explanation received from the recommended tenderer's supplier suffices enough to demonstrate the suitability of the product being offered by the said tenderer. This Board has no reason to doubt that the product in question adheres to the specifications listed in the tender document under review.
3. With regard to the 'fuel cell' the Public Contracts Review Board contends that, since the tender document did not set a 'minimum' power but a maximum or near minimum power of 250W-300W, the evaluation board was correct in considering 175W as more than adequate and in line with tender specifications.

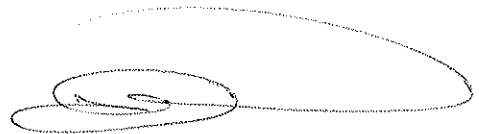
In view of the above this Board finds against the appellant company and recommends that the deposit paid by the same company for the appeal to be lodged should not be reimbursed.



Alfred R Triganza
Chairman



Joseph Croker
Member



Paul Mifsud
Member

6 December 2012