

PUBLIC CONTRACTS REVIEW BOARD

Case No. 512

CT/3026/2012

Tender for the Procurement of Helicopter/s for Border Control – Armed Forces of Malta

This call for tenders was published in the Government Gazette on the 4th September 2012. The closing date for this call with an estimated budget of € 18,000,000 was the 30th October 2012.

Two (2) tenderers submitted their offers.

Eurocopter SAS filed an objection on the 28th December 2012 against the decision of the Contracts Department to disqualify its offer as administratively non-compliant.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Joseph Croker and Mr Carmel Esposito as members convened a public hearing on Wednesday 16th January 2013 to discuss this objection.

Present for the hearing were:

Eurocopter SAS

Dr Kenneth Grima	Legal Representative
Dr Antonio Ghio	Legal Representative
Mr Lionel de-Maupeou	Representative
Ms Marie-Anne Batoche	Representative
Mr Baudoin Marraud des Grottes	Representative

Augusta Westland Spa.

Dr Joseph Camilleri	Legal Representative
Mr Attilio Vassallo Cesareo	Representative
Mr Mark Vassallo Cesareo	Representative

Armed Forces of Malta

Dr Susann Agius	Legal Representative
Dr Mario Spiteri Bianchi	Legal Representative
Col. David Mifsud	Project Leader

Evaluation Board

Col. Harold Stivala	Chairman
Lt. Col. Ian Ruggier	Member
Maj. Robert Bonnici	Member
Capt. Stephen Spiteri Staines	Member
Capt. Douglas Falzon	Member

Lt. Angelic Galea
Mr James Grixti

Member
Secretary

Contracts Department

Ms Marisa Gauci

Representative

At the request of the appellant company and interested parties, the Public Contracts Review Board agreed to conduct the hearing in English.

Preliminary Plea

Dr Joseph Camilleri, legal representative of Agusta Westland SpA, an interested party in this tendering procedure, registered his complaint in the sense that the contracting authority had turned down his client's request to be provided with a copy of the letter of objection submitted by the appellant company both for the sake of transparency and so that it would enable him to prepare his case, even though he was aware that Art. 83 of the Public Procurement Regulations were silent in this regard.

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

Dr Kenneth Grima, legal advisor of Eurocopter SAS, the appellant company, made the following submissions:

- i. this tender called for the procurement of one helicopter with the option for the contracting authority to procure a further two helicopters and, as a result, the estimated value of the tender ranged from €18m to €54m;
- ii. by letter dated 21st December 2012 the appellant company was informed that its offer was not administratively compliant because it included a CD containing the financial offer;
- iii. only two bidders participated in this tendering procedure and the elimination of one of them from the very initial stage of the process would leave only one bidder;
- iv. it was also noted that whereas the appellant company had been disqualified on administrative grounds, namely at the initial stage of the process, which issue was being contested through this objection, instead of halting the tendering process it appeared that the process continued such that the other tender had proceeded to the opening of financial offer stage;

and

- v. it was not correct for the contracting authority to evaluate a tender technically when the process should have been stopped once an objection had been lodged at the preceding administrative stage so much so that the Public Procurement

Regulations stated at Reg. 83 (5) that *“The review is to be effected by the Public Contracts Review Board before the next stage of the adjudication process is commenced.”*

The Chairman Public Contracts Review Board acknowledged that the letter sent by the Public Contracts Review Board to the appellant company was incorrect in stating that the tender has been recommended for award. He added that the Public Contracts Review Board’s letter should have reflected the contents of the Contracts Department’s letter sent to the appellant company on the 21st December 2012, which stated that *“the General Contracts Department has accepted the recommendation for your tender to proceed to the opening of the financial package”* – and so there was no recommendation for award.

Dr Grima continued as follows:-

- i. at tender opening stage, which was held in public, nothing amiss was noted;
- ii. the Public Contracts Review Board, the European Court of Justice and our Courts have repeatedly upheld that whenever a tender document contained ambiguous provisions then that fault should not be attributed to the bidder;
- iii. in the case under reference the appellant company had been extra careful to satisfy the tender conditions;
- iv. this tender procedure entailed the submission of packages 1, 2 and 3 plus the printed copy and the soft copy, namely 5 packages in all and were to be delivered in one bundle;
- v. clause 15.1 of the tender document stated that:
 - a. *All tenders must be submitted in one original, clearly marked "original", and one identical copy (including all documentation in the original) signed in the same way as the original and clearly marked "copy",*
 - b. *Both documents are to be separately sealed and placed in another sealed envelope/package so that the bid can be identified as one tender submission. Following the tender opening session, the copy shall be kept, unopened, at the Department of Contracts, for verification purposes only should the need arise. The soft copy must be included with the original tender offer.*
- vi. whilst the tender document referred to ‘the soft copy’ which could well have meant one CD containing all 3 packages, namely including the financial package, yet the appellant company was extra careful and included two CDs, a CD containing packages 1 and 2, which was sealed in an envelope, and another CD containing the financial offer, which was sealed in a separate envelope, and both on the CDs and on the respective envelopes it was clearly indicated what they contained – in so doing it was ensured that if the contracting authority wanted to look into the technical submission of the soft

copy it could do so without having access to the financial offer which was purposely stored in a separate CD sealed in a separate envelope;

- vii. the appellant company had to follow the instructions given in the tender document in the sense that the bundle containing the tender submission which was delivered to the Contracts Department had to include the original printed tender, the copy of the tender in printed form and the soft copy of the tender – in the appellant company’s case consisting of 2 CDs;

and

- viii. clause 16.1 (f) ‘Documentation to be inserted ONLY in package 3’ made no mention of ‘the soft copy’ and clause 16.1 stated, among other things, that “*Any indication of the financial offer in packages 1 and 2 will automatically disqualify the tender*”. Nevertheless, the appellant company was careful not to insert the financial offer in packages 1 or 2 and, as a consequence, the said appellant company should not have been disqualified.

The Chairman Public Contracts Review Board remarked that one of the purposes of having a 3-package system was so that, at administrative and technical evaluation stage, the contracting authority would have no access to the financial bid and that the purpose of having a soft copy was to serve as a back-up, a point of reference, in case a page or something in the printed submission went missing. He went on to ask whether the term ‘documentation’ referred only to printed information or if it also included information in soft form.

Mr Lionel de Maupeou, also representing the appellant company, remarked that ‘documentation’ related to printed information which was backed up by a soft copy.

The Chairman Public Contracts Review Board expressed the view that if ‘documentation’ meant information both in printed form and in soft form, then, it could be that, according to clause 16.1 (f), the ‘financial offer’, both printed and in soft form, should have been inserted in package 3.

Dr Antonio Ghigo, legal representative of the appellant company, submitted that:-

- a. there was agreement that the purpose of the soft copy was to back up the written/printed tender submission;
- b. whilst clause 15 (1), among other things, stated that “*The soft copy must be included with the original tender offer*”, yet this, and even clause 16, did not state that a soft copy of package 1 had to be inserted in original package 1, a soft copy of package 2 had to be inserted in original package 2 and a soft copy of package 3 had to be inserted in original package 3 so much so that clause 15 referred to ‘the offer’ and not to ‘packages’;

and

- c. clause 15 (1) referred to ‘the original tender offer’, which envelope or bundle was made up of packages 1, 2 and 3, and the soft copy was to be included with the original offer and not in the three packages.

Dr Grima and Dr Ghigo insisted that the appellant company had to abide by the provisions of the tender document and at no stage did the tender document direct that the soft copy had to be inserted in packages 1, 2 and 3. They added that since, according to clause 16.1, the financial offer had to be presented separately from packages 1 and 2, the appellant company was diligent and provided packages 1 and 2 on one CD sealed in an envelope and package 3 (the financial offer) on a separate CD sealed in another envelope and that there was no definition clause with regard to ‘documentation’.

Dr Susann Agius, legal advisor representing the contracting authority, submitted that:-

- i. the tender document mentioned a 3-package/envelope tender and it did not mention any bundles or parcels;
 - ii. the appellant company admitted that its tender submission contained 3 packages plus one envelope with 2 CDs with one of them being the financial bid;
 - iii. clause 15 (1) contained two requirements, namely that the original and the copy had to be sealed in separate envelopes and then that the soft copy had to be included with the original version and not with the copy;
 - iv. clause 16 then required that packages 1 and 2 had to be sealed separately from package 3 such that any indication of the financial offer in packages 1 and 2 led to disqualification;
 - v. the appellant company sought no clarification in this regard and, moreover, a clarification meeting was held on the 18th September 2012 (the minutes were dated 9th October 2012), which was attended by a representative of the appellant company and where the 3-package system was explained;
 - vi. section 3.8.1.3 of the internal ‘Standard Operating Procedures/Guidelines for Tender Evaluation Committees’ provided, among other things, that “*The Evaluation Committee shall also ensure that any reference to price is not included in the CD submitted with the tender documents (if and when a CD is required)*”;
 - vii. the text of the tender document was quite clear and there was no need for diverging interpretations;
- and
- viii. in this case, the appellant company provided a fourth envelope where it included the financial bid with the other two packages and that led to the company’s disqualification.

Dr Mario Spiteri Bianchi, legal representative of the contracting authority, referred to various Public Contracts Appeals Board cases, for example, case numbers 201 and 205 of 2010 and 144 and 145 of 2009 respectively, and to case number 243/89 of the European Court of Justice (ECJ) concerning the 3-package system. He added that this tender was financed through EU funds and delaying the award might jeopardise the utilisation of these funds.

Dr Ghigo referred to other Public Contracts Appeals Board cases, including case numbers 98 and 99 of 2006, case number 117 of 2008, case number 158 of 2009 and case number 180 of 2010 together with ECJ cases mainly concerning ambiguous and/or unclear provisions in tender documents and transparency in the tendering procedure.

The Chairman Public Contracts Review Board remarked that it could be the case that the circumstances of the cases mentioned by both the appellant company and the contracting authority were not identical to those of the case under reference and he added that the fact that EU funds were involved should not imply that important aspects of the tendering procedure could be overlooked.

Dr Grima pointed out that:-

- a. Dr Agius quoted from internal guidelines which were not available to tenderers and which were not part of the tender document nor part of the procurement regulations;
- b. Reg. 83 (1) made no mention whatsoever of the soft copy
- c. the appellant company had inserted the soft copy in a sealed envelope separate from packages 1, 2 and 3 as per tender instructions;
- d. if at the clarification meeting issues emerged that merited a change to the tender document, then the Contracts Department would have circulated the clarification among all bidders and it would have formed an integral part of the tender document, yet, no such clarifications seemed to have been issued;
- e. the Public Procurement Regulations and the amendments thereto effected in 2010 were meant to ensure transparency and to enhance competition as far as possible by giving tenderers the opportunity to clarify and/or rectify certain aspects of the tender submission so as not to resort to outright rejection of bids on trivial matters to the detriment of competition and better offers;

and

- f. whilst the appellant company had been disqualified at administrative stage, which decision was being contested, yet, it seemed that the contracting authority had moved on with the technical evaluation of the other bidder prior to the appeal being decided upon.

Col. David Mifsud, project leader, acting on behalf of the Armed Forces of Malta, explained the procedure followed, namely that, whilst package 1, containing the bid

bond, was opened at tender opening stage, with regard to package 2, containing the technical offer, the evaluation board would open it and first check the contents for administrative compliance followed by the technical evaluation of the administratively compliant offers.

Col. Harold Stivala, chairman of the evaluation board, remarked that package 1 contained the bid bond whereas package 2 contained the technical offer and the appellant company was disqualified administratively at package 2 stage and therefore it was not correct to imply that, after having disqualified the appellant company, the evaluation board went on to open and to consider the technical offer, because the technical offer was in package 2 which had already been opened. He added that the first task of the evaluation board was to check the documentation submitted and it was there that it came across the CD and the process stopped.

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 28th December 2012 and also through its representatives verbal submissions presented during the hearing held on the 16th January 2013, 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) this tender called for the procurement of one helicopter with the option for the contracting authority to procure a further two helicopters and, as a result, the estimated value of the tender ranged from €18m to €54m, (b) by letter dated 21st December 2012 the appellant company was informed that its offer was not administratively compliant because it included a CD containing the financial offer, (c) only two bidders participated in this tendering procedure and the elimination of one of them from the very initial stage of the process would leave only one bidder, (d) it was also noted that whereas the appellant company had been disqualified on administrative grounds, namely at the initial stage of the process, which issue was being contested through this objection, instead of halting the tendering process it appeared that the process continued such that the other tender had proceeded to the opening of financial offer stage, (e) it was not correct for the contracting authority to evaluate a tender technically when the process should have been stopped once an objection had been lodged at the preceding administrative stage so much so that the Public Procurement Regulations stated at Reg. 83 (5) that *“The review is to be effected by the Public Contracts Review Board before the next stage of the adjudication process is commenced.”*, (f) at tender opening stage, which was held in public, nothing amiss was noted, (g) the Public Contracts Review Board, the European Court of Justice and Maltese law Courts have repeatedly upheld that whenever a tender document contained ambiguous provisions then that fault should not be attributed to the bidder, (h) in the case under reference the appellant company had been extra careful to satisfy the tender conditions, (i) this tender procedure entailed the submission of packages 1, 2 and 3 plus the printed copy and the soft copy, namely 5 packages in all and were to be delivered in one bundle, (j) clause 15.1 of the tender document stated that *“All tenders must be submitted in one original, clearly marked "original", and one identical copy (including all documentation in the original) signed in the same way as the original and clearly marked "copy" and that*

“Both documents are to be separately sealed and placed in another sealed envelope/package so that the bid can be identified as one tender submission. Following the tender opening session, the copy shall be kept, unopened, at the Department of Contracts, for verification purposes only should the need arise. The soft copy must be included with the original tender offer, (k) whilst the tender document referred to ‘the soft copy’ which could well have meant one CD containing all 3 packages, namely including the financial package, yet the appellant company was extra careful and included two CDs, a CD containing packages 1 and 2, which was sealed in an envelope, and another CD containing the financial offer, which was sealed in a separate envelope, and both on the CDs and on the respective envelopes it was clearly indicated what they contained – in so doing it was ensured that if the contracting authority wanted to look into the technical submission of the soft copy it could do so without having access to the financial offer which was purposely stored in a separate CD sealed in a separate envelope, (l) the appellant company had to follow the instructions given in the tender document in the sense that the bundle containing the tender submission which was delivered to the Contracts Department had to include the original printed tender, the copy of the tender in printed form and the soft copy of the tender – in the appellant company’s case consisting of 2 CDs, (m) clause 16.1 (f) ‘Documentation to be inserted ONLY in package 3’ made no mention of ‘the soft copy’ and clause 16.1 stated, among other things, that “Any indication of the financial offer in packages 1 and 2 will automatically disqualify the tender”, (n) word ‘documentation’ related to printed information which was backed up by a soft copy, (o) there was agreement that the purpose of the soft copy was to back up the written/printed tender submission, (p) whilst clause 15 (1), among other things, stated that “The soft copy must be included with the original tender offer”, yet this, and even clause 16, did not state that a soft copy of package 1 had to be inserted in original package 1, a soft copy of package 2 had to be inserted in original package 2 and a soft copy of package 3 had to be inserted in original package 3 so much so that clause 15 referred to ‘the offer’ and not to ‘packages’, (q) clause 15 (1) referred to ‘the original tender offer’, which envelope or bundle was made up of packages 1, 2 and 3, and the soft copy was to be included with the original offer and not in the three packages, (r) insisted that the appellant company had to abide by the provisions of the tender document and at no stage did the tender document direct that the soft copy had to be inserted in packages 1, 2 and 3, (s) albeit, according to clause 16.1, the financial offer had to be presented separately from packages 1 and 2, the appellant company was diligent and provided packages 1 and 2 on one CD sealed in an envelope and package 3 (the financial offer) on a separate CD sealed in another envelope and that there was no definition clause with regard to ‘documentation’, (t) other Public Contracts Appeals Board cases, including case numbers 98 and 99 of 2006, case number 117 of 2008, case number 158 of 2009 and case number 180 of 2010 together with ECJ cases, which mainly concerned ambiguous and/or unclear provisions in tender documents and transparency in the tendering procedure, (u) Dr Agius quoted from internal guidelines which were not available to tenderers and which were not part of the tender document nor part of the procurement regulations, (v) Reg. 83 (1) made no mention whatsoever of the soft copy, (w) if at the clarification meeting issues emerged that merited a change to the tender document, then the Contracts Department would have circulated the clarification among all bidders and it would have formed an integral part of the tender document, yet, no such clarifications seemed to have been issued, (x) the Public Procurement Regulations and the amendments thereto effected in 2010 were meant to ensure transparency and to enhance competition as far as possible by giving tenderers the opportunity to clarify and/or rectify certain aspects of the tender submission so as not to resort to outright rejection of bids on trivial matters

to the detriment of competition and better offers and (y) whilst the appellant company had been disqualified at administrative stage, which decision was being contested, yet, it seemed that the contracting authority had moved on with the technical evaluation of the other bidder prior to the appeal being decided upon;

- having considered the contracting authority's reference to the fact that (a) the tender document mentioned a 3-package/envelope tender and it did not mention any bundles or parcels, (b) the appellant company admitted that its tender submission contained 3 packages plus one envelope with 2 CDs with one of them being the financial bid, (c) clause 15 (1) contained two requirements, namely that the original and the copy had to be sealed in separate envelopes and then that the soft copy had to be included with the original version and not with the copy, (d) clause 16 then required that packages 1 and 2 had to be sealed separately from package 3 such that any indication of the financial offer in packages 1 and 2 led to disqualification, (e) the appellant company sought no clarification in this regard and, moreover, a clarification meeting was held on the 18th September 2012 (the minutes were dated 9th October 2012), which was attended by a representative of the appellant company and where the 3-package system was explained, (f) section 3.8.1.3 of the internal 'Standard Operating Procedures/Guidelines for Tender Evaluation Committees' provided, among other things, that "*The Evaluation Committee shall also ensure that any reference to price is not included in the CD submitted with the tender documents (if and when a CD is required)*", (g) the text of the tender document was quite clear and there was no need for diverging interpretations, (h) in this case, the appellant company provided a fourth envelope where it included the financial bid with the other two packages and that led to the company's disqualification, (i) this tender was financed through EU funds and delaying the award might jeopardise the utilisation of these funds, (j) the procedure followed was clear, namely that, whilst package 1, containing the bid bond, was opened at tender opening stage, with regard to package 2, containing the technical offer, the evaluation board would open it and first check the contents for administrative compliance followed by the technical evaluation of the administratively compliant offers, (k) package 1 contained the bid bond whereas package 2 contained the technical offer and the appellant company was disqualified administratively at package 2 stage and, as a result, it was not correct to imply that, after having disqualified the appellant company, the evaluation board went on to open and to consider the technical offer, because the technical offer was in package 2 which had already been opened and (l) the first task of the evaluation board was to check the documentation submitted and it was there that it came across the CD and the process stopped,

reached the following conclusions, namely:

1. The Public Contracts Review Board maintains that the fact that EU funds were involved should not imply that important aspects of the tendering procedure could be overlooked.
2. This Board acknowledges the fact that the letter sent by the Public Contracts Review Board to the appellant company was incorrect in stating that the tender has been recommended for award. As a matter of fact this Board's letter should have reflected the contents of the Contracts Department's letter sent to the appellant company on the 21st December 2012, which, *inter alia*, stated that "*the General Contracts Department has accepted the recommendation for your tender*

to proceed to the opening of the financial package” – and so there was no recommendation for award.

3. The Public Contracts Review Board opines that one of the purposes of having a 3-package system was so that, at administrative and technical evaluation stage, the contracting authority would have no access to the financial bid and that the purpose of having a soft copy was to serve as a back-up, a point of reference, in case a page or something in the printed submission went missing.
4. This Board feels that, contrary to the interpretation given to it by the appellant company’s representative, the term ‘documentation’ referred to both printed as well as information submitted in soft format. Once this Board has embraced this line of thought it cannot but express the view that if ‘documentation’ meant information both in printed and in soft format, then, it reaches its own conclusion, namely that, according to clause 16.1 (f), the ‘financial offer’, both in printed and in soft form, should have been inserted in package 3 with the consequence that, in case of non observance of this tender condition this would have led to automatic disqualification. Needless to state that, in this case, the appellant company provided a fourth envelope where it included the financial bid with the other two packages and that led to the company’s outright disqualification.
5. The Public Contracts Review Board has no doubt that the tender document mentioned a 3-package/envelope tender and it did not mention any bundles or parcels and it is also of the opinion that the text of the tender document was quite clear and there was no need for diverging interpretations.
6. This Board has taken full cognisance of the fact that the appellant company sought no clarification albeit a clarification meeting was held on the 18th September 2012 (the minutes were dated 9th October 2012), which was attended by a representative of the appellant company and where the 3-package system was explained.
7. The Public Contracts Review Board is satisfied that the evaluation board followed the right procedure wherein package 1, containing the bid bond, was first analysed and this was followed by an analysis of package 2 which contained the technical offer. Needless to say, the evaluation board was correct in disqualifying the appellant company at the stage wherein package 2 was analysed in view of a non observance of a mandatory condition.

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

Alfred R Triganza
Chairman

Joseph Croker
Member

Carmel Esposito
Member

24 January 2013