

## **PUBLIC CONTRACTS REVIEW BOARD**

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**Case 1223 – CT 3092/2017 –Tender for the Supply, Delivery, Installation and Commissioning of Multi-Purpose Variable Temperatures X-Ray Single Crystal and Powder Diffractometers including Environmentally Friendly Personal Computers at the University of Malta**

### **Call for Remedies before the Closing Date for Competition**

The publication date of the call for tenders was the 15<sup>th</sup> August 2018 whilst the closing date of the call for tenders was 30<sup>th</sup> October 2018 (to be extended). The estimated value of the tender (exclusive of VAT) was € 1,000,000

On the 17<sup>th</sup> September 2018, Rigaku Corporation filed a Call for Remedy against the University of Malta as Contracting Authority on the grounds that as drafted the tender exclusively favours one supplier.

On 23rd October 2018 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Carmel Esposito and Mr Lawrence Ancilleri as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

#### **Appellants – Rigaku Corporation**

Dr John L Gauci	Legal Representative
Dr Marcus Winter	Representative
Mr Stephen Debono	Representative

#### **Contracting Authority – University of Malta**

Dr Oriella de Giovanni	Legal Representative
Mr Tonio Mallia	Representative
Prof Ulrich Baich	Representative
Ms Elaine Mangion	Representative

Dr Anthony Cassar, Chairman of the Public Contracts Review Board, welcomed the parties and invited submissions.

Dr John Gauci, Legal Representative of Rigaku Corporation (Rigaku), said that according to the Appellants, and to persons in this industry, the tender specifications were lifted from a particular model of one supplier, and that only that supplier can participate and be compliant. There are characteristics to a particular model requested which cannot be met by any other economic operator. Moreover, there was also a restriction on any supplier bidding for only a single lot.

Dr Marcus Winter testified on oath, that he has been working in the X-Ray diffraction instruments industry since 1988 and was therefore very experienced in this field. He had a Doctorate in Chemistry. He explained the difference between single crystal and powder diffraction equipment and their different uses. He stated that the detailed specifications of the two powder units in the tender were attuned specifically to a particular manufacturer. Rigaku were unable to meet these specifications and were therefore unable to make an offer, as no variant solutions would be accepted. The tender also carried a clause that all three lots must be supplied by one manufacturer. A further disadvantage was the lack of flexibility as to whether the X-Ray tube housing should be vertical or horizontal and instruments not directly interfacing when they could easily use the same data from each instrument.

It seemed, according to the witness, that the specifications had been lifted from the products of STOE & Cie GmbH a German manufacturer and were configured to one supplier. There were four world leading suppliers of similar equipment but only one could meet all the specifications – all four could have offered or proposed variable solutions if they had been given the opportunity. As an example, witness mentioned that the quality of the X-Ray image of the Rigaku optic sensor equipment was superior, and a more generic description of the X-Ray instruments would give a wider choice. There should be no lock-out items as these restrict offers.

In reply to questions, witness stated that there is no justification for some of the specifications, and whilst he accepted that certain parts can be obtained from third parties there are other items which are lock-outs.

Prof Ulrich Baiche, on taking a solemn undertaking, testified that he was the Professor of Chemistry at the University of Malta. He explained at length that the specifications had been drawn up particularly to reflect on the work that will be undertaken, i.e. the setting up of a centre of excellence. They were unique specifications specially suited to a particular use. Eventually there will be 15 instruments to set up a centre which will be unique in the Mediterranean. Instruments were required to measure a very wide range of temperatures, and they had to fulfil these requirements. The University had checked different manufacturers' products to ensure that they found the right instruments. The specifications are not from a single manufacturer and they are a challenge because these instruments are unique. There are several companies, available to all manufacturers, which can produce these instruments.

In reply to questions witness stated that the choice of a horizontal rather than a vertical tube was intentionally intended to facilitate the alignment of tubes during the measuring process as this saves time – also necessary to guarantee a long period, maybe 15 years, of service of the

instrument. The minimum time to move from one instrument to another without adjustment is of great importance in the foreseeable research. Also to be considered is the temperature range required (between -190 to 1500C) and that certain samples have to be monitored in the shortest possible time. Regarding the Rigaku claim that the use of a vertical tube is possible, witness said that the Contracting Authority would be happy to consider it, if it fulfilled the same function. He agreed that it was 'a tight tender' but they were prepared to consider alternatives, and there were arguments in favour of having a detector with a larger detection area. There followed a detailed questions and answers session on the attributes of the various instruments (detectors, cooling heads, ovens, diffractometers) with witness confirming that they would consider all applications provided they produced the same results. STOE were not the only manufacturers – Deksit (?) Huber and Bruker all produced instruments that can meet the specifications.

The Chairman mentioned that although the requirements were specific if the Contracting Authority can modify the terms so that alternative equipment can meet the requirements then the tender can go forward.

Dr Baiche, continuing his testimony, stated that Bruker and Rigaku can offer instruments to meet the tender specifications – they had made the requirements such that at least three suppliers should be able to submit an offer. He agreed that the University requirements in this instance were 'beyond state of the art'. There should be one manufacturer, with interfacing instruments, as a matter of seconds, in adjusting from one instrument to another, makes a difference in the results, Getting instruments from different manufacturers would add to the cost as different service contracts would be required with each different manufacturer – this could be quite expensive. It was witness's view that the Appellants can compete on the terms of the tender.

The Chairman thanked both parties for their submissions and declared the hearing closed.

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**This Board,**

**having noted this Call for Remedies filed by Rigaku Corporation, (also referred to as the Appellants) before the closing date for competition on 17 September 2018, refer to the contentions made by the same Appellants with regard to the Tender of Reference CT 3092/2017 issued by the**

**University of Malta and listed as Case No 1223 in the records of the Public Contracts Review Board.**

**Appearing for the Appellants: Dr John L Gauci**

**Appearing for the Contracting Authority: Dr Oriella de Giovanni**

**Whereby the Appellants contend that:**

**a) their first concern is that the way the technical specifications were drafted represent an extract from a particular model of one supplier, to the effect that, the Appellants and other prospective Bidders are precluded from participating in this Tender and thus limiting the scope of competition;**

**b) the Tender dictated that all three lots must be supplied by one manufacturer and such a requirement precludes prospective Bidders to participate for a particular lot.**

**This Board has also noted the Contracting Authority's "*Letter of Reply*" dated 15 October 2018 and its verbal submissions during the Public Hearing which was held on 23 October 2018, in that:**

**a) the University of Malta contends that the technical specifications were compiled in accordance with the requirements to set up a "*centre of***

*excellence*” which will be unique in the Mediterranean. In this respect, the Contracting Authority confirms that prior to the drafting of the technical specifications, the latter carried out market research to ensure that the proper instruments are available and in this regard, there are several companies which can provide such instruments;

b) the Contracting Authority maintains that it is not practical at all to have the set-up comprised of instruments pertaining to different manufacturers. Apart from the arising necessity of having different service contracts, the Contracting Authority insists that the instruments must be interfacing, so that, such a supply must be obtained from one manufacturer.

This Board has also noted the testimony of the witnesses namely,

1. Dr Marcus Winter, duly summoned by Rigaku Corporation;
2. Prof Ulrich Baiche, duly summoned by the University of Malta.

This Board, after having examined the relative documentation to this case and heard submissions made by the parties concerned, including the testimony of the technical witnesses duly summoned, opines that the issues to be considered are twofold namely:

- i) The Technical Specifications;**
- ii) The Preclusion of the Bidders to participate in any one of the Lots.**

**i) The Technical Specifications**

**The technical specifications in a Tender Document are not capriciously formulated but are compiled to reflect the precise requirements of the Contracting Authority. In this particular case, through the vivid testimony of Prof Baiche, this Board was made aware of the fact that this is no ordinary procurement requirement, but consisted of specialised X-Ray diffraction instruments for a “*state of the art*” centre which will be unique in the Mediterranean.**

**This Board was also informed that prior to the publication of the technical specifications of this Tender, the University of Malta, through its professional technical advisors, carried out a market research to ensure that what it is requesting, in so far as equipment is concerned, is available on the market and that such equipment can be supplied by more than one supplier. In fact, from the credible testimony of**

**Prof Baiche, it was confirmed that there are several manufacturers, available to all bidders, which can produce such instrumentation.**

**Rigaku Corporation maintains that there are four leading suppliers which can supply similar equipment, but the manner that the technical specifications are drawn up, only one supplier can conform with these specifications. The Appellants, through the testimony of Dr Marcus Winter, informed this Board that although certain parts can be obtained from third parties, there are other items which are lock-outs and in this respect, the specifications should be more generic so as to allow a wider choice of equipment.**

**In this particular case, this Board noted from the submissions made, that the Contracting Authority admitted that this was a “*tight tender*” and credible explanations were given for such specific rigid requirements which might tend to advantage in some form or other, a particular economic operator. In this respect, the Board opines that the technical specifications should include a clause to allow “*similar equipment or instruments*” to be considered provided such similar equipment will render the desired results of the Contracting Authority.**

**This Board would also emphasize the fact that there exist circumstances where the Contracting Authority will require highly specialised procurement and which, due to its sophisticated and specialised nature, competition is limited to only a few, prospective Bidders. This does not limit the scope of competition, as the possible suppliers of the same product are also limited. This Board would opine that, as long as the available suppliers of the equipment being requested by the Contracting Authority, are allowed to participate in the Tender, the scope of open competition is not limited or suppressed in any particular way. In this regard, this Board instructs the University of Malta to ensure that the technical specifications are modified in such a manner as to enable the available suppliers of such equipment, to participate in the Tendering process of this procurement.**

**At the same instance, from submissions made by the technical witness, the Contracting Authority confirmed that, as long as the Appellants' equipment fulfilled the same functions as those intended by the Contracting Authority, the latter will be able to participate in this Tender.**

**ii) The Preclusion of the Bidders to Participate in any one of the Lots**

**The Tender is comprised of three major pieces of equipment and stipulates that a prospective Bidder cannot submit an offer for only a single unit of such equipment, so that, prospective Bidders have to participate for the whole configuration of the tendered equipment. This Board opines that, although, at face value, there seems to be a limitation in the participation of Bidders, through submissions and explanations given during the Public Hearing, a valid justification was presented as to why the Contracting Authority insists that the total configuration of the equipment should be procured from one supplier; the major issues referring to maintenance agreements and the interfacing instrumentation compatibilities. In this regard, this Board confirms that such a condition in the Tender Dossier will ensure a more feasible and practical utilisation of the equipment to achieve the desired function from the same.**

**After the hearing of this Call for Remedies, this Board received communication from Rigaku Corporation wherein the latter stated that although this Application is still being processed by the Public Contracts**

**Review Board, the Department of Contracts erroneously published the details of the only offer received up to 30 October 2018. The information so published on the e-tendering system breaches the fundamental rules of the Public Procurement Regulations, with special reference to Regulation 266, in that:**

*“Pending the decision of the Public Contracts Review Board, the process of the call for tenders shall be suspended.”*

**In view of the above, this Board:**

- i) instructs the University of Malta to cancel the Tender;**
  
- ii) instructs the Contracting Authority to issue a fresh tender taking into consideration this Board, findings and recommendations;**

Dr Anthony Cassar  
Chairman

Mr Carmel Esposito  
Member

Mr Lawrence Ancilleri  
Member

*1<sup>st</sup> November 2018*