

## PUBLIC CONTRACTS REVIEW BOARD

Case No. 467

DH/979/2012

**Expression of Interest /Request for Proposal: Consultancy Agency to assist in the implementation of changes in inventory management and associated financial management systems and processes within the Central Procurement & Supplies Unit**

This call for tenders was published in the Government Gazette on the 19<sup>th</sup> February 2012. The closing date for this call with an estimated budget of € 120,000 was the 12th March 2012.

Six (6) tenderers submitted their offers.

Crowe Horwath filed an objection on the 12<sup>th</sup> July 2012 against the decision of the Central Procurement and Supplies Unit (CPSU) of the Ministry for Health, the Elderly and Community Care (MHEC) to discard its proposal and to recommend award to Pricewaterhouse Coopers.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Carmel Esposito and Mr Paul Mifsud as members convened a public hearing on Monday, 8<sup>th</sup> October 2012 to discuss this objection.

Present for the hearing were:

### **Crowe Horwath**

Mr John Abela	Partner
Mr Julian Sant Fournier	Representative
Mr Jean Claude Spiteri Migiani	Representative

### **Pricewaterhouse Coopers**

Mr Lino Casapinta	Representative
Mr Joseph Muscat	Representative

### **Central Procurement and Supplies Unit (CPSU) of the Ministry for Health, the Elderly and Community Care (MHEC)**

Dr Adrian Mallia	Legal Representative
Ing. Karl Farrugia	Head, CPSU

### **Evaluation Board**

Mr Arthur Gerada	Chairman
Mr Joseph Azzopardi	Member
Mr Joseph Piscopo	Member
Ms Isabelle Zahra Pulis	Member
Ms Stephanie Abela	Secretary



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

Mr John Abela, representing Crowe Horwath, the appellant firm, made the following submissions:

- by means of email dated 6<sup>th</sup> July, 2012 the contracting authority informed his firm as follows:

*"Thank you for participating in the above-mentioned procurement procedure. However, we regret to inform you that the offer submitted by your company was found not to be the most economic and advantageous proposal."*

### **MEAT**

- whilst it was evident that the award criterion was the most economic and advantageous tender (MEAT), yet, the tender document did not indicate MEAT as the selection criterion and that was in breach of of the Public Procurement Regulations, which stated as follows:-

*'Reg. 28 (3) Contracting authorities shall determine the award of public contracts on the following criteria:*

- i. the most economically advantageous offer; or*
- ii. the lowest price offered compliant with the tender specifications.*

*(4) Where the award is made to the most economically advantageous offer, various criteria relating to the subject matter of the contract, including but not limited to, price, delivery date, delivery period or period of completion, running costs, cost effectiveness, quality, aesthetic and functional characteristics, technical merit, profitability, after-sales service and technical assistance shall be taken into consideration.*

*(5) Where the contract is to be awarded on the basis of the most economically advantageous offer, the contracting authority shall, in the contract documents or, in the case of competitive dialogue, in the descriptive document, indicate all the criteria it intends to apply in the determination of the award, indicating the relative weighting which can be expressed by providing for a range with an appropriate maximum-spread:*

*Provided that where, in the opinion of the contracting authority, weighting is not possible for demonstrable reasons, the contracting authority shall indicate in the contract notice or contract documents or, in the case of a competitive dialogue, in the descriptive document, the criteria in descending order of importance.'*

- \_\_\_\_\_ the published tender document did not include the information specified in Reg. 28 (5) and, as a consequence, the tender should not have been awarded on the basis of MEAT;

## PRICE

- Horwath Malta quoted a work schedule of 1,300 hours at the rate of €32.50 per hour including VAT whereas Pricewaterhouse Coopers quoted a work schedule of 1,000 hours at the rate of €106 per hour including VAT, which meant that the successful bidder undertook to work 300 hours less and to charge three times as much as Horwath Malta;

## EXPERIENCE

- Horwath Malta had the necessary experience for this job so much so that it had been appointed to manage the Financial Monitory Control Unit (FMCU) within the Ministry for Health, the Elderly and Community Care which provided it with an insight of the problems encountered within stock management and control across in the local health sector. During its appointment at the FMCU, Howarth Malta also assisted with the setting up of SIMS (Stock Information Management System).

Dr Adrian Mallia, legal representative of the contracting authority, submitted that:-

- a) the appellant firm was not correct on one crucial point, namely that this was not a tender nor a request for quotations as per Reg. 20 of the Public Procurement Regulations;
- b) the appellant firm reckoned that this procedure fell under Reg. 20 (1) which, provided, among other things, that:

*“where the estimated value exceeds six thousand euro (€6,000) but not one hundred and twenty thousand euro (€120,000), the equipment, stores, works or services may be procured after a departmental call for tenders or after publishing a call for quotations in the Gazette. The tenders and quotations shall be opened in public by three senior officers of the said department and the prices quoted shall also be made public. The provisions of regulation 28 shall apply for the adjudication of the tenders and quotations submitted”;*

- c) this expression of interest/request for proposals was issued in terms of Reg.20 (4) which provided as follows:

*“Without prejudice to sub-regulation (1)(d) direct contracts valued in excess of six thousand euro (€6,000) may, in exceptional cases, be placed by any contracting authority listed in Schedule 2 after such an authority obtains the prior written approval of the Minister who may delegate his authority in*



*writing to the Permanent Secretary or any other senior official in his Ministry”;*

- d) whilst the Ministry for Health, the Elderly and Community Care had submitted a request for a direct order to the Ministry of Finance, yet the latter’s officials had recommended the issue of an ‘expression of interest’ / ‘request for proposals’ which would eventually lead to a direct order;
- e) the regulations did not contemplate appeal procedures in the case of direct orders and, as a result, the same should apply to the expression of interest / request for proposals which was to lead to the direct order. In fact, Reg. 21 provided for appeals in the case of any ‘tenderer or candidate concerned’, which did not apply in the case under review;

and

- f) even if one were to concede that this expression of interest / request for proposals was to be subject to appeal as per Reg. 21, still, the offer submitted by the appellant firm was not compliant with specifications. Nevertheless, it was admitted that, in the letter of rejection, the contracting authority did not communicate these shortcomings to the appellant firm.

The Chairman Public Contracts Review Board noted that, whereas the appellant firm was basing its appeal on Reg. 28, the contracting authority was invoking Reg. 20. He added that an expression of interest served the purpose of exploring the market prior to the issue of a call for tenders but not for the issue of a direct order or else it served the scope of enabling the selection of a few valid interested parties for the contracting authority to negotiate with them.

Ing. Karl Farrugia, Head Central Procurement and Supplies Unit, at the contracting authority, remarked that the instructions issued by the Ministry of Finance, the Economy and Investment were to the effect that, prior to resorting to a direct order, one had to issue a call for expression of interest to explore the market. He added that the pertinent regulations made no mention of a call for ‘expression of interest’ and that the right to appeal mentioned in the letter of rejection was issued on instructions from the Ministry of Finance , the Economy and Investment.

Mr Abela argued that if the contracting authority wanted to issue a direct order, then it was evident that it had a contractor in mind, and, as a consequence, there was no need to issue an expression of interest because this procedure was not meant to precede the issue of a direct order.

Mr Joseph Croker, in his capacity of a senior official at the Ministry of Finance, the Economy and Investment, requested to clarify a few issues under oath. He gave the following evidence:-

- a) his role within the Ministry of Finance, the Economy and Investment was to make recommendations to the Permanent Secretary on requests concerning the issue of direct orders;



- b) in this case, the Ministry for Health, the Elderly and Community Care had submitted a request to issue a direct order to a particular firm for services related to inventory management and associated financial management systems and, given that it was public knowledge that there were several other firms which could provide this kind of service, he felt that it would be more appropriate to first issue a 'request for expression of interest' for the sake of transparency and to introduce an element of competition;
- c) he was aware that Ministry for Health, the Elderly and Community Care required this service urgently and, therefore, the issue of a call for tenders would have taken an inordinate long time to process;

and

- d) conceded that the ideal method would have been the issue of a departmental call for tenders with the shortest possible tendering period, given the time constraints.

The Chairman Public Contracts Review Board shared the unease of the Ministry of Finance, the Economy and Investment in issuing a direct order for this service but he added that perhaps the issue of an 'expression of interest' as part of a direct order procedure was not the ideal way to introduce transparency and competition to the intended direct allocation. He declared that if this 'expression of interest' was conducted as if it were a tender then the participants had the right to appeal but if this expression of interest represented a 'direct order' then it should not be subjected to an appeal.

Mr Abela made it clear that he was not questioning the direct order procedure but what he was contesting was that, once this was an expression of interest and not a direct order, then the evaluation had to follow the rules governing the tendering procedure.

Ing. Karl Farrugia remarked that the Ministry for Health, the Elderly and Community Care had recommended a direct order in favour of PricewaterhouseCoopers because of the urgency of the matter and because this firm had already been allocated, and successfully executed, other smaller assignments in inventory management and associated financial management systems and, encouraged by the positive results achieved, the Ministry for Health, the Elderly and Community Care wanted to urgently implement further control systems on a wider level. Ing. Farrugia added that whilst this expression of interest was published in the local newspaper and did not contain all the details that were found in a tender document, yet the participants were allowed to ask about any aspect, the adjudication was carried out by an independent board and the Ministry for Health, the Elderly and Community Care had no problem to subject the process to appeal.

Mr Arthur Gerada, chairman of the evaluation board, remarked that this call for expression of interest published in the local newspapers did not include the technical evaluation criteria but, on being assigned this task, the evaluation board formulated these criteria as evidenced in the relative evaluation report.



The Chairman Public Contracts Review Board remarked that the evaluation criteria should have been made public at the time the call was issued and that the bidding firm had the right to know the reasons why its offer was unsuccessful. He added that although Ministry for Health, the Elderly and Community Care requested the issue of a 'direct order', ultimately the the Ministry of Finance, the Economy and Investment approved the issue of an 'expression of interest'/'request for proposals', and as a result from that point onwards things changed.

Dr Mallia complained that one should not impose a procedure suitable to a tendering procedure onto a direct order procedure. He added that a call for tenders would entail a tender document which was certainly different from the notice published in the local newspapers. Dr Mallia reiterated that, in any case, the appellant firm's offer was not compliant.

Mr Tonio Casapinta, representing PricewaterhouseCoopers, explained that:-

- a) the Ministry for Health, the Elderly and Community Care wanted to contract this consultancy with urgency because, presently, there was a lack of inventory control of medicines and related items and his firm had already been assigned a contract, of about €5,000, and, as can be seen from the letter of objection, even the appellant firm was awarded similar contract/s;
  - b) the Ministry for Health, the Elderly and Community Care was determined to tackle this inventory control problem with urgency by increasing the resources employed towards this goal;
  - c) following a review of the current system it was reckoned possible to reduce by 5% the present bill amounting to about €260m and that would mean a saving of about €1million a month;
- and
- d) that, along with the fact that the appellant firm failed to satisfy the requested criteria, was why his firm had been indentified by Ministry for Health, the Elderly and Community Care to carry out this assignment.

At this point the hearing came to a close.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated the 11<sup>th</sup> July 2012 and also through their verbal submissions presented during the hearing held on the 8<sup>th</sup> October 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 means of email dated 6<sup>th</sup> July, 2012 the contracting authority informed the appellant firm the "*offer submitted by your company was found not to be the most economic and advantageous proposal.*", (b) whilst it was evident that the award criterion was



the most economic and advantageous tender (MEAT), yet, the tender document did not indicate MEAT as the selection criterion and that was in breach of the Public Procurement Regulations, (c) the published tender document did not include the information specified in Reg. 28 (5) and, as a consequence, the tender should not have been awarded on the basis of MEAT, (d) Horwath Malta quoted a work schedule of 1,300 hours at the rate of €32.50 per hour including VAT whereas Pricewaterhouse Coopers quoted a work schedule of 1,000 hours at the rate of €106 per hour including VAT, which meant that the successful bidder undertook to work 300 hours less and to charge three times as much as Horwath Malta, (e) Horwath Malta had the necessary experience for this job so much so that, whereas it had been appointed to manage the Financial Monitory Control Unit (FMCU) within the Ministry for Health, the Elderly and Community Care which provided it with an insight of the problems encountered within stock management and control across in the local health sector, during its appointment at the FMCU, Howarth Malta also assisted with the setting up of SIMS (Stock Information Management System), (f) if the contracting authority wanted to issue a direct order, then it was evident that it had a contractor in mind, and, as a consequence, there was no need to issue an expression of interest because this procedure was not meant to precede the issue of a direct order and (g) the appellant firm was not questioning the direct order procedure but what it was contesting was that, once this was an expression of interest and not a direct order, then the evaluation had to follow the rules governing the tendering procedure;

- having considered the contracting authority's representative's reference to the fact that (a) the appellant firm was not correct on one crucial point, namely that this was not a tender nor a request for quotations as per Reg. 20 of the Public Procurement Regulations, (b) the appellant firm reckoned that this procedure fell under Reg. 20 (1), (c) this expression of interest/request for proposals was issued in terms of Reg.20 (4), (d) whilst the Ministry for Health, the Elderly and Community Care had submitted a request for a direct order to the Ministry of Finance, yet the latter's officials had recommended the issue of an 'expression of interest' / 'request for proposals' which would eventually lead to a direct order, (e) the regulations did not contemplate appeal procedures in the case of direct orders and, as a result, the same should apply to the expression of interest / request for proposals which was to lead to the direct order – in fact, Reg. 21 provided for appeals in the case of any 'tenderer or candidate concerned', which did not apply in the case under review, (f) even if one were to concede that this expression of interest / request for proposals was to be subject to appeal as per Reg. 21, still, the offer submitted by the appellant firm was not compliant with specifications, (g) it was admitted that, in the letter of rejection, the contracting authority did not communicate these shortcomings to the appellant firm, (h) whilst the instructions issued by the Ministry of Finance, the Economy and Investment were to the effect that, prior to resorting to a direct order, one had to issue a call for expression of interest to explore the market, it was also a fact that the pertinent regulations made no mention of a call for 'expression of interest' and that the right to appeal mentioned in the letter of rejection was issued on instructions from the Ministry of Finance, the Economy and Investment, (i) the Ministry for Health, the Elderly and Community Care had recommended a direct order in favour of PricewaterhouseCoopers because of the urgency of the matter and because this

firm had already been allocated, and successfully executed, other smaller assignments in inventory management and associated financial management systems and, encouraged by the positive results achieved, the Ministry for Health, the Elderly and Community Care wanted to urgently implement further control systems on a wider level, (j) Ing. Farrugia added that, whilst this expression of interest was published in the local newspaper and did not contain all the details that were found in a tender document, yet the participants were allowed to ask about any aspect, the adjudication was carried out by an independent board and the Ministry for Health, the Elderly and Community Care had no problem to subject the process to appeal, (k) this call for expression of interest published in the local newspapers did not include the technical evaluation criteria but, on being assigned this task, the evaluation board formulated these criteria as evidenced in the relative evaluation report and (l) one should not impose a procedure suitable to a tendering procedure onto a direct order procedure;

- having considered the recommended tenderer's representative's reference to the fact that (a) the Ministry for Health, the Elderly and Community Care wanted to contract this consultancy with urgency because, presently, there was a lack of inventory control of medicines and related items and the firm had already been assigned a contract, of about €5,000, and, as can be seen from the letter of objection, even the appellant firm was awarded similar contract/s, (b) the Ministry for Health, the Elderly and Community Care was determined to tackle this inventory control problem with urgency by increasing the resources employed towards this goal, (c) following a review of the current system it was reckoned possible to reduce by 5% the present bill amounting to about €260m and that would mean a saving of about €1million a month and (d) that, along with the fact that the appellant firm failed to satisfy the requested criteria, was why the recommended tenderer had been indentified by Ministry for Health, the Elderly and Community Care to carry out this assignment;
- having considered Mr Croker's testimony, particularly the reference made to the fact that (a) his role within the Ministry of Finance, the Economy and Investment was to make recommendations to the Permanent Secretary on requests concerning the issue of direct orders, (b) in this case, the Ministry for Health, the Elderly and Community Care had submitted a request to issue a direct order to a particular firm for services related to inventory management and associated financial management systems and, given that it was public knowledge that there were several other firms which could provide this kind of service, he felt that it would be more appropriate to first issue a 'request for expression of interest' for the sake of transparency and to introduce an element of competition, (c) he was aware that Ministry for Health, the Elderly and Community Care required this service urgently and, therefore, the issue of a call for tenders would have taken an inordinate long time to process and (d) he conceded that the ideal method would have been the issue of a departmental call for tenders with the shortest possible tendering period, given the time constraints,

reached the following conclusions, namely:

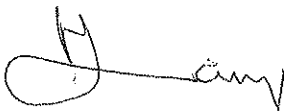
1. The Public Contracts Review Board recognizes the fact that, whereas the appellant firm was basing its appeal on Reg. 28, the contracting authority was invoking Reg.





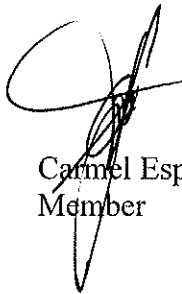
20. This Board argues that an expression of interest served the purpose of exploring the market prior to the issue of a call for tenders but not for the issue of a direct order or else it served the scope of enabling the selection of a few valid interested parties for the contracting authority to negotiate with them.
2. The Public Contracts Review Board, whilst sharing the uneasiness of the Ministry of Finance, the Economy and Investment in issuing a direct order for this service, yet establishes that perhaps the issue of an 'expression of interest' as part of a direct order procedure was not the ideal way to introduce transparency and competition to the intended direct allocation. As a consequence, if this 'expression of interest' was conducted as if it were a tender then the participants had the right to appeal.
  3. This Board feels that the evaluation criteria should have been made public at the time the call was issued and that the bidding firm had the right to know the reasons why its offer was unsuccessful. This Board contends that although Ministry for Health, the Elderly and Community Care requested the issue of a 'direct order', ultimately the Ministry of Finance, the Economy and Investment approved the issue of an 'expression of interest'/'request for proposals', and, as a result, from that point onwards things changed.
  4. The Public Contracts Review Board recommends that the ideal way forward would be for the contracting authority to (a) cancel the 'Expression of Interest /Request for Proposal', (DH/979/2012) - *'Consultancy Agency to assist in the implementation of changes in inventory management and associated financial management systems and processes within the Central Procurement & Supplies Unit'* and to (b) issue of a departmental call for tenders with the shortest possible tendering period, given the time constraints.

In view of the above, this Board finds in favour of the appellant company and recommends that the deposit paid by the same appellant for the appeal to be lodged should be reimbursed.

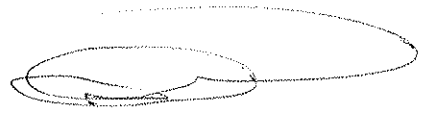


Alfred R Triganza  
Chairman

26 October 2012



Carmel Esposito  
Member



Paul Mifsud  
Member