

PUBLIC CONTRACTS REVIEW BOARD

Case No. 508

CT/2034/2012

Tender for the Supply of Motor Cycles for the Traffic Branch of the Malta Police Department

This call for tenders was published in the Government Gazette on the 20th July 2012. The closing date for this call with an estimated budget of €190,000 was the 11th September 2012.

Two (2) tenderers submitted their offers.

M. Demajo & Co. Ltd filed an objection on the 5th November 2012 against the decision of the Police Department to disqualify its offer as non-compliant and to recommend the award of tender to Muscat Motors Ltd.

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 Friday, 14th December 2012 to discuss this objection.

M Demajo & Co. Ltd

Dr Antoine Cremona	Legal Representative
Mr Martin Borg	General Manager

Muscat Motors Ltd

Dr Graziella Bezzina	Legal Representative
Mr Henry Scicluna	General Manager
Mr Patrick Scicluna	Representative

Evaluation Board (Malta Police Department)

Inspector Anthony Agius	Member
P.C. David Mallia	Member

Department of Contracts

Ms Joelle Mifsud Bonnici	Representative
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After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of the company's objection.

Dr Antoine Cremona, legal representative of M. Demajo & Co. Ltd, the appellant company, made the following submissions:

- i. by letter/email dated 26th October 2012 the appellant company was informed that its offer was adjudicated to be administratively non-compliant because the list of principal deliveries submitted were, apparently, made by the manufacturing company and not by the bidder;
 - ii. the appellant company contended that the list of principal deliveries was presented in the format requested in the tender document and satisfied the provisions of Volume 1 Section 4;
 - iii. the appellant company was the supplier of Moto Guzzi motor cycles (presently forming part of the Piaggio Group), which the Malta Police Force had made use of for a number of years, especially when the procurement of such motor cycles was financed through the *Italian Financial Protocol*, whereas the recommended tenderer supplied BMW motor cycles which the Malta Police Force has been using for the past few years;
 - iv. M. Demajo & Co. Ltd was not questioning the suitability of the motor cycles proposed by the recommended tenderer because both brands of motor cycles were suitable for Police services even overseas;
 - v. it was correct that the list of deliveries submitted by the appellant company was not according to tender conditions because, since both M. Demajo & Co. Ltd and Muscat Motors Ltd did not manufacture motor cycles themselves, the tender conditions allowed the bidder to rely on the capacity of other entities so much so that clause 6.1.2 of the tender document provided as follows:

'An economical operator may, where appropriate and for a particular contract, rely on the capacity of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract, for example, by producing an undertaking by those entities to place the necessary resources at the disposal of the economic operator'
 - vi. the list provided by Piaggio referred to principal deliveries it effected even to Police forces overseas;
- and
- vii. if the contracting authority was going to interpret the relevant clause in such a way that the bidding company had to provide a list of principal deliveries it made to the Malta Police Force then, effectively, there would be no scope in issuing a tender once it was only the recommended tenderer who had been supplying BMW motorcycles to the Malta Police Force over the past few years.

Insp. Anthony Agius, a member of the evaluation board, explained that:-

- with regard to the administrative compliance of the bid submitted by M. Demajo Ltd it resulted that the list of principal deliveries submitted referred to deliveries made by the manufacturer overseas and not in Malta;
- whilst the evaluation board had sent an email on the 19th September 2012 to the Contracts Department requesting guidance as to the proper interpretation of principal deliveries, namely, whether deliveries made by the manufacturer was acceptable as proof of technical capacity of the bidder, yet the Contracts Department replied, among other things, that it could not interfere in the adjudication of the tender and that the evaluation board should present its recommendations to the General Contracts Committee (email dated 20th September 2012);
- moreover, the list of principal deliveries submitted by the appellant company was not accompanied by any documentation regarding the legal links between the bidder and the overseas manufacturer and it did not include deliveries made in Malta;

and

- according to the tender document the term 'of a similar nature' referred to 'motorcycles'.

The Chairman Public Contracts Review Board remarked that it was one of the functions of the Contracts Department to offer guidance to government departments and entities on matters of public procurement and, as a result, the Police Department should have pressed for guidance and not take a 'no' for an answer. He added that when drawing up tender conditions and specifications contracting authorities have to be careful to allow as many competitors as possible and not to limit or even eliminate competition.

Dr Graziella Bezzina, legal representative of the recommended tenderer, submitted that:-

- the list of principal deliveries could have included similar motor cycles delivered/sold on the local market and not necessarily to the Malta Police Force;
- and
- BMW manufactured motor cycles specifically for use by Police Departments whereas it would appear that the Moto Guzzi model had to be adapted for Police use.

Dr Cremona argued that the appellant company had not been excluded on technical grounds but on administrative grounds, namely the list of principal deliveries.

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Insp. Agius pointed out that according to the evaluation report and the technical report attached thereto, the appellant company was excluded both on administrative and on technical grounds.

Ms Joelle Mifsud Bonnici, representing the Contracts Department, remarked that since the appellant company was rejected at administrative compliance stage it should not have been evaluated technically besides contracting authorities should shoulder their responsibilities and not pass it on to the Contracts Department.

At this point the Chairman Public Contracts Review Board intervened to explained to Ms Mifsud Bonnici that:-

- i. a request for guidance made by an evaluation board did not amount to interference in the adjudication of the tender or to shedding responsibility but it was simply a request for advice;
 - ii. a couple of years back the Public Procurement Regulations were reviewed whereby the vast majority of appeals lodged, even those pertaining to local councils, were to be dealt with by the Public Contracts Review Board so that the Contracts Department would primarily dedicate itself to the supervision of public procurement, including tendering advice to contracting authorities on procedures and other matters related to public procurement;
 - iii. the Contracts Department was obliged to guide the Police Department on this issue;
- and
- iv. the letter of rejection issued by the Contracts Department dated 26th October 2012 only referred to the list of principal deliveries and made no mention to the technical deficiencies which were included in the evaluation report.

Dr Cremona objected to the likelihood that, if this appeal were to be upheld, the appellant company would be disqualified once again on technical grounds and insisted that should the appeal be upheld then the sole remaining consideration would be the price.

Dr Bezzina expressed her disagreement with Dr Cremona and stressed that the award was to be made to the cheapest bidder satisfying the administrative and technical criteria.

Dr Cremona alleged that the technical specifications were fashioned to suit the BMW motor cycle model.

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 5th November 2012 and also through its representatives verbal submissions presented during the hearing held on the 14th December 2012, had objected to the decision taken by the pertinent authorities;

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- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by letter/email dated 26th October 2012 the appellant company was informed that its offer was adjudicated to be administratively non-compliant because the list of principal deliveries submitted were, apparently, made by the manufacturing company and not by the bidder, (b) the appellant company contended that the list of principal deliveries was presented in the format requested in the tender document and satisfied the provisions of Volume 1 Section 4, (c) the appellant company was the supplier of Moto Guzzi motor cycles (presently forming part of the Piaggio Group), which the Malta Police Force had made use of for a number of years, especially when the procurement of such motor cycles was financed through the *Italian Financial Protocol*, whereas the recommended tenderer supplied BMW motor cycles which the Malta Police Force has been using for the past few years, (d) M. Demajo & Co. Ltd was not questioning the suitability of the motor cycles proposed by the recommended tenderer because both brands of motor cycles were suitable for Police services even overseas, (e) since both M. Demajo & Co. Ltd and Muscat Motors Ltd did not manufacture motor cycles themselves, the tender conditions allowed the bidders to rely on the capacity of other entities so much so that clause 6.1.2 stated that *'An economical operator may, where appropriate and for a particular contract, rely on the capacity of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract, for example, by producing an undertaking by those entities to place the necessary resources at the disposal of the economic operator'*, (f) the list provided by Piaggio referred to principal deliveries it effected even to Police forces overseas, (g) if the contracting authority was going to interpret the relevant clause in such a way that the bidding company had to provide a list of principal deliveries it made to the Malta Police Force then, effectively, there would be no scope in issuing a tender once it was only the recommended tenderer who had been supplying BMW motorcycles to the Malta Police Force over the past few years, (h) the appellant company which had not been excluded on technical grounds but on administrative grounds, namely the list of principal deliveries, objected to the likelihood that, if this appeal were to be upheld, the appellant company would be disqualified once again on technical grounds and insisted that should the appeal be upheld then the sole remaining consideration would be the price and (j) alleged that the technical specifications were fashioned to suit the BMW motor cycle model;

- having considered the contracting authority's representative's reference to the fact that (a) with regard to the administrative compliance of the bid submitted by M. Demajo Ltd it resulted that the list of principal deliveries submitted referred to deliveries made by the manufacturer overseas and not in Malta, (b) whilst the evaluation board had sent an email on the 19th September 2012 to the Contracts Department requesting guidance as to the proper interpretation of principal deliveries, namely, whether deliveries made by the manufacturer was acceptable as proof of technical capacity of the bidder, yet the Contracts Department replied, among other things, that it could not interfere in the adjudication of the tender and that the evaluation board should present its recommendations to the General Contracts Committee (email dated 20th September 2012), (c) the list of principal deliveries submitted by the appellant company was not accompanied by any

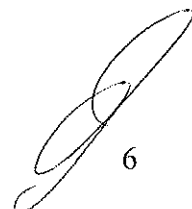

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documentation regarding the legal links between the bidder and the overseas manufacturer and it did not include deliveries made in Malta, (d) according to the tender document the term 'of a similar nature' referred to 'motorcycles' and (e) according to the evaluation report and the technical report attached thereto, the appellant company was excluded both on administrative and on technical grounds;

- having considered the recommended tenderer's representative's reference to the fact that (a) the list of principal deliveries could have included similar motor cycles delivered/sold on the local market and not necessarily to the Malta Police Force, (b) BMW manufactured motor cycles specifically for use by Police Departments whereas it would appear that the Moto Guzzi model had to be adapted for Police use and (f) expressed her disagreement with Dr Cremona and stressed that the award was to be made to the cheapest bidder satisfying the administrative and technical criteria;
- having also considered the Contracts Department's representative's reference to the fact that since the appellant company was rejected at the administrative compliance stage its submission should not have been evaluated technically,

reached the following conclusions, namely:

1. The Public Contracts Review Board recognizes the fact that it remains one of the pivotal functions of the Contracts Department to offer guidance to government departments and entities on matters of public procurement and, as a result, in this instance, the Police Department should have pressed for guidance and not take a 'no' for an answer. Contrary to what the Contracts Department's representative claimed, this Board contends that a request for guidance made by an evaluation board did not amount to interference in the adjudication of the tender or to shedding responsibility but it was simply a request for advice.
2. The Public Contracts Review Board remarks that a couple of years back, the Public Procurement Regulations were reviewed whereby the vast majority of appeals lodged, even those pertaining to, for example, local councils, were to be dealt with by the Public Contracts Review Board so that, *inter alia*, the Contracts Department would, primarily, dedicate itself to the supervision of public procurement, including tendering advice to contracting authorities on procedures and other matters related to public procurement.
3. The Public Contracts Review Board argues that, when drawing up tender conditions and specifications, contracting authorities have to be careful to allow as many competitors as possible and not to limit or even eliminate competition as it was the case with this particular tender. Needless to say that, in this instance, a request for a list of principal deliveries 'of a similar nature' (a) could not be provided by anyone else but the current service provider and (b) by 'similar nature' one has to refer to motorcycles like those used by the Malta Police Department and, undoubtedly, one may only find such motorcycles at the latter's depot – in other words it is a very special niche market which precludes anyone from, arbitrarily, importing similar motorcycles bearing specific requirements for, *inter alia*, patrol and security purposes.



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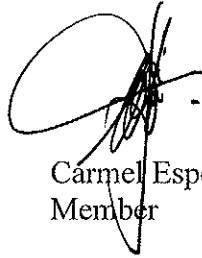
4. This Board has noted that in the letter of rejection issued by the Contracts Department dated 26th October 2012 reference was only made to the list of principal deliveries, making no mention to the technical deficiencies which were included in the evaluation report.
5. The Public Contracts Review Board considers the scope of this tender's specifications as too restrictive thus, very likely, impeding freer and wider participation to take place to the detriment of the competitive spirit which is normally recognized as being indispensable in public procurement.

In view of the above this Board recommends that this tender be cancelled and that another tender be reissued including specifications, terms and conditions which are applicable to as many as interested parties as possible.


Furthermore, this Board recommends that the deposit paid by the same company for the appeal to be lodged should be reimbursed.



Alfred R Triganza
Chairman



Carmel Esposito
Member



Paul Mifsud
Member

18 December 2012