

PUBLIC CONTRACTS APPEALS BOARD

Case No. 22

CT 2251/2003, Advert No. 280/2003 - Provision of incontinence diapers and pads for Senior Citizens and Persons with Disability

This call for tenders, published in the Government Gazette on the 7th October 2003, was issued by the Contracts Department following a formal request received by the latter from the Department for the Elderly and Community Services.

The global estimated value of the contract in question covering a period of two years was Lm 90,000.

The closing date for this call for offers was 18.11.2003.

The Department for the Elderly and Community Services appointed an Adjudication Board consisting of Messrs.

- a. J Rapinett (Chairperson)
- b. T Cordina (Departmental Nursing Manager)
- c. A Zahra (Nursing Officer)
- d. M Abela (Executive Officer)

to analyse a total of eleven offers submitted by six different tenderers.

Following the recommendation by the Adjudication Board on 22.06.2004 to the Contracts Committee and the latter's formal agreement thereto signed on 07.07.2004, Messrs. Protex Ltd filed a Notice of Objection on 07.07.2004 against the said award to Messrs. Sarrebico Medical Supplies Ltd (cost: Lm 21,404 based on two years) based on the following points:

- (a) Protex Ltd. tendered various combinations of requested items resulting in the 1st, 2nd and 5th cheapest offers whereas Sarrebico Medical Supplies Ltd. submitted the 6th cheapest offer;
- (b) Sarrebico Medical Supplies Ltd. did not submit the full range of requested items for Option 'B' offers. Only Option 'A' offer conformed with Clause 13 in Tender Document and therefore Option 'B' should have been disqualified from the process;
- (c) In Option 'A' offer, Sarrebico Medical Supplies Ltd. offered disposable adult diapers instead of children's diapers;
- (d) Sarrebico Medical Supplies Ltd. only submitted samples after closing date of tender.

The Public Contracts Appeals Board (PCAB) made up of Mr. Alfred Triganza (Chairman), Mr Anthony Pavia and Mr. Edwin Muscat, respectively, as members, convened two public hearings on 15.09.2004 and 01.10.2004 to discuss this objection.

Present for the hearings were:

Protex Ltd

Dr Ronald Aquilina LL.D
Mr Jonathan A. Guillaumier

Sarrebico Medical Supplies Ltd

Dr Anna Mallia LL.D
Ms Alexis Sciberras

Witnesses

Mr Michael Bezzina (Director, Dept for the Elderly and Community Services)
Mr Joe Rapinett (Chairman Adjudicating Board)
Ing John Bugeja (Malta National Laboratory Co Ltd)
Mr Bottiglieri John (Principal, Dept for the Elderly and Community Services)
Miss Silvana Cauchi (Clerk, Dept for the Elderly and Community Services)

The appellant's legal representative, Dr Ronald Aquilina, informed those present that, apart from the points raised in the original letter of objection, he requested to raise a further three issues which, according to him, were considered to be vital to his client's appeal proceedings. Also, he claimed that since such facts came to his client's knowledge soon after the filing of the objection, it was only pertinent for such matters to be considered holistically with the initial objection. As a result, Dr Aquilina requested the PCAB to make sure that:

- a. Sarrebico Medical Supplies Ltd. produce their Trading Licence;
- b. Protex Ltd is furnished with copies of all laboratory tests effected on samples; *and*
- c. the persons indicated by his client in a tabled document, particularly, Ing John Bugeja (Engineering Divisional Manager – Malta National Laboratories Co Ltd) be summoned as witnesses.

Dr Anna Mallia LL.D. on behalf of Sarrebico Medical Supplies Ltd replied that they would produce their Trading Licence in the next public hearing. However, she claimed that in their offer Sarrebico Medical Supplies Ltd indicated that their Trading Licence was valid till December 2003.

With regard to the availability of the laboratory test reports, the PCAB ruled that it intended to follow the same procedure as in previous cases, i.e. only allowing the publication of such documentation whenever witnesses made specific reference to them during their testimony.

Mr Joe Rapinett (Chairman, Adjudication Board), was asked by the appellant's councillor

- a. to explain the procedure adopted in the evaluation of the offers taking into account the fact that in the tender's specifications and conditions it was indicated that '*preference will be given to diapers with the least leakage release*';
- b. whether the tender was adjudicated on the basis of either absorption or leakage.

The Adjudication Board's Chairman replied that adjudication was based both on absorption and leakage. He said that they sent samples for laboratory testing – starting with the cheapest offer. This was arrived at by taking the prices quoted by each contractor for each item in each alternative offer submitted. From this exercise it resulted that the cheapest offer, which was that submitted by G Borg Barthet, had to be discarded because the tenderer failed to submit samples. So the Board decided to send the samples of the second (Krypton Ltd's) and third (Protex Ltd's) cheapest offers for laboratory testing.

Mr Rapinett emphasised that apart from the fact that all samples were opened at room temperature in the laboratory in accordance with ISO standards, these same samples were marked in a different manner so that those carrying out the tests at the Malta National Laboratory would not be able to assign tenderer identification to samples being analysed.

From tests carried out it transpired that the second cheapest offer failed in samples submitted for all sizes of children diapers and sample of incompads while the third cheapest failed in samples submitted for large and extra large diapers for children as well as in sample of incompads. The fourth cheapest offer, which was that submitted by Krypton, failed in all sizes of samples submitted for children diapers and incompads.

In reply to Mr Guillaumier's (Protex Ltd.) question regarding the fact that *absorption* and *leakage* were two separate things, Mr Rapinett stated that the method used in evaluating the offers was that if two samples succeeded in passing the tests in connection with absorption, these would then go through other analysis relating to matters connected with leakage. All things being equal, the Chairman of the Adjudication Board explained, preference will be given to the diapers with the least leakage release. Yet, Mr Rapinett also proceeded by placing emphasis on the fact that whenever laboratory tests on samples result in failure by the latter to pass the absorbency testing procedure, such samples are generally not tested for leakages in view of the fact that these would have failed to comply with tender specifications. He said that previous tenders did not include leakage in their specifications. All prospective bidders were informed that both *absorbency* and *leakage* (liquid release), are benchmarked by *I.S.O. 11948 Part 1 and 2* and this was considered to form part of the tender document.

Mr Rapinett said that when laboratory results of the lowest bid fail to positively reflect the tender specifications, the Adjudication Board always proceeds to carry out further tests relating to the next cheapest offer and continues to do so until the results

of the laboratory test are conclusive. In this particular instance, following the same procedure, the samples submitted by Sarrebico Medical Supplies Ltd managed to pass these stringent tests.

When Dr Aquilina enquired about the structure of Sarrebico Medical Supplies Ltd's offer, the Chairman of the Adjudication Board explained that this consisted of two options, Offer 'A' and Offer 'B'; the first offer included quotations for all items whilst the second offer submitted excluded quotations for children's diapers. Mr Rapinett stated that the Board followed what was felt to be an equitable and plausible solution wherein the cheapest prices of all items were taken into consideration, irrespective of the option under which they would have been included. In fact, from *Offer B* the Board accepted Adult Normal Diapers, Adult Extra Absorbent Diapers and Incopads, whilst Children's Diapers were accepted from *Offer A*.

At this stage Mr Guillaumier intervened, insisting that Sarrebico Medical Supplies Ltd did not submit the full range of the requested items in *Option B* and, as a direct result, should have been disqualified from the tender adjudication process. He claimed that only *Option A* conformed with clause 13 of the tender document which stated that '*Only tenderers who offer the full range of requested pads and diapers will be considered.*' Here Mr Rapinett pointed out that Sarrebico Medical Supplies Ltd had offered the full range and that for the same reason the Board would have had to disqualify Protex Ltd's *Options B* and *C* respectively.

With regard to Mr Guillaumier's remark about Sarrebico Medical Supplies Ltd's late submission of samples, namely, after the closing date of the tender, Mr Rapinett said that, although he was not in a position to state whether or not the samples were submitted before the closing date of the tender, he could, however, confirm that all samples were available to the Board at the time the latter was proceeding with the adjudication process. In order to demonstrate that Mr Guillaumier's claim was unfounded, Ms Sciberras tabled a receipt following submission of samples, issued by the Department for the Elderly and Community Services dated 18th November 2003, the closing date of the tender in question.

Following an issue raised relating to the validity of the tenderers' trading licence at the time the said tender was closed, the PCAB requested the respective parties to table such licence for evaluation purposes. Protex Ltd obliged but Sarrebico Medical Supplies Ltd refrained to table the licence within the specified timeframe and as a result were asked to do so by the following working day addressing a copy to both the PCAB's secretary as well as to the other party. At this point, Dr Anna Mallia wanted to draw the attention of this Board that the tender conditions did not specify that the offers of those tenderers who had no trading licence were to be considered invalid.

When Mr Bezzina was cross-examined by Mr Guillaumier, he said that, as a Director, his competence was to improve the specifications so as to decrease complaints and ameliorate standards, adding that in this case it was not the quantity that was relevant but the specifications concerning *absorbency*, *leakage* and *measurements*. The Director, Department for the Elderly and Community Services, explained that whilst all three requirements were considered important, yet, it is standard procedure that whenever samples successfully pass the so called 'absorbency tests', then, at this stage, preference would be given to diapers with the least leakage release. He said

that in this tender specific reference was made to 'leakage' in view of the fact that most of the complaints were received on this particular issue.

When the witness was cross-examined by Dr Mallia, Mr Bezzina confirmed that the current suppliers to the Department were Protex Ltd. He said that taking into account the consumption of diapers, the number of complaints received from users was considered small and negligible.

Ing. John Bugeja, Engineering Divisional Manager, Malta National Laboratory (MNL), said that he was a specialist in the testing of diapers.

When he was asked by Dr Aquilina to give details regarding test results of samples supplied by Protex Ltd and Sarrebico Medical Supplies Ltd, Ing Bugeja asked Mr J Rapinett to give him the necessary information as he did not know to whom they belonged. The Chairman of the Adjudication Board said that the samples marked AA, BB, CC, DD, EE, FF, GG, HH, II and JJ were supplied by Protex Ltd and those marked ABC, DEF, GHI, JKL, MNO, PQR, STU, VWX, YZ and AAB were submitted by Sarrebico Medical Supplies Ltd.

Ing. Bugeja said that he was requested to test the samples basing his analysis on particular tender specifications relating to measurements, absorbency levels and leakages. At this stage the MNL's official referred to reports of test results on samples submitted by the two interested parties giving a detailed account of findings relating to Adult Extra Absorbent Diapers (Small, Medium and Large), Adult Normal Diapers (Small, Medium and Large), Children Diapers (Medium, Large and Extra-Large) and Incopads. However, in order to simplify matters, the PCAB requested Ing. Bugeja to submit a comparative analysis between Protex Ltd's and Sarrebico Medical Supplies Ltd's test results and specifications in the form of a tabulation.

Ing. Bugeja said that in the maximum width/hip measurement maximum fit of diapers he had assumed an overlap of 2.5 cm on each side. He contended that, although, he said that they conformed to specifications, it was not his role to formally interpret findings and that the final decision was left entirely to the discretion of his client, in this case the Adjudication Board.

Mr Rapinett stated that the cheapest offer, namely the one submitted by Messrs G. Borg Barthet, had to be discarded as the tenderer failed to quote for *Adult Diapers Extra Absorbent*. He said that the samples submitted by Protex Ltd's, duly marked AA – FF (*Adult Diapers*), were not tested because the samples of the second cheapest offer (submitted by Krypton Ltd) for adult diapers had already passed the tests. As Krypton Ltd's offer failed as regards the samples submitted for children diapers and incopads, the Adjudication Board requested Ing Bugeja to commence the pertinent testing analysis relating to similar samples submitted by Protex Ltd. However, according to Mr Rapinett, in view of the fact that tests carried out on both *large* and *extra large diapers for children* as well as in respect of incopads, had failed, the tender could not be awarded to Protex Ltd.

Conversely, the Chairman of the Adjudication Board contended, all the test reports on samples submitted by Sarrebico Medical Supplies Ltd, specifically declared that these were in conformity with tender specifications.

With regard to the test results of sample marked STU (submitted by Sarrebico Medical Supplies Ltd), Mr Guillaumier said that the Waist/ Hip measurement for Children Diapers/ Extra Large had a Maximum Fit of 84 cm. Consequently, since according to specifications these had to be between 35 and 60 cm, this item was not in conformity with the tender specifications. Also, he noted that the size of this diaper was equivalent to sample GHI for Adult Normal Diaper – Small. He was of the opinion that adult diapers could never satisfy children’s needs. Apart from this, he said that, as the size of children’s diapers was excessively larger than requested in the tender, such diapers would obviously create discomfort to children. He demonstrated samples of an adult’s and child’s diaper to prove his point but Sarrebico Medical Supplies Ltd’s representatives questioned their sizes.

Ms Silvana Cauchi testified that, as the officer in charge of the *incontinence service*, she was responsible for the receipt and processing of applications as well as dealing with complaints. She confirmed that users of this service have always aired some kind of complaint or other, very often reasonably. One has to appreciate that the users have different requirements dependent on age, size, disability and so forth.

During her cross-examination, she said that they used different sizes of children diapers as it depended on their stature.

Dr Aquilina asked Ms Cauchi to confirm whether the Department she worked for had, over time, received any complaints from clients relating to the fact that in particular instances small adult diapers were distributed instead of children diapers extra large. Ms Cauchi replied in the affirmative.

At this stage the PCAB decided to bring this hearing to a close requesting the representatives of the interested parties, namely Messrs. Sarrebico Medical Supplies Ltd and Protex Ltd respectively, to provide the Board with formal submissions in both printed and electronic format. This Board also ruled that a printed version of the said submissions had to be exchanged between the relevant parties for further analysis by the said Companies. It was also made clear that final points relating to the pertinent submissions had to be made by a date to be stipulated by this Board at a later stage following receipt of the formal submissions by 15.10.2004.

In the meantime the PCAB also decided that:

- a. Sarrebico Medical Supplies Ltd were to submit their Trading Licence (by 04.10.2004)
- b. Ing. John Bugeja was to compile a tabulation with the test results in respect of samples submitted by Protex Ltd and Sarrebico Medical Supplies Ltd and specifications (by 05.10.2004)

This Board also instructed the Board’s Secretary to furnish the interested parties with copies of *Trading Licence* (Sarrebico Medical Supplies Ltd’s) and *tabulation* (MNL) respectively.

Ing. John Bugeja submitted the following tabulation for this Board’s perusal. The results enclosed are tabulated in two groups, namely:

- GG to JJ referring to samples submitted by Protex Ltd
- and
- PQR to AAB referring to samples submitted by Sarrebico Medical Supplies Ltd

Sample	Specifications Waist/Hip measurement	Max fit assuming 2.5cm overlap cm	Minimum Absorption Capacity	Absorption g	Leakage g
GG (Children Diaper / medium)	Not specified	58.5	1000ml	1011	0.26
HH (Children Diaper / Large)	Not specified	59	1300ml	1204	0.09
II (Children Diaper / Ex-Large)	35 – 60 cm	63	1600ml	1344	0.02
JJ (Disposable Pads)	App. 32cm X 11cm	Size 30.5 X 13	700ml	470	0.02

Sample	Specifications Waist/Hip measurement	Max fit assuming 2.5cm overlap cm	Minimum Absorption Capacity	Absorption g	Leakage g
PQR (Adult Extra Absorbent Diaper / small)	50 –80 cm	85	1900ml	1903	0.04
MNO (Adult Extra Absorbent Diaper / medium)	70 – 110 cm	124	2400ml	2942	0.24
JKL (Adult Extra Absorbent Diaper / Large)	100 –150 cm	157	2600ml	4400	0.04
GHI (Adult Normal Diaper / small)	50 –80 cm	84	1600ml	2057	0.02
DEF (Adult Normal Diaper / medium)	70 – 110 cm	125	2000ml	2329	0.26
ABC (Adult Normal Diaper / Large)	100 –150 cm	154	2300ml	2603	0.15
YZ (Children Diaper / medium)	Not specified	58	1000ml	1127	0.12
VWX (Children Diaper / Large)	Not specified	68	1300ml	1351	0.02
STU (Children Diaper / Ex-Large)	35 – 60 cm	84	1600ml	1993	0.02
AAB (Disposable Pads)	App. 32cm X 11cm	Size 35 X 15	700ml	741	0.03

Both parties submitted their formal submissions within the time limit.

In their submission **Sarrabico Medical Supplies Limited** stated that “Protex diapers and Pads have failed in one of main requirements that is absorption. The main

constitutions of a diaper are its ability to absorb and Protex diapers and pads have failed miserably in this regard. In fact one of the pads does not even attain 50% of the required absorption figure.” Sarrebico Medical Supplies Ltd claimed that “this is what disqualified Protex ...”

According to Sarrebico Medical Supplies Ltd the “fact that Protex Ltd tendered various combinations of the requested items, is irrelevant as the absorption of these diapers was not according to what was specified in the tender requirements.” The fact “*that a world leader employing 2000 people manufactures the diapers does not hold water as the diapers failed in the absorption tests conducted at the Malta National Laboratory*”, claimed Sarrebico Medical Supplies Ltd. proceeding that their Company had “submitted various diapers and they were all according and even exceeding the specifications requested by the department”.

Sarrebico Medical Supplies Ltd placed major emphasis on the fact that, contrary to what was being claimed by Protex Ltd, their Company never tried to mislead anyone. They stated that at no time, for example, did they

- a. offer adult diapers small instead of children diapers extra large;
- b. submit samples after the tender closing date (documentation is available to prove otherwise).

On their part, in their submission, **Protex Ltd**’s legal representatives made reference to quite a list of issues, the salient and the most relevant to this case according to this Board including:

Trading Licence - Sarrebico Medical Supplies Ltd

According to Protex Ltd., the licence presented by Messrs Sarrebico Medical Supplies Ltd. does NOT refer to Sarrebico Medical Supplies Ltd but to Mr. Alexander Sciberras personally.

The appellant claims that this is confirmed by the fact that:

- a. the Trading Licence presented does not refer to Sarrebico Medical Supplies Ltd in any manner whatsoever but refers only to Mr. Alexander Sciberras. When a trading licence is issued in respect of a limited liability company, this would be indicated on the trading licence itself in the field “*Post Licenzjat*”, as is the case with Protex Ltd’s trading licence. Once this is not the case with the trading licence presented by Sarrebico Medical Supplies Ltd, then the trading licence applies to Mr. Sciberras personally and not to Sarrebico Medical Supplies Ltd.
- b. the VAT number on the Certificate presented (i.e. 1266-1014) is not registered with VAT Department as Sarrebico Medical Supplies Ltd’s official VAT number. Sarrebico Medical Supplies Ltd indeed have a different VAT Number. VAT number 1266-1014 refers to Mrs. Alexandra Sciberras personally, whereas trading licence is in the name of Mr. Alexander Sciberras personally, thus giving rise to an evident anomaly.

According to Dr Aquilina, “In her covering letter of the 4th October, Mrs. Sciberras states “*I still operate from the same address*” when referring to the address indicated on the trade licence document furnished by her. The fact that Mrs. Sciberras makes this assertion, however, can be of no comfort to Sarrebico Medical Supplies Ltd. It simply means that Sarrebico Medical Supplies Ltd is operating from those premises without a valid trading licence i.e. in breach of the law.” The legal counsel to Protex Ltd elaborated further by stating that at law “a company enjoys a separate and distinct legal personality from that of its shareholders and other individuals. As such therefore, Sarrebico Medical Supplies Ltd cannot argue that they have a trading licence because Mr. Alexander Sciberras used to have a trade licence in his name. The same also applies even if the trading licence presented by Sarrebico Medical Supplies Ltd were in the name of Mrs. Alexandra Sciberras personally.”

In their submission, Protex Ltd argue that Sarrebico Medical Supplies Ltd's lack of a valid trading licence at the relevant time necessarily leads to their disqualification and Sarrebico Medical Supplies Ltd are therefore not eligible for the award of this contract:

- a. in view of clause 13 of the document "*Specifications And Conditions For The Supply Of Incontinence Diapers And Pads For Senior Citizens And Persons With Disabilities*" relative to this Tender which specifies that: "The Schedule of prices must be properly filled in and a quote submitted for each item. Tenderers who do not comply with this condition will not be considered". The Schedule of Prices clearly indicates that tenderers were to provide both "Police Licence Number" and "Police Licence Valid till date". Sarrebico's lack of trading licence necessarily implies that either the afore-mentioned requested information was not supplied at all or that such information was erroneously supplied;
- b. as legally, no entity is authorized to carry out trading activities without a valid trading licence. Once Sarrebico Medical Supplies Ltd does not hold a trading licence, it cannot trade in the first place, let alone trade with a government department / organisation.

Protex Ltd's legal representatives also make reference to the fact that past decisions taken by previous members of a similar Board to this confirm the principle that a party which is not properly authorized to carry on trade according to law and therefore not as envisaged in a particular tender cannot be eligible for the award of that tender (*vide* CT 2131/1999 - Supply of Incontinence Pads & Disposable Adult Nappies to the Welfare Committee (CT 106/99) - decision dated 9th December, 1999.

Sarrebico Medical Supplies Ltd - supply of Adult Diapers instead of Children Diapers

The appellant claimed that the *Tender Document* (clause 10) provides that the “diapers must have ... waist/hip measurement and the minimum absorption capacity for the following diapers must be as follows ... Children Extra-large; 35-60 cm waist/hip measurement”

According to the test results supplied by Ing. John Bugeja of Malta National Laboratory Co. Ltd., the samples submitted by Messrs Sarrebico Medical Supplies

Ltd had the following measurements - *Children Extra Large (sample STU) - 84 cm Maximum Fit.*

Protex Ltd claimed that it should be evident that the samples supplied by Messrs Sarrebico Medical Supplies Ltd in respect of Children Extra Large Diapers (sample STU) are substantially not in conformity with tender specifications (by a margin of 40% based on the maximum fit allowed of 60cm). Moreover, at 84 cm, the waist/hip measurement of sample STU is identical to that of sample GHI (Sarrebico Medical Supplies Ltd's Adult Normal Diaper - Small) where even the absorption is also nearly identical. In the circumstances, it should be evident that Sarrebico Medical Supplies Ltd supplied an Adult Normal Diaper - Small instead of a children extra-large diaper as requested in the tender document (clause 10). Incidentally, it should also be evident that Sarrebico Medical Supplies Ltd has passed the absorbency specification for children extra-large diaper by virtue of submitting bigger samples (*Adult Normal Diaper – Small*) instead of children extra-large diapers.

Dr Aquilina proceeded by stating that the “supply of Adult Normal Diapers - Small instead of Children Extra-Large Diapers would obviously create serious and unnecessary discomfort because of an overly excessive size to that expressly requested in the tender, resulting also in further discomfort because of leakages as diapers would be far too loose; the maximum waist measurement is too big whereas the length of the diaper is too long for children. The elastication around the leg area would also be loose whereas the crotch width too wide for children. It should also be noted that the refastenable adhesive tapes system for adult diapers are completely different to those for children’s diapers, and therefore inappropriate. It is pertinent to bear in mind that should Messrs Sarrebico's offer be accepted, children needing extra-large diapers would AS A RULE be supplied with Adult Diapers which are by far too big for their needs. This is intolerable as when in the past this practice was tried on limited occasions, complaints were made by users in view of the serious discomfort caused to them. Vide in this regard the evidence submitted before the Board by Ms. S. Cauchi from the Department for the Elderly and Community Services.”

Protex Ltd’s submission then proceeds to mention a list of items as offered in Sarrebico Medical Supplies Ltd’s tender which are also not in conformity with specifications as stipulated in the Tender Document (Clause 10), e.g.:

- Children Large - no waist/hip measurement specified
- Children Large (sample VWX) - 68 cm maximum fit
- Adult Extra-Absorbent Diaper - Medium (samples MNO) - Waist/hip measurement 124cms instead of 70-110cm
- Adult Normal Diaper – Medium (samples DEF) - Waist/hip measurement 125cms instead of 70-110cm

Thus, according to Protex Ltd, practically all items (except for items YZ, GHI, ABC & AAB) submitted by Messrs Sarrebico Medical Supplies Ltd do not conform fully with the specifications required.

Protex Ltd - cheapest offer

In view of the above considerations and in view of the fact that the offer submitted by Protex Ltd is the next cheapest offer, the Company submits that the tender should, in the circumstances, be awarded to Protex Ltd. Protex Ltd's legal representatives claim that the Company should in no way be penalized for the Department's failure to test a number of samples submitted by the same Company, including disposable pads for which an alternative was submitted by appellant. It seems that Protex Ltd has only failed two items (circa 10 % of total contract quantities) as against those failed by Sarrebico Medical Supplies Ltd. According to Dr Aquilina, past decisions of the "General Contracts Committee have awarded contracts to tenderers who have failed a fewer number of samples than the next tenderer in line."

Protex Ltd concluded their submission by stating that, in view of the above, Sarrebico Medical Supplies Ltd's offer should be rejected.

As already explained this Board also ruled that a printed version of the said submissions had to be exchanged between the relevant parties for further analysis by the said Companies.

Such analysis led Sarrebico Medical Supplies Ltd to rebut issues raised by Protex Ltd in the latter's submission. The Company made particular reference to matters relating to Trading Licence, VAT and the Supply of Adult Diapers instead of Children Diapers.

Sarrebico Medical Supplies Ltd stated that in their formal objection dated 16.07.2004, the appellant "never raised the issue of the trading licence and so they could never issue it in the course of the proceedings."

However, in spite of the fact that "the tender conditions do not mention anything about trading licences", Ms Sciberras claimed that, without prejudice, she still wants to draw the attention of this Board that "the Trade Licence issued to Mr Alexander Sciberras is transferable by inheritance." In order to substantiate her claim, Ms Sciberras enclosed a document entitled 'Regulations of 2002 regarding Trade Licences', section 2 paragraph 19, which according to her clearly state this fact.

Sarrebico Medical Supplies Ltd enclosed other documentary evidence (legal declaration taken under oath in front of Notary Public J H Saydon on 21.10.2004) in order to confirm that Mr Alexander Sciberras' legal heirs, Mr Andrew Sciberras and Ms Angela-Denise Sciberras respectively, declare that they have no objection to Trade Licence in question (07/291) being transferred to them and agree that this Licence should be transferred to their mother in her own capacity or to Sarrebico Medical Supplies Ltd, a Company in which Ms Alexandra Sciberras is the majority shareholder and also has absolute control of the said Company.

Mr Andrew Sciberras' legal heirs also declared that they were unaware of the fact that such a formal transfer of licence was supposedly to be effected within six months form the demise of their father.

Sarrebico Medical Supplies Ltd also rebutted the issue raised by Protex Ltd with regards to VAT claiming that “this does not give rise to disqualification as the matter can easily be rectified.”

The reference made in paragraph 1.5 of the appellant’s formal submission was also subject to a reaction by Sarrebico Medical Supplies Ltd prompting the latter to include certified documentation “confirming that no further application is needed for the change of use on MEPA B1 application forms.”

Sarrebico Medical Supplies Ltd. then brought to the attention of this Board that the quoted case, *Vernon Carus vs Sarrebico Medical Supplies*, was totally different, stating that “The shareholders of Protex Ltd, were minority shareholders in *Vernon Carus (Malta) Ltd*. The law states that when the majority shareholders of a company registered in Malta are foreigners and do not reside in Malta, then no trading activity can be carried out by this company. This is has no relation to what Protex is claiming.”

In so far as regards the points raised by Protex Ltd in regard to the supply of *Adult Diapers* instead of *Children Diapers*, Sarrebico Medical Supplies Ltd. stated that although they can confirm that the Department had requested that *Children Diapers Extra Large* have the same absorption capacity as the *Adult Diapers Small*, yet one should not go with the idea that these are the same; “there are certain specific differences which make them unique to their particular size, type and supplier. In fact tests conducted by Ing John Bugeja of the Malta National Laboratory confirm this.” emphasised Sarrebico Medical Supplies Ltd.

Sarrebico Medical Supplies Ltd. proceeded by stating that “the arguments being raised by Protex regarding the fit of Sarrebico Diapers is totally irrelevant. We can assure the Board that our children’s *diapers extra large* take into consideration the anatomy and the comfort of the users of these diapers – be they children or adults.... most of the users are bedridden or wheelchair bound and tend to be much heavier around the waist thus requiring in the diaper the ability to encompass a wider girth.”

“The award of the tender to Protex Ltd would mean that they have been awarded a tender when they did not conform to the specifications requested”, concluded Sarrebico Medical Supplies Ltd.

Protex Ltd.’s legal representative also reacted to the other interested party’s formal submission by presenting his comments for this Board’s consideration relative to specific paragraphs of *Sarrebico Medical Supplies Ltd.*’s submission. These comments, formally submitted by Protex Ltd’s legal representative on 21.10.2004, are being reproduced hereunder, quoted not in their entirety, but most importantly, in relation to this Board’s weighting of their importance to objections raised:

- “The function of an incontinence diaper/pad is to absorb and retain fluid in a comfortable and discrete manner for end users. This is only achieved through a synergy of all tender specifications/product conditions; For example, a diaper fails to absorb and retain fluid when it’s size is larger than intended user, and so users will experience further discomfort and distress...”

- "... Sarrebico's submissions regarding the submissions of Mr. Michael Bezzina and Ms. Silvana Cauchi are absolutely and directly opposite to what was actually stated by Mr. Bezzina and Ms. Cauchi before the Board. This, if necessary, can be confirmed with the recordings of the relevant sitting. For clarity's sake, Mr. Bezzina testified that complaints were only few and far between. As a responsible head of Department Mr. Bezzina asked for Protex's comments. Protex, fully confident in its products, co-operated fully and Mr. Bezzina confirmed that he was satisfied with Protex's comments.

As regards Ms Silvana Cauchi, she never testified that a large number of complaints were received. She only made reference to some reports regarding an issue of size concerning *Children Extra Large* diapers, and that complaints did ensue when such diapers were temporarily replaced by *Adult Diapers Small* with the client's consent..."

- "...The fact that a manufacturer supplies products which are accepted by millions of users world-wide, including the American and Japanese markets, is testimony to a high product standard of international recognition..."
- "... It is evident that the sizes for adult diapers small and children's diapers Extra Large submitted by Sarrebico are identical when the tender specifies different sizes. This is irrefutable evidence that adult diapers were offered instead of children's diapers, yet Messrs. Sarrebico choose to ignore these facts and instead insinuate Protex is misleading the board..."

Following a thorough analysis of the issues raised and the documentation submitted during the hearings, as well as the formal submissions presented by the respective parties, this Board decided that equal importance should be attached to the three technical specifications laid down in the Tender Document, namely absorbency, leakage and measurements and, within this context, went on to deliberate on the formal objections raised by appellant.

With regards to objection (a) on page 1 of this document, this Board noted that samples submitted by Protex Ltd had been subjected to technical evaluation by the MNL and found not to conform to requirements. The Board feels that the specifications of 'absorbency', where Protex Ltd failed, is crucial and it is therefore irrelevant whether their offer was the most advantageous or not.

As regards (b), in terms of Section 13 of the Tender Document which states that "*only tenderers who offer the full range of diapers will be considered ... Tenderers who do not comply with this condition will not be considered*", this Board noted that the Adjudication Board's report dated 22.06.2004 stated that "*in order to arrive at the real cheapest offer, the Board agreed to take the cheapest prices for each item in each alternative offer submitted*" Sarrebico Medical Supplies Ltd. The Board found that the 5th cheapest offer was the one submitted by Sarrebico Medical Supplies Ltd. but this was composed of items extracted from Offers 'A' and 'B'. This Board feels that this was unacceptable as it contravened the said condition.

In so far as the third objection (c) raised by the appellant is concerned, this Board has examined the technical reports and confirmed that samples submitted by Sarrebico

Medical Supplies Ltd. have exceeded the maximum sizes laid down in the specifications. This, however, holds also true for samples submitted by Protex Ltd. In the circumstances this Board considers that in both cases the specifications have not been met.

When this Board deliberated on issues concerning the fourth (*d*) objection raised by the appellant, namely the one relating to samples submitted by Sarrebico Medical Supplies Ltd. not being forwarded to pertinent authority within the time frame stipulated in the Tender Document, this Board feels that this complaint was not substantiated.

The Public Contracts Appeals Board opted, once again, to remain consistent with its stringent procedural policy, operative since its formation. In the light of this policy it cannot consider the objections raised during the hearing regarding Sarrebico Medical Supplies Ltd.'s Trading Licence since such objection was not raised by appellant 'ab initio' when the formal complaint was initially lodged.

Having considered the above, this Board finds that

- (i) *the recommendation made by the Adjudication Board to the Contracts Committee for the latter to award the tender to Sarrebico Medical Supplies Ltd. based on a mix of items selected (by the same Board) from both Options 'A' and 'B' cannot be entertained since Option 'B' had already been considered to be invalid in the process;*
- (ii) *the samples supplied by Sarrebico Medical Supplies Ltd. were not in accordance with measurements laid down in specifications. The argument holds true also for the samples submitted by Protex Ltd.*

This Board concludes that, in the circumstances, the tender in question should not be awarded to any of the two tenderers and that a fresh call for offers should be issued.

As witnessed by the above conclusion the board feels that the appeal by Protex Ltd was not frivolous. The board therefore rules that the appellant should be reimbursed with the full amount paid as deposit when lodging the formal claim with the pertinent authority.

Alfred Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

29th October, 2004