

PUBLIC CONTRACTS APPEALS BOARD

Case No. 58

RE: CT 2394/05 – Advert No 259/2005: Tender for the Supply, Delivery, Installation and Commissioning of a Portable Wheel Washing Unit at the entrance of the Maghtab Waste Management Complex

This call for tenders, published in the Maltese Government Gazette on 05.08.2005 was issued by the Contracts department following a request transmitted to the latter by WasteServ Malta Ltd.

The closing date for this call for offers was 06.09.2005.

Messrs WasteServ Malta Ltd appointed an Evaluation Board consisting of Messrs.

Ing Aurelio Attard	- Chairman
Ing Vladimir Filipovic	- Member
Ing Stephen Dimech	- Member

to analyse a total of three (3) offers submitted by different tenderers.

The global estimated value of the contract in question was Lm 40,000.

Following recommendations made by the Evaluation Board to the Contracts Committee for the latter to award the tender to *Messrs William Gatt* (Lm 38,285), Messrs S.R. Services Ltd on behalf of *Frutiger Baumachinen & Co.* filed an objection on 16.11.2005.

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Edwin Muscat, respectively, acting as members, convened a public hearing on 25.01.2006 to discuss this objection.

Present for the hearing were:

S.R. Services Ltd/ Frutiger

Mr Urs Frutiger (Witness)

Dr Joseph Ellis LL.D.

Mr Ray Muscat

Ms Sarah Muscat

Messrs William Gatt

Mr William Gatt

WasteServ Malta Ltd

Dr Stefan L. Frendo LL.D

Evaluation Committee

Ing Aurelio Attard - Chairman

Ing Vladimir Filipovic - Member
Ing Stephen Dimech - Member

Following the Appeals Board Chairman's brief introduction relating to this case, the representatives of S.R. Services Ltd/Messrs Frutiger were invited to give a resume' of what lead to the lodging of their objection. This was followed by WasteServ Malta Ltd's legal representative's reply and the witnesses' testimony.

In his opening statement, Dr Joseph Ellis said that in his clients' view they were being somewhat hindered in their submissions due to lack of information provided relating to the equipment that had been chosen by the Evaluation Committee and the General Contracts Committee respectively. He pointed out that (i) the Secretary PCAB had refused to furnish them with such information, (ii) the analysis report was extremely scant and (iii) WasteServ Malta Ltd's letter dated 20 December 2005 lacked the required information. Dr Ellis said that the primary scope of having access to such information 'a priori' was to prove that their equipment was better value for money *viz-a-viz* the chosen equipment. The PCAB remarked that, once it was known that their product was comparably better than that of their competitor, this implied that they were already in possession of facts. Also, it was emphasised that the PCAB did not allow for 'fishing expeditions' and that an appellant was expected to possess solid grounds regarding an objection before this is filed. Furthermore, the PCAB explained that it could not allow for the divulging of such information because it could possibly contain commercial data that was deemed to be confidential. This line of reasoning was also expressed by WasteServ Malta Ltd's representatives.

The PCAB said that, rather than making a comparative analysis between the two offers, the appellants needed to prove that their offer was technically acceptable and to state why in their opinion they were wrongly judged.

Mr Urs Frutiger, President and owner of Frutiger Company (based in Switzerland) on taking the witness stand, claimed that his company had been concentrating on the production and sale of wheel-washing units for these last 20 years and that they were market leaders worldwide. He claimed that their philosophy was to solve every problem concerning dirty roads.

Mr Frutiger testified that they had decided to submit their tender for the wheel-washing unit after visiting the Maghtab site, after checking the soil condition and after observing trucks leaving the Maghtab landfill. The witness said that they based their tender on the information gathered during his familiarisation visit on site. Mr Frutiger declared that the situation at this landfill was not easy especially when the soil was wet.

Mr Frutiger said that they submitted two offers – Option A (Moby Dick Quick 400) - Option B (Moby Dick Quick 939). The length of the washing elements of the second unit was 939cm which allowed 3 revolutions of the wheel. He said that this unit was rather expensive because of the length of the washing platform. However, the washing effect of this option was very good because the wheels of the vehicles would be absolutely clean. According to the same witness, the other unit, which was cheaper but smaller, was

suitable for sandy conditions. Furthermore, the wheels were only washed during one revolution because the washing elements were only 4m long. He said that this unit was also good but the washing results could not be 100% effective in wet conditions if the truck drivers drove very fast through the unit. However, Mr Frutiger explained that the washing results would be efficient if drivers were advised to drive slowly, to stop on the unit and/or to drive backwards. He emphasised that both options met all the technical specifications of the tender.

The witness claimed that he highlighted these problems in the tender because a wheel washing unit to be effective needed to have a long washing platform which allowed two or three revolutions of the wheel. He contended that they should have specified the length of the washing platform in the specifications because if they installed a small unit they would not solve the dirt problem on the roads.

He claimed that it was not possible for the recommended tenderer to provide such a long unit for that price because these were rather expensive.

Dr Stefan Frendo, in his capacity as legal representative to WastServ Malta Ltd., said that by this objection the appellants were attacking the evaluation carried out by the Adjudication Board. He explained that when one attacked the discretion or put into doubt the discretion of an Evaluation Board, one must not try to substitute the discretion of the Evaluation Board with the discretion of the PCAB unless there were compelling issues that the Evaluation Board had committed a severe error of judgement that was motivated by wilful misconduct or negligence or fraud. The lawyer said that this did not arise in this case. Dr Ellis responded that, in spite of what had been stated by Dr Frendo, the regulations did not limit the PCAB in carrying out a complete and detailed re-examination of the reasons brought forward by the adjudication board for the discarding of any particular tender.

Dr Frendo continued by stating that, as far as the appellants' offer (Option A) was concerned, it was Mr Frutiger himself who had declared that the unit was insufficient for their purposes. Thus, in the prevailing circumstances, the Evaluation Committee's only alternative was to consider favourably the cheapest compliant offer, namely that of Messrs William Gatt (Tenderer No 1 – Offer A).

Mr Aurelio Attard, Chairman Evaluation Committee, who was the second witness to take the stand, testified that the introduction of the tender document stipulated that '*This tender provided for the supply, delivery, installation and commissioning of one (1) portable wheel washing unit to effectively pressure-wash and clean wheels of vehicles leaving the Magtab Waste Management Complex managed by WasteServ Malta Ltd, hereinafter referred to as "The Company".*' He said that the appellants had submitted two options for this tender and that in the *Wheel Washer Specification Form* the tenderer indicated that both units were capable of handling 60 vehicles per hour.

Also, the same witness made reference to Mr Frutiger's letter dated 5 September 2005 which was submitted with their offer, wherein it was stated that:

'The following offer (Variation A) meets all specifications mentioned in the tender. Because the length of the washing elements is only 4m, the wheels are only washed during 1 revolution. Together with the tendency of the truck drivers to drive too fast through the system the washing result will be insufficient. If you choose this variation it is important to advise the drivers to drive very slowly. During wet periods with a maximum degree of soiling it might be necessary to stop on the unit with every wheel and/or to drive backwards.'

Mr Attard claimed that by this statement the tenderer highlighted a risk that, with this type of wheel washer, they would not be capable of handling the maximum of 60 vehicles per hour and that they would not be able to achieve an optimum performance especially during peak hours.

Furthermore, he said that, theoretically, this system could be manageable but they had to take into consideration the local scenario since the drivers were undisciplined. He claimed that it would be very difficult to manage and convince them to drive slowly or occasionally to reverse into the wheel washing unit. In reply to a specific question by the PCAB, Mr Attard declared that they did not enquire whether they would encounter similar problems with the recommended tenderer. However, he claimed that their performance would be monitored as they went along. Here, his attention was drawn to the fact that it was indispensable for Adjudication Boards to evaluate all offers properly 'a priori' and on the same conditions and criteria.

Continuing, Mr Attard said that the Evaluation Committee maintained that once the larger unit (Option B) met the 60 vehicles per hour condition, it was very unlikely that the smaller one (Option A) would meet such requirement. Here, Mr Frutiger explained that in their tender it was indicated that both units could handle 60 vehicles per hour because the time taken to wash the wheels did not depend on the length of the units but on the speed of the vehicles as they were driven through the system. He declared that both units could have the same capability, because if the drivers drove their trucks too fast through the 4m unit (Option A), the washing result would not be sufficient. However, if the drivers drove slowly, their wheel washing station would be effective because then each vehicle would stay longer on the system (more than the normal 20 seconds but less than 60 seconds).

With regard to the offer submitted by the recommended tender, Mr Attard declared that the length of the washing platform was 11.48m. Following this, Mr Frutiger intervened to explain that the actual length of the washing platform was only 5m because of the ramps. Mr Attard confirmed that in their evaluation they took into consideration the whole measurement of 11.48m. However, he pointed out that as the washing elements of Messrs Frutiger had a length of 4m, the wheels were washed during 1.2 revolutions contrary to that of the recommended tender which was 1.8 revolutions. Mr Frutiger insisted that a system needed to have more than 2 revolutions in order to be effective.

When Mr Attard said that the pressure of the spray water of the units pertaining to the recommended tenderer was 6 bars and that of the appellant was only 2 bars, Mr Frutiger intervened by stating that there were two philosophies of wheel washing systems - the first had high pressure with low volume of water and the other had low pressure with high volume of water. He said that the *MobyDick* used the latter system because they only needed to wash the mud from the tyres and the chassis. Mr Frutiger contended that their target was not to clean the vehicles but to clean the roads. Here, Mr Muscat presented a document to demonstrate the difference between the two philosophies. With regard to the volume of water, when Dr Frendo remarked that water in Malta was expensive and scarce, Mr Frutiger stated that no water was wasted because their system had no ramps and had a recycling tank.

As regards specifications, Mr Attard confirmed that the length, pressure and volume of water were not specified in the tender. However, he pointed out that the technical specifications indicated in the tender document were the minimum requirements. Mr Attard was of the opinion that the tender document was complete, however, he declared that with hindsight it could have included more specifications.

During his testimony, Mr Attard said that in view of the permit restriction imposed by MEPA they had to ensure that the wheel washing station was effective. However, when he was asked to state whether he was comforted that they were going to meet the MEPA requirements with the recommended offer, he replied that they were not 100% comfortable. Furthermore, he said that if Mr Frutiger had not been so sincere when highlighting such problems related to the length of the *MobyDick* 400, they might have recommended their offer.

In his short intervention, Mr William Gatt highlighted the fact that (i) the motor and generator (60kVA vs 13kVA) of his product were more powerful than that offered by Messrs S.R. Services/Frutiger, (ii) the unit offered by his Company was safer because the power-washer was inbuilt in the unit, and (iii) they needed less construction works since the water tank formed part of the unit itself.

In his concluding remarks, Dr Ellis said that from the outcome of these proceedings it resulted that there were no grounds to disqualify Messrs S.R. Services/ Frutiger's offer and to award the contract to a tenderer who offered much more expensive equipment. He contended that in the prevailing circumstances the decision should be changed by awarding the tender to his clients.

Dr Frendo concluded by stating that in his testimony Mr Frutiger declared that their *Option A* was intended for sandy and not muddy situations. He claimed that in view of the problems highlighted in Mr Frutiger's letter, the Evaluation Committee was more comfortable in recommending Messrs Gatt's offer Option A. Dr Frendo emphasised that once it had been established that there was nothing fundamentally flawed or wrong with the Evaluation Committee's decision, then the PCAB had no alternative but to confirm their recommendation.

Dr Ellis responded by stating that since the Adjudication Board did not seek clarifications there was a major shortcoming in its workings. However, Dr Frendo rebutted by stating that a clarification was to be sought only when the need arose, which was not the case at that point in time.

At this stage, the public hearing was brought to a close and the PCAB proceeded with its deliberations before reaching its decision.

This Board,

1. having noted that the appellants, in terms of their 'reasoned letter of objection' dated 16th November, 2005, and also through their verbal submissions presented during the public hearing held on the 25th January, 2006, had objected to the decision taken by the General Contracts Committee who considered the tender submitted by them as "non-compliant / unacceptable for award";
2. having noted the appellants' arguments and points raised in favour of their offers to demonstrate that both their options meet all the technical specifications of the tender;
3. having taken note of the appellants' principals' genuine approach in the submission of their offer which was intended to draw the Evaluation Committee's attention as to the best way to derive maximum effectiveness from the preferred option being submitted;
4. having noted Mr Attard's claim that by Mr Frutiger's statement the tenderer highlighted a risk that, with this type of wheel washer, they would not be capable of handling the maximum of 60 vehicles per hour and that they would not be able to achieve an optimum performance unless certain specific conditions were observed, especially during peak hours;
5. having taken note of the Evaluation Committee's consideration given to the fact that, in their opinion, local drivers were undisciplined thus not so inclined to having a system which necessitates such drivers to slow down;
6. having established that the Committee did not enquire whether they would encounter similar problems (as raised by appellants in their offer) with the recommended tenderer as, according to Mr Attard, the performance of the system provided by the latter would be duly monitored following implementation;
7. having also established that in their evaluation of the preferred tenderer, committee members had erroneously considered the whole length of the washing platform, namely 11.48 m instead of the operational length of 5 m;
8. having noted that the washing elements of the system offered by Messrs Frutiger had a length of 4 m, the wheels were washed during 1.2 revolutions and that of the recommended tender which was 1.8 revolutions;
9. having taken note of Mr Fruiger's claim that a system needed to have more than two (2) revolutions in order to be effective, which was not contested;

10. having established that the length, pressure and volume of water were not specified in the tender and that Mr Attard declared under oath that with hindsight the tender document could have included more detailed and precise specifications;
11. having taken note of Mr Attard's testimony who, under cross-examination, declared that he is not 100% comfortable that the preferred tenderer's offer would ultimately meet the stringent MEPA requirements;
12. having heard Mr Attard state that if Mr Frutiger had not been so sincere when highlighting such problems related to the length of the *Moby Dick 400*, the Evaluation Committee might have recommended their offer

reached the following conclusions:-

1. Once the Chairperson of the Evaluation Committee, at a point in time, during the hearing, acknowledged that, following the evidence heard during the sitting, he was no longer confident that the awarded tender would, after all, meet MEPA's requirements;
2. Once it is also clear that the tender specifications were not drafted in a comprehensive manner and lacked sufficient technical details;
3. Furthermore, once it seems also evident that the Evaluation Committee overlooked certain important details while deliberating on the award of this tender thus enabling an offer to be placed at an advantage over another one;
4. As a consequence to all points raised during the hearing, especially to '1, 2' and '3' above, the appellants' objection to the decision reached by the General Contracts Committee to award the contract to Messrs William Gatt, is upheld by this Board. Also, this Board recommends that this tender be re-issued in a more detailed manner

Finally, in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by appellants in terms of regulation 83, should be refunded.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

17th February, 2006