

PUBLIC CONTRACTS APPEALS BOARD

Case No. 65

RE: CT 2082/2005 - Provision of Waste Recycling Containers to be placed in Streets for household use and in schools and vehicles for their servicing – Lot 1

This call for tenders, contemplated under the three-package system, was published in the Maltese Government Gazette on the 20th May 2005 and 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 with a global estimated value of contract being Lm 168,000 (excluding VAT) was 26th July 2005.

An Evaluation Committee consisting of Messrs.

Mr Joe Degiorgio	Chairperson
Ms Mary Grace Micallef	Secretary
Ing Vincent Magri	Member
Dr Ing Chris Ciantar	Member
Ing Mario Agius	Member

was appointed to analyse offers submitted by five (5) different tenderers.

Following various clarification exercises between interested parties and the Evaluation Committee / contracting authority, a formal report was submitted by the Evaluation Committee.

In a letter dated 6th January 2006, the DG (Contracts) formally notified the appellants that their *tender for Lot 1* was '*not among the selected ones since it has been adjudicated as technically non-compliant because the porthole dimensions given are not as requested in the tender specifications*', Messrs 8657 SmartBin filed an objection on 11 January 2006.

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 22.02.2006 to discuss this objection.

Present for the hearing were:

8657 SmartBin

Mr Andrew Xuereb	
Mr Albert Xuereb	
Ing. Alex Galea	Consultant Engineer

Evaluation Committee

Mr Joe Degiorgio	Chairperson
Ms Mary Grace Micallef	Secretary

Ing Vincent Magri	Member
Dr Ing Chris Ciantar	Member
Ing Mario Agius	Member

Soon after the Chairman introduced the subject matter of the hearing session to those present, the representatives of 8657 SmartBin were invited to explain the motive of their objection.

Mr Andrew Xuereb, representing the appellants, said that on 6 January 2006 the Director General (Contracts) informed them that their tender for Lot 1 was adjudicated as technically non-compliant because the porthole dimensions of their containers were not in accordance with those specified in the tender document.

Mr Xuereb said that, according to clause 13 of the Technical Specifications, the approximate size of the portholes (Lot 1) was :- Width 180mm – 250mm; Length 300mm – 400mm or a diameter 300mm – 400mm. He claimed that in the certificate (signed by Ing Alex Galea) that was submitted with their offer it was clearly specified that the *'hoods can be replaced with a light plastic/mild steel cover with vertical portholes 180x400mm'*.

8657 SmartBin's representative also claimed that on 20 September 2005 they received a letter from WasteServ Malta Ltd wherein they were requested to confirm the dimensions of the bins. He clarified that the 0.68m (length) and the 0.58m (width) listed in their letter dated 27 September 2005 were the dimensions of standard portholes upon which the requested porthole attachment would be fitted.

Ing Galea pointed out that the container consisted of two parts, (a) the base and (b) the hood. He maintained that the hood was an integral part of the bin and the actual porthole was part of the hood. He declared that the dimensions of the portholes on the hood were 180 x 400mm which were in line with the tender specifications.

Mr Albert Xuereb, another representative appearing on behalf of the appellants, confirmed that the dimensions submitted in their reply forming part of the clarification process pertained to the portholes of the bins and not to those of the segregated waste. During the sitting, Mr Xuereb produced photographs of the containers which he himself had developed in Malta.

Dr Stefan Frendo, WasteServ Malta Ltd's legal representative said that the whole issue was restricted to the dimensions of the portholes and not of the hoods/covers. He emphasised that the tender specifications required an approximate width of 180 to 250 mm and an approximate length of 300 to 400mm. Dr Frendo said that in their original offer it was stated that *'A standard container has two portholes 680mm x 650mm each with spring loaded, automatically closing stainless steel hoods however, these can be replaced with a light plastic/mild steel cover with different portholes designs for different types of wastes'*. On the other hand, in the Techman Ltd's certificate it was stated that *'For segregated waste the hoods can be replaced with a light plastic/mild steel cover with vertical portholes 180 by 400mm.'* He claimed that the hoods did not feature in the request for proposal. He maintained that the manner

in which the offer was written was ambiguous because it was not clear whether the dimensions referred to the portholes or the covers. As a consequence, the Evaluation Committee, by way of a letter dated 20 September 2005, requested the tenderers (including the appellants) *'to confirm the dimensions offered by the filling of the tables attached to this letter as applicable'* which included the width, length or diameter of the portholes. In their letter of reply dated 27 September 2006 the appellants confirmed that the dimensions of the portholes were 0.68m in length and 0.58m in width and under the 'asterix' of *Dimensions of standard portholes* it was specified that *'Optional porthole covers/hoods are available in a number of shapes and sizes for different waste materials.'* In view of the fact that they mentioned the covers and hoods instead of portholes, the Evaluation Committee had no alternative but to consider their offer as not being according specifications.

Dr Frendo pointed out that Techman Ltd was not the tenderer and that it was only the engineering Consultant Company that issued the certificate. He claimed that the responsibility of compliance with the tender specifications lied solely with the tenderer. The lawyer contended that, upon clarification, the tenderer 'confirmed' that the portholes offered by him were not according to specifications.

In her brief intervention, Ms Mary Grace Micallef, representing the Evaluation Committee, said that when they asked for clarifications they expected the tenderer to confirm the dimensions indicated in Techman Ltd's report. She confirmed that the dimensions submitted by the other tenderers were within the range requested in the tender document.

During the sitting it was stipulated that WasteServ Malta Ltd wanted containers for segregated waste because under Clause 1.1 of Instructions to Tenderers it was specified that *'Lot 1: Above ground waste collection bins to be utilised as road containers for the separate collection of recyclable waste consisting primarily of paper, plastic, metal and glass.'*

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

This Board,

- having noted that the appellants, in terms of their formal objection dated 11 January 2006, and also through their verbal submissions presented during the public hearing held on the 22 February 2006, had objected to the decision taken by the General Contracts Committee communicated to them in terms of the letter dated 6 January 2006, informing them that the tender submitted by them was not in compliance with technical specifications;
- having also noted Mr Xuereb's clarification wherein it was stated that the 0.68m (length) and the 0.58m (width) listed in their letter dated 27 September 2005 were the dimensions of standard portholes upon which the requested porthole attachment would be fitted and that an integral part of the bin and the actual porthole was part of the hood;

- having taken cognizance of Dr Frendo's arguments relating to the issue being restricted to the dimension of the portholes and not of the hoods / covers as well as the reference made to issues mentioned in Techman Ltd's certificate;
- having heard Dr. Frendo describe the offer as ambiguous because it was not clear whether the dimensions referred to the portholes or the covers;
- having ascertained the fact that the Evaluation Committee tried to clarify the issue relating to the dimensions of portholes and noted that in the said 'clarification' the appellants included a footnote to the effect that 'it was specified that 'Optional porthole covers/hoods are available in a number of shapes and sizes for different waste materials',

reached the following conclusions:-

1. the offer as submitted could indeed be deemed to have been ambiguous;
2. the clarifications in tabular form as requested by the Evaluation Committee could have constrained the appellants in the manner that they wished to give their information, forcing them to submit such information by means of a foot note to the clarification table;
3. although the methodology adopted by the Evaluation Committee was in line with normal praxis that is normally required in similar circumstances the PACB feels that in the interests of greater competition and in view of the ambiguity remaining even after the clarification letter, it would have been wiser if an extra effort were made to ensure the maximum clarity possible and to eliminate all remaining ambiguities;
4. during the hearing it emerged clearly that the appellants had intended to offer, and indeed did offer, albeit somewhat ambiguously, the dimensions as requested in the Tender Document;

The Board therefore has decided to uphold the appeal and rules that the Tender by appellants should be readmitted for further consideration.

Furthermore, 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

March 16, 2006