

## PUBLIC CONTRACTS APPEALS BOARD

### Case 66

**RE: CT 2082/2005 - Adv No 173/2005 - 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, published in the Maltese Government Gazette on 20<sup>th</sup> May 2005 was issued by the Contracts Department following a request transmitted to the latter by the 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 26<sup>th</sup> July 2005.

WasteServ Malta Ltd appointed an Evaluation Committee consisting of:

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

to analyse a total of five (5) offers submitted by different tenderers.

Following receipt dated 06.01.2006 of a formal notification from the DG (Contracts) whereby they were informed that their tender for Lot 1 (Options 1 and 2) was not among the selected ones since it was adjudicated as technically non-compliant because the porthole dimensions given were not as requested in the tender specifications, Messrs Green Skip Services Ltd filed an objection on 12.01.2006.

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:

#### **Green Skip Services Ltd**

Ms Mary Gaerty  
Ms Doris Sammut

#### **Evaluation Committee**

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

After the Chairman, PCAB's brief introduction, Dr Stephan Frendo, representing WasteServ Malta Ltd, claimed that not only did the appellants not observe the mandatory procedure as laid down by law, but they also filed a late objection with the result that the tenderer's objection could not be acceded to in view of the fact that it was time-barred at law. He explained that the appellants were notified about the decision on 6 January 2006 and that the tenderer had submitted the required deposit of Lm840 through a letter dated 12 January 2006. Dr Frendo pointed out that the actual reasoned letter of objection was only officially filed in a letter dated 16 January 2006 but which was only received by the Department of Contracts the day after. WasteServ Malta Ltd's legal representative contended that in view of the fact that this tender followed a three separate package procedure, appellants had to follow the procedure as specified in Regulation 82 (4) of the Public Contracts Regulation 2005, which stipulated that the complaint had to be filed within four working days from the date of notification of the decision and such complaint should be accompanied by the deposit therein specified.

Ms Mary Gaerty, representing the appellants responded by stating that they followed the procedure as indicated by an official from the Department of Contracts. When asked by the PCAB whether she could still remember who this official was, Ms Gaerty said that most probably he was Mr Melvin Cachia – however she could not really say with certainty.

Ms Gaerty insisted that this official had told them that it was important that the 'reasoned letter of objection' be submitted within four working days after registering their objection.

The PCAB pointed out that *Article 45* of the Tender Document dealt with the procedure for the submission of appeal under Part XIII of the Public Contracts Regulations. At this stage, reference was made to *Article 46* which defined the procedure that had to be followed when a complaint was received under the three package system. Dr Frendo said that the tender document was correct because Part XII referred to the interim appeal (bid bond and technical evaluation) and Part XIII referred to the final appeal (awarding of tender after the opening of the financial offer). He pointed out that the tender document could not substitute the law and therefore the PCAB had no alternative but to abide by the latter.

The PCAB said that it needed to delve deeper in the matter because it had to be ensured that appellants were not misled and that the tender document reflected what was specified in the law. In spite of this, the PCAB decided to proceed with the hearing because it was not considered practical to suspend the sitting once all parties were present. Nevertheless, it was made clear that if during their deliberations it resulted that the regulations had been breached they would disregard what would have been said during the hearing.

At this point, the representatives of Green Skip Services Ltd were invited to explain the motive which gave rise to their objection.

Ms Gaerty said that on 6 January 2006 the Director General (Contracts) informed them that their tender for Lot 1 (Option 1 & 2) was adjudicated as technically non-

compliant because the apertures were not in accordance with those specified in the tender document. She contended that it was never stated that the specifications of the apertures indicated in the tender could not be met. Ms Gaerty claimed that they could submit portholes of different sizes as an option. Furthermore she said that although the Option C on the tables submitted by WasteServ Malta Ltd was not filled, all sizes were shown on the leaflets.

Ms Gaerty alleged that the RAL Colour and the portholes indicated in the specifications of the tender document were tailor-made to one particular company and therefore they defeated the scope of the issuance of a tender. She explained that the two leaflets submitted, which pertained to two different companies (one French and the other German), showed that the standard dimension of the diameter of the aperture for glass containers was 160mm. Ms Gaerty said that in spite of the fact that this was in accordance with European standard EN 13071 which was also indicated in the tender document itself, the size of the diameter requested was 300mm – 400mm. Furthermore, she claimed that the colour should not have been indicated in the tender because the Maltese standard colour coding was the MSA 800.

Ms Gaerty said that the words ‘option: with recycling inserts’ in the Alaska leaflet meant that the sizes of portholes could be made according to the clients’ requirements or modified to meet their requirements. She said that the diameter of the aperture of the third option on the ‘Sulo’ leaflet was 285mm and this fell within the ‘approximate’ and ‘close adherence’ measurements indicated in the tender document, namely 300mm.

She claimed that the measurements given in their reply to the clarifications were the same standard dimensions shown on the leaflets that were submitted with their original offer.

Dr Stefan Frendo responded by stating that the issue of the colour was irrelevant because the appellants’ offers were discarded on the dimensions of the portholes.

WasteServ Malta Ltd’s legal representative said that the tender specifications required that the portholes should have an approximate width of 180 to 250 mm and an approximate length of 300 to 400mm or a diameter of 300 to 400 mm. He claimed that under Option 1 for paper bins the appellants submitted porthole dimensions of length of 600mm with a breadth of 150mm and the circular aperture for the glass/metal bins had a diameter of 160mm. Dr Frendo said that although on the same leaflet there was another aperture with a diameter of 285mm, the appellants did not submit this option with their offer. As regards the Second Option, the lawyer said that as far as the plastic bins were concerned the appellants submitted porthole dimensions of a length of 326mm with a width of 144mm. This meant that the length of the offered porthole was within the measurements requested but the breadth was significantly out of specifications.

At this point, Dr Frendo made reference to WasteServ Malta Ltd’s letter dated 20 September 2005 wherein tenderers (including the appellants) were requested ‘*to confirm the dimensions offered by the filling of the tables attached to this letter as applicable, showing clearly the dimensions of the bins being offered for Lot 1*’.

Furthermore, he said that tenderers were requested to give the dimensions of the portholes in the tables. He contended that in their reply to the above mentioned clarification letter, the appellants confirmed that they were going to offer two of the options indicated on the leaflet. Therefore, once it was established that the options were out of specifications, the Evaluation Committee had no alternative but to discard their offers.

Although, Dr Frendo refused to comment on the issue of colours, the PCAB contended that it was still obliged to ensure that the tender was not tailor-made to one company.

At this point, Ms Mary Grace Micallef, representing the Evaluation Committee, was called to take the stand. She gave her testimony under oath.

On cross-examination by the PCAB, Ms Micallef testified that the specifications of the waste recycling bins and portholes were formulated by Project Leader Ms Margaret Fenech (who had since resigned from the Company) and herself. She explained that the bring-in sites were introduced in 1998 and that the specifications were based on skips that were bottom opening/emptying because these were the types of bins that were accepted by the people. Also, they took into consideration the sizes of the portholes because many people were complaining that commonly used items could not be deposited through them. She declared that they wanted bins/portholes which satisfied the needs of people.

Ms Micallef denied that the specifications reflected the parameters of one particular company. In reply to a specific question by the PCAB, the witness declared that she did not know that the RAL Colour pertained to one particular company/brand. However, she confirmed that she knew that the RAL Colour pertained to one particular company only recently, that is, when MSA standards were issued. Also, she confirmed that none of the tenderers were excluded because of the RAL colour. Furthermore, it was pointed out that the waste containers had to be *'in the shade of'* RAL colours.

Ms Micallef declared that in the brochure it was indicated that the Sulo Company could manufacture bins with three different portholes. However, in their offer the appellants submitted only the first two options, namely 160mm diameter and the other 600 x 150mm. The third option, namely the aperture that had a diameter of 285mm, was not included in their offer.

The witness declared that three out of five offers met the requested dimensions and passed to the final phase. Ms Micallef said that the appellants' offers were excluded because the dimensions of the portholes did not comply with the specifications.

Ms Gaerty insisted that she was convinced that the dimensions of their portholes were within the limits of the tender specifications. Also she questioned why WasteServ Malta Ltd asked for clarifications when all the dimensions were available on the leaflets.

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 taken note of the preliminary plea lodged by Dr. Frendo regarding the admissibility or otherwise of the appeal on account of it being allegedly filed later than the time permitted by Law;
- having noted that the appellants, in terms of their initial objection dated 12<sup>th</sup> January 2006, subsequently followed by a 'reasoned letter of objection' dated 16<sup>th</sup> January, 2006, and also through their verbal submissions presented during the public hearing held on the 22<sup>nd</sup> February, 2006, had objected to the decision taken by the General Contracts Committee communicated to them in terms of the letter dated 6<sup>th</sup> January 2006, informing them that the tender submitted by them was not in compliance with technical specifications;
- having heard Dr Frendo making reference to WasteServ Malta Ltd's letter dated 20 September 2005 wherein tenderers (including the appellants) were (a) requested '*to confirm the dimensions offered by the filling of the tables attached to this letter as applicable, showing clearly the dimensions of the bins being offered for Lot 1, as well as (b) giving dimensions of the portholes in the tables;*
- having established that appellants claimed that they could submit portholes of different sizes as an option and that although the *Option C* on the tables submitted by WasteServ Malta Ltd was not filled by the said appellants yet all sizes were shown on the leaflets;
- having also heard Ms Gaerty claiming that the words 'option: with recycling inserts' in the Alaska leaflet meant that the sizes of portholes could be made according to the clients' requirements or modified to meet their requirements;
- having ascertained that whilst the brochure submitted by the appellants along with the offer indicated that the Sulo Company could manufacture bins with three different portholes, yet, in their offer the same appellants submitted only the first two options (the 160mm diameter and the 600 x 150mm), with a third option related to the aperture that had a diameter of 285mm and which was also mentioned in the brochure, ending up not being included in the appellants' offer at all;
- having noted that whilst appellants' representative (Ms Gaerty) had alleged that the *RAL Colour* and the portholes indicated in the specifications of the tender document were tailor-made to one particular company, yet, Ms Micallef denied that the specifications reflected the parameters of one particular company confirming under oath that none of the tenderers were excluded because of the RAL colour and that the only request made was that the waste containers had to be '*in the shade of*' RAL colours;

- having also noted Dr Frendo’s argument that placed emphasis on the fact that the issue of the colour was irrelevant because the appellants’ offers were discarded on the dimensions of the portholes,

reached the following conclusions:-

1. Sub-regulation 82 (4) of the PCAB does not lay down as a strict legal requirement the giving of reasons for the complaint within the period of four (4) working days stipulated therein. In the opinion of this Board this regulation is worded in a manner to allow for the Board’s discretion to permit the giving of a detailed explanation of the complaint via the reasoned letter of objection within a longer reasonable period as long as the deposit and the initial complaint are made within four working days;
2. the clarifications provided to the Evaluation Committee by the appellants as well as the arguments raised by the same appellants during the hearing, were not convincing;
3. the perception that participants can assume that the responsibility to trace the availability or otherwise of contents listed in a brochure submitted by the said participants falls on the Evaluation Committee rather than the tenderers themselves, is totally unacceptable, particularly when a contracting party clearly requests participants to confirm details of offers “by the filling of the tables attached” to a particular letter and the said participants simply refrain to do so;
4. the methodology adopted by the Evaluation Committee was in line with normal praxis;
5. In consequence to 1, 2 and 3 above, the appellants’ objection to the decision reached by the General Contracts Committee to deny Messrs Green Skip Services Ltd from being considered further as regards this particular tender is not upheld.

Furthermore, in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by appellants in terms of regulation 83, should not be refunded.

**Alfred R Triganza**  
Chairman

**Anthony Pavia**  
Member

**Edwin Muscat**  
Member

*March 20, 2006*