

## **PUBLIC CONTRACTS APPEALS BOARD**

### **Case 75**

#### **CT 2146/2005, Advert No. 119/2005, ECCD 163/2005 - Provision of INCONTINENCE DIAPERS and PADS for Senior Citizens and Persons with Disability**

This call for tenders, published in the Maltese Government Gazette on 03.05.2006, was issued by the Contracts Department following a request transmitted to the latter by the Department for the Elderly and Community Services on 02.03.2005.

The closing date for this call for offers was 28.06.2005 and the global estimated value of the contract was Lm 20,000.

Five (5) different tenderers, who between them submitted nine (9) different offers, were considered to be suitable for further consideration.

Following recommendations made to the General Contracts Committee by the Adjudication Board, Messrs Protex Limited filed an objection on 15.02.2006, against the intended award of the said tender to Messrs A. Sciberras on the premise that the contract could not be split as it would result, *inter alia*, in an inconvenience being created to a considerable proportion of beneficiaries of this service.

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 19.04.2006 to discuss this objection.

Present for the hearing were:

#### **Protex Ltd**

Dr Ronald Aquilina LL.D  
Mr Jonathan A. Guillaumier

#### **A. Sciberras**

Dr Anna Mallia LL.D  
Ms Alexis Sciberras

#### **Elderly and Community Care Department**

Mr Michael Bezzina

#### **Adjudication Board**

Mr George Pavia - Chairman  
Ms Antoinette Zahra - Member  
Mr Mario Abela - Member

After the Chairman's brief introduction, Protex Ltd's representatives were invited to explain the motive leading to their objection.

Dr Ronald Aquilina, the appellants' legal representative, started by stating that this tender, which was issued by the Department of Elderly and Community Care, dealt with assistance provided to those senior citizens and disabled persons who were incontinent. He explained that there were two schemes whereby the beneficiaries of this service were either given vouchers which they exchange for free diapers at the successful tenderer or they could buy incontinence pads from the successful tenderer at subsidised price. Dr Aquilina said that these items were not supplied by the Elderly and Community Care Department but by the successful tenderer via two distribution centres which had to be identified by the tenderer. He said that they filed their objection in respect of those items which were recommended for award to Messrs A Sciberras, that is, the Adult Diapers Normal (Small, Medium and Large) because the other seven items, namely Adult Diapers Extra (Small, Medium and Large), Children (Medium, Large and Extra Large) and Pads, were recommended for award to his clients, namely Protex Ltd.

The appellants' lawyer contended that the manner in which the tender was formulated indicated that it could not be awarded on an item by item basis but should be awarded as a whole. Therefore, he claimed that once Protex Ltd's overall offer was the cheapest and according to the tender specifications, the tender should be awarded in its entirety to his client.

Dr Aquilina said that the fact that the specifications and conditions of this tender always referred to a 'successful tenderer' (in the singular) clearly indicated that the contract was intended to be awarded to 'one' tenderer.

Also, Protex Ltd's legal representative maintained that, although the general conditions of the tender indicated that the contract could be divided among two or more tenderers, there were various clauses in the specific conditions of the tender document which indicated that the contract could not be split and that it was considered as a single tender. He contended that the specific condition superseded the general conditions. At this stage, Dr Aquilina made reference to the following clauses:

Clause 3 - *'The successful tenderer is expected to provide diapers and pads as the case may be, to about 700 disabled persons which may increase to 900 by Year 2 and 1600 senior citizens which may increase to 2000 by Year 2.'*

and ...

Clause 14 - *'Only tenderers who offer the full range of requested pads and diapers will be considered. 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.'*

Furthermore, Dr Aquilina said that Clauses 6 – 8 envisaged that the successful tenderer had to provide two (2) distribution centres from where to distribute the

products directly to the beneficiaries. He said that this implied that the successful tenderer had to incur overhead costs (included in the tendered price) in order to be in a position to manage these distribution centres to cater for the number of beneficiaries indicated in the tender document. He insisted that the two (2) distribution centres were intended for the entire tender because otherwise there would be more than two (2) distribution centres - depending on the number of tenderers amongst which the contract was divided.

Moreover, the appellants' lawyer claimed that if the contract were to be split, it would cause unnecessary inconvenience to a substantial number of beneficiaries because those who needed a combination of diapers would have to go to different places and deal with two tenderers.

Dr Anna Mallia, Messrs A Sciberras' legal representative, responded by stating that the Adult Diapers Normal (Small, Medium and Large) were awarded to her client because they were cheaper than those offered by Protex Ltd. She said that there was nothing in the tender conditions which precluded the Director General Contracts from splitting this tender. Dr Mallia maintained that Clause 29 of the General Conditions of tender which stipulated that '*The Government reserves the right of accepting any tender wholly or in part, or of dividing the contracts among two or more tenderers*', was also binding to this particular tender. Furthermore, she said that the fact that the tender was split should not create confusion because the beneficiaries would know from where they had to collect the products since her client was awarded the diapers that were used during the day while Protex Ltd were awarded the diapers that were used during the night as well as those used by children. Furthermore, appellants were also awarded the tender for the supply of pads.

With regard to Dr Aquilina's comments regarding Distribution Centres, Ms Sciberras's lawyer said that the relative overheads had to be included in their costing.

Dr Mallia maintained that this was not the first tender that was split because when a similar tender was issued with the same conditions in 2003, it was decided that the pads be awarded to Messrs Krypton and the diapers to Messrs Sarrebico. However, Mr Guillaumier intervened to point out that the two tenders were different because the one referred to by Dr Mallia was issued by the Welfare Committee for the supply of products directly to the institutions indicated in that tender whilst the tender in question was specifically issued by the Elderly and Community Care Department for the provision of an incontinence service directly to the public.

Ms Alexis Sciberras alleged that all offers submitted by Protex Ltd were much more expensive than hers and that she could not state whether it was their cheapest offer that was accepted because she did not know which of the items passed the absorption tests. With regard to her offers, Ms Sciberras said that she assumed that most probably the products included in her cheapest offer did not pass the absorption tests because the Adult Diapers Normal that were accepted were included in her 2<sup>nd</sup> cheapest offer.

A Sciberras' representative complained about the fact that they were not given any information about laboratory results of the products tested and the consumption of each item. Ms Sciberras said that such breakdown was requested for a comparative analysis to be carried out. At this stage, Dr Aquilina agreed that it was important for

all interested parties to have access to such information because even an appellant had to be well prepared. It was established that such information was not provided in view of the Data Protection Act.

On cross examination by Dr Aquilina, Mr Michael Bezzina, Director of the Elderly and Community Care Department, confirmed that similar tenders had never been split before and that it had always been awarded to that tenderer who had the cheapest overall offer. He testified that, in its original report, the Adjudication Board recommended that the tender be awarded to Protex Ltd. Mr Bezzina explained that it was following the advice given by the Contracts Department that the Adjudication Board recommended that the tender be awarded between Messrs A Sciberras and Protex Ltd respectively. He said that the Department did not find any objection to split the tender because the service was divided into two schemes (A – persons with disability and B – Senior Citizens) and therefore logistically it was possible to operate and, hence, acceptable. Furthermore, he claimed that the clients' requirements were going to be met because the instances where the same beneficiaries required a combination of products were very remote. Here, Mr Guillaumier pointed out that there were about 200 – 250 persons who were entitled for adult diapers and pads and therefore if the tender was split they would need to go to two Distribution Centres.

On cross-examination by Dr Aquilina, Mr George Pavia, Chairman of the Adjudication Board, confirmed that all items offered by Protex Ltd were tested and found according to specifications. He confirmed that the appellants' offer was cheaper overall than that of A Sciberras and that, initially, they had recommended the award of this tender to Protex Ltd. Mr Pavia, testified that, subsequently, the Adjudication Board was asked by the Department of Contracts to reconsider their recommendation because individually certain items were cheaper. He declared that when they discussed the issue with Mr Bezzina it appeared that only a very small percentage of beneficiaries were going to be adversely affected because the amount of products that overlapped was minimal.

In reply to a specific question by Dr Mallia, Mr Pavia confirmed that all the items recommended for award were according to specifications and passed from the tests.

On cross-examination by the PCAB, Mr Pavia declared that when they re-examined the matter it resulted that the Department was going to save about Lm 1,080. He confirmed that this was the first time that this type of tender was split.

Mr Pavia explained that the total cost of each item was worked by taking the price quoted for each item and multiplied it by 20,000 units (consumption of 10,000 units annually). He declared that from this exercise it resulted that A Sciberras's offer in respect of Adult Diapers Normal (Small, Medium and Large) was the cheapest. At this point, his attention was drawn by the PCAB that the manner in which the exercise was carried out was unrealistic and incorrect because it was impossible that the consumption of each item was the same. It was pointed out that the exercise should have been based on the actual consumption (as recorded over the last few years) of each item, separately.

Here, Ms Sciberras said that the Adult Diapers Normal (small, medium and large) were the most used products while Dr Mallia claimed that it was not true that Protex

Ltd's offer was overall cheaper. On the other hand, Dr Aquilina pointed out that the appeal was 'in parte' because the objection was filed in respect of three items only.

Towards the end of this hearing, the PCAB carried out an exercise based on the actual consumption of the products over the last two years (as provided by Mr Bezzina) and the cost per unit as offered by A Sciberras and Protex Ltd (as indicated by Mr Pavia).

The following results were obtained:

Description	Actual	A Sciberras	Protex Ltd		Total Cost
	Consumption over 2 years	Cost per unit	Total Cost	Cost per unit	
	Units	Lm	Lm	Lm	Lm
Adult Diapers Normal Small	96,984	0.093	9,019.51	0.096	9,310.46
Adult Diapers Normal Medium	694,176	0.106	73,582.66	0.110	76,359.36
Adult Diapers Normal Large	1,821,864	0.118	214,979.95	0.127	231,376.73
Adult Extra Small	NA	0.099		0.080	
Adult Extra Medium	NA	0.120		0.126	
Adult Extra Large	NA	0.132		0.126	
Children Medium	10,752	0.069	741.89	0.046	494.59
Children Large	79,128	0.078	6,171.98	0.058	4,589.42
Children Extra Large	284,472	0.093	26,455.90	0.082	23,326.70
Pads	97,512	0.055	5,363.16	0.026	2,535.31

Protex Claimed their price of item 9 was 8c1 and not 8c2

Finally, Mr Bezzina was requested by the PCAB to furnish the Secretary with the actual consumption of all the products because those in respect of the Adult Extra were not available during the hearing.

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 'reasoned letter of objection' dated 22 February 2006 and also through their verbal and written submissions presented during and after the public hearing held on 19<sup>th</sup> April, 2006, had objected to the decision taken by the General Contracts Committee, formally communicated via a letter, informing them that the tender submitted by them was not successful;
- having noted that, despite the request for a proper exercise to be carried out by the Elderly and Community Care Department after the hearing, the latter were still not in a position to provide actual consumption per item even though it was claimed that unit prices were the same;
- having considered the fact that irrespective of the issues raised by all parties concerned prior to and during the hearing, the *modus operandi* resorted to by the Adjudication Board was found to have been based on both erroneous and

totally misleading assumptions thus making a shambles of this whole call for offers

reached the following conclusions:-

1. The call for offers was vitiated by serious errors of judgement and assumptions by the beneficiary's representative.
2. The PCAB recommends that in order to do justice to all participants, and for the sake of correctness, the Adjudication Board should re-calculate the total costs (x 2 years) based on actual consumption levels (over the previous two years) per item and not on an average of 10,000 per item (20,000 per item over two years).

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

*May16, 2006*