

PUBLIC CONTRACTS APPEALS BOARD

Case 94

CT 2597/2005 – Adv No CT 61/2006 – GPS12032TO5RA - Tender for the Supply of Cheese to the Health Division

This call for tenders was published in the Maltese Government Gazette on 02.06.2006 and was issued by the Contracts Department following a request transmitted to the latter on 21.04.2006 by the Ministry for Health, the Elderly and Community Care.

The closing date for this call for offers was 25.07.2006 and the global estimated value of the contract was Lm 70,000.

Seven (7) different tenderers originally submitted their offers.

Following the publication of the *Notification of Recommended Tenderers*, Messrs Paolo Bonnici Ltd filed an objection on 20.10.2006 against the intended award of the said tender to Rimus Trading Agency.

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 29.11.2006 to discuss this objection.

Also present for the hearing were:

Paolo Bonnici Ltd

Dr Philip Manduca
Mr Joseph Bonnici
Mr Jimmy Cardona
Mr Stephen Scicluna

Legal Representative

Rimus Trading Agency

Mr Simon Schembri

Health Division/Adjudication Board

Mr Joe Degiorgio

Chairperson

After the Chairman's brief introduction, Paolo Bonnici Ltd's legal representative was invited to give a resume' of what lead to the filing of their objection.

Dr Philip Manduca, the appellants' legal representative, started by giving some background information about a similar tender for the supply of cheese to hospitals that was issued last year. He said that the tender in question concerned the supply of 'Edam Cheese'. However, Dr Manduca claimed that this was erroneously awarded to Messrs Rimus Trading Agency whose offer was for cheese which was not 'edam' but better known in the trade as 'food preparation'. As a result, Dr Manduca contended, the offer submitted by the awarded bidder at the time was already not compliant with the tender specifications because such product was not actually 'Edam Cheese'. Yet, appellants noted that the award was uncontested and as a direct result Rimus Trading Agency proceeded with the fulfilment of its commercial obligations.

Yet, returning to this particular tender, namely the one being disputed by appellants in front of this Board of Appeal, Dr Manduca said that the fourth type of cheese requested in the tender specifications was for the supply of 'Edam Cheese'. He explained that in view of last year's decision, his clients decided to submit two options – one for 'Edam Cheese' and the other for 'food preparation'. At this stage, the appellants' lawyer drew the attention of those present that the reason given by the evaluators for not accepting their latter offer was that the product offered was not 'Edam Cheese'. Dr Manduca maintained that his clients did not contest this decision because it was acknowledged that 'food preparation' was not 'Edam Cheese' and, therefore, this particular offer was not in conformity with the tender document. However, he pointed out that the tender for 'Edam Cheese' was, once again, erroneously awarded to Rimus Trading Agency even though these submitted an offer which referred to a 'food preparation' type of cheese, same as the one offered in the previous tender.

At this stage the appellants' legal advisor wanted to place major emphasis on the fact that 'Edam Cheese' had to be made according to international standards and his clients had documents to prove that those products that were not in conformity with these standards were not 'Edam Cheese'. As a consequence, this time, his clients, claimed Dr Manduca, wanted to avail themselves of their legal rights in publicly contesting the irregular award of this tender to Rimus Trading Agency.

Mr Simon Schembri, representing Rimus Trading Agency, responded by confirming that last year they were awarded the 'Edam Cheese' contract despite the fact that the product supplied was to be classified under 'food preparation'. However, he declared that they had submitted their offer and sample in good faith.

As far as this year's tender was concerned, Mr Schembri explained that it was decided to re-submit the same product which they had been supplying regularly to hospitals and other institutions for the last eleven months because as far as they were aware it was acceptable - in actual fact it was once again recommended for award. Nevertheless, Mr Schembri confirmed that 'Edam Cheese' was distinct from 'food preparation' because whilst the first product (*Edam cheese*) had to be produced from *Pasteurised Cow Milk*,

what is widely known as *food preparation*, as is the case of the *Edina* brand being offered by awarded bidder, the product is produced from *Skimmed Milk added with Vegetable Fat*.

Mr Joe Degiorgio, Chairman of the Adjudication Board, in his intervention, confirmed that this tender was identical to the previous one. He explained that last year the tender was awarded to Rimus Trading Agency because the analyst who had examined their sample reported that the product offered was 'consistent with tender requirements'. Furthermore he pointed out that no one had drawn their attention to the fact that the type of cheese in question was not 'Edam Cheese'.

With regard to this year's tender, Mr Degiorgio confirmed that one of Paolo Bonnici's offers was for 'food preparation'. He maintained that they decided to send the relevant sample for the necessary laboratory tests together with the tender specifications because this was the cheapest product offered and also considering the fact that last year the tender was awarded for this same type of product. Mr Degiorgio explained that although in the expert's report it was confirmed that it was 'Consistent with tender requirements' it was also stated that the sample provided 'Does not fully satisfy the labelling requirements of the tender in conformance with LN 5/2002.' In reply to a specific question by the PCAB, Mr Degiorgio confirmed that they did not consider the appellants' other offer, this time containing 'Edam Cheese', because they evaluated the second cheapest offer first, that is, the offer submitted by Rimus Trading Agency who offered the same brand as was currently being supplied. The Chairman of the Adjudication Board confirmed that none of the 'Edam Cheese' samples was sent for laboratory tests.

During the proceedings the PCAB emphasised that during the evaluation process it was imperative for the Adjudication Board to ensure that tender specifications were respected and that non-compliant offers were rejected. Also, it was remarked that analysts who examined the samples were expected to know what constituted 'Edam Cheese' and 'food preparation' because an Adjudication Board should not rely on the importers' declarations.

In his concluding remarks, Mr Simon Schembri reiterated that they acted in good faith because they offered the same product that was supplied during the previous eleven months. He felt that it would be an injustice if it were to be decided to award the tender in favour of another product from others that have been offered in the same call for tenders because their product satisfied the needs of their client. He argued that if last year their product was not accepted, this year they could have submitted an offer for Edam Cheese.

Dr Manduca contended that once it had been established that the product offered by the recommended tenderer was not 'Edam Cheese' but a 'food preparation', then it would be an injustice if there were a repeat of last year's mistake by accepting an offer which was not compliant with the tender specifications.

At this stage the hearing came to a close and the PCAB members proceeded with their deliberations before reaching their decision.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 23.10.2006, and also through their verbal submissions presented during the public hearing held on 29.11.2006, had objected to the decision taken by the General Contracts to award the tender to Messrs Rimus Trading Agency;
- having taken into consideration the points raised by all parties concerned;
- having noted the fact that analysts who examined the samples were expected to know what constituted ‘Edam Cheese’ as distinct from ‘food preparation’;
- having noted that, for people in the trade, the difference between *edam cheese* and *food preparation* should be obvious, thus making the claim made by awarded Company’s representative that the Company was acting in good faith, somewhat dubious;
- having considered the fact that a substantial price differential between the offer submitted by Rimus Trading Agency and that of all the other bidders was not deemed to be sufficient enough to warrant further analysis by the Adjudication Board;
- having also observed that an Adjudication Board should not rely on the importers’ declarations but should be comforted by proper analytical and technical reports;

concludes that:

1. not only this Board cannot allow a repeat of past mistakes but it is duty bound to suggest remedial action/s;
2. other potential bidders could have decided against submitting an offer for any other type of cheese which would have been considered ‘a priori’ as not in conformity with specifications pertinent to *edam*;

As a result of points (1) and (2) above, this Board decides that given the fact that the awarded tenderer’s offer has resulted to be not in conformity with tender specifications, whilst annulling the decision for such award to Messrs Rimus Trading Agency, yet this Board feels that the adjudication process should proceed taking into consideration those offers which are in conformity with such specifications.

In view of the above and 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

December 14, 2006