

## PUBLIC CONTRACTS APPEALS BOARD

### Case 95

#### **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 was originally published in the Maltese Government Gazette on 03.05.2006 and was issued by the Contracts Department following a request transmitted to the latter by the Department of the Elderly and Community Care on 02.03.2005.

Five (5) different tenderers originally submitted their offers.

Following the publication of the *Notification of Recommended Tenderers*, Messrs Protex Ltd filed an objection on 23.10.2006 against the intended award of the said tender to Ms A. Sciberras.

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:

#### **Protex Ltd**

Dr Ronald Aquilina	Legal Advisor
Mr Jonathan A. Guillaumier	

#### **A. Sciberras**

Dr Anna Mallia	Legal Advisor
Ms Alexis Sciberras	

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

Mr Michael Bezzina	Director
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#### **Adjudication Board**

Mr George Pavia	Chairman
Mr Mario Abela	

#### **Malta National Laboratory Co Ltd**

Ing John Bugeja	
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#### **Employment and Training Corporation**

Mr Philip Bonnici	
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Following the Chairman's brief introduction, Protex Ltd's legal representative, Dr Ronald Aquilina, was invited to explain the motive leading to the filing of his clients' objection.

Dr Aquilina, started by clarifying that his clients were objecting only on that part of the tender that was recommended for award to A. Sciberras because the other part of the tender was recommended for award to them.

He said that Protex Ltd decided to lodge this appeal because there were so many shortcomings in the evaluation of this tender, amongst which the recommendation to award part thereof to A. Sciberras. The extent of these 'so-called' deficiencies, contended the appellants' legal representative, vitiated the whole process.

Dr Aquilina said that the Evaluation Committee failed to inspect the proposed distribution centres from where the contractor had to provide the service. He argued that such evaluation should have formed an integral part of the tender adjudication process because Clause 6 of the tender document specified *inter alia* that 'Tenderers who do not offer acceptable distribution centres will not be considered.'

Furthermore, Dr Aquilina alleged that subsequent to the submission and adjudication of the tender, Ms Sciberras moved her Company's distribution centre in Zebbug to another premises in B'Kara. He brought to the attention of those present that the tender did not permit such changes at that stage because according to clause 6, referred to earlier tenderers were obliged to 'give full details of these centres at the tendering stage.'

Also, apart from this, the appellants' lawyer maintained that the outlet in B'Kara was not an 'acceptable' distribution centre because it was not easily accessible and lacked adequate parking facilities or, at least, car stopping possibilities. He claimed that such premises did not satisfy the tender requirements because under the same clause it was also specified that the centres had 'to be situated in an easily accessible location and on the ground floor.'

Dr Aquilina said that another issue mentioned in their motivated letter of objection dealt with the trading licence. He said that the trading licence indicated by Ms Sciberras in her tender offer could not have covered such premises because the premises in Birkirkara were acquired only recently. The appellants' lawyer questioned whether Ms Sciberras had a valid trading licence to operate from the said premises or for import/wholesale activity.

Furthermore, he doubted whether they had the required manpower and resources to execute the tender because otherwise it would be necessary to resort to subcontracting.

Dr Aquilina said that another aspect of their appeal concerned the specifications of the products that were offered by Messrs A. Sciberras. He said that they requested the person who physically performed the testing of the tender samples to give evidence because in their opinion the evaluation of the specification was not carried out properly.

At this stage, the appellants' legal representative referred the Board to its decision (Case Reference No. 75) relating to the first objection in connection with the same subject matter, and contended that the wording of the tender and the PCAB's decision indicated that the contract could not be divided but should be awarded as a whole.

Following this statement, the PCAB intervened and drew Dr Aquilina's attention regarding the fact that in its decision, the PCAB made no reference to this issue. It was pointed out that in that decision, referred to by appellants, the PCAB had only recommended the Adjudication Board to re-calculate the total costs (x 2 years) based on actual consumption levels (over the previous two years) because the mathematical workings left much to be desired. It was explained that this conclusion was arrived at since it was impossible to have a consumption of 10,000 units of each item.

Continuing, Dr Aquilina said that it would be unfair on tenderers to split the contract because of the running costs and all the overhead expenses involved in managing the two distribution centres. Also he argued that the awarding of the contract to more than one party would cause unnecessary inconvenience and undue hardship to a substantial proportion of beneficiaries of the service.

In her intervention on this issue, Dr Anna Mallia, representing Ms Sciberra, insisted that Clause 29 of the General Conditions of the tender 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'*. However, Protex Ltd's legal representative responded by stating that Clauses 3 and 6 of the specifications and conditions of the tender document indicated that the contract could not be split. He contended that the specific conditions superseded the general conditions.

Mr Jonathan Guillaumier, intervening on behalf of Protex Ltd, remarked that the decision to split the tender was only taken following the advice given by the Department of Contracts because in its original decision the Adjudication Board recommended that the tender should be wholly awarded to Protex Ltd.

The first witness to take the stand was Mr George Pavia, Chairman of the Adjudication Board, who was cross-examined by Dr Aquilina. He confirmed that during the tender evaluation the Adjudication Board did neither visit the distribution centres indicated by the tenderers nor checked the Trading Licenses submitted with the offers. He testified that their evaluation was mainly based on the quality of the product.

Mr Pavia declared that the premises indicated in Messrs A Sciberras' offer were those located in Zebbug, B'Bugia and Gzira respectively and that he was not aware that during the evaluation process Messrs A Sciberras were operating from the premises in B'Kara instead of those located in Zebbug, as previously declared in the tender. However, the PCAB remarked that, in spite of this, Messrs A Sciberras still appeared to have satisfied the tender requirements as far as the number of distribution centres was concerned because tenderers were required to provide only two distribution centres.

When specifically asked by the appellants' lawyer to state whether full details of the distribution centres were given, the witness replied that they gave the full addresses of the above-mentioned three distribution centres and that they would be opened daily including Saturdays between 8 a.m. and 7 p.m.

During Mr Pavia's testimony, the PCAB drew his attention that it was indispensable for the Evaluation Board to visit the distribution centres because they needed to verify whether these were in conformity with the tender's requirements, namely that they were situated in an easily accessible location and on the ground floor. The PCAB pointed out that in the prevailing circumstances it could neither have comfort with regard to the other offers because the whole adjudication process was perverse. Here, Dr Anna Mallia corroborated with this statement arguing that the same questions could be asked in respect of the appellants' offer.

When Ing John Bugeja, Engineering Divisional Manager, Malta National Laboratory (MNL) took the witness stand, he was asked specifically to state whether the diaper samples were tested to establish whether they conformed with the specifications under Clause 10 of the tender document. The said witness declared that only two out of seven requirements were checked, namely the,

- (i) diapers had 'an absorbent and fluff mixture with increased absorbency in crotch area' (this item included leakages and it was checked as whole product)

*and*

- (ii) 'waist/hip measurement and the minimum absorption capacity'

The witness confirmed that he did not check whether the diapers

- (a) had waterproof polythene backing
- (b) had complete covering
- (c) had special leg design with soft lycra threads
- (d) had re-fastenable adhesive tapes *and*
- (e) were elasticated around the leg area in order to minimise leakages.

Ing Bugeja emphasised that he always based his analysis in accordance with his clients' specific requests and in this particular case he was only required to carry out tests in respect of measurements, absorbency levels and leakages.

Mr Michael Bezzina, Director of the Department for the Elderly and Community Care, intervened by pointing out that the tender specifications were attached with their request to the MNL.

On his part, Mr Pavia said that they based their decision on the results received from the MNL and confirmed that the Adjudication Board had not checked further to ensure that

the specifications which were missed out by the MNL were included in the various offers.

The PCAB saw it highly pertinent to intervene to demonstrate its disgruntlement at the amateurish way observance of tender specifications was made by the same Adjudication Board whose primary objective is predominantly to ensure that such observance was made by third parties. As such, the PCAB pointed out, the adjudication had to be based on what was requested in the tender document because it was imperative for the Evaluation Board to determine that the tenderer's offer was compliant with the specifications and satisfied tender's requirements.

Protex Ltd's representatives agreed that, in view of the testimony given by the witnesses representing the Department, there was no need for Mr Philip Bonnici, representing the Employment and Training Corporation (ETC), to testify on the number of persons employed with Messrs A. Sciberras as originally requested by the appellants.

In his concluding remarks, Dr Aquilina reiterated that the evaluation was not appropriately carried out because it had been established that neither the *Distribution Centres* nor the *Trading Licenses* were checked and the *samples* were not properly tested.

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 31.10.2006, 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 A Sciberras;
- having taken into consideration the points raised by all parties concerned particularly the fact that the Adjudication Board failed to inspect the tenderers' distribution centres;
- having noted that certain issues raised by the appellants were considered as irrelevant as the PCAB concludes that once a tenderer participates in a process one should not expect to be taken seriously for arguing at an appeals stage that terms and conditions of a particular tender were 'unfair' or impossible to be met;
- having also noted that the Adjudication Board failed to ensure that the requirements listed in the specifications were fulfilled as admitted by the Chairman of the same Board during the hearing;
- having also noted the issue raised, namely that, in the prevailing circumstances, it is impossible for the adjudication process to be considered effective enough to enable decisions to be drawn therefrom;

concludes, that this particular adjudication process gave rise to more questions than it managed to establish a decision-making scenario.

As a result of the above-mentioned points, this Board decides that the entire evaluation and adjudication process was fallacious and based on an overall demonstration of administrative incompetence.

In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the call for offers be re-issued, properly evaluated and adjudicated within the next three months from publication of this decision.

Furthermore, this Board recommends that the deposit submitted by the appellants in terms of regulation 83, should be refunded.

**Alfred R Triganza**  
Chairman

**Anthony Pavia**  
Member

**Edwin Muscat**  
Member

*December 14, 2006*