

## **PUBLIC CONTRACTS APPEALS BOARD**

### **Case 100**

#### **CT 2509/2006 – CT/WSC/T/68/2006 - Supply of Bills and Window Envelopes for Automailer**

This call for tenders was published in the Maltese Government Gazette on 11.08.2006 and was issued by the Contracts Department following a request transmitted to the pertinent authorities by the Water Services Corporation (WSC).

Three (3) different tenderers submitted their offers.

The closing date for this call for offers was 19.09.2006 and the global estimated value of the total contract was Lm 23,000.

Following the publication of the *Notification of Recommended Tenderers*, Messrs InServ Ltd filed an objection on 22.01.2007 against the intended award of the said tender to Messrs Printex Ltd.

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 07.03.2007 to discuss this objection.

Also present for the hearing were:

#### **InServ Ltd**

Dr Joe Mifsud  
Mr Richard Pace Bonello

Legal Representative

#### **Printex Ltd**

Mr Peter Galea

#### **Water Services Corporation**

Ing Mr Mark Perez

#### **Adjudication Board**

Mr Stephen Zerafa  
Mr Charles Fardell

Chairman  
Member

Following the Chairman's brief introduction, *InServ Ltd*'s representatives were invited to explain the reason which led to their objection.

Dr Joe Mifsud, the appellants' legal representative, started by stating that his client felt aggrieved by the General Contracts Committee's decision to award the tender under reference to Printex Ltd because their offer was 55% or Lm 7,340.40 cheaper than that submitted by the recommended tenderer. Dr Mifsud pointed out that InServ Ltd had supplied 1.6 million similar envelopes (*Business Reply Envelopes*) to the Corporation without ever receiving any verbal or written complaint whatsoever. Undoubtedly, Dr Mifsud claimed, his clients had an exceptional track record with the WSC!

The appellants' lawyer contended that the product offered by his clients was in compliance with the specifications of the tender. He argued that when tenderers were requested to submit samples they did not necessarily need to provide them in the exact sizes because samples were required during the adjudication process to check the quality of the paper. Moreover, Dr Mifsud pointed out that in their offer his clients had clearly indicated that they were committed to supply the *Bills* and *Window Envelopes* for the 'Automailer' in the same quality and size as the samples attached by the WSC.

Dr Mifsud highlighted the importance of the international tolerance standards and produced a document regarding the *British Paper and Board Trade Tolerance*. He questioned whether in its decision the Adjudication Board took into consideration these tolerance standards.

InServ Ltd's legal representative also remarked that, despite the fact that the validity period of the tender had expired, the bidders were not asked to extend the validity of their offer. Moreover, he said that, during the adjudication process, no clarifications were sought from InServ Ltd even though, in their tender documents, his clients invited the WSC to contact them in case they needed to clarify any issue.

The appellants' legal representative questioned the criteria used by the Adjudication Board for not awarding the tender to that bidder who had submitted an offer which was 55% cheaper and according to specifications.

Mr Stephen Zerafa, Chairperson of the Adjudication Board, intervened to state that, although the appellants had, in the past, supplied the Corporation with *Business Reply Envelopes*, the contract under review dealt with a different type of envelope, namely *Window Envelopes*. He explained that the automailer machine had critical specifications and the envelopes submitted by InServ Ltd were not according to the published specifications insofar as the window location, the overall dimensions and the design of the closing flap and panel were concerned.

In reply to a specific question by the PCAB regarding the published specifications of the envelopes/samples, Mr Zerafa said that these were included under *Clause 3 Window Envelopes for Automailer* which stipulated that:

- ‘3.1 The size of the envelopes shall be 115mm x 235mm;
- 3.2 The size of the window well gummed shall be 100mm x 34mm;
- 3.3 The paper shall be white 90 gsm matt paper printed in black on the outside back flap;
- 3.6 Samples of at least one hundred (100) envelopes (both ordinary and recycled paper) according to size, grammage and texture are to be supplied with the tender offer, in a separate package bearing tender reference and name of tenderer. This quantity of envelopes will be required to ensure compatibility with the existing automailer. Offers without samples will not be considered.’

At this stage, Mr Richard D Pace Bonello, Managing Director of InServ Ltd, intervened, stating that it was impossible for a tenderer to submit an envelope exactly as requested by WSC because the production of such envelopes was costly since they needed a special cutter. Mr Pace Bonello said that although the sample was not exactly as the WSC specimen envelope attached with the tender, in their offer they clearly indicated that the window envelopes would be submitted ‘Same as WSC sample’. In reply to a specific question by the PCAB, Mr Pace Bonello explained that when they provided their foreign supplier with all the specifications it was confirmed that it would not be a problem to produce the envelopes in compliance with the WSC specifications.

On cross-examination by the PCAB, Mr Charles Fardell, a member of the Adjudication Board, declared that Printex Ltd had been supplying these envelopes for some ten years without any problem and that past experience had shown that when the tender was awarded to another supplier (not the appellants) the envelopes caused problems due to some incompatibility with the automailer’s mechanism. He also confirmed that the specifications in the tender document reflected the specifications of the automailer and that the samples of the envelopes were required to ensure compatibility with their automailer. Albeit, when specifically asked by the PCAB to state whether he knew of other suppliers who supplied the same type of envelopes Mr Fardell replied in the negative, yet, he also wanted to emphasise the fact that there was more than one supplier who had submitted an offer.

With regard to the PCAB’s concern regarding the need for total transparency in the tendering process as well as the need to ensure a level playing field for all participants, Ing Mark Perez, also representing the WSC explained that the fact that there were many similar machines on the market and sold worldwide was a proof that the automailer was not custom made to WSC and that there were many suppliers who could produce such envelopes. Furthermore, he said that even the appellants declared that the goods would be supplied in the same quality and size as the WSC samples. Ing Perez confirmed that the sample of the envelope submitted with the appellants’ offer did not conform to the WSC sample and the difference in size was substantial. He remarked that the documentation submitted by the appellants in their offer did not really highlight the fact as to whether the

supplier was ready to alter the dimensions because it was only stated 'Same as WSC sample'.

At this point, the PCAB maintained that, in their opinion, there could have existed grounds for clarification because although the specifications of the appellants' offer were in line with those indicated in the tender document those of the sample were not. Ing Perez claimed that the WSC's policy was that if samples submitted did not conform to specifications, the relative offers would not be considered and in this case it was imperative that the samples were accepted by the automailer. On his part, Dr Mifsud intervened to claim that the WSC's interests were safeguarded because of the bank guarantee and insisted that they could have sought clarifications and requested a sample exactly as required.

Mr Peter Galea, representing Printex Ltd, addressed those present by stating that in Clause 1 Scope of the tender it was stipulated that:

'This tender calls for the supply to the Water Services Corporation, Malta, all charges paid including Value Added Tax (VAT) of bills and window envelopes, in accordance with these specifications and the attached schedule.

The make of the automailer currently installed at WSC is a Pitney Bowes, model F400. This machine will soon be replaced by a PFE new Maximailer.'

Mr Galea emphasised that in the tender document it was clearly indicated that the samples were required for testing purposes. He claimed that bidders were expected to demonstrate exactly what they were offering. He noted that the sample of the envelope submitted by the appellants with their offer was *self adhesive* which was a type of envelope that could not be inserted in the automailer. Replying to a question by the PCAB, Mr Galea said that the sample of the envelope needed to satisfy the requested specifications in order to ensure that it was compatible with the existing automailer.

Mr Pace Bonello, reiterated that samples were submitted to test the quality of the paper. He insisted that, taking into consideration the period between the issue and the closing date of tender, there was not enough time to provide the sample as requested. Mr Pace Bonello claimed that the only suppliers who had the sample already available were Printex Ltd.

On the issue of the restricted time-frame available, Mr Galea responded by stating that the appellants could have asked their foreign suppliers to provide them with the samples of the envelope. Furthermore, he said that even the sample of the Bills submitted was not according to the specifications because of its size and absence of perforation. Mr Galea claimed that offers that did not comply with the tender specifications should be automatically disqualified. Dr Mifsud intervened to clarify that the tender specifications only stipulated that 'offers without samples will not be considered.'

In his concluding remarks Dr Mifsud invited the PCAB to analyse thoroughly the Adjudication Board's report and the comments made on the recommended tenderers' and appellants' offers in order to verify whether the question of the samples had any bearing on its decision and to establish the exact reasons behind its decision.

Replying to a specific question by the PCAB, Mr Zerafa said that in their report it was stated that 'the envelope was not according to specs and past experience has shown that these envelopes cause problems with the automatic inserting machine.'

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

This Board,

- 1 having noted that the appellants, in terms of their 'reasoned letter of objection' dated 22.01.2007, and also through their verbal submissions presented during the public hearing held on 07.03.2007, had objected to the decision taken by the General Contracts to award the tender to Messrs Printex Ltd;
- 2 having analysed the arguments raised by all interested parties during the hearing;
- 3 having analysed documentation considered pertinent to the case including the Adjudication Board's report and recommendations;
- 4 having established during the hearing that no interested party could have been precluded in any way from participating in the said tender on a level playing field in view of the fact that anyone could have either imported or else manufactured the requested 'bills' and 'window envelopes' for the Corporation's automailer, subject to one having *inter alia* the right business know how to do so;
- 5 having taken note of the fact that during the hearing the appellants stated that whilst having the know how and the potential to supply the requested samples in accordance with Tender Document specifications, yet, solely due to financial considerations, namely a cost of approximately Lm 100 (One Hundred Maltese Liri), Messrs InServ Ltd decided to refrain from providing the Contracting Authority with the requested, specifically defined, quantity of samples required, which samples had to be provided in the correct size (bills) or as per specimen envelope attached in *Annex B* of the document (window envelopes for automailer), despite being specifically admonished that "offers without samples will not be considered" (Clauses 2.6 and 3.6 respectively);
- 6 having observed that the appellants could have availed of the right to seek clarifications and even an extension of the time frame prior to submission of offer once the same appellants became aware that, in the Company's opinion, it was impossible for them to provide the requested sample in time and in the same size

as specified in the tender document due to production changes (mould, interruption of normal production flows and so forth) necessary;

- 7 having noted that in the appellants' offer, Messrs InServ Ltd, albeit stating that they will be offering the said bills and envelopes 'same as WSC sample', yet did not give any justification as to why their offer was not fully compliant at that stage, by making particular reference to their inability to supply the requested quantities (samples) and type (including 'perforation') as specifically referred to in the Tender Document;
- 8 having considered the fact that, whilst it is true that the appellants were not fully compliant as referred to in '6' above, yet it is also evident that the Corporation did not seek any clarification whatsoever as to why the appellants' offer was compliant with regards to confirmation of specifications but then such documentation fell short of including the samples (and quantities) requested by the Contracting party;
- 9 having taken cognisance of the fact that it seems that the Adjudication Board members could have based their deliberation on issues which were not specifically mentioned in the specifications but simply manifested in the sample attached in *Annex B*. For example, particular reference could be made to the fact that the Board rejected samples submitted by other tenderers which "had a different type of construction and opening flap". This is a process of deliberation which could be flawed in other circumstances where the sample/s requested purposely attached in the Tender Document is not further specifically reflected in the written document. In this regard, one could also mention the issue raised with regards to self-adhesive envelopes being preferred when no specific mention was made in regard in the said Tender Document;

concludes, that

- a. albeit both interested parties had some degree of shortfalls, yet this Board feels that, *ceteris paribus*, the Tender Document is quite straightforward and devoid of areas which could potentially give rise to equivocal interpretations of facts, terms and conditions;
- b. despite the fact that the appellants' offer may have been some 55% cheaper - Lm 7340.40 - as stated by the appellants in their *Reasoned Letter of Objection*), than the one which ended up being recommended, yet, this Board considers the reasons referred to in (1) to (9) above as adequate vindication of the Board's final recommendations;
- c. the fact that all tenderers were participating on a level playing field and that the appellants could have submitted the requested samples (quantity and type) had they not decided, purely on commercial terms (which they considered to be unviable at the time), not to do so (thus nullifying their commercial risk), in

spite of the fact that they were fully aware that they were arbitrarily not abiding by the terms and conditions of the Tender Document, tantamount to an erroneous commercial decision taken by the appellants;

- d. the PCAB also considered the fact that this is not the first case that it has examined, where in a tender document a sample or a working system had been specified as a necessary part of the offering and which was not submitted as requested. In all these cases this Board has ruled against the appellants concerned;
- e. although the Adjudication Board did not appear to have gone into all the details which were considered during the Appeals Board hearing to enable it to arrive at the decision that it had taken, there are insufficient grounds to prompt this Board to annul their decision and recommend the award of the tender to the appellants.

In view of the above the Public Contract Appeals Board rules that the decision taken by the Adjudication Board was in line with the Public Procurement Regulations and should stand as is.

As a result, this Board decides against the appellants and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the appellants in terms of regulation 83, should not be refunded.

**Alfred R Triganza**  
Chairman

**Anthony Pavia**  
Member

**Edwin Muscat**  
Member

*20 March 2007*