

PUBLIC CONTRACTS APPEALS BOARD

Case No. 118 and Case No. 119

Objection 1

**Advert No CT 77/2007 - CT 2087/2007 – ECCD 163/2005
Supply of Incontinence Diapers and Pads for Senior Citizens and Persons with
Disability for the Elderly and Community Care Department
(Items A2/B2, A3/B3 and C3/D3 only) – Case No. 118**

Objection 2

**Advert No CT 359/2005 - CT 2575/2005 – Welfare Comm/09/2005
Supply of Incontinence Bed Pads, Incontinence Pads (Rectangular Diapers) and
Disposable Adult Nappies to the Welfare Committee – (Item 3 only - Disposable Adult
Nappies Large) – Case No. 119**

These calls for tenders were published in the Maltese Government Gazette and issued by the Contracts Department following a request transmitted to the latter by the Elderly and Community Care Department (ECCD).

The estimated contract values of these tenders were Lm 90,540 (Case No. 118) and Lm 500,000 (Case No. 119) respectively.

In Case No. 118 four (4) different tenderers submitted their offers.

In Case No. 119 five (5) different tenderers submitted their offers.

Following the decision taken by the General Contracts Committee to award these tenders to A Sciberras, Protex Ltd filed two separate objections (Case No. 118 dated 13.08.2007 and Case No. 119 dated 02.07.2007) in respect of the items of the tenders in caption intended to be awarded.

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 the 30th January 2008 to discuss these objections.

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 (ECCD)

Dr Stephanie Xuereb	Director
Mr Michael Bezzina	<i>ex</i> Director

Evaluation Board – ECCD

Mr John Bottiglieri	Chairman
Ms Antoinette Zahra	Member
Ms Rosita Sammut	Member

Adjudication Committee – Welfare Committee

Mr George Pavia	Chairman
Mr Alfred Briffa	Member
Ms Antoinette Zahra	Member

Malta National Laboratory Co Ltd

Ing John Bugeja

Employment and Training Corporation

Mr Christiano Calleja

Department of Contracts

Mr Francis Attard	Director General Contracts
Mr Mario Borg	Director, Post Contracts

After the Chairman's brief introduction about this case, the parties concerned agreed with the PCAB's recommendation to hear the two appeals concurrently since both appeals included common issues. However the appellants' legal advisor reserved the right to raise separate arguments regarding any of the specific cases when he deemed that this was required. The PCAB explained that the decisions would be issued separately.

Furthermore, no objection was found to Dr Ronald Aquilina's (legal advisor to Protex Ltd) suggestion to start with the appeal in connection with CT 77/2007 (Case 118). The reason given was that two of the four reasons indicated therein were also included in their appeal referring to CT 359/2005 (Case 119) and so there would be no need to go over them again.

At this stage, Protex Ltd's representatives were invited to explain the motive leading to the filing of their objections.

Dr Aquilina, started by stating that their appeal as regards CT 77/2008 was based on the following grounds:

- Mrs A Sciberras was not in possession of a valid trading licence and therefore did not qualify to be recommended for the award of this tender;
- Mrs A Sciberras did not have the wherewithal, legal, financial and technical capacity to carry out the contract as specifically requested in the tender;
- there was no proper evaluation of the tender bid because of deficiencies in the testing and/or specifications of the samples provided by Mrs A. Sciberras;
- the adjudicating committee failed to make a proper evaluation of the tender bid as the distribution centres proposed by Mrs A Sciberras did not meet all the tender requirements as far as accessibility was concerned.

With regard to the other appeal Re CT 359/2005, the appellants' legal representative said that their grievances dealt with the following issues:

- the trade licence
- subcontracting
- technical literature documentation (not submitted by Mrs A Sciberras)

With regards to matters relating to objection raised in connection with CT 77/2007 – Elderly and Community Care Department (Items A2/B2, A3/B3 and C3/D3 only), in the said proceedings, Dr Anna Mallia, Mrs Sciberras' legal representative, questioned whether the tender of the appellants was submitted by Protex Prosan Ltd or Protex Ltd because on the Contracts Department's Notice Board it was indicated as Prosan Protex Ltd.

The appellants declared that Prosan was only a brand name and not the name of the company. The Chairman, PCAB said that once Prosan was a brand name he advised the appellants not to continue using it with the name of the company, namely Protex Ltd, because it was causing confusion.

Both the appellants and the recommended tenderer confirmed that their offers were submitted by Protex Ltd (not Protex Prosan Ltd) and Mrs Alexandra Sciberras (not Sarrebico Medical Supplies) respectively. Furthermore the Value Added Tax certificates of both tenderers were in the name of Protex Ltd – VAT Reg No 1152-0333 and Alexandra Sciberras – VAT Reg No MT 12661014.

The first witness to take the stand was Mr John Bottiglieri, Chairman Adjudication Committee.

Dr Aquilina referred the witness to Clauses 3.5 under *Instructions to Tenderers* wherein it was stipulated that

'To be eligible for participation in this tender procedure, tenderers must prove to the satisfaction of the Contracting Authority that they comply with the necessary legal, technical and financial requirements and have the wherewithal to carry out the contract effectively' and to Clause 3.6 which specified that *'tenderers must prove to the satisfaction of the Contracting Authority that they have the technical capacity to carry out the contract effectively. In this regard tenderers shall compile and provide the information requested in Annex II Part 2 as part of the Contractor's Technical offer'*

wherein they had to indicate the number of full time and part time employees.

In his response, Mr Bottiglieri said that in the letter dated 17 April 2007 which was part of the tender submission, it was declared that

'Ms A Sciberras currently employs 2 full time sales assistants and 3 part time sales assistants within her group. Should our tender be successful we intend to employ another 4 full time sales assistants to be able to cope with the demand and to ensure that the service will run smoothly from all our designated centres.'

He confirmed that the Adjudication Committee was satisfied with the number of employees indicated. When asked by the PCAB to state whether they did verify the number of employees working at the distribution centres visited by the Adjudication Committee, the reply given by Mr Bottiglieri was in the negative.

However, Dr Aquilina sustained that the two (2) full time and three (3) part time employees indicated by Ms Sciberras were not sufficient to provide such service

considering the fact that the tender stipulated that the successful tenderer had to provide two (2) distribution centres in Malta with extensive opening times and, preferably, open even on Saturdays.

Mr Michael Bezzina, ex Director, Elderly, intervened by stating that their suppliers and distributors were either Sarrebico Medical Supplies or Prosan Ltd and that they never received any complaints related to distribution and service provided.

On cross examination by Dr Aquilina, Mr Bottiglieri testified that, acting on behalf of the Board, he had personally gone to the Trading License Unit and that Mr Farrugia (Director) had given him a copy of her Trading Licence and had confirmed that it was valid.

When asked to state which centres and premises the said Trading Licence did actually cover, Mr Bottiglieri replied that, as far as he was aware, a Trading Licence was issued to indicate that an individual was licensed to operate in a particular sector. The appellants' legal representative insisted that a Trading Licence to be valid had to cover a particular activity from a particular premises. Mr Guillaumier claimed that when they checked with the Trading Licence Unit, it was confirmed that a Trading Licence was issued to cover a particular premises only and that it remained valid until the individual or Company, declared on the licence, operated therefrom. Dr Mallia claimed that the Trading Licence was associated with the individual and if s/he moved to another premises s/he did not need to apply for another licence. The Chairman, PCAB said that in his opinion a Trading Licence was issued to indicate that the person concerned had the capacity to conduct a particular trading activity. Here Dr Aquilina invited the PCAB to verify the matter with the Trading Licensing Unit.

In reply to a specific question by the PCAB, Dr Aquilina confirmed that Protex Ltd had a Trading Licence to operate from each Distribution Centre indicated in the tender and Mrs A Sciberras confirmed that each distribution centre had its own valid trading licence. Mrs Sciberras explained that they would operate from the pharmacies indicated in their offer if they were awarded the tender. She also confirmed that a Pharmacy Licence permitted the distribution of diapers.

Mr Bottiglieri said that Trading Licences (bearing Nos 07/1053) were both in the name of Alexandra Sciberras and the licensed premises were Sarrebico Medical Supplies at Triq tal-Hlas Zebbug and Triton Lodge, 34 Triq Mario Cortis Attard. The witness confirmed that they did not visit these premises. Mr Guillaumier alleged that the appellants' representative no longer operated from Zebbug and, on that basis only, the Trading Licence was not valid.

Furthermore, he sustained that the said Trading Licence did not pertain to Alexandra Sciberras because Sarrebico Medical Supplies was a different and distinct entity.

Dr Aquilina sustained that Mrs Sciberras was operating only from the premises in B'Kara. Also he stated that a Trading Licence was always:

- (a) issued in the name of a person and never in the name of a Company *and*
- (b) associated with a particular premises.

He said that his clients' Trading Licence was issued in the name of Jonathan Guillaumier on behalf of Protex Ltd. However, Dr Mallia intervened to point out that her clients' licences were both issued on behalf of Alexandra Sciberras.

At this point the PCAB made reference to an e-mail dated 25 January 2008 from the Trade Licensing Unit, which was presented by Mr Bottiglieri during the hearing, wherein it was confirmed that she had '*a valid Trading Licence for the commercial premises Sarrebico Medical Supplies Triq il-Hlas Zebbug with Licence Number 07/1053*'. Here, Dr Aquilina pointed out that she did not operate anymore from the commercial premises indicated because the rent / lease agreement had since been terminated.

In reply to a specific question by Dr Mallia, Mr Bottiglieri said that the Trading Licence No 45/707 was in the name of Jonathan Guillaumier and the premises licensed were Protex Ltd, Qasam Industrijali Kordin Paola while License No 21/603 was on behalf of Technoline Ltd of 51, Triq Edgar Bernard Gzira. The witness confirmed that they had visited both premises. Mrs Sciberras claimed that, as far as she was aware, Technoline Ltd did not operate any longer from the premises at Gzira. Mr Guillaumier denied this.

Dr Aquilina maintained that the tender conditions stipulated that the two distribution centres had to be situated in an easily accessible location so that the persons entitled for this service could collect on a monthly basis the specified items therefrom. In reply to a specific question by Dr Aquilina regarding the distribution centre in B'Kara, Mr Bottiglieri confirmed that it was accessible. The appellants' legal representative responded by stating that no specific parking facilities were available and that it was not easily accessible. The witness contended that members of the Adjudication Committee visited the premises of PharmaPlus Pharmacy at Ganu Street, B'Kara and Central Pharmacy, Luqa (two distribution centres indicated by Mrs Sciberras) and it was satisfied that parking facilities / accessibility was adequate. Ms Antoinette Zahra intervened by stating that Mrs Sciberras had informed them that, in case of parking difficulties, her staff would give all the required assistance. Mrs Sciberras clarified that the premises in B'Kara were also accessible from the back, where more parking facilities were available.

On cross examination by Dr Aquilina, Mr Bottiglieri said that they identified the cheapest offers of each item and sent two (2) sets of samples to the Malta National Laboratory for testing of measurements and absorption respectively. They also submitted their recommendations according to the results received. The witness testified that the Adjudication Committee unanimously agreed not to consider the items where the test reports indicated that the specification 'conforms subject to Interpretation'.

Mr Bottiglieri confirmed that all items recommended for award were according to specifications.

Mr Christiano Calleja, the Employment and Training Corporation's (ETC) representative was called to take the witness stand to confirm the number of persons employed with Mrs A Sciberras.

The witness declared that, according to the records available at the Corporation, Mrs Sciberras had the following number of employees:

Date	Full Time	Part Time
28 January 2005	1	4
28 January 2008	2	1

He said that staff members employed on a full time basis included the owner, namely, Mrs Alexandra Sciberras.

Mr Calleja also presented a document containing information about employees who were engaged by Mrs Sciberras from 28/1/2004 to 28/1/2008 but this was considered irrelevant.

Mrs A Sciberras pointed out that in CT 359/2005 (closing date 21 February 2006) tenderers were not required to indicate the number of full time and part time employees working in the supplier's company because such items could be delivered by one person. On the other hand in CT 77/2007 (Closing date 27 April 2007) tenderers were required to submit such information because the service provided under this tender was different, that is, delivery of items to beneficiaries from Distribution Centres.

On cross-examination by Dr Aquilina, Mr Michael Bezzina (former Director, Elderly and Community Care) testified that although the tender had not yet been awarded this service continued to be provided jointly by Mrs A Sciberras and Protex Ltd after obtaining necessary approvals from the Ministry of Finance. In reply to a remark by the appellants' lawyer, Mr Bezzina did not exclude the possibility that they were being invoiced by either Mrs A Sciberras or Sarrebico Medical Supplies, however, the most important thing for him, as Head of Department, was that they were covered by the necessary 'Finance' approvals and that the beneficiaries of the 'incontinence service' were satisfied with the products and service provided.

On cross-examination by Dr Aquilina, Dr Stephanie Xuereb, Director, Elderly and Community Care, testified that she needed to check with the Department's Accounts Section to establish who was invoicing them. Here, Dr Aquilina said that they had two receipts which confirmed that it was Sarrebico Medical Supplies and not Mrs A Sciberras that was invoicing the Department. On the other hand Dr Mallia alleged that she had information that the Treasury was issuing cheques to Protex Prosan Ltd and not to Protex Ltd.

The PCAB drew the attention of those present that this issue was not relevant to the tender and appeal under reference.

Dr Aquilina alleged that, if Mrs A Sciberras were to be awarded the tender, she would not be in a position to perform the contract obligations and that the service would have to be totally carried out by another company. He said that Clause 6.1 under General Conditions of the tender document specified that

'A subcontract shall be valid only if it is a written agreement by which the Contractor entrusts performance of a part of his contract to a third party'

while Clause 6.2 stipulated that

‘The Contractor shall not subcontract without the prior written authorisation of the Contracting Authority’.

He sustained that although the tender made an allowance for subcontracting it did not allow for total subcontracting.

Dr Mallia remarked that subcontracting was an issue which had to be dealt with after the award of contract.

However, Dr Aquilina pointed out that they were raising the issue at this stage because Clause 3.5 stipulated that to *‘be eligible for participation in this tender procedure, tenderers must prove to the satisfaction of the Contracting Authority that they comply with the necessary legal, technical and financial requirements and have the wherewithal to carry out the contract effectively.’*

He alleged that at present, although Mrs Sciberras was supposed to be supplying the items, in actual fact she was not supplying as Mrs Sciberras but as Sarrebico Medical Supplies. The lawyer claimed that this was a proof that Mrs Sciberras did not have the *‘wherewithal to carry out the contract effectively’*.

Dr Aquilina said that Clause 2, Submission of Tender – *Contents of individual envelopes under Instruction to Tenderers*, specified that in Envelope No 2 marked ‘Documentation’ tenderers had to submit, *inter alia*, ‘Technical Specifications’ and ‘Technical Literature on each item being offered’. He said that according to the ‘Schedule of Tenders Received’ that was published on the Notice Board at the Department of Contracts, Mrs Sciberras was the only tenderer who did not submit the ‘Technical Literature’. Dr Aquilina contended that this was the reason why in their letter of objection they stated that *‘item number 3 – Disposable Adult Nappies Large should be awarded to Protex Limited instead of A Sciberras as Protex Limited is the second cheapest offer and fully conforms with all tender and legal requirements, which is not the case with A Sciberras’*.

Mrs Sciberras responded by stating that, as far as she was aware, they had submitted such documents.

When asked by the PCAB to present the tenderer’s submission, Mr Mario Borg, representing the Department of Contracts, informed the Board that the technical submissions could not be found and that according to their records such documents were still at the Department concerned.

In reply to a specific question by the PCAB, Mr Borg contended that in view of the fact that the evaluation of the technical offers received was carried out by the Adjudication Committee, they felt that the issue of the ‘Technical Literature’ documents had to be dealt with by the said Committee and not the General Contracts Committee.

At this point, Mr Francis Attard, Director General (Contracts) was called to take the witness stand.

When asked by the PCAB to state whether Mrs Sciberras's tender should have been disqualified once she did not submit the 'Technical Literature', Mr Attard responded by stating that this depended on the tender conditions because there were instances where these permitted the Adjudication Committees to ask tenderers, through the General Contracts Committee, to submit such documents at evaluation stage.

On cross examination by the PCAB, Mr Attard explained that, under the *Three Package Procedure*, Package No 2 ('Technical Offers') was always opened by the General Contracts Committee and the offers received were then sent to the Adjudication Committee who was obliged to

- (i) examine whether the technical offers were in conformity with the requirements of the tender conditions
- and
- (ii) submit clear recommendations to the General Contracts Committee.

He said that if the Adjudicating Committee proceeded with the evaluation, then it was assumed that such offers were compliant.

The last witness to take the stand was Mr Gino Pavia, Chairman of the Evaluation Committee.

On cross-examination by the PCAB, Mr Pavia confirmed that they had seen the word 'No' under Technical Literature but the Evaluation Committee decided to proceed because it was of the opinion that it had sufficient information under the *Technical Specifications* and said that they also relied on the laboratory test results.

The PCAB remarked that the Board had exercised its discretion when it decided to proceed with the evaluation of the tender and enquired whether such discretion was foreseen or allowed in the tender document. Mr. Pavia intimated that he was not sufficiently aware of the relevant conditions to be able to answer the question.

Dr Aquilina contended that in view of the fact that Mrs Sciberras did not submit the 'Technical Literature', her offer should have been disqualified and the *Third Package* ('Financial Offer') should not have even been opened. Here, he quoted part of the extract of the law which was incorporated in the tender documents which specified that:

'In the process of adjudicating the tender, the packages for all tenderers shall be opened in public and in the sequence enumerated in the immediately preceding sub-regulation. When at any stage, any tenderer fails to comply with the tendering procedural requirements and, or with specifications, the remaining packages in his tender offer are to be discarded unopened.'

Dr Aquilina made reference to the 'Important Notice' attached to the tender document which, *inter alia*, specified that

'Furthermore, tenderers are to make sure that all technical details relevant to their offers are included in Envelope 2. It is their responsibility to ensure that any relevant literature, brochures, data, drawings, calculations, etc. necessary

for their technical evaluation of their offers are submitted by the closing time and date.'

Dr Mallia pointed out that Mrs Sciberras had submitted everything that was relevant for the technical evaluation of her offer. She maintained that this did not mean that the technical literature was necessary to substantiate the technical specifications for the technical evaluation of the offers as was being argued by the appellants' lawyer. Dr Aquilina responded by stating that the 'Important Notice' could not be interpreted to mean that it exempted tenderers from specific requirements of the tender and from presenting all the required documents.

When asked by the PCAB to declare whether she had submitted the 'Technical Literature', Mrs Sciberras's reply was vague. Dr Aquilina claimed that once Mrs Sciberras did not know whether she had submitted the technical literature or not, then they should rely on the official document.

With regard to what was stated by the PCAB regarding the discretion of the Adjudicating Committee, Mr Alfred Briffa, a member of the Adjudication Committee, contended that, if they had no right to exercise their discretion, the Director of Contracts should have drawn their attention and informed them accordingly.

Mr Briffa sustained that they never relied on literature submitted but on laboratory test results. His attention was drawn by the PCAB that if this was the case the PCAB failed to understand why tenderers were requested to submit such documentation. It was also pointed out that it was the responsibility of Adjudication Committees to ensure that tenderers strictly adhered to the tender documents' requirements as well as to be consistent in their evaluation since otherwise the tendering process could be jeopardised.

With regard to the case under reference, the PCAB felt that there was no need for the Director of Contracts to intervene because the conditions and requirements of the tender were specific. It was maintained that Adjudication Committees should not exercise their discretion arbitrarily, more so, in similar instances where public funds are involved.

In his concluding remarks Dr Aquilina stressed that at the moment the second 'envelope' was opened and the recommended tenderer's submission was found unaccompanied by the requested documents (e.g 'technical literature'), such offer should have been rejected immediately and should have never been referred to the Adjudication Committee.

Finally, Dr Mallia asked Mr Attard to state why the Department of Contracts did not disqualify the offer submitted by Mrs Sciberras as they did with the other tenderer. Mr Attard replied that the General Contracts Committee's role at the tenders opening stage was not to disqualify but to record what was found in the second envelope. The offers received were then referred to the Adjudication Committee for the technical evaluation. Mr Triganza added that apparently the Chairman of the General Contracts Committee had sufficient evidence to disqualify the other bid but did not have enough evidence to disqualify Mrs Sciberras' offer.

At this stage the public hearing was brought to a close and the PCAB proceed with the deliberation before reaching its decision.

This Board,

- having noted that the appellants, in terms of their ‘motivated letters of objection’ dated 22.08.2007 (*Case No. 118*) and 06.07.2007 (*Case No. 119*) respectively, and also through their verbal submissions presented during the public hearing held on the 30.01.2008, had objected to the decision taken by the General Contracts Committee;
- having noted the issues raised in connection with the correct use of the bidders’ Company names as well as their respective VAT Registration Numbers;
- having considered (a) Mr Bottiglieri’s testimony concerning Mrs Sciberras’ staff employment levels and the corresponding adequacy to enable her to deliver the promised service, and (b) Mrs Sciberras’ explanation regarding specific requirements relating to indication of staff complement dependent on the tenders in question, which requirements were different;
- having also considered Mr Bottiglieri’s admission that the Adjudication Committee did not verify whether staff details submitted by bidders were actually working with participating tenderers;
- having heard (a) Mr Bezzina claim that both Sarrebico Medical Supplies Ltd and Prosan Ltd have been supplying the Department with these products and, to date, they never received any complaints related to the apposite distribution and provision of services and (b) Mr Bottigieri confirm that all items recommended for award were according to specifications;
- having also noted the arguments raised in connection with the validity of the tenderers’ respective trading licenses as well as the documentation tabled during the hearing in relation to the same subject matter;
- having taken full cognizance of accessibility issues in designated premises, as well as, to other comments made on similar subject content by various witnesses;
- having reflected on Dr Aquilina’s claim regarding the fact that, according to his clients, should Mrs Sciberras be awarded the tender, she would not be in a position to fulfil her contractual obligations and that the service would have to be totally carried out by another Company;
- having taken note of the fact that, whilst Mrs Sciberras was not so sure whether her bid contained the ‘technical literature’ as specifically requested in the tender document, yet, Mr Pavia, the Chairman of the Adjudication Committee, confirmed that they did not come across any ‘technical literature’ accompanying her bid;
- having also heard that the Adjudication Committee, arbitrarily, decided to proceed with the evaluation of Mrs Sciberras’ bid albeit this did not contain any ‘technical literature’ as was specifically requested in the tender document;

- having heard Mr Briffa sustaining that Adjudicating Committees, evaluating similar tenders, never rely on literature submitted by bidders but they rely on laboratory test results

reached the following conclusions, namely:

1. the issue of declared staff levels as compared to existing staff levels tends to be seen as a trivial matter in view of the fact that both parties involved in this hearing are considered to have, to date, always provided the service they had promised to deliver and in a quality which incessantly met the Contracting Authority's full satisfaction;
2. matters relating to 'trading licence' and 'accessibility' to customers have been satisfactorily attended to by the Adjudicating Committee and this Board has nothing else to add, especially when one considers the track record of both parties in question;
3. the appellants' claim regarding the awarded tenderer's capability to fulfil her future contractual obligations is considered to be purely speculative and not corroborated by specific proof of evidence;
4. the Adjudication Committee's decision to deviate from their remit which, *inter alia*, required them to ensure that bidders complied with tender specifications, was an erroneous conclusion to reach. This Board reiterates that it fails to understand why tenderers are specifically requested to submit certain documentation (e.g. 'technical literature') and, then, Adjudicating Committees themselves, refrain from taking such non-compliance by bidders into consideration. As pointed out during the hearing, it is the responsibility of Adjudication Committees to ensure that tenderers strictly adhere to the tender documents' requirements as well as to be consistent in their evaluation since, otherwise, the tendering process could be jeopardised;

As a consequence of (1) to (4) above, this Board:

1. cannot uphold the objection (Case No. 118) as lodged by appellants;
2. finds in favour of appellants with regards to the objection (Case No. 119) considering that the Adjudicating Committee should have insisted on the submission of the 'technical literature' once this was a specific requirement, a 'sine qua non' condition.

In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that only the deposit paid by the appellants in connection with Case No. 118 should not be refunded to the appellants.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

7 March 2008