

PUBLIC CONTRACTS APPEALS BOARD

Case No. 226

Adv. 004/2010; CT/2164/2009

Service Tender for Supply of Mattresses to Irregular Immigrants - AFM

This call for tenders was published in the Government Gazette on 5th January 2010. The closing date for this call for offers was 25th January 2010.

The estimated value of this tender was Euro 80,000.

Six (6) tenderers submitted their offers.

Environmed Ltd filed an objection on the 18th June 2010 following the decision by the Contracts Department to reject its offer for being technically non-compliant since the length of the sample mattress was 184 cm instead of the required 185 cm to 190 cm.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Carmel J Esposito as members convened a public hearing on Monday, 4 October 2010 to discuss this objection.

Present for the hearing were:

Enviromed Ltd

Dr John Gauci
Mr Noel Delia

Legal Representative
Representative

Armed Forces of Malta (AFM)

Dr Mario Spiteri Bianchi

Legal Adviser

Adjudicating Board

Col. M Bondin
Lt. Col. B Gatt
Lt. Col. G Galea
Mr J Debattista
Bdr. J Miruzzi

Chairman
Member
Member
Member
Secretary

Department of Contracts

Mr Francis Attard

Director General (Contracts)

After the Chairman's brief introduction as to how the hearing was going to be conducted, the appellant was invited to explain the motives which led to the objection.

Dr John Gauci, legal representative of Environmed Ltd, the appellants, stated that, by way of letter dated 9th June 2010, the Contracts Department had informed his client that his tender was adjudicated to be non-compliant because the length of the sample mattress presented was 184 cm instead of the requested 185 cm to 190 cm and that since none of the tenders submitted were found fully compliant the tender was to be reissued.

Dr Gauci submitted the following:

- according to the contracting authority, the sample presented by his client was found to be 1 cm short of the length requested in the tender document;
- the sample supplied and, in the event of award, the mattresses that would eventually be supplied by his client would be 185cmx75cmx10cm as per specifications that his client furnished in its tender submission;
- foam material, unlike hard and solid material like steel or wood, tended to vary slightly in dimensions partly because these foam mattresses were delivered compressed in blue fibreglass waterproof bags for the purpose of packaging and transportation; and
- these mattresses were quite dense and when unpackaged and left to straighten out in favourable temperatures the mattresses would assume more or less the declared dimensions

On his part, Col. Martin Bondin, Chairman of the adjudicating board, made the following remarks:

- six tenderers participated in this tendering process of which three were found to be administratively non-compliant;
- of the other three administratively compliant tenders it transpired that on measuring the samples provided, tenderer no. 4 submitted a mattress 192cm long, i.e. exceeding the 185cm to 190cm requested, tenderer no. 5 presented a sample 82cm wide, i.e. beyond the stipulated limits of 75cm to 80cm and tenderer no. 6, the appellant, provided a sample that was 184cm long, i.e. outside the requested 185cm to 190cm;
- the adjudicating board had to evaluate within the specifications outlined in the tender document and it could not accept goods that did not fit those specifications

The PCAB asked whether it was imperative for the mattress to be of the exact measurements stipulated in the tender document. The PCAB argued that strict adherence to sizes and measurements was essential when dealing with precision instruments and scientific equipment but not when dealing with such an item as a foam mattress being 1cm too long or too short. The PCAB also pointed out that the appellants submitted both the sample and the supporting document, which document

was within the stipulated criteria, and that one could not simply ignore the written declaration produced by the tenderer. He added that, in the event that the mattresses delivered would not be, in part or entirely, in accordance with the written specifications accepted by the tenderer, then the contracting authority would have every right to refuse the goods and could even to seek compensation.

Mr Noel Delia, also representing the appellant Company, explained that the manufacturer had indicated to him that one had to allow for a plus or minus 10% from the documented measurements because the cutting machine was liable to vary by that much when it came to cutting foam material.

Col. Bondin remarked that the mattress was measured by two different teams and with different measuring tapes and the result was identical. He added that the contracting authority would prefer to award a tender rather than cancel it, however, since none were strictly in line with specifications they had to refuse them otherwise one would end up with the dilemma as to what variation from the stipulated measurements was acceptable or tolerable.

Dr Gauci insisted that his client was going to commit himself in writing, according to the 'foam mattress specification' which he submitted with his offer, that the mattresses were going to be supplied within the specifications requested. He continued that if the deliveries would not respect that commitment then the contracting authority had every right to request replacement or to impose penalties or even to cancel the contract.

The Chairman PCAB remarked that he still needed some reassurance to the statement made that foam material was liable to a 10% variation in size.

Col. Bondin remarked that the tenderers were not obliged to submit written specifications or certificates of the mattress offered but they were obliged to submit a sample as per Art. 5 of the 'Special Conditions'

Dr Gauci insisted that his client had gone beyond what was requested of him and backed his sample with written specifications as to size, density, cover, packaging and so forth which were in conformity with tender specifications. The appellants' legal representative insisted that he still had to be convinced that his client's product was not up to specifications while adding that even the variation of 1cm brought up by the contracting authority was very minimal indeed and therefore his client's offer ought to be reinstated in the tendering process.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated 18 June 2010 and also through their verbal submissions presented during the public hearing held on 4 October 2010 had objected to the decision taken by the General Contracts Committee;

- having taken note of the appellants' remarks in respect of the fact that (a) according to the contracting authority, the sample presented by them was found to be 1 cm short of the length requested in the tender document, (b) the sample supplied and, in the event of award, the mattresses that would eventually be supplied by them would be 185cmx75cmx10cm as per specifications that they furnished in their tender submission, (c) foam material, unlike hard and solid material like steel or wood, tended to vary slightly in dimensions partly because these foam mattresses were delivered compressed in blue fibreglass waterproof bags for the purpose of packaging and transportation, (d) these mattresses were quite dense and when unpackaged and left to straighten out in favourable temperatures the mattresses would assume more or less the declared dimensions and (e) they were committing themselves in writing, according to the 'foam mattress specification' and should deliveries not respect that commitment then the contracting authority would have every right to request replacement or to impose penalties or even to cancel the contract;
- having also taken note of the contracting authority's representatives' (a) statement relating to the fact that of the other three administratively compliant tenders it transpired that on measuring the samples provided, tenderer no. 4 submitted a mattress 192cm long, i.e. exceeding the 185cm to 190cm requested, tenderer no. 5 presented a sample 82cm wide, i.e. beyond the stipulated limits of 75cm to 80cm and tenderer no. 6, the appellant, provided a sample that was 184cm long, i.e. outside the requested 185cm to 190cm, (b) remark that the adjudicating board had to evaluate within the specifications outlined in the tender document and it could not accept goods that did not fit those specifications, (c) reference to the fact that the mattress was measured by two different teams and with different measuring tapes and the result was identical, (d) remark regarding the fact that, since none of the bidders were strictly in line with specifications, the adjudication board had to refuse them otherwise one would have ended up with the dilemma as to what variation from the stipulated measurements would have been acceptable or tolerable and (e) comment that the tenderers were not obliged to submit written specifications or certificates of the mattress offered but they were obliged to submit a sample as per Art. 5 of the 'Special Conditions';
- having considered whether it was imperative for the mattress to be of the exact measurements stipulated in the tender document;
- having taken cognizance of the fact that the appellants submitted both the sample and the supporting document, which document was within the stipulated criteria, and that one could not simply ignore the written declaration produced by the tenderer,

reached the following conclusions, namely:

1. The PCAB feels that it still needed some reassurance to the statement made by the appellants that foam material is liable to a 10% variation in size.
2. The PCAB opines that, *prima facie*, it seems that the appellants had fulfilled all their obligations when submitting their bid, however, considering the fact that

the sample varied from the size of the mattress declared in the document included in their submission, the PCAB is not in a position to establish in an objective manner as to whether the specifications being followed by the contracting authority and the claims made by the appellants are both factual and plausible.

As a consequence of (1) to (2) above this Board has decided to engage an independent expert on subject matter who, within the next few days and in the presence of both the contracting authority's as well as the appellant company's representatives, shall conduct his own analysis of facts available. It is this Board's opinion that such independent analysis will provide it with greater peace of mind as to how it should proceed.

The PCAB so decides that the findings of this independent expert shall determine the outcome of this tendering process and that all parties concerned will have to abide with such expert's findings and pertinent recommendations.

In consideration of (a) the fact that this appeal was not lodged in a frivolous manner, so much so, that the PCAB itself needs further independent advice on the matter in question and (b) the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the said appellants should be reimbursed irrespective of the outcome of the independent consultant's findings.

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmel J Esposito
Member

13 October 2010