

PUBLIC CONTRACTS APPEALS BOARD

Case No. 249

AFM 9/10 – FO 6604/2/10

Tender for the Supply of Boots High Leg to the Armed Forces of Malta

This call for tenders was published in the Government Gazette on 16th March 2010. The closing date for this call for offers with a department estimate of €43,000 was 1st May 2010.

Eight (8) tenderers had originally submitted their offers

Sicuro Safety Solutions Ltd filed an objection on 29th October 2010 against the decision by the Contracts Department to disqualify its offer on being found technically non-compliant and to recommend the award of tender to Uniformity Ltd.

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 Wednesday, 19th January 2011 to discuss this objection.

Present for the hearing were:

Sicuro Safety Solutions Ltd

Dr John L. Gauci
Mr Christian Gafa

Legal Representative
Representative

Uniformity Ltd

Ms Vicky Zammit Mangion
Mr Charles Mifsud

Representative
Representative

Armed Forces of Malta (AFM)

Dr Mario Spiteri Bianchi
Mr J Debattista

Legal Representative
Asst. Head (Finance & Administration)

Evaluation Board

Col. Martin Bondin
Lt Col. G Galea
Capt. F Buhagiar
Bdr J Meruzzi

Chairman
Member
Member
Secretary

Department of Contracts

Mr Francis Attard

Director General

After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of its objection.

Dr John L. Gauci, legal representative of Sicuro Safety Solutions Ltd, explained that his client received a letter from the Contracts Department dated 22nd October 2010 informing the Company that its offer *“was not successful as it was technically non-compliant since the sample boots submitted is fitted with an external toe cap against the published technical specifications, which state that the boots must be supplied without external toe cap.”*

Dr Gauci contended that the sample submitted by its client did not have an external toe cap and that the toe cap was internally reinforced as requested and, as a result, it conformed to published specifications which stated that the *“boots shall be without external toe cap but the toe cap area shall be internally reinforced apart from the lining.”*

Dr Gauci also pointed out that the price of the recommended tender was €58,000 whereas the price of his client's tender was €40,000 or €18,000 cheaper and that, in the circumstances, the tender ought to be awarded to his client.

Dr Mario Mifsud Bianchi, legal representative of the AFM, the contracting authority, agreed that the reason for exclusion was the toe cap since the sample submitted by the appellant company was not fit to be used by the Armed Forces for combat purposes as it would lead to injuries being sustained by users.

Col. Martin Bondin, Chairman of the Evaluation Board, under oath explained that:

- the tender document did not expressly state that no steel could be used in the toe cap but it stated that the toe cap had to be internally reinforced;
- by the term ‘without external toe cap’ the contracting authority meant that the toe cap had to be moulded from the same material (leather in this case) that the boot was made of;
- in the case of the sample submitted by the appellant company the toe cap was fitted with a steel metal cap inserted between the outer and the inner layers of the material that toe cap was made of and, therefore, the toe cap was not moulded from the same material that the rest of the boot was made of;
- the sample submitted was more of a safety boot than a lightweight combat boot as requested in the tender. The combat boots were meant to have a measure of safety features in the sense that the toe cap had to be reinforced by additional layers of the same material that the boot was made of so as to protect the toes against bumping into stones while running on rough terrain during combat training and the like. However, at the same time, the toe cap still had to be a bit flexible to allow soldiers to run during combat exercises without causing injuries;

- the steel protection embedded in the toe cap rendered the sample submitted by the appellant company rigid and unfit for use in military combat training and that, as a consequence, soldiers would refuse to use them; and
- the AFM issued a tender with different specifications for the supply of safety shoes.

The Chairman Public Contracts Appeals Board observed that from the evidence that was emerging it appeared that the contracting authority might have had its good reasons to reject the product offered by the appellant company, however:

- the evaluation report stated that the sample submitted by the appellant company was rejected since it was fitted with an external toe cap against the published specifications which stated that the boots must be supplied without external toe cap;
- this same reason was faithfully reproduced in the letter of rejection issued by the Contracts Department;
- whilst during the hearing clear explanations were emerging as to what exactly was meant by the term ‘external toe cap’ and what actually led to disqualification, yet these details were not recorded in the evaluation report and, as a result, were not communicated by the Contracts Department to the appellant company; and
- the Evaluation Board should have made it clear in its report that it considered the sample as safety boots and not as military combat boots.

The Chairman Public Contracts Appeals Board also referred to the information insert accompanying the sample submitted by appellant company where it was noted that reference was repeatedly made to ‘Safety footwear’ and to ‘EN ISO 20345-2004 Standard’.

Brigadier J. Meruzzi, secretary to the Evaluation Board, under oath and after producing the sample offered by the appellant company submitted that:

- the sample displayed the number ISO 20345-2004 which, according to the Malta Standards Authority (MSA), related to “Personal Protective Equipment: Safety footwear” and hence to safety shoes;
- the literature accompanying the sample submitted by the appellant company indicated the name ‘06941 Commando KEV’ but it was noted that further down in the document under ‘Norms’ there was this indication: ‘Conforms to the EN ISO 20345 : 2004 new norm for safety shoes’;
- on the other hand ISO 20347:2004 referred to ‘Personal Protective Equipment: Occupational footwear’ which was different from safety footwear; and
- safety boots with an internally steel reinforced toe cap was unfit for use in military combat because it would cause injury to the soldiers using them.

Mr Christian Gafa', also representing of Sicuro Safety Solutions Ltd, under oath remarked that whilst safety shoes referred to shoes that had an internally reinforced toe cap, yet, there were various types of safety shoes and he did not exclude that safety boots could be used as combat boots.

Dr Gauci insisted that according to the evaluation report the Board rejected his client's offer solely because it was claimed that the sample was fitted with an external toe cap and for none of the other reasons that were mentioned only at the hearing.

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 29th October 2010 and also through their verbal submissions presented during the hearing held on 19th January 2011, had objected to the decision taken by the pertinent authorities;
- having noted the appellant company's representatives' (a) reference to the fact that its offer was considered as technically non-compliant since the sample boots submitted is fitted with an external toe cap against the published technical specifications, which state that the boots must be supplied without external toe cap, (b) claim that the sample submitted by them did not have an external toe cap and that the toe cap was internally reinforced as requested and, as a result, it conformed to published specifications which stated that the *"boots shall be without external toe cap but the toe cap area shall be internally reinforced apart from the lining."*, (c) claim that since their price was €18,000 cheaper than that of the recommended tender the tender ought to be awarded to them, (d) remark that albeit *safety shoes* referred to shoes that had an internally reinforced toe cap, yet, there were various types of *safety shoes* and one should not exclude that safety boots could be used as combat boots and (e) reference to the fact that, according to the evaluation report, the Board rejected its offer solely because it was claimed that the sample was fitted with an external toe cap and for none of the other reasons that were mentioned only at the hearing;
- having considered the contracting authority's reference to the fact that (a) the tender document did not expressly state that no steel could be used in the toe cap but it stated that the toe cap had to be internally reinforced, (b) by the term 'without external toe cap' the contracting authority meant that the toe cap had to be moulded from the same material (leather in this case) that the boot was made of, (c) in the case of the sample submitted by the appellant company the toe cap was fitted with a steel metal cap inserted between the outer and the inner layers of the material that toe cap was made of and, therefore, the toe cap was not moulded from the same material that the rest of the boot was made of, (d) the sample submitted by the appellant company was more of a safety boot than a lightweight combat boot as requested in the tender as it was clearly referred to on the same sample which displayed the number ISO 20345-2004 which, according to the Malta Standards Authority (MSA), related to "Personal Protective Equipment: Safety

footwear” and hence to safety shoes, (e) whilst the literature accompanying the sample submitted by the appellant company indicated the name ‘06941 Commando KEV’ yet it was noted that, further down in the document, under ‘Norms’, there was this indication: ‘Conforms to the EN ISO 20345 : 2004 new norm for safety shoes’, (f) ISO 20347:2004 referred to ‘Personal Protective Equipment: Occupational footwear’ which was different from safety footwear, (g) the steel protection embedded in the toe cap rendered the sample submitted by the appellant company rigid and unfit for use in military combat training and that, as a consequence, soldiers would refuse to use them because such footwear could easily cause injury and (h) the AFM issued a tender with different specifications for the supply of safety shoes,

reached the following conclusions, namely:

1. The Public Contracts Appeals Board acknowledges that, according to the evaluation report, the Board rejected the appellant company’s offer solely because it was claimed that the sample was fitted with an external toe cap and for none of the other reasons that were mentioned only at the hearing.
2. The Public Contracts Appeals Board, however, feels that, albeit the literature accompanying the sample submitted by the appellant company indicated the name ‘06941 Commando KEV’ yet, it is also a fact that, further down in the document, under ‘Norms’, there was this indication: ‘Conforms to the EN ISO 20345: 2004 new norm for safety shoes’, which, as far as the Public Contracts Appeals Board is concerned, is self explanatory.
3. The Public Contracts Appeals Board, furthermore, acknowledges that no one managed to, effectively, challenge the claim made by the contracting authority whereby major emphasis was placed on the fact that the sample submitted by the appellant company was more of a safety boot than a lightweight combat boot - as requested in the tender - as it was clearly referred to on the same sample which displayed the number ISO 20345-2004 which, according to the Malta Standards Authority (MSA), related to “Personal Protective Equipment: Safety footwear” and hence to safety shoes.

In view of the above this Board finds against the appellant company.

This Board acknowledges that the letter of exclusion could have better reflected the content of the evaluation report which, as a result, could have had a bearing on the appellant company’s decision to object. As a consequence, this Board recommends that the deposit paid by the appellants should be reimbursed.

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmel J Esposito
Member

16 February 2011