

PUBLIC CONTRACTS REVIEW BOARD

Case No. 457

QMS/U 6/10

Tender for the Supply of Winter Trousers to the Malta Police Department

This call for tenders was published in the Government Gazette on the 28th January 2012. The closing date for this call with an estimated budget of €80,000 including VAT was the 23rd March 2012.

Six (6) tenderers submitted their offers.

Indesign Ltd filed an objection on the 5th July 2012 against the decision of the Malta Police Department to disqualify its offer as administratively non-compliant.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Joseph Croker and Mr Carmel Esposito as members convened a public hearing on Tuesday, 25th September 2012 to discuss this objection.

Present for the hearing were:

Indesign Ltd

Dr Isabel Bharwani-Scicluna Legal Representative
Ms Samantha Reed Manager

Yorkie Clothing Ltd – Lots No. 1 and 2

Mr Jeffrey Calleja Export Manager

Astor Ltd – Lot No. 3

Ms Concetta Calleja Representative

Malta Police Department

Evaluation Board

Supt. Dr Mario Spiteri	Chairman
SM 85 Audrey Cassar	Member
PS 4 A. Bellia	Member
Mr Martin Debono	Member

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

Dr Isabel Bharwani-Scicluna, legal representative of Indesign Ltd, the appellant company, stated that by letter dated 27th June 2012 the contracting authority informed her client that its offer was found not compliant since it failed to submit the sample with a label marked with the words 'GM', the contract number and the year of manufacture as required in the 'Additional Specifications' on page 51 of the tender document;

Dr Bharwani-Scicluna submitted that:-

- i. her client had submitted the sample on request by the contracting authority;
- ii. clause 2 of the 'Additional Specifications and Summary of Special Conditions' (page 51 of the tender document) read as follows:

Contractor shall also sew on the inside of each pair of trousers, a label bearing the letters, GM, name of contractor, year of manufacture or supply and size of relative trousers;

- iii. the contracting authority was not complaining about the quality or the design or the price of the trousers;

and

- iv. albeit the contracting authority rejected the offer because the sample presented did not have the label requested, yet, the appellant company insisted that such a label could only be provided once the tender was awarded so much so that the specification referred to the 'Contractor' and not the 'Tenderer' and these two terms were quite distinct from one another since the first referred to the contractor, namely the stage following the tender award, whereas the second referred to the tenderer, i.e. to the bidder at tendering stage.

Supt. Dr Mario Spiteri, chairman of the evaluation board, explained that:-

- a. the sample provided by the appellant company was rejected at administrative stage because it did not have the requested label and, as a result, that sample had not been referred for laboratory testing with regard to the material and so forth;
- b. clause 2 had to be seen in the light of clause 6 of the same 'Additional Specifications' (page 51), which entitled the evaluation board to request the submission of a sample of the 'actual material' to be used and a sample of the 'actual trousers (size 36)' made from the requested 'actual material';
- c. the recommended tenderers submitted the samples according to tender specifications;

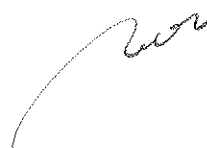


- d. the evaluation board had to examine not only the material but also the design, labelling and so forth, namely the trousers in its entirety;
 - e. clause 1 of the 'Additional Specifications' stated, among other things, that "*The trousers shall be cut similar to specimen available for viewing purposes at the Quartermaster's Stores Police General Headquarters, Floriana, Malta,*" and, therefore, the appellant company could have viewed that sample in order to provide a similar one;
 - f. the contracting authority required a sample that matched the tender specifications and the sample it made available for viewing by bidders;
- and
- g. if the appellant company's sample trousers had the label requested it would have been submitted for laboratory testing.

The Chairman Public Contracts Review Board noted that:-

- i. throughout, clause 6 only referred to the 'material' and no mention was made of the 'label' and there general agreement was expressed that the material was distinct from the label;
 - ii. it was the prerogative of the contracting authority to request the label with the information thereon and no one was contesting the purpose or the use of that label;
 - iii. a compliant sample did not guarantee that the whole supply would be likewise compliant on delivery but the contracting authority had to be vigilant that the supply matched the specifications and samples;
 - iv. the appellant company was not contesting that the trousers had to bear the label with the 'GM' mark and the other details but it was claiming that the label was not to be submitted by the bidder at tendering stage but by the contractor after the award of the tender;
- and
- v. on the other hand, the contracting authority was insisting that the sample trousers had to be identical to the ones which would, eventually, be supplied in the course of the execution of the contract.

Mr A Bellia, a member of the adjudicating board, stated that bidders were requested to submit (a) a sample of the material, which would be sent for laboratory testing, and (b) a sample of the trousers made from the same material which had to meet all the specifications and had to be similar to the one available for viewing at the Police General Head Quarters. He added that no deviations were tolerated, be it a 'label' or whatever.



Supt. Spiteri informed those present that six bidders participated in this tendering procedure, of whom three were disqualified at administrative stage, namely, BTI, Brown's Pharma Ltd and Indesign (Malta) Ltd, whereas JBC Mfg & Imp failed to submit the samples when requested to do so and that left the two recommended tenderers, namely Yorkie Clothing Ltd for lots 1 & 2 and Astor Ltd for lot 3. Supt. Spiteri remarked that the members of the evaluation board were not experts as far as the material was concerned and, as a consequence, the material was submitted for laboratory testing but what the evaluation board could deliberate upon was the actual trousers in terms of design, size, labels etc.

Dr Bahrwani-Scicluna concluded that:-

- a. the bidder had to abide by the specifications and conditions of the tender and although the provision of the label with the requested information was, indeed, a tender specification, that label had to be provided by the 'contractor' after entering into/signing the contract and not by the bidder at tendering stage;
 - b. the contracting authority did not communicate with her client so as the latter would submit the sample trousers with the label even at tendering stage all the more when the two recommended tenderers were the current suppliers and, as a result, could submit labelled samples from the ones they were currently supplying;
- and
- c. clause 1 of the 'Additional Specifications' stated that 'the trousers shall be cut similar to specimens available' and so it referred to a 'similar cut' - not even an identical cut - and not to the 'label'.

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 the 5th July 2012 and also through their verbal submissions presented during the hearing held on the 25th September 2012, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by letter dated 27th June 2012 the contracting authority informed the appellant company that its offer was found not compliant since it failed to submit the sample with a label marked with the words 'GM', the contract number and the year of manufacture as required in the 'Additional Specifications' on page 51 of the tender document, (b) the appellant company had submitted the sample on request by the contracting authority, (c) clause 2 of the 'Additional Specifications and Summary of Special Conditions' (page 51 of the tender document) read as follows "*Contractor shall also sew on the inside of each pair of trousers, a label bearing the letters, GM, name of contractor, year of manufacture or supply and size of relative trousers*", (d) the contracting authority was not complaining about the quality or the design



or the price of the trousers, (e) albeit the contracting authority rejected the offer because the sample presented did not have the label requested, yet, the appellant company insisted that such a label could only be provided once the tender was awarded so much so that the specification referred to the 'Contractor' and not the 'Tenderer' and these two terms were quite distinct from one another since the first referred to the contractor, namely the stage following the tender award, whereas the second referred to the tenderer, namely to the bidder at tendering stage, (f) the bidder had to abide by the specifications and conditions of the tender and although the provision of the label with the requested information was, indeed, a tender specification, that label had to be provided by the 'contractor' after entering into/signing the contract and not by the bidder at tendering stage, (g) the contracting authority did not communicate with the appellant company so as the latter would submit the sample trousers with the label even at tendering stage all the more when the two recommended tenderers were the current suppliers and, as a result, could submit labelled samples from the ones they were currently supplying and (h) clause 1 of the 'Additional Specifications' stated that 'the trousers shall be cut similar to specimens available' and so it referred to a 'similar cut' - not even an identical cut - and not to the 'label';

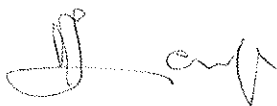
- having considered the contracting authority's representatives' reference to the fact that (a) the sample provided by the appellant company was rejected at administrative stage because it did not have the requested label and, as a result, that sample was not referred for laboratory testing with regard to the material and so forth, (b) clause 2 had to be seen in the light of clause 6 of the same 'Additional Specifications' (page 51), which entitled the evaluation board to request the submission of a sample of the 'actual material' to be used and a sample of the 'actual trousers (size 36)' made from the requested 'actual material', (c) the recommended tenderers submitted the samples according to tender specifications, (d) the evaluation board had to examine not only the material but also the design, labelling and so forth, namely the trousers in its entirety, (e) clause 1 of the 'Additional Specifications' stated, among other things, that "*The trousers shall be cut similar to specimen available for viewing purposes at the Quartermaster's Stores Police General Headquarters, Floriana, Malta,*" and, therefore, the appellant company could have viewed that sample in order to provide a similar one, (f) the contracting authority required a sample that matched the tender specifications and the sample it made available for viewing by bidders, (g) if the appellant company's sample trousers had the label requested it would have been submitted for laboratory testing, (h) bidders were requested to submit (1) a sample of the material, which would be sent for laboratory testing, and (2) a sample of the trousers made from the same material which had to meet all the specifications and had to be similar to the one available for viewing at the Police General Head Quarters, (i) no deviations were tolerated, be it a 'label' or whatever and (j) six bidders participated in this tendering procedure, of whom three were disqualified at administrative stage, namely, BTI, Brown's Pharma Ltd and Indesign (Malta) Ltd, whereas JBC Mfg & Imp failed to submit the samples when requested to do so and that left the two recommended tenderers, namely Yorkie Clothing Ltd for lots 1 & 2 and Astor Ltd for lot 3;

reached the following conclusions, namely:

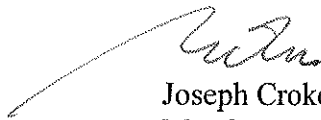


1. Whilst this Board agrees with the contracting authority's stand, namely that the sample trousers had to be identical to the ones which would, eventually, be supplied in the course of the execution of the contract, yet a compliant sample did not guarantee that the whole supply would be likewise compliant on delivery and, as a consequence, notwithstanding, the contracting authority had to be vigilant that the supply matched the specifications and samples.
2. The Public Contracts Review Board opines that, whilst it was the prerogative of the contracting authority to request the label with the information thereon and no one was contesting the purpose or the use of that label, yet, it is equally true that, throughout, clause 6 only referred to the 'material' and no mention was made of the 'label' and, in this context, during the public hearing, general agreement was expressed that the material was distinct from the label.
3. The Public Contracts Review Board feels that the appellant company is right in (a) contesting that the trousers had to bear the label with the 'GM' mark and the other details and in (b) claiming that, as worded in the tender document, the label was not to be submitted by the bidder at tendering stage but by the contractor after the award of the tender. This Board fully acknowledges the difference referred to by the appellant company between a 'tenderer' and a 'contractor'.
4. This Board considers that evaluation boards should, where possible, be guided by principles based on 'substance over form' and, in this instance, this Board opines that the 'material' and 'cut' carried far greater import than a mere 'label'.

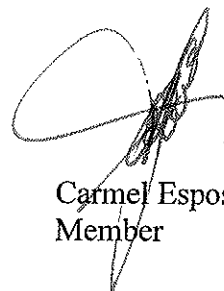
In view of the above this Board finds in favour of the appellant company and recommends that the said company is not only reimbursed with the deposit paid for the appeal to be lodged but also that the company's bid be reintegrated in the evaluation process.



Alfred R Triganza
Chairman



Joseph Croker
Member



Carmel Esposito
Member

2nd October 2012