

Following an introduction by The Public Contracts' Review Board Chairman, Dr Anthony Cassar, the Appellant was invited to make his submissions.

Mr Anthony Galea, representing Windsor Co Ltd, requested the Public Contracts Review Board to summon the Technical person who was present on behalf of the Contracting Authority to testify with regards to the manner "*in which the mattress contracts with continuous use.*"

Dr Stefan Zrinzo Azzopardi, the Legal Representative for the Central Procurement and Supplies Unit countered that in order for things to be simplified, there were two things which were to be treated namely the type firstly and the height secondly of the mattresses. He also said that he brought with him the person who was in charge of this Tender so that he could explain exactly what was required from this Tender.

At this point, Mr Geoffrey Scicluna, a Manager at the Support Services Directorate within Mater Dei Hospital, holding ID Card 259674 M was summoned by the Central Procurement and Supplies Unit to testify under oath before the Public Contracts Review Board.

Mr Anthony Galea, the Appellant, submitted that he wasn't saying that as the Public Contracts Review Board has stated, there should be a range since the mattress was not a piece of wood. If one had to measure any mattress, it resulted that its size differs depending on the way the mattress is measured. In view of this, the Appellant submitted that the range requested should be between 18cm and 20cm.

The Central Procurement and Supplies Unit's idea of having a more durable mattress depending on its size was a completely wrong idea, continued Mr Galea who also said that he has been in this industry for the last 50 years and he feels that he knows a thing or two about mattresses.

The crux of everything is in the bed cotton's height. In the old days, this material was put on the mattress and as time passes by it started to go down. Nowadays, this cotton passes from 5000 needle in order to reduce it to the required size. The Appellant can ask his employees to create a mattress with an extra 1cm but then problems can arise in the long term.

The Appellant continued explaining that when the work is ready, the mattresses are put on top of each other and the next day they are turned around so that they will have a settling period. Windsor Co Ltd also guaranteed that the mattresses' size will remain 18cm-19cm for fifteen years.

Mr Galea insisted that the specifications are to be 18cm-20cm to ensure that the Contracting Authority will receive the best quality mattresses. He was also wondering whether the Pocket Spring mattress, which is 22cm and considered as the best mattress in the world would be considered as non-compliant from the Authority should he decide to bid with it.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board said that at the same time the Central Procurement and Supplies Unit were not limiting the Appellant.

Mr Anthony Galea, the Appellant, insisted that the size does not make any difference at all. When ordering a mattress, one had to check whether it had a frame on the outside and a

strong side board spring. Windsor Co Ltd controls 60% of the market and what the Appellant was asking was only to specify a range 18cm-20cm.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board commented that if there would still be a range if this was a 20cm-22cm one for which Mr Anthony Galea, the Appellant, replied that the normal board spring mattress is between 18cm and 20cm and that if the range would be 20cm upwards, one was going to eliminate many types of mattresses which does not make sense.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked the Appellant how do the latter market the mattresses for which Mr Anthony Galea, the Appellant replied that these are marketed as orthopedic mattresses.

The Chairman of the Public Contracts Review Board then asked whether the mattresses are marketed with their sizes also for which the Appellant replied that if one visits their websites, one won't find any mattress sizes since it does not make any difference unlike the foam mattresses which are indeed marketed by sizes.

Dr Stefan Zrinzo Azzopardi, the Legal Representative for the Central Procurement and Supplies Unit replied that at the end of the day, the discussion was about a pre-contractual concern and that he was understanding from where the Appellant was talking to. On the other hand, a decision must be taken from somewhere.

The Public Contracts Review Board must evaluate whether the condition discussed was being restrictive to the competition or not or else was giving an unfair advantage to a particular Bidder in a particular Tender with special reference to be made from what the Witness has said in his Testimony under oath according to Dr Zrinzo Azzopardi. Despite all this it was interesting to listen to the Technical Expertise which the Appellant had to offer.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked how many suppliers there are in the bedding market for which Mr Anthony Galea, the Appellant replied that in Malta there are only two but suppliers can come from anywhere in the World. The Appellant raised this Pre-Contractual Concern because it hurts him seeing that the Technical Specifications insisted on a 20cm only range.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether the Appellant can produce a mattress with a range from 20cm upwards for which the latter replied that if the spring made was higher than 14cm, it would jeopardise the quality of the mattress.

Mr Geoffrey Scicluna, representing the Central Procurement and Supplies Unit asked the Appellant what difference does it make if the spring was raised for which Mr Galea replied that when the mattress with a higher spring is eventually used, the part which is mostly used will then lower itself down.

At this stage, the Public Hearing was closed.

This Board,

Having noted this Pre-Contractual Objection filed by Windsor Co Ltd (herein after referred to as the Appellant) on 5 January 2017, refers to the Contentions made by the latter with regards to the Tender of Reference DH 2620/2016 listed as Case No 1015 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Mr Anthony Galea

Appearing for the Contracting Authority: Dr Stefan Zrinzo Azzopardi

Whereby, the Appellant contends that:

- a) The imposed Technical Height of the “*Board Spring Mattress*” of 20cm and upwards would, in actual fact, eliminate many types of mattresses, hence limiting competition. In this regard, Windsor Co Ltd contends that the range of the height of the Board Spring Mattress should be between 18 and 20 cm.**

This Board also noted the Contracting Authority’s “*Letter of Reply*” dated 13 January 2017 and its verbal submissions during the Public Hearing held on 17 January 2017, in that:

- a) The Central Procurement and Supplies Unit contend that the established minimum “*Board Spring Mattress*” was based on past experience, in that, the imposed minimum height of 20cm would enable the mattress in use to last longer.**

This same Board also noted the Testimonies of the witness namely, Mr Geoffrey Scicluna duly summoned by the Central Procurement and Supplies Unit.

This Board, after having treated the merits of this case, arrived at the following conclusions:

- 1. This Board, after having examined the relative documentation and heard the credible technical submissions made by the Appellant, opines that explanations were given to denote that the height of the “*Board Spring Mattress*” does not determine the durability of a mattress. At the same instance, this Board, through the explicit explanations given by the Appellant, the difference between 18cm**

and 20cm would not affect the purpose of the use of the mattress itself.

This Board also notes the fact that the Central Procurement and Supplies Unit has all the rights to impose Technical Specifications, as long as the latter do not limit the scope of the competition. In this particular case, the imposition of a 20cm minimum height of the “*Board Spring Mattress*” does in fact exclude prospective suppliers from Tendering.

This Board, in arriving at its Adjudication, has taken into consideration the important Technical Factor, in that, the minor difference between a minimum height of 18cm and that of 20cm would not affect the quality or the purpose for which the product is to be used.

In view of the above, this Board recommends that the range of height to be dictated in the Tender Document should be 18cm and over.

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member

24 January 2017