

Case No. 1

Contract: CT 253/2002 – Purchase of a Mobile Drum Type Screening Machine by Parks and Landscape Conservation Section, Works Division

This call for tenders was issued to enable the Parks and Landscape Conservation Section of the Works Division to purchase a mobile drum type machine suitable to screen bricks, soil, mixed rubble, debris, demolition and construction waste, raw compost, mixed waste, excavated waste, contaminated soil and wood chips.

The estimated value of this contract was Lm 40,000.

Six offers were received and were adjudicated by the adjudication board composed of professional personnel from the Ministry for Resources and Infrastructure, namely Architect G. Buhagiar, Ing. C. Galea and Ing. M. Agius.

In their Comparison Report dated 17.12.2002 the adjudication board had stated that whilst the cheapest offer submitted was that of Messrs. Beyer GmbH at a CIF price of Euro 86,690 exclusive of cost of spare parts which amounted to Euro 3,200, yet such offer had to be rejected on the basis that it was not to specifications due to two major reasons:

- a. the engine offered was a three cylinder and not four cylinder as requested
- b. from clarifications received it transpired that the sieve drums were not easily replaceable as they required bolt dismantling which, due to the nature of the work, would have become difficult to undo.

As a result, the adjudication board agreed to recommend the next cheapest offer submitted by Messrs. S. R. Services at a CIF price of Euro 95,010 (inclusive of spare parts).

Following the publication of the said recommendation, Messrs. Techno Logic Limited, the local representatives for Messrs. Beyer GmbH, filed an objection with the Director of Contracts on the 7th February, 2003 followed by an explanatory letter in regard addressed to the same Government department dated 14th February, 2003.

In order to ascertain the validity of the complaint raised by Messrs. Techno Logic Limited against the decision of the Contracts Committee to award the said tender to Messrs. Maschinenbau Farwick GmbH represented locally by Messrs. S. R. Services, the Public Contracts Appeals Board convened on the 21st May 2003 under the chairmanship of Mr. Alfred Triganza in the presence of the other members of the said board, namely, Mr. Anthony Pavia and Mr. Edwin Muscat.

The following persons were also in attendance during the said hearing:

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| Mr. A. Bonello | - | A/Director of Contracts |
| Arch. G. Buhagiar Ing. C. Galea Ing. M. Agius |] | Ministry for Resources and Infrastructure |
| Mr. R. G. Borg | - | Messrs. Techno Logic Limited |
| Ing. R. Muscat | - | Messrs. S. R. Services |

On being invited by the Appeals Board to present the basis for his objection, Mr. Borg reiterated that in line with the contents of his letter addressed to the Director of Public Contracts, he feels that the reasons given by the adjudication board against awarding the tender to Messrs. Beyer GmbH are unacceptable.

As a matter of fact he wanted to remind those present that in his letter he had mentioned a letter dated 17th October, 2002 wherein he had specifically asked a direct question relating to the type of engine as had been mentioned in section PT (5) of the Technical Specifications. In the said correspondence Mr. Borg had stated the following:

“As regards Item PT5 of the Technical Specifications is this a determining factor for selecting the machine or can one supply alternative engine types such as air cooled. This is done without minimizing, in any way, the performance of the machine.”

Mr. Borg stated that such query was replied to by the Department of Contracts (ref. CT/430/02 and WD 446/2002) in a telefax message dated 22.10.2002 containing the following specific answer, namely, *“there are no objections to accede to the above proposal”*.

Furthermore, in view of this, Mr. Borg opined that he could not understand the reason why, following such definite positive reply to his query, the adjudication board went on to deliberate against the supply of a three cylinder engine claiming contravention of tender specifications (PT 5).

As far as the dismantling of the sieve is concerned, Mr. Borg claimed that this could be performed by anyone in ten to fifteen minutes. He argued that, compared to the thirty minutes considered necessary by Messrs. Maschinenbau Farwick GmbH (as indicated in their product brochure) to perform the same job, there was no plausible reason why such factor was negatively assessed at adjudication stage.

Architect Buhagiar was asked to air his opinion. He emphasized that in recommending to the Contracts Department *“to accede to the proposal presented by Technologic Limited”* the Works Division at the Ministry for Resources and Infrastructure was solely limiting itself to an air cooled machine instead of a water cooled machine and not the entire pertinent technical specification, namely PT (5) which states:

“The unit shall be powered by an EC approved water-cooled, four cylinder, four stroke diesel engine.”

Consequently, this was the reason why the adjudication board had considered that a three-cylinder engine as offered by Messrs. Beyer GmbH was in contravention of the said technical clause.

In expressing his personal opinion, Ing. C. Galea stated that a four-cylinder engine was specifically asked for in the specifications as this is technically considered preferable to a three cylinder one. He opined that a four-cylinder engine manages to work on a smaller amount of vibrations thus leading to less wear and tear possibilities.

Ing. Galea also expressed his opinion regarding the facts which led to the adjudication board claiming that in the offer submitted by Messrs. Beyer GmbH the sieve drums were not easily replaceable as they required bolt dismantling which, due to the nature of the work, would have become difficult to undo. Through experience, he has found the clip type (as proposed by Messrs. Maschinenbau Farwick GmbH) to be a far easier type to operate. He also stated that bolted type mounted sieves tended to result in maltreatment of the bolts themselves during operation of the machine rendering such bolts too laborious to dismantle with a huge possibility of the latter snapping whilst being dismantled leading to a few number of minutes being taken to remove such bolts from their respective locations.

At this stage Ing. Muscat was asked to comment if he wanted to and he obliged by stating that:

- a. as regards the two types of sieve mountings mentioned, his principals abroad had formerly used bolted type sieve mountings on their machines. Yet, the introduction of the clip type mountings was resorted to because it presented a considerable improvement on the bolt type mountings. The clip type mountings are in fact still patented in his principal's manufacturing line;

- b. while it was a fact that his principal's brochure indicated a thirty minute period in order for dismantling of clip type bolt to occur, yet, at the same time, he was having serious doubts as to the verbal assertion made by Mr. Borg (o.b.o Messrs. Beyer GmbH) regarding a person being in a position to dismantle the said bolt/s within ten to fifteen minutes.

The Chairman intervened by expressing his own personal views relating, particularly, to the fact that both the query and the reply given by Mr. John J. Farrugia for Director General Works Division (Ministry for Resources and Infrastructure) are very much generic. There may be reason to assume that Mr. Borg had specifically and conscientiously intended to place a vague question trusting that he would receive a vague reply open to subjective interpretations. On the other hand, it may also be a possibility that in seeking a further clarification in writing Mr. Borg had acted in good faith aiming for a general deviation from the specific technical requirement subject to how much of a determining factor such deviation is considered to be.

As far as the technical reply given to such query, there is also a sense of subjectivity. One could easily accept the adjudication board's thesis that Mr. Borg's written query (a copy of which was transmitted by the Contracts Department to all prospective tenderers prior to closing date of tender) specifically referred to air-cooled vis-à-vis water-cooled and not as stated by the latter as being of a generic nature referring to the entire technical clause PT (5). Also, one may regard the presence of a specific technical requirement as important enough not to be deviated from in any way. Consequently, it seems very problematic to accept why the request was acceded to in the first place as one may argue that an issue is either important enough to be there or not important enough and consequently not mentioned at all.

Furthermore, with regards to the claim that a three-cylinder engine is not up to standard, one has to observe that this statement was made only verbally at appeals stage. One may be tempted to argue that if such a cylinder type engine is considered to have so many flaws why wasn't it not clearly adversely mentioned in the same technical specifications accompanying the tender documentation?

Finally, one could also be inclined to interpret the said issue as being a misinterpretation of the real question being asked in writing by Mr. Borg.

One has to consider the fact that Ing. Muscat has during the course of the appeal proceedings commented, one dare say, in a very genuine manner, that whilst, initially, he had interpreted the query made by Mr. Borg as referring solely to air-cooled vis-à-vis water-cooled machine, he went on to state that, with hindsight, he could be inclined to agree that a wider interpretation could have been given to Mr. Borg's query.

In the light of the above and following further deliberation, the Public Contract Appeals Board decided that it has to award the tender to Messrs. Beyer GmbH trusting that, in future, technical replies have to be more carefully and meticulously handled in order to avoid further possibility of subjective interpretations taking place.