

## PUBLIC CONTRACTS APPEALS BOARD

### Case No. 207

**CT/2330/2009 Advert No CT/373/2009; AGRIC 150/2009**

### **Supply, Delivery and Commissioning of Heavy Duty Palm Tree Shredder/Chipper for the Plant Health Department**

This call for tenders was published in the Government Gazette on 18 September 2009. The closing date for this call for offers was 10 November 2009.

Four (4) tenderers had originally submitted their offers

Reactilab Ltd filed an objection on the 12 March 2010 following the decision taken by the Contracts Department to disqualify its offer for being considered administratively non-compliant which also led to the cancellation of tender as none of the bidders were found to be compliant.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Anthony Pavia and Mr. Carmel J Esposito as members convened a public hearing on Friday, 9 July 2010 to discuss this objection.

Present for the hearing were:

#### **Reactilab Ltd**

Dr Michael Psaila	Legal Representative
Mr Stephen Debono	Representative

#### **SR Services Ltd**

Eng. Ray Muscat	Representative
Ms Sarah Muscat	Representative
Mr Vincent Muscat	Representative

#### **Ministry for Resources and Rural Affairs (MRRA)**

Dr Marica Gatt	Director (Plant Health)
Dr Joseph Bonello	Legal Representative
Ms Audrey Grima Baldacchino	Legal Procurator

#### **Evaluation Board**

Ms Sonya Sammut	Chairperson
Eng. Chris Cremona	Evaluator
Mr Paul Zammit	Evaluator
Mr Joseph Bonello	Evaluator
Mr Mario Buttigieg	Secretary

#### **Contracts Department**

Mr Mario Borg	Assistant Director
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After the Chairman's brief introduction, the appellant Company was invited to explain the motives of the objection.

Dr Michael Psaila, representing Reactilab Ltd, the appellant Company, stated that the reason given by the Contracts Department for the disqualification of his client's offer read as follows:

*"Your offer was administratively non-compliant because you did not give details of other shredders supplied during the last 5 years as per Part A Instructions to Tenderers Section 3.6."*

Dr Psaila then quoted from the 'Notes' included in his client's tender submission which stated that:

*"Please note that the offered Bandit 1680 Beast Shredder/Chipper is currently in use at various clients for the processing of palm trees – two such clients are ALM, BP 46145, 53061 Laval Cedex, 9 France and Guifor S L, C/Atallu 10-1220170 Usurbil, Spain."*

Dr Psaila remarked that his client had in fact submitted what the contracting authority requested at Clause 3.6 (b) and even satisfied the requirement set out at Clause 3.6 (c) with the submission of the written confirmation by the manufacturer that the machinery being offered was able to shred palm trees, which was made up of fibrous timber.

Dr Joseph Bonello, representing the Ministry for Resources and Rural Affairs (MRRA), quoted Clause 3.6 'Selection Criteria' (b) Technical Abilities, namely:

*"Tenderer is to give details of other shredders supplied during the last 5 years."*

Dr Bonello remarked that the information supplied by the appellants in this regard was considered insufficient by the contracting authority.

The Chairman PCAB observed that the tender document simply requested the tenderer 'to give details of other shredders supplied during the last 5 years'.

Dr Psaila stressed that his client had indicated the model of the equipment, i.e. *Bandit 1680 Beast Shredder/Chipper*, which was the same type of equipment that his client was offering in his tender submission and which submission had been supported by a DVD, samples, brochures, instruction manuals and all such details.

Ms Sonya Sammut, Chairperson of the adjudication board, under oath, gave the following evidence:

- according to Clause 3.6 (b) 'Technical Abilities', the adjudication board was after the technical abilities of the bidder, i.e. that the bidder had supplied those machines and that he had the technical know-how to maintain such machines,

and, as a result, the emphasis was laid on the technical abilities of the supplier/tenderer rather than those of the equipment itself;

- she agreed that the appellant Company had given a lot of detail about the palm tree shredder that it was offering;
- it had not been indicated that the two similar shredding machines used by clients in France and Spain were in fact supplied by the appellants;
- four tenderers participated in this call for tenders with three of them having had no previous experience in the supply of such a shredding machine;
- this shredder was required as part of the action plan to combat the destruction of palm trees caused by the *Red Palm Weevil (Bumunqar Aħmar tal-Palm)*;

and

- the shredding machine offered by Reactilab Ltd appeared to be technically compliant, although no thorough technical evaluation had been carried out since the appellant Company failed at the administrative compliance stage.

The Chairman PCAB noted that the tender document at 3.6 (b) did not specify that the machines supplied over the past 5 years had to be supplied by the bidder himself. He added that, according to the contracting authority, it could have been the case that, locally, only one supplier could provide this type of equipment given its very particular use.

Dr Marica Gatt, Director (Plant Health), under oath, gave the following evidence:

- the contracting authority wished to ensure that the supplier would have the technical know-how to maintain the machinery that it supplied so as to avoid past negative experiences when suppliers failed to provide adequate after sales service to the detriment of the department;
- in order not to stifle competition, the contracting authority was careful to request experience not only on the requested type of shredder but on other types of shredders because the department was aware of the very limited availability of this kind of equipment on the local market; and
- in the absence of having this kind of shredder, the department was hiring one from a contractor who did not participate in this call for tenders.

Mr Anthony Pavia, a PCAB member, noted that, apart from Clause 3.6 (b), certain technical requirements were in fact requested in Clause 11.2 (page 6) of the tender document.

The Chairman PCAB remarked that Clause 3.6 (b) of the tender document did not specify that the shredders had to be supplied in Malta and that they had to be supplied by the bidder.

Dr Psaila concluded that his client had submitted all the information requested of him in the tender document and that as a consequence, there was no justification for the rejection of his client's offer on administrative grounds.

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 17.03.2010 and also through their verbal submissions presented during the public hearing held on 09.07.2010, had objected to the decision taken by the General Contracts Committee;
- having taken note of the appellant Company's legal advisor who, *inter alia*, (i) stated that his client's offer was declared administratively non-compliant because it was claimed that Company did not give details of other shredders supplied during the last 5 years as per Part A Instructions to Tenderers Section 3.6., (ii) claimed that, contrary to what had been claimed his client had in fact submitted what the contracting authority requested at Clause 3.6 (b) and even satisfied the requirement set out at Clause 3.6 (c) with the submission of the written confirmation by the manufacturer that the machinery being offered was able to shred palm trees, which was made up of fibrous timber and (iii) stressed that his client had indicated the model of the equipment, i.e. *Bandit 1680 Beast Shredder/Chipper*, which was the same type of equipment that his client was offering in his tender submission and which submission had been supported by a DVD, samples, brochures, instruction manuals and all such details ;
- having also taken note of Dr Bonello's claim that the information supplied by the appellants was considered insufficient by the contracting authority;
- having heard the Chairperson of the adjudication board (a) claim that the adjudication board was after the technical abilities of the bidder, i.e. that the bidder had supplied those machines and that he had the technical know-how to maintain such machines, and, as a result, the emphasis was laid on the technical abilities of the supplier/tenderer rather than those of the equipment itself, (b) confirm that the appellant Company had given a lot of detail about the palm tree shredder that it was offering, (c) state that four tenderers participated in this call for tenders with three of them having had no previous experience in the supply of such a shredding machine and (d) state that the shredding machine offered by Reactilab Ltd appeared to be technically compliant, although no thorough technical evaluation had been carried out since the appellant failed at the administrative compliance stage;
- having taken into consideration Dr Gatt's intervention, particularly the one referring to (a) the fact that the contracting authority wished to ensure that the supplier would have the technical know-how to maintain the machinery that it supplied and (b) the fact that, being highly cognizant of the fact that the type of shredder being requested could not be easily sourced;

reached the following conclusions, namely:

1. The PCAB opines that the very fact that the tender document at 3.6 (b) did not specify that the machines supplied over the past 5 years had to be supplied by a tenderer in one's own personal capacity rather than as a representative of some other local or foreign principal could not have been interpreted otherwise by the contracting authority's adjudication board, regardless of what the overall intention was. Furthermore, this Board maintains that tenders are decided upon following a lengthy examination process of specifications, terms and conditions designed by or on behalf of contracting authorities and formally published, and by corresponding submissions formally made by tenderers. Undoubtedly, such process excludes anything which is not formally stated and published.
2. The PCAB also notes that, contrary to the initial impression given but in line with Ms Sammut's admission, there is enough evidence highlighting the fact that the appellant Company provided more than sufficient information about the product being offered to corroborate its submission.
3. The PCAB opines that apart from Clause 3.6 (b), certain technical requirements were in fact requested in Clause 11.2 (page 6) of the tender document and submitted as requested
4. The PCAB argues that the shredding machine offered by Reactilab Ltd appeared to be, seemingly, technically compliant. However, considering that a thorough technical evaluation had not been carried out since the appellant Company's offer had been judged to have failed at the administrative compliance stage, it would be correct to give the said appellants the right for their offer to be reintegrated in the process with a view to enable its offer to be valued technically.

As a consequence of (1) to (4) above this Board finds in favour of the appellant Company and recommends that the cancellation of this tender be revoked.

In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the said appellants should be reimbursed.

Alfred R Triganza  
Chairman

Anthony Pavia  
Member

Carmel J Esposito  
Member

*16 July 2010*