

## PUBLIC CONTRACTS APPEALS BOARD

### Case No. 208

**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

SR Services Ltd filed an objection on the 15 March 2010 following the decision taken by the Contracts Department to disqualify its offer for being considered technically non-compliant with tender specifications which in turn 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:

#### **SR Services Ltd**

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

#### **Reactilab Ltd**

Dr Michael Psaila	Legal Representative
Mr Stephen Debono	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
---------------	--------------------

After the Chairman's brief introduction, the appellant Company was invited to explain the motive/s of the objection.

Engineer Ray Muscat, director of SR Services Ltd, the appellant Company, remarked that besides being by far the cheapest one, his offer was the only administratively compliant one. He added that in its report, the adjudication board had indicated certain shortcomings which prevented it from carrying out a full evaluation of his tender submission.

The Chairman PCAB remarked that the way things turned out, none of the bidders were found administratively compliant except for SR Services Ltd, which, then again, was found to be technically non-compliant with the consequence that the tender was recommended for cancellation.

Eng. Muscat explained that the adjudication board had indicated a number of shortcomings, such as the absence of a fire extinguisher or of a manual, which he was prepared to rebut one by one. Eng. Muscat, however, started by referring to the blanket statement which he had included in four different sections of his tender submission whereby it had been declared that the machine offered would be fully compliant with specifications and, on top of that, attached a statement to that effect from the supplier 'Caravaggi' of Italy stating that model Bio 1250 would be custom built to meet all the tender specifications.

Eng. Muscat informed those present that his firm represented the Italian firm 'Caravaggi' with seventy years experience in this line of business. He explained that palm trees were very particular given that they were made up of both abrasive and fibrous fibre matter.

Ms Sonya Sammut, Chairperson of the adjudication board, under oath, explained that during the technical evaluation of the offer submitted by the appellants, they noticed several instances where there was lack of detail/evidence, such as that listed at point 4 in the evaluation report with regard to the number of knives/blades even though it was noted that the blades were mentioned in the warranty. Ms Sammut remarked that the tender document specified that the shredder should be equipped with hammers for crushing material and with knives for cutting material (minimum of 4 knives). Ms Sammut added that the shortcomings listed in the adjudication report might not amount to technical non-compliance but rather to lack of detail/evidence.

Eng. Muscat explained that albeit the standard machine Bio1250 usually had 44 hammers to break certain types of material, yet, this same model could be converted into a customised palm tree shredder by installing 22 hammers and 22 knives to deal with palm tree shredding. He further explained that some types of palm trees were made of abrasive material which had to be broken down by the use of hammers while other types were of fibrous material which had to be shredded by the use of blades and therefore his firm was offering a shredding machine equipped with both hammers and blades. Eng. Muscat remarked that the brochure submitted with his offer was in respect of the standard shredding machine but he added that an appropriate note was included to the effect that the standard model would be adapted to the needs of the contracting authority. Eng Muscat declared that such features as the voltage of the

machine offered, the stop button and safety aspects were all adequately covered by appropriate EU directives.

The Chairman PCAB appreciated the fact that it was difficult to have a readily available brochure of a custom built piece of equipment.

Ms Sammut stated that the blanket statement of compliance submitted by the appellant Company was given due consideration by the adjudication board so much so that in its evaluation report the board had recommended the acceptance of the offer made by SR Services and even in the letter dated 19<sup>th</sup> February 2010 sent to the General Contracts Committee the adjudication board had decided to recommend the acceptance of the offer by SR Services Ltd on the basis of the declaration that the machine shall be custom-built and fully compliant with specifications. However, one had to acknowledge the fact that, on the basis of the information provided in the tender, the adjudication board could not declare that the offer was fully compliant with the published specifications. She added that the reaction the adjudication board got from the General Contracts Committee was to reject the offer of SR Services Ltd once it was not fully compliant.

The Chairman PCAB commented that it seemed to have become a trend to resort to the cancellation of tenders and that, occasionally, this was resorted to even against the recommendation/judgement of the adjudication board, which included technical member/s. He added that, given the very limited availability on the international market and, more so, on the local market of the type of shredding machine requested in this tender, one had to exercise a measure of flexibility and to make certain allowances.

Dr Marica Gatt, Director (Plant Health), under oath, remarked that the palm tree shredding machine they were hiring did satisfy the tender specifications but the contractor concerned did not participate in this tendering process. She added that the reason why they did not refer specifically to palm tree shredders in Clause 3.6 (b) was precisely to avoid issuing a call for tenders tailor made to suit the, perhaps, unique position in the local market of the contractor who was hiring this equipment to the department. Dr Gatt stated that they requested a palm tree shredder because of the particular characteristics attached to palm tree shredding however that did not mean that this machine would be used exclusively to shred palm trees. Dr Gatt informed the PCAB that the department had obtained EU funding (up to 50%) to a programme designed to combat the destruction of palm trees brought about by the *Red Palm Weevil (Bumunqar Aħmar tal-Palm)* and that the purchase of the palm tree shredder formed part of that programme.

Eng Muscat stated that his supplier had already sold adapted versions of the standard shredder for use as palm tree shredders some of which were being used in Dubai. Eng Muscat declared that he failed to find a brochure specifically drawn up for a palm tree shredder because, apparently, the market for such machines was so limited that there was no such machine as a palm tree shredder but it appeared that a standard model had to be adapted/converted into a palm tree shredder.

Ms Sammut remarked that, with regard to clarifications, the general direction that the adjudication board received from the Contracts Department was to stick strictly to

what was requested in the tender document and to what tenderers actually provided in their original submission. The Chairman PCAB remarked that it was legitimate and useful to seek clarifications on information that had already been provided by the bidder in its original submission because that did not involve the submission of fresh or mandatory information which should have been submitted by the bidder in the first place nor did it amount to negotiation.

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 15.03.2010 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 Ing. Muscat’s (a) remark that besides being by far the cheapest one, his offer was the only administratively compliant one, (b) reference to the blanket statement which he had included in four different sections of his tender submission whereby it had been declared that the machine offered would be fully compliant with specifications and, on top of that, attached a statement to that effect from the supplier ‘Caravaggi’ of Italy stating that model Bio 1250 would be custom built to meet all the tender specifications, (c) explanation that, albeit the standard machine Bio1250 usually had 44 hammers to break certain types of material, yet, this same model could be converted into a customised palm tree shredder by installing 22 hammers and 22 knives to deal with palm tree shredding, (d) claim that whilst the brochure submitted with his offer was in respect of the standard shredding machine, yet he added that an appropriate note was included to the effect that the standard model would be adapted to the needs of the contracting authority and (e) statement that his supplier had already sold adapted versions of the standard shredder for use as palm tree shredders some of which were being used in Dubai;
- having also taken note of the fact that the way things turned out, none of the bidders were found administratively compliant except for SR Services Ltd, which, then again, was found to be technically non-compliant with the consequence that the tender was recommended for cancellation;
- having heard Ms Sammut’s evidence wherein, *inter alia*, she (a) made reference to the fact that during the technical evaluation of the offer submitted by the appellants, they noticed several instances where there was lack of detail/evidence, (b) claimed that the shortcomings listed in the adjudication report might not amount to technical non-compliance but rather to lack of detail/evidence, (c) stated that the blanket statement of compliance submitted by the appellant Company was given due consideration by the adjudication board so much so that in its evaluation report the board had recommended the acceptance of the offer made by SR Services and (d) claim that despite the fact that in their letter dated 19<sup>th</sup> February 2010 sent to the General Contracts Committee the adjudication board had decided to recommend the acceptance

of the offer by SR Services Ltd on the basis of the declaration that the machine shall be custom-built and fully compliant with specifications, yet, the General Contracts Committee replied that the offer of SR Services Ltd had to be rejected once it was not fully compliant;

- having taken into consideration Dr Gatt's intervention wherein, *inter alia*, the latter stated that that they requested a palm tree shredder because of the particular characteristics attached to palm tree shredding however that did not mean that this machine would be used exclusively to shred palm tree;

reached the following conclusions, namely:

1. The PCAB acknowledges that it is difficult for a tenderer to have a readily available brochure of a custom built piece of equipment albeit modified from an already existent model.
2. The PCAB also notes that whilst it may be understandable for the Contracts Department to reject a recommendation made by an adjudication board, yet, in this particular instance, some kind of pragmatic approach was required, especially when it is generally recognised that such equipment is not easily found in the respective market. The fact that the same adjudication board had decided to recommend the acceptance of the offer by SR Services Ltd on the basis of the declaration that the machine shall be custom-built and fully compliant with specifications should have provided enough comfort even though, on the basis of the information provided in the tender, the adjudication board could not declare that the offer was fully compliant with the published specifications. Yet, considering that it is widely accepted that, in similar circumstances, it is difficult for a tenderer to have a readily available brochure of a custom built piece of equipment, this should have given rise to some leeway by the Department of Contracts instead of the latter resorting to such a rapid rejection of the appellant's offer despite the adjudication board's favourable recommendation.

As a consequence of (1) to (2) 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