

PUBLIC CONTRACTS REVIEW BOARD

Case No. 246 and Case No. 247

Case No. 246 - Objection 1

WSM/190/2010 - Period Contract for the Hire of a Hooker Loader to be used at CA Sites managed and operated by WasteServ Malta Ltd

This call for tenders was published in the Maltese Government Gazette on 27th August 2010. The closing date of the said call was 17th September 2010.

The estimated value of this tender was up to €120,000 over two years.

Four (4) different tenderers submitted their offers.

Case No. 247 - Objection 2

WSM 191/2010 - Period Contract for the Hire of a Hooker Loader to be used at the SAWTP (Sant Antnin Waste Treatment Plant)

This call for tenders was published in the Maltese Government Gazette on 27th August 2010. The closing date of the said call was 17th September 2010.

The estimated value of this tender was up to €120,000 over two years.

Six (6) different tenderers submitted their offers.

Following the decision taken by the adjudication committee to award the two tenders to Polidano Bros Ltd, Messrs Bonnici Bros Ltd filed appealed against these decisions on 21 October 2010 (both in Case No. 246 and Case No. 247) respectively.

The Public Contracts Review Board (PCRB) made up of Mr Alfred Triganza (Chairman) with Mr Edwin Muscat and Mr Carmel J Esposito, respectively, acting as members, convened a public hearing on the 10 December 2010 to discuss these objections.

Present for the hearing were:

Bonnici Bros Ltd

Dr John Gauci	Legal Representative
Mr Mario Bonnici	Representative
Perit Reuben Aulina	Representative

Polidano Bros Ltd

Dr Jesmond Manicaro was informed of the date of the hearing but no representative of the recommended tenderer turned up at the hearing.

WasteServ Malta Ltd

Dr Victor Scerri	Legal Representative
------------------	----------------------

Adjudicating Board

Ing. Peter Vella	Chairperson (WSM/190/2010)
Mr Marco Borg	Member (WSM/191/2101)

Contracts Department

Mr Francis Attard	Director General
-------------------	------------------

The parties concerned agreed with the suggestion put forward by the Chairman PCRB to deal with these two appeals concurrently once they involved the same parties and the cases were identical.

After the Chairman's brief introduction the appellant company was invited to explain the motive/s of the objections.

Dr John Gauci, legal representative of Bonnici Bros Ltd, explained that both objections were basically the same and then went on to raise the following issues:

- clause 1.2.11 requested tenderers to submit with their tender offer any relevant technical literature, catalogues and/or illustrations related to the items being offered, which had to corroborate the details filled in the 'Specifications Form'. The said clause specifically stated that these documents "are required to enable a full technical evaluation. All documents provided shall be written in English Language. **Failure to comply with this clause shall render the tender offer null**"
- clause 8.4 (xvii) provided that these hook loaders had to have the year of manufacture from 2005 onwards with Euro IV engines and respective emission standards and that failure "**to comply with the above clause**" would have rendered "**the Tender null**"
- his client, being the local representative for DAF, was aware that the DAF loader offered by Polidano Bros Ltd and, for that matter, loaders offered by the other participating bidders, were not Euro IV compliant
- he called upon the adjudicating boards to state if they had verified whether the loader being offered by Polidano Bros Ltd was technically compliant and whether they had checked this against relative brochures and catalogues
- he contended that his client had submitted the only technically compliant offer

Mr Mario Bonnici, also representing Bonnici Bros Ltd, remarked that, although Polidano Bros offered a loader manufactured in 2005 and was described as Euro IV compliant, the fact was that a Euro IV engine had to have installed the *Adblue Tank* otherwise it would not be Euro IV compliant. Mr Bonnici added that he was aware that the DAF loaders owned by Polidano Bros Ltd were not Euro IV compliant.

Ing. Peter Vella, chairman of the adjudicating board (SWM/190/2010), gave the following explanations with regard to the administrative evaluation:

- the tender requested a date of manufacture from 2005 onwards with Euro IV engine and the recommended tenderer declared in writing that the company was offering a hook loader manufactured in 2005 and with a Euro IV engine and respective emission standards
- Polidano Bros Ltd had submitted the catalogue as requested – *as verified thereafter by the PCRB with the original tender submission* - which, admittedly, could be downloaded anytime and by anyone from the internet

- the recommended tenderer submitted a copy of the logbook issued by Transport Malta, confirming the year of manufacture as 2005, and a copy of the insurance as requested
- therefore, according to the documentation submitted by Polidano Bros Ltd, the hook loader offered was manufactured in 2005 and was Euro IV compliant and, as a result, in accordance with tender specifications
- upon commencement of operations or within six weeks after the tender award the contracting authority reserved the right to inspect the hook loader offered

Mr Vella added that, in the company's letter of reply dated 3rd November 2010, the recommended tenderer attached a copy of the VRT test carried out on vehicle PLB060 - dated 2nd November 2010 - indicating 'test OK' with regard to emission limits even though the emission readings were not related to the Euro IV standards.

Mr Bonnici stated that, as from September 2006, it became compulsory for one to manufacture such loaders Euro IV compliant. Nevertheless, he conceded that manufacturers could have placed on the market this kind of plant Euro IV compliant even in 2005.

The Chairman PCRB referred to the email dated 14 September 2010 from WasteServ Malta Ltd addressed to Mr Reuben Aquilina of Bonnici Bros Ltd wherein it clarified that the Euro IV Emissions Standard was approved and came into effect on 1st October 2005 and that, as a consequence, the tender technical specifications were correct.

Mr Bonnici explained that Transport Malta would register a vehicle as compliant with Euro IV standards from year of manufacture 2006 onwards. He added that the fact that a vehicle passed the VRT test did not mean that the vehicle was Euro IV compliant and further stated that, in spite of the fact that heavy duty vehicles on our roads passed the local VRT, there were only about 100 such vehicles that were Euro IV compliant. Mr Bonnici maintained that he could not picture a situation where a vehicle was manufactured somewhere in Europe after October 2005, namely when the Directive came into force, brought over to Malta and registered with the local transport authority during 2005 and that was why Transport Malta deemed 2006 as the starting date for the registration of Euro IV engines.

Ing Vella stated that, to inspect such heavy duty vehicles, WasteServ Malta Ltd usually would detail a graduate engineer either from within the organisation itself but unconnected with the adjudication process or else engage an independent engineer. He added that the tender provided for inspections to be made and for the log book to be presented even after the award of tender because the contracting authority wished to leave the tender open also to bidders who would import the required vehicle once they were awarded the contract. Mr Vella remarked that if it would, eventually, result that, upon inspection, the vehicle was not found up to specifications then the contracting authority would (i) impose upon the contractor the penalties contemplated in the tenderer, (ii) terminate his contract and (iii) award the tender to the next compliant bidder, if there would be any, or else issue a fresh call for tenders.

Ing. Vella remarked that by time one became aware of what the relatively small local market had to offer in terms of plant and equipment but, then again, a contracting authority had to rely on the documentation submitted and on subsequent inspections and not on personal knowledge. He added that, at that stage, no verifications had been carried out with Transport Malta.

Dr Gauci insisted that, besides the 2005 year of manufacture, the bidder had to corroborate one's claim that the vehicle was Euro IV compliant with documents and illustrations – as his client did – especially since the hook loader offered was already in the possession of the recommended tenderer.

Dr Victor Scerri, legal representative of WasteServ Malta Ltd, the contracting authority, remarked that the contracting authority could not depart from the point that the bidder was not going to offer what one would have committed oneself to provide in one's tender submission but the contracting authority had to go by the documentation presented reserving the right to inspect the equipment. Dr Scerri argued that, once the recommended tenderer was compliant as far as the documentation was concerned, then the contracting authority had to award the said bidder the tender otherwise the contracting authority would be inviting an objection from that same tenderer. Dr Scerri assured the PCRB that, at the opportune time, the contracting authority would carry out the necessary inspections on the equipment being offered.

The Chairman PCRB observed that the point of departure of the contracting authority was October 2005, the date the relative EU Directive came into force and hence a hook loader manufactured in 2005 could still be Euro IV compliant. The Chairman PCRB remarked that once the preferred bidding company was offering a particular hook loader, so much so that it presented its log book, then the inspection had to be carried out on that specific vehicle and not on any other vehicle.

Ing. Vella informed the PCRB that in tender WSM/190/2010 the next cheaper bid was that of Bonnici Bros Ltd whereas in tender WSM/191/2010 the next cheapest bidder was Mr Andrew Abela's – who did not lodge an appeal - with Bonnici Bros Ltd next in line. Dr Gauci declared that what applied to Polidano Bros Ltd applied to Mr Andrew Abela in the sense that both were technically not compliant. The Chairman PCRB remarked that it appeared that should Polidano Bros Ltd bid be found technically non compliant on inspecting the hook loader then both tenders would eventually be awarded to Bonnici Bros Ltd.

The Chairman PCRB remarked that, at this stage and in both cases, the PCRB had to establish whether the two adjudication boards had acted correctly as far as administrative compliance was concerned and that it had to leave it up to the contracting authority to move on to the next step of inspecting the plant offered to see whether they were up to the technical data indicated in the relative tender submissions.

It transpired that Polidano Bros Ltd offered the same hook loader in these two calls for tenders and hence the question arose as to whether this bidder could service both

tenders with one loader considering that in both instances the said bidder had to provide the service within a relatively short time from the order to do so.

Dr Scerri argued that the contracting authority had to evaluate each tender separately and according to the documentation provided in each case and, similarly, Polidano Bros Ltd was entitled to bid for both the contracts because the company had no assurance that it would be awarded both contracts. He added that even if Polidano Bros Ltd were to be awarded both contracts the contractor would have to provide the service as specified in the tender and failure to do so would result in the imposition of penalties and, possibly, the termination of the contract.

Dr Gauci considered it nearly impossible for the recommended tenderer to service both contracts with the same hook loader in the light of the provisions of clause 8.5.1 which stated that:

“The Hook Loader is expected to operate on a 7-day week cycle from 0600hrs to 2300hrs. In exceptional circumstances, the Hook Loader may be required to operate outside these hours. ...”

At this stage the public hearing was brought to a close and the PCRB proceeded with the deliberation before reaching its decisions.

Following thorough deliberation, the PCRB felt that, considering the amount of overlap with regards to facts submitted by all interested parties, verbally and during the said hearing, as well as the relevance to both appeals of submissions and statements made, the PCRB decided to treat all in a holistic manner listing its decision motives separately if and where required for it to do so.

This Board,

- having noted that the appellants, in terms of their ‘motivated letters of objection’ dated 21 October 2010 (in *Case No. 246* and *Case No. 247*) respectively, and also through their verbal submissions presented during the public hearing held on the 10.12.2010, had objected to the decision taken by the Adjudication Committee;
- having noted the appellant company’s representatives’ (a) submission relating to the fact that clause 8.4 (xvii) provided that these hook loaders had to have the year of manufacture from 2005 onwards with Euro IV engines and respective emission standards, (b) submission relating to the fact that they were aware that the DAF loader offered by Polidano Bros Ltd and, for that matter, loaders offered by the other participating bidders, were not Euro IV compliant, (c) claim that their offer was the only technically compliant offer and (d) claim that Transport Malta would register a vehicle as compliant with Euro IV standards from year of manufacture 2006 onwards and that the fact that a vehicle passed the VRT test did not mean that the vehicle was Euro IV compliant;
- having considered the contracting authority’s (a) remark that the tender requested a date of manufacture from 2005 onwards with Euro IV engine and the recommended tenderer declared in writing that the company was offering a hook loader manufactured in 2005 and with a Euro IV engine and respective emission

standards, (b) claim that Polidano Bros Ltd had submitted the catalogue as requested, (c) claim that the recommended tenderer submitted a copy of the logbook issued by Transport Malta, confirming the year of manufacture as 2005, and a copy of the insurance as requested, (d) submission that upon commencement of operations or within six weeks after the tender award the contracting authority reserved the right to inspect the hook loader offered, (e) statement that the tender provided for inspections to be made and for the log book to be presented even after the award of tender because the contracting authority wished to leave the tender open also to bidders who would import the required vehicle once they were awarded the contract, (f) remark that if it would, eventually, result that, upon inspection, the vehicle was not found up to specifications then the contracting authority would (1) impose upon the contractor the penalties contemplated in the tenderer, (2) terminate his contract and (3) award the tender to the next compliant bidder, if there would be any, or else issue a fresh call for tenders, (g) remark that at that stage, no verifications had been carried out with Transport Malta and (h) claim that the contracting authority could not depart from the point that the bidder was not going to offer what one would have committed oneself to provide in one's tender submission but the contracting authority had to go by the documentation presented reserving the right to inspect the equipment;

- having also considered the email dated 14 September 2010 from WasteServ Malta Ltd addressed to Mr Reuben Aquilina of Bonnici Bros Ltd wherein it clarified that the Euro IV Emissions Standard was approved and came into effect on 1st October 2005 and that, as a consequence, the tender technical specifications were correct;

reached the following conclusions, namely:

1. The PCRB acknowledges that, in full consideration of what emerged during the hearing, in both Case Nos. 246 and 247 respectively, it cannot uphold the objections as filed by appellants subject to the proviso that further checks will have to be carried out to ensure that the hook loader offered by Messrs Polidano Bros Ltd is indeed EU IV certified.
2. The PCRB feels that, whilst Polidano Bros Ltd offered the same hook loader in these two calls for tenders, yet the contracting authority had to evaluate each tender separately and according to the documentation provided in each case and, similarly, Polidano Bros Ltd was entitled to bid for both the contracts because the company had no assurance that it would be awarded both contracts.
3. The PCRB recommends that, upon verification, should it be established that the submission made by the recommended tenderer ends up not corroborating with actual findings made by the authority's representative/s, then, as a consequence, apart from the imposition of fines as contemplated in the tender document, the second cheapest compliant tenderer's offer - in both cases under review - will have to be re-evaluated with a view for the said tenderer/s to be awarded the tender.

4. The PCRB establishes that the awarded tenderer cannot be allowed to offer a hook loader other than the one specifically referred to in the offer.
5. Finally, the PCRB recommends that the pertinent contract between the contracting authority and the awarded tenderer/s should not be signed prior to the positive outcome following apposite inspection carried out within the six week period allowed in the tender document.

As a consequence of (1) to (5) above, this Board:

1. cannot uphold the objection (Case No. 246) as lodged by appellants
2. cannot uphold the objection (Case No. 247) as lodged by appellants

In view of the above and in terms of the Public Contracts Regulations, LN 296 of 2010, this Board recommends that the deposit submitted by the said appellants (Case Nos.246 and 247 respectively) should not be reimbursed if, following further verification within the next six weeks, it transpires that the recommended tenderer's statement regarding compliance with EU IV certification was justified. On the other hand, this Board recommends that the deposit submitted by the said appellant company should be reimbursed if the recommended tenderer's statement is found to be non-compliant.

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmel J Esposito
Member

16 December 2010