

## PUBLIC CONTRACTS REVIEW BOARD

### Case No. 255

#### **MRRA/A/51/2009/1 Adv. No. 160/2010**

#### **Tender for the supply, delivery, installation and commissioning of slings and wire ropes for hoist cranes at the Hard Standing Facility in Marsaxlokk**

This call for tenders was published in the Government Gazette on 19<sup>th</sup> October 2010. The closing date for this call for offers with a department estimate of € 40,000 was 5<sup>th</sup> November 2010.

Two (2) tenderers had originally submitted their offers.

*Y & P Marketing (Malta) Ltd* filed an objection on 26<sup>th</sup> November 2010 against the recommendation to award the tender to General Maintenance Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Joseph Croker as members convened a public hearing on Monday, 31st January 2011 to discuss this objection.

Present for the hearing were:

#### **Y & P Marketing (Malta) Ltd**

Dr Ian Stafrace	Legal Representative
Dr Robert Piscopo	Legal Representative
Mr Stephen Gauci	Representative
Mr Raymond Gauci	Representative

#### **General Maintenance Ltd**

Mr Mark Camilleri	Representative
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#### **Ministry for Resources and Rural Affairs**

#### **Evaluation Board**

Mr Joseph John Vella	Chairman
Mr Marixei Callus	Member

After the Chairman's brief introduction, the appellant company was invited to explain the motives of its objection.

Dr Ian Stafrace, legal representative of Y & P Marketing (Malta) Ltd, the appellant company, considered this objection as rather straightforward for the following reasons:

- clause 7.3.2 stated that the “*Slings and wire ropes have to be approved by a certificate from Hoist manufacturer and carry a CE mark*”;
- the manufacturer of the hoist cranes is locally represented by his client and the hoist manufacturer, offering WISE as its product's brand name, had not certified the products offered by the recommended tenderer;
- the WISE hoist manufacturer informed his client that, should the firm be asked to certify those products it would only do so through its appointed representatives, namely his client;
- although his client was not aware of the kind of products offered by the recommended tenderer, it was evident that his supplier's products could not have met the condition set out in clause 7.3.2 because the hoist cranes at the Marsaxlokk Facility were manufactured by Wise Handling Ltd, which did not certify the products of the recommended tenderer;
- the contracting authority was correct to include the condition at clause 7.3.2 so that it would have the comfort of the crane manufacturer that the slings and wire ropes would be up to standard.

Mr Edwin Muscat, a Public Contracts Review Board member, remarked that if the goods had to be certified solely by the crane manufacturer, as was being claimed by the appellant company, then the contracting authority might as well have issued a direct order and not a call for tenders. The Chairman Public Contracts Review Board also noted the difference in the price, i.e. €44,297.20 offered by the appellant company and €29,219.16 offered by the recommended tenderer.

Dr Stafrace declared that the condition at clause 7.3.2 was laid down by the contracting authority and he exhibited two documents from Wise Handling Ltd stating that for the supply of genuine and original spare parts for the Wise cranes one had to go through its appointed representatives. Dr Stafrace added that certification came at a cost and that explained the difference in the products offered.

Mr Joseph John Vella, Chairman of the adjudicating board, made the following remarks:

- the appellant company was misinterpreting clause 7.3.2 because by ‘hoist manufacturer’ they meant the manufacturer of the products to be purchased through this tender and not the manufacturer of the cranes;
- the contracting authority inserted the make and type of the cranes on site so that the tenderer would have a clear idea of the use that would be made of the items being purchased and therefore it would offer appropriate and compatible products;
- the tender document even catered for site visits;

- product compatibility in this sector was regulated by EU Directive 95/16/EC as amended by Regulation 1882/2003 and Directive 2006/42/EC and hence lift and hoist equipment had to conform with these standards;
- the EU had a number of notified bodies that issued certifications and the recommended tenderer had submitted a certificate by TUV SUD which, research over the internet demonstrated that it was licensed to issue certifications with regard to safety on lifting equipment according to the CE mark;
- the contracting authority was after products that met the tender specifications, mainly as to how much load they could lift, and the specifications of the products offered by the recommended tenderer were found to exceed those of the original items in terms of lifting capacity;
- the local certification body was the national accreditation board and subsidiary legislation 424/05 (or 44/05) Work Places Hoist and Lifts Regulations; and
- the items to be purchased did not form part of the crane itself but these were separate items which could be used when operating other lifting equipment.

Mr Marixei Callus, a member of the adjudicating board, pointed out that (i) clause 7.3.2 did not refer to a specific hoist manufacturer but it was left open on purpose to include any hoist manufacturer; (ii) subsequent clause 7.4 mentioned the brand name and type of hoists on site as a guide to tenderers as to the intended use of the items being purchased; and (iii) on delivery, the products would be subjected to further certification relative to that particular batch of items.

Dr Stafrace was in agreement with the contracting authority as far as the CE mark was concerned but he insisted that, apart from the CE mark, the products offered had to be certified by the hoist manufacturer. He also referred to the title of the tender which read 'for hoist cranes' and his interpretation of 'hoist manufacturer' at clause 7.3.2 was the manufacturer of the particular cranes used on site, namely, Wise. Dr Stafrace argued that, as a result of the way the tender was worded, the contracting authority was requesting items that had to be certified by the hoist (crane) manufacturer and that it was not requesting compatible or alternative items. Dr Stafrace stated that the tender document made sense to purchase original items for safety purposes even if it would turn out to be more expensive to purchase original items. Dr Stafrace left it up to the contracting authority as to whether that, effectively, amounted to a direct order or not.

Mr Mark Camilleri, representing General Maintenance Ltd – the recommended tenderer - submitted a certificate from the company's supplier, Pfeifer Rope and Tackle Ltd UK, indicating that the items the company was offering in this tender would also be supplied to Wise Handling in the UK and CE marked. He added that the term 'hoist' in clause 7.3.2 referred to a lifting system and the term hoist manufacturer meant any lifting system manufacturer and not necessarily Wise Handling Ltd.

Mr Vella remarked that the contractor authority's main concerns were the quality and safety of the slings and wire ropes and they saw to it that the tender specifications were drawn up in such a way as to meet the required standards stipulated in EU Directives. He added that the slings and wire ropes

of the recommended tenderer did not bear the 'Wise' mark but they were branded items just the same.

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 26<sup>th</sup> November 2010 and also through their verbal submissions presented during the hearing held on 31<sup>st</sup> January 2011, had objected to the decision taken by the pertinent authorities;
- having noted the appellant company's representatives' reference to the fact that (a) clause 7.3.2 stated that the "*Slings and wire ropes have to be approved by a certificate from Hoist manufacturer and carry a CE mark*", (b) the manufacturer of the hoist cranes is locally represented by the appellant company and the hoist manufacturer, offering WISE as its product's brand name, had not certified the products offered by the recommended tenderer, (c) the WISE hoist manufacturer informed the appellant company that should the firm be asked to certify those products it would only do so through its appointed representatives, namely Y & P Marketing (Malta) Ltd, (d) it was evident that the appellants' supplier's products could not have met the condition set out in clause 7.3.2 because the hoist cranes at the Marsaxlokk Facility were manufactured by Wise Handling Ltd, which did not certify the products of the recommended tenderer, (e) the contracting authority was correct to include the condition at clause 7.3.2 so that it would have the comfort of the crane manufacturer that the slings and wire ropes would be up to standard, (f) the title of the tender referred to 'for hoist cranes' and the manufacturer of the particular cranes used on site is Wise (g) as a result of the way the tender was worded, the contracting authority was requesting items that had to be certified by the hoist (crane) manufacturer and that it was not requesting compatible or alternative items and (h) it was up to the contracting authority to establish whether the request as stated in the tender document, effectively, amounted to a direct order or not;
- having noted the contracting authority's reference to the fact that (a) the product compatibility in this sector was regulated by EU Directive 95/16/EC as amended by Regulation 1882/2003 and Directive 2006/42/EC and hence lift and hoist equipment had to conform with these standards, (b) the EU had a number of notified bodies that issued certifications and the recommended tenderer had submitted a certificate by TUV SUD which, research over the internet demonstrated that it was licensed to issue certifications with regard to safety on lifting equipment according to the CE mark, (c) the contracting authority was after products that met the tender specifications, mainly as to how much load they could lift, and the specifications of the products offered by the recommended tenderer were found to exceed those of the original items in terms of lifting capacity, (d) the local certification body was the national accreditation board and subsidiary legislation 424/05 (or 44/05) Work Places Hoist and Lifts Regulations, (e) the items to be purchased did not form part of the crane itself but these were separate items which could be used when operating other lifting equipment and (f) the contractor authority's main concerns were the quality and safety of the slings and wire ropes and they saw to it that the tender specifications were drawn up in such a way as to meet the required standards stipulated in EU Directives;

- having considered the contracting authority's (a) claim that clause 7.3.2 referred to the fact that by 'hoist manufacturer' it was meant that the 'manufacturer' of the products to be purchased through this tender and not the 'manufacturer' of the cranes and, as a consequence, the same clause did not refer to a specific hoist manufacturer but it was left open on purpose to include any hoist manufacturer and (b) claim that the contracting authority inserted the make and type of the cranes on site so that the tenderer would have a clear idea of the use that would be made of the items being purchased and therefore it would offer an appropriate and compatible product;
- having also reflected on the claims made by the recommended tenderer's representative who, *inter alia*, stated that (a) the certificate from the company's supplier, Pfeifer Rope and Tackle Ltd UK which they submitted in their offer clearly indicates that the items the company was offering in this tender would also be supplied to Wise Handling in the UK and CE marked and (b) the term 'hoist' in clause 7.3.2 referred to a lifting system and the term hoist manufacturer meant any lifting system manufacturer and not necessarily Wise Handling Ltd,

reached the following conclusions, namely:

1. The Public Contracts Review Board acknowledges that as a result of the way the tender was worded, the contracting authority was requesting items that, *prima facie*, implied that they had to be certified by the hoist (crane) manufacturer and that it was not clear that it was requesting compatible or alternative items.
2. The Public Contracts Review Board feels that the overall scope of the tender, as perceived by the contracting authority, was pertinent and, generally, it may have well been correct for one to consider the fact that clause 7.3.2 referred to a 'hoist manufacturer' with the word 'manufacturer' referring to the products to be purchased through this tender and not the 'manufacturer' of the cranes thus resulting in the same clause not referring to a specific hoist manufacturer but, possibly, include any hoist manufacturer.

As a result of the vagueness in the tender specifications - as referred to in (1) and (2) above - the Public Contracts Review Board feels that this tender should be re-issued.

In view of the above this Board finds in favour of the appellant company and also recommends that the deposit paid by the appellants should be reimbursed.

Alfred R Triganza  
Chairman

Edwin Muscat  
Member

Joseph Croker  
Member

16 February 2011