

## PUBLIC CONTRACTS REVIEW BOARD

Case No. 880

WSM 377/2015

### **Tender for the Hire of 2 Landfill Compactors with Operators for the Handling and Compaction of Permitted Waste.**

The Tender was published on the 7<sup>th</sup> September 2015. The closing date was on the 22<sup>nd</sup> September 2015. The estimated value of the Tender is €115,560.00 (Exclusive of Vat).

Two (2) offers had been submitted for this Tender.

On the 10<sup>th</sup> November 2015 Bonnici Bros Services Limited filed an objection against the proposed award of the Tender to Ballut Blocks (Services) Limited.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Thursday the 17<sup>th</sup> December 2015 to discuss the objection.

Present for the hearing were:

#### **Bonnici Bros Services Limited:**

Mr Emanuel Bonnici	Representative
Dr John L Gauci	Legal Representative

#### **Ballut Blocks (Services) Limited:**

Mr Paul Vella	Representative
Mr Charles Tonna	Representative
Dr Massimo Vella	Legal Representative

#### **WasteServ Malta Limited:**

Mr Martin Casha	Chairperson Evaluation Board
Mr Daniel Bowes	Member Evaluation Board
Dr Victor Scerri	Legal Representative

The Chairman made a brief introduction wherein he pointed out that the Letter of Objection did not clearly give the reasons for the objection. He said that in future such objections would not be tolerated any longer, and that the Appellants were expected to list clearly their grievances and to submit any proofs which they may have with the Letter of Objection. The Appellant's representative was then invited to make his submissions.

Dr John L Gauci on behalf of the Appellant said that his client's appeal was based on two grievances:

- i) That the Recommended Bidder's offer may have been technically non-compliant; and this was based on publicly available market information about the Recommended Bidder's offered equipment;
- ii) That the Contracting Authority had deemed the Appellant's Tender to be over the budget when the Tender Document failed to indicate the estimated budget. It is also contended that the Tender should have clearly indicated this estimated value.

Regarding the first grievance he cited clause 1.2.10 of the Tender Document which was clear that bidders had to declare if their bid was compliant or not and then had to produce documents to show that they were in fact compliant. The Contracting Authority's reply confirms this but then continued that *"from the submitted literature and market research carried out during the evaluation process, the Evaluation Committee felt that the landfill compactors offered by the recommended bidder complied with the requirements."*

The words 'felt' and 'market research' confirm the Appellant's doubts that the Recommended Bidder had failed to confirm compliance of his offer. To this end he wished to put questions to the chairman of the Evaluation Board.

Mr Martin Casha, ID No. 43457M, Chairperson of the Evaluation Board under oath testified that he was replacing the former chairperson of the same Board who had since passed away. He was however familiar with the adjudication process. Replying to questions by Dr John L Gauci about page 21 of the Tender specifications he said that clause 7.4 stated that the two compactors shall have:

- i) Emission Standard Tier III or better;
- ii) A minimum operating weight of 35,000 kilograms.

He agreed that these two specifications were mandatory. He said that during the evaluation process importance was given to the bidders' declaration but the Evaluation Board also examined the submitted literature. Since the literature did not specifically state that the equipment was Tier III, but indicated this, the Evaluation Board researched the equipment and found that the parameters of the equipment were within those of tier III and thus compliant.

The literature for the Recommended Bidder's compactor stated that the minimum operating weight was 36,967 Kg and this was over the requested specifications. He said that the literature submitted by the Recommended Bidder referred to BowMag PC 77 1RB had minimum weight of 36250 Kg and to Caterpillar 826 with operating weight 36,967.

At this point Dr Gauci showed witness a document referring to Caterpillar specifications. The witness pointed out that this referred to a different model of Caterpillar 826. The literature referred to model 926 H while the document submitted by Dr Gauci referred to model 826 H. Furthermore the bidder had declared that his offer was according to specifications. When filling the forms the recommended bidder had just indicated model 826. The Tender did not request the submission of log books.

Dr John L Gauci claimed that it is clear that the Recommended Bidder had offered Caterpillar model 826 but had submitted literature for model 826 H.

Mr Martin Casha pointed out that if that was the case and the Recommended Bidder failed to produce the offered product the Contracting Authority had other remedies.

Dr Victor Scerri on behalf of the Contracting Authority said that regarding the first grievance, the reason for the Contracting Authority's selection of the Recommended Bidder was clear from the evidence. Regarding the second grievance he pointed out that this was a Departmental Tender and these are only allowed up to the value of €120,000 and all bidders should have known this fact.

Dr John L Gauci for the Appellant contended that it was clear that the Recommended Bidder did not follow the instructions of clause 1.2.11 in that he did not produce the necessary emission standards, and this was mandatory. He also contended that in fact the Recommended Bidder had indicated that Caterpillar model 826 was being offered but submitted the literature for model 826 H; the reason for this was that the Recommended Bidder does not possess any model H. He reiterated that the Contracting Authority should have declared the available budget in the Tender Document. He added another plea and insisted that if the Board agreed that there was no need to declare the budget then the Tender should be cancelled and re-issued.

Dr Massimo Vella on behalf of the Recommended Bidder contended that the literature submitted by his client and the specifications list agreed and should be viewed holistically. The model being offered was clearly identified. He said that his client had declared that his offer was totally compliant regarding emissions when signing the Tender form. After the filing of the Letter of Objection the Recommended Bidder had had his machines tested and the result showed that in fact these were better than Euro III.

Mr Charles Tonna ID No 398155M, an engineer produced by the Recommended Bidder, under oath said that he had tested the Recommended Bidder's compactors at a VRT station and the results had shown that emissions were better than the requested specifications. He had tested both models and filed copies of the relevant certificates. Replying to a question by the Board he said that the models were a Bowmag and a Caterpillar. The Caterpillar was model 826 C.

Mr Martin Casha for the Contracting Authority insisted that Tenders never declare the budget.

At this point the hearing was closed.

**This Board,**

**Having Noted the Appellant's Objection, in terms of the "*Reasoned Letter of Objection*" dated 10 November 2015 and also through their verbal submissions during the Public Hearing held on 17 December 2015, and had objected to the decision taken by the Pertinent Authority, in that:**

- a) The Appellant contends that the Recommended Bidder's offer may not be Technically Compliant. The Appellant is basing his contentions on the information available from market resources. In particular, the Appellant maintains that the Literature submitted by the Recommended Bidder does not tally with the actual machinery to be utilised in this Tender by the latter;**
  
- b) The Appellant also maintains that the Tender should have indicated the Estimated Value in its call for application.**

**Having considered the Contracting Authority's "*Letter of Reply*" dated 20 November 2015 and also their verbal submissions during the Public Hearing held on 17 December 2015, in that:**

- a) The Contracting Authority confirmed that Clause 7.4 dictated that**

**the two compactors shall possess:**

- i) Emission Standard Tier III or better;**
  
- ii) A Minimum Operating Weight of 35,000 Kg.**

**The Contracting Authority during the Evaluation Process, made an emphasis on the Literature submitted by the Recommended Bidder and in the Evaluation Committee's opinion, the Compactors were Tier III.**

- b) The Contracting Authority maintains that since this was a Departmental Tender, it was common knowledge that this should not exceed € 120,000.**

**Reached the following conclusions:**

- 1. With regards to the Appellant's First Grievance, this Board, after having heard the verbal submissions and examined the Pertinent Tender Document, opines that the Tender Document with specific reference to Clauses 1.2.10 and 1.2.11, wherein great emphasis was made by the Contracting Authority in that, the Literature to be submitted must**

collaborate with the Equipment being offered in all respects, with regards to the Mandatory Conditions relating to Emissions and operating weight.

This Board would also refer to Clause 7.4 and wherein same clause is dictating that the compactors must have an emission standard tier 3/EU Stage III and a minimum operating weight of 35,000 Kg. This Board will treat these two factors separately:

- *Emissions*

From the Submissions made during the Public Hearing, it was credibly established that this factor was not the Subject of Appeal and in this Regard, this Board opines that from the Technical Witness' submission under oath, it was confirmed that the Emission tests carried on the Recommended Bidder's Caterpillar Model, were in fact carried out on a different model, namely, Caterpillar 826c, as was evidenced from the VRT Certificates presented during the Public Hearing. In this Regard, this Board justifiably upholds the Appellant's Contention.

- **Operating Weight**

**With regards to the Operating Weight, from the Engineer's submissions summoned by the Recommended Bidder himself, he confirmed under oath that the tests carried out on their compactors, with particular reference to the Caterpillar was referring to Model 826 C and not Model 826 H, the Literature of which was submitted by the Recommended Bidder.**

**In this regard, this Board opines that, in accordance with the Tender Conditions Bidders were to submit literature which specifically agrees with the actual equipment to be deployed. The evidence given by the Recommended Bidder's Technical witness, clearly confirms that the tests carried out on their Caterpillar compactor did not refer to the same model as declared in their offer.**

**This Board also notes that the Recommended Bidder quoted a Caterpillar Model 826 without giving the Serial Model. This fact also created confusion when identifying the Proper Model.**

**At the same instance, this Board noted that in Accordance with**

**Clause 1.2.10 wherein it was emphasized that *“Failure to submit the specifications and literature form, completed in all respects supported in full by the Technical Documents as requested, shall render the Tender Offer null.”***

**In this regard, this Board credibly opines that, apart from quoting a vague model of 826 in his submissions, the Tests carried out on the Caterpillar Model did not refer to the indicated model of 826**

**H. In this regard, this Board upholds the Appellant’s Contention.**

- 2. This Board credibly points out that the Technical Assessment was not carried out thoroughly by the Evaluation Board. This Board also opines that in this particular case, the Proper Model numbers of the Equipment to be utilised should be stated in the Tender Document to avoid unnecessary confusion and misunderstandings during the Evaluation Process.**

**At the same time, this Board insists that the Technical Documentation as dictated in the Tender should be accompanied by all Literature and proofs which are necessary for a just and transparent Evaluation Process.**

**In view of the above, this Board finds in favour of the Appellant Company and recommends that:**

**i) The deposit paid by the Appellant is to be reimbursed;**

**ii) To avoid any delay in awarding this Tender and eliminate confusion and misunderstandings, this Tender should be cancelled and re-issued in a more professional manner.**

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Lawrence Ancillieri  
Member

*29 December 2015*