



8th May 2024

Public Contracts Review Board
Notre Dame Ditch
Floriana

APPLICATION BY UNITED EQUIPMENT COMPANY (UNEC) LTD (HEREINAFTER 'APPLICANT')
FOR REMEDIES PRIOR TO THE CLOSING DATE OF A CALL FOR COMPETITION

Re: CT2072/2024 - TENDER FOR THE SUPPLY, DELIVERY AND COMMISSIONING OF VARIOUS MOBILE EQUIPMENT FOR WASTESERV MALTA - Lot 3: Five (5) Telehandlers, including a three (3) year Service Agreement (hereinafter 'the Tender')

Whereas Applicant is an interested prospective bidder in relation to the Tender;

Whereas Applicant has identified certain specifications within the Lot 3 of the Tender that restrict competition, specifically concerning the transmission requirements for the telehandlers.

Whereas Applicant has observed from the tender clarification process that the specifications are overly restrictive and tailored to exclude technically capable alternatives that could provide equal or superior functionality.

Whereas such specifications are therefore, unlawful, discriminatory and abusive in terms of both local and EU legislation;

Now therefore, Appellant submits the following:

1. Discriminatory Technical Specifications Which Impede Competition and Therefore Unlawful

- 1.1. For the sake of clarity, this application for reconsideration and review of tender specifications is specifically limited to Lot 3: Five (5) Telehandlers, including a three (3) year Service Agreement, which lot is part of Tender Reference No. CT2072/2024. The Applicant's concerns and requests for adjustments in the technical specifications, as detailed herein, pertain solely to this lot.

ADVOCATE

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- 1.2. Applicant is particularly concerned with the Tender's stipulation that telehandlers must feature a transmission system with at least 4 forward gears and 2 reverse gears. This specific requirement significantly restricts the range of technological solutions that can be considered, potentially excluding more advanced and efficient alternatives that are currently available in the market.
- 1.3. Furthermore, the responses provided by the Contracting Authority during the clarification stage clearly confirm a rigid adherence to these transmission requirements:

Clarification note 1:

Q4: With reference to LOT 3 Telehandlers - Point 4:

e. Forward gears minimum of 4

f. Reverse gears minimum of 2

Would a gearbox without gears option be considered, instead of traditional gearbox?

A4: No, Point 4 (e) & (f) indicates that the equipment shall have gears hence the technical specifications shall be adhered to.

Clarification Note 2:

Question 3:

Forward Gears Minimum Of 4 And Reverse Gears Minimum Of 2 - Rather than the traditional Powershift transmission would you also consider different types of transmissions which are also more efficient?

Answer 3: Lot 3 Point 2 (e) & (f) indicates that the equipment shall have gears hence the technical specifications shall be adhered to. No specifications can be changed. Offers which do not follow the specifications will be considered as not compliant.

Question 4:

Can you specify if you require a machine with two reverse gears to reach certain speeds? And if yes can you specify the desired speed that the machine should

reach in reverse? Once this value is defined and shared from your end, would it be acceptable to offer machine have a transmission with 4 forward gear and 1 reverse gear but still be able to reach the desired speed in reverse?

Answer 4: Lot 3 Point 2 (f) of the technical specifications is stating that "Reverse gears minimum of 2", hence the specification must be adhered to. Please note that due to our operational requirements, we require to have 2 gears while the equipment is in reverse. This is to limit speed at one gear and to open up speed on the other depending on the operational requirement.

Question 5:

In today's market there are different types of transmissions apart from the traditional powershift where some of them have a first gear which is totally hydrostatic and then from second to fourth completely mechanical. The hydrostatic gear (used on both forward and reverse) is capable of enabling the machine to reach speeds up to 20kmh which is sufficient for a reverse speed on this type of telehandler.

Answer 5: Please note that the published specifications reflect operational requirements and hence all specifications in the tender dossier must be adhered to.

- 1.4. These verbatim responses from the Contracting Authority clearly show a procurement approach that potentially limits technological diversity and competitive offerings, contravening the principles of public procurement.
- 1.5. Applicant has conducted extensive market research concerning the specific gearbox requirements stipulated in Lot 3 of the tender. The research findings are significant in that the gearbox type specified — a traditional powershift with at least 4 forward and 2 reverse gears — is so narrowly defined that it has been observed to be manufactured by only a single supplier globally. This specification, therefore, significantly restricts the field of potential suppliers, limiting competition and potentially infringing upon the principles of transparency and open competition as outlined in the public procurement regulations.
- 1.6. Moreover, the Applicant wishes to highlight the capabilities of alternative transmission systems, such as hydrostatic transmissions, which not only meet but can exceed the operational requirements specified in the tender. Hydrostatic transmissions are capable of achieving the maximum speed of 35 km/hr in both forward and reverse directions, with the reverse speed safely limited to 20 km/hr. These systems also feature multiple drive modes with pre-set speed limits, allowing operators to select the appropriate drive mode for different operational needs without exceeding these limits.

1.7. This advanced functionality effectively addresses and nullifies the concerns raised in Clarification Note 2, Answer 4, regarding operational speeds and gear functionality. The hydrostatic system provides flexibility and efficiency that the specified traditional powershift transmission does not, thereby offering potentially greater value and performance.

1.8. Applicant is therefore respectfully requesting that the tender specifications be revised to allow for these technically equivalent or superior transmission systems. This would not only widen the competition but also enhance the operational capabilities and efficiency of the procured telehandlers.

1.9. That indeed, Regulation 53 (6) of the Public Procurement Regulations stipulates expressly the following:

Technical specifications shall afford equal access of economic operators to the procurement procedure and shall not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

1.10. That furthermore, Regulation 53 (8) states that:

Unless justified by the subject-matter of the contract, technical specifications shall not refer to a specific make or source, or a particular process which characterises the products or services provided by a specific economic operator, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products.

1.11. In addressing the issue of discriminatory technical specifications in public procurement, the European Court of Justice's ruling in Case C-448/01, *EVN and Wienstrom GmbH v Republic of Austria* is highly pertinent. This landmark case underlines the principle that technical specifications in public procurement must facilitate, rather than obstruct, the functioning of the internal market.

The Court explicitly stated:

“The requirement in a public tender to specify a product by brand name or by reference to specific processes, without allowing for equivalents—unless such specification is objectively justified by the subject matter of the contract—constitutes a form of discrimination.”

Indeed this judgment highlights the need for technical specifications to be drafted in a way that does not unfairly restrict competition by favoring particular suppliers or products, except where such specifications can be substantiated as essential for meeting the core requirements of the contract.

1.12. That, in a decision delivered by this Board (Case 1130 – CT 2233/2017 – 13th February 2018), it was stipulated that the Contracting Authority, “should do its utmost to allow equivalent products to participate and thus eliminate or suppress any limitation to free competition”.

1.13. The Applicant believes that the insistence on a traditional powershift transmission overlooks the potential benefits of adopting more advanced and efficient transmission technologies such as hydrostatic or continuously variable transmissions (CVTs), which could meet or exceed the operational parameters specified in the tender.

Therefore, in view of the above, and in terms of Regulation 262 of the Public Procurement Regulations, Applicant humbly requests this Honorable Board to:

- 1) decide and declare that the technical specifications as described above are overly restrictive, are in violation of the principle of open competition and therefore unlawful;
- 2) consequently:
 - (a) to set aside or to ensure the setting aside the unlawful clauses of Lot 3 of the Tender document, and
 - (b) to remove the discriminatory technical specification present in Lot 3 of the Tender document.
 - (c) to order the revision of the technical specifications to acknowledge and allow for the use of advanced transmission technologies capable of fulfilling or surpassing the desired operational outcomes.
 - (d) to take any other measures to ensure that the tendering process remains inclusive to a wider array of potential suppliers and technologies, in terms of the applicable law.

Dr. John L. Gauci LL.D



BOV

Bank of Valletta

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22-725

Date: 9/5/2024

Bank of Valletta p.l.c., Malta

Pay The Secretary of the Public Contracts Review or order

Three thousand six hundred eighty

seven euro + 50 cents only

€ 3,687.50

UNITED EQUIPMENT CO. (UNEC) LTD
CC1

Please do not write or mark below this line.

⑈003464⑈ 22⑈725⑈ 40015632339⑈

Public Contracts Review Board

Temporary Receipt

Date: 9/5/2024

Received from United Equipment Co. (Inc) the sum of £3,687.50
in respect of Tender CT 2072/2024.

Cheque No: 40015632339

Validity of receipt is subject to bank clearance, when payment is made by cheque