

PUBLIC CONTRACTS REVIEW BOARD

Case 2020 – CT2072/2024 – Tender for the Supply, Delivery and Commissioning of Various Mobile Equipment for Wasteserv Malta – Lot 3

3rd February 2025

The Board,

Having noted the call for remedies filed by Dr John L. Gauci acting for and on behalf of United Equipment (UNEC) Limited, (hereinafter referred to as the appellant) filed on the 9th May 2024;

Having also noted the letter of reply filed by Dr John Axiak acting for Wasteserv Malta (hereinafter referred to as the Contracting Authority) filed on the 14th May 2024;

Having heard and evaluated the testimony of the witness Mr Daniel Tabone (Representative of Wasteserv Malta) as summoned by Dr John L. Gauci acting for United Equipment (UNEC) Limited;

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by representatives of the parties;

Having noted and evaluated the minutes of the Board sitting of the 18th June 2024 hereunder-reproduced.

Minutes

Case 2020 – CT 2072/2024 –Tender for the Supply, Delivery and Commissioning of various Mobile Equipment for Wasteserv Malta - Lot 3

Remedy prior to the closing date of a Call for Competition

The tender was issued on the 16th April 2024 and the closing date was the 21st May 2024.

The estimated value of Lot 3 in this tender, excluding VAT, was € 737,500.

On the 9th May 2024 United Equipment Company (UNEC) Ltd filed an appeal under Regulation 262 of the Public Procurement Regulations.

A deposit of € 3,687.50 was paid on this lot.

On the 18th June 2024 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Mr Richard Matrenza as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – United Equipment Co (UNEC) Ltd

Dr John L Gauci	Legal Representative
Mr Robert Azzopardi	Representative

Contracting Authority – Wasteserv Malta Ltd

Dr John Axiaq	Legal Representative
Mr Daniel Tabone	Representative
Mr Dylan Debono	Representative
Ms Branica Xuereb	Representative

Interested Party

Eng Paul Simon Zammit	Representative
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Department of Contracts

Dr Mark Anthony Debono	Legal Representative
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Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr John Gauci Legal Representative for UNEC said that appellant was seeking a Regulation 262 remedy as it feels that the tender specifications regarding gears in the equipment requested limits choice and that the specifications are tailor-made to suit one supplier. These restrictive specifications should be removed or widened.

Dr John Axiaq Legal representative for the Contracting Authority said it is not correct to state that the tender is tailor-made as there are several manufacturers offering this product.

Mr Daniel Tabone (203197M) called to testify by the appellant stated on oath that he is a Chief Officer at Wasteserv and that the tender reflects the needs of the Contracting Authority. The drafting of the tender was in the hands of technical people and they had specified that the equipment had to have four forward and two reverse gears. Four manufacturers had been researched which did offer the requested equipment – these were JLG Model 1055; JCB Model Agri; Manitou Model MLT 841-145 and Caterpillar Model TL 943. Brochures for each of these models were tabled as exhibits WS1 to WS 4.

After a short recess to enable brochures to be perused Dr Gauci proceeded with his examination of the witness.

Dr Gauci first pointed out certain inconsistencies:

Re JLG 1055 the outside turning radius was 4.27m when the tender requested 4m

Re JLG 1055 the maximum speed reached was 32.9km when the tender requested 35km

Re JCB Agri the engine power indicated was 109 hp when tender requested 35km

Witness agreed that on this point the offer was not compliant.

Re JCB Agri the turning circle was indicated as 4.4m when the tender requested 4m maximum

Re Caterpillar the gross power basic was 111 hp when tender requested 130 minimum

Re Caterpillar top travel speed was 29 km/hr when tender requested 35km/hr

Re Manitou this was fully compliant with the tender.

Continuing with his examination of the witness Dr Gauci pointed out to him that only one of the proffered models fully met the tender requirements. Witness said that the scope of wanting a manual gearbox was that in the past hydrostatic gear boxes proved unreliable. Multiple gears enable vehicles to recover from difficult situations. The Authority keeps a maintenance log book [exhibited] which indicated that gear box models are more reliable. These machines are required for rough work and failures among other things stop rubbish collection.

This concluded the testimony.

Dr Gauci said that only one model of the four indicated meets the tender requirements. The Board is being requested to direct that the terms of the tender are widened and that if there are different specifications bidder will not be disqualified.

Dr Axiak said that the Authority was trying to widen the specs but trying to avoid using hydrostatic transmission. The Board should direct the widening of the terms provided mechanical transmission was maintained.

There being no further submissions the Chairman thanked the parties and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 18th June 2024.

Having noted the call for remedies filed by United Equipment (UNEC) Limited (hereinafter referred to as the Appellant) on 9th May 2024, refers to the claims made by the same Appellant with regard to the tender of reference CT2072/2024 – Lot 3 listed as case No. 2020 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr John L. Gauci

Appearing for the Contracting Authority: Dr John Axiak

Whereby, the Appellant contends that:

- a) 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.
- b) Furthermore, the responses provided by the Contracting Authority during the clarification stage clearly confirm a rigid adherence to these transmission requirements.
- c) The responses from the Contracting Authority clearly show a procurement approach that potentially limits technological diversity and competitive offerings, contravening the principles of public procurement.
- d) 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.
- e) 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.
- f) 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.
- g) 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.
- h) 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.”*
- i) 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.”

- j) 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.

This Board also noted the Contracting Authority’s Reasoned Letter of Reply filed on 14th May 2024 and its verbal submission during the hearing held on 18th June 2024, in that:

a) ***First Grievance - Only One Supplier -***

The applicant contends that *"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 competitions and potentially infringing upon the principles of transparency and open competition as outlined in the public procurement regulations"*.

That the Contracting Authority believes the applicant company's reasoning is unfound (sic) in fact because the Contracting Authority itself can already identify four companies which produce vehicles that meet the specifications. That therefore the ground for arguing that the specifications are discriminatory because there is allegedly only one supplier is unfounded both in fact and should be completely rejected. That without prejudice to the fact that there is more than one supplier (contradicting that said by the applicant company) the Contracting Authority observes that the specifications are fully compliant with all the conditions laid down in Regulation 53 of the Public Procurement Regulations, including paragraph 53(8) - cited in the applicant company's appeal. That therefore given that there is more than one supplier (which is the basis for the applicant's appeal) and that the specifications are all in line with the law, this alone is sufficient for the honourable board to reject this appeal, without the need to examine the matter any further.

b) ***Second Grievance - Exclusion of Hydraulic Transmission -***

That the applicant is aggrieved by the fact that the Contracting Authority ruled out hydrostatic transmission systems. The applicant company believes that this is a form of discrimination that is unjustified and runs contrary to the public procurement regulations. That the public authority concedes that by excluding hydraulic transmission this specification does limit the range of products. However, this does not mean that this limitation is prohibited by the public procurement regulations or the case law cited.

At the outset the Contracting Authority would like to specify that, amongst others, the reasons why it opted for a gear transmission system as opposed to a hydrostatic transmission system are the following:

1. Speed Control
2. Hydraulic oil
3. Operating Temperatures
4. In-house expertise

That the contracting authority did not capriciously rule out hydraulic transmission, as is being claimed by the applicant, but is aiming at purchasing machinery that would be far more beneficial in the longer term to the particular and unique needs of the Contracting Authority.

That as specified by the applicant company in its own appeal application the discrimination has to be unjustified. It refers to regulation 53(8) which provides 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. Such reference shall be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract pursuant to sub-regulation (3) is not possible. Such reference shall be accompanied by the words 'or equivalent'”*

That therefore the Contracting Authority would like to point out that the discrimination in Regulation 53(8) does not come into effect because:

- The technical specifications do not refer to a specific make or source;
- The technical specifications do not refer to a particular process which characterises the products or services provided by a specific economic operator; and
- The technical specifications do not refer to trade marks, patents, types or a specific origin or production;

And hence contrary to what is being alleged by the applicant appellant Company UNEC, the technical offer is fully compliant with Regulation 53(8).

Moreover, even if it is determined that the specifications do constitute a discrimination with the effect of favouring or eliminating certain undertaking or certain products laid down in Regulation 53(8), the same regulation allows for justification. As per para 11, the Contracting Authority has provided justifications for removing hydraulic transmissions systems from the tender.

Moreover, even by referring to the case law mentioned by the applicant in the appeal one finds that there is no unjustifiable discrimination that is being alleged by the applicant. The case law cited states that there's discrimination where there is:

- Specification of a product or by brand name (which is not the case in this situation);

- Reference to a specific process (however in this case the equivalent process has been ruled out for objectively justifiable reasons);

Hence, the case law cited by the applicant company itself in the appeal demonstrates that applicant's second grievance is unfound at law.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties including the testimony of the witness duly summoned, will now consider Appellant's grievances as follows in their entirety.

- a) This Board refers to the testimony under oath of Mr Daniel Tabone.
- b) During his testimony, Mr Tabone presented 'Product Specification Sheets' of four different telehandlers manufacturers being JLG, JCB, Manitou & Cat.
- c) According to the Contracting Authority, all these four models satisfy all the tender requirements while also possessing the 'gear transmission' system rather than the 'hydrostatic transmission' system as is being proposed by the appellant. Therefore, according to the Contracting Authority, competition was not being artificially narrowed.
- d) It however transpired that three out the four models presented, failed in one or more tender specifications. During Mr Daniel Tabone's testimony it was proven that the following models failed the below mentioned specifications:
 - i. JLG model fails in specification 4f (reference to page 24 of the tender dossier) and specification 2g (reference to page 23 of the tender dossier)
 - ii. JCB model fails in specification 2d (reference to page 23 of the tender dossier)
 - iii. CAT model fails in specification 2d (reference to page 23 of the tender dossier) and specification 2g (reference to page 23 of the tender dossier)
- e) Therefore, appellant's arguments that the tender dossier, as currently drafted, is artificially narrowing competition, is in the opinion of this Board proven.
- f) The Board, however, also makes reference to log sheet presented by the Contracting Authority whereby a considerable amount of downtime was experienced due to the 'hydrostatic transmission' system of currently owned telehandlers.
- g) Thereby, this Board deems it fit to initially uphold Contracting Authority's arguments whereby a 'gear transmission' system would still be required, however to widen and broaden the specifications for Lot 3, found in pages 23 to 26 of the tender dossier, especially those mentioned in paragraph (d) above, to include the possibility of other telehandler models / manufacturers to fit into the requirements of the tender document.
- h) The Contracting Authority is therefor to re-visit the specifications for Lot 3 and issue a clarification note.

The Board,

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) Whilst agreeing with the Contracting Authority about the use of a ‘gear transmission’ system, uphold Appellant’s grievances about the artificial narrowing of competition;
- b) Orders the Contracting Authority to re-visit the specifications for Lot 3 and issue a clarification note as per the findings of this Board;
- c) after taking all due consideration of the circumstances and outcome of this Call for Remedies, directs that the deposit be refunded to the Appellant.

Mr Kenneth Swain
Chairman

Mr Keith Victor Grech
Member

Mr Richard Matrenza
Member