

INDEPENDENT REVIEW PANEL

In the matter of:

Scomat Ltee

(Applicant)

v/s

Cargo Handling Corporation Ltd

(Respondent)

(Cause No. 06/08/IRP)

Decision

A. Background

1. The then Central Tender Board launched on behalf of the Cargo Handling Corporation Ltd, the operator for the container terminal in Port Louis, a tender for four reachstakers in September 2007. The closing date for the submission of bids was fixed for 29 November 2007. Six bids were received by the closing date and were opened in public on the same day. All the bids were then forwarded to the Cargo Handling Corporation Ltd for evaluation purposes, as was the given practice under the former Central Tender Board Act. Originally, consultancy services for reachstakers were not included in the scope of services of an existing contract between Cargo Handling Corporation Ltd and Hamburg Port Consulting GmbH. Hamburg Port Consulting GmbH agreed to include the tender evaluation for reachstakers into the scope of their existing contract. The bids were received by the Hamburg Port Consulting GmbH on 12 December 2007. Hamburg Port Consulting GmbH requested and on 11 January 2008 received written authorisation from Cargo Handling

Independent Review Panel – Decision No. 06/08

Corporation Ltd to contact all bidders for clarifications on their respective bids. All bidders except for one (Sany) submitted the requested information by 21 January 2008. Additional clarifications were requested and were received by the due date of 21 February 2008. The proposal of Sany was not evaluated any further.

2. Hamburg Port Consulting GmbH in their report dated 27 February 2008 states that all proposals were evaluated in strict accordance with the tender documents for the supply of four reachstackers contract FY 2007/08/03, issued in September 2007 and the corresponding annexes and schedules:

- Volume A, including Instructions to Bidders
- Volume B, Technical Specifications

3. The main design criteria of the reachstackers as defined by Hamburg Port Consulting GmbH and as given in table 1 of their report are as follows:

2. MAIN DESIGN CRITERIA

The main design criteria of the reachstackers are as follows:

Table 1 Main Technical Requirements

<i>Application</i>	<i>Yard handling of full and empty ISO 20', 30', 40' containers, reefers, customs inspection purposes</i>
<i>Lifting capacities</i>	
<i>1. at 1,900 mm load centre</i>	<i>42 t</i>
<i>2. at 3,950 mm load centre</i>	<i>24t</i>
<i>3. at 6,500 mm load centre</i>	<i>11 t</i>
<i>Lifting height under spreader</i>	<i>15,200 mm</i>
<i>Lifting speed (full/empty)</i>	<i>0.2-0.25 m/s / 0.25-0.4 m/s</i>
<i>Lowering speed (full/empty)</i>	<i>0.25-0.3 m/s / 0.2-0.25 m/s</i>
<i>Driving speed</i>	<i>20-25 km/h</i>
<i>Overall length</i>	<i>11,500 mm</i>
<i>Overall width without spreader</i>	<i>4,500 mm</i>
<i>Turning radius</i>	<i>8,000 mm</i>
<i>Height boom lowered</i>	<i>4,800 mm</i>
<i>Maximum front axle weight with load</i>	<i>100 tons</i>
<i>Diesel Engine, turbo charged</i>	<i>210-260 kW</i>
<i>Emissions</i>	<i>Tier 2</i>
<i>Transmission</i>	<i>Torque converter, power shift</i>
<i>Brakes – drive axle</i>	<i>Wet disc brake</i>
<i>Parking brake</i>	<i>Dry disc brake</i>

Independent Review Panel – Decision No. 06/08

<i>Spreader, telescopic type</i>	<i>20', 30', 40'</i>
Spreader side shifting	+/-800 mm
Spreader slewing	-95°/+185°
Spreader tilting (trim)	+/-5°
Cabin	Fixed, closed, sound insulated, safety glass, FOPS, air-conditioned
Tyres, pneumatic, min.	18.00 x 25-40 PR, E4
Main design criteria	DIN, FEM, EN/ISO, IEC, DIN/VDE

From the list drawn up by the Consultant Hamburg Port Consulting GmbH it is observed that:

- Batteries
- Floodlight mounted at the rear of the cabin
- Horn mounted at the top of the cabin
- Additional lashing hooks at the spreader
- Extended paint warranty
- Duration of Training
- Temperature of air-conditioning system inside the cabin

Are not considered to be major design criteria/main technical requirements.

4. At Section 5 of their report Hamburg Port Consulting GmbH make recommendations. They conclude that since all bidders comply with the technical specifications and have comparable main components, the decision should be made mainly on the basis of price. Thus, only the two lowest bidders (Scomat – Fantuzzi Reggiane and Axess Ltd – Linde Material Handling) were retained for further consideration. The major difference between the two bidders is that the Linde's spreader (Elme) is capable of +/- 5° trim while for Fantuzzi's it is +/- 3°. The report does not make a firm recommendation and leaves the decision to the Cargo Handling Corporation Ltd. The report states *"It is understood that Cargo Handling Corporation Ltd has experience with both suppliers, Fantuzzi and Linde. A decision among Fantuzzi and Linde should therefore also be made according to Cargo Handling Corporation Ltd's experience with long-term maintenance and operation costs, after-sales service, responsiveness as well as spare part prices and availability.*

5. The Managing Director of Cargo Handling Corporation Ltd on 03 April 2008 wrote to the Secretary of the Central Procurement Board and informed him that his Board had at its meeting held on 31 March 2008 examined the recommendations contained in the Evaluation Report of the Hamburg Port Consulting GmbH and

Independent Review Panel – Decision No. 06/08

concurred with same. The Board recommended the award of the Contract FY2007/08/03 to Messrs Scomat Ltd for the amount of 1,485,340 EUR subject to compliance to the following provisions to be incorporated in the letter of intent:

- “(i) Confirmation of lifting, lowering and driving speed by submission of Data*
- (ii) Spreader automatic position for 30 ft position*
- (iii) Batteries to be provided with specified capacity of at latest 130 Ah.*
- (iv) Flood lights mounted at top of cabin*
- (v) Air-conditioning system to be provided inside cabin*
- (vi) Additional lashing hooks to be lifted to the spreader*
- (vii) Automatic lubrication system to be provided*
- (viii) Training period to be as per specification requirement*
- (ix) Delivery not to exceed six months.”*

The approval of the Central Procurement Board was sought for the award and a copy of the evaluation report of Hamburg Port Consulting GmbH was annexed.

6. The Managing Director of Cargo Handling Corporation Ltd wrote to the Chairman of the Central Procurement Board on 28 April 2008 and made reference to:
- Our letter dated 03 April 2008
 - Our meeting on 22 April 2008 and
 - Your correspondence dated 23 April 2008

He informed the Central Procurement Board that his Board at its meeting held on 25 April 2008 has re-examined the Evaluation Report of the Consultants and has taken the following Decisions:

- declare null and void its decision to award the contract to Messrs Scomat as its bid is non-responsive
- retain the offer of Messrs Axess as it is the lowest responsive offer
- approve the award of the contract to Messrs Axess for the amount of EUR 1,537,978 (inclusive of VAT).

The approval of Central Procurement Board was sought to issue the letter of intent to Messrs Axess Ltd.

7. An addendum to the Final Evaluation Report was submitted by Hamburg Port Consulting GmbH on 22 May 2008. The report concludes that, in line with the Tender Document Vol. A, Section 17.1, which does not allow any amendment to the substance of

Independent Review Panel – Decision No. 06/08

tender or to the price after tender opening, Fantuzzi's bid can be declared as non responsive.

8. On 26 May 2008 the Ag. Managing Director of Cargo Handling Corporation Ltd issued a letter of intent to Axess Ltd. In the letter, the General Manager is informed that Cargo Handling Corporation Ltd intends to make an award to his company for the supply of four units reachstakers make Linde – model C 4230 TL/S and associated equipment as the quoted price of EUR 1,537,978 (VAT inclusive) subject to four conditions. The first condition states full compliance with specifications. The letter also refers to the offer made by Axess Ltd under cover of their letter dated 29 November 2007 in response to the invitation to tender launched by Cargo Handling Corporation Ltd on 11 September 2007. In accordance with Section 40(3) of the Procurement Policy Act 2006, a notice in writing was given to Scomat Ltee specifying the name and address of the proposed successful bidder and the price of the contract.
9. On 26 May 2008, the General Manager of Axess Ltd wrote to Cargo Handling Corporation Ltd to acknowledge receipt of the letter of intent and to confirm his acceptance of the conditions mentioned.
10. On 12 June 2008, a letter of award was issued to Axess Ltd. Pending the signature of a formal agreement, Axess Ltd were informed that the letter of award constituted a binding contract between the Cargo Handling Corporation Ltd and themselves.
11. On 29 May 2008, Scomat Ltee dissatisfied with the decision of the Cargo Handling Corporation Ltd challenged the procurement proceedings on the prescribed form. In reply to the application for challenge the Managing Director of Cargo Handling Corporation Ltd on 03 June 2008 informed Scomat Ltee as to why its bid had not been retained.
12. On 13 June 2008, Scomat Ltee still not satisfied with the reasons given by the Managing Director of the Cargo Handling Corporation Ltd made an application to the Independent Review Panel to review the decision of the Cargo Handling Corporation Ltd.
13. The Independent Review Panel informed the Cargo Handling Corporation Ltd on 13 June 2008 of the application of Scomat Ltee for review and that in accordance with Section 45(4) of the Public Procurement Act 2006 the procurement proceedings shall be suspended until the appeal is heard and determined.

14. In its comments to the application for review filed by Scomat Ltee, Cargo Handling Corporation Ltd informed that “the contract was awarded to Axess on 12 June 2008 and it was only on the 13 June 2008 that Respondent received notice of an application for review before the Independent Review Panel.”

B. Grounds for Review

- *“Applicant’s bid is the lowest bid as confirmed by Cargo Handling Corporation (the public body in question). Letter annexed as Doc A.*
- *Applicant is of opinion that it is also the lowest Responsive Tenderer, even if in any event any arithmetical errors have been corrected in line with Sec. 37(5) of the Public Procurement Act 2006.*
- *Applicant views the reasons given by the public body as stipulated in its letter being referred to as Doc. A as being of utter bad faith, in as much as all the requirements of the tender documents with regard to the technical specifications have been met with.*

The more so, in the tender documents at page 32 under the caption Schedule 5 – Technical Schedule, Applicant provided all the required technical details with regard to features and specification.

In addition further information was provided in the specalog provided at page 2 which is included in the tendered documents.

All the 6 tender specifications which as per the public body Applicant has not compiled with are not relevant arguments as the specalog and the technical schedule duly filled speak for themselves.

- *The Public Body in its letter referred to as Doc A, has confirmed that several units of similar equipments ought to be provided by Applicant as per Contract in lite are being used in the Port Area. Therefore Applicant fails to understand how and why despite being the lowest bidder and despite having complied with all technical specifications of the tender, Applicant is not being awarded the contract in lite.”*

C. The Evaluation Process

The first evaluation report by the Hamburg Port Consulting GmbH was submitted on 27 February 2008 and an addendum to the evaluation report on 22 May 2008. The first report carries out a detailed Technical and Financial Evaluation of the bids received. However, no bidder is recommended for an award and the final decision, as to whether Axess (Linde) or Scomat (Fantuzzi) should be the preferred bidder, was left to the Cargo Handling Corporation Ltd. The bid of Scomat Ltee was recommended for an award by the Board of the Cargo Handling Corporation Ltd. Following discussions between the Cargo Handling Corporation Ltd and the Central Procurement Board, the bid of Scomat Ltee was considered to be non-responsive and Axess Ltd was recommended for an award. An award was subsequently made to Axess Ltd by the Cargo Handling Corporation Ltd and Axess Ltd accepted it on the terms and conditions specified.

D. Submissions and Findings

1. Hamburg Port Consulting GmbH in their report dated 27 February 2008 stated that all proposals were evaluated in strict accordance with the tender documents, volumes A and B dated September 2007.
2. Based on all documentary evidence submitted by both the Cargo Handling Corporation Ltd and Scomat Ltee and evidence submitted during the hearing three clauses of Volume A of the Tender Documents are relevant for the review process.

“17 Clarification of Bids

17.1 To assist in the examination, evaluation and comparison of bids the Purchaser may, at its discretion, ask the Bidder for a clarification of its bid. The request for clarification and the response shall be in writing and no change in the price or substance of the bid shall be sought, offered or permitted.”

“18. Preliminary Examination

18.3 Prior to the detailed evaluation, pursuant to Clause 19 the Purchaser will determine the substantial responsiveness of each bid to the Bidding Documents. For purposes of these Clauses, a substantially responsive Bid is one which conforms to all terms and conditions of the Bidding Documents without material deviations. The Purchaser’s determination of a bid’s responsiveness is to be based

on the contents of the tender itself without recourse to extrinsic evidence.

18.4 *A bid determined as not substantially responsive will be rejected by the Purchaser and may not subsequently be made responsive by the Bidder by correction of the non-conformity.*

18.5 *The Purchaser may waive any minor informality or non-conformity or irregularity in a bid which does not constitute a material deviation, provided such waiver does not prejudice or affect the relative ranking of any Bidder.*

19. Evaluation and Comparison of Bids

19.1 *The Purchaser will evaluate and compare the bids previously determined to be substantially responsive, pursuant to Clause 18.”*

3. In the main technical requirements defined by Hamburg Port Consulting GmbH in its report dated 27 February 2008 four of the six deviations mentioned by Cargo Handling Corporation Ltd in its letter dated 03 June 2008 are not listed. The two requirements listed are automatic stop at 30 feet and air conditioning at a temperature of 20°C inside cabin.
4. From the documents supplied by Scomat Ltee, it was observed that the spreader can be provided with an automatic stop at 30 feet and had air conditioning in the cabin.
5. The other four items must have been considered to be minor informality or non-conformity or irregularity in the bid which did not constitute a material deviation. The Panel considers that provision of flood light at rear of cabin, a battery capacity of 130 Ah instead of 102 Ah, lashing hooks for sling operations and paint guarantee for five years are indeed minor deviations that can be easily corrected without contravening Clause 18.4.
6. However, the Panel cannot understand how both the Hamburg Port Consulting GmbH and the Cargo Handling Corporation Ltd offered an opportunity to Scomat Ltee to change the value of its bid from EUR 1,389,200 to EUR 1,485,340. This clearly contravenes Clause 17.1 of Volume A of the Tender Documents. Thus, the statement by Hamburg Port Consulting GmbH that the proposals were evaluated strictly in accordance with the Tender Documents is not correct. The role of Central Procurement Board in assuming its responsibility and in pointing out this deviation from established bids evaluation procedures must be highlighted. If

Scomat Ltee had replied that the minor deviations could be made good at no extra costs, then its bid could have been considered to be fully responsive. Scomat Ltee would have been eligible for an award as the lowest substantially responsive bidder.

7. A more serious issue was subsequently raised by the Central Procurement Board. Two of the main technical requirements listed by the Hamburg Port Consulting GmbH (Table 1, pg 2 of Report) are:

- | | | |
|------|-------------------------------|-----------|
| (i) | Lifting height under spreader | 15,200 mm |
| (ii) | Spreader tilting (trim) | +/- 5° |

On page 4 of its evaluation report Hamburg Port Consulting GmbH writes under 4.1 “Fantuzzi and Ferrari have a slightly lower lifting height (15,100 mm instead of 15,200 mm) but it is absolutely sufficient for handling five 9’6” containers in the first row.” Thus, this deviation is not considered to be a materially significant one.

However, on pg 9 under Section 5, Recommendations it is stated that huide’s spreader is capable of +/- 5° trim while Fantuzzi’s spreader trim movement is limited to +/- 3°. This is a major deviation as a spreader tilting of +/- 5° means superior flexibility and maximum spreader mobility.

8. Scomat Ltee does not dispute the fact that the spreader they propose has a tilting of +/- 3°. This was confirmed by them during the hearing and in a subsequent correspondence to the Independent Review Panel. The claim by Scomat Ltee that the tender specifications do not require the spreader to be equipped with a powered pile slope and hydraulic control is not a valid one. The specifications call for a spreader tilting of +/- 5°. It is up to the bidder to provide the appropriate system to meet this requirement and to build it into their price.
9. The bid of Axess Ltd was next examined to check its responsiveness with respect to the spreader tilting. It was stated that main suppliers of spreaders for reachstakers normally base themselves on a standard value of +/-3%. The evaluation report of the Hamburg Port Consulting GmbH states unequivocally that Linde’s spreader (Elme) is capable of less or equal to +/- 5° trim.

Schedule 5 of Volume B (pg 33), is a Technical Schedule to be filled by the tenderer. Item 9 in the schedule refers to the spreader brand and the bidder is required to attach the data sheet separately. Details of the spreader to be provided, Elme 817, is

Independent Review Panel – Decision No. 06/08

annexed accordingly. The model 817 of spreader is the appropriate one for use with reach stackers according to the supplier.

10. An examination of the model 817 Telescopic Top Spreader technical specifications sheet indicates that there is a standard supply and then options. The range of the hydraulic pile slope for the standard supply is not indicated. However, a hydraulic pile slope of +/- 6° is indicated as an option.
11. There is no mention in the bid of Axess that it will supply the Elme 817 with options. The information cannot also be extracted from the circuit diagrams provided. It would appear that diagrams for the electrical circuit and hydraulic circuit have been interchanged (pg 141 and pg 143). To fully comply with the main technical requirements of spreader tilting of +/- 6° and hydraulic stops at 30' the bidder most imperatively supply the Elme 817 with options.
12. The Independent Review Panel notes that as per letter dated 28 April 2008 from Cargo Handling Corporation Ltd to the Central Procurement Board the bid of Scomat Ltee was considered to be non-responsive on the basis of clause 17.1 of Volume A of the tender documents. However, if the matter is considered under this clause only then the Consultant, the bidder and the Board of Cargo Handling Corporation Ltd are all at fault. The Consultant offered an option to change the price, the bidder took the offer and the Cargo Handling Corporation Ltd approved it. The Central Procurement Board rightly did not concur with the recommendations. The non-conformity of the bid of Scomat Ltee could easily have been corrected but at no extra costs, if this was the only issue.
13. The Independent Review Panel notes that Cargo Handling Corporation Ltd awarded the contract to Axess Ltd on 12 June 2008 and claims that it was only on 13 June 2008 that they had received notice of an application for review before the Independent Review Panel. The Independent Review Panel draws the attention of the competent authority that Cargo Handling Corporation Ltd has by its action contravened Clause 45(4) of the Procurement Policy Act 2006.
14. The Independent Review Panel considers that in view of the important observations made by the Central Procurement with respect to the spreader tilting the letter of intent to Axess Ltd should have clearly highlighted this issue. As an award has already been made by the Cargo Handling Corporation Ltd, they should now ensure that Axess Ltd fully complies with the

Independent Review Panel – Decision No. 06/08

specifications. Thus, Cargo Handling Corporation Ltd must ensure that it complies with Sections 20 and 60 of the Regulations 2008 and in case they do not have the expertise then they may designate an agency to assist them as provided for by the regulations.

Finally, for reasons highlighted above, the Panel finds that the bid of Scomat Ltee is non-responsive as it fails to satisfy a main technical requirement – spreader tilting (trim) +/- 5°. The Panel therefore dismisses the application for review.

(Dr. M. Allybokus)
Chairperson

(H. D. Vellien)
Member

(Mrs E. Hanoomanjee)
Member

Dated this 1st of September 2008