

Case No. 13

E/E/300/4/2001 – New 33 KV Switchgear at Marsa Power Station (Advert GEN 500-17)

Estimated Value of Tender	Lm 1.7m
Date of Request received from Enemalta Corporation	05.06.2001
Closing Date of Tender	20.07.2001
Offers received:	
	No.1 Siemens AG
	No.2 Allstom-Suchenwerk GmbH (not according to cifications)
	No.3 ABB Sace SpA
Date of Award of Tender	09.07.2003
Date of Objection	11.07.2003
Adjudication Board	Ing. A. Farrugia Ing. J. Farrugia

1.0 Introduction

Objection raised by Messrs ABB Sace S.p.a. (represented locally by Messrs Associated Supplies Ltd) against the decision to award the tender in caption to Siemens (represented locally by JRD Systems Ltd).

Present

Public Contracts Appeals Board:

Mr A Triganza	Chairman
Mr A Pavia	Member
Mr E Muscat	Member

ABB Sace/ Associated Supplies Limited (ASL)

Mr Joseph Rizzo	Associated Supplies Limited (ASL)
Mr Alessandro Magnanti	ABB Sace SpA.
Dr Norval Desira LL.D.	Legal Representative

Siemens AG/ JRD Systems Ltd.

Mr Christopher Cassar Torreggiani	JRD Systems Ltd
Mr Bruno Opitsch	Siemens AG
Dr Nicolai Vella Falzon LL.D	Legal Representative

Enemalta Corporation

Dr J J Vella LLD

Witnesses

Mr Joseph V Spiteri	DG Contracts
Prof. Robert Ghirlando	Ex-Chairman, Enemalta Corporation)
Eng. Joseph Farrugia	Enemalta Corporation
Mr Bruno Opitsch	Siemens AG

Dates of Public Hearings

Session 1	17.09.2003
Session 2	08.10.2003

2.0 Appeal

The grounds for ABB Sace SpA's objection are principally the following:

- The offer presented by Siemens AG was not in full and strict compliance with all tender specifications
- The specification contained in the Tender documents relating to the Control and Protection System were too vague and gave rise to conflicting interpretations by the competing tenderers
- The Adjudicating Committee's technical analysis of the respective offers did not include a proper appraisal of ABB Sace's technical offer

3.0 Written Submissions (Salient Parts) : Desira Thake Advocates

According to Desira Thake Advocates, writing on behalf of Messrs ABB Sace S.p.a., as represented locally by Messrs Associated Supplies Limited of Fafner House, National Road, Blata l-Bajda The offer presented by Siemens was not in full and strict compliance with all tender specifications.

ABB Sace's legal representatives claimed that in terms of article 4.06.03.01:

"The DCS (*Distribution Control System*) shall be capable of taking corrective action whenever a Generator Transformer TRIPS AND the system frequency fall below predefined levels."

This same Article proceeds to explain the corrective action that the DCS would be expected to take in the event of such an occurrence - in particular that:

"If the Generator Transformer Trips due to a protective Trip, the DCS shall calculate the loss of Real Power from that Generator Transformer. It shall then determine the number of Feeders that need to be tripped to compensate for a percentage of this loss of Real Power Generation. This amount shall be Operator definable".

According to Dr. Desira, all of the Enemalta representatives who were summoned to give evidence during these proceedings, including both members of the adjudicating panel (namely Eng. A Farrugia and Eng J Farrugia) as well as Enemalta Corporation's ex-Chairman (Profs. R Ghirlando), were unanimous in their expert opinion that the system, as originally offered by Siemens, was incapable of taking such required corrective action. These witnesses further confirmed that manual intervention would have been required by Enemalta personnel so as to render the system operational. Alternatively, (as was eventually accepted by Siemens) additional software would have to be purchased for the same purpose.

While claiming that Siemens' offer was not to specification, ABB Sace's lawyers contended that the German Company had tried to play down in their offer the potential problem of the alleged nonrequirement of the "load-shedding", by claiming that the "load-shedding solution" was included in its original offer, and that it was only the result of Siemens' representatives' inability to clarify the matter in clear English, that lead to the apparent misunderstanding in the adjudicating panel's interpretation of Siemens' offer.

During the proceedings, Siemens' representative admitted that he was fully cognizant with the meaning and functions of a SCADA. As a matter of fact, Siemens' offer, under item 4.06.03, makes a clear distinction between the "SICAM SAS" (that is the Station Controller where the load-shedding solution should have been inserted a priori) and the "SCADA-System". This distinction is also brought out in paragraph

28 of Siemens' fax of the 8th March 2002 where the different functions of the Station Controller and the SCADA-System are clearly explained.

Dr. Desira emphasized the fact that it seems highly unlikely that Siemens should, in their vast experience, have made a mistaken use of (or given an alternative meaning to) the word SCADA.

The contents of Siemens' concluding letter of the 4th June 2003, clearly imply that the load-shedding solution was contained in the tenderer's original offer. Siemens state that:

"We can realize the desired functions by parameterisation in two Substation Controllers to the price of our original tender offer".

Siemens' lawyers remarked that in his testimony, Eng. A Farrugia confirmed that such a parameterisation is required in the absence of the SCADA-system, such that the load shedding solution could be provided directly from within the Station Controllers. The solution, Dr. Desira argued, as finally offered by Siemens, is clearly distinct from its original offer under 4.06.03 in that it offers the solution from within the Station Controllers themselves.

In their written submission, Thake Desira Advocates state that Enemalta representatives attempted to play down the vital importance of this missing specification, by remarking that such a specification was not so indispensable for the system, and, besides, it could be easily resolved through manual intervention by Enemalta Corporation's personnel.

Following the submission of the Engineers' initial report, the adjudicating panel was of the opinion that all offers had missing and unclear technical information of items which are of both major and minor importance to this project. As a consequence, permission was sought from the Contracts Committee to submit a detailed list of questions to each tenderer.

Dr. Desira reflects on this issue by claiming that among the 29 questions listed by the adjudicating panel to Siemens, Question 27 states that Clauses 4.05 and 4.06.03.01 of the Specification require that the Load Shedding Scheme be implemented through the DCS in the *interim* commenting and defining the implementation of such a Load Shedding Scheme as imperative. Following the answers received from Siemens, the adjudicating panel followed up with another report dated 8th April 2002, in which the panel felt the need to seek further clarification, only in relation to the load-shedding requirement.

ABB Sace's legal representative contends that it is hardly likely that the adjudicating panel would have felt the need to prolong such an urgent adjudication process, on a "minor and uncompromising issue"!

ABB Sace claimed that Enemalta's suggestion to resolve the omission of such a requirement, by the manual intervention of the Corporation's personnel, is in any case an unacceptable solution due to the fact that:

- a. Enemalta Corporation would still need to purchase or create the load-shedding system (as is suggested in the adjudicating panel's concluding report of the 15th May 2003);
- b. such an alternative solution would, even if carried out by Enemalta personnel, lead to the technical problems raised in the same concluding report;
- c. such a solution would have been tantamount to granting Siemens a discount on their offer or otherwise varying their price offer (since Siemens would not have been required to provide the system offered by them under items 4.05 and 4.06.03 of their original offer);
- d. such a solution would also be untenable in view of the fact that Enemalta would, ultimately, have been accepting an "INCOMPLETE" system.

Dr. Desira made reference also to the so-called 'redundant system' as required under Section 4.0 of the tender documents entitled *Distributed Control Systems*. During the course of the public hearing this system was described as having an identical standby system that would come into effect in any event that any part of the first system would encounter a malfunction. This, according to Dr. Desira, requires the installation of two Station Controllers, with identical functional and technical requirements.

Indeed, evidence submitted during the hearing tends to shed some serious doubt upon whether the *Protection and Control System* offered by Siemens does in fact contain two Station Controllers. To accentuate this fact, in Siemens' letter dated 17th April 2002, ABB Sace's lawyer places emphasis on the fact that the German Company are offering two alternative solutions, namely

- a first solution that contains only one Station Controller and redundant communication ways (in this latter case meaning that the system would not even be 100% redundant, as it would only be limited to the communication links and connections, but not the Controller itself, its hardware and its software);
- a second alternative solution, using two Station Controllers, with an additional computer, hardware, firmware and programme. This latter solution is defined as containing "considerable additional expenditure".

as a result of which Dr. Desira claims that it is thus more than evidently clear that Siemens' original offer

- contained only one Station Controller,
- was not 100% redundant, and
- still required parameterisation to resolve the missing load-shedding solution

This interpretation is in fact further confirmed in Siemens' subsequent letter of the 4th December 2002 in which Siemens reiterate that they are offering one Station Controller, wherein they can realize the load-shedding function as explained in their first solution, contained in their previous correspondence.

However, on the contrary, Siemens' final and concluding offer dated 4th June 2003 confirms delivery of the solution with two Substation Controllers and the load-shedding function!

In their written submission, Thake Desira Advocates, state that

“This deficiency in Siemens' original offer was unequivocally confirmed by the Director of Contracts, who, in the course of these appellate proceedings, was the first to admit the justification of our clients' claims for the disqualification of Siemens' offer, and confesses that the only legally-permissible solution would have been to issue a fresh call between short-listed tenderers. He added, however, that the Contracts Committee relented to the pressure exercised by Enemalta and "took the plunge". He does reiterate, moreover that "there was nothing normal in this tender".

Dr. Desira questioned whether the actions and decisions taken by the Contracts Committee and Enemalta Corporation were, in fact, legally permissible in view of the fact that

- a. Siemens' offer did not meet all the specifications and functional requirements listed in Enemalta's tender and following pertinent clarifications which (*in Dr. Desira's opinion*) brought about the undoubted result that Siemens' submitted an offer which is NOT replete with all requisite specifications, the adjudicating committee did not have the necessary legal powers to validate such offer;
- b. the adjudicating committee did not even have the power, at this or any later stage, to negotiate the inclusion of any omitted specification to Siemens' original offer, particularly in the light of Siemens' closing sentence to their letter of the 17th April 2002 that, "Both solutions are not contained in our price-offer."
- c. rather than disqualify Siemens' offer, the adjudicating committee and the Contracts' Committee acted beyond their legal powers and proceeded to

negotiate with only one tenderer, namely Siemens, by requesting, in the DG Contracts' letter of the 4th December 2002 whether Siemens was *"prepared to provide the proposed Station Controller solution for load shedding at no additional cost so that the unopened price remains unchanged"*

- d. the final decision proposed by the adjudicating committee in their report of the 15th May 2003, recommended that negotiations be opened with the cheapest tenderer without any price variations.

ABB Sace's legal representative claimed that Enemalta representatives even met round a table to negotiate with Siemens, which finally ended with Siemens' acceptance, in their letter of June 2003, to vary their original offer by providing Enemalta with a system which met the prescribed specifications.

4.0 Written Submissions (Salient Parts) : Fenech & Fenech Advocates

Fenech & Fenech Advocates, writing on behalf of Messrs Siemens AG, as represented locally by Messrs JRD Systems Limited of 'Miral Works', Cannon Road, Hamrun claim that according to ABB Sace's legal representatives none of these circumstances have been established and as a matter of fact the evidence submitted during the Appeal proceedings has unequivocally shown that none of the above is true and that Siemens did offer a load shedding solution in their original tender, so much so that it has been confirmed by no less than four of the five witnesses giving evidence during the Appeal (namely, Mr Joe Farrugia, Mr Albert Farrugia, Professor Ghirlando and Bruno Opitsch) who stated that:

- no changes were required to the original offer of Siemens' in order to achieve the load shedding solution;
- there was no amendment to Siemens' original tender (let alone a "substantial amendment");
- there was no price change or discount

From the evidence produced during the Appeal, Siemens contend that it is clear that the first objection raised by ABB was based on one single piece of correspondence, a letter dated 17th April, 2002 sent by Siemens to the Department of Contracts which must be considered in its proper context, as one letter in a chain of correspondence that ensued the clarificatory exercise commenced by the adjudicating committee in November, 2001.

Siemens' legal representatives argue that the correspondence shows that, as clearly explained by Mr Bruno Opitsch, there was a serious misunderstanding between Enemalta and Siemens with regard to the load shedding solution provided by Siemens in its original offer.

The misunderstanding, Fenech & Fenech Advocates argue, was triggered by the terminology used by Siemens in its original tender offer to describe the human machine interface equipment ("HMI") provided by Siemens. In their tender Siemens refer to this equipment as "HMI or SCADA" . The term SCADA is regularly used in the engineering world to mean a central control system, at a national or local level, used to operate and control power distribution systems connected to it. In their original tender Siemens offered two station controllers (SC's) operated and controlled by two HMI's or local SCADA systems as requested by Enemalta. The load shedding solution offered by Siemens is perfectly achievable through parameterisation or configuration in the same HMI (or SCADA) interfaces.

In their submission, Siemens' legal representatives state:

“Regrettably, when considering Siemens’ tender as well as Siemens’ answer (numbered 28) to Enemalta’s clarificatory question (numbered 27) (vide Docs ‘BO3’ and ‘BO4’ submitted to the Board by Bruno Opitsch), Enemalta misunderstood the original solution to necessitate connection to the national SCADA, which, as indicated in Page 130 of the Specifications, is not yet installed in Malta. Of course, as confirmed by Mr Opitsch, what Siemens were referring to in their original offer was their HMI or local SCADA system.”

Enemalta’s letter dated 15th April, 2002 attempted to clarify this issue but only gave rise to further misunderstanding. When Enemalta asked Siemens whether the load shedding routine “*could be programmed in the Station Controller*”, Siemens interpreted the question to imply that Enemalta did not require the load shedding routine to be programmed through the HMI’s or local SCADA’s as per the original solution offered by Siemens, but rather directly through one or both Station Controllers connected down the line.

This “alternative” is indeed achievable by Siemens’ equipment in two ways, namely the “alternative solutions” proposed by Siemens in their letter dated 17th April, 2002. Of course, both would have required a change to the original tender offer and hence Siemens indicated that there may be an additional price to pay for both “alternatives”.

The misunderstanding continued. Enemalta took the view that the solution was achievable and that therefore subject to Siemens confirming that there would not be an additional cost, no change or amendment to the tender was necessary and thus Siemens were fully compliant. The DG Contracts stated that his view, on the other hand, was that for Siemens to offer this different solution at no cost would be tantamount to a “discount”.

In his testimony the Director of Contracts stated that when, in and around June, 2002 he discussed the load shedding issue with the General Contracts Committee he was of the view that given that Siemens were seemingly non-compliant on this issue and given that ABB were also non-compliant on a number of other issues, both tenderers should have been eliminated and the tender re-issued. Mr Spiteri stated that at the time he did not concur with Enemalta’s view that Siemens’ non-compliance was not material and that in his view the acceptance of one or other of the options, mistakenly put forward by Siemens was tantamount to a discount on price which was not acceptable. Enemalta did not concur with this view (*vide Prof Ghirlando’s letter received by the Director on the 4th June, 2002*).

Mr Spiteri also stated that due to “pressure” brought to bear upon him both from Enemalta (which needed and still needs the 33KV Switchgear urgently) and from the Ministry of Finance, he decided to “take the plunge” and to accept to retain both tenderers in the running. In fact, Mr Spiteri also mentioned that this was a “tit-for-tat” situation wherein both tenderers were given a chance to remedy their non-compliance.

Both arguments were of course tenable, but it was also rightly pointed out by Enemalta at the time that it was unfair to attempt to disqualify Siemens on this score since at that time ABB itself was (seemingly) non-compliant on the same score.

In actual fact, of course, it is evident that in actual fact it was the original solution proposed by Siemens that was finally accepted by Enemalta and therefore there was absolutely no “amendment” or “discount” ever required.

In his evidence, Enemalta Corporation’s ex-Chairman, Professor Ghirlando, stated that Siemens’ proposals never contained any problem that was considered to be of a substantial nature. Enemalta considered that what seemed to be missing was simply the process of “parameterisation” (or configuration) which in fact is a simple manual data inputting process which has an insignificant cost implication. Both Mr Joe Farrugia and Professor Ghirlando confirmed that in their opinion the whole process of parameterisation would not take more than a maximum of two days if Enemalta personnel were to do it, whilst Bruno Opitsch from Siemens stated that the process can be achieved within less than an hour!

ABB Sace claimed that the award to Siemens ought to be rejected on the basis of a mistaken belief that this simple process of parameterisation was not included in the tender. According to Siemens it was amply demonstrated that this is far from the truth.

ABB’s first objection is simply that Siemens’ original offer did not provide a load shedding solution, that this solution was only offered at a later stage and at an additional price and that Enemalta accepted a “substantial amendment” to Siemens’ original offer. Once it has been proved that Siemens did in fact offer a load shedding solution in its original offer, that there was no amendment to Siemens’ offer, that there was no change in price and no discount, then this objection must be rejected

Fenech & Fenech Advocates contend that “*to entertain an objection by ABB relating to a misunderstanding regarding the load shedding solution would be overtly unfair in circumstances which denote that the very same misunderstanding existed in so far as ABB’s own tender was concerned*” ... “ABB were given the opportunity to clarify that misunderstanding during the review proceedings held in November, 2002 even though those proceedings were only intended to discuss the Busbar problem. Siemens never had the same opportunity”.

Siemens’ lawyers state that “*it is today evident and proven that in actual fact Siemens was never non-compliant and therefore these arguments are solely intended to unfairly and inequitably penalise a fully compliant tenderer in favour of a tenderer who is still till this very day non-compliant on a number of issues (vide inter alia Red 62, Red 79, letter of Prof Ghirlando received by Director on 4th June, 2002, Red 94, Red 150 and Red 152) and more expensive than Siemens.*”

Fenech & Fenech Advocates argue that despite the fact that even after the review proceedings of November, 2002, ABB Sace were still non-compliant on a number of

other issues, ABB were allowed to proceed to the third stage of the tendering process. At this stage Enemalta and the DG Contracts were harbouring the impression that Siemens were also not technically compliant, albeit on a minor point, but as far as ABB were concerned there were still a number of unresolved issues. It is for this reason that the Director, upon the recommendation of the adjudicating committee, deemed it fit to inform ABB that their acceptance to the third stage was not to imply acceptance as far as the technical specifications of the tender were concerned. No similar condition was imposed on Siemens.

Fenech & Fenech Advocates stated that ABB Sace maintained that the tender was “vague” in so far as the technical specifications relating to the control and protection equipment are concerned and that the difference between the specifications and prices of the two tenderers “*was the direct consequence of undefined specifications in the tender which left either tenderer guessing about Enemalta’s actual requirements*”.

Moreover, ABB Sace maintained that Enemalta were “*duly expected to request and allow explanations and variations by **all** tenderers and not only by Siemens*”.

In their written submissions, Siemens’ legal representatives stated that **no** evidence was submitted to prove that the tender specifications were “vague” or “ambiguous”. Indeed both Mr Joe Farrugia and Mr Albert Farrugia who were involved in the drafting of the tender testified with regard to their experience and expertise in the fields covered by the tender and stated that this was not the first tender that they drafted and that they both had considerable experience in this regard.

Dr. Vella Falzon went on to confute ABB Sace’s claim that Siemens were ever “confused” or “left guessing about Enemalta’s requirements”. The German firm’s offer was “from the very first instance fully compliant with *inter alia* the Protection & Control Equipment specifications of the tender.

Siemens, through their lawyers claimed that, if ABB were of the view that the Control & Protection Equipment specifications were vague they had the opportunity to inquire as to the proper interpretation of these specifications and could have availed themselves of the clarification procedures provided in the Tender Instructions (vide Clauses 1.1.7 and 1.3 and 1.11 of the Tender Instructions)

The second part of ABB Sace’s second objection is that Enemalta was duly expected but did not request and allow explanations and variations by all tenderers.

According to Fenech & Fenech Advocates, “*it is overtly **not true** that the adjudicating committee did not request clarifications from ABB. Indeed it originally recommended that a list of no less than 22 clarifications be sought from ABB ... and one of these questions was in fact directly related to the fact that ABB had ‘over-specified’ in their tender.*”

Dr. Vella Falzon argued that it “*is also not true that ABB were not given the opportunity to discuss their Control & Protection Equipment. Indeed, when the*

*Director of Contracts testified about the review proceedings held in November, 2002 he stated that another issue relating to the load shedding solution provided by ABB was also clarified at that meeting. Mr Spiteri also admitted that at that meeting some discussion was held with regard to problems the Contracts Committee was encountering with Siemens' tender and it was at that meeting that Red 76 was discussed and disclosed to ABB. Evidently, therefore, the discussions that took place in the review proceedings held in November, 2002 went well beyond discussions on the busbar problem that ABB had and other issues were also discussed. The load shedding solution forms an integral part of the Control & Protection Equipment and it is obvious, therefore, that if ABB's load shedding solution was discussed there, the Control & Protection specifications of ABB's tender **were in fact discussed** during those review proceedings"*

*Siemens' lawyers claimed that "all allegations made by ABB that Enemalta should have requested further clarifications are also unfounded as a matter of law. As testified by both members of the adjudicating committee and by Professor Ghirlando, there is **no obligation** on Enemalta to inquire as to why one tenderer or another is not compliant with the tender specifications or as to why, the clarifications requested from such tenderer have not been adequately addressed and answered. In fact these testimonies corroborate the legal position as stated in Clauses 1.1.9 and 1.2.2 of the Tender Rules."*

*Furthermore, Fenech & Fenech Advocates contended that were "Enemalta to have given ABB further opportunity to address its over-specification in so far as the Control & Protection Equipment is concerned, it would have necessitated a situation where Enemalta would have had to give ABB **another** opportunity to make a **substantial amendment** to their tender offer, not only in so far as the technical specifications are concerned, but **also with regard to price**. This would have necessitated a serious breach of the tender process and therefore it is not surprising that Enemalta or the Director of Contracts for that matter, did not allow it. "*

Dr. Vella Falzon concludes that on the basis of the above, "ABB's second objection can not be accepted and ought to be rejected both as a matter of fact as well as a matter of contract and law."

Siemens' legal representatives claimed that as regards ABB Sace's third and final objection, namely that the adjudicating committee "must have concluded its recommendations solely upon a comparison of the prices offered by the respective tenderers, without any comparative analysis of the respective systems offered by either tenderer", it seems quite incredible that ABB Sace went as far as to raise this particular objection when ABB Sace's tender "was never and still is not actually technically compliant".

According to Dr. Vella Falzon, "this objection was not proved by ABB during the Appeal proceedings since no evidence was produced to sustain this objection. In fact the only relevant testimony with regard to this third objection was the testimony of Professor Ghirlando who on cross-examination confirmed that the evaluation of the tenders was made in accordance with the tender rules ... It was also confirmed that

the evaluation of the technical side of the tender starts as soon as the second envelope is opened and is normally concluded by the time the price envelope is opened and considered”.

5.0 Key Witnesses (Salient matters raised during public hearing sessions)

Prof. R. Ghirlando (ex Chairman, Enemalta Corporation)

During his evidence and cross-examination, Profs Robert Ghirlando confirmed that he was not involved in the writing of the tender specifications and adjudication. He said that it was imperative that the Load Shedding system be implemented through the Distribution Control System and that the one originally offered by Siemens was sufficiently complete for their purposes. According to Enemalta Corporation's ex Chairman, the Load Shedding System was a crucial element of the whole station.

He said that the solution that Siemens offered was 2 (two) station controllers linked to a SCADA System. Such system was unavailable at Enemalta. It was revealed that in the absence of a SCADA System, parameterisation (involving minor software development / data inputting) was required so that the load shedding could be provided within the Station Controllers.

Professor Ghirlando confirmed that this involved the writing of software that could be done in-house because Enemalta Corporation had, amongst its staff members, programmers who were familiar with this type of programming.

Enemalta's ex Chairman stated that Siemens had offered two solutions

- the first alternative, which was not acceptable to Enemalta, contained only one Station Controller and redundant communication ways (which meant that the system would not even offer 100% redundancy. Moreover, such system needed two controllers);
- the second solution necessitated the use of two Station Controllers with an additional computer, hardware, firmware and a programme.

Enemalta opted for the latter solution because no significant change was required and because it did not bring a change in Siemens' original price.

When he was cross-examined by Dr. Vella Falzon, Profs. Ghirlando confirmed that in the original offer submitted by Siemens there were two substation controllers and that they only needed to clarify the element of parameterisation, which consisted of a few lines of software development. He declared that no hardware needed to be added and therefore there was no amendment to Siemens' original tender. It was acknowledged that the load shedding solution was achievable with the equipment offered by Siemens through parameterisation or configuration. He said that it was not tenable to state that the parameterisation would cost about 300,000 and 400,000 Euros.

At this stage Prof. Ghirlando stated that Enemalta had to resort to a formal tender procedure in order not to be seen that it was favouring one entity as compared to others.

He insisted that the tender was not evaluated solely on price. Evaluation was primarily based on the three-envelope system. In actual fact, the technical evaluation was done when the second envelope was opened and the prices were considered when the third envelope was opened.

Mr. J.V. Spiteri (DG Contracts))

In his testimony, the Director General Contracts stated that during the examination of the technical documents of each offer, Enemalta's adjudication board realised that all tenderers had missing and unclear technical information of items which were of both major and minor importance to this project.

Mr Spiteri claimed that the three envelope procedure used to create friction between Enemalta and the Contracts Department because, if they were to follow the law scrupulously, no clarifications could have been sought as offers were either according to specifications or not. However, they agreed on a policy and this took into consideration the fact that, if a tender appeared basically compliant, clarifications could be sought to establish conclusively that it was technically correct. As a result, after the opening of the 2nd envelope it was normal to seek clarifications because it would have been highly impractical to be strict. Had such a course of action not been taken, no contract would have ever been awarded. So, if an adjudication panel felt it necessary to seek clarifications they allowed it to ask questions.

Mr Spiteri said that from meetings held with Enemalta it was quite understandable that the *load shedding system* was evidently very important. As a matter of fact, it is the load shedding procedure which would very likely ensure that a total blackout in Malta and Gozo could be avoided.

As far as the *bolted busbar connections* are concerned, the General Contracts Committee opined that its specifications restricted competition. As a direct result of this, on 6th August 2002, the General Contracts Committee decided to refer the matter to the Ministry of Finance for a decision in terms of the Public Service Procurement Regulation 1966. The Ministry seemed to accept the arguments about the question of the *busbar* not being proprietary and that it did not limit competition.

Mr. Spiteri proceeded by claiming that the General Contracts Committee wanted to re-issue the tender at least to let these two bidders compete again under clear conditions in a short time by way of a 'selective call'.

Mr Spiteri said that he discussed the matter again with Ministry officials and decided to “take the plunge.” As a consequence, the Committee followed the instruction given by the Ministry of Finance to proceed and accepted to open Siemens’ offer relating to the price.

Therefore, as stipulated in the Regulations, a notice had to be published stating that only one financial proposal was going to be opened. Also, ABB Sace were informed accordingly.

Following the publication of this result ABB Sace lodged a complaint against the exclusion of its offer.

On 28 November 2002, during a private hearing, various Enemalta and ABB Sace representatives discussed the technical properties of the joint system proposed by Sace which consisted of a plug-in system. It was established that Enemalta wanted the busbar to be bolted on both ends for safety reasons.

The Contracts Committee and Enemalta officials agreed that:

- the tender condition regarding the busbar connection being bolted at both ends could have been written more specifically;
- *‘Siemens AG to be requested to confirm that they would be prepared to provide the Station Controller solution for load shedding at no additional cost so that their unopened price would remain unchanged’;*
- *‘ABB Sace to be requested to state whether they are prepared to supply the switchgear with the busbar connections bolted at both sides as insisted upon and duly explained by the Enemalta engineers during the review meeting and this at no change whatsoever in their tender price.’*

At the end of that meeting it was decided to open also ABB Sace’s tendered price since it was acknowledged that both tenders had defects. Therefore, provided that the above conditions were met, the tenderer who had the better price would have been adjudicated the tender.

Mr Spiteri claimed that this was a “*tit for tat situation*” wherein both tenderers were given a chance to remedy their non-compliance.

On 6 December 2002 ABB Sace replied and agreed to provide the busbars as requested by Enemalta and to supply them with a design.

On 9 December 2002, Siemens wrote a letter in which they stated:

“We confirm that we can offer the solution No.1 according to our Fax from 17.04.2002. We can realize the load shedding function with the solution Nr. 1 with one Substation Controller to the offered price.”

On 10 December 2002 the Contracts Committee received a letter from JRD Systems wherein they stated that Siemens had confirmed that the required load shedding

solution could be achieved by utilising one Station Controller already included in the main offer. They also complained about General Contracts Committee's decision to give ABB Sace a chance to conform to an essential part of the tender specifications, namely the bolting of the busbars.

On 16 December 2002, the Contracts Committee referred the replies to Enemalta to enquire whether the financial proposals of both tenderers could be opened and published. However, Mr Spiteri said that the Corporation's Chairman reopened the whole issue since apparently he was not convinced that ABB Sace could comply.

So, on 6 January 2003 ASL was informed that since there may still be additional technical clarifications required from its principals, the Contracts Committee was prepared to open their financial proposal provided they agree that this action on the Committee's part will not imply any de facto right for them to be awarded the contract even if their price turns out to be more advantageous than that of their competitors. The contents of this letter were accepted and agreed to by ABB Sace.

Subsequently, on 7th January 2003, the Contracts Committee decided to open the financial proposals of both tenderers.

In reply to ABB Sace lawyer's question about the difference in prices, the DG Contracts stated that Siemens's and ABB Sace's offers amounted to Euro 4.765m and Euro 6.835m respectively. He said that ABB Sace's switchboards were cheaper but the Control and Protection Equipment was more expensive than that of Siemens by more than Euro 2m. This tender was estimated at Lm1.7m.

He added that on 23 January 2003 the Board of Directors decided to award the tender for the Marsa Power Station Switchgear to Siemens because their offer was cheaper and in compliance with the specifications requested.

The decision was communicated to the Contracts Department on 15 May 2003. In his report Eng Albert Farrugia stated that *'The whole issue regarding the total acceptability of Tenderer 1 to specification lies solely with the question of the load shedding system. Such item is a minor, non-compromising issue in the whole system.'*

Mr. Spiteri said that the Contracts Committee discussed the contents of the report and agreed *'to open negotiations with T1 to try to obtain the load shedding system as part of the original offer without increases in the respective price.'* They did not discuss ABB Sace tender because it was more expensive.

Mr Spiteri pointed out that there wasn't sufficient consistency about load shedding because initially Enemalta's Engineers described the load shedding solution to constitute a vital part of the system and the tender and then they considered it as a trivial issue.

On 4 June 2004 Siemens were in a *'position to confirm delivery of the solution with two Substation Controllers and the load shedding function in accordance with clause*

4.06.03.01 (GEN 500 – 17/June 2001).’ They also confirmed that they ‘can realise the desired function by parameterisation in two Substation Controllers to the price of’ their original tender offer.

On 6 June 2004 Prof Ghirlando wrote to the D G (Contracts) and recommended that the tender be awarded to Siemens on the basis of the fact that they were according to specifications and they had the cheapest offer.

Ing. J.Farrugia (Enemalta Corporation)

In his testimony, Ing. Farrugia confirmed that he was involved in the writing of the tender specifications.

He said that Siemens did not carry out a site survey while ABB Sace did. When asked by Dr. Desira about the scope of the site survey, Dr Nicolai Vella Falzon objected to the fact that it was not relevant to the objection raised.

The Public Contracts Appeals Board decided in favour of Siemens’ legal representatives ruling that this objection was only being raised now and it did not form part of the original objections.

Also, Ing. Farrugia testified that, following the Contracts Committee’s decision on ABB Sace’s appeal, they didn’t ask for a redesign because their tender was not disqualified on the issue of the busbar connections only but also on other items which did not comply with the specifications. In reply to Dr. Desira’s question as to whether he had ever told ABB that they had other items that were not according to specifications, he stated that it was not within his competence to do so!

Mr. Farrugia confirmed that it was imperative that the system was implemented through the Distribution Control System as per clause 4.05 and 4.06.03.01 of the specifications. He claimed that although it was possible for Enemalta employees to write the software, they wanted to opt for the issue of a formal tender so that they would not be seen as in some way providing additional assistance to Siemens’ offer.

Ing. Farrugia also confirmed that

- a. the redesigning of the busbar by ABB Sace was considered as a material change;
- b. the Load Shedding function was now achievable;
- c. nothing was changed since Siemens’ original offer as far as equipment/hardware was concerned;
- d. in Siemens’ original offer there were two substation controllers;
- e. Parameterisation, which was required in the tender, was simply the inputting of data in a computer;
- f. they needed different parameterisation / software in the absence of a SCADA system.

Mr. Bruno Opitsch (Siemens AG)

Mr Bruno Opitsch, was the last person to take the witness stand. He was cross-examined by Dr Vella Falzon LL.D.

Siemens' representative stated that he was involved in this tender during clarifications.

He declared that there was a misunderstanding between Enemalta Corporation and Siemens AG with regard to the load shedding solution provided by Siemens in its original offer. He claimed that the term SCADA meant a central control system, at a national or local level, which was used to operate and control power distribution systems connected to it. In its original tender Siemens offered two station controllers operated and controlled by two Human Machine Interfaces (HMI) or local SCADA systems. Enemalta misunderstood the original solution to necessitate connection to the national SCADA. He confirmed that in their original offer, Siemens were referring to HMI or local SCADA system and not to a national SCADA because from the tender documents they knew that Enemalta had no SCADA. He confirmed that the load shedding solution was always achievable with what they offered, through parameterisation or configuration in the same HMI (or SCADA) interfaces.

This misunderstanding continued when on 15 April 2002 the D G (Contracts) asked Siemens whether the load shedding routine '*could be programmed in the Station Controller*', Siemens thought that Enemalta wanted the load shedding solution to be programmed directly through one or both Station Controllers connected down the line rather than through the HMI's or local SCADA as per the original solution offered by Siemens . He said that this was the reason why in their letter dated 17 April 2002 they proposed two "alternative solutions", which both required a change to the original offer.

Also, he declared that on the 4 June 2003 it was stated that Siemens had confirmed the following:

'Today we are in a position to confirm delivery of the solution with two Substation controllers and the load shedding function in accordance with clause 4.06.03.01.'

Nothing was changed and the misunderstanding was eliminated.

6.0 Letter (dated 15.10.2003) received by DG Contracts from ABB Sace's lawyers

In conformity with the ruling given during the public hearing, this Board decided to ignore the contents of the letter dated 15th October, 2003 addressed to the DG Contracts a copy of which was forwarded by the latter to the PCAB. This Board opines that new objections or grievances should not be allowed to be submitted once the reasons for objection would have been formally submitted and a subsequent deposit paid accordingly.

Similarly, during the hearing, this Board had upon a specific request made by ABB Sace's legal representatives, formally ruled in the latter's favour when Siemens' lawyers tried to introduce new objections referring to

- ABB Sace having been allowed to make a substantial amendment to their original tender offer by re-submitting a new busbar design and that this new busbar design is still not type tested

Unofficially, Dr. Vella Falzon had also mentioned that he would have other objections to submit to this Board including

- ABB Sace still being non-compliant on a number of critical issues
- ABB Sace being allowed to proceed to the third stage of the tender process even though without prejudice, and, consequently, to lodge this Appeal
- Siemens not being a party to the review proceedings held in November, 2002 and their first and only opportunity to register their grievance with regard to this issue being in the course of the Appeal proceedings brought by ABB Sace.

The PCAB had abided by their ruling and stressed that this applied to all parties concerned.

7.0 Public Contracts Appeals Board: Findings / Recommendations

The Public Contracts Appeals Board

- having heard the verbal submissions of Dr. N. Desira and Dr. N. Vella Falzon, legal advisers representing Messrs. ABB Sace S.p.a and Siemens AG respectively;
- having hear the evidence submitted by witnesses, namely:

Mr Joseph V Spiteri	DG Contracts
Prof. Robert Ghirlando	Ex-Chairman, Enemalta Corporation)
Eng. Joseph Farrugia	Enemalta Corporation
Mr Bruno Opitsch	Siemens AG

- having perused the final written submissions presented by the two legal representatives

examined the grounds of the appeal in terms of the objections raised by Thake Desira Advocates acting on behalf of ABB Sace S.p.a, namely:

- a. The offer presented by Siemens was not in full and strict compliance with tender specifications.*

The Board cannot but agree with this thesis. However the evidence that was presented revealed in an abundantly clear manner that no one of the two tenderers concerned had made an offer which was perfectly in compliance with the tender specifications.

Indeed the DG Contracts confirmed that meetings had been held on the 28th November 2002 with representatives of ABB Sace S.p.a. to discuss the existing inconsistencies. Following this meeting both tenderers submitted that they would each be taking action to correct the perceived deficiencies such as to render their respective offers fully compliant with the specifications of tender.

It must be said at this stage that this Board, from the evidence heard and which it considers to be completely reliable, feels that the problem with the load shedding solution as offered by Siemens AG did not require alterations which were of sufficient material substance as to disqualify their bid. On the other hand, the changes which were required of ABB Sace S.p.a. were of a higher order of magnitude.

- b. *The specifications contained in the Tender documents, relating to the Control and Protections System, were too vague and gave rise to conflicting interpretations by competing tenderers.*

The board feels that it cannot accept this thesis. Surely the correct time to raise this complaint would have been during the period leading up to the closing date of the tender.

If indeed the tender had missing or vague specifications this constituted a problem which extended to all prospective tenderers and thus did not spoil the concept of a level playing field. Any clarifications requested before the closing of tender regarding the specifications would also have been made available to all prospective tenderers and thus would have maintained the level of fairness required in such matters.

- c. *The Adjudicating Committee's technical analysis of the respective offers did not include a proper appraisal of ABB Sace's technical offer.*

This Board is satisfied that the point when it was decided to open the third envelope and, therefore, when the prices for each bid were revealed, only occurred following meetings and correspondence as a result of which both Enemalta and the Contracts Committee were satisfied that the offers of both ABB Sace and Siemens' would be in compliance with the tender specifications if the adjudication were to go in their favour.

As regards the objection raised verbally during the hearing by ABB Sace's legal representative, namely that Siemens AG had not conducted a site visit prior to presenting their offer, the Public Contracts Appeals Board decided that this objection could not be taken into account as it was not included in ABB Sace's original letter of objection.

On the above considerations the Board cannot find itself in agreement with any of the grounds of objection raised on behalf of ABB Sace and confirms that the adjudication of the Tender in favour of Siemens AG was made in a correct and fair manner and should therefore be allowed to proceed.

Alfred R. Triganza
Chairman

Anthony Pavia
Board Member

Edwin Muscat
Board Member

Date: 01.12.2003