

#### Case No. 4

#### **Contract: E / E / T / 49 / 2002 – Supply of Distribution Transformers**

On 23.07.2002 Enemalta Corporation formally requested the Director of Contracts to issue a call for offers for the supply of distribution transformers. As a result, a formal tender with an estimated contract value of Lm 78,120 was published in the Government Gazette. The closing date for the call for offers was 26.11.2002.

In the Tender Adjudication Report dated 16.01.2003 and compiled by Ing. P. Borg and Mr. J. Danastas respectively, it was stated that twelve (12) tenderers had submitted their offer for the supply of eighteen (18) 800kVA transformers. It was noted that, where applicable, prices had been adjusted in accordance with the metal price variation and exchange rates. Furthermore, it was also pointed out that with the initial capital investment of the transformers the running costs, which mostly depend on the full load and the no load losses, were also included for adjudication purposes. The total adjusted cost of a transformer was obtained by adding the capital investment, the type tests and the cost of losses over a period of ten (10) years using the formula supplied with the tender documents. The most economical transformer would have been the one with the cheapest total adjusted cost.

According to the same report, it transpired that the cheapest offer submitted was the one offered by Messrs. J.P. Baldacchino & Co. Ltd. However, from the literature submitted the transformers offered were considered to be not in accordance with specifications since the HT cable box dimensions were smaller than that specified by the tender.

The next cheapest offer was that submitted by Messrs. Associated Supplies Limited with an adjusted quoted price (including price for type tests on one transformer) of Lm 63,317. Following analysis of literature submitted as well as certain clarifications made during adjudication stage it transpired that transformers being quoted for were according to specifications.

In view of the fact that Enemalta Corporation had been supplied with similar transformers in the past it was decided to recommend the offer submitted by Messrs Associated Supplies Limited.

Upon publication of the award of the tender as recommended by the Adjudication Board, two notices of objection were received from:

- a. Messrs. J.P. Baldacchino & Co. Ltd. dated 07.04.2003 *and*
- b. Messrs. Ragonesi & Company Ltd. dated 09.04.2003

The Public Contracts Appeals Board, consisting of Messrs A. Triganza (Chairman) and A. Pavia and E. Muscat (Board Members), met on 11.06.2003 to publicly analyse the objections made by Messrs Baldacchino and Ragonesi respectively. This was done in the presence of *Enemalta Corporation* representatives (Mr. G. Camilleri, Ing. J. Scicluna and Ing. P. Borg); *Messrs J.P. Baldacchino & Co. Ltd.* (Mr. Ant. Baldacchino and Mr. A. Baldacchino); *Messrs. Ragonesi & Co.* (Mr. R. Ragonesi and Dr. F. Vassallo).

Messrs. Ragonesi contended that the correct tendering procedure was not adhered to during the compilation of the schedule of prices as it is evident from documentation published that the CFR price submitted by Messrs Associated Supplies Limited did not cover all the pertinent expenses related to insurance cover. Consequently, according to Messrs. Ragonesi, the omission by the Adjudication Board to include the average 1% 'ad valorem' charge for insurance purposes, led to an inversion in the cheapest pricing structure as calculated by the same Board. Needless to say, the former argued that this mistake resulted in Enemalta Corporation's schedule showing the next cheapest offer being that submitted by Messrs. Associated Supplies Limited instead of Messrs. Ragonesi & Co.

Messrs J.P. Baldacchino & Co. Ltd. stated that the reason given by the Adjudication Board as for their offer being rejected, namely that the connection box affixed to the actual transformer was smaller in size when compared to the specifications of the tender, was very much a surprising conclusion considering that according to Messrs. Baldacchino it is normal practice for the manufacturer to supply connection boxes according to client's wishes. The Company contended that in the past it had agreed with Enemalta officials regarding a standard size for the connection box and tenders were awarded in its favour and deliveries of connection boxes to the Corporation made thereafter. Messrs. Baldacchino & Co. Ltd. stated that, although in this particular call for offers they had overlooked the specific requirement imposed in the tender document relating to a bigger connection box, they would have thought that the least Enemalta Corporation could have done (considering the satisfactory track record as a result of previous awards to the same foreign principal) was to seek the reason why they were offering a smaller connection box. Messrs. Baldacchino & Co. Ltd. argued that a minor clarification would have saved a lot of time and money to Government *coffers*. They continued by stating that had they been asked to change their offer to the required dimension they would have obliged without any additional cost.

Ing. Scicluna, said in his evidence that as regards Messrs. Ragonesi's objection he felt that the price differential between the offers submitted by Messrs. Associated Supplies Limited and Ragonesi & Co. Ltd. respectively was still substantial even if one were to include a 1% increase in the adjusted price of Messrs. Associated Supplies Limited in order to align both offers in so far as the insurance element is concerned.

With regards to the points raised by Messrs. J. P. Baldacchino, Ing. Scicluna argued that the question of importance of the connection box raised by the tenderer was not as trivial as it was contended to be. Ing. Scicluna said that Enemalta engineers had valid technical reasons to request larger boxes and the new dimensions were not introduced in this particular tender. According to the Enemalta Engineer, the Adjudication Board members were faced with an offer proposing a smaller sized connection box, supported by detailed drawings, than that requested in clear terms in the tender specifications. Clarifications at this stage would have constituted a change in dimensions originally offered rather than a simple clarification, the Enemalta representative argued.

In view of further clarifications considered necessary by the Public Contracts Appeals Board in order to enable it to ensure a fair hearing, it was agreed that the meeting would be adjourned with a view to reconvene the hearing as soon as requested information would have been made available.

The clarifications requested by the Board were in the form of a

- a. revised price schedule in order to allow a precise comparative adjusted pricing structure (including insurance calculation) between the offers submitted by Messrs. Associated Supplies Limited and Messrs. Ragonesi & Co.
- b. confirmation in writing from Messrs. Alstom Endustrisi that Messrs. Ragonesi & Co. are their representatives in Malta.

As a matter of fact such information was made available and another hearing session was called for the 9<sup>th</sup> July 2003.

Enemalta Corporation was on this occasion represented by Mr. T. Mifsud (Financial Controller, Enemalta) instead of Mr. G. Camilleri. However, while Mr. Ant. Baldacchino did not attend this hearing, Mr. J. Mizzi representing Messrs. Associated Supplies Limited, joined those present.

On submitting the said workings, Mr. Mifsud, explained that the rate of 1% in respect of insurance is an approximate rate for working purposes only. As a matter of fact, the normal rate paid by Enemalta Corporation was 0.2%. However, in spite of this, the offer submitted by Messrs. Associated Supplies Limited would have still been cheaper. He added that, although in 10 years' time the difference in the final price of the two offers would be trivial, yet the Corporation gives greater importance to always initial capital outlay.

Dr. F. Vassallo, representing Messrs. Ragonesi, stated that he still failed to understand how Enemalta did not take into account the 1% insurance element in its workings.

At this stage Dr. Vassallo raised the question of the 'demurrage clause' wherein he pointed out that the offer submitted by Messrs. Associated Supplies Limited did not offer the 14 days free of demurrage charges as stipulated in the tender documents.

Mr. T. Mifsud reiterated that, taking into consideration the fact that seven (7) days period was the minimum, the extra costs involved, if any, would be negligible. Nonetheless, Dr. Vassallo insisted that once it was included in the tender documents as a mandatory condition it should have been submitted along with the other documents. Ing. Scicluna remarked that this may be so but one has to argue that none of the tenderers, except for one, had confirmed that the items would be delivered to Enemalta stores either. So, he argued, where would that leave the Adjudication Board in the latter's adjudication process?

In view of the fact that the representatives of Messrs. Ragonesi & Co. stated that they needed more time to analyse Enemalta's calculations in depth, the Board, before closing the sitting requested Messrs. Ragonesi & Co. to submit their views on such calculations by 11.07.2003.

In a letter to the Board dated 11.07.2003, Dr. Vassallo continued to try to demonstrate how Messrs. Ragonesi's offer was still cheaper when compared to the one submitted by Messrs. Associated Supplies Limited arguing that according to the workings re-submitted by Enemalta the tenderers quoting on a CFR basis were at an advantage. Further considerations were made to 'type test' required (considered an optional by Enemalta Corporation) as well as the demurrage mandatory condition overlooked by the Adjudication Board in the case of the offer submitted by Messrs. Associated Supplies Limited.

Enemalta Corporation's reply came in a fax transmitted to the Board on 25.07.2003 in which it was argued that, as stated during one of the hearing sessions and in line with documentary evidence submitted, the insurance element actually paid by Enemalta Corporation is 0.09%. Consequently, although assuming a 1% insurance surcharge would in Enemalta Corporation's opinion still leave Messrs. Ragonesi's offer dearer than that of its competitor, yet this would become irrelevant considering that the Corporation actually pays 0.09% 'ad valorem' surcharge.

Furthermore, Mr. T. Mifsud, writing on behalf of Enemalta Corporation, states that while it may be true that "those who offered a lower facility should have their tender debited with the extra cost" yet "it would surely not be fair to throw out all the work already done on this tender just for something which again does not change the final recommendation of the adjudication".

In a separate fax-transmission dated 28.07.2003, Ing. J. Scicluna (Enemalta Corporation) stated that "tests carried out on transformers are classified as either routine test or type tests. Routine tests are carried out on all transformers and are intended to confirm that the transformers are manufactured without defects. Type tests are only carried out on a sample of the transformers manufactured and requested by the client. The purpose of the type tests is to verify that the design of the transformers is according to the specification. Enemalta does not carry out type tests on all orders, but only on those orders where there is a significant change in the transformer design or when the order is awarded to a new manufacturer. Type tests are therefore always requested as an optional item and are accepted at the discretion of the purchaser."

Having considered all that was submitted and argued the Public Contracts Appeals Board feels that:

- a. the objection raised by Messrs. J. P. Baldacchino & Co. Ltd. cannot be upheld as omission to adhere to specific requirements clearly stated in tender documents, solely on the basis of different specifications requested in the past, is not a good enough reason to expect that things are not subject to change or, worse still, to expect preferential treatment by the Adjudication Board;
- b. Enemalta's explanation was acceptable. Furthermore, in so far as the demurrage clause is concerned, whilst acknowledging that a mandatory condition has to be adhered to, yet the reasons given by Mr. T. Mifsud during the hearing and in his subsequent fax-transmission were justifiable enough. Similarly, the explanations given by Ing. J. Scicluna with regards to the 'type test' requirement were considered relevant.

As a consequence, The Public Contracts Appeals Board considers that the original recommendation in favour of the offer submitted by Messrs. Associated Supplies Limited should be upheld.

**Alfred R. Triganza**  
Chairman

**Anthony Pavia**  
Board Member

**Edwin Muscat**  
Board Member

Date: 18.08.2003