

PUBLIC CONTRACTS APPEALS BOARD

Case No. 21

E/G/T/5/2003 – Supply of 12kg/ 25kg Gas Cylinders (CT 2586/2003)

The call for offers, with an estimated value of Lm 200,000, was published in the Government Gazette on the 14th November, 2003 following a request received by the Director of Contracts from Enemalta Corporation.

Six companies tendered for a total of seven offers with the cheapest offer being the one submitted by Messrs. *Darel Ltd.* for a price of Lm 231,086. The other tenderers were Messrs.

- *Frank Borg & Co. Ltd.,*
- *Shear Gold (UK)*
- *I.M.S.S Co. Ltd.*
- *Zarb Stores Ltd.*
- *J P Baldacchino & Co. Ltd.*

Following receipt of samples the Adjudication Board, consisting of

- a. Ing. Mario Magri
- b. Ing. Michael Falzon
- c. Ing. Michael Mifsud,

disqualified the offers submitted by Messrs. *Darel Ltd* and Shear Gold (UK).

The second cheapest offer was the one submitted by Messrs *J P Baldacchino & Co. Ltd.* However, the Adjudication Board, having considered certain salient points as described in the adjudication report, “*especially the failure of the material to satisfy the requirements of EN 10120 ... decided that this offer is not to spec.*” As a consequence the next cheapest offer was considered, namely the one submitted by Messrs I.M.S.S Co. Ltd.

Considering that this offer was up to the required tender specifications the Adjudication Board recommended that the tender be awarded to this Company for the total sum of EUR 699,560 (*circa* Lm 302,111 delivered). The Contracts Committee agreed with this recommendation and awarded the tender to Messrs I.M.S.S Co. Ltd.

On the 16th August, 2004, soon after the publication of the award, Messrs. J P Baldacchino & Co. Ltd filed an objection with the Director of Contracts.

The Public Contracts Appeals Board met on 24th September, 2004 to discuss the objection raised by Messrs J P Baldacchino & Co. Ltd against the decision to award the said tender to Messrs I.M.S.S Co. Limited local representatives of Messrs. Sahamitr Pressure Cont. Co Ltd.

Mr. A. Triganza chaired proceedings accompanied by Messrs. A. Pavia and E. Muscat who formed the other Board members.

During the hearing

- a. *Evas Turkey and J P Baldacchino & Co. Ltd.* were represented by Mr Anthony Baldacchino, Mr Adrian Baldacchino, Dr Patrick Galea LL.D and Ing. Adnan Atilla (Evas);
- b. *Sahamitr Press Cont Co Ltd and I.M.S.S. Co. Ltd* were represented by Mr Lawrence Said Ward and Ms Emer Said Ward;
- c. *Enemalta Corporation* was represented by Mr Godfrey Camilleri, Ing. Mario Magri, Ing. Michael Falzon and Dr Damian De Giorgio

The appellant, represented by Mr Anthony Baldacchino, commenced proceedings by drawing the attention of all those present as to what led the Company to file an objection with the Contracts Department following the award of the said tender to Messrs. I.M.S.S. Co. Ltd.

He said that the objection is based on the observations included in Adjudication Board's report.

These observations, which could be short-listed as mentioned hereunder, namely:

- a. *Late Delivery*
- b. *Cavagna / Kosangas valves*
- c. *Vacuum of Cylinders*
- d. *Samples*
- e. *Mechanical properties*

were dealt with in greater detail by the appellant

a. ***Late Delivery***

Mr Baldacchino denied that there was any delay on Evas' part in the delivery of the first consignment of cylinders. He claimed that the letter of acceptance was issued on the 21 August 2003 and the first delivery had to be effected by the end of October 2003 - the whole order had to be delivered within 120 days. The first consignment arrived in Malta on 22 October 2003 and the balance was successfully shipped within the term of delivery stipulated in the letter of acceptance. Mr Baldacchino argued that as this contract stipulated a C & F incoterm, this meant that the clearing from Customs was Enemalta Corporation's responsibility. So much so that the Corporation did not impose any penalty for any late delivery meaning that there was no basis or reason for it to do so!

b. ***Cavagna / Kosangas valves***

The appellant said that his Company did not offer Cavagna / Kosangas valves but solely the S.R.G. ones. He emphasised that it was Enemalta Corporation who opted to receive the initial 20% of the order (6,000 units) fitted with Cavagna / Kosangas valves because in doing so it would have been in a position to advance on the expected delivery time frame. He insisted that the matter was attended to by the Corporation directly with Cavagna. EVAS was in no way a participant to this decision. Thus, in the prevailing circumstances and taking into account that it was Cavagna / Kosangas which provided these valves, it was not correct to blame EVAS for any defective valves.

He was of the opinion that it was unfair and unreasonable that the Adjudication Board included such comments in its observations to justify the exclusion of a supplier and burden the taxpayer with an additional amount of Lm66, 382.

c. *Vacuum of Cylinders*

As regards the Adjudication Board's remark that consignments were received without a vacuum, Mr Baldacchino stated that the tender did not stipulate up to what level the cylinders had to be supplied with a vacuum. He claimed that the vacuum was on the same level as that of Germany and the Netherlands, that is, between 1 bar and 1½ bars, which was very low for Enemalta Corporation. He said that when the Corporation drew the Company's attention regarding this problem, prompt action was taken and an understanding was reached between interested parties by which the Company agreed to vacuum the cylinders on site. On 6 September 2004 the Gas Division requested Messrs JP Baldacchino & Co Ltd to continue vacuuming the gas cylinders. He pointed out that in previous tenders, namely, Nos. G/3/95 and G/1/96, the Corporation had imported cylinders without vacuum and so he wondered how come this time around these cylinders were being regarded as defective.

d. *Samples*

Mr Baldacchino said that the 12kg cylinder sample submitted was prepared by hand because the production lines were occupied with a different type of cylinder. However he contended that the fact that EVAS's embossed mark on the handle was not there, in no way affected the characteristics of the cylinder. He said that it did not make sense to make a sample with a mark because it was very difficult during production. They attached their labels to the samples before delivering and a receipt was issued.

e. *Mechanical properties*

The last point raised by Mr Baldacchino was that concerning the Adjudication Board's observation that the mechanical properties (*tensile strength and elongation*) of the cylinders received by the Corporation in the last consignment were found to be below the required standard when pertinent material testing was conducted at the Malta Drydocks (MDD).

The appellant tabled a letter dated 22 September 2004 in which it was remarked that the Specifications of the previous tender stated that '*the material, design, construction, inspection testing and certification of the cylinders shall comply with BS 5045 Part 2 1989*'. The material permissible for propane cylinders under this norm, BS 5045 Part 2 1989, was classified under Table 2 Type B and that from these tables it transpired that the minimum tensile strength was 400NM/ mm² and the corresponding elongation varied from 24% to 29% minimum, depending on the original gauge length.

He claimed that the fact that the MDD's report stated that the results of tests carried out on an 'Evas' cylinder (supplied under the terms and conditions stipulated in tender No T/G/2/2002) showed that the tensile strength of material was equal to 405 N/mm² and Elongation was 29.74%, simply meant that it was still within the stipulated parameters of the norm (i.e. BS 5045 Part 2 1989), hence in conformity with tender specifications. Mr Baldacchino said that consideration should be taken to the fact that electronic machines allowed a tolerance of 1%± and that the environment temperature of the laboratory could affect the tensile strength result. He alleged that MDD's machinery was not precise because it was very old. He said that the certificates issued with every 250 cylinders produced were submitted with each consignment and these demonstrated that the material used was not below the requested standard.

The appellant claimed that his Company reserves the right to carry out its own testing contending that the cylinders had the 'π' mark and also had already passed the tests of an internationally recognised independent inspecting authority which was the TUV.

Messrs J P Baldacchino's legal representative, Dr P Galea, declared that his client's offer was within the specifications' requirements and that for this reason they were contesting the laboratory tests carried out by MDD. He said that the appellant was not informed about the results obtained. He argued that the much more authoritative German TUV had already tested the cylinders in question and the respective design and type were duly approved. Messrs J P Baldacchino cannot but cast doubt on the validity of MDD's report and as a consequence insists to have these cylinders tested again by an independent laboratory. He requested the Board to issue a ruling about the matter.

Evas' representative, Ing. Adnan Atilla, declared that he was a Mechanical Engineer who had been working for his employers for the last fifteen years.

He said that Evas produced LPG Cylinders for many export markets in Europe, Asia and other parts of the world.

Ing. Atilla claimed that the fact that cylinders had the 'π' mark affixed to them and accompanied by the necessary certification, indicated that they had a good quality system at the production line.

During his testimony Evas' representative criticised the results of the testing carried out by MDD. He declared that his Company satisfied the BS standards and not the EN (European) standards. When he was specifically asked by the Board to state whether the 'π' mark could be attributable to a BS standard, the reply given was in the negative, claiming that this mark was attributable to EN standards.

When he was cross examined by Mr Lawrence Said Ward, representing I.M.S.S. Co. Ltd., he declared that the cylinders submitted as samples and those forming part of the actual consignment were of the same quality and that they were made on the same production line. He could not say why the 12Kg sample did not have the 'π' mark.

Enemalta Corporation's representative, Ing. Mario Magri, started his testimony by confirming that, contrary to what was stated in the Adjudication Board's report, the first consignment was not delayed. However, he emphasised that the third consignment was not submitted within the contract time of 120 days, but after 141 days.

He claimed that it was not correct for Mr Baldacchino to state that the Corporation was so much the releasing party and hence should be deemed responsible for the delay in the actual delivery, as the Corporation, whilst still reserving the right to impose a penalty of 1% per week, yet, out of sole benevolence, refrained from applying the penalty clause in this particular instance.

With regard to the vacuum of cylinders, Ing Magri tabled a copy of an e-mail dated 2 January 2004 to prove that cylinders were not supplied with vacuum. In actual fact he said that the cylinders of all three consignments were received without a vacuum.

Ing. Magri confirmed that in view of the fact that 6,000 cylinders were requested immediately, they accepted to receive them fitted with 'Cavagna' valves instead of S.R.G. valves. However, his employers were expecting that such valves were going to be of the same quality as those supplied by S.R.G. All valves proved to be not according to specifications, of an inferior quality and defective. He said that they had two major failures at the Gas Division. As a consequence, it was decided that the Cavagna valves should be replaced at the Corporation's expense as they were not safe. At this stage Ing. Magri tabled a document in order to prove that, contrary to what Mr Baldacchino had stated earlier, the Cavagna valves were chosen by Messrs J P Baldacchino & Co Ltd. and that Evas had direct contact with the Cavagna Group.

The Corporation's representative declared that the 12Kg sample was without a 'π' mark and that, according to the TPE Directive, it was illegal in Malta to import cylinders without such mark. As a result, they took a cylinder from the last consignment and took it to MDD for material testing. He declared that although the sample of 25 kg cylinder had the required 'π' mark it was not sent for such testing.

It was acknowledged that, in view of the missing 'π' mark on 12Kg sample, they could have rejected the offer submitted by Messrs J P Baldacchino & Co Ltd.

During his testimony, Ing Magri tabled the following documents ('a' to 'c') submitted by Evas:

- a. confirming that the material, design, construction, inspection testing and certification of the cylinders should comply with EN 1442, and that cylinder would be in conformity with the Transportable Pressure Equipment Directive;
- b. containing information about the differences between BS 5045 Part 2 1989 and EN 1442 1998;

- c. containing an extract from the tender document in which the supplier, Evas, indicates the type of material used in the production of cylinders.

When Ing. Magri's attention was drawn to the fact that the standards EN 1442 and BS 5045 included in the specifications appeared to be conflicting, he said that the matter had been clarified with all tenderers as they were notified that cylinders had to be in conformity with the PED (Pressure Equipment Directive) and not with BS (British Standards). Mr Baldacchino denied that they had ever received such communication. When Ing. Magri was asked by the Board to go through the relative correspondence in file, it transpired that only those tenderers who had requested such clarifications were notified and Messrs J P Baldacchino had not requested such clarification and as a consequence the Corporation did not notify this Company that the cylinders had to be in conformity with the PED. Yet, Ing Magri claimed that the Corporation had notified in a previous tender Messrs J P Baldacchino that cylinders had to be in conformity with the Transportable Pressure Equipment Directive and in order to substantiate his claim he produced a document.

With regard to the variation in price between the offers submitted by Messrs J P Baldacchino & Co Ltd and I.M.S.S. Co Ltd, Ing Magri stated that as the total value of offers amounted to Lm267,331.51 and Lm302,110.76 respectively, then the difference should be less than the amount of Lm66,382 mentioned by Mr Baldacchino in his testimony.

Ing. Magri confirmed that Enemalta Corporation had engaged a consultant and decided to submit the cylinders for testing at Omeco Laboratories in Italy. He said that he was informed that the cylinders submitted had failed the tests as they were defective and not up to EN standards.

With regard to the tests carried out in Italy, Ing Michael Falzon, another witness, stated that the Corporation was not in a position to publish the reports as the investigations so far carried out were still at a preliminary phase and very much inconclusive at this stage. He said that cylinders were currently being collected from households as a precautionary measure.

Ms Emer Said Ward, representing I.M.S.S Co. Ltd. quoted clause 1.9 of the tender specifications which stated that:

'A sample of 12Kg cylinder and a sample of 25Kg cylinder is to be submitted. It is to be made clear that without these samples, the tender will not be considered. Samples are to be identical to the cylinders on offer complying with all the requested specifications. Samples are not returnable.'

She declared that they had supplied the samples of the 12Kg and 25Kg cylinders according to specifications inclusive of the 'π' mark and Enemalta Corporation's Logo. She contended that whoever did not actually comply with specifications should have been automatically disqualified and not even considered for evaluation. Furthermore, she stated that the benchmark test showed that the product that was likely to be imported would not meet the required tender specifications.

Ms Said Ward contended that the tender should not have been adjudicated on the basis of a sample pertaining to another tender.

Towards the end of this public hearing, the PCAB suspended the sitting for a few minutes to deliberate on Dr Patrick Galea's request regarding the results of the tests. The Board ruled that, irrespective of the arguments that would be deliberated upon and explained in the sentence which would be referred for publication to the Director of Contracts on another date, there was no need for this Board to doubt the results of the tests which were carried out by recognised and independent laboratories. Also, it was felt that if the appellant felt aggrieved by these laboratory results, which were being contested, the said appellant had every right to take separate legal action against the parties concerned in a different forum.

The Board, took note that:

- a. tender documents are compiled in a way that, in the absence of proper clarification, one could possibly misinterpret the actual requirements of the specifications requested;
- b. Enemalta Corporation's representative, namely Ing. Magri, had admitted during the hearing that the inclusion of two different set of standards, i.e. BS 5045 and EN 1442, could have easily created a possibility for any tenderer to erroneously interpret which standard one should abide by;
- c. the samples actually submitted do not conform to specifications. This should have sufficed to disqualify the offer as submitted by Messrs. J P Baldacchino & Co. Ltd. '*ab initio*'. As a matter of fact this Board believes that the decision taken by the Corporation to analyse two samples from a current tender supply was the wrong decision to take under the circumstances as this gesture, albeit taken in good faith is a strong deviation from the normal practice as it tends to treat tenderers on uneven levels;
- d. Enemalta Corporation had written on 24 November 2003 to those interested parties who had formally sought clarifications from the Corporation notifying the latter that cylinders had to be in conformity with the PED (Pressure Equipment Directive) and not with BS (British Standards). This Board, whilst recognising that the Corporation committed a mistake by not formally notifying all tenderers and not only those two companies who sought information themselves, yet is also aware of the clarifications made by the Corporation's representative during the hearing wherein it was stated that the Corporation had notified in a previous tender Messrs J P Baldacchino on 2 January 2003 that cylinders had to be in conformity with the Transportable Pressure Equipment Directive and in order to substantiate such claim a document was produced;
- e. the sample taken from an existing supply (as consigned by the principals of Messrs J P Baldacchino & Co. Ltd.) was, however, not found to be according to specifications

decides in favour of the decision taken by the Contracts Committee as recommended by the Adjudication Board.

In view of the fact that the filing of this objection is not deemed to be frivolous and may be slightly due to the unclear way of the existing content format of tender specifications as well as the flawed manner in which the Adjudication Board may have decided to conduct the testing of sample cylinders in its process of adjudication, this Board feels that Messrs J P Baldacchino & Co Ltd should be reimbursed the amount paid for the filing of this formal complaint.

Alfred Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

Date: 04.10.2004