

## PUBLIC CONTRACTS APPEALS BOARD

### Case No. 44

#### **RE: CT 2709/2004 – Advert No 350/2004 Air Monitoring Equipment**

This call for tenders was originally published in the Government Gazette and the EU Official Journal on the 30.11.2004 and the closing date for the call for offers was 25.01.2005.

The global estimated value of the contract (forming part of the ERDF 10 Programme financed via 75% of funds generated through EU Funds and 25% generated via local sources) in question was Lm 212,390 (inclusive of VAT).

A total of five (5) offers submitted by different tenderers were analysed by an Adjudication Committee.

Following the notification that their Company would not be selected in view of the fact that their offer was considered as non-compliant with tender specifications, Messrs Casella Monitor Europe (*locally represented by M Demajo & Co Ltd*) lodged a formal objection on 03.06.2005 against the decision to award the tender in caption to Messrs. Environnement SA (*locally represented by Technoline Ltd*) for Lm 161,336.68.

The Public Contracts Appeals Board made up of Mr. Alfred Triganza (Chairman) with Mr. Edwin Muscat (Member) and Mr Maurice Caruana (Member), convened a public hearing on 05.09.2005 to discuss this objection.

Present for the hearings were:

#### **Casella Monitor Europe / Demajo & Co Ltd**

Mr Peter Lawson (Export Sales Manager)  
Mr Paul Rubens (Managing Director)  
Mr Norman Miller (Deputy Managing Director – Demajo & Co Ltd)  
Mr Robert Azzopardi (Demajo & Co Ltd)

#### **Environnement SA / Technoline**

Dr Serge S Aflalo (International Commercial Director)  
Mr Stephen Debono (Technoline)  
Mr Ivan Vassallo (Technoline)  
Dr Michael Sciriha - Legal Advisor

#### **Evaluation Committee**

Mr Joe Degiorgio - Chairperson  
Mr Kevin Mizzi - Secretary  
Mr Louis Vella – Member  
Ms Nadine Axisa – Member  
Dr Maciek Lewandowski – Member

Following the Chairman's brief introduction relating to this case, Casella Monitor Europe's representatives were invited to explain the motive of their objection.

Mr Paul Rubens, representing the appellants, commenced his intervention by stating that they based their objection purely on the grounds of software forecasting because that was the only information available at the time. However, they believed that there were other areas where their scores should be re-evaluated in view of the fact that, since then, they received the full scoring documentation. These points were mentioned during the hearing and also included in a report which was subsequently forwarded to the PCAB.

Casella Monitor Europe's representative said that they had submitted the *Enview 2000* software with their tender and they understood that Environnement SA had forwarded the same or an identical software package in their proposal. He said *Enview 2000* data acquisition and management software was a standard package which operated a module for air quality forecasting. He declared that they did not specifically include any documentation on forecasting software in their proposal because at the time of submitting the tender it was not available in the data sheet. However, he emphasised that in the tenderers' declaration/s they declared that they would comply with the terms of the tender and therefore they were also stating that they were proposing all the forecasting software that was required. As a consequence, he was of the opinion that the scoring they received for software should also include forecasting.

Mr Rubens said that Casella Monitor Europe had supplied analysers and systems to companies and governments across Europe and Africa and that they already had one of their systems installed in Malta. He also pointed out that their track record was excellent and this was substantiated by a reference list which formed part of a document presented during the hearing. The appellants' representative said that they failed to understand why they scored less than any other company, particularly Enviro Technology Services, which had no track record whatsoever in Malta.

The appellants' Managing Director said that Casella Monitor Europe, together with another bidder, scored lower than maximum points for the technical requirements of the tender even though the equipment that they were proposing was fully certified by TUV in Germany and EPA from the USA. Thus, considering the fact that they were fully compliant with the required technical specifications they did not see why they did not score maximum points.

Mr Rubens also referred to the issue of Quality Assurance/ Control (QA/QC) procedures. He argued that Cassella Monitor Europe scored 8 against 8.67 scored by both Enviro Technology and Environnement SA. He maintained that when he analysed their proposal, it resulted that it matched exactly with the requirement of the tender. As a consequence, he questioned why his Company had scored lower than other bidders in this area.

Finally, in his opening statement, he resolved to mention the maintenance contract on which Casella Monitor Europe scored 8.33 against 8.67 and 9 scored by Enviro

Technology Services and Environnement SA respectively. He maintained that their proposed maintenance contract was fully compliant with the tender requirements. In addition, they had an excellent track record for servicing the existing system they had in Malta and they had fully trained engineers that regularly service this equipment. Therefore, contended Mr Rubens, they did not see any reason why they scored lower than Environnement SA.

During the hearing Mr Rubens confirmed that they offered *Enview 2000* as a standard package but they intended to offer an upgrade to *Enview 2000* because it had an additional module for forecasting and their intention was to offer the correct package to conform with the tender specifications.

During his brief intervention, Mr Peter Lawson, the appellants' Export Sales Manager, explained that in the tenderer's declaration/s they mentioned items 1 – 29 because in addition to the list of the 23 items listed on the same declaration, the commercial/ financial offer included consumables and spare parts, after sales service contract, commissioning and installation, training proposal, shipping freight cost to Malta and 10 Years' supply of spare parts and consumables.

Dr Michael Sciriha, Environment SA's legal advisor, contended that the appellants, Casella Monitor Europe, should have brought supporting documentation to prove why the people who adjudicated their tender were not correct. Dr Sciriha placed major emphasis on the fact that, as a preliminary plea on the side of Environment SA, they could not accept the argument that the said Company would observe all conditions of tender by simply signing a declaration.

During the proceedings, Dr Sciriha said that a company which was knowledgeable of the trade should know exactly what it should submit or not when submitting offers. He pointed out that, in spite of the fact that the importance of the software was reflected in the specifications, it was missing in their offer. Casella Monitor Europe were obliged to submit supporting documentation and not a sweeping declaration stating that they would offer to deliver the *Air Monitoring Equipment* in accordance with the terms of the tender dossier without reserve or restriction. Dr Sciriha explained that, just under the general declaration clause, there were the description and specifics of supplies. Thus, apart from the declaration, bidders were obliged to include all the specifics. Dr Sciriha said that Casella Monitor Europe submitted the supplies but they decided to leave out a particular part of the software.

Dr Serge S Aflalo, International Commercial Director, Environment SA, commented, aiming at clarifying various points raised by Mr Paul Rubens in his opening statement.

He said that the software submitted by Environnement SA was *ScanAIR* which was a trademark. Although it was very similar to *Enview 2000* it had much more features inside. He declared that the standard packages of *ScanAIR* and *Enview 2000* did not include forecasting. However, their software was a specific package manufactured by specialised companies which was an additional and totally separate package, using the data provided by *Enview 2000* and *ScanAIR* in order to make prediction and

forecasting. Furthermore, Dr Aflalo proceeded by saying that in their bid they offered both and, as a matter of fact, the specification of the modelling software was presented in seven pages full of descriptions.

With regard to the issue of the Company's *track record*, Dr Aflalo said that Environnement SA, which was set up 27 years ago, was the first and original manufacturer of air quality monitoring system in Europe and that it had worldwide presence.

Environnement SA's International Commercial Director claimed that, in such tenders, it was imperative for bidders to submit detailed information and full description of what was included in their offer because they had to justify and to prove their compliance with the tender documents/ specifications and also for evaluation purposes. Dr Aflalo added that the company carried out site surveys to ensure that what they offered fitted exactly with the country's needs and the customer's requirements. He contended that in Europe bids were rejected every time tenderers submitted solely a simple declaration stating that they were fully compliant with the specifications.

Mr Joe Degiorgio, Chairperson of the Evaluation Committee, was the first person to take the witness stand. When asked by the PCAB to give his opinion on Mr Rubens' comments regarding the forecasting software, he testified that the technical evaluators were the competent people to comment on this issue. However, he declared that the fact that the appellants only had a declaration stating that they would abide by the tender conditions was a question of concern because they did not have detailed technical specifications.

When Mr Rubens was asked by the PCAB to explain how in their objection (Point No 6) it was stated that the air quality forecasting was always included in their bid when it was not individually mentioned within the data sheets, he replied that at that stage it was the standard part of the software package. However, he claimed that during the tender evaluation period they were not informed that their bid had failed the technical specifications resulting in immediate rejection. Also, Mr Rubens stressed the point that, at no stage were clarifications on such matter sought from them by pertinent bodies or authorities. Therefore, by definition, they believed that their bid had been accepted.

At this point, Mr Degiorgio intervened by stating that according to the tender dossier, the request for clarification was to be made on existing documentation submitted by tenderers. However, Mr Rubens insisted that they should have been informed that the software was not compliant. Mr Degiorgio replied that they did not ask for clarification on this matter because they could not alter the substance of the tender and also because forecasting was either present or not.

When pressed by the PCAB, Mr Rubens categorically declared that "with hindsight", the specific mentioning of the intended inclusion of the upgraded version of the *Envview 2000* software package as supplementary information to the submitted

data sheets, would have left no doubt whatsoever that the Air Quality Forecasts technical requirement would have been provided for.

Mr Louis Vella, another summoned witness, testified that as a committee they were obliged to examine the offers on documents supplied and so they limited their evaluation accordingly. He declared that, although the *Enview 2000* software package had an additional feature which would cater for the forecasting requirement, the software presented did not include this component. He explained that Casella Monitor Europe's bid scored low and not rejected because the evaluation committee took into consideration the fact that part of the software was acceptable whilst another was missing. In actual fact they reported that '*offer made in respect of the software was not to the required specifications since it lacked a major element with regards to the air quality forecasts up to 48 hours in advance.*'

When asked by Mr Rubens to state why no clarification was sought if potentially there were two conflicting statements between the non-inclusion of the forecasting software and the signed declaration that they included this specific function in their bid, Mr Vella replied that, being a substantial requirement in the tender specifications, he felt that they were not allowed to ask the tenderer for clarification as one of the tender conditions specified that '*no change in the price or substance to the tender may be sought.*' However, Mr Rubens insisted that if Casella Monitor Europe failed the technical requirements, they should have been informed that their bid had been rejected. At this point, Dr Sciriha intervened by stating that it did not result from the tender dossier that there was any obligation on the adjudication board to elucidate and point out the contradictions in a any particular tender. Also, he pointed out that in any tender, matters of substance could not be changed.

Mr Degiorgio explained that, in view of the value of this tender, the adjudication process that had to be followed was the '*single envelope system*', whereby tenderers were informed accordingly after a whole process of adjudication was completed. On the other hand, in the '*three envelope system*', when the technical evaluation was done, in case of a rejection, tenderers would be informed accordingly.

When asked whether Item 17 '*Ambient Air Data Acquisition and Management Software*' referred to the forecasting equipment that was requested, Mr Vella replied that if it did not specifically mention the forecasting, being the most essential component part of the software, then to his mind it was not there. Here, the PCAB requested Mr Rubens to pinpoint exactly where in their bid was the forecasting software mentioned and he confirmed that it was not specifically mentioned.

Ms Nadine Axisa, another witness, in her intervention made reference to Clause 12.2 of the tender dossier wherein it was specified that '*VAT and all other taxes are to be quoted separately*'. As regards the issue of clarification, she maintained that the evaluation committee could not ask for clarifications because forecasting was missing in the actual tender. At this point, Mr Miller intervened by stating that forecasting was actually included because the word 'management' included everything. He reiterated that only information and specification on forecasting was not included.

In his concluding remarks, Dr Sciriha said that from the evidence and submissions made, it clearly resulted that beyond any reasonable doubt, the adjudication board had decided well.

At this stage, the public hearing was concluded and the PCAB proceeded with its deliberations before reaching its decision.

The Board,

- having noted that the appellant, in terms of his “reasoned letter of objection” dated 3<sup>rd</sup> June, 2005, and also through his verbal submissions presented during the public hearing held on the 5<sup>th</sup> September, 2005, had objected to the decision taken by the General Contracts Committee communicated to him in terms of the letter dated 20<sup>th</sup> May, 2005, informing him that the tender submitted by him “*was not successful because the offered equipment failed to comply fully with the published specifications*”;
- having established that the reasons given to appellant for such “failure” were specifically: “*The offer made in respect of the software was not to the required specifications since it lacked a major element in regards to the air quality forecasts up to 48 hours in advance*” (extracted from page 4 of the Adjudication Report);
- having noted that the “advance forecast” requirement was clearly spelled out on page 79 (Annex C4) of the Tender Document and featured as one of the important functional requirements listed under “Data analysis”, namely:-

*“Air Quality Forecasts: forecasts/projections up to 48 hours in advance for all pollutants measured at monitoring sites. Software should make use of air quality data, traffic, and weather information to produce maps of concentrations at selected road sites for present situation or few hours ahead”;*

- having confirmed, following the evidence produced under oath, that, when referring to this technical requirement (Air Quality Forecasts), appellant’s bid specifically quoted the ‘*Envview 2000*’ software package and the supporting technical information supplied (data sheets) omitted any reference to the requirement in question;
- having heard and examined appellant’s verbal and written arguments for such “omission”, namely, that, when submitting the tender, (a) declarations were made and signed to the effect that (i) “*.....having read all parts of tender, there are no situations justifying any exclusion of our bid*” - cfr. statement dated 18<sup>th</sup> January, 2005 and (ii) in the context of section 3 titled “Tenderer’s Declaration” (Commercial Bid) he fully accepted the contents of the

dossier in its entirety, without reservation or restriction, the Air Monitoring Equipment being one such included item, (b) at no time did he declare in his bid that there was “.....any exclusion from the tender dossier/specification as required in Item 11.10 On page 10” and (c) at no time was he informed during the evaluation period that (i) his bid had failed the technical specification which would have resulted in immediate rejection as required in para 20.1 on page 14 or (ii) that any technical clarification was required in respect of his bid;

- having also heard appellant’s clear declaration to the effect that, “with hindsight”, the specific mentioning of the intended inclusion of the upgraded version of the “ENVIEW 2000” software package, as supplementary information to the submitted data sheets, would have left no doubt whatsoever that the Air Quality Forecasts technical requirement would have been provided for;
- having noted that the Adjudication Board, when evaluating appellant’s bid utilising the adopted pre-agreed “Evaluation Grid” , particularly when applying the weighting factors in respect of the item “Data processing software” under the main item “CONFORMITY TO SPECIFICATION (60%)” did, in fact, award 5 scoring points to appellant’s bid, having regard to appellant’s failure to include the Air Quality Forecasts technical requirement in his bid – cfr. page 11 of the Adjudication Board’s Report;
- having also noted that requests for clarification on the part of the contracting authority were regulated by article 20.3 of the tender document which, *inter alia*, premised that “.....no change in the price or substance of the tender may be sought, offered or permitted except as required to confirm the correction of arithmetical errors discovered during the evaluation of tenders pursuant to Article 20.3”

reached the following conclusions:-

1. Appellants’ “blanket declarations” to the effect that, when presenting their bid they had confirmed that (a) there were no situations justifying any exclusion of their bid (b) they fully accepted the contents of the tender dossier in its entirety, without reservation or restriction, do not, in any way, justify any omission, on their part, to specifically quote and also support with documentary evidence, the technical item they were offering in compliance with the specified requirement;
2. By their own declaration, made during the public hearing, appellants confirmed that, with hindsight, the information submitted in conjunction with the Air Quality Forecasts technical requirement was not complete;

In consequence to 1 and 2, appellant's objection to the decision reached by the General Contracts Committee cannot be upheld by the Board.

Furthermore, in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by appellants in terms of regulation 83, should not be refunded especially considering the fact that, by their own declaration, made during the public hearing, appellants confirmed that, with hindsight, the information submitted in conjunction with the *Air Quality Forecasts* technical requirement was not complete rendering the objection raised somewhat frivolous.

**Alfred R. Triganza**  
Chairman

**Edwin Muscat**  
Member

**Maurice Caruana**  
Member

19<sup>th</sup> September, 2005