

PUBLIC CONTRACTS APPEALS BOARD

Case No. 45

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 Enviro Technology Services plc (locally represented by Advanced Industrial Systems Ltd) lodged a formal objection on 01.06.2005 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:

Enviro Technology Services / Advanced Industrial Systems Ltd

Mr Mike Webley (Technical Director)
Mr Kevin Schembri (AIS)

Environnement SA / Technoline Ltd

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

Evaluation Committee

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

After the Chairman's brief introduction to this particular tender, the representatives of Enviro Technology Services plc were invited to commence proceedings by giving a brief resume of what led to their objection.

Mr Mike Webley, the Company's Technical Director, started by stating that their case was based on the fact that the equipment they supplied for this tender was technically the same or even better than the equipment proposed by Environnement SA. Therefore they did not see how under the *Technical Average Weighted Score* they scored lower.

He said that, in view of the fact that they did not receive a full copy of the Adjudication Board's report, as they believed that Environment SA did, they were going to limit their arguments on the few points which were included in the small section of the AB's report that was submitted to them by the Contracts Department.

Mr Webley claimed that they could not understand how it was stated that the tender was '*difficult to elucidate and extract the specific items required for the adjudication process*' considering the fact that the tender reply was written in the same format and the items were written in the same order of the tender document.

As regards '*logistic costs for overseas technicians*', he said that all relative expenses were included. As far as the VAT, '*Handling charge*', and '*standard conditions of sale*' were concerned, these issues were settled after necessary clarifications were sought wherein they confirmed that their prices excluded all taxes and they accepted the terms and conditions outlined in the tender *dossier*.

With regard to the last point, namely, '*The cost of installation of the above mentioned software is limited to 4 stations*' he contended that, at no stage, did they state that the software was limited to 4 stations. Furthermore, he said that they were never asked from how many stations their software could be collected.

Mr Webley concluded his opening statement by stating that they wanted to establish whether they were marked down on these points.

Mr Kevin Schembri, representing Advanced Industrial Systems Ltd, argued that it was unfair to lose points on these issues.

During the proceedings Dr Serge S Aflalo explained that when they make a quotation for a tender, they usually make a site survey and try to offer the best system which was fully compliant with the customer's needs. In this case, they had stipulated that the licence for the software was fully open irrespective of the number of stations available. This was a very high additional value because otherwise each time a station was added to the network additional licensing costs would be incurred.

Mr Joe Degiorgio, Chairperson of the Evaluation Committee, declared that the clarifications sought did not affect negatively Enviro Technology Services plc in the weighted score because these were settled to their complete satisfaction. Also, he

wanted to place major emphasis on the fact that during the adjudication process they were as objective as possible.

In reply to Dr Sciriha's specific questions, the witness confirmed that no conditional bids could be submitted and that in the adjudication process there was level playing field among all bidders.

Mr Louis Vella, another member of the Evaluation Committee, on taking the witness stand, was cross-examined by the PCAB. He confirmed that there were no negative repercussions on the Enviro Technology Services Ltd's score because the only difficulty they had was that the itemised submission was not added up and, in so far as the issue of logistic costs for overseas technicians was concerned, this was satisfactorily clarified by the appellant.

At this stage Mr Vella recalled that the appellant's software was meant to be licensed for 4 stations and, as a consequence, if, eventually, the contracting party would need to extend the number of stations, additional costs would be incurred. He claimed that this affected the score to the extent that those bidders who had an 'open-ended' software licence were given some extra points. In reply to a specific question by the PCAB, the witness declared that the tender specifications required the supply of software for two existing stations and for two new ones. At this point, the PCAB questioned why, in the prevailing circumstances, such bidders were given preferential scoring. Mr Vella replied that, once the submissions received were complete and rather good, they had to consider such fine details. Also, he confirmed that no clarification was sought from Enviro Technology Services plc to enquire whether they could provide software for more stations.

Mr Vella testified that both Environnement SA and Enviro Technology Services plc conformed to the tender specification but the first were given 0.5 extra points under *Data Processing Software* because they offered something more than what was requested. The PCAB pointed out that as long as they were satisfying the tender's requirement, none of the tenderers should have been penalised or given preferential treatment. By the time Mr Vella was calculating how the extra 0.5 point actually affected the final score, Mr Degiorgio intervened and declared that in the tender dossier they did not ask for 4 Stations. He said that under '*Ambient Air data acquisition and management software*' it was specified that the packages that they would deliver '*must be compatible with the presently owned air monitoring stations and must include data handling from these as well*'. He said that although at present there were two stations and another two were going to be purchased, they were not limiting their request for 4 stations.

The PCAB said that this was a totally different scenario because then it was a question of who gave the best value for money.

At this instance, Mr Vella corrected himself by stating that the tender dossier did not specifically ask for 4 stations and therefore in this respect none of the tenderers was penalised because in their evaluation they took into consideration that software which was covered by multi-user licences. Then, he declared that the final score would still

not be affected because when he added the 0.5 point with the 8.5 originally allocated to Enviro Technology Service plc for *Data Processing Software* and worked out the total average weighted score under *Conformity to Specifications*, their points had increased from 4.759 to 4.819 which was still lower than Environnement SA's 4.961.

Mr Vella and Mr Degiorgio pointed out that Enviro Technology Services plc did not lose points on clarifications.

In his concluding remarks, Mr Webley reiterated the fact that the tender *dossier* stipulated that the new software had to be supplied for the 2 existing stations *plus* another 2 that they were going to buy and not for future stations.

On the other hand, Dr Sciriha said that the Evaluation Committee had taken a holistic approach to the tender and they were after the best value for money.

At this stage, the public hearing was brought to a close and the PCAB proceeded with its deliberations before reaching its decision.

This Board,

- having noted that the appellant, in terms of his “reasoned letter of objection” dated 1st June, 2005, and also through his verbal submissions presented during the public hearing held on the 5th September, 2005, had objected to the decision taken by the General Contracts Committee communicated to him in terms of the letter dated 20th May, 2005, informing him that the tender submitted by him was not successful;
- having established that, in fact, appellant’s “failure” was rather the result of appellant’s overall (final) score emerging from the evaluation exercise, particularly, the awarding criteria, pre-determined by the Evaluation Committee, as described in detail on page 5 of the latter’s Report and quantified in the evaluation grid presented on page 12 of the same Report;
- having obtained under oath, the Evaluation Committee’s confirmation to the effect that (a) all clarifications sought and obtained from appellant resulted in satisfactory replies (b) no clarifications were required in respect of appellant’s bid limitation to four (4) stations when quoting the cost of installation relating to the item: “Ambient Air data acquisition and management software” on pages 78-79 (Annex C4) of the tender document and (c) consequent to the limitation mentioned in (b) appellant’s score was lower than that awarded to his competitors who did not apply such limitation, resulting in cost savings to the client ;
- having heard and examined appellants’ arguments for insisting that their tender “...fully met the tender specifications and therefore our technical average weighted score should have been the same or higher than Environment S.A.. Also from the cost weighted score we understand that our price tendered was lower than theirs and therefore Enviro Technology should have been awarded this contract”;

- having examined and also interpreted the text of item: “Ambient Air data acquisition and management software” on pages 78-79 (Annex C4) of the tender document, particularly the second paragraph of this text which reads as follows: *“The system must be compatible with the presently owned air monitoring stations and must include data handling from these as well”* ;
- having also evaluated mathematically the overall implication of appellant’s “capping” of the cost of installation in the context of the score awarded under the main item “CONFORMITY TO SPECIFICATION (60%)” in respect of the item “Data processing software”, (cfr. “Evaluation Score Summary” on page 12 of the Adjudication Board’s report), and having reached the conclusion that such limitation, even if not taken into account for scoring purposes, would still not have altered the final score awarded to all bidders ;

reached the following conclusions:-

1. The decision not to award the contract to appellant was essentially based on the final score obtained in the context of the evaluation procedure adopted by the Evaluation Committee and not on any compliance limitations;
2. The tender evaluation process and procedure adopted and applied by the Evaluation Committee, as detailed in its Report, including particularly, the methodology applied and the scores awarded, whilst essentially subjective in character, were accepted by the Board as being fair and impartial. In this respect, this Board had no reason or grounds on the basis of which it should insist on the review of the scores applied in the context of evaluation grids;
3. This being the case, the Board is not in a position to query the “final score” secured by all bidders, including appellant, as registered in the grid titled: “Evaluation Score Summary” on page 12 of the Evaluation Committee’s report;
4. In consequence to 1, 2 and 3 above, the appellant’s objection to the decision reached by the General Contracts Committee to award the contract to Environment S.A., cannot be upheld by this 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.

Alfred R. Triganza
Chairman

Edwin Muscat
Member

Maurice Caruana
Member

19th September, 2005