

PUBLIC CONTRACTS APPEALS BOARD

Case No. 56

CT 2085/05 – E/E/T/PC3/46/2004

TENDER FOR THE CONSTRUCTION OF SUBSTATIONS IN MALTA

This call for tenders, published in the Government Gazette on 11 February 2005, was issued by the Contracts Department following a request transmitted to the latter by Enemalta Corporation.

The closing date for this call for offers in respect of a period contract, the global estimated value of which was Lm 450,000 covering three years, was 22 March 2005.

The Corporation appointed an Evaluation Board to analyse a total of eight (8) offers submitted by different tenderers.

In terms of Clause 82, Part XII of Legal Notice No. 177 of the Public Contracts Regulations 2005, the public was notified that during the session held on 6 October 2005 the General Contracts Committee recommended that the financial proposals (prices) of the indicated tender/s were to be published and unless any objection was received, such proposals were going to be opened and made public on 18 October 2005.

Upon being informed that their offer has been disqualified for alleged “*bad record on an identical contract*”, Messrs C & F Building Contractors Ltd filed an objection on 11 October 2005.

The Public Contracts Appeals Board (PCAB) made up of Mr. Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr. Maurice Caruana, respectively acting as members, convened a public hearing on 14 December 2005 to discuss this objection.

Present for the hearings were:

C & F Building Contractors Ltd

Mr Frank Schembri (Director)
Arch Carl Grech

Enemalta Corporation

Mr Godfrey Camilleri
Mr Francis Darmanin
Arch Mario Scicluna
Eng Ronnie Vella
Arch Joseph Sapienza (Witness)

After the Chairman's brief introduction, C & F Building Contractors Ltd's representatives were invited to explain the motive leading to their objection.

Architect Carl Grech, representing appellants, started by stating that since C & F Building Contractors Ltd had in the past and were still carrying out various works simultaneously for Enemalta Corporation, they did not know which project they were referring to when they were informed that their offer had been disqualified for alleged "*bad record on an identical contract*". However, they had to assume that the Corporation was referring to the Marsa Power Station and/or Mosta Projects.

When the PCAB requested the Corporation's representatives to indicate the contract, Ing. Ronnie Vella said that, in actual fact, C & F Building Contractors Ltd had a bad track record on four similar contracts assigned to it. Arch Mario Scicluna proceeded by saying that the four construction projects on which they had problems were the following:

Project	Date of Letter of Acceptance
Switchgear at Marsa Power Station	15 May, 2002
Structural works at Mosta	22 April, 2002
Valletta Distribution Centre	21 December, 2000
Marsascala Distribution Centre	22 June, 2001

Eng. Vella continued his intervention by stating that the Corporation's complaint was not on the quality of work as this was considered to be satisfactory but, this was on the fact that none of these projects were completed on time. He maintained that, apparently, the main problem with this contractor (the appellants) was that they were either not organised or did not have the capability in carrying out certain finishing works. However, Enemalta Corporation's representative admitted that such delays did not always happen because of the contractor's fault since there were instances where the necessary permits or drawings were not available by the time they had to commence work. This claim was also confirmed by Arch. Grech who reiterated the fact that, very often, both parties were to blame for not finishing these projects on time, namely within the agreed time frame. The Corporation's representative said that, as far as the Marsa Power Station and Mosta Distribution Centre projects were concerned, they had to wait for indispensable information from Enemalta Corporation to continue the works.

During these proceedings, Ing Vella declared that they had sent various letters to C & F Building Contractors Ltd which were never challenged by the Company and in order to substantiate his claim he quoted textually from two of these letters. It was explained that the first letter was sent on 7 July 2004 by one of the Corporation's legal representatives, Dr Damien Degiorgio, wherein the contractor was requested to carry out all outstanding works on the Mosta Distribution Centre, the M'Scala Distribution Centre and the Power Station project because, if such works were not to be completed on time, Enemalta Corporation would not be in a position to install the necessary equipment. As far as the other letter is concerned, Ing Vella said that he had personally written such letter on 27 August 2003, in order to refer to delays by the contractor in carrying out pending works at the Marsascala Distribution Centre.

The members of the PCAB intervened to ask Arch Grech why the appellants never replied to such letters. The appellants' architect replied that they did not send a reply to the first letter because immediate action was taken accordingly. With regard to the

second letter, Mr Grech denied that they did not send a reply. Also, he declared that all necessary works, including extra ones, had been completed by the time the new equipment was delivered. At this stage, Arch Mario Scicluna intervened by stating that in the case of the Marsascala Distribution Centre they considered the contractor to have abandoned the remaining works and claimed that the finishing works had to be completed by another contractor who was responsible for maintenance of substations. On the other hand, Mr Frank Schembri, also acting on behalf of the appellants, not only denied that they had abandoned any works but also remarked that they had to carry out certain works which were not even included in the contract. Ing. Vella confirmed that there were variations and extra works on these projects. Also, he declared that they neither applied the penalty clauses included in the tender regarding delays and abandonment of contract nor took any legal action against the contractor.

When asked by the PCAB as to whether there were other instances where contractors had been sidelined by the Corporation in other tenders, Arch Scicluna said that another contractor, who did not tender for this contract, had been barred from tendering for a period of time.

The PCAB also drew Mr Scicluna's attention to the fact that when a contracting party is somehow dissatisfied with the type of work carried out by any successful tenderer, it is to be expected that such matter should be promptly referred to the Department of Contracts for any remedial action, if any, to be taken. Furthermore, the PCAB saw it fit to declare that contractors should not be black listed during the adjudication stage but should be informed about such a decision *ab initio* in order to avoid any potential bidder from incurring unnecessary expenses for then to be told that they were not even being considered.

In answering a specific question raised by the PCAB which referred to whether the other bidders had any track record on similar works, Arch Scicluna said that tenderers Nos 2, 4 and 6, namely Raymond Farrugia, Paul Psaila and KHC Ent Ltd respectively, had previous experience in similar works with Enemalta Corporation. The other four contractors, namely B Grima & Sons, Kalaxlokk Co Ltd, PSV Turnkey Contractors and Denfar Concrete Supplies did not carry out any works for the Corporation in recent years however, they had seen their work. The PCAB intervened once again to point out that although the other bidders' work appeared to be satisfactory in instances which did not directly involve the Corporation, yet it could not be ascertained whether their clients had experienced any delays. Thus, the PCAB argued that tenderers were not adjudicated on an equal level playing field.

The main and only witness to take the stand in these proceedings, Arch. Joseph Sapienza, Enemalta Corporation's consultant on the Mosta, Marsascala and Valletta projects, confirmed that there were variations during the course of works and delays in carrying out certain finishing works. He said that in so far as concerned Marsascala Distribution Centre, certain finishing works were not even completed and therefore could not be included in the final bill. Mr Schembri said that these were only minor finishing works and that these could not be carried out due to inclement weather.

In his concluding remarks, Arch Grech stated that it had been established that the main problem was not related to the quality or the programme of works, but mainly due to minor works which were left pending at the Marsascala Distribution Centre. Furthermore, he emphasised that, in spite of the fact that the programme of works was revised, they always managed to finish these four projects within the stipulated time

frames. Mr Grech claimed that this was evident considering that that when the equipment was eventually delivered it was installed in the location in which it was originally intended for.

Arch. Scicluna concluded by stating that, as far as these four projects were concerned, Enemalta Corporation always experienced extensions on the delivery dates because of delays on the part of the appellants. He emphasised that, although these substations consisted of small rooms, it was indispensable for the selected contractor to start and complete the necessary works within the stipulated time frames because they could adversely affect the provision of electricity in the locality and as a consequence the Corporation could suffer damages. Arch Scicluna, said that in the tender document it was pointed out that in the award of quotation, serious consideration would be given to (a) Experience of Contractor in similar works, (b) Time of completion of Contract, (c) Quality of work of Contractor and (d) A fair and reasonable Contract Price.

Finally, he said that Enemalta needed to construct approximately 10 - 12 substations every year. He explained that under clause 4, 'Award of Quotation', it was specified that *'More than one contractor may be chosen to work on substations provided he is willing to work with the Contract Price of the selected contractor'*.

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 appellants, in terms of their 'notice of objection' dated 11th October, 2005, and subsequently, through their motivated letter dated 24th November, 2005, had objected to the decision taken by the General Contracts Committee communicated to them in terms of the letter dated 7th October, 2005, informing them that the tender submitted by them was *".....not among the selected ones because of (their) bad record on an identical contract"*;
- having considered appellants' contention in their motivated letter and also during their verbal submissions presented during the public hearing held on the 14th December, 2005, that the delay in the completion of certain projects awarded to them by the Contracting Authority (Enemalta Corporation) were mainly the result of (a) *".....piecemeal delivery of indispensable information from third parties to Enemalta and consequently from Enemalta to (them) to be able to execute the said works"* and (b) the revision of programmes of works and target dates;
- having established that appellants' failure to be *"among the selected ones"* was essentially the result of an evaluation of their previous performance record on similar projects executed by them on behalf of the Contracting Authority;
- having obtained from the Contracting Authority's representatives, a detailed account of the specific situations where the appellants were deemed to have defaulted in their performance, with particular reference being made to the four projects which were singled out for the purpose of the adjudication

exercise, namely, (i) MPS E/E82/1/01, (ii) E/E/T 05/2001, (iii) E/E/T/62/1/00 and (iv) E/E/T3/1/01 - E/E/99/91/99;

- having established, after seeking detailed explanations from the representatives of the appellants as well as the Contracting Authority, that, whilst the quality of the work previously performed by appellants on behalf of the Contracting Authority was, in general terms, satisfactory, there were instances when the appellants defaulted in the finalisation of minor finishing works - a problem which, according to the Contracting Authority's representatives, was "chronic" with most local contractors;
- having also taken note of the declarations made by the Contracting Authority's representatives to the effect that (a) the appellants were not invariably to blame for the delay in the finalisation of certain contracted works since there were instances when the Contracting Authority was itself in default and its actions had contributed to the resulting delays, and (b) the Contracting Authority did not consider it necessary to resort to the application of the remedial measures contemplated in the tender documents, particularly the "penalty clauses" relating to delay or abandonment of the projects premised in terms of clauses 17 – 20 of the "General Conditions of Contract for the Execution of Works in Malta", given the nature of the defaults related to the mentioned four projects and (c) in the case of the "Mosta" project (E/E/T 05/2001), which had been reported to the General Contracts Committee as having been abandoned (*"Deemed to have abandoned works"*), intended as evidence that the Contractor (appellants) were in default, it resulted to this Board during the public hearing that, in fact, the project had been completed without the Contracting Authority's acknowledgement;
- having noted that the Contracting Authority had not otherwise ever reported the Appellants to the Director General of the Contracts Department with a view to blacklisting them from any further tendering work for Enemalta Corporation;
- having also heard the appellants' explanations for the delay in the finalisation of the minor finishing works which, according to them, were not of a serious nature given the related low cost value and also their secondary importance *vis-à-vis* the other aspects of the respective construction projects - an "excuse" which was rejected by the Board;

reached the following conclusions:

The decision to exclude the appellants' tender on the stated grounds of the appellants' "...*bad track record on an identical project*" was not fully substantiated nor was it justified for the following reasons:-

1. The Contracting Authority's representatives had admitted that the Contracting Authority had to accept its own share of responsibility for the delays that resulted from its own failures;
2. The Contracting Authority admitted that it did not consider the appellants' defaults on previous projects as serious enough to warrant the application

of the remedial measures contemplated in the tender documents, even in the case of two out of the four projects which were deemed to have been abandoned, which turned out to be not the case in one of the two projects, namely the “Mosta” project;

3. The Contracting Authority had never taken steps to formally blacklist the appellants from tendering for its projects.

In view of these findings, the Board decided to uphold the appeal and authorised the award procedure to continue with the inclusion of the appellants’ bid.

Consequent to this decision, the Board concluded that the appellants should be refunded the deposit paid in conjunction with this appeal.

Alfred R. Triganza
Chairman

Anthony Pavia
Member

Maurice Caruana
Member

30th December 2005