

PUBLIC CONTRACTS APPEALS BOARD

Case 67

Advert Notice No E/E/T/42/2005 - Tender for the Supply of STEEL POLES to Enemalta Corporation

This selective call for tenders was issued by the Contracts Department following a request transmitted to the latter by Enemalta Corporation.

The closing date for this call for offers was 02.08.2005 and the global estimated value of the contract was Lm 180,000.

Three different tenderers submitted a total of four (4) offers.

Following recommendations made by the Evaluation Board to the Contracts Committee for the latter to award the tender ('trial order') to **Messrs Ningbo Liaoyuan** (USD 30,500 equivalent to approximately Lm 10,700), Messrs Ragonesi & Co Ltd on behalf of SA-RA Energy Construction Trade & Industry Co Ltd - Turkey, filed an objection on 21.12.2005.

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Edwin Muscat, respectively, acting as members, convened a public hearing on 08.03.2006 to discuss this objection.

Present for the hearing were:

Ragonesi & Co Ltd obo SA-RA Energy Construction Trade & Industry Co Ltd - Turkey

Mr Roberto Ragonesi – Managing Director
Dr Franco Vassallo

Darel Ltd obo Messrs Ningbo Liaoyuan

Ms Elaine Frendo
Mr Joseph Frendo
Mr Alexander Schembri

Enemalta Corporation

Mr Godfrey Camilleri – Procurement Executive
Mr Francis Darmanin – Head of Procurement

After the Chairman PCAB's brief introduction, the Board's attention was drawn to the fact that despite that Enemalta Corporation was duly notified about the date and time of the hearing, none of the Corporation's representatives were present for the hearing. As a consequence, the Board instructed the Secretary to contact Mr Godfrey Camilleri (Procurement Executive, Enemalta Corporation) by phone in order to establish the reason for their non appearance.

Following such contact it transpired that the Corporation's officials thought that the time of the hearing was 9.45 hours and not 8.45 hours. They apologised and advised that they will be leaving within minutes to attend the hearing.

The PCAB decided to start the hearing by inviting the representatives of Ragonesi & Co. Ltd, the appellants, to explain the motive leading to their objection.

Dr Franco Vassallo, the appellants' legal representative started by stating that once the tender for the supply of specific steel poles was issued in terms of the public procurement regulations and awarded to Messrs Ragonesi & Co Ltd, the Department of Contracts and Enemalta Corporation could not go beyond the parameters of the law by awarding a "trial order" to Messrs Ningbo Liaoyuan. Thus, he maintained that the Corporation's recommendation had to be perceived as having been construed (i) *ultra vires* of the tender procedure, (ii) in a discriminatory manner against those who could not participate in the "trial order" and (iii) in a way as to attempt to circumvent the public procurement regulations with the consent of the Department of Contracts.

Dr Vassallo said that he arrived at the conclusion that the Chinese company did not abide by or fulfilled the tender specifications and conditions because, if theirs was the cheapest acceptable offer, then they would have been awarded the tender and not just given a "trial order". He contended that his clients were concerned because such decision could serve as a precedent to future adjudication of tenders.

Dr Vassallo maintained that as an interested party they should have access to the adjudication report. The lawyer said that although Malta had the *Professional Secrecy Act* and the *Data Protection Act*, it was very unfortunate that it did not yet have the *Freedom of Information Act*. Here, the PCAB pointed out that, except for sensitive commercial data, all other information could be divulged during the course of the hearing.

Finally, the appellants' legal representative, whilst acknowledging that Enemalta Corporation could place a "trial order", yet, he insisted that *Tender Advert E/E/T/42/2005 – Supply of Steel Poles to Enemalta Corporation* should only be considered and awarded within the parameters of the tender conditions and the public procurement regulations.

At this stage, Enemalta Corporation's two representatives joined the hearing and apologised for being late. Mr Camilleri explained that none of the adjudicating members were present because they had delegated Mr Francis Darmanin, Head of Procurement, and himself to attend.

The Board took a very poor view of this and the Chairman informed the Corporation's representative that this was not the first time that such neglectful actions had occurred and this reflected badly on the organisation as a whole and on the persons directly concerned.

Mr Darmanin submitted that this tender was first examined by the Tender Evaluation Board and then by the Tender Sub-Committee. He declared that one of the members of the first board was involved in the drawing up of the specifications. Mr Darmanin said that when the Tender Sub-Committee evaluated the tenders, it found that the tender specifications were difficult to interpret and so they could have led to some form of misinterpretation on the part of participants. However, when Enemalta Corporation's representatives were asked to state whether any clarifications were sought, the reply given was in the negative.

Mr Darmanin explained that the Tender Evaluation Board recommended the award of this tender (Item 1 – Transmission poles) to Ragonesi & Co Ltd because, although it was the 2nd cheapest, their offer was compliant with specifications. He said that according to this Board the cheapest offer, which was submitted by Ningbo Liaoyuan, could not be considered further because it was not according to specifications. However, he maintained that the Tender Sub-Committee recommended the award of a "trial order" of 100 poles to Ningbo Liaoyuan to serve as a sample order.

On his part Mr Camilleri stated that the board considered this offer because the catalogues submitted indicated that the poles were of a certain standard. He said that if he were a Board member he would have arrived at the same conclusions because from the data submitted the supplier was established worldwide and the price was cheaper.

During the hearing, the PCAB noted that in the Tender Sub-Committee's report that was submitted by Enemalta Corporation's representatives, there was stated that the '*problem with Tenderer No 4 is that this manufacturer from China has not submitted any test certificates or a sample in spite of several requests.*'

However, for the sake of clarification and transparency, when the Enemalta Corporation's representatives were asked by the Board to table a copy of the 'sample test certificate' submitted by Messrs Ragonesi & Co Ltd, it was also noted that, in this case, this 'certificate' was not issued by an independent body.

Dr Vassallo intervened to make reference to the tender document wherein under paragraph '*TECHNICAL LITERATURE AND SAMPLE*' it was clearly specified that:

'All offers must include detailed technical literature and drawings with all dimensions and pole construction details. Sample test certificates must also be included with offers. Prior to the acceptance of this tender and at any time during the duration of supply period, samples may be requested for independent verification of:

- *Material*
- *Quality of galvanizing*
- *Protection of bottom section of pole from corrosion.'*

The appellants' lawyer said that nowhere in the tender document was it stipulated that the 'certificate' had to be issued by an independent body.

Furthermore, the same lawyer said that with regard to his clients' offer, he contended that it was very risky for the Corporation to accept such a product without a 'sample test certificate' because in case of a fatal accident the same Corporation could face serious consequences.

On cross-examination by the PCAB, Mr Alexander Schembri, representing Messrs Darel Ltd / Messrs Ningbo Liaoyuan, testified that the 'sample test certificate' could not be provided because the product had to be manufactured according to customer's requirements. The witness ensured those present that the Chinese company guaranteed that their product would be provided in compliance with all the specifications and at the required standards.

On her part, Ms Elaine Frendo, also acting in representation of Messrs *Darel Ltd / Messrs Ningbo Liaoyuan*, testified that they presented the necessary information relating to the specifications of the poles. She explained that whilst the 'sample test certificate' did not exist because the poles still had to be manufactured, yet, the brochures submitted did refer to other certificates. Also, during her testimony, Ms Frendo confirmed that their product would be according to specification because the poles were custom made.

Mr Joseph Frendo, also representing the successful tenderer, said that in view of the fact that the difference in price between the offers submitted by the Chinese Company and the appellants was Lm 15,000, Enemalta Corporation was going to save 8% of the next most financially advantageous offer.

In concluding, Dr Vassallo reiterated that the procedure to order samples as recommended by the Tender Sub-Committee was not contemplated in the tender dossier and therefore it was *ultra vires* and went beyond the parameters of the tender.

On his part, the Corporation's representative, Mr Darmanin concluded by stating that the procedure followed regarding the 'trial order' could be incorrect and would possibly need to be re-examined.

Finally, Mr Camilleri said that, personally, he felt that the appeal was frivolous because Ragonesi & Co Ltd were awarded half the quantity requested for Item 1. He pointed out that, as a direct consequence of this objection, the tendering process had been delayed by two months.

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

This Board,

1. having noted that the appellants, in terms of their 'reasoned letter of objection' dated 24th January, 2006, and also through their verbal submissions presented during the public hearing held on 8th March, 2006, had objected to the decision taken by the General Contracts Committee to award the tender ('trial order') to Messrs Ningbo Liaoyuan;
2. having considered the appellants' legal representative's points raised relating to existing public procurement regulations and also the fact that, according to him, the Department of Contracts and Enemalta Corporation could not go beyond the parameters of the law by awarding a "trial order" to Messrs Ningbo Liaoyuan;
3. having taken cognizance of the appellants' claim that the Corporation's recommendation has to be perceived as having been construed (i) *ultra vires* of the tender procedure, (ii) in a discriminatory manner against those who could not participate in the "trial order" and (iii) in a way as to attempt to circumvent the public procurement regulations with the consent of the Department of Contracts;
4. having also noted Mr Darmanin's statement that, whilst evaluating the tenders, Enemalta Corporation's Tender Sub-Committee had noted that the tender specifications may have been difficult to interpret and so they could have led to some form of misinterpretation on the part of participants;
5. having also noted that whilst the Tender Evaluation Board had decided that the offer submitted by Messrs *Ningbo Liaoyuan*, could not be considered further because it was not according to specifications, yet the Tender Sub-Committee recommended the award of a "trial order" of 100 poles to the same Company to serve as a sample order;
6. having also considered the fact that whilst it was mandatory for "*Sample test certificates*" to be "*included with offers*", yet the Tender Sub-Committee's report stated that the "*problem with Tenderer No 4 is that this manufacturer from China has not submitted any test certificates or a sample in spite of several requests*";
7. having deliberated upon points raised by (i) the appellants' legal representative as to the fact that it was very risky for the Corporation to accept such a product without a 'sample test certificate' because in case of a fatal accident the same Corporation could face serious consequences as well as by (ii) the successful bidder who stated that the 'sample test certificate' could not be provided because the product had to be manufactured according to customer's requirements;

reached the following conclusions:-

1. Sample test certificates, which should ideally be issued by independent bodies, were mandatory and had to be provided when requested. As a matter of fact, tender conditions clearly stipulated that "*Sample test certificates must also be included with offers. Prior to the acceptance of this tender and at any time during the duration of supply period, samples may be requested for independent verification of Material, Quality of galvanizing and Protection of bottom section of pole from corrosion.*". The PCAB feels that had there been any problem with adhering to any of the conditions, any tenderer was obliged to seek clarification rather than dictating one's own terms and conditions;

2. Albeit officials from Enemalta Corporation had themselves drafted the tender's specifications, yet, at adjudicating stage, some of the Corporation's officials had not observed these same specifications, thus, possibly discriminating against unsuccessful bidders as well as giving rise to a questionable way of adjudicating similar tenders in the future;
3. Recognises the fact that Mr Darmanin's concluding statement, namely, that the procedure followed regarding the 'trial order' could be incorrect and would possibly need to be re-examined, does not provide enough comfort to this Board with respect to the arbitrary way of deciding in favour of the successful bidder, especially, when, during the hearing, *prima facie*, it transpired that the 'trial order' was decided upon in view of the fact that there was still an aura of uncertainty about the quality of the product offered by the Chinese Company and this was considered as a way of minimising potential risk. As a matter of fact the 'trial order' was recommended on the condition that payment to supplier would only be affected after the poles would have been received and tested to the Corporation's complete satisfaction and that should the tests fail the poles will be returned back to the supplier with all related costs being borne by the same supplier!;
4. Considers (a) Mr Camilleri's concluding remarks which contended that the appeal was frivolous because Messrs Ragonesi & Co Ltd were awarded half the quantity requested for *Item 1*, and (b) Mr Frendo's claim that in view of the fact that the difference in price between the offers submitted by the Chinese Company and the appellants was Lm 15,000, the Corporation was definitely right in opting for the most financially advantageous offer, as both as being unacceptable. Although price is a major determinant in public procurement, yet, observance of tender requirements is also a *sine qua non*. Furthermore, just because a tenderer is awarded half the requested quantity does not automatically preclude same from qualifying for the award of the entire contract in question. Needless to say that even though the beneficiary always retains the prerogative to award in full or in part or refrain to award any contract at all, yet any similar decision has to be sensibly taken and following strict adherence to tender requirements.

Consequent to (1) to (4) above, the Board does not uphold the decision taken by the Contracts Committee to award Messrs Ningbo Liaoyuan a 'trial order' as an integral action within this tender procedure.

Furthermore, in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by appellants in terms of regulation 83, should be refunded.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

March 29, 2006