

## **PUBLIC CONTRACTS APPEALS BOARD**

### **Case 74**

#### **Advert Notice No E/E/T/PC3/41/2005 - Period Contract for the supply of Insulation Piercing Connectors**

This call for tenders, published in the Maltese Government Gazette on 3 June 2005, was issued by the Contracts Department following a request transmitted to the latter by Enemalta Corporation on 23 May 2005.

The closing date for this call for offers was 5 July 2005 and the global estimated value of the contract was Lm 53,718.

Five (5) different tenderers were considered to be suitable for further consideration.

Following receipt by the appellants of a formal notification (dated 1 February 2006 sent by the DG - Contracts) of the recommendations made by the Evaluation Board, Messrs Ragonesi & Co Ltd filed an objection on 14 February 2006, against the intended award of the said tender to Messrs Reactilab (Lm 39,612).

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 19.04.2006 to discuss this objection.

Present for the hearing were:

#### **Ragonesi & Co Ltd**

Mr Roberto Ragonesi  
Dr Franco Vassallo

Managing Director  
Legal Advisor

#### **Reactilab**

Mrs Maria Attard  
Dr Antoine Cremona

Managing Director  
Legal Advisor

#### **Enemalta Corporation**

Mr Godfrey Camilleri  
Mr Francis Darmanin  
Dr Damian Degiorgio  
Ing Mark Sciberras  
Ing John D Mizzi

Procurement Executive  
Head of Procurement  
Legal Advisor

Following the Chairman's brief introduction, Messrs Ragonesi & Co Ltd's legal representative was invited to explain the motive leading to appellants' objection.

Dr Franco Vassallo, started by stating that *Ragonesi & Co Ltd* filed their objection because the tender in caption was recommended for award to the second cheapest tenderer, namely, *Reactilab*, albeit his clients' offer was compliant to the tender's specifications and slightly cheaper.

Dr Vassallo said that when on 30 January 2006, Ragonesi & Co Ltd wrote to the Director General Contracts to clarify the matter, in the latter's reply dated 1 February 2006 the following was stated 'inter alia', namely:

*'Clause 25 of the General Conditions of the tender stipulates that payment to the contractor will be made 60 days after delivery of goods to Enemalta Stores where offers are made on a delivered to Stores basis.'*

*Your payment terms "Within – but not later than – 30 days from date of delivery of goods to your Stores" are in breach of clause 25 of the tender conditions.'*

*Moreover, the difference between the price of your tender and that recommended for award is so minimal that the extra 30 days credit would make the awarded tender cheaper.'*

Then, the appellants' lawyer made reference to clause 25 of the tender document which specified that:

*'Enemalta may insist that payment will be made to the Contractor by the Corporation within 90 days from Bill of Lading/Airway Bill date where offers are made on CFR basis, provided that goods are found to correspond to our order or within 60 days after delivery of goods to Enemalta Stores where offers are made on delivered to Stores basis, again provided that the goods are found to correspond to our order. Payment will be subject to any deductions to which the Contractor may become liable under the Contract.'*

Dr Vassallo contended that this condition did not stipulate that payment had to be made within 60 or 90 days after delivery to stores since it was only stated that Enemalta Corporation 'may insist' on the terms of payment. He claimed that where the Corporation wanted to specify a term of payment it did so, as was the case under Clause 27 wherein it was specified that *'Offers requesting payments by Letter of Credit or on Cash against Documents basis will only be considered for adjudication if they allow a Credit period of 90 days from Bill of Lading/Airway Bill Date – but payment will only be released by their Bank after presentation by Seller of Certificate issued by Enemalta confirming that goods received are to specification and funds can be released.'*

However, the appellants' lawyer argued that the tenderer's demands regarding the terms of payment were irrelevant because such terms would be subject to the terms specified under Clause 25. Dr Vassallo maintained that this was the interpretation of

Enemalta Corporation itself as had been the case in the past when Ragonesi & Co Ltd had successfully tendered with similar payment terms of 30 days from delivery of goods. As a matter of fact, back then, the Corporation always paid the Company within 60 days or even over 60 days. At this point Dr Vassallo produced a list of such instances as evidence. The appellants' lawyer was of the opinion that the decision made, apart from being mistaken, was misleading. He contended that the first paragraph in the DG Contracts' letter referred to earlier should be withdrawn because the tender conditions had been misinterpreted.

Dr Damian Degiorgio, Enemalta Corporation's legal representative said that Enemalta based its decision on what was offered by the bidders for this particular tender and did not take into consideration the latter's track record with the Corporation. He claimed that Ragonesi & Co Ltd did not give the discretion requested by Enemalta regarding the payment terms period. Dr Degiorgio explained that the difference in price between Ragonesi & Co Ltd's and Reactilab Ltd's offers was less than Lm3 and that both included a condition in their offers for payment to be effected within 30 days and 60 days respectively. He maintained that, after taking into consideration the very small difference in the prices offered and the interests payable by Enemalta on payments made after the 30 days credit terms, Enemalta arrived at the conclusion that it was in the best interest of the Corporation and public finance to accept the latter's offer as it was more advantageous.

Enemalta's lawyer said that the appellants' payment term '*Within – but not later than – 30 days from date of delivery of goods to your Stores*' was in breach of the tender conditions because Enemalta could not exercise its discretion to insist that payment be made in accordance with the provisions of clause 25.

In reply to a specific question by the PCAB, Mr Francis Darmanin, Head of Procurement at the Corporation, confirmed that payments were generally made within 60 days. He said that when this 60-day period was exceeded this was due to circumstances beyond one's control. Furthermore, he proceeded by stating that, with regard to the cases referred to by Dr Vassallo in his opening statement, Enemalta's tender conditions were the same and Ragonesi's offer was similar to this tender.

Dr Antoine Cremona, Reactilab's legal representative, explained that according to Clause 25 of the tender document, tenderers were obliged to submit two options to the effect that offers were to be made either on CFR basis or on delivered to Stores basis with payment terms of 90 days and 60 days respectively. Thus, he maintained that the appellants had submitted different payment terms when they demanded that payments had to be made '*within – but not later than – 30 days from the date of delivery of goods to your Stores.*' Dr Cremona argued that in the past Enemalta might have not considered the appellants' demand as a hurdle because it might be that the difference in prices was substantial. Also, he pointed out that each tender had to be considered on its own merits. Reactilab's lawyer said that the manner in which Ragonesi & Co Ltd's offer was submitted put Enemalta in a situation where it could never pay within 60 days. He maintained that it was incorrect to state that Reactilab's offer was chosen notwithstanding that it was not the cheapest because taking into consideration the very small difference in the prices tendered, the period allowed for payment and a charge

of 5% interest in late payments, Ragoni & Co Ltd's offer would result in it being more expensive.

Dr Cremona argued that on the basis of what was stated by the appellants' lawyer, namely that there were instances where Enemalta effected payments even after 60 days indicated that the Corporation was justified in its decision not to accept a tenderer who offered only a 30-day payment period instead of the requested 60 days. Also, Reactilab's lawyer contended that although the appellants' offer was cheaper, Enemalta reserved the right not to accept the cheapest offer.

Dr Cremona said that Dr Vassallo's argument would have been logical and correct had they did not submit a qualified offer because they would be accepting all conditions of tender including clauses 25 and 27.

During his intervention, Dr Cremona, on behalf of Reactilab, presented the PCAB and the other parties with a letter of reply dated 3 April 2006.

The only witness to take the stand in these proceedings was Mr Roberto Ragoni, who under oath, confirmed that although they always used the same phrase in their tenders, that is, '*payment within – but not later than – 30 days from date of delivery of goods at your stores*', Enemalta Corporation always paid them within 60 days or even over 60 days from delivery and no interest was ever requested or charged.

In his concluding remarks Dr Vassallo emphasised that the Corporation should be consistent, uniform and reasonable in its decisions because they had historical proof that Ragoni & Co Ltd were not in breach of the tender conditions because, in spite of the fact that his clients always requested payment terms of 30 days, Enemalta accepted their offers.

Dr Cremona said that the fact that in the past Enemalta did not take into consideration their demand regarding the 30-day payment terms was irrelevant because it was a well established point in public procurement legislation that every procurement process had to be evaluated and subsequently adjudicated on its own merits.

Dr Degiorgio concluded by stating that Enemalta Corporation based its decision on the conditions of this particular tender and Ragoni & Co Ltd's offer regarding the terms of payment was not submitted as requested by the Corporation.

All the parties involved agreed to submit, within one week, formal submissions to the Board. Furthermore, it was also agreed that such submissions had to be submitted in electronic format and to be duly exchanged amongst themselves via the same medium.

*As agreed, the parties concerned presented the following submissions for due consideration by this Board in its deliberation of the facts presented to it in verbal and written format during and after the hearing of the objection raised by appellants:*

*Submission presented by Mamo TCV Advocates*

The Board of Appeal  
(Department of Contracts)  
Floriana

25<sup>th</sup> April, 2006

In the records of the Appeal of the company Ragonesi & Co. Ltd  
(E/E/T/PC3/41/2005)

Note of submissions of Ragonesi & Co. Ltd;

The appellant makes reference to the submissions of Enemalta Corporation and of Reactilab, and submits as follows:

1. Contrary to what was said during oral submissions and to what is claimed from the note filed by the Corporation, it results that Ragonesi's hypothesis that there was no condition regarding the term for payment is the only reasonable interpretation, particularly in view of the fact that where the Corporation wanted to impose a term for payment it did so, as in Article 27.
2. It therefore results that the meaning of Article 25 of the conditions of contract is that the Corporation has the right to ("MAY") demand that payment be made within sixty (60) or ninety (90) days;
3. That since the correct interpretation of Article 25 is as explained above, an offerer's demands regarding to the period of payment is irrelevant since such term would in any case be subject to Article 25.

This hypothesis is supported by the following observations:

- if the arguments of Enemalta and Reactilab were correct, Ragonesi's offer would have been declared out of specification in its financial aspect

- Historically, whatever the offerer states, Enemalta never keeps to a fixed term for payment, as results from the documents exhibited and confirmed on oath
- Despite the fact that in its note of submissions Enemalta referred to these cases as “a superficial example”, it never denied that they were correct even though it has all the files and could have rebutted the appellant’s claims with a simple printout.

## **Conclusion**

The only argument which *prima facie* appears convincing is that Ragonesi & Co asked for payments to be made within thirty (30) days and so, in default of this, Enemalta could have incurred about fifty Maltese Liri (Lm 50) in interests in late payments. This notwithstanding, the apparent strength of this argument of potential financial harm wanes when one considers that Enemalta could have easily successfully rebutted this argument by arguing that, in line with the above-mentioned Article 25 it reserved the right to vary the term for payment as it always did in the past.

That, with due responsibility, the appellant submits that it results from the circumstances of the cases that the Corporations’ arguments to deny Ragonesi the tender award were all put forward “with hindsight”.

## **Franco Vassallo**

cc. client

Dr. D. Degiorgio

Dr. A. Cremona

*Submission presented by Ganado & Associates Advocates*

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3<sup>rd</sup> April 2006

**Director of Contracts**  
**Department of Contracts**  
**Notre Dame Ravelin**  
**Floriana**

Without Prejudice

Re: Letter of Objection filed by Ragonesi + Company Ltd. with respect to the call for tenders for the Supply of Insulation Piercing Connectors (E/E/T/PC3/41/2005).

I write on behalf of our clients Messrs. Reactilab (hereinafter called 'Reactilab'), and refer to the reasoned letter of objection dated 17<sup>th</sup> February 2006 filed by Messrs. Ragonesi + Company Ltd. (hereinafter called the 'Appellants') in response to the above-captioned call for tenders.

**Letter of Objection**

In their letter of objection the Appellants refer to Clause 25 of the General Conditions (Tender Dossier) published by the Contracting Authority and indirectly argue that the grounds for exclusion adduced by the Director General (Contracts) in the letter dated 1<sup>st</sup> February 2006 are invalid as *'nowhere in the tender document does it state that payment will be made within 60 days after delivery.'* In support of this allegation the Appellants refer to another contract where the Director General (Contracts) allegedly sanctioned their submission of different payment terms by issuing a Letter of Acceptance.

The Complainants further argue and subsequently conclude that *'a correct and logical interpretation of the tender conditions of this tender, concerning payment terms, should not have a bearing on the evaluation process.'*

Our clients strongly object to these conclusions and humbly submits that this approach to the construction, interpretation and adjudication of the tender documentation proposed by the Appellants is in reality completely illogical and unacceptable in a public procurement process.

Clause 25 of the tender dossier is in reality very clear and allows no room for different interpretations:

*“Enemalta may insist that payment will be made to the Contractor by the Corporation within 90 days from Bill of Lading/Airway Bill date where offers are made on CFR basis, provided that goods are found to correspond to our order or within 60 days after delivery of goods to Enemalta Stores where offers are made or delivered to Stores basis, again provided that the goods are found to correspond to our order. Payment will be subject to any deductions to which the contractor may become liable under the Contract.”*

Contrary to the letter of this clause, the Appellants stipulate different payment terms to the effect that payment has to be affected by the Contracting Authority to them as Contractors ‘*within – but not later than – 30 days from the date of delivery of goods to your Stores.*’ In real terms this shortens by half the credit period which the Contracting Authority was seeking in the tender dossier, when it requested that payment may be done as late as 60 days from the delivery to the Enemalta Stores.

The grounds adduced by the Director General (Contracts) for exclusion on this ground, are even more justified and reasonable when one considers the very small difference in the prices tendered. Indeed the price offered by Reactilab as the recommended bidder amounts to EUR 30,756 whereas the price tendered by the Appellants amounts to EUR 30,750. It is therefore only logical for even the slightest difference in the respective financial and economic packages submitted, to make the difference in the adjudication of the tender.

In this respect, one should also note that whereas the Appellants allege that Reactilab’s offer was chosen notwithstanding that it was not the ‘cheapest’ offer, this assertion is incorrect. Indeed, if one considers the difference in the period allowed for payment, i.e. 60 days compared to the 30-day period offered by the Appellants, the Appellants’ offer would result as more expensive, even with a basic interest rate of 5%.

### **Fire fighting tender**

In addition to the points mentioned above, the Appellants also argue that in the past, particularly in connection with the ‘*Fire fighting tender*’ the Contracting Authority instead of excluding the tender allegedly submitted with a similar 30-day payment period, accepted our offer and only later insisted to have a 60-day period.

It is a well established point in public procurement legislation however that every procurement process has to be evaluated and subsequently adjudicated on its own merits

and that past conduct of the contracting authority including the past exercise of discretion does not impinge on the substantive evaluation of subsequent calls for tender. It goes without saying therefore that particularly in view of the almost identical prices submitted, the Contracting Authority was entitled to consider even small differences between the offers submitted.

Finally, our clients strongly feel that the decision of the evaluation committees appointed by the contracting authorities in terms of the applicable public procurement legislation should only be disturbed by this honourable Appeals Board in circumstances where there has been a proven irregularity, manifest error of judgement or abuse of discretion. The burden of proving any such occurrence rests exclusively on the Appellants who have instead limited themselves to assert that in the past, the contracting authority has not refused tenders but has insisted in having the terms of the tender dossier incorporated therein.

In view of the above, the decision notified by the Director General (Contracts) to exclude the tender submitted by the Appellants should be confirmed and the costs of this appeal should be borne exclusively by the Appellants, particularly in virtue of the manifestly frivolous nature of this appeal.

Yours truly,

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Dr. Antoine Cremona LLD

## **Board of Appeals**

Department of Contracts

### **Submissions by Enemalta Corporation**

The tender in question relates to the provision of Insulating Piercing Connectors to Enemalta Corporation which issued a call for applications, which stipulates the following, among others, in the General Conditions Clause 25:

25. Enemalta may insist that payment will be made to the Contractor by the Corporation within 90 days from Bill of Lading/Airway Bill dayt wehre offers are made on CFR basis, provided that goods are found to correspond to our order or within 60 days after deliver of goods to Enemalta Stores where offers are made on delivered to Stores basis, again provided that the goods are found to correspond to our order. Payment will be subject to any deductions to which the Contractor may become liable under the Contract.

It results that Enemalta Corporation exclusively reserves the right to make, at its discretion, payment in the prescribed term/ period.

In its offer the appealing party stipulated that the payment had to be made ‘ within – but not later than 30 days from the date of Deliver of Goods at your Stores, at the same rate of exchange...’

It is right in terms of Commercial Obligations, that when an offer is accepted this constitutes a binding contract.

In the case in question it emerges clearly that the appealing party does not agree with the Corporation’s request, since it was seeking to deprive Enemalta the right which the same Corporation had reserved, that is, the right to insist that a payment be made in terms provided in the above mentioned Clause 25.

Had the Corporation accepted this offer contractually it would have been renouncing an important right it had reserved, so that as had been said the appealing party would have dishonoured the Corporation’s stipulation as in Clause 25 of the General Conditions of the contract in question.

Had Enemalta Corporation accepted this offer, the appealing party would have had the right to demand payment after the thirtieth day.

The violation of Clause 25 of the General Conditions affected directly the Financial Offer of Enemalta since one had to consider that the payment would have had to be made in a shorter time than that requested by the Corporation since Ragonesi & Company Ltd asked for payment in not later than 30 days.

This resulted that the offer had to be considered Lm52.25c Malta Liri (Lm13,200 x 4.75%/12) higher thus rendering the offer no longer an advantageous one.

Furthermore the Corporation would have had various payments to make in precise terms and when the Corporation asks for credit it does this trying to avoid having various payments due at the same time, and the bidder cannot oblige the Corporation to make payments on its terms.

Thus the Corporation Enemalta could not have accepted this offer from Ragonesi & Company Ltd, since Clause 25 of the General Conditions had not been observed by Ragonesi this having a direct impact on their offer making this a non-advantageous one.

In the end what is of utmost importance to Enemalta Corporation is that it chooses the most advantageous offer and above all the best one in the public's financial interest.

In this case Ragonesi & Company Ltd having omitted to observe the above mentioned condition, rendering their offer not the most advantageous, cannot expect Enemalta Corporation to accept their offer.

Enemalta insists that one cannot merely make comparisons to past cases without revising them in detail.

One has to take into consideration that the case in question is not only one where all the conditions have been observed but also that this rendered the offer not to be the most advantageous one.

That as has already been submitted, the action of the appealing party had a direct affect on the offer under consideration whilst in the cases referred to by Ragonesi all that was mentioned was that the bidder i.e. Ragonesi had made a similar offer with a 30 day term limit – the issue of the change in payment terms was never entered into iro whether this would have rendered Ragonesi's offer less advantageous than that of other bidders. In this case the changes in payment terms were taken into account.

One must consider that this case does not only constitute a breach in Tender Conditions but also one where the breach renders the offer no longer the most advantageous one.

That Ragonesi is pretending that because Enemalta had accepted such offers in the past from him it should continue to do so even though it would mean that the public would have to pay more.

The Corporation is confident that this appeal cannot be upheld since this would result in bidders can place offers as they see fit and be entitled to be awarded the contract in question without an accurate analysis of the changes (in payment) made subsequently – and this to the detriment of public finances.

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 appellants, in terms of their ‘reasoned letter of objection’ dated 17 February 2006 and also through their verbal and written submissions presented during and after the public hearing held on 19<sup>th</sup> April, 2006, had objected to the decision taken by the General Contracts Committee, formally communicated via a letter, informing them that the tender submitted by them was not successful;
- having considered the fact that Dr Franco Vassallo stated that *Ragonesi & Co Ltd* filed their objection because the tender in caption was recommended for award to the second cheapest tenderer, namely, *Reactilab*, albeit, in his opinion, his clients’ offer was compliant to the tender’s specifications and slightly cheaper;
- having also noted that the Director General Contracts wrote to appellants stating ‘inter alia’ that their payment terms were in breach of clause 25 of the tender conditions as these stipulated that payment had to be made “*Within – but not later than – 30 days from date of delivery of goods to your Stores*”;
- having, yet, also considered Dr Vassallo’s contention that payment conditions did not stipulate that payment had to be strictly made within 60 or 90 days after delivery to stores but that Enemalta Corporation stated in the tender document that it ‘may insist’ on the terms of payment;
- having also considered Dr Vassallo’s remark regarding the fact that where the Corporation wanted to specify a term of payment it did so;
- having taken cognizance of Enemalta Corporation’s legal representative claim that the Corporation based its decision on what was offered by the bidders for this particular tender and did not take into consideration the latter’s track record with the Corporation;
- having also noted Dr Degiorgio’s claim that *Ragonesi & Co Ltd* did not give the discretion requested by Enemalta regarding the payment terms and that the appellants’ payment term ‘*Within – but not later than – 30 days from date of delivery of goods to your Stores*’ was in breach of the tender conditions because Enemalta could not exercise its discretion to insist that payment be made in accordance with the provisions of clause 25;
- having heard Mr Francis Darmanin, Head of Procurement at the Corporation, confirming that payments were generally made within 60 days and that with regard to the cases referred to by Dr Vassallo in his opening statement,

Enemalta's tender conditions were the same and Ragonesi's offer was similar to this tender;

- having taken into consideration Dr Cremona's intervention regarding the fact that according to Clause 25 of the tender document, tenderers were obliged to submit two options to the effect that offers were to be made either on CFR basis or on delivered to Stores basis with payment terms of 90 days and 60 days respectively, maintaining that the appellants had submitted different payment terms when they demanded that payments had to be made '*within – but not later than – 30 days from the date of delivery of goods to your Stores.*';
- having assessed the point made by Reactilab's legal advisor as regards the fact that the appellants had submitted a qualified offer;
- having examined Mr Ragonesi's and Dr Vassallo's claim that the Corporation should be consistent, uniform and reasonable in its decisions and not accept certain terms and conditions when it deems fit, claiming in the written submission that, "historically, whatever the offerer states, Enemalta never keeps to a fixed term for payment";
- having also assessed Dr Cremona's counter-claim which placed major emphasis on the fact that albeit, in the past, Enemalta Corporation did not negatively consider the appellants' '30-day payment terms', yet this was irrelevant because it was a well established point in public procurement legislation that every procurement process had to be evaluated and subsequently adjudicated on its own merits;
- having noted the Corporation's legal advisor's point raised in his written submission relating to the fact that "Enemalta Corporation exclusively reserves the right to make, at its discretion, payment in the prescribed term/ period".

reached the following conclusions:-

1. The Adjudication Board may have not followed the awarding criteria of other adjudicators in similar tenders in the past as regards the strict adherence to payment terms conditions as stated in the tender document. However, in this case it seems that, because the offers were very close, it was deemed pertinent to consider each potential cost saving resulting in due consideration being given to an issue which in the past did not give rise to any concern.
2. This Board may agree with the Adjudication Board's mode of deliberating in this particular instance, or it may not, but, undoubtedly, this Board reserves the right to categorically claim that inconsistency does not provide comfort to one and sundry.
3. This Board feels that it should rely on points of law rather than arbitrary points of fact which may have been applied in a different manner on different

occasions over which this board had not been called upon to examine all the facts and much less deliberated upon, and as a result it decides to remain consistent with tender conditions for the sake of the same transparent and consistent 'modus operandi' it always advocates and expects adjudicating boards to follow.

Consequent to (1) to (3) above, the Board upholds the decision taken by the Contracts Committee.

In view of the possibility that the inconsistent manner that the Adjudication Board may have been seen to follow, this Board feels that, in this case, the appellants were not acting frivolously in submitting their objection. As a consequence, in terms of the Public Contracts Regulations, 2005, this Board recommends that the appellants should be reimbursed with 70% of the original deposit paid to lodge this claim.

**Alfred R Triganza**  
Chairman

**Anthony Pavia**  
Member

**Edwin Muscat**  
member

*May16, 2006*