

PUBLIC CONTRACTS APPEALS BOARD

Case 77

E/E/T 16/2005 – CT 2191/2005: Tender for the Supply of SHUNT REACTORS for the New Mosta Distribution Centre

This call for tenders, published in the Maltese Government Gazette on 18.03.2005, was issued by the Contracts Department following a request transmitted to the latter on 01.03.2005 by Enemalta Corporation.

The closing date for this call for offers was 26.04.2005 and the global estimated value of the contract was Lm 210,000.

Three (3) tenderers submitted five (5) different offers.

Following the publication of the *Notification of Recommended Tenderers* dated 08.03.2006, and the fax dated 15.03.2006 which transmitted to them by DG Contracts in which they were told that according to their records “*Messrs Areva were unable to keep the prices in their offer valid due to the huge increase in material prices in the world markets*”, Messrs *Ragonesi & Co Ltd on behalf of their principals Areva T&D* filed an objection on 28.03.2006 against the intended award of the said tender to Messrs *JRD Systems on behalf of their principals Siemens AG* (Lm 330,210.04).

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 03.05.2006 to discuss this objection.

Present for the hearing were:

Ragonesi & Co Ltd as agent of Areva T&D

Mr Jan Prins	Sales and Project Manager – Areva T&D
Mr Roberto Ragonesi	Managing Director
Dr Franco Vassallo LLD	

JRD Systems Ltd on behalf of their principals Siemens AG

Mr John Sullivan	Managing Director
Mr Christopher Cassar Torreggiani	
Dr Francesco Depasquale LL.D.	
Mr Lawrence Mizzi	

Enemalta Corporation

Mr Joseph Scicluna	Manager Development
Mr Joseph Danastas	Member, Adjudication Board
Mr John Caruana	Member, Adjudication Board

After the Chairman's brief introduction, the representatives of *Ragonesi & Co Ltd as agent of Areva T&D A.S. – Turkey* were invited to explain the motive of their objection.

During the proceeding it was established by the legal representatives of the tenderers concerned, namely Dr Franco Vassallo and Dr Francesco Depasquale, that an objection could be filed by a third party on behalf of a bidder provided that the former had the necessary mandate from the latter. In this case, Ragonesi & Co Ltd filed the objection as agents of Tenderer No 2: Areva T&D A.S - Turkey.

Dr Vassallo, the appellants' legal representative, started by stating that the closing date of tender was 26 April 2005 and that the validity period of six months expired on 26 October 2005. He pointed out that on 10 November 2005, that is, after the expiry date, Enemalta asked his client to extend their offer until the 17 January 2006. Dr Vassallo maintained that Areva T&D agreed to extend their offer as requested, however, they informed Enemalta that they were increasing the price of their original offer by about 3% due to an increase in the cost of raw materials, namely steel, copper and fuel. The appellants' lawyer said that, subsequently, the contract was recommended for award to Siemens AG whose tender was Lm 57,000 more expensive than that of his clients' offer and this inclusive of the 3% increase. He claimed that on asking why Areva T&D's offer was not successful, they were informed that their failure to keep the price as originally offered had effectively disqualified them.

Dr Vassallo insisted that this decision should be quashed in view of the fact that the requested increase in price was justified and, also, in consideration of the fact that they were not bound by the price variation formulae. Furthermore, he said that Enemalta were obliged to adhere to the validity period of the tender and to inform bidders about the reasons for requesting an extension.

Mr Joseph Scicluna, Manager Development, explained that Enemalta Corporation received five (5) offers from four (4) bidders, namely, Tenderer No 1 Areva T&D through their local agent Ragonesi & Co Ltd, Tenderer No 2 Areva T&D who submitted two alternatives (the only difference was in the delivery conditions because one was delivery to site and the other delivery to Malta), Tender No 3 Siemens PTD (Germany) through their local agent JRD Systems Ltd and Tenderer No 4 ABB OY Transformers through their local agent E Calleja & Sons. He said that on 1 September 2005, during the adjudication process, queries regarding the technical specifications were sent to all tenderers. On 12 October 2005 more queries/clarifications were sent to Tenderer Nos 1, 2 and 3 wherein they were asked to specify the maximum 3 seconds short circuit withstand of the reactors during a fault.

On 18 October 2005, Ragonesi & Co Ltd replied for Tenderer Nos 1 and 2 but, instead of specifying the current value that the reactor could withstand, they only confirmed that there would be a current flow through it. Thus, the matter was referred back to Ragonesi & Co Ltd and on 28 October 2005 (after the closing date of the validity of the tender) they informed Enemalta that the validity for offer by Tenderer No 1 had expired and that Areva T&D were unable to keep the prices of their original offer due to huge increase in prices. Mr Ragonesi also wrote that there was no scope in providing the information requested. Mr Scicluna said that as a consequence, this

offer could not be considered any further and so the Adjudication Board passed on to evaluate the next cheapest offer submitted by Tenderer No 2 Areva T&D. However, he said that this tender could not be recommended for acceptance because both alternatives were not according to specifications as the withstand current of the reactor was less than the current flowing through the reactor in case of a fault on the system and therefore it could not withstand the fault level of the system.

Mr Joseph Danastas, a member of the Adjudication Board, pointed out that the appellants' offer was not accepted either because of the 3% increase in price or due to the validity of the tender or because of the fact that the reactors offered were not suitable for the system due to low short time withstand rating. In the report the reason given was that *'The maximum three seconds withstand neutral earth-fault current as 1.5 x In (which is 1.5 x 210A = 315 Amps). This value of permissible neutral fault current is below the calculated value in Appendix 1'* wherein it was indicated that the equivalent 3-second rating was 694 Amps.'

At this point, Dr Vassallo intervened by stating that there was no communication from Enemalta or the Director General Contracts which indicated that Areva T&D were disqualified because of the specifications. He clarified that when on 14 March 2005 Ragonesi & Co Ltd on behalf of their principals Areva T&D specifically requested the Director General Contracts *'to clarify why their 3 offers, which were all cheaper than those of Siemens, were not recommended'* the official reason given on 15th March 2006 was that *'According to our records Messrs Areva were unable to keep the prices in their offer valid due to the huge increase in material prices in the world market.'*

In reply to a specific question by the PCAB, Mr Danastas said that although the short time withstand requirement of the reactor was not directly stated in the specifications, yet, it could be obtained from the information/details available under clause 6.01 *GUARANTEE SCHEDULE – Specific conditions under Network-system conditions* which referred to the conditions under which the reactors were going to operate. Mr Scicluna maintained that Areva T&D had sufficient information to design their shunt reactors to withstand the fault levels of the system and that they provided drawings showing where the reactors were going to be installed on their system.

On cross-examination by the PCAB, Mr Scicluna declared that, even if the appellants' offer was according to specifications, Enemalta would still not be in a position to consider their tender because tenderers were not permitted to change their tendered prices after the opening of tenders. With regard to the expiry date of the tender, he said that this might have happened because they were more concerned with the technical rather than the legal and the financial aspects of the tender. Here, his attention was drawn by the PCAB that they should have taken into consideration every phase of the tender. Also, Mr Danasatas admitted that they made a mistake for not asking the bidders to extend the validity of their offers before the expiry date.

Mr Jan Prins, Sales and Project Manager of Areva T&D, was the only witness to take the stand in these proceedings and on cross-examination by Dr Vassallo, the witness said that in reply to Enemalta's technical questions he confirmed that Areva T&D *'can supply the reactors with PFisterer 828.103.400 connection'* and that their *'reactors are able to withstand 1.5 x In (normal current) during maximum three*

seconds'. Mr Prins said that the fault current that could flow through the reactor depended on the network voltage and not on the network current. He insisted that in order to withstand a current flow of 694Amps the shunt reactor would need to be 55/60kV and not 33kV.

At this point, Mr Scicluna clarified that when they made use of the fault analysis software it showed that for a phase to earth fault close to the distribution centre the current that would flow through the reactors would be 694 Amps.

In the final submissions, Dr Francesco Depasquale, legal representative of JRD Systems Ltd on behalf of Siemens JRD, said that Enemalta had every right to continue discussing the offers with the bidders after the expiry date of the tender.

Mr Scicluna said that Tenderer No 2 could not be accepted because the reactors offered were not suitable for their system and also because they could not accept changes in prices at that stage.

Dr Vassallo insisted that Enemalta Corporation was obliged to ask the tenderers to extend their offers before and not after the closing date of the validity of the tender. He contended that, legally, the procedure followed rendered the whole process null. Moreover, the appellants' legal representative claimed that he failed to understand why his clients were requested to extend their offer when, according to Enemalta's representatives, their offers were not according to specifications. He maintained that they were not in a position to defend their case because it was during this public hearing that Areva T&D were informed that they were not up to specifications. Also, he reserved the right to contest the specifications and to be provided with the report because they did not know whether the other tenderers were up to specifications or not. As regards the prices, Dr Vassallo pointed out that these were changed after the expiry date of the tender.

Finally, Mr Scicluna clarified that when Tenderer No 2 Areva T&D was asked to extend the validity Enemalta did not know yet that their reactors were not suitable for their system.

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 04.04.2006, and also through their verbal submissions presented during the public hearing held on 03.05.2006, 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 both (a) the appellants' comment regarding the fact that, albeit the closing date of tender was 26 April 2005 and the validity period of six months had expired on 26 October 2005, yet Enemalta Corporation, on 10 November 2005, i.e. after such validity period had lapsed, asked them to extend their offer until 17 January 2006, as well as (b) the appellants' remark

regarding the fact that Enemalta Corporation were obliged to adhere to the validity period of the tender and to inform bidders about the reasons for requesting an extension;

- having also noted that appellants had originally been informed by the Department of Contracts that their failure to keep the price as originally offered had effectively disqualified them;
- having also considered the fact that Messrs Ragonesi & Co Ltd had informed Enemalta on 28 October 2005, that the validity for offer by Tenderer No 1 had expired and that Areva T&D were unable to keep the prices of their original offer due to huge increase in prices;
- having taken cognizance of (a) Enemalta Corporation's representatives, namely Messrs Scicluna and Dalmas respectively, who testified that both offers submitted by Areva were not according to specifications as the withstand current of the reactor was less than the current flowing through the reactor in case of a fault on the system and therefore it could not withstand the fault level of the system, as well as (b) Mr Prins' counter arguments in regard;
- having also examined the appellants' legal representative's observation that not only there was no communication from Enemalta or the Director General Contracts which indicated that Areva T&D were disqualified because of the specifications but the sole reason given to his clients was that according to their records "*Messrs Areva were unable to keep the prices in their offer valid due to the huge increase in material prices in the world market*";
- having also taken note of the appellants' claim that they were not in a position to defend their case because it was during this public hearing that Areva T&D were informed that they were not up to specifications;
- having also given due consideration to both (a) Mr Scicluna's remark regarding the fact that the disregard by the Corporation of the expiry date of the tender was largely attributable to the fact that they were more concerned with the technical rather than the legal and the financial aspects of the tender and (b) Mr Danasatas' admittance that they most probably made a mistake for not asking the bidders to extend the validity of their offers before the expiry date;
- having further noted that, in the final submissions, Dr Depasquale, said that Enemalta had every right to continue discussing the offers with the bidders after the expiry date of the tender;

reached the following conclusions:-

1. The PCAB feels that, although the appellants, together with their principals, may have, perhaps knowingly, reacted in a non-collaborative manner, yet they simply exercised their commercial acumen within the time frame envisaged by the same tender and, as a consequence, did not contravene any terms and conditions stipulated in the same tender document.

2. The admittance by the Corporation's representatives that during the evaluation stage, the Corporation may have, albeit not deliberately, (a) made a mistake for not asking the bidders to extend the validity of their offers before the expiry date and (b) been more concerned with the technical rather than the legal and the financial aspects of the tender, provides no comfort to this Board that the beneficiary's evaluators were in the circumstance fully conversant with their task.
3. This Board expresses concern about the fact that a tenderer could be disregarded from being further considered in any call for offers, for, inter alia, a major issue, but then, this same tenderer is subsequently informed in a formal manner, that his or her offer could not be considered anymore for a reason or reasons which do not reflect the same motive.
4. The PCAB feels that, albeit not done so in a deliberate manner, yet the adjudication process followed in this particular tender may have somehow been vitiated and, possibly, disadvantaged one or more parties participating in this call for offers.

Pursuant to (1) to (4) above this Board finds in favour of the appellants and recommends that this tender be nullified and re-issued.

In view of the above and 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

May30, 2006