

PUBLIC CONTRACTS APPEALS BOARD

Case No. 113

Advert No TD/T/PC/3/90/2006; CT 2218/2007 and E/E/T/42/1-1/05 Tender for the Supply of Galvanised Steel Poles

This call for tenders was published in the Maltese Government Gazette and the European Communities' Official Journal on 23.03.2007 and was issued by the Contracts Department following a request transmitted to the latter on 05.09.2006 by Enemalta Corporation.

The closing date for this call for offers was 29.05.2007 and the estimated three-year contract value was Lm 1,035,750.

Nine (9) different tenderers submitted their offers.

Following the decision taken by the General Contracts Committee (GCC) not to allow the appellants' offer to continue to be considered in the ensuing stages of the adjudication process in view of the fact that the former claimed that the said offer was "adjudicated as not complying with the tender specifications because the size of the compartment door is 400 x 85mm instead of 400 x 100mm as required", on 09.10.2007 Messrs JP Baldacchino & Co. Ltd submitted an objection on behalf of their Turkish principals, namely MITAS, claiming that their submission for this tender was being disqualified for reasons which were not valid.

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 31.10.2007 to discuss this objection.

Present for the hearing were:

JP Baldacchino & Co. Ltd:

Mr. Anthony Baldacchino	Representative
Dr. Patrick J. Galea	Lawyer

Adjudication Board:

Ing. Mark Sciberras	Head, Adjudication Board
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Department of Contracts:

Mr. Francis Attard	Director General (Contracts)
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The Chairman PCAB gave a brief introduction to those present relating to the objection under review following which he invited Mr. Anthony Baldacchino, representing Messrs JP Baldacchino & Co. Ltd, the appellants, to take the floor.

Mr. Baldacchino explained that the service compartment in the poles is like a small window, about two metres above street level, through which the wires are inserted in the poles which are mainly used for street lighting.

He claimed that the disqualification has resulted from a typographical error, featuring on the drawings of the said type 'B' poles wherein these were shown on the drawing as 400 x 85mm instead of 400 x 100mm as requested.

The appellants claimed that this is a clear typographical error as the declaration by the suppliers on page 17 out of 23, paragraph 3.10.4 of *Schedule A: Technical Requirements*, clearly affirms that the size of the service compartment is 400mm high x 100mm wide.'

Mr. Baldacchino stated that as soon as his Company received the letter from the Director General, Contracts Department, they wrote to Enemalta Corporation to verify that this is a typographical error as the signed declaration carries the correct specifications of the service compartment of poles 'B'.

At this point, those present were further informed by the appellants' representative that on the 8th October 2007, the Corporation's Chairman wrote to the appellant Company stating that:

“Two of the drawings refer to the type B 'single arm' and type B 'double arm' poles, and in both drawings the dimensions of the compartment are shown as 400 x 85 mm. These drawings are checked and approved by different persons to the person who actually made the drawing and if these dimensions were 'typographical' errors they would have had to pass through three stages (the draughtsman who made the drawing, the checker and the approver of the drawing.) It is thus not considered credible that this was a typographical error. A properly executed drawing is considered to be an accurate representation of the finished product, which was thus not to specification.”

Mr. Baldacchino remarked that Enemalta Corporation seems to have overlooked the determining factor which is the binding document, namely *Schedule A – Technical Requirements Para. 3.10.4*, wherein there is the answer to the question 'dimensions of service compartment for type B – 400 mm high x 100mm wide.' The answer to that question is 'Yes'.”

On the assumption made by the Corporation's Chairman as stated in the same correspondence, Mr. Baldacchino argued that the Corporation's Chairman's description regarding the checking procedures in connection with the drawings adopted by MITAS, was highly arbitrary and a simple personal viewpoint which is based on an assumption solely made by the same Chairman.

Mr. Baldacchino drew the attention of those present that apart from the fact that MITAS had, on two previous occasions, supplied galvanised steel poles to Enemalta

Corporation, more recently, they had also delivered 60% of all the steel poles erected in the north of Malta.

Mr. Baldacchino stated that MITAS had drawn up two documents. In the first submission they drew up drawings featuring poles 'B' with a service compartment measuring 400 x 85 mm. The appellants' representative admitted that these measurements were incorrect as these pertained to poles 'C'. However, he also stated that in the signed declaration in *Schedule A*, MITAS agreed to submit poles 'B' with the requested measurements and specifications, that is, 400 x 100mm.

As a consequence, Mr. Baldacchino argued that in the e-mail, previously referred to, which was sent by the Corporation's Chairman, it is clear that the latter is incorrect when stating that 'in both drawings the dimensions of the compartment are shown as 400 x 85mm.' as MITAS had signed a declaration, as found in *Schedule A*, wherein it is stated that they shall provide type 'B' poles whose compartment dimensions would be 400 x 100mm.

According to the appellants' representative, all that was being discussed in the hearing could have easily been discussed during the adjudication stage in the form of a clarification as suggested in the first page of his Company's submitted tender document, wherein it is stated that:

'in the event that any data submitted is not clear or different from the data provided, kindly liaise with us since human error is always possible.'

At this point, Engineer Mark Sciberras, Head of the Adjudicating Board, was asked to elaborate further on issues considered pertinent to the said proceedings.

Mr. Sciberras explained that the Corporation asks suppliers to fill in both *Schedules A* and *B* respectively. He commented that MITAS committed themselves to both Para. 3.10.4 of *Schedule A* and to Para. 5.4. of *Schedule B*. He remarked that in the appellants' main offer the drawing did not corroborate with signed declaration.

The PCAB intervened to ask Mr. Sciberras why nobody from the Corporation decided to contact the appellant Company to clarify the discrepancy between the drawings and the signed declaration. The PCAB also remarked that, in not doing so, the Adjudicating Board could have lessened the extent of a potential wider choice available to the Contracting Authority, when, as it seems to be the case, the said Board decided to eliminate a bidder without first getting clarifications on the offer submitted, noting that this could have resulted in a more cost effective and pragmatic option. Also, such a decision, namely not to seek clarification from appellant Company, tends to become a more erroneous one, especially when this was taken without at least seeking advice from the Contracts Department with regards to the appropriate 'modus operandi' to follow in similar circumstances wherein there were two official documents with contradictory information. Considering this anomalous scenario, the PCAB queried, how was it possible for the Adjudicating Board to choose to discard the tender before clarifying which version was correct?

At this point Mr. Sciberras remarked that, had the Adjudicating Board contacted JP Baldacchino & Co. Ltd, such action could have been interpreted as a negotiation

with the bidder. The PCAB replied by stating that this is a 'clarification' and not a 'negotiation'.

Prior to bringing this hearing to a close, the PCAB asked the appellants' representative whether he was in a position to confirm if, in the event that MITAS were to be reinstated, will they be in a position to deliver poles 'B' with the requested compartment measurements, namely 400 x 100mm. Mr. Baldacchino replied affirmatively.

At this stage the public hearing was brought to a close and the PCAB proceed with the deliberation before reaching its decision.

This Board,

- having noted that the appellants, in terms of their 'motivated letter of objection' dated 10 October 2007, and also through their verbal submissions presented during the public hearing held on the 31 October 2007, had objected to the decision taken by the General Contracts Committee;
- having considered the fact that according to the appellant Company the disqualification had resulted from a typographical error;
- having noted the point raised by Enemalta Corporation's Chairman in his email to the appellant Company;
- having also noted that the appellants had, on two previous occasions, supplied galvanised steel poles to Enemalta Corporation;
- having reflected on the point raised by the appellant Company, namely that what was being discussed in the hearing could have easily been discussed during the adjudication stage in the form of a clarification process;
- having also re-considered its opinion already voiced during the same hearing;

reached the following conclusions, namely

1. the PCAB fails to understand why the Adjudicating Board decided to discard the appellants' offer before clarifying which version was correct given that each of the different versions carried more or less equivalent weight in terms of the Tender Document.

As a consequence of '1' above this Board finds in favour of appellants and recommends that the offer submitted by the appellant Company should be re-instated for further analysis along with the rest of the previously accepted offers.

Furthermore, in view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit paid by the appellants should be refunded.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

26 November 2007