

After the Chairman PCAB's brief introduction, Mr Alan Abela (Managing Director), representing the appellants, namely, Engenuity Ltd, started his submission by stating that his Company provided two different 'models' or 'options' for the supply and installation of air conditioning equipment at Wards 7 and 8, St Vincent de Paule Residence.

The same appellants' representative said that the reasons his Company was officially given for both its options being rejected, which were cheaper than the offer submitted by the recommended tenderer, namely, Titan International Ltd, were that the units offered under *Option 1* were not 'inverter driven' and those offered under *Option 2* operated on a 'single phase' power supply instead of on a 'three phase' power supply as requested in the tender dossier.

Mr Abela contended that the tender document did not specify that the required air conditioning units had to be 'inverter driven'. He claimed that his Company had identified an anomaly in the tender documentation because the specifications indicated that the items requested had to be 'split type' heat-pump air-conditioning units while the heading of the Bills of Quantity *Item B* called for '*Variable Refrigerant Volume Heat Pump Units*.' He explained that 'Variable Refrigerant Volume' (VRV) was a system which consisted of a single outdoor unit and multiple indoor units and that these were not 'split type' units. He claimed that the VRV was proprietary of *Daikin* and that none of the tenderers had offered the requested product.

Replying to various questions made by the PCAB, Mr Abela insisted that any reference made to VRV could never be interpreted to mean 'inverter-driven' and that in the tender specifications no reference was made to 'inverter-driven'. The appellants' representative confirmed that he was conscious that he could not submit such a brand. He said that his Company did not complain with the Department of Contracts before the closure of the tender and instead opted to make an offer because they thought it was an oversight. At this point, the PCAB remarked that in such instances the attention of the Department of Contracts should have been drawn immediately because the tender document can only be amended at the tendering stage and not after the whole tendering and adjudication process are completed.

Mr Abela contended that from a technical viewpoint, the reason given for the disqualification of their second option was not valid since 'single phase' equipment could be operated on a 'three phase' electrical supply without the need for any alteration or modification. However, he acknowledged that the client had requested three phase units.

At this point, the PCAB called Engineer Brian Cauchi, a member of the Adjudication Board, to take the witness stand.

On cross examination by the PCAB, the witness declared that the Board's decision was unanimous and that the specifications were drawn by Mr George Cutajar, another member of the Adjudication Board. He said that the description given in the BOQ was '*SUPPLY, INSTALLATION AND COMMISSIONING OF BELOW SPLIT TYPE VARIABLE REFRIGERANT VOLUME HEAT PUMP UNITS*'. Mr Cauchi pointed out that all tenderers, including the appellants, understood that they had to provide 'inverter' type split units. He confirmed that VRV was a patent for a system and that it was developed by *Daikin* (locally represented by *Medairco*).

At this stage, the PCAB remarked that if this was accessible for one company only then such tender should not have been issued. It was also pointed out that in public procurement there should not be specifications where companies, entities, brands etc would seem to have a privilege over others or where other prospective tenderers would be precluded from participating. Ing Cauchi intervened and declared that the Department was not after a 'particular product' but after a 'system'. He emphasised that VRV was the name of a 'system' and not a trade name of a product.

When the PCAB asked the witness to state whether other companies were in a position to offer such a 'system', the reply given was that all participants, including *Engenuity Ltd.*, the appellants, and *Titan International Ltd.*, i.e. the recommended tenderer, offered what was requested. He went on to reiterate that everybody understood that they wanted 'inverter driven' units including the appellants.

Mr Alan Abela intervened by expressing his disagreement with Mr Cauchi's point of view, insisting that none of the units offered, including his offer, were compliant with the tender specifications as these were not 'Variable Refrigerant Volume' or 'Variable Refrigerant Flow' and that all offers submitted were 'inverter driven'. Mr Abela presented two documents of *Hitachi* air conditioning products – 'DC Inverter' (Split System) and 'VRF'. He said that *Titan Interantional Ltd* offered the 'Utopia DC Inverter'. Engenuity Ltd's representative pointed out that 'split unit' was not equivalent to VRV because these were completely two different systems. He explained that they had offered two options - a split unit with inverter and another split unit without inverter and both were not VRV. Mr Abela said that they had submitted these two options because they were the only ones that existed on the market.

Eng Cauchi remarked that in the BOQ it was indicated that they required 'split units'. He said that 'split units' with inverter driven compressors were more expensive than those without inverter driven but in the long term the former were more economic than the latter.

On further cross examination by the PCAB, the witness declared that the other offers of the other bidders were also analogous with the system. Mr Cauchi claimed that the appellants' Option 2 was compliant with the system but not as far as the electrical supply was concerned. He also declared that the Adjudication Board had selected the third cheapest compliant offer which was submitted by *Titan International Ltd.* He confirmed that if the units offered under Option 2 had operated on a three phase power supply they would have recommended such offer because it was the second cheapest and compliant with the system.

With regard to the three phase power supply (appellants' Option 2), Mr Cauchi sustained that clause 1.12.1 of the tender specifications clearly specified that '*All units shall require a three-phase 415V*'. He claimed that the tender was not issued solely for the purchase of air conditioning equipment but also for the electrical installation to cater for the air conditioning units that were to be supplied and installed. He remarked that the client wanted a three phase electrical supply.

Mr Abela intervened to claim that such units were also available in three phase configuration and therefore, had his firm been asked to clarify, they would have met

such requirement. The PCAB said that, in this instance, there was no need for clarification because the specific requirement was clearly indicated in the tender document and the tenderers were obliged to offer what was required. The units offered in the tender were clearly 'single phase' and there was no ambiguity which could have prompted a request for clarification by the department.

Dr Louis Thompson, legal representative of *Titan International Ltd*, said that legally the issue of patent was delicate and therefore it was imperative to establish how *Daikin's* trade mark was exactly registered. He pointed out that the words used in the BOQ were not always *Variable Refrigerant Volume* but also *Split Type Variable Refrigerant Heat Pumps* (Summary of BOQ). He claimed that although it had not been proven how the trade mark was registered they were assuming that the patent was *Variable Refrigerant Volume*. Here, Mr Cauchi intervened by stating that other companies could not use such words. Furthermore, in reply to a specific question by the PCAB, Mr Abela said that the only evidence he had that VRV was registered was a document which he downloaded from *Daikin* website. He declared that other manufacturers could not use the words *Variable Refrigerant Volume* in their literature.

Continuing, the recommended tenderer's lawyer said that during the proceedings it resulted that all tenderers, including *Engenuity Ltd*, understood that reference was made to 'Split Type Inverter Driven System' so much so that even the appellants had offered such a system in Option No 2. Dr Thompson argued that, on the basis of the appellants' arguments, if it was understood that the call for tenders was issued solely for the *Daikin* System, then the appellants were expected to protest or to contact *Daikin* or even not to participate at all.

Dr Thompson said that it was established that the appellants did not present a product of *Daikin* but presented a product which was 'inverter driven' but which operated on a 'single phase electrical supply'. He maintained that if the units offered under Option 2 operated on 'three phase power supply' their bid would have been recommended for award because the units offered were 'inverter driven' and the cheapest. The recommended tenderer's legal representative maintained that, by their own arguments, *Engenuity Ltd* were implicitly conceding that, although the words used in the tender document were not 'inverter driven', the sense everybody understood, including the appellants, was that the Department required 'inverter driven' units.

The lawyer said that whilst the tender document was clear, yet, he pointed out that if the contents of such document seemed ambiguous, Clause 13 of the same document specified that any questions had to be submitted in writing sixteen (16) days before closing date and were to be addressed to the Director General, Contracts Department. Thus, Dr Thompson maintained, that this was not the appropriate forum and time where and when such queries should be raised. He was sure that if the appellants' Option 2 offer had a 'three phase power supply' and, as a result, the firm would have won the tender, the appellants would not have protested!

With regard to the 'three phase electrical supply', Dr Thompson claimed that the specifications were clear and the fact that the appellants offered units that operated on a 'single phase electrical supply', implied that the appellants were not compliant.

Mr Kevin Portelli, intervening on behalf of *Titan International Ltd* claimed that in issues concerning 'refrigeration', the mentioning of 'Variable Refrigerant' implied

that one would be referring to an 'inverter system' because, in such a system. the flow of refrigerant would vary according to the compressor's speed.

On his part, Mr Abela sustained that the *Hitachi* documentation exhibited during these hearing showed that the 'Variable Refrigerant Flow' air conditioning system was completely different from an 'inverter driven' system.

Mr Cauchi confirmed that an 'inverter driven' compressor varied the speed and the refrigerant flow and that it was more economical to run. He acknowledged that VRV was a 'system' and not a 'split unit'. Mr Cauchi reiterated that the Department wanted 'split units'.

However, Mr Abela insisted that VRV or VRF Split Unit did not exist. Dr Thompson said that when a 'split type' was requested, by definition, the VRV was being excluded.

The PCAB pointed out that when the appellants noticed that the specifications were anomalous, they were obliged to draw the attention of the Department of Contracts to remedy the situation by amending the specifications or else to consider the issue of a fresh call. Tenderers, argued the PCAB, should not be afraid to challenge the system.

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 22.12.2007, and also through their verbal submissions presented during the public hearing held on the 16.04.2008, had objected to the decision taken by the General Contracts Committee;
- having considered the fact that the appellants provided two different 'models' or 'options' for the supply and installation of air conditioning equipment at Wards 7 and 8, St Vincent de Paule Residence, which 'options' were both rejected by the Adjudication Board in view of the fact that the units offered under *Option 1* were not 'inverter driven' and those offered under *Option 2* operated on a 'single phase' power supply instead of on a 'three phase' power supply as requested in the tender dossier;
- having noted the divergent opinions as regards references made to 'trade marks' rather than 'systems' as well as specific references to 'units' offering a 'Variable Refrigerant Volume' or 'Variable Refrigerant Flow' and being 'inverter driven';
- having heard Engineer Cauchi confirm that, whilst it is a fact that 'VRV' was a patent for a system and that it was developed by *Daikin*, yet, in the trade it was common knowledge that this was predominantly a reference made to a 'system' rather than a 'trade name';

- having also heard Engineer Cauchi maintain that the Department was not after a ‘particular product’ but after a ‘system’;
- having also noted the fact that, during the public hearing, after having heard the appellants’ representative confirm that he was conscious that he could not submit such a ‘brand’, the latter also continued by stating that, in the circumstance, his Company did not complain with the Department of Contracts because they thought it was an oversight and, nonetheless, had decided to submit their bid;
- having also taken cognizance of the fact that whilst, according to the appellants’ representative, ‘single phase’ equipment could be operated on a ‘three phase’ electrical supply without the need for any alteration or modification, yet, it also noted Engineer Cauchi’s claim that the appellants’ Option 2 was compliant with the system but not as far as the electrical supply was concerned. As a matter of fact, on the same subject matter, Engineer Cauchi also maintained that had, in the second Option, the appellants offered the units on a ‘three phase’ power supply, the Adjudication Board would have recommended such offer because it was the second cheapest as well as being compliant with the system;
- having taken full consideration of the emphasis placed by Engineer Cauchi regarding the fact that the tender specifications clearly specified that ‘*All units shall require a three-phase 415V*’, claiming in the process that the tender was not issued solely for the purchase of air conditioning equipment but also for the electrical installation to cater for the air conditioning units that were to be supplied and installed;
- having deliberated on Mr Abela’s claim that such ‘units’ were also available in a ‘three phase’ configuration and therefore, had his firm been asked to clarify, they would have obliged;
- having reflected on the issues raised by Dr Thompson, particularly those relating to (a) ‘trade marks’ and the fact that, (b) according to the same awardees’ legal advisor, it seemed that although the words used in the tender document were not ‘inverter driven’, the sense as understood by everyone, including the appellants, was that the Department required ‘inverter driven’ units, so much so that the same appellants offered another Option (*Option 2*);

reached the following conclusions, namely:

1. On the basis of the appellants’ arguments, if were truly understood that the call for tenders was issued solely for the *Daikin* System, then the appellants were expected to protest to the Contracts Department or to contact *Daikin* or even not to participate at all. The PCAB argues that, in similar circumstances, the attention of the Department of Contracts should be drawn immediately because the tender document can only be amended at the tendering stage and not after the whole tendering and adjudication processes are completed. As stated during the hearing, participating tenderers should not be afraid to challenge the system

or simply pluck up the courage to do so when award decisions go against those who ultimately decide to file an objection;

2. It is obvious that the contracting authority wanted a 'three phase' electrical supply, a fact that was also acknowledged by the appellants' representative himself. The PCAB maintains its stand as expressed during the hearing that, in this particular instance, there was no need for a 'clarification' because the specific requirement was clearly indicated in the tender document and the tenderers were obliged to offer what was required.

As a consequence of (1) to (2) above this Board finds against appellants.

The PCAB would also like to note the time frame between the closing date of the call for tenders, 06.09.2007 and the actual date of publication for the proposed award of contract, namely, 12.12.2007.

Furthermore, this Board also recommends that, in future calls, the department will take greater pains to ensure that there will be no specific reference made to particular trademarks or even references that could be understood to indicate particular trademarks.

In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the appellants should not be refunded.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

05 May 2008