

PUBLIC CONTRACTS APPEALS BOARD

Case No. 155

CT/2262/2008; TD//T/12/2008

Tender for the Supply, Installation and Commissioning of 132 KV Cable Circuits between Delimara Power Station and Marsa South Distribution Centre

This call for tenders was, for a contracted estimated value of € 6,000,000 was published in the Government Gazette on 30.05.2008. The closing date for this call for offers was 28.10.2008.

Four (4) different tenderers submitted their offers.

On 27.04.2009 *Prysmian Cables and Systems (Italy)* filed an objection after their bid was adjudicated as technically non-compliant and therefore eliminated from the tendering process.

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 17.06.2009 to discuss this objection.

Present for the hearing were:

Prysmian Cables and Systems (Italy)

Ms Cinzia Farisè	Director (Marketing, Trade & Installer, Utilities & Accessories)
Mr Eduardo Redondo	Worldwide strategic materials researcher of <i>Prysmian</i>
Mr Cristiano Pala	Representative
Mr Mario Agius	Representative
Mr Joseph Mizzi	Local Representative

Enemalta Corporation (Enemalta)

Dr Damian Degiorgio	Legal Representative
Mr Francis Darmanin	Procurement Manager

Evaluation Committee:

Eng. Dr Joseph Vassallo	Chairperson
Eng. Mark Sciberras	Member
Eng. Benjamin Pavia	Member

CES Ltd obo L.S. Cables Ltd

Eng. Arthur Ciantar	Representative
Eng. Lawrence C. Ciantar	Representative
Eng. Lawrence J. Ciantar	Representative

Associated Supplies Ltd obo CCC GmbH

Mr Joseph Aquilina	Local Representative
Mr Peter Hungershausen	Representative

Department of Contracts

Mr Francis Attard	Director General
Mr Bernard Bartolo	Asst. Director (EU Related Procurement)

After the Chairman's brief introduction, the appellant Company was invited to explain the motives of the objection.

Ms Cinzia Farisè, a Company Director, representing the appellants, namely, Prysmian Cables and Systems (Italy), explained that the firm that she represented considered this tender as a strategic one and, as a consequence, they offered Enemalta Corporation, the contracting authority, up to four solutions in order to provide a high quality installation. She added that after having, carefully, analysed the technical report drawn up by the evaluating committee, they drew up a comprehensive report on the points raised as evidenced from their reasoned letter of objection.

On his part, Mr Edoardo Redondo, worldwide strategic materials researcher of the same appellant Company, pointed out that there were two issues in respect of which his firm was considered non compliant, namely the

a. fire performance

and

b. graphite layer (para. 1.3 (iii) and (iv) of the evaluation report conclusions).

He added that, originally, they thought that the customer was more concerned about the fire performance of the cable and so they did not propose the use of graphite because from previous experience gained by them with similar installations graphite, a combustible material, was not the best solution as far as fire performance is concerned.

Ms Farisè explained that in the original tender document there was no specific chapter dedicated to fire performance and that it was only after a few days that they received an addendum, an important part of which was dedicated to this issue. Ms Farisè added that their interpretation of this addendum was that Enemalta Corporation attached a lot of importance to the safety aspect of this installation/connection. As a consequence, added the appellants' representative, they were obliged to act on the customer's request by offering the best solution.

At this stage the Chairman, PCAB drew the attention of the appellants that the PCAB was not a technical committee but that its main concern was to ascertain that the process was transparent and fair to all participating parties. PCAB Members also pointed out that the adjudicating committee had to evaluate the tender on the information actually provided.

Mr Redondo explained that standard IEC 60332 was divided into three different internal specifications such that the test could be carried out in three different ways. Mr Redondo remarked that the specifications included three tests and that his firm could perform all those tests.

Eng. Dr Joseph Vassallo, in his capacity as Chairman of the evaluating committee and the person responsible for the drafting of the tender specifications, explained that the fire performance of a cable in a tunnel was very important and that the international commission provided two standards, namely, (a) IEC 60332-1 which concerned a

single cable and (b) 60332-3 which concerned a bunch of cables. He further explained that the tender specifications indicated that if a cable passed the test in IEC 60332-1 it could not be assumed that it would pass the test in a bunched condition. Eng Vassallo remarked that, since this contract contemplated that the cables were going to be bunched, Enemalta Corporation had to include in the specifications the more stringent test. He added that the initial tender document did not include the standard numbers but these were included in an addendum issued about two weeks after the issue of the tender adding in particular emphasis that these two weeks had to be seen in the light that the tenderer had five months to submit the tender documentation.

Eng Vassallo informed the PCAB that the appellant Company had indicated that the cable it presented was compliant with standard IEC 60332-1 which dealt with a single cable and not with cables in a bundle, as a result of which, after the closing date of tender, the contracting authority asked for clarifications from the appellants, following which the appellants reiterated that the product was compliant with standard IEC 60332-1 (question 5) whereas Enemalta Corporation had requested compliance with standard IEC 60332-3 (clause 1.9.9).

Mr Redondo explained that their firm had indicated standard IEC 60332-1 because, through their experience in this field of work, they knew that that standard was good enough and that it was comparable at least to the type 'C' (standard 60332-3 was also divided into A, B and C as per section 2.1 (d) of the reasoned letter (report) of objection).

Dr Damian Degiorgio, legal advisor of Enemalta Corporation, stated that, in very simple terms, the standard IEC 60332-3 was mandatory and from the tender documentation and even from the answer to the clarifications it emerged that the appellant Company did not offer that standard.

Mr Farisè argued that they did not consider standard IEC 60332-1 as less stringent than standard IEC 60332-3. She added that, in their submission, they did not say that the cable they presented did not respect standard IEC 60332-3 but they said that their product certainly respected standard IEC 60332-1 and that, through their experience in this sector, they considered that the type of installation that was being requested related more to standard IEC 60332-1 rather than to standard IEC 60332-3. Ms Farisè said that it has been demonstrated that their product was compliant with both standards, ie IEC 60332-1 and 3.

The Chairman PCAB observed that the standards that one was referring to appeared to be European Standards and hence had a common interpretation to all. He asked if it was the case that Enemalta Corporation asked for 3 tests and the appellant Company submitted only one test because they felt that one test would suffice.

Ms Farisè confirmed the Chairman's statement.

The Chairman PCAB remarked that the tender requirements were set by the contracting authority and not by the bidders. He added that even if the appellants considered that through experience standard IEC 60332-1 should suffice one should also appreciate that Enemalta Corporation had its own professional people and the

necessary experience to establish its requirements and therefore the bidder should not dictate what the contracting authority should procure. The Chairman PCAB exclaimed that it was inconceivable how the appellants did not provide the standard requested, even after the clarification, when the same appellants were confirming that they could meet that standard. The Chairman PCAB stressed that the contracting authority had the prerogative to request what it desired and if a bidder was not in a position to provide what was being requested then there had to be some sort of clarification process prior to the closing date for the submission of tenders. He also added that the PCAB was examining the tendering process and not the technical details of the offer.

Ms Farisè explained that standard IEC 60332 had three variations and, then again IEC 60332-3 had three sub-divisions A to C. Ms Farisè stated that the appellant Company's interpretation was that the product had to be compliant with standard IEC 60332. Ms Farisè acknowledged that, unfortunately, in the original submission they did not indicate that they were compliant with both standards, i.e. IEC 60332-1 and 3 – not even in their clarification (question 5) - but that they were mentioning it only now that they were compliant with standards IEC 60332-1 and 3. Ms Farisè reiterated that in their original submission they only mentioned compliance with standard IEC 60332-1 because they considered that this particular installation required that standard.

Dr Degiorgio observed that this issue should have been raised and clarified before the original submission was made. He added that the appellants did not indicate in their offer that they were compliant with standard IEC 60332-3 or, for that matter, with any of its three sub-divisions A to C.

The Chairman PCAB remarked that an adjudicating committee would judge an offer on the documents that the bidder presented and the responsibility to ensure that the tender documentation was all in order rested with the bidder. The Chairman PCAB acknowledged that unfortunate circumstances could arise but, on the other hand, there had to be a cut off date for the submission of the documentation and if one were to allow alterations to take place after that date then that could amount to negotiation which, in itself, was problematic to the tendering process.

With reference to the issue of the graphite coating, Dr Degiorgio explained that, in principle, this was similar to the previous one in the sense that Enemalta Corporation requested a graphite or similar coating for the cables and the appellant Company did not provide it.

Eng Dr Vassallo explained that they requested graphite, the appellants did not offer graphite in the original offer but then, in reply to the clarification sought after the submission of tenders, the appellants did explain why graphite was not offered. At this point the Chairman PCAB intervened and reiterated that clarifications, sought after the closing date of tenders, on mandatory requirements should not be permitted as that would create problems with regard to transparency and might even give rise to abuse. The PCAB urged contracting authorities and bidders to clarify things before but not after the closing date of tenders.

Ms Farisè admitted that their readiness to supply graphite coating, if that was considered mandatory, was mentioned following the clarification sought by the adjudicating committee after the closing date of tenders. She added that it appeared to them that Enemalta Corporation attached a lot of importance to this issue. Ms Farisè stated that this type of contract was quite complex and a lot of considerations had to be taken into account. As a consequence, she continued, one could have easily overlooked or misinterpreted certain aspects of the contract. She also opined that, perhaps, that was the reason why Enemalta Corporation felt the need to seek clarifications afterwards.

At this stage Eng Dr Vassallo quoted question 6 of the clarifications:

Can the tenderer clarify whether the lack of a graphite coating would affect the verification on site of the integrity of the outer sheath after laying?

Eng Vassallo recalled that the appellants had indicated that the integrity could be checked by a visual inspection only. Eng. Vassallo added that that was not enough for Enemalta Corporation because the cables were going to be in a bunched form and not single and separated cables which meant that after laying they would need to be 100% sure of the integrity of the outer sheath.

The Chairman PCAB remarked that in case a bidder was in doubt or else what the bidder was proposing represented a departure from what was being requested then clarifications should be sought by the bidder before submitting the offer and not be expected to assume that one's own interpretation would meet the customer's needs.

Ms Farisè argued that when they received the addendum to the tender document which dealt with fire performance they thought that the addendum superseded the original tender document in that respect.

Mr Redondo explained that graphite, being a flammable material, did not meet the 'fire performance' and that was why his firm was against the use of graphite and opted to use another solution. Ms Farisè confirmed that the addendum to the original tender document did not, in fact, alter Enemalta Corporation's requirement with regard to graphite but she added that in their opinion there was a contradiction because the original document mentioned the use of graphite, a flammable material, whereas the addendum emphasised the importance of fire performance.

Dr Degiugio and Eng Muscat did not agree that there was any contradiction in this respect.

Ms Farisè quoted from Attachment 2 of the reasoned letter of objection (report rather) para. marked 3.1.5 'Overall Sheath' (representing pages 8 and 9 of Prysmian Technical proposal submitted in October 2009) as follows:

We underline that, since the overall sheath shall guarantee great retardant performances, we will not apply the graphite coating layer.

Mr Redondo reiterated that his firm had stated that if they would use graphite with the cable it would jeopardise the fire performance.

Mr Pavia, PCAB member, remarked that Enemalta Corporation required the graphite solution so that it could test the cable for integrity.

The Chairman PCAB reiterated that it was not up to the bidder to determine the best solution for the contracting authority because that was the prerogative of the contracting authority and, in this case, it was evident that the contracting authority insisted on various occasions that it required the graphite layer.

Mr Redondo argued that there were different solutions to a problem and that they were confident that the solution they presented was a good one.

Ms Farisè, once again, stated that in the original tender document Enemalta Corporation included the graphite layer requirement but then in the addendum to the original tender document the same contracting authority placed emphasis on 'fire performance'. As a result, Ms Farise' contended, they considered the use of graphite as requested in the original tender document as not in line with to what was being requested in the addendum and, therefore, they presented a solution that did not include graphite, which was a flammable material. She argued that there existed a contradiction between what was originally requested and what was subsequently requested in the addendum, at least, that was their interpretation.

The Chairman PCAB observed that it would appear that the addendum did not eliminate the graphite requirement mentioned in the original submission. Eng. Dr Vassallo confirmed that the addendum did not substitute anything that was requested in the original tender document but it was in addition to it or a qualification to what had already been requested.

Ms Farisè declared that both with regard to fire performance and with regard to graphite, her firm did not, in any way, want to imply that the solutions it offered were superior to those that Enemalta Corporation was requesting. She added that the solutions presented by her firm were based on their interpretation of the tender document and the addendum thereto and that it was their practice to present what the customer requested and not what her firm, the supplier, wanted.

With regard to IEC standards 60332 1 and 3, Ms Farisè stated that they could prove that they were equivalent because these standards related more to medium voltage cables than to high voltage cables and she argued that, with the installation requested in the tender, both standards were in line.

Eng Dr Vassallo stated that the appellant Company did indicate that the product was compliant with IEC 60332-1 but it did not mention that it was also compliant with IEC 60332-3, not even in its answer to the clarification sought after the opening of tenders. Dr Degiorgio questioned how two different standards were one and the same thing as the appellants were inferring.

When asked if standard IEC 60332-1 covered IEC 60332-3, Mr Redondo replied in the affirmative, whereas Eng Dr Vassallo stated that, in normal circumstances, one did not cover the other and reiterated that part 1 referred to a single cable whereas part

3 referred to bunched cables and further stated that if a cable conformed with standard IEC 60332-1 it did not necessarily conform with IEC 60332-3.

Ms Farisè admitted that these two standards were not identical but that in the case under reference both standards were equivalent and argued that they filed the appeal precisely to clear points of this nature.

The Chairman PCAB said that a tender had to follow a path and along that path all the players had to be responsible for the actions taken at the various stages even in respect of incorrect actions taken with good intentions.

Ms Farisè argued that when dealing with standards one could apply different interpretations and she maintained that, in this case, one standard was not more stringent than the other. She added that they did not consider the standards in isolation but had taken into account other aspects of the tender. Ms Farisè repeated that they assumed that the addendum prevailed upon the original tender document with regard to fire performance. Ms Farisè added that they could include graphite in their solution at no extra cost but the point was that they were more concerned with safety, especially in the case of a public contract. She maintained that since graphite was combustible then they had to decide whether safety was more important than maintenance, especially in the light of the contents of the addendum. However, Ms Farisè stated that later on, namely from the evaluation report, they realised that Enemalta Corporation attached a lot of importance to the maintenance aspect of this installation. Ms Farisè explained that the firm she represented had undertaken the installation of cables in three tunnels and that no graphite was used because of fire performance considerations and because it was not considered reliable for use in big tunnels. Ms Farisè conceded that previous contracts had nothing to do with the case in hand and repeated that their intention was to, ultimately, supply the customer with what it requested in the tender document.

Mr Peter Hungershausen, intervening on behalf of Associated Supplies Ltd / CCC GmbH, expressed his agreement with the PCAB's approach that (a) there were clear specifications in the tender document, (b) they were applicable to all tenderers and (c) tenderers had to stick to them. He added that his firm was comfortable with these specifications. Mr Hungershausen agreed that if one was after high standards then one was correct to demand stringent standards.

Eng. Arthur Ciantar, acting on behalf of CES Ltd / L.S. Cables Ltd, pointed out that clause 1.9.10 of page 118 of the tender document clearly specified that:

A graphite layer or similar shall be applied for sheath testing.

Eng Ciantar remarked that the use of graphite or similar was meant for testing purposes and the fact was that no graphite was included in the appellants' submission. He added that the appellant Company "*acknowledged, however, that because of the lack of a graphite layer, no electrical test can be made to verify the integrity of the oversheath after laying*" – para. 1.3 (iv) of page 11 of the conclusions of the evaluation report.

Eng Ciantar also pointed out that the cable had to comply with IEC 60332-3 as per clause 1.9.9 at page 118 of the tender document.

At that point, the Chairman PCAB asked Eng Ciantar not to repeat issues that had already been adequately covered and urged him to use his intervention to contribute additional information and arguments because that was what the PCAB was after at that stage of the hearing.

Eng Ciantar remarked that what he had just mentioned were omissions in the appellants' original submission, which omissions should not be rectified at this stage of the tendering process.

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 30.04.2009 and also through their verbal submissions presented during the public hearing held on the 17.06.2009, had objected to the decision taken by the General Contracts Committee;
- having taken note of the fact that there were two issues in respect of which the appellant Company was considered non compliant, namely (a) the fire performance and (b) the graphite layer;
- having also taken note of the fact that, apart from the original document an addendum was subsequently distributed to participating tenderers;
- having also noted Eng Vassallo's (a) explanation regarding the fact that a cable in a tunnel could be laid out in either a single format or via a bunch of cables, (b) remark that the international commission provided two standards, namely, (1) IEC 60332-1 which concerned a single cable and (2) 60332-3 which concerned a bunch of cables, (c) statement concerning the fact that this contract contemplated that the cables were going to be bundled, (d) statement that the tender specifications indicated that if a cable passed the test in IEC 60332-1 it could not be assumed that it would pass the test in a bunched condition, (e) submission that the initial tender document did not include the standard numbers but these were included in an addendum issued about two weeks after the issue of the tender;
- having taken cognizance of the fact that (a) the appellant Company had indicated that the cable it presented was compliant with standard IEC 60332-1 which, according to the contracting authority, dealt with a single rather than bundled cables, (b) after closing date, the contracting authority requested that a few issues be clarified following which the appellants reiterated that the product was compliant with standard IEC 60332-1 (question 5) whereas Enemalta Corporation had requested compliance – a mandatory requirement - with standard IEC 60332-3 (clause 1.9.9);

- having established that during the hearing the appellants' representatives (a) acknowledged that their firm had indicated standard IEC 60332-1 because, through their experience in this field of work, they knew that that standard was good enough, not considering standard IEC 60332-1 as less stringent than standard IEC 60332-3, (b) claimed that their product was compliant with both standards, namely IEC 60332-1 and 3 respectively;
- having also heard Ms Farise' claim that in their original submission they only mentioned compliance with standard IEC 60332-1 because they considered that this particular installation required that standard;
- having also taken cognizance of the fact that, despite the fact that the contracting authority had specifically requested graphite, a mandatory requirement, yet the appellants did not offer graphite in the original offer but then, in reply to the clarification sought after the submission of tenders, the appellants did explain why graphite was not offered, namely because, at tendering stage, it had seemed to the appellant Company that Enemalta Corporation was attaching a lot of importance to the issue of fire safety;
- having heard the appellants' representatives claim that they assumed that the addendum prevailed upon the original tender document with regard to fire performance;
- having heard Ms Farise' declare that the solutions presented by the appellant Company were based on their interpretation of the tender document and the *addendum* subsequently issued by the contracting authority;
- having taken note of (a) Eng Vassallo's questioning of the appellant Company's claim that two different standards, IEC 60332-1 covered IEC 60332-3, were one and the same thing, especially, when one considers the fact that *part 1* referred to a single cable whereas *part 3* referred to bunched cables and (b) Mr Redondo's and Ms Farise's divergent views on the same subject matter;
- having also considered Mr Hungershausen's remarks made during the hearing;
- having taken note of Eng Ciantar's intervention, especially his contention relating to the fact that the appellants had omitted mandatory requirements in the original bid and that such omissions should not be rectified at this stage of the tendering process,

reached the following conclusions, namely:

1. The PCAB acknowledges that an adjudicating committee has to evaluate a tender on the information actually provided;
2. The PCAB acknowledges that, through its own admission, the appellant Company has admitted that the product was compliant with standard IEC 60332-1, whereas Enemalta Corporation had requested compliance with standard IEC 60332-3 (clause 1.9.9) – two standards which were

European Standards and hence had a common interpretation to all and not allowable to subjective interpretation;

3. The appellant company did not offer the graphite, or similar, coating for the cables as requested in the tender specifications;
4. The PCAB feels that tender requirements are set by the contracting authorities and not by the bidders and, regardless of the fact as to whether a participating tenderer is fully in agreement with content or not, such tenderer has to abide by such terms and conditions and not try to seek to rectify matters after a manifested refusal by the said tenderer to be aligned with specific mandatory requirements requested by contracting authority 'ab initio'. As a consequence, this same Board cannot accept the argument made by appellants wherein they stated that in their original submission they only mentioned compliance with standard IEC 60332-1 because they considered that this particular installation required that standard;
5. The PCAB (a) is totally against clarifications on mandatory requirements being sought after closing date of tenders and these should not be permitted as, in this instance, problems may arise with regard to transparency, also giving rise to possible abuse of procedural system and (b) feels that in case a participating tenderer is in doubt or, rather, what the bidder is proposing represents a departure from what has been requested by the contracting authority, then clarifications should be sought by the bidder before submitting the offer and not expect that one should be expected to assume that one's own interpretation would meet the customer's needs;
6. The PCAB feels that a tender has to follow a path and along that path all the players have to be responsible for the actions taken at the various stages even in respect of incorrect actions taken with good intentions

As a consequence of (1) to (5) above this Board finds against the appellants.

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 be forfeited.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

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