

PUBLIC CONTRACTS APPEALS BOARD

Case No. 218

CT/2581/2009; TD/T/24/2009

Service Tender for the Supply of Hydraulic Platforms mounted on Chassis Cab (Enemalta)

This call for tenders was published in the 24 November 2009.

Eight (8) tenderers submitted their offers.

Burmarrad Commercials Ltd filed an undated 'letter of complaint' (received at the Contracts Department on 04.05.2010) against the decision by the Contracts Department to reject its offer for being administratively non-compliant because in the self-declaration concerning the 'Commercial Warranty and Performance Guarantee' it declared that the units carried a warranty of 4 years against rust and under-sealing when the tender document specified that a minimum guarantee of 6 years was mandatory.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Carmel J Esposito as members convened a public hearing on Monday, 16 August 2010 to discuss this objection.

Present for the hearing were:

Burmarrad Commercials Ltd

Dr Ronald Aquilina

Mr Mario Gauci

Legal Representative

Representative

SR Services Ltd

Mr David Muscat

Representative

Enemalta Corporation (Enemalta)

Mr Ivan Bonello

Representative

Adjudicating Board

Engineer Ramon Tabone

Engineer Silvan Mugliett

Member

Member

After the Chairman's brief introduction as to how the hearing was going to be conducted, the appellant Company was invited to explain the motive/s of the objection.

Dr Ronald Aquilina, representing Burmarrad Commercials Ltd, the appellants, remarked that his client disagreed with the conclusions reached by the Contracts Department, namely that his firm offered 4 instead of 6 years warranty against rust and under-sealing and submitted the following arguments:

- at Annex II 'Technical Specifications' section 2.12 at page 62 of the tender document his client had answered in the affirmative that a minimum of 6 years guarantee for rust proofing and under-seal would be provided;
- over and above the documentation included in the tender submission, his client submitted also a declaration titled 'Commercial Warranty and Performance Guarantee' which provided 2 years comprehensive cover against any defect caused by a manufacturing or assembly fault which included parts and labour costs, and, in addition, a 4 year warranty against rust and under-sealing for these units;
- these two documents had to be taken into consideration together and not each on its own such that the 4 years guarantee against rust and under-sealing was in addition to the 2 year comprehensive cover, i.e. the 4 years would start running after the expiry of the 2 year comprehensive cover, and therefore the rust and under-sealing cover would effectively add up to 6 years which matched the other declaration made at Annex II section 2.12;
- it was not correct to quote part of the documentation in isolation but one had to consider both declarations holistically such that one corroborated the other and stress was laid on the term 'in addition'.

Dr Aquilina further explained that the truck and the platform formed one unit and the warranties covered the whole unit such that the units were comprehensively guaranteed for 2 years, including the rust proof and under-sealing, and the same units were then covered by a further 4 years only with regard to rust and under-sealing.

Mr Edwin Muscat, member of the PCAB, argued that the declaration, as presented, seemed to provide a warranty of 2 years against any manufacturing or assembly defect and another warranty of 4 years against rust and under-sealing.

Dr Aquilina insisted that one could not ignore the statement made at Annex II section 2.12 and added that the declaration did not indicate that the two warranties would start concurrently but that one was in addition to the other and, as a consequence, a 4 year warranty would take off on the expiry of the 2 year guarantee. He remarked that, in his opinion, the proper terms had been used in this statement.

Eng. Ramon Tabone, a member of the adjudicating board, explained that at Annex II Enemalta Corporation requested two guarantees, namely:

- under section 2.9 a minimum of two years full guarantee which in the automobile sector is known as parts and labour (electrical and mechanical) warranty; *and*
- under 2.12 a minimum of 6 years guarantee for rust proofing and under-seal

Eng. Tabone remarked that the adjudicating board interpreted the other declaration submitted by the tenderer, which declaration was not requested in the tender document but the bidder submitted it out of his own free will, to mean 2 years in respect of Annex II section 2.9 and 6 years in respect of section 2.12.

The Chairman PCAB remarked that, albeit he understood the line of thinking of the adjudicating board, yet he also felt that, faced with two rather conflicting statements made by same bidder, the adjudicating board should have sought a clarification to clear the air.

Mr Bonello, representing Enemalta Corporation, remarked that the declaration made by the bidder was interpreted as a sort of statement to qualify what he indicated in Annex II.

Eng. Tabone stated that the indication given by the tenderer at Annex II would have sufficed but the adjudicating board could not ignore the declaration submitted by the tenderer. He added that the contacting authority considered the warranty against electrical and mechanical defects as separate from the rust proofing and under-seal guarantee so much so that it provided for them in separate sections at Annex II, i.e. sections 2.9 and 2.12 respectively, and that was the norm when one purchased a vehicle. Eng. Tabone contended that, in normal practice, the warranty for parts and labour did not cover rust proofing and under-seal.

Dr Aquilina claimed that, according to EU law in force, one had to provide a minimum guarantee of 2 years on a product.

The Chairman PCAB did not blame the adjudicating board for having interpreted the separate declaration submitted by the appellant Company the way it did because the said appellants should have used more appropriate terms to convey the message that the rust proofing and under-seal warranty covered a period of 6 years. The Chairman PCAB stated that, on the other hand, the adjudicating board could not ignore the fact that in Annex II the appellant Company had formally confirmed that the rust proofing and under-seal guarantee would cover a minimum period of 6 years and, considering that this was in conflict with the board's interpretation of the separate declaration that this same warranty covered only a 4 year period, then the adjudicating board should have sought a clarification to establish without any doubt the period that this warranty actually covered. He stressed that such a 'clarification' would have amounted to 'negotiation' but it would have been interpreted as an explanation of information already submitted.

Eng. Tabone remarked that the responsibility to present a correct and unambiguous bid rested with the tenderer. He added that, normally, a tenderer would submit an additional declaration for the purpose of elaborating or substantiating information already provided in the tender document.

Mr Mario Gauci, also representing Burmarrad Commercials Ltd, explained that, in the past, it was the practice that on purchasing a vehicle which carried a rust proofing and under-seal guarantee for, say, 2 years, one would then apply a further rust proof coating thereby extending the guarantee up to, say, 10 years.

The PCAB expressed the view that had the appellant Company failed to fill in section 2.12 of Annex II and instead submitted the separate declaration as it was, then the adjudicating board would have been correct to reject the offer but once the appellant Company did fill in Annex II provided in the tender document in a way that satisfied the tender specifications and, at the same time, presented a separate declaration which in a

way contradicted its indication at Annex II, then the adjudicating board should have sought a clarification from the bidder to eliminate its ambiguity.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their undated 'letter of complaint' (received at the Contracts Department on 4 May 2010) and also through their verbal submissions presented during the public hearing held on 16 August 2010 had objected to the decision taken by the General Contracts Committee;
- having taken note of Dr Aquilina's submission;
- having also taken note of Enemalta Corporation's reasons as to why they decided against the appellant Company's offer;

reached the following conclusions, namely:

1. The PCAB expresses the view that had the appellant Company failed to fill in section 2.12 of Annex II and instead submitted the separate declaration as it was, then the adjudicating board would have been correct to reject the offer
2. The PCAB feels that, albeit it understands the line of thinking of the adjudicating board, yet it also feels that, , the adjudicating board could not ignore the fact that in Annex II the appellant Company had formally confirmed that the rust proofing and under-seal guarantee would cover a minimum period of 6 years and, considering that this was in conflict with the board's interpretation of the separate declaration that this same warranty covered only a 4 year period, then the adjudicating board should have sought a clarification to establish without any doubt the period that this warranty actually covered.

As a consequence of (1) to (2) above this Board finds in favour of the appellant Company.

In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the said appellants should be reimbursed.

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmel J Esposito
Member

20 August 2010