

## PUBLIC CONTRACTS APPEALS BOARD

### Case No. 304

#### **CT/4024/2010; Adv. TD/T/23/2010 Tender for the Dismantling of 33KV Pylons**

This call for tenders was published in the Government Gazette on 7<sup>th</sup> May 2010. The closing date for this call with an estimated budget of € 100,000 was 10<sup>th</sup> June 2010.

Three (3) tenderers submitted their offers.

Messrs D.D.E. Attard Ltd filed an objection on 12<sup>th</sup> February 2011 against the decision by Enemalta Corporation to award the tender to Malukit Ltd for having the cheapest offer.

The Public Contracts Appelas Board composed of Mr Alfred Triganza as Chairman, Mr. Edwin Muscat and Mr Carmel Esposito as members convened a public hearing on Friday, 17<sup>th</sup> June 2011 to discuss this objection.

Present for the hearing were:

#### **D.D.E. Attard Ltd**

Dr John Bonello	Legal Representative
Mr Disma Attard	Representative

#### **Malukit Ltd**

Dr Stefano Fillietti	Legal Representative
Perit Godwin Agius	Representative
Mr John Debono	Representative

#### **Enemalta Corporation**

Dr John Micallef Grimaud	Legal Representative
Dr Julianne Portelli Demajo	Legal Representative

#### **Evaluation Board:**

Ing. Ivan Bonello	Chairman
Ing. Silvan Mugliett	Member
Ing Josef Micallef	Member
Ing. Carmen Abela	Member

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

Dr John Bonello, legal advisor of D.D.E. Attard Ltd, the appellants, stated that by letter dated 2<sup>nd</sup> February 2011 the Department of Contracts informed his client that this tender had been awarded to Malukit Ltd for having submitted the cheapest technically compliant offer.

Dr Bonello went on to submit the following explanations:-

- i. the tender document related to the removal and scrapping of several pylons belonging to Enemalta Corporation and section 2.1 of the 'Tender Specification' (page 8) provided as follows:

*“No pylons or items dismantled shall be retained by Enemalta. All the 103 structures plus related material along the mentioned routes shall be dismantled, removed and scrapped by the contractor.”*
- ii. section 1.2 was termed "M" which according to the *Instructions to Persons Tendering* stood for "Must Have" or mandatory requirement (page 13);
- iii. the tender specifications made it abundantly clear that the selected contractor had to prove that one was in a position to carry out the necessary work for the dismantling and scrapping of the pylons and it was, therefore, reasonable for the tenderers to back such capability with the possession and submission of the necessary permits;
- iv. scrapping activities had to be covered by a valid waste management permit issued by the Malta Environment and Planning Authority according to the Waste Management. (Permit and Control) Regulations, 2001 (Legal Notice 337 of 2001);
- v. his client, D.D.E Attard Ltd, held a valid waste management permit bearing number WM00009/06, which was last renewed on the 28th April 2010 and was valid up to the 28th October 2011;
- vi. through this permit, his client was authorised to carry out the recovery and recycling of scrap metal at the company's waste management facility located in Scrap Lane, Off Valletta road, Luqa;
- vii. on the other hand, Malukit Ltd, the recommended tenderer, did not hold a permit to carry out scrapping activities but what it had was a permit to act as a waste broker, which permit was issued by the Malta Environment and Planning Authority on the 14th October 2010;
- viii. a waste broker could make arrangements for the collection, recovery, recycling or disposal of waste on behalf of others – the waste broker was a kind of middle man who put together operators to execute the works but did not personally carry out the works

and for one's services one charged a commission. The recommended tenderer did not possess a waste management permit to operate any scrapping facility;

- ix. the recommended tendering company did not have the necessary permits to undertake the works indicated in the tender but what it had was a permit to make arrangements for the pylons to be scrapped when the contracting authority had clearly indicated that the dismantling and scrapping had to be carried out by the contractor;
- x. even if, for the sake of the argument, the company's registration as a waste broker was sufficient for the works contemplated in this tender, Malukit Ltd would have still violated the conditions of tender since it had been registered as a waste broker after the closing date for the submission of tenders; and
- xi. one had also to note the length of time taken to adjudicate this tender, i.e. from June 2010 to February 2011 and the slight difference in the price of the recommended offer, €88,900 and his client's offer €94,400.

Dr John Micallef Grimaud, legal representative of Enemalta Corporation, the contracting authority, made the following submissions:-

- a. the evaluation board had to abide by the tender conditions and specifications and that the appeal had to be viewed in the light of the 2005 Public Procurement Regulations;
- b. Section 2.1 already cited, did not preclude the contractor from obtaining the services of other contractors to carry out the works contemplated in the tender or part thereof, in other words, the tender conditions did not oblige the contractor to personally carry out all the works;
- c. the appellant company's contention that the contracting entity had to have its own scrap yard and waste management permits was not included in the tender conditions and neither was the contractor requested to submit any Malta Environment and Planning Authority waste management permit/s;
- d. Enemalta Corporation requested the services of a contractor to take full responsibility of the works included in the tender and it was left up to the contractor to see to it how the task was going to be accomplished and, strictly speaking, the contractor did not need to have any licences at all because it was up to the Malta Environment and Planning Authority, in its regulatory and supervisory role, to ensure that such works were carried out according to regulations;
- e. during the evaluation process the contracting authority asked for any permits that the bidder might have had, even if that was not requested in the tender document, and the preferred bidder produced the permit of a waste broker which, admittedly, had been issued after the closing date of tender;
- f. Enemalta Corporation also assumed the responsibility that whoever actually carried out

the works did so according to regulations and if that would not turn out to be the case then Enemalta Corporation would sue the contractor for having been in breach of the contract conditions; and

- g. although one could argue that the tender document could or should have requested that bidders had to be in possession of waste management permit/s, as things stood, the tender as drafted did not include this requirement and the evaluating board had to adjudicate on the tender document as it was published.

At this point the Public Contracts Appeals Board members observed that (i) if the tender document did not request any permit from the contractor in connection with waste management then it should not have requested it during adjudication, (ii) a permit issued after the closing date of the tender should not have been considered for adjudication purposes and (iii) at page 3 of the evaluation report against Malukit Ltd under the 'summary of exchange of correspondence' it was stated that clarifications regarding the final disposal site and waste carrier licence, although not asked for in the tender document, were vital for the successful conclusion of the project.

Mr Mark O'Neil, an 'Environment Protection Officer' at the Malta Environment and Planning Authority, under oath, gave the following information:

- i. if the works were not going to be carried out by Enemalta Corporation itself then whoever carried out the waste management works had to be licensed by the Malta Environment and Planning Authority, namely (i) to manage a facility that took in scrap material, such as metal or plastic and (ii) for one to make the necessary arrangements for the dismantling, transportation and scrapping of the waste, whether locally or abroad, had to have a broker's licence which, after May 2010 covered all types of waste material;
- ii. once a pylon was dismantled the residue, metal, concrete and so forth, was termed as waste;
- iii. the owner of the waste – Enemalta Corporation, in this case - could enter into arrangements with licensed persons to manage its waste but a third party had to have the permit of a waste broker to get licensed contractors to manage the waste of others;
- iv. in terms of Legal Notice 337 of 2001, to manage, for example, metal waste one needed a permit and to manage inert material required another permit or an extension of an existing one to also cover such inert waste;
- v. Malukit Ltd was issued with a waste broker permit dated 14<sup>th</sup> October 2010 whereby it could organise the services of a licensed waste carrier to carry the waste and of an authorised facility where to scrap the material;
- vi. the owner of the scrap material – Enemalta Corporation - had the 'duty of care' and so, ultimately, it remained responsible for the waste until such time that a *certificate* would be issued attesting that the waste had been recycled; and

- vii. the appellant company, besides having a permit for an authorised facility, also held licences of a waste carrier and of a broker which covered all types of waste.

At this point Dr Stefano Filletti, legal representative of the recommended tenderer, took the floor and made the following remarks:-

- a. no one was contesting that, at the time of execution of the contract, the contractor had to be covered by some kind of permit and, according to the tender issued by Enemalta Corporation, the contractor had to ensure that at the time of contract execution one had the relative permit/s;
- b. the objection raised by the appellant company was not as to whether his client had a broker permit or not but the said appellant was contending that Malukit Ltd, as a waste broker, should not be awarded a tender involving the scrapping of material because Malukit Ltd itself did not have an authorized facility;
- c. the appellant company was interpreting section 2.1 in the sense that the waste had to be dismantled, removed and scrapped by the same contractor;
- d. the correct interpretation to section 2.1 was that the contractor had to assume the responsibility for the dismantling, removal and scrapping of the waste but the said contractor did not have to personally do that, in fact, what mattered to Enemalta Corporation was that *“no pylons or items dismantled shall be retained by Enemalta”*;
- e. the appellant company did have an authorized facility but, as the Malta Environment and Planning Authority representative had confirmed, an authorized facility to receive and process metal waste whereas, according to section 2.1, a pylon, besides the metal structure was also made of the base, the bulk of which was concrete or inert waste, and, as a consequence, besides having an authorized facility for scrap metal one also had to have an authorized facility for inert material, something that the appellant company did not have;
- f. therefore, by the same argument put forward by the appellant company that the contractor had to have all permits in place because all the works had to be carried out by the contractor, then the same appellant company had to be disqualified because it could not scrap and process the entire pylon because all it had was an authorized facility for scrap metal and, as a result, it would have to entrust another facility to process the inert waste;
- g. his client was in possession of a waste broker licence to handle all forms of waste and, therefore, at the time of contract execution his client was in a position to handle the works contemplated in the tender document;
- h. the tender document did not oblige the bidder to produce any licence or expected that one had to possess any licenses and, although one might agree or disagree with that,

still that was how things stood; and

- i. his client had abided by the conditions of the tender and the company was licensed to undertake these works.

In conclusion Dr Bonello (a) shared the Public Contracts Appeals Board's view that this tender was quite straight forward and yet it had taken from June 2010 to February 2011 to adjudicate; (b) noted that, at the closing date of the tender, the recommended tenderer did not hold any licences to broker or to handle waste management activities; and (c) the contracting authority had to ensure that the contractor company was competent and possessed the required licences to render the services requested of such company in which regard his client had two licences, i.e. for an authorized facility for scrap metal and of a waste broker in the case of inert material.

On the other hand, Dr Filletti reiterated that if one were to take on board the argument made by the appellant company's representatives, then one had to agree that, whereas the appellant company had an authorized facility for scrap metal but only had a brokerage licence for inert waste, namely the same kind of licence that Malukit Ltd was in possession of, then the appellant company had to be disqualified.

Finally, Dr Micallef Grimaud reiterated that the tender document did not require any licensing and that the evaluation board had correctly assessed the bids in line with the provisions laid down in the published tender document.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated 12<sup>th</sup> February 2011 and also through their verbal submissions presented during the hearing held on 17<sup>th</sup> June 2011, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant company's representatives' claims and observations, particularly, the references made to the fact that (a) section 1.2 was termed "M" which according to the *Instructions to Persons Tendering* stood for "Must Have" or mandatory requirement, (b) the tender specifications made it abundantly clear that the selected contractor had to prove that one was in a position to carry out the necessary work for the dismantling and scrapping of the pylons and it was, therefore, reasonable for the tenderers to back such capability with the possession and submission of the necessary permits, (c) scrapping activities had to be covered by a valid waste management permit issued by the Malta Environment and Planning Authority according to the Waste Management. (Permit and Control) Regulations, 2001 (Legal Notice 337 of 2001), (d) the appellant company had a valid waste management permit and through this permit it was authorised to carry out the recovery and recycling of scrap metal at the company's waste management facility located in Scrap Lane, Off Valletta road, Luqa, (e) Malukit Ltd, the recommended tenderer, did not hold a permit to carry out scrapping activities but what it had was a permit to act as a waste broker, which permit was issued by the Malta Environment and Planning Authority on the

14th October 2010, (f) a waste broker could make arrangements for the collection, recovery, recycling or disposal of waste on behalf of others and, as a consequence, the recommended tendering company did not have the necessary permits to undertake the works indicated in the tender but what it had was a permit to make arrangements for the pylons to be scrapped when the contracting authority had clearly indicated that the dismantling and scrapping had to be carried out by the contractor and (g) even if, for the sake of the argument, the company's registration as a waste broker was sufficient for the works contemplated in this tender, Malukit Ltd would have still violated the conditions of tender since it had been registered as a waste broker after the closing date for the submission of tenders;

- having considered the contracting authority's representative's reference to the fact that (a) Section 2.1 already cited, did not preclude the contractor from obtaining the services of other contractors to carry out the works contemplated in the tender or part thereof, in other words, the tender conditions did not oblige the contractor to personally carry out all the works, (b) the appellant company's contention that the contracting entity had to have its own scrap yard and waste management permits was not included in the tender conditions and neither was the contractor requested to submit any Malta Environment and Planning Authority waste management permit/s, (c) Enemalta Corporation requested the services of a contractor to take full responsibility of the works included in the tender and it was left up to the contractor to see to it how the task was going to be accomplished and, strictly speaking, the contractor did not need to have any licences at all because it was up to the Malta Environment and Planning Authority, in its regulatory and supervisory role, to ensure that such works were carried out according to regulations, (d) during the evaluation process the contracting authority asked for any permits that the bidder might have had, even if that was not requested in the tender document, and the preferred bidder produced the permit of a waste broker which, admittedly, had been issued after the closing date of tender, (e) Enemalta Corporation also assumed the responsibility that whoever actually carried out the works did so according to regulations and if that would not turn out to be the case then Enemalta Corporation would sue the contractor for having been in breach of the contract conditions and (f) although one could argue that the tender document could or should have requested that bidders had to be in possession of waste management permit/s, as things stood, the tender as drafted did not include this requirement and the evaluating board had to adjudicate on the tender document as it was published;
- having taken note of Mr O'Neil's testimony, particularly, the fact that (a) if the works were not going to be carried out by Enemalta Corporation itself then whoever carried out the waste management works had to be licensed by the Malta Environment and Planning Authority, namely (1) to manage a facility that took in scrap material, such as metal or plastic and (2) for one to make the necessary arrangements for the dismantling, transportation and scrapping of the waste, whether locally or abroad, had to have a broker's licence which, after May 2010 covered all types of waste material, (b) the owner of the waste – Enemalta Corporation, in this case - could enter into arrangements with licensed persons to manage its waste but a third party had to have the permit of a waste broker to get licensed contractors to manage the waste of others, (c) Malukit Ltd was issued with a waste broker permit dated 14<sup>th</sup> October 2010 whereby it could organise the services of a licensed waste carrier to carry the waste and of an authorised facility where to scrap the material, (d)

the owner of the scrap material – Enemalta Corporation - had the ‘duty of care’ and so, ultimately, it remained responsible for the waste until such time that a *certificate* would be issued attesting that the waste had been recycled and (e) the appellant company, besides having a permit for an authorised facility, also held licences of a waste carrier and of a broker which covered all types of waste;

- having also taken cognisance of the recommended tenderer’s points raised during the hearing, particularly, the fact that (a) no one was contesting that, at the time of execution of the contract, the contractor had to be covered by some kind of permit and, according to the tender issued by Enemalta Corporation, the contractor had to ensure that at the time of contract execution one had the relative permit/s, (b) the objection raised by the appellant company was not as to whether the recommended tenderer had a broker permit or not but the said appellant was contending that Malukit Ltd, as a waste broker, should not be awarded a tender involving the scrapping of material because Malukit Ltd itself did not have an authorized facility, (c) the appellant company was interpreting section 2.1 in the sense that the waste had to be dismantled, removed and scrapped by the same contractor when the correct interpretation to section 2.1 was that the contractor had to assume the responsibility for the dismantling, removal and scrapping of the waste but the said contractor did not have to personally do that, in fact, what mattered to Enemalta Corporation was that “*no pylons or items dismantled shall be retained by Enemalta*”, (d) albeit the appellant company did have an authorized facility yet, apart from the need for one to have an authorized facility for scrap metal one also had to have an authorized facility for inert material, something that the appellant company did not have, which by the same argument put forward by the appellant company that the contractor had to have all permits in place because all the works had to be carried out by the contractor, then the same appellant company had to be disqualified because it could not scrap and process the entire pylon because all it had was an authorized facility for scrap metal and, as a result, it would have to entrust another facility to process the inert waste, (e) the recommended tenderer was in possession of a waste broker licence to handle all forms of waste and, therefore, at the time of contract execution his client was in a position to handle the works contemplated in the tender document and (f) the tender document did not oblige the bidder to produce any licence or expected that one had to possess any licenses and, although one might agree or disagree with that, still that was how things stood,

reached the following conclusions, namely:

1. The Public Contracts Appeals Board opines that if the works were not going to be carried out by Enemalta Corporation itself then whoever carried out the waste management works had to be licensed by the Malta Environment and Planning Authority, namely (1) to manage a facility that took in scrap material, such as metal or plastic and (2) for one to make the necessary arrangements for the dismantling, transportation and scrapping of the waste, whether locally or abroad, one had to have a broker’s licence which, after May 2010 covered all types of waste material. The Public Contracts Appeals Board feels that the point raised by the appellant company that, even if, for the sake of the argument, the company’s registration as a waste broker was sufficient for the works contemplated in this tender, Malukit Ltd would have still violated the conditions of tender

since it had been registered as a waste broker (14<sup>th</sup> October 2010) i.e. after the closing date for the submission of tenders (10<sup>th</sup> June 2010).

2. The Public Contracts Appeals Board contends that the stand taken by the contracting authority left to be desired especially when Enemalta Corporation's representatives claimed that (a) the request for services of a contractor to take full responsibility of the works included in the tender left it entirely up to the contractor to see to it how the task was going to be accomplished and (b) strictly speaking, the contractor did not need to have any licences at all because it was up to the Malta Environment and Planning Authority, in its regulatory and supervisory role, to ensure that such works were carried out according to regulations. With this in mind this Board finds little comfort in the fact that, during the evaluation process, the contracting authority asked for any permits that the bidder might have had, even if that was not requested in the tender document, and the preferred bidder produced the permit of a waste broker which, admittedly, had been issued after the closing date of tender. On this subject matter this Board concludes that, irrespective as to whether a clause is specifically mentioned in the tender document or not, an adjudicating panel cannot simply overlook the fact that the legal parameters have to be observed whether manifestly stated or not. The fact that Enemalta Corporation would sue any contractor for breaching the contract conditions cannot but be considered by this Board as a useless observation in view of the fact that public entities have the responsibility to do their 'homework' right and not aim at being in a position to have legal recourse just in case something goes against what would have been thought in the first place. Such attitude, argues this Board, could give rise to unnecessary waste of resources, human and financial, apart from the myriad of opportunity costs incurred.
3. The Public Contracts Appeals Board opines that the owner of the scrap material – Enemalta Corporation - had the 'duty of care' and so, ultimately, it remained responsible for the waste until such time that a *certificate* would be issued attesting that the waste had been recycled. As a result, it cannot agree with the recommended tenderer's claim that, since the tender document did not oblige the bidder to produce any licence or expected that one had to possess any licenses, as much as one might agree or disagree with that, that was how things stood. This Board recognises Mr O'Neil's testimony wherein, *inter alia*, he stated that the owner of the waste – Enemalta Corporation, in this case - could enter into arrangements with licensed persons to manage its waste but a third party had to have the permit of a waste broker to get licensed contractors to manage the waste of others, a permit which, on the closing date of the tender, the recommended tenderer did not have.

In view of the above this Board finds in favour of the appellant company and, whilst recommending the re-integration of the appellant company in the tender evaluation process, also recommends that the deposit paid by the latter should be reimbursed.

Alfred R Triganza  
Chairman

Edwin Muscat  
Member

Carmel Esposito  
Member

4 July 2011