

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case No. 355**

**TD/T/3000/2011**

**Tender for the supply of Plastic Enclosures and Accessories – Enemalta Corporation**

This call for tender was published on the 18<sup>th</sup> March 2011. The closing date for this call with an estimated budget of €75,820 was the 20<sup>th</sup> April 2011.

**Electrical Supplies and Services Ltd** filed an objection on 20 July 2011 against the decision taken by Enemalta Corporation to award items 2 and 3 to Calleja Ltd.

The Public Contracts Review Board composed of Mr Joseph Croker, A/Chairman, Mr Carmel Esposito and Mr Paul Mifsud as members, convened a public hearing on the 12<sup>th</sup> December 2011 at 10.30 a.m.

Present for the hearing:

### **Electrical Supplies and Services Ltd (ESS)**

Dr Reuben Farrugia  
Mr Duncan Agius

Legal Representative  
Managing Director

### **Calleja Ltd**

Mr Stephen Calleja

Representative

### **Enemalta Corporation**

Dr Damien Degiorgio  
Dr Erika Grech

Legal Representative  
Legal Representative

### **Adjudicating Board**

Ing. Ivan Bonello  
Ing. Ramon Tabone  
Ing. Charles Bugeja  
Ing. Jason Falzon

Chairman  
Member  
Member  
Member

After the Acting Chairman's brief introduction, the appellant was invited to explain the motive of his objection.

Dr Reuben Farrugia, on behalf of Electrical Supplies and Services Ltd (ESS), the appellant company, made the following submissions:-

- i. Enemalta had in the past issued identical tenders, e.g. TD/T/73/2009, whereby the items were divided into lots and therefore could be awarded to different tenderers;
- ii. Quoted from clause 22.4 of the 'General Instructions' that:- *if the tender procedure contains several lots, financial offers are compared for each lot....;*
- iii. Enemalta had acted in that manner in previous calls for tenders whereby it assessed each item separately and awarded each item to the cheapest bidder;
- iv. in the call for tenders under reference bidders were requested to quote the price for each item;
- v. reference was also made to clause 24.2 which stated that: *Enemalta Corporation reserves the right of accepting any tender wholly or in part or of dividing the contract among two or more tenders;*
- vi. therefore, clause 24.2 contemplated the possibility that the items could be awarded to different tenderers which meant that the contracting authority had the option to either award all the items to one bidder or to award the items to different bidders;
- vii. in this case, the prices offered for items 2 and 3 in Option 1 of ESS were cheaper than those offered by Calleja Ltd whereas in the case of items 1 and 4 Calleja Ltd quoted the cheapest prices in its Option 1 and therefore one would have reasonably expected the contracting authority to award items 2 and 3 to his client and items 1 and 4 to Calleja Ltd, thus saving the public purse about €2,000;
- viii. ESS had requested an explanation from Enemalta as to why, contrary to what Enemalta did in previous identical calls for tenders, opted to award all the items to one tenderer instead of awarding each item to the relative cheapest bidder, and the feedback his client got on the 15<sup>th</sup> July 2011 was that:-  

*it transpired that due to new procurement regulations, tenders with multiple items are being awarded on a global sum basis. Where items are to be awarded separately, these are being called 'lots' in the tender document. In this particular tender 'lots' were not called for;*
- ix. subsequently Enemalta informed his client that the above procedure was not adopted as per new procurement regulations but as per guidelines;
- x. moreover, Enemalta had stated that: *in view of the above, notwithstanding clause 24.2, the general understanding is that tender is awarded in its totality;*

- xi. public procurement was not carried out through a “general understanding” but by means of national and EU legislation; and
- xii. it was incomprehensible how, as per clause 24.2, a public entity reserved the right to award each item to the cheapest bidder but it opted to renounce that right when it was more than justified to exercise it so as to safeguard public funds and instead recommended to award all items to one bidder at a higher expense.

Dr Damien Degiorgio, obo Enemalta, made the following counter submissions:-

- a. reference was made to clause 3.1 of the tender document, which stated as follows:

*This tender is not divided into lots, and tenders must be for the whole of quantities indicated. Tenders will not be accepted for incomplete lots;*

- b. the requirement for tenderers to quote the price for each item arose from the possibility that in the course of the contract Enemalta might require extra quantities of a particular item and in that way it could place an order at the already established price, something which would not be possible if only a lump sum were to be quoted;
- c. with regard to clause 24.2, one had to note that it stated that ‘*Enemalta Corporation reserves the right*’ which denoted discretion but it did not state that ‘*Enemalta shall or was obliged to*’ whereas the provisions of clause 3.1 were binding to the effect that the tender was not divided into lots;
- d. clause 24.2 was resorted to by Enemalta only in case of an emergency given that it provided an essential service;
- e. in case items were to be awarded as one lot the tender format as per clause 3.1 cited at (i) above whereas if the items were to be awarded individually – which was not this case - the tender format was as follows:-

- a. *This tender is divided into lots. Tenderers may submit a tender for one lot only / several lots / all of the lots].*
- b. *Each lot will form a separate contract and the quantities indicated for different lots will be indivisible. The tenderer must offer the whole of the quantity or quantities indicated for each lot. Under no circumstances will tenders for part of the quantities required be taken into consideration.*
- c. *Contracts will be awarded lot by lot, but the Contracting Authority must choose the most favourable overall solution.*

- f. contrary to what the appellant had quoted with regard to clause 22.4, in this tender document no mention was made of ‘several lots’ for the simple reason that the items in this tender were not split up into lots and in fact it read as follows:-

*The Evaluators will check that the financial offers contain no arithmetical errors. The financial evaluation will have to identify the best financial offer.*

- g. the appellant was evidently not quoting from the tender document under reference but he was quoting from other sources which might have since been modified to come in line with Contracts Department tender documentation; and
- h. if one were to view the tender document in its entirety one would undoubtedly note from the provisions of clauses 3.1 and 22.4 that the intention of the contracting authority was all along to award the tender in one lot and that these two clauses prevailed over the discretion mentioned at clause 24.2.

The Acting Chairman remarked that the inclusion of clauses 3.1, 22.4 and 24.2 in the same tender document was confusing and gave rise to a degree of ambiguity. He added that if Enemalta was set to award this tender in one lot then there was no need to include clause 24.2.

Dr Farrugia put forward the following arguments:-

- i. once Enemalta reserved the right through clause 24.2 “*of dividing the contract among two or more tenders*” then the safeguard of public funds was not only a good reason but an obligation for Enemalta to exercise its discretion;
- ii. the discretion at clause 24.2 should not be resorted to only in cases of emergencies, as the contracting authority seemed to imply, but it should be exercised judiciously according to law; and
- iii. public procurement was not regulated by a ‘general understanding’ or through ‘discretion’ but by legislation and regulations.

Dr Degiorgio reiterated that clause 3.1 was clear and binding whereas clause 24.2 was discretionary and in this case Enemalta chose to abide by what was mandatory rather than discretionary. Dr Degiorgio stressed that contrary to what the appellant had indicated, clause 22.4 of this tender document made no mention whatsoever to ‘several lots’.

In his concluding remarks Dr Reuben Farrugia, obo the appellant, maintained that (a) the contracting authority was obliged to award the tender on the basis of the cheapest offers made in respect of the items to be purchased in the interest of the taxpayer/the public purse and (b) the tender document had to have an unequivocal interpretation and it should not be left open to different interpretations according to circumstances.

Dr Damien Degiorgio, obo Enemalta, the contracting authority, on his part concluded that the contracting authority had acted in a manner consistent with the clear and binding provisions of the tender document, namely clauses 3.1 and 22.4, and it did not exercise any form of discretion.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellant's company had objected to the award of items 2 and 3 of the tender to Messrs Calleja Ltd;
- having noted the appellant firm's representative claims and observations that in the past Enemalta had issued identical tenders whereby the items were divided into lots and therefore could be awarded separately; that item 22.4 of the tender document stated that '*if the tender procedure contains several lots, financial offers are compared for each lot....*'; that the usual practice for Enemalta was to award tenders by lot; that the tender requested that the price for each item be quoted; that according to clause 24.2 Enemalta reserved the right of accepting any tender wholly or in part or of dividing the contract among two or more bidders; that had the Corporation followed the usual procedure the Government would have saved some €2,000, and that it was incomprehensible how a public body opted to renounce its right to award each item to the cheapest bidder;
- having considered the Corporation's reference to clause 3.1 of the tender document which specifically mentioned that the tender is not divided into lots and tenders had to quote for the whole quantities; that the requirement for separate prices for each item arose from the fact that the Corporation might be constrained to purchase extra supplies of a particular item; that clause 24.2 stated that 'Enemalta Corporation reserves the right' which denoted discretion and did not impose an obligation on the Corporation; that clause 22.4 was incorrectly quoted by appellant since there was no mention of lots in the tender document; that clauses 3.1 and 22.4 clearly indicated that the intention of the contracting authority was to award this tender as one lot,

reached the following conclusions:

1. the Public Contracts Review Board while understanding that in the past Enemalta opted to award similar tenders on a lot by lot basis, also maintains there was nothing which prevented the Corporation from changing its practice and award a tender as a whole lot;
2. though the inclusion of clause 24.2 together with clauses 3.1 and 22.4 in the same tender document might have given rise to some degree of confusion, the Public Contracts Review Board notes that the fact that in this clause the Corporation reserved the right indicated a certain discretion and did not oblige it to implement the provision of this clause, and that the other clauses were quite clear in pointing out the Corporation's intention to award the tender as a whole lot.

In view of the above this Board finds against the appellant company and recommends the forfeiture of the deposit paid.

Joseph Croker  
A/Chairman

Carmel Esposito  
Member

Paul Mifsud  
Member

4 January 2012