

PUBLIC CONTRACTS REVIEW BOARD

Case No. 409

P/T/3001/2011

Tender for the Transportation of EN590 Diesel in bulk by sea

This call for tenders was published in the Government Gazette on the 8th July 2011. The closing date for this call – which attracted no fewer than two (2) tenderers - with an estimated budget of € 110,000 was the 20th July 2011.

Island Bunker Oils Ltd filed an objection on the 1st December 2011 against the decision of EneMalta Corporation to disqualify its offer and to recommend tender award to San Lucian Oil Company Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr. Joseph Croker and Mr Paul Mifsud as members convened a public hearing on Friday, 11th May 2012 to discuss this objection.

Present for the hearing:

Island Bunker Oils Ltd

Dr Adrian Attard	Legal Representative
Mr Pippo Pandolfino	Representative

San Lucian Oil Company Ltd

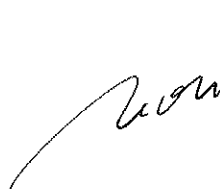
Mr Joseph Falzon	Representative
Dr Yvnaka Mifsud	Legal Representative

EneMalta Corporation (EneMalta)

Dr Antoine Cremona	Legal Representative
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Evaluation Board

Ing. Ivan Bonello	Chairman
Ing. Philip Borg	Member
Ing. Silvan Mugliett	Member



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

Dr Adrian Attard, legal representative of Island Bunker Oils Ltd, the appellant company, submitted that:-

- i. by email dated 1st December 2011, Enemalta Corporation had informed his client that its offer was unsuccessful because the price quoted was not according to Volume 4 'Financial Bid' but was conditional to other additional costs;
- ii. the price quoted by his client of €6.40 per m/ton represented the cost of the works necessary to render the service requested in the tender document whereas the other fees were in respect of exceptional circumstances such as pilot fees required when inclement weather prevailed;
- iii. since the tender document was not entirely clear his client inserted those exceptions to make it clear what his firm's price included and what it excluded;
- iv. his client did not request a clarification from the contracting authority with regard to price;
- v. the price quoted by his client for rendering the service requested was cheaper than that offered by the recommended tenderer, namely 7.25 per m/ton;
and
- vi. the tender requested the labour and equipment necessary to provide this service and his client provided them and, in addition, the company also provided a sort of guideline as to other services which were to be provided by the contracting authority itself.

Dr Antoine Cremona, legal representative of Enemalta Corporation, the contracting authority, submitted that:-

- a. two tenderers participated in this tendering process, where the recommended tenderer was fully compliant even with regard to the price, €7.25 per m/ton, which included VAT, duties, other taxes and charges whereas the price quoted by the appellant company, although cheaper at €44,800, was conditional in the sense that it excluded direct operational costs such as surveyors, pilots, tugs, berthing and port fees etc where applicable;
- b. the contracting authority could not establish the total cost of the offer submitted by the appellant company since it was conditional and, as a consequence, it could not compare the prices of the two bidders on a like-with-like basis;
- c. the tender document seemed quite clear to the recommended tenderer because the latter proposed an all inclusive fixed price as per definition of 'global price contract' at page 19 of the tender document;



and

- d. even if one of the items excluded in the appellant company's price were to be in fact provided by the bidder then the appellant company's price would be subject to other charges and thus it would be considered not all inclusive

Ing. Ivan Bonello, chairman of the adjudicating board, declared that the total cost had to be all inclusive.

Mr Pippo Pandolfino, representing Island Bunker Oils Ltd, under oath, submitted that:-

- i. his firm was the current contractor of Enemalta Corporation for this service and through experience he was aware that surveyor's fees, port fees, mooring fees and tugs and pilot fees were always paid by Enemalta Corporation and would continue to be paid by Enemalta Corporation;
 - ii. the pilots and tugs were only required if, by chance, the service was ordered in inclement weather;
- and
- iii. the contracting authority should have spelt out what fees were included in the unit cost including VAT, duties, other taxes and "charges" because that aspect was not clearly explained in the tender document.

The Chairman Public Contracts Review Board remarked that what Mr Pandolfino stated through his past experience concerned contracts awarded that far but it could be the case that this time Enemalta Corporation was going to modify the operation which could influence who would pay what. He added that the tender price had to include all specific charges and the use of the term 'etc' was not acceptable.

Ing. Philip Borg, a member of the adjudicating board as well as being in charge of the service requested, under oath, provided the following explanations:-

- a. the surveyor's fee were usually paid on a 50/50 basis by the seller and the buyer but, in this case, the fuel belonged to Enemalta Corporation and what the contractor had to do was to transport the fuel from one Enemalta Corporation site to another Enemalta Corporation site and, as a result, any surveyor fees had to be borne by Enemalta Corporation;
- b. the quays at both departure and arrival terminals belonged to Enemalta Corporation and, as a consequence, the mooring fees were, likewise, borne by Enemalta Corporation as was the case with port fees;
- c. the contractor had to provide the barge aimed at transporting the fuel - apart from barge operational costs, the only extra costs that the contractor had to pay for represented pilots and tugs fees whenever the barge master requested pilot and tug services, which expense could amount to about €2,000 each time;
- d. it took about five trips to transport the stipulated 7,000 MT of fuel;



- e. the use to pilots and tugs was not limited to inclement weather but it was at the discretion of the barge master so much so that there were instances when the master of the barge provided by the appellant company at Paradise Bay fuel station, who was rather new to the job, used to call the pilots and the tugs to assist him in berthing the barge even in normal weather conditions;

and

- f. in his opinion, he would classify surveyor and pilot fees as labour costs; tug and port fees as equipment; and mooring and berthing as labour & equipment costs.

Mr Pandolfino remarked that whereas in the beginning the contracting authority stated that the price included all charges, Ing Borg was now stating the surveyor, mooring and port fees were to be paid by Enemalta Corporation, which, in itself, demonstrated that the price requested by Enemalta Corporation was not clearly defined and hence the need was felt to qualify the price his firm offered by distinguishing what was payable by the contractor and what was payable by the contracting authority. He added that, although the contracting authority was stating that the price had to be all inclusive, he was certain that, for example, the mooring fees were not payable by the bidder.

Dr Cremona pointed out that, even if only one of the fees left out by the appellant company had to be included in the price, for example pilot and/or tug fees, then the price offered by the appellant company was incomplete and not acceptable. He added that the appellant company should have asked for a clarification if it was not clear to any of its representatives what the price should include.

Mr Joseph Falzon, representing San Lucian Oil Company Ltd, an interested party, under oath, explained that:-

- i. the unit price of €7.25 per m/ton, equivalent to a total of €50,750 to transport 7,000MT, quoted by his firm was inclusive of VAT, duties, other taxes and charges as requested in the tender document;
- ii. the surveyor's fee was excluded from the price quoted by his firm because it was not part of the transportation costs since the surveyor's job was to quantify the fuel that left point A and arrived at point B and once the fuel was the property of the contracting authority and it did not change hands then the surveyor's fee was a cost on the contracting authority;
- iii. on the other hand pilot, tug, berthing and port fees were included in his firm's price because they were connected with the transport of the fuel by barge;

and

- iv. the price he quoted was an all inclusive one for the fuel transport operation from point A to point B

Mr Pandolfino remarked that:-



- a. his price included all that was required to run his firm's barge, namely fuel, crew and the barge itself, but excluded other charges, such as mooring fees - because in past contracts it was always a charge on Enemalta Corporation and, as also confirmed during the hearing Ing. Borg, it was still going to be a charge on Enemalta Corporation;
- b. Volume 4 'Financial Bid' was not clear as to what the price should include and that was why his firm qualified the items included/excluded in the price submitted so much so that the preferred bidder stated that the company included all charges, except for surveyor charges, when Enemalta Corporation itself confirmed that berthing and other fees were at its expense;

and

- c. it appeared that, during the adjudication process, the offers were not compared like-with-like because it was emerging that the two bidders were offering a service/price which covered a range of fees different from those that Enemalta Corporation had in mind.

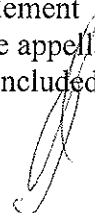
The Chairman Public Contracts Review Board noted that it was evident that (a) the price offered by the appellant company excluded the pilot and tug fees whereas the price offered by the preferred bidder included those charges; (b) the appellant company should not have offered a price that was subject to other charges and (c) if the appellant company had any doubt as to who should pay for certain charges then the firm's representative/s should have clarified the matter prior to submitting the tender.

Dr Cremona intervened to point out that if one were to stretch the argument to the limit, if all the five barge trips required to execute this contract were to be carried out in inclement weather, thus requiring pilot and tug services, then that would involve about €10,000 pilot and tug charges which would have to be added to the appellant company's quoted price.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their 'letter of objection' dated 1st December 2011 and also through their verbal submissions presented during the hearing held on the 11th May 2012, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by email dated 1st December 2011, Enemalta Corporation had informed his client that its offer was unsuccessful because the price quoted was not according to Volume 4 'Financial Bid' but was conditional to other additional costs, (b) the price quoted by the appellant company of €6.40 per m/ton represented the cost of the works necessary to render the service requested in the tender document whereas the other fees were in respect of exceptional circumstances such as pilot fees required when inclement weather prevailed, (c) since the tender document was not entirely clear the appellant company inserted those exceptions to make it clear what his firm's price included



and what it excluded, (d) the appellant company did not request a clarification from the contracting authority with regard to price, (e) the price quoted by the appellant company for rendering the service requested was cheaper than that offered by the recommended tenderer, namely 7.25 per m/ton, (f) the tender requested the labour and equipment necessary to provide this service and the appellant company provided them and, in addition, the company also provided a sort of guideline as to other services which were to be provided by the contracting authority itself, (g) his firm was the current contractor of Enemalta Corporation for this service and through experience he was aware that surveyor's fees, port fees, mooring fees and tugs and pilot fees were always paid by Enemalta Corporation and would continue to be paid by Enemalta Corporation, (h) the pilots and tugs were only required if, by chance, the service was ordered in inclement weather, (i) the contracting authority should have spelt out what fees were included in the unit cost including VAT, duties, other taxes and "charges" because that aspect was not clearly explained in the tender document, (j) whereas in the beginning the contracting authority stated that the price included all charges, Ing Borg was now stating the surveyor, mooring and port fees were to be paid by Enemalta Corporation, which, in itself, demonstrated that the price requested by Enemalta Corporation was not clearly defined and hence the need was felt to qualify the price the appellant company offered by distinguishing what was payable by the contractor and what was payable by the contracting authority, (k) although the contracting authority was stating that the price had to be all inclusive, the appellant company was certain that, for example, the mooring fees were not payable by the bidder, (l) his price included all that was required to run his firm's barge, namely fuel, crew and the barge itself, but excluded other charges, such as mooring fees - because in past contracts it was always a charge on Enemalta Corporation and, as also confirmed during the hearing Ing. Borg, it was still going to be a charge on Enemalta Corporation, (m) Volume 4 'Financial Bid' was not clear as to what the price should include and that was why the appellant company qualified the items included/excluded in the price submitted so much so that the preferred bidder stated that the company included all charges, except for surveyor charges, when Enemalta Corporation itself confirmed that berthing and other fees were at its expense and (n) it appeared that, during the adjudication process, the offers were not compared like-with-like because it was emerging that the two bidders were offering a service/price which covered a range of fees different from those that Enemalta Corporation had in mind;

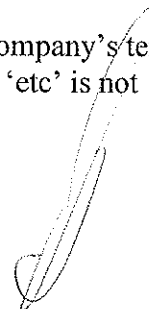
- having considered the contracting authority's representatives' reference to the fact that (a) two tenderers participated in this tendering process, where the recommended tenderer was fully compliant even with regard to the price, €7.25 per m/ton, which included VAT, duties, other taxes and charges whereas the price quoted by the appellant company, although cheaper at €44.800, was conditional in the sense that it excluded direct operational costs such as surveyors, pilots, tugs, berthing and port fees etc where applicable, (b) the contracting authority could not establish the total cost of the offer submitted by the appellant company since it was conditional and, as a consequence, it could not compare the prices of the two bidders on a like-with-like basis, (c) the tender document seemed quite clear to the recommended tenderer because the latter proposed an all inclusive 'fixed price' as per definition of 'global price contract' at page 19 of the tender document, (d) even if one of the items excluded in the appellant company's price were to be, in fact, provided by the bidder then the appellant company's price would be subject to other charges and thus it would be considered not all inclusive, (e) during the hearing Ing. Ivan Bonello,

chairman of the adjudicating board, declared that the total cost had to be all inclusive, (f) the surveyor's fee were usually paid on a 50/50 basis by the seller and the buyer but, in this case, the fuel belonged to Enemalta Corporation and what the contractor had to do was to transport the fuel from one Enemalta Corporation site to another Enemalta Corporation site and, as a result, any surveyor fees had to be borne by Enemalta Corporation, (g) the quays at both departure and arrival terminals belonged to Enemalta Corporation and, as a consequence, the mooring fees were, likewise, borne by Enemalta Corporation as was the case with port fees, (h) the contractor had to provide the barge aimed at transporting the fuel - apart from barge operational costs, the only extra costs that the contractor had to pay for represented pilots and tugs fees whenever the barge master requested pilot and tug services, which expense could amount to about €2,000 each time, (i) it took about five trips to transport the stipulated 7,000 MT of fuel, (j) the use to pilots and tugs was not limited to inclement weather but it was at the discretion of the barge master so much so that there were instances when the master of the barge provided by the appellant company at Paradise Bay fuel station, who was rather new to the job, used to call the pilots and the tugs to assist him in berthing the barge even in normal weather conditions, (k) in the contracting authority's opinion, surveyor and pilot fees would be classified as labour costs; tug and port fees as equipment; and mooring and berthing as labour & equipment costs, (l) apart from the fact that, even if only one of the fees left out by the appellant company had to be included in the price, for example pilot and/or tug fees, then the price offered by the appellant company was incomplete and not acceptable, the appellant company should have asked for a clarification if it was not clear to any of its representatives what the price should include and (m) if one were to stretch the argument to the limit, namely if all the five barge trips required to execute this contract were to be carried out in inclement weather, thus requiring pilot and tug services, then that would involve about €10,000 pilot and tug charges which would have to be added to the appellant company's quoted price;

- having considered the interested party's representatives' reference to the fact that (a) the unit price of €7.25 per m/ton, equivalent to a total of €50,750 to transport 7,000MT, quoted by the said firm was inclusive of VAT, duties, other taxes and charges as requested in the tender document, (b) the surveyor's fee was excluded from the price quoted by the said firm because it was not part of the transportation costs since the surveyor's job was to quantify the fuel that left point 'A' and arrived at point 'B' and, once the fuel was the property of the contracting authority and it did not change hands, then the surveyor's fee was a cost on the contracting authority, (c) on the other hand, pilot, tug, berthing and port fees were included in the firm's price because they were connected with the transport of the fuel by barge and (d) the price the firm quoted was an all inclusive one for the fuel transport operation from point 'A' to point 'B',

reached the following conclusions, namely:

1. The Public Contracts Review Board opines that the appellant company's tender price had to include all specific charges and the use of the term 'etc' is not acceptable.



2. The Public Contracts Review Board feels that it was evident that the price offered by the appellant company excluded the pilot and tug fees whereas the price offered by the preferred bidder included those charges.
3. The Public Contracts Review Board opines that the appellant company should not have offered a price that was subject to other charges, namely the offer was conditional in the sense that it excluded direct operational costs such as surveyors, pilots, tugs, berthing and port fees etc where applicable.
4. This Board agrees with the contracting authority's representative's claim, namely that even if one of the items excluded in the appellant company's price were to be, in fact, provided by the bidder then the appellant company's price would be subject to other charges and thus it would be considered not all inclusive rendering the appellant company's offer to be incomplete and hence not acceptable.
5. This Board would like to highlight the fact that the contracting authority would, in future, do well to desist from referring to some charges as 'other charges' without providing sufficient explanatory information to substantiate what it is really after. Nevertheless, the Public Contracts Review Board also opines that, notwithstanding that the appellant company claimed that it ended up inserting those exceptions to make clearer what the firm's price included and what it excluded since, in its representatives' opinion, the tender document was not entirely clear – especially Volume 4 'Financial Bid', yet, this Board concludes that once the appellant company had any doubt as to who should pay for certain charges then the firm's representative/s should have clarified the matter prior to submitting the tender.
6. This Board agrees with the evaluation board's interpretation of facts which, *inter alia*, included the fact that the tender document seemed quite clear to the recommended tenderer because the latter proposed an all inclusive 'fixed price' as per definition of 'global price contract' at page 19 of the tender document.

In view of the above, this Board finds against the appellant company and recommends that the said appellant forfeits the deposit paid for the appeal to be lodged.



Alfred R Triganza
Chairman



Joseph Croker
Member



Paul Mifsud
Member

28th May 2012