

## PUBLIC CONTRACTS REVIEW BOARD

Case No. 461

**CT/4038/2011; GN/MPS/3001/2011**

**Call for Expression of Interest for the Supply and Delivery of Sulphuric Acid**

This call for tenders was published in the Government Gazette on the 9<sup>th</sup> December 2011. The closing date for this call with an estimated budget of € 200,000 (excl. VAT) was the 31st January 2012.

Two (2) tenderers submitted their offers.

Ragonesi & Company Ltd filed an objection on the 23<sup>rd</sup> July 2012 against the decision of the Contracts Department to accept United Equipment Company (UNEC) Ltd as one of the two potential suppliers of sulphuric acid since it did not have the technical capacity requested in clause 6.1.2 of the tender document.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Carmel Esposito and Mr Joseph Croker as members convened a public hearing on Tuesday, 2nd October 2012 to discuss this objection.

Present for the hearing were:

### **Ragonesi & Company Ltd**

Dr Franco Vassallo  
Mr Roberto Ragonesi

Legal Representative  
Representative

### **United Equipment Co. Ltd**

Dr John Gauci  
Mr Mario Bonnici  
Mr Marcus Bonnici

Legal Representative  
Representative  
Representative

### **Enemalta Corporation**

Dr Paul Micallef Grimaud  
Dr Gillian Portelli Demajo

Legal Representative  
Legal Representative

### **Evaluation Board**

Ing. Ivan Bonello  
Ing. Marvin Cutajar  
Ing. Jean Paul Micallef  
Ing. Silvan Mugliett

Chairman  
Member  
Member  
Member

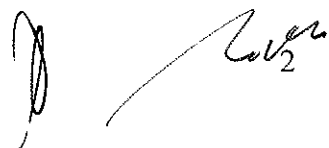
After the Chairman's brief introduction, the appellant company was invited to explain the motives of his company's objection.

Dr Franco Vassallo, legal advisor of Ragonesi & Company Ltd, the appellant company, submitted that:-

- i. by letter dated 13<sup>th</sup> July 2012 the Contracts Department informed his client that "*Ragonesi + Company Ltd and United Equipment Co. (UNEC) Ltd are to be considered as potential suppliers of Sulphuric Acid and they are asked to submit a price quotation as and when the need of Sulphuric Acid arises*";
  - ii. clause 6.1.2 'Information about the candidate's technical capacity' stated that the tenderer had to provide the following evidence:-

*'A list of deliveries effected during the last 5 years;  
The minimum number of deliveries of a similar scope/nature completed in the last 5 years had to be at least 1 in number.  
In so listing the end clients, the tenderer is giving his consent to the Evaluation Committee, so that the latter may, if it deems necessary, contract the relevant clients, with a view to obtain from them an opinion on the works provided to them, by the tenderer. The Evaluation Committee reserves the right to request additional documentation in respect of the deliveries listed.'*
  - iii. his client contended that the other recommended tenderer, namely, United Equipment Ltd, did not possess the required level of knowledge in deliveries of this kind;
  - iv. locally, there were only two suppliers, including his client, that supplied sulphuric acid in the quantity requested in this tender, namely, 950 metric tons, which was quite a substantial quantity;
  - v. the other recommended tenderer had never before participated in tenders for the supply of the sulphuric acid;
  - vi. had the *Freedom of Information Act* come into force earlier - it came into effect in September 2012 - his client would have sought further information about this tendering procedure with a view to ascertaining whether all the tender requirements had been met by the other recommended tenderer;
- and
- vii. he requested the evaluation board to explain why it took over six months to adjudicate this tender which, in his view, was quite straightforward.

Dr Paul Micallef Grimaud, legal representative of Enemalta Corporation, submitted that:-



- a. the delay was attributed to a certain extent to the fact that it took 6 weeks for the evaluation board to obtain the approval of the Contracts Department to ask United Equipment Ltd about its technical capacity;
- b. apart from what the appellant company had cited from clause 6.1.2, one had to add that it also stated that:

*'An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract, for example, by producing an undertaking by those entities to place the necessary resources at the disposal of the economic operator';*

- c. United Equipment Ltd was the local agent of Aurubis Bulgaria AD, which was an international supplier of this substance and which possessed the technical capacity requested in the tender document.

Dr John Gauci, legal advisor of United Equipment Company (UNEC) Ltd, remarked that:-

- i. when dealing with the supply of very particular items or innovative items, Clause 6.1.2 provided the tenderer with the opportunity to rely on the technical capacity and experience of other economic operators so as that more bidders would be able to participate;
  - ii. the provisions of clause 6.1.2 of the tender document mirror the provisions of Regulations 50 and 51 of the Public Procurement Regulations;
- and
- iii. his client's relationship with Aurubis Bulgaria AD, his overseas supplier, had been laid down in the company's tender submission and it was further reinforced by its commitment to deliver the material as tender specifications and conditions as per email dated 5<sup>th</sup> April 2012.

The Chairman Public Contracts Review Board noted that, whereas the appellant company claimed to possess the necessary technical capacity in-house, the other recommended tenderer, namely United Equipment Company (UNEC) Ltd, was relying on the technical capacity of an overseas economic operator and, then again, clause 6.1.2 stated that *'No limits to the amount of sub-contracting are being made in this procedure'*. On the other hand, he questioned whether the technical capacities requested in the tender document referred to those of the bidder, who would ultimately sign the agreement, or to those of the other entity on whom the bidder could rely on as per clause 6.1.2.

Dr Gauci remarked that the provisions of the tender document and the Public Procurement Regulations made it quite clear that an economic operator could rely on

the capacities of other operators once it provided proof that it had at its disposal the resources of the other operator/s.

Dr Micallef Grimaud pointed out that both clause 6.1.2 and Reg. 52 (3) of the Public Procurement Regulations made it clear that the bidder, the one who would ultimately sign the contract, could rely, even exclusively, on the technical capacities of other entities regardless of the legal nature of the links.

Dr Vassallo declared that he disagreed with both the contracting authority and the other recommended tenderer that what was required of the bidder was to have an international firm as his technical backer. He contended that the contracting authority should have sought to have a declaration in writing or an undertaking that that entity would, actually, place the necessary resources at the disposal of the bidder, in this case, that it could provide this supply as requested and that it could charter a suitable vessel to transport this material. Dr Vassallo added that this undertaking should have been provided by the bidder in the first instance and, if not, the contracting authority was obliged to obtain it from the bidder.

Dr Gauci argued that clause 6.1.2 and Regulation 52 were aimed to widen competition in particular with regard to supplies of a restricted nature, such as the one under review, or in the case of new operators which lacked the requested experience. He added that it was up to the contracting authority to satisfy itself that the bidder possessed the resources or could rely on others who could provide those resources and the contracting authority even had the right to seek clarifications in that respect and, in this case, the contracting authority was satisfied with the documentation presented.

Ing. Ivan Bonello, procurement manager and chairman of the evaluation board, under oath, gave the following evidence:-

- a. United Equipment Co. Ltd had submitted the list of principal deliveries in its tender submission with all the details laid down in Volume 1 Section 4 and that was practically all that was required in terms of technical capacities as per clause 6.1.2;
- b. in its tender submission United Equipment Co. Ltd did state that it was the local agents/resellers of Aurubis Bulgaria AD but it did not present any contract or such other document to that effect;
- c. Enemalta Corporation sought the approval of the Contracts Department to ask United Equipment Co. Ltd to provide proof that it would have at its disposal the resources of Aurubis Bulgaria AD and, subsequently, the bidder submitted an email dated 5<sup>th</sup> April 2012 from Aurubis Bulgaria AD stating that it was committing itself to deliver the material to the bidder;
- d. although the appellant company did provide its track record, it did not submit the contract entered into with the company's supplier;

and



- e. in the tendering process it was legally acceptable to ask for and acquire information by the exchange of emails.

Dr Vassallo stated that:

- i. the contracting authority did not feel the need to ask any clarification from his client company because it had provided its track record but, in the case of United Equipment Co. Ltd, the contracting authority felt obliged to ask for further information because it had no track record of its own;  
  
and
- ii. given that sulphuric acid represented an essential material for the operations of Enemalta Corporation and that the provision of 950 metric tons had to be pre-ordered, one would have expected the contracting authority to rely on something more reliable than an email sent by the bidder's supplier, namely Aurubis Bulgaria AD

*The Public Contracts Review Board went through the email sent by Aurubis Bulgaria AD on the 5<sup>th</sup> April 2012.*

Dr Micallef Grimaud reiterated that the part of clause 6.1.2 which was relevant to this issue read as follows:

*"It must in that case prove to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract, for example, by producing an undertaking by those entities to place the necessary resources at the disposal of the economic operator."*

He pointed out that the term 'undertaking' as proof was only 'an example' but, surely, not the only means to provide proof because, for instance, the email provided by Aurubis Bulgaria AD was to the satisfaction of the contracting authority and emails were legally binding documents.

Dr Vassallo concluded by stating that:-

- a. the purpose of this call for expression of interest was for Enemalta Corporation to identify suitable contractors to supply it with sulphuric acid;
- b. albeit his client was not against clauses or regulations that allowed more competition in the tendering process, yet one had to interpret those provisions in their proper light;
- c. United Equipment Co. Ltd only presented an email and, then again, it was not presented with its original tender submission but it was submitted in response to a request for clarification issued by the contracting authority;
- d. no clarification was necessary from his client because the company had been operating in this sector for about 40 years and that, in itself, provided peace of

mind which did not appear to be the case with the other recommended tenderer;

- e. in clause 6.1.2 the tendering company was to give its consent to the evaluation committee so that, if it deemed it necessary, it could contact the relevant clients. Yet, given that United Equipment Co Ltd did not have any clients of its own, then it was Aurubis Bulgaria AD that had to give such a consent to the contracting authority;

and

- f. in the circumstances, United Equipment Co Ltd ought to be excluded from this tendering process.

Dr Gauci argued that once Aurubis Bulgaria AD handed over to United Equipment Co Ltd its list of principal deliveries with all the relevant details to submit it for the purposes of this tender then, at the same time, Aurubis Bulgaria AD had also given its consent to the contracting authority to contact its clients because the tender document stipulated that once the tenderer - in this case United Equipment Co Ltd - presented the list it was giving its consent. Dr Gauci stated that it, therefore, followed that the tenderer was required to give one's consent and not the economic operator one was relying on and, moreover, as per clause 6.1.2, the contracting authority even reserved the right to ask for more information on the deliveries listed.

At this point the hearing came to a close.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated the 23<sup>rd</sup> July 2012 and also through their verbal submissions presented during the hearing held on the 2nd October 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 letter dated 13<sup>th</sup> July 2012 the Contracts Department informed the appellant company that "*Ragonesi + Company Ltd and United Equipment Co. (UNEC) Ltd are to be considered as potential suppliers of Sulphuric Acid and they are asked to submit a price quotation as and when the need of Sulphuric Acid arises*", (b) clause 6.1.2 'Information about the candidate's technical capacity' stated that the tenderer had to, *inter alia*, provide a list of deliveries effected during the last 5 years the minimum number of which that had to bear a similar scope/nature completed in the last 5 years had to be at least 1 in number, (c) the other recommended tenderer, namely, United Equipment Ltd, did not possess the required level of knowledge in deliveries of this kind, (d) locally, there were only two suppliers, including the appellant company, that supplied sulphuric acid in the quantity requested in this tender, namely, 950 metric tons, which was quite a substantial quantity, (e) the other recommended tenderer had never before participated in tenders for the supply of the sulphuric acid, (f) had the *Freedom of Information Act* come into force earlier - it came into effect in September 2012 - the appellant company

6

would have sought further information about this tendering procedure with a view to ascertaining whether all the tender requirements had been met by the other recommended tenderer, (g) one could not but disagree with both the contracting authority and the other recommended tenderer that what was required of the bidder was to have an international firm as one's technical backer, (h) the contracting authority should have sought to have a declaration in writing or an undertaking that that entity would, actually, place the necessary resources at the disposal of the bidder, in this case, that it could provide this supply as requested and that it could charter a suitable vessel to transport this material, (i) this undertaking should have been provided by the bidder in the first instance and, if not, the contracting authority was obliged to obtain it from the bidder, (j) the contracting authority did not feel the need to ask any clarification from the appellant company because it had provided its track record but, in the case of United Equipment Co. Ltd, the contracting authority felt obliged to ask for further information because it had no track record of its own, (k) given that sulphuric acid represented an essential material for the operations of Enemalta Corporation and that the provision of 950 metric tons had to be pre-ordered, one would have expected the contracting authority to rely on something more reliable than an email sent by the bidder's supplier, namely *Aurubis Bulagaria AD*, (l) the purpose of this call for expression of interest was for Enemalta Corporation to identify suitable contractors to supply it with sulphuric acid, (m) albeit the appellant company was not against clauses or regulations that allowed more competition in the tendering process, yet one had to interpret those provisions in their proper light, (n) United Equipment Co. Ltd only presented an email which was not presented with its original tender submission but it was submitted in response to a request for clarification issued by the contracting authority, (o) no clarification was necessary from the appellant company because the company had been operating in this sector for about 40 years and that, in itself, provided peace of mind which did not appear to be the case with the other recommended tenderer, (p) whilst in clause 6.1.2 the tendering company was to give its consent to the evaluation committee so that, if it deemed it necessary, it could contact the relevant clients, yet, given that United Equipment Co Ltd did not have any clients of its own, then it was Aurubis Bulgarias AD that had to give such a consent to the contracting authority and (q) in the circumstances, United Equipment Co Ltd ought to be excluded from this tendering process;

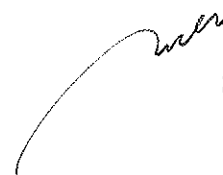
- having considered the contracting authority's representative's reference to the fact that (a) apart from what the appellant company had cited from clause 6.1.2, one had to add that it also stated that "*An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract, for example, by producing an undertaking by those entities to place the necessary resources at the disposal of the economic operator*", (b) United Equipment Ltd was the local agent of *Aurubis Bulgaria AD*, which was an international supplier of this substance and which possessed the technical capacity requested in the tender document, (c) both clause 6.1.2 and Reg. 52 (3) of the Public Procurement Regulations made it clear that the bidder, the one who would ultimately sign the contract, could rely, even exclusively, on the technical capacities of other entities regardless of the legal nature of the links,



(d) United Equipment Co. Ltd had submitted the list of principal deliveries in its tender submission with all the details laid down in Volume 1 Section 4 and that was, practically, all that was required in terms of technical capacities as per clause 6.1.2, (e) in its tender submission United Equipment Co. Ltd did state that it was the local agent/reseller of *Aurubis Bulgaria AD* but it did not present any contract or such other document to that effect, (f) Enemalta Corporation sought the approval of the Contracts Department to ask United Equipment Co. Ltd to provide proof that it would have at its disposal the resources of *Aurubis Bulgaria AD* and, subsequently, the bidder submitted an email dated 5<sup>th</sup> April 2012 from *Aurubis Bulgaria AD* stating that it was committing itself to deliver the material to the bidder, (g) although the appellant company did provide its track record, it did not submit the contract entered into with the company's supplier, (h) in the tendering process it was legally acceptable to ask for and acquire information by the exchange of emails and (i) the term 'undertaking' in clause 6.1.2 as proof was only 'an example' but, surely, not the only means to provide proof because, for instance, the email provided by *Aurubis Bulgaria AD* was to the satisfaction of the contracting authority and emails were legally binding documents;

- having considered the recommended tenderer's representative's reference to the fact that (a) when dealing with the supply of very particular items or innovative items, Clause 6.1.2 provided the tenderer with the opportunity to rely on the technical capacity and experience of other economic operators so as that more bidders would be able to participate, (b) the provisions of clause 6.1.2 of the tender document mirror the provisions of Regulations 50 and 51 of the Public Procurement Regulations, (c) the recommended tenderer's relationship with *Aurubis Bulgaria AD*, its overseas supplier, had been laid down in the company's tender submission and it was further reinforced by its commitment to deliver the material as tender specifications and conditions as per email dated 5<sup>th</sup> April 2012, (d) the provisions of the tender document and the Public Procurement Regulations made it quite clear that an economic operator could rely on the capacities of other operators once it provided proof that it had at its disposal the resources of the other operator/s, (e) clause 6.1.2 and Regulation 52 were aimed to widen competition in particular with regard to supplies of a restricted nature, such as the one under review, or in the case of new operators which lacked the requested experience, (f) it was up to the contracting authority to satisfy itself that the bidder possessed the resources or could rely on others who could provide those resources and the contracting authority even had the right to seek clarifications in that respect and, in this case, the contracting authority was satisfied with the documentation presented, (g) once *Aurubis Bulgaria AD* handed over to United Equipment Co Ltd its list of principal deliveries with all the relevant details to submit it for the purposes of this tender then, at the same time, *Aurubis Bulgaria AD* had also given its consent to the contracting authority to contact its clients because the tender document stipulated that once the tenderer - in this case United Equipment Co Ltd - presented the list it was giving its consent and (h) the tenderer was required to give one's consent and not the economic operator one was relying on and, moreover, as per clause 6.1.2, the contracting authority even reserved the right to ask for more information on the deliveries listed,

reached the following conclusions, namely:





1. The Public Contracts Review Board noted that, whereas the appellant company claimed to possess the necessary technical capacity in-house, the other recommended tenderer, namely United Equipment Company (UNEC) Ltd, was relying on the technical capacity of an overseas economic operator namely Aurubis Bulagaria AD.

This Board, whilst, on one hand, it acknowledges that clause 6.1.2 stated that 'No limits to the amount of sub-contracting are being made in this procedure', yet, on the other hand, it cannot but question whether the technical capacities requested in the tender document referred to those individuals or entities' representative's who would, ultimately, sign the agreement, or to those upon whom a bidder could totally rely on in view of lack of technical capacity on specific subject matter.

This Board establishes that, from a thorough analysis of documentation provided by United Equipment Co. (UNEC) Ltd, it was amply clear that the company would be entirely relying on the technical capacity of its supplier, namely Aurubis Bulagaria AD. This Board feels that given that (a) sulphuric acid represented an essential material for the operations of Enemalta Corporation, (b) the provision of 950 metric tons had to be pre-ordered and (c) in the absence of tangible informative evidence, one would have expected the contracting authority to rely on something more reliable than a simple email sent by the bidder's supplier, namely Aurubis Bulagaria AD wherein the latter stated that it was committing itself to deliver the material to the bidder.


2. This Board contends that the contracting authority should have realised that albeit in its tender submission United Equipment Co. Ltd did state that it was the local agent/reseller of Aurubis Bulgaria AD yet it did not present any contract or such other document to that effect.
3. The Public Contracts Review Board argues that whilst in clause 6.1.2 the tendering company was to give its consent to the evaluation committee so that, if it deemed it necessary, it could contact the relevant clients, yet, given that United Equipment Co Ltd did not have any clients of its own, then it was Aurubis Bulgari AD that had to give such a consent to the contracting authority.

Furthermore, this Board establishes that, whilst it was a fact that Aurubis Bulgaria AD handed over to United Equipment Co Ltd its list of principal deliveries with all the relevant details to submit it for the purposes of this tender then, at the same time, Aurubis Bulgaria AD had not necessarily given its consent to the contracting authority to contact its clients.

4. This Board feels that, as things stand at the moment, the contracting authority does not have adequate peace of mind as it did not seek proper clarification during the evaluation process. As a result, the Public Contracts Review Board strongly recommends that, prior to proceeding further with United Equipment Co Ltd's expression of interest, the contracting authority should first seek to (a) establish whether the list of deliverables as submitted by United Equipment Co Ltd is in line with Enemalta Corporation's scope of work, namely the real

purpose of the tender, (b) obtain directly from Aurubis Bulgaria AD the latter's consent to enable it (the contracting authority) to contact its (Aurubis Bulgaria AD) clients, (c) obtain an independent legal opinion as to the commercial / representation agreement entered into between United Equipment Co Ltd and Aurubis Bulgaria AD in order to confirm claims made in United Equipment Co Ltd's submission and (d) obtain direct assurances (original signed document to be sent) from United Equipment Co Ltd's foreign supplier on the latter's letterhead that, should United Equipment Co Ltd's submission be successful, Aurubis Bulgaria AD will also be jointly responsible with United Equipment Co Ltd to attend to the transportation of the sulphuric acid to Enemalta Corporation's designated premises..

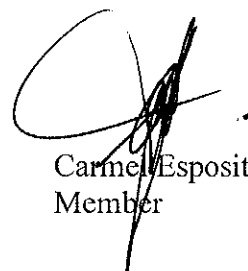
In view of the above this Board recommends that the deposit paid by the appellant company for the appeal to be lodged should be reimbursed.



Alfred R Triganza  
Chairman



Joseph Croker  
Member



Carmel Esposito  
Member

29 October 2012