

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case No. 587**

**TD/T/3088/2012**

### **Tender for the Supply of New Transformer Oil.**

The tender was published on the 5<sup>th</sup> April 2013. The closing date was the 15<sup>th</sup> May 2013. The estimated value of the Tender was €67063.3 (Exclusive of VAT).

Five (5) bidders had submitted their offers on line.

On the 26<sup>th</sup> July 2013, Uniking International filed an objection against a decision by the Contracting Authority, Enemalta Corporation, wherein no reasons for the objection were given. This was followed by another letter explaining his objection for the award of the tender to Ragonesi & Company Limited.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Tuesday 3<sup>rd</sup> September 2013 to discuss the appeal.

### **Present for the hearing:**

#### **Uniking International - Appellant**

Mr Malcolm Caruana	Representative
Dr Michael Tanti Dougall	Legal Representative

#### **Ragonesi & Company Limited – Recommended Bidder**

Mr Roberto Ragonesi	Representative
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#### **Enemalta Corporation – Contracting Authority**

Ing Ivan Bonello	Chairman Evaluation Board
Ing David Azzopardi	Member Evaluation Board
Ing. Silvan Mugliett	Member Evaluation Board
Ing. Karl Xerri	Member Evaluation Board
Dr Paul Micallef Grimaud	Legal Representative

After making a brief introduction, the Chairman invited the appellant to make his submissions.

Mr Malcolm Caruana, for appellant stated that they quoted two separate prices in their tender bid. One price was valid for three months, and another price valid for the next three months. They had filed several tenders in this way. The reason was that suppliers would not bind themselves on a fixed price for six months.

Mr Ivan Bonello, the Chairman, Evaluation Board stated that all the other bidders abided by what was requested and offered one price, valid for six months.

Dr Paul Micallef Grimaud, for Enemalta confirmed that appellants' first offer was the cheapest but was valid only for three months. Their second offer was higher and not the cheapest, although it was for the next three months, in fact it was higher than that offered by the preferred bidder. He explained that this was an e tender, where bids were received on line, and the system allows input of one price. Thus the first quote by appellant, and the cheapest bid was accepted and shown. It is the contracting authority's prerogative, to make any orders and purchases throughout the length of the validity period. For this reason appellants' bid could not be averaged, because the date when the actual order would be made was not known. This shows the importance of the specifications asking for a fixed price for six months duration. Otherwise evaluation of bids could not be made on an equal footing.

Dr Michael Tanti Dougall for appellants explained that suppliers normally bound themselves to supply this kind of oil only for one month at a fixed price. Appellants being regular customers managed to obtain a quote for three months. To arrive at the price appellants quoted for the second three months, they had to make projections and take certain commercial decisions. Appellants have supplied Enemalta before with this kind of oil before, and there were never any problems. He claimed that the criteria used in the evaluation were subjective.

Dr Micallef Grimaud said that it seems that the criteria used to evaluate the tenders are now being questioned. This appeal should not be used to question the award criteria. The appeal was not based on these, and could not be so based because the criteria were published before the closing date, and there were other means to raise objections to them. Once the tender was filed, the criteria were accepted. Appellants bid was not rejected because of the price, but because a required criterion was not followed. The preferred bidder offered what was required and requested in the tender document, and there are inbuilt safeguards to ensure that he delivers what he promised. The certainty of pricing has to be ensured, and the preferred bidder is bound by his offer for the whole of the six months. That is why this requisite was insisted upon.

Dr Michael Tanti Dougall stated that the question is one of price only. It was not a question of technical compliance. Thus not awarding the cheapest offer was the result of a purely subjective decision, and the principle behind it was defective, because the evaluation board should have worked out an average of appellants' offers. He claimed also that there were other instances in previous tenders, where bidders had split their offers, just as the appellants did in this one, and were successful.

Dr Micallef Grimaud for the contracting authority said that appellants made two bids and not one. They did not bind themselves to provide oil for six months. Appellants' bid was thus

administratively non-compliant. Clause 7.3 and Clause 8.1 required the prices to remain fixed for a period of one hundred and fifty days. This was an administrative criterion because whenever the contracting authority issued an order for the purchase of the oil, it had to be certain of the price.

Dr Roberto Ragonesi on behalf of the preferred bidder stated that no comparisons with previous tenders should be made. This was an e tender and conditions are not the same. All tenderers, including appellants, signed a declaration where they accepted all the conditions of the tender documents. Contends that the tender had to be valid for six months and to make an offer for three months was not permissible.

Dr Micallef Grimaud on behalf of contracting authority said that the tender was for a single bulk order, within a six month window. He explained that ranking of bids would be impossible if multiple bids for different periods were to be accepted. That is the reason why the contracting authority specifically asked for one fixed price for a period of six months, to obtain a level playing field. That was the precise reason why this was an administrative requirement. He also admitted that in the past, a tender was awarded to someone who made two bids, like today's case. In that case however, both prices bid by the tenderer in question had been the cheapest, enabling the ranking of offers to be made.

The Chairman asked the contracting authority, if the bulk purchase had to be made at the appellants' second offer, how would this offer have ranked in the pricing. Mr Ivan Bonello replied that it would have ranked in the third place.

Dr Tanti Dougall stated that the contracting authority could have decided to order the oil supply during the first three months and so obtaining it at the cheapest price. It had enough storage facilities to do so. It would have been an administrative decision to order at the cheapest bid.

Replying to a question by the Chairman, Mr Ivan Bonello explained that the evaluation and approval process of a tender is not carried out by any single person. It was a process that entailed several sub committees and approvals. There was never a guarantee that the process would be completed within three months. These three months start from the closing date of the tender. In fact when, in the present tender, the permission of the DCC was obtained, and the objection filed, the first three months had already elapsed. He reiterated that that was the reason why a six month period was insisted upon.

Dr Tanti Dougall claimed that three months was enough and cited tender DT/T 48/2009 where the closing date was the 9<sup>th</sup> September 2009 while adjudication was made on the 17<sup>th</sup> September 2009, just eight days after the closing date. This shows that the contracting authority could be efficient when it chose to be.

Mr Roberto Ragonesi the preferred bidder reiterated that the present tender was an e tender and conditions differ from the usual previous tenders. One such condition was that the price offered had to be fixed for six months. It goes against this condition for anyone to offer two prices. Should the appellant be awarded the tender it would discriminate against all the other bidders who followed the regulations.

Mr Ivan Bonello here explained that the present form of e tender does not allow the offer of two prices from the same bidder. Bidders had to put in one price and tick "agreed" to any

condition therein contained. Thus the only price the system accepted from appellants was the cheapest one he offered, but this was for just three months. Enemalta had to operate within the framework of the Procurement Regulations.

Dr Micallef Grimaud stated that the Regulations have to be adhered to. The decision making process within the regulations, has to follow a set administrative procedure. Before accepting a tender, it has to be ensured that the price would be known. Answering a hypothetical question by the Board, Dr Grimaud stated that appellants bid as of today would not be the cheapest.

The hearing was at this point brought to a close.

**This Board,**

**Having noted the Appellant's objection in terms of the 'Letter of objection without reason' dated 26<sup>th</sup> July 2013 and thereafter followed by another 'But reasoned letter of Objection' dated 30<sup>th</sup> July 2013 and also through the Appellant's verbal submissions presented by same during the hearing held on 3<sup>rd</sup> September 2013, had objected to the decision taken by the pertinent Authority, in that:**

- a) The Appellant contended that suppliers for this type of product usually bind themselves for a fixed and stable price of the product in question for only one month due to the fluctuating economic situation of the global markets. However, Appellant managed to obtain a fixed price for a period of three months.**
- b) The Appellant had to forecast the price for the following three months, taking into account the vulnerable situations of movement in prices of this particular product.**
- c) Applicant was a provider for the same Contracting Authority and never encountered problems with regards to pricing and deliveries. In the past, the Appellant had always quoted two prices for two periods within a six month span.**
- d) The Appellant was aware of the fact that previously, bidders did split their tender offer with regards to tendered prices over a period and were unsuccessful.**
- e) If the Contracting Authority decided to order the procurement of the product from the Appellant within the first three months, then the cost of the product for the Contracting Authority would have been not only compliant in all respects but also the cheapest.**
- f) There was enough time for the Contracting Authority to take advantage of the Appellant's bid offer, which was the cheapest rate, for the first three months.**

**Having considered the Contracting Authority's verbal submissions presented by same during the hearing held on 3<sup>rd</sup> September 2013, in that:**

- a) All bidders had to quote just one price, for a period of six months.**
- b) The Appellant's was not rejected because of bid price, but because certain conditions were not adhered to in accordance with the tender conditions laid out in the tender document.**
- c) The preferred Bidder was Administratively and Technically Compliant and fulfilled all the requirements laid out in the tender document.**
- d) The tender was purposely intended for a single bulk order of the product during a six month duration. So that the tenderer had to cater for any fluctuation in the global price of the product during the six months period.**
- e) The Tender document requested one price for a duration period of six months.**

**Reached the following conclusions:**

- 1. This Board noted the fact that had the Contracting Authority decided to apply the most advantageous bid within the a period of three months, the Contracting Authority would have obtained substantial savings. The Fact that the procedural system of award of a tender is too bureaucratic and in this Board's opinion is inefficient, the Appellant did not abide by the requirement of the tender conditions.**
- 2. This Board also took into consideration that although, in the past, two quoted prices were quoted and were acceptable by the Contracting Authority, this particular tender is to be regarded as a separate issue with different requirements and conditions as laid out in the tender document. To this effect, no comparison should be made between past and present conditions.**
- 3. This Board also feels that since all other tenderers quoted one price as stipulated in the tender document, it would be unfair and unethical if a decision is taken to reintegrate the Appellant's bid in the evaluation process.**

**In view of the above, this Board finds against the Appellant, however due to defective administrative procedures, this same Board recommends that the deposit paid by the Appellant be reimbursed.**

Dr. Anthony Cassar  
Chairman

Dr. Charles Cassar  
Member

Mr. Richard A. Matrenza  
Member

*24 September 2013*