

Case 1241 – TD/T/3355/2018 –Tender for the Supply and Installation of Unit Substations

The publication date of the call for tenders was the 29th March 2018 whilst the closing date of the call for tenders was 23rd May 2018. The estimated value of the tender (exclusive of VAT) was € 210,000.

On the 8th November 2018 Lucy Switchgear Ltd filed an appeal against Enemalta plc as the Contracting Authority objecting to being disqualified on the grounds that their offer was not the cheapest bid. A deposit of € 1,050 was paid.

There were three (3) bidders.

On 14th December 2018 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Carmel Esposito and Mr Lawrence Ancilleri as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants: Lucy Switchgear Ltd

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| Dr Joseph Camilleri | Legal Representative |
| Mr Philip Lonsdale | Representative |
| Mr Mark Vassallo Cesareo | Representative |

Contracting Authority – Enemalta plc

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| Dr Clement Mifsud Bonnici | Legal Representative |
| Eng Ivan Bonello | Chairman Evaluation Committee |
| Eng Miguel Borg | Member Evaluation Committee |
| Eng Charles Bugeja | Member Evaluation Committee |
| Eng Ernest Ciantar | Member Evaluation Committee |

Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties and invited them to make their submissions.

Dr Joseph Camilleri Legal Representative of Lucy Switchgear Ltd stated that there had been a number of developments since the appeal was filed arising out of certain clarifications made by Enemalta plc. Some points raised in the appeal letter had therefore been superseded.

The tender referred to the supply of a number of transformers and was to be awarded to the cheapest compliant offer. There was a difference in this tender in that the value component included the costs of the transformers plus the value of the costs of certain tests plus the calculation of the capitalisation of losses (change in value over the years). The offer by the Appellants was much cheaper in the first place but after adding the cost of the tests and capitalisation costs became higher than the opposing bid by some € 10,000. The appeal therefore was on two points – the costs of the tests and the capitalisation calculations. Enemalta requested three types of tests – an impulse test, a heat run test and a sound level test. Appellant had, in the case of the impulse test, obtained pricing for three alternative tests due to Enemalta having the option to decide which one of the tests they would apply. This offer by the Appellants to include the cost of all three impulse tests made their bid higher, since the recommended bidder had only costed one test in his bid.

Although there was an obvious disparity in the bids because the costs of the tests, Enemalta did not enquire further – they should have given an indication that something was wrong and clarification should have been sought. The difference of over €25,000 in the cost of the tests should have triggered an investigation in a tender where the overall difference between the bids was only some € 10,000.

In regard to the capitalisation costs there were a number of considerations in the calculations to be taken with regard to the four types of transformers demanded. The calculation of the life of a transformer over ten years warped the calculations since the life of a transformer was in excess of that number of years. When the tendered prices were so close it should have lead the Contracting Authority to look further into these calculations to ensure that they were getting the best benefit.

Dr Clement Mifsud Bonnici Legal Representative of Enemalta plc said that the submission of the bid had not been done correctly and the point of this appeal is an attempt to revise the offer. Appeals are not meant to be used to revise bids. Appellants claim that they did not have full clarity for reasons as to why their offer was not the cheaper. They should have followed Article 242 of the PPR which gives the right to ask for clarification even after the award of the tender – answers from the Contracting Authority would then have been forthcoming.

When Dr Mifsud Bonnici touched on the first point of the appeal, namely the method of the calculation of the total price, Dr Camilleri confirmed that that the first point in the letter of objection was not being pursued.

Continuing Dr Mifsud Bonnici said that the price of the successful bidder was not abnormally low but in line with the current market value, and in any case the mechanism of low value was not grounds for rectification. As to the capitalisation costs, Appellant forgot exactly what they were bidding for. The formula set out in the tender was not challenged and followed PPR directives – it was not arbitrary, but if that was the case it should have been raised earlier.

Dr Camilleri re-iterated that the costs of the tests should not have been brushed aside. The difference in the cost of these tests was € 26,000 which was considerable in view of the value in the closeness of the two bids. The adjustment in the value of the tests would have swayed the outcome of the bids. The test price quoted by the successful bidder was lower than the market value – this was clear evidence of an abnormally low price.

Dr Mifsud Bonnici said that amending the value of the tests was equivalent to a rectification, and there was no evidence that the price was abnormally low as no market price had been established. It was up to the Appellant to prove that point.

The Chairman thanked both parties for their submissions and declared the hearing closed.

This Board,

having noted this Objection filed by Lucy Switchgear Limited, (hereinafter also referred to as the Appellants) on 8 November 2018, refers to the contentions made by the same Appellants with regard to the award of the Tender of Reference TD/T/3355/2018 awarded by Enemalta plc, (hereinafter also referred to as the Contracting Authority), and listed as Case Number 1241 in the records of the Public Contracts Review Board.

Appearing for the Appellants:

Dr Joseph Camilleri

Appearing for the Contracting Authority:

Dr Clement Mifsud Bonnici

Whereby, the Appellants contend that:

- a) **there were developments since the filing of this Appeal and some points raised in the “*Letter of Objection*” have been superseded, however some of their concerns remained in that, the value of tests on the transformers, in the Appellants’ offer, included the costs of the three type of tests, (instead of one), so that their offer seemed to be much higher than expected. In this regard, Lucy Switchgear Limited maintain that, the Contracting Authority should have noticed that only the cost of one of the tests should be considered;**

- b) **the calculation of the life of a transformer over a period of ten years was not realistic as the normal lifespan of a transformer is much more than ten years. In this regard, the Appellants maintain that the evaluation committee should have also considered the “*Best Value for Money*”, offer.**

This Board has also noted the Contracting Authority’s “*Reasoned Letter of Reply*” dated 19 November 2018 and its verbal submissions during the Public Hearing held on 14 December 2018, in that:

a) Enemalta Corporation insist that the Evaluation Committee could not take into consideration the cost of one test only thereby adjusting the total quoted offer of the appellants as this would have been a rectification of the latter's offer. At the same instance, the Corporation did not consider the successful Bidder's offer as being abnormally low, so that further investigation into the latter's offer was not required and in fact Enemalta Corporation maintains that the Preferred Bidders' offer reflects the market conditions.

b) The Contracting Authority also contends that the capitalisation costs of the transformers was dictated to all Bidders and in this regard, the Appellants were well aware of what was being requested by the Contracting Authority, so much so, that they submitted their offer. In this regard, the Appellants had the remedy to submit their concern prior to the closing date of submissions but no form of clarification or concern regarding this issue was forthcoming from the Appellants.

This Board noted that, since the filing of this Appeal, some of the points raised in the Appellants' "*Letter of Objection*" have been superseded, so that only the remaining issues will be considered.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by the parties that attended opines that the issues that merit consideration are twofold namely,

- 1. The submission of three quotes for testing;**
- 2. The Contracting Authority’s obligation to investigate further the successful Bidder’s offer and formula ambiguity**

- 1. The submission of three quotes for testing**

This Board refers to Clause 6.3, (Financial Offer,) as follows:

“6.3 – Prices of Type Tests

Tenderers must include separate prices in their offer of both Type Tests in the form shown below, and the total price of both Type Tests carried out on only one transformer shall be included in the sum of prices for financial evaluation (see Section 6 “Financial Offer/Cl 6.5 “Financial Formula for Evaluation”

However, Enemalta shall reserve the option to decide which of these tests, if any, shall be included at the time of placing of the order, and the prices of the selected Type Tests shall be officially included in the total price of the order.

PRICES OF TRANSFORMER TYPE TESTS ON ONE TRANSFORMER FOR EACH ITEM

| <i>ITEM NO</i> | <i>IMPULSE TEST AMOUNT ON ONE TRANSFORMER</i> | <i>HEAR RUN TEST AMOUNT OF ONE TRANSFORMER</i> | <i>SOUND LEVEL TEST ON ONE TRANSFORMER</i> | <i>TOTAL PRICE FOR TESTS</i> |
|-----------------------|--|---|---|-------------------------------------|
| <i>1</i> | | | | <i>0</i> |
| <i>2</i> | | | | <i>0</i> |
| <i>3</i> | | | | <i>0</i> |
| <i>4</i> | | | | <i>0</i> |
| <i>TOTAL</i> | | | | <i>0</i> |

The above mentioned clause is clearly dictating that the bidders must include separate prices of both type tests in the form shown above, and in this respect, this Board confirms that the Contracting Authority explained in clear terms what it was requesting.

In this particular case, the Appellants, under the “*type tests*” column, included the total cost of all three different impulse tests, instead of one, so that their offer, for this particular technical requisite, was much higher than the normal market price. Although the Appellants’ offer in this regard presented a glaring difference from the other offers, at the stage of evaluation, the Evaluation committee could not ask for a clarification on this financial offer’s discrepancy in Lucy Switchgear Limited’s quoted price. If on the other hand, the Contracting Authority allowed such a clarification, the principle of equal treatment would have been breached. At the same instance, the Appellants did not denote any indication that the quoted costs of the tests represented the costs of the three tests combined. In this respect, this Board would confirm that the Evaluation Committee could not, in whatsoever manner, assume such an inclusion.

This Board, would point out that it is the responsibility of the Bidder to ensure that the information submitted in their offer conforms with what was requested in the Tender Document, and on the other hand, the Evaluation Committee must deliberate on the

information submitted by the Appellants and at the same time, abide by the principle of self-limitation.

With regard to the Appellants' claim that, since there was this financial discrepancy, the Contracting Authority should have investigated whether the Preferred Bidder's offer is abnormally low, this Board would point out that, Enemalta Corporation is not obliged to enquire why a financial bid is low, as the financial offer was subject to note 3, apart from the fact that the Preferred Bidders' offer represented the market rates. In this regard, this Board opines that the Tender Document clearly defined what was requested by the Contracting Authority and the Evaluation Committee carried out the evaluation process in a fair, just and transparent manner. At the same instance, the Appellants had all the remedies to clarify any doubts or misinterpretations in any clauses in the Tender Dossier and this Board notes that the Appellants did not avail themselves of such remedies. In this regard, this Board does not uphold Lucy Switchgear Limited's First Contention.

2. The Ambiguity of the Formula and the Contracting Authority's Obligation to indulge further

With regards to Lucy Switchgear's second contention, in that, the calculation of the life of the transformer over ten years distorted the dictated calculation, this Board would refer to Clause 6.5, Financial Formula for Evaluation, as follows:

"6.5 Financial formula for Evaluation

The Total Price for financial evaluation shall be derived from the addition of the following price components, namely: -

- i) The prices for the required unit substations submitted which shall also incorporate the prices of all mandatory Routine Tests – see Section 6 “Financial Offer”/Clause 6.4 “Prices of Routine Tests” as adjusted during evaluation for metal price and rate of exchange variations, (namely P1 – see Section 6 “Financial Offer/Cl 6.1 Financial Bid)*

ii) The Price Adjustment for the Capitalisation of Losses corresponding to the respective item, (see Section 6 “Financial Offer/ Cl 6.2.3 “Price Adjustment for the Capitalisation of Losses”), and

iii) The Total Price for all Type Tests carried out on only one transformer, (see Section 6 “Financial Offer”/Cl 6.3 “Prices of Type Tests)

The above clause explains vividly how the final financial values of the offers were to be assessed and if the Appellants disagreed with such a formula, they had all the remedies to clarify their concern in this regard. The fact that the Appellants submitted their offer means that they had accepted the Terms and Conditions as laid out in the Tender Document. This Board however notes that although this issue was raised by the Appellants in their “*Letter of Objection*”, the latter confirmed that such an issue was not being pursued; however, this Board felt that such an issue necessitated this Board’s opinion.

Lucy Switchgear Limited maintain that since the two contending offers' prices were very close and the only difference in the Appellants' offer was due to the inclusion of the total costs of three tests for impulses, Enemalta Corporation should have enquired further into the Appellants' offer. This Board, would reassert the fact that there were no signs or indications that the successful Bidders' offer was abnormally low, in fact, it has been proved that the latter's bid reflected the present market process and under these circumstances, the Evaluation Committee acted in a proper and transparent manner. At the same instance, this Board highlights the fact that the appellants did not indicate to the Contracting Authority that, in their financial Bid, they had included the total of the three costs of tests carried out relating to the impulse tests of the transformer. In this regard, this Board does not uphold the Appellants' Second Contention.

In view of the above, this Board,

- i) does not uphold the contentions made by Lucy Switchgear Limited;**

- ii) upholds Enemalta Corporation's decision in the award of the Tender;**

iii) recommends that the deposit paid by the Appellants should not be refunded.

Dr Anthony Cassar
Chairman

Mr Carmel Esposito
Member

Mr Lawrence Ancilleri
Member

8th January 2019