

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1873 – CT 2000/2022 – Framework Agreement for the Supply of 11KV Circuit Breakers.**

**29<sup>th</sup> May 2023**

The tender was issued on the 4<sup>th</sup> May 2022 and the closing date was the 16<sup>th</sup> June 2022. The estimated value of the tender excluding VAT, was € 5,032,575.

On the 27<sup>th</sup> March 2023 Siemens SpA filed an appeal against Enemalta plc as the Contracting Authority on the grounds that the tender had been awarded to another bidder.

A deposit of € 25,163 was paid.

There were four (4) bids.

On the 18<sup>th</sup> May 2023 the Public Contracts Review Board composed of Dr Charles Cassar as Chairman, Mr Lawrence Ancilleri and Ms Stephanie Scicluna Laiviera as members convened a virtual public hearing to consider the appeal.

The attendance for this public hearing was as follows:

#### **Appellant – Siemens SpA**

Dr Adrian Mallia	Legal Representative
Dr Michael Ellul Sullivan	Legal Representative
Mr Lorenzo Penati	Representative

#### **Contracting Authority – Enemalta plc**

Dr Clement Mifsud Bonnici	Legal Representative
Dr Calvin Calleja	Legal Representative
Eng Ivan Bonello	Chairperson Evaluation Committee
Mr Kenneth Barbara	Evaluator
Mr Keith Callus	Evaluator
Mr Charles Bugeja	Evaluator
Mr Ernest Ciantar	Representative

#### **Preferred Bidder – Lucy Electric (UK) Ltd**

Dr Joseph Camilleri	Legal Representative
Mr Andrew Evans	Representative
Mr Mark Vassallo Cesareo	Representative

#### **Department of Contracts**

Dr Mark Anthony Debono	Legal Representative
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Dr Charles Cassar Acting Chairman of the Public Contracts Review Board welcomed the parties and prior to inviting submissions said that the Board will deal first with the

preliminary plea raised by Dr Mallia on behalf of Siemens regarding their request for sight of documents submitted by the preferred bidder.

Dr Adrian Mallia Legal Representative for Siemens SpA referred to his request for certain documents submitted by the preferred bidder which were vital to his client's appeal. The applicable Public Procurement Regulations demand openness and transparency and appellant has to be granted effective remedies. To achieve this it is necessary for that appellant to be given certain documents. Conversely, the Regulations also seek to protect confidential information. A recent decision in the *Polska* case (CJEU 54/21) must be given a lot of weight when it stated 'the principle of confidentiality must be reconciled with the general principle of good administration (para 60); balancing the right of both parties (para 65); the contracting authority cannot be bound by claim by bidder that documents are confidential – it is up to the contracting authority or the board to decide if the documents are truly confidential (para 66); documents attached to the bid cannot be considered confidential in their entirety (paras 72 to 74). There is a duty to produce redacted version of requests made relating to information regarding Section 5.B of the tender in the selection criteria. These criteria are regulated by Regulation 40(2) which states what documents are considered confidential or otherwise. This regulation makes it clear that the selection criteria should be provided in full or a redacted version provided to enable remedy to be exercised.

Dr Calvin Calleja Legal Representative for Enemalta plc said that the original objection requests a deep dive analysis of the offer of the preferred bidder. The Appellant filed a request for documents one working day before the deadline for submissions lapsed. The necessary time is needed to enable a reply to be formulated. There is no unilateral right to information. The Contracting Authority is under an obligation to not disclose documents designated as confidential – the preferred bidder has designated documents as confidential on no less than three occasions. Regulation 40 gives protection to the Contracting Authority's obligation without prejudicing it. This right is also given in Regulation 242(3). These regulations are in line with the EU legal regime to open up procurement. In the *Varec* case it is stated that effectiveness would be seriously undermined if all information is made unreservedly available to the Appellant. Technical information is confidential and is not public information. This has been confirmed in various judgements in the Maltese Courts. In the present situation the recommended bidder has already disclosed information which Appellant sought as confirmed in Document LE 1. This appeal is on the parameters of the original objection which makes no reference to switchgear.

Dr Clement Mifsud Bonnici Legal Representative for Enemalta plc said that the overall balance is in favour of confidentiality. The Maltese market is limited and highly competitive. The technical literature could be indicative of the price of a product and can contain secrets in a situation where there is a limited number of operators with intense competition. The disclosure of technical information should not be taken lightly. A request for this type of information should have been raised prior to submitting an appeal.

Dr Joseph Camilleri Legal Representative for Lucy Electric (UK) Ltd agreed with the position stated by the Contracting Authority. Representatives of the preferred bidder can confirm the confidentiality of the documents requested by Appellant which stated that the documents are not confidential as they are publicly available. If this is so, said Dr Camilleri, then Appellants could have found out the requested information themselves. The solution

offered by the preferred bidder in this case is particular to this project, is confidential and a trade secret. The key point to be emphasised in regard to this appeal is its very vague approach with no attempt by the Appellant to indicate any real complaint. The appeal is totally unclear and not based on any specific suspicion but simply on a request for information. A representative of Lucy Electric will confirm this confidential nature of the documents requested.

Mr Andrew Evans (UK PP 1339278) called to testify by the preferred bidder stated on oath that he is a Divisional General Manager of Lucy Electrics and that the technical information regarding the switchgear is not publicly available and is very commercially sensitive and involves significant intellectual property.

Dr Mallia said that this was the second time this award was being made. The first award was struck down as the Authority admitted a serious mistake had been made in the evaluation process. These sort of circumstances create in the Appellant's mind doubts on the evaluation. Had the request for information been made before proceedings, as has been claimed, the outcome would have been the same as getting the information now. It is not up to the bidder to claim what is confidential – this assessment has to be made by the Board whose responsibility it is to provide a redacted version if necessary.

Dr Mifsud Bonnici stated that the *Polska* case referred to makes the point that if the documents are not produced then the appeal can be specifically on those grounds – there are no such grounds in the original appeal and thus it cannot be introduced now.

At this stage the Chairman proposed a short recess to enable the Board to consider the points made on this preliminary plea.

On resumption the Chairman stated that on the request by the Appellant for additional documents the Board directs that this information is not to be provided to the Appellant – redacted or otherwise. This information should have been requested prior to the submission of the original objection letter. Any further queries in relation to information that could have been potentially provided post to such request could be put to potential witnesses during this hearing. The Board has decided to proceed with hearing this appeal on the claim by the Contracting Authority of the third ground of appeal.

Dr Mifsud Bonnici requested that the full appeal be heard rather than one of the grounds. Dr Mallia concurred with this suggestion and the Board acceded to the request.

Eng Ivan Bonello (556363M) called to testify by the Appellant stated on oath that he was the Chairperson of the Tender Evaluation Committee (TEC). He detailed the members of the TEC and confirmed that they were all technical engineers employed by Enemalta. The evaluation was carried out holistically as a team. Witness confirmed that he was aware that there had been a previous tender on this product which had been withdrawn. The TEC on this tender was the same as the one which had evaluated the first tender.

Dr Mifsud Bonnici objected to this line of questioning stating that the first evaluation decision was '*res judicata*'. The questions being asked were not related to and have no issue with this tender.

Proceeding with his testimony witness stated that the reasons for the withdrawal of the first tender had been officially stated. Witness was referred to the letter of the 24<sup>th</sup>

November 2022 from the Contracting Authority to the preferred bidder and said that his had been replied to through the ePPS within the statutory deadline. He said that there were two attachments (1 and 2) to the letter – attachment 1 covering the years 2019 to 2021 and the other went further covering the years 2017 to 2022. The latter was irrelevant to the tender and the TEC considered only the former document (1).

Dr Mifsud Bonnici objected to a question from Dr Mallia to the witness as to the number of units declared in attachment 1 as he said this information was confidential as it could indicate to a competitor the market share of the preferred bidder. The Board should not allow such questions.

In reply to further questions, witness stated that in attachment 1 there are more than 300 units listed.

Engineer Kenneth Barbara (116193M) called to testify by the Appellant stated on oath that any of the units listed in attachment 1 excluding the non- extensible ones gives a result which is higher than 300. According to the witness, it was not stated whether these were single modular panels or ring mains units. He then explained the difference between the two products, went on say that the ring mains units were not acceptable according to the tender terms and confirmed that more than 300 single modular panels were in the list submitted under Section 3.2 of the specifications.

This concluded the testimonies.

Dr Mallia stated that the other parties claimed that the Appellant's objection was null. There are several instances in case law where it was held that nullity is the absolute last resort and applied in very limited circumstances to the extent that the claim has to be so vague as to be not understandable such that it deprives the other party from making a defence. Regarding Appellant's request for the suspension of the award the same principles as mentioned above apply. The definition of suspension in a dictionary is defined as a temporary revocation. On the merits of the appeal the Appellant relies on its written submissions as it cannot prove or disprove the statements of the witnesses. The Board should carefully consider and examine if Lucy's bid is compliant.

Dr Calleja stated that the Authority relies on its written submissions whilst Dr Mifsud Bonnici urged the Board to base its decision on all the points contested.

Dr Camilleri said that the preferred bidder's plea is that the Appellant's request is not correct in the form it is made. Using an imperfect word is not a reason to ignore it – suspension is not revocation. On that basis alone the appeal should be turned down. The appeal is totally vague and lacks clarity and no grounds were put forward to indicate any doubts or suspicions about the evaluation process or on the technical offer of the preferred bidder. If Appellant's claim is accepted it could lead to a situation where objections could be raised against any bid without any basis. The preferred bidder's position is as stated in its written reply.

There being no further submissions the Chairman thanked the parties and declared the hearing closed.

End of Minutes

## Decision

This Board, having noted this objection filed by Siemens SpA., (herein after referred to as the appellant), on the 27<sup>th</sup> March 2023. The objection refers to the claims made by the same appellant against Enemalta Plc regarding the tender listed as case No.1873 in the records of the Public Contracts Review Board

The Board also noted the letter of reply by Enemalta plc (herein after referred to as the contracting authority) dated 6<sup>th</sup> April 2023, together with its verbal submissions during the hearing on the 18<sup>th</sup> May 2023.

Having taken cognisance of the Minutes appearing above, all further documentation submitted and the testimonies of the witnesses called to testify.

Whereby, this Board, on the preliminary plea made by the appellant requesting certain documents submitted by the preferred bidder,

concluded that:

“ On the request by the Appellant for additional documents the Board directs that this information is not to be provided to the Appellant – redacted or otherwise. This information should have been requested prior to the submission of the original objection letter. Any further queries in relation to information that could have been potentially provided post to such request could be put to potential witnesses during this hearing. The Board has decided to proceed with hearing this appeal on the claim by the Contracting Authority of the third ground of appeal”.

After the board considered the arguments and documentation from both parties on the main grounds of the appeal, the Board's view was that the Appellant's claim was not sustainable as he had given no clear reason for its appeal contrary to the requirements of the Public Procurement Regulations. The appeal is unclear since no specific points were made to justify any doubts and suspicions on how the evaluation process was carried out or on the technical offer submitted by the preferred bidder.

The Board therefore concludes and decides that:

- a) Does not uphold the Appellant's Letter of objection.
- b) Upholds the Contracting Authority's decision in the award of the tender.
- c) Directs that the deposit paid by the Appellant not to be reimbursed

Dr Charles Cassar  
Chairman

Ms Stephanie Scicluna Laiviera  
Member

Mr Lawrence Ancilleri  
Member