



Il-Viċi Prim Ministru

The Deputy Prime Minister

4th August 2010

HE Mr Jose' Manuel Barroso
President of the Commission
European Commission
B-1049 Brussels
Belgium

Excellency,

I refer to the letter of Formal Notice dated 3 June 2010 concerning the award of a contract for increasing the local generating capacity at the existing Delimara power plant station.

I. Information queries accompanying the Letter of Formal Notice

- In its letter, the Commission requests the precise date when the change in the emission limits of the technical specifications took place.

The change in legislation, namely to the Limitations of Emissions of Certain Pollutants into the Air from Large Combustion Plants Regulations (LN329/02) was introduced through the Limitations of Emissions of Certain Pollutants into the Air from Large Combustion Plants (Amendment) Regulations (LN2/08), published on 4 January 2008. A clarification notice advising all short-listed candidates of the resultant changes was issued by Enemalta Corporation on 7 January 2008.

- In its letter, the Commission also requests information on the status of the national appeal procedure eventually brought by the unsuccessful bidder against the award decision.

Article 83(1) of the Public Contracts Regulations (LN177/05¹) states that 'Any tenderer who feels aggrieved by a proposed award of a contract...may, within ten calendar days of the publication of the decision, file a notice of objection at the Department of Contracts or the contracting authority involved as the case may be.' None of the bidders raised an objection in terms of these Regulations or appealed against the award decision. The procedure for the submission of appeals is explained under section III of this reply. It should also be noted that none of the bidders lodged an action before the Courts of Malta as they were entitled to do if they felt that their right to an effective review under the Public Contract Regulations had in any way been prejudiced.

¹ As amended by the Public Contracts (Amendment)(No.2) Regulations (LN130/06).

With regard to the arguments made in the letter of Formal Notice, you may wish to note the following.

II. Claim concerning obligations under Article 10 of Directive 2004/17/EC

The Limitations of Emissions of Certain Pollutants into the Air from Large Combustion Plants Regulations (LN329/02) transposing the Large Combustion Plant Directive (LCPD) was amended by the Limitations of Emissions of Certain Pollutants into the Air from Large Combustion Plants (Amendment) Regulations (LN2/08) in order to introduce a reference within national law to the exclusion of diesel and gas engines from the scope of application of the emission limit values specified in the LCPD, which exclusion had been omitted from the original transposition measure. Following verification and confirmation from the Commission's Directorate General for the Environment, on 4 January 2008, the Limitations of Emissions of Certain Pollutants into the Air from Large Combustion Plants Regulations (LN329/02) was amended by the Limitations of Emissions of Certain Pollutants into the Air from Large Combustion Plants (Amendment) Regulations (LN2/08) in order to align national legislation with the Large Combustion Plant Directive and with national policy.

Whilst it is the prerogative of the Member States to set higher or more stringent requirements than those set out by the LCPD, this was not the intention or policy of the Maltese authorities and it was considered that the national transposing legislation merited correction. In fact, this same legislation had several other inaccuracies which were brought to the attention of the Maltese authorities by the Commission and was subsequently amended by the Large Combustion Plants Regulations (LN172/10).

Prior to the amendment made by the Limitations of Emissions of Certain Pollutants into the Air from Large Combustion Plants (Amendment) Regulations (LN2/08), the interpretation by the competent authority was that Maltese legislation required that liquid fueled diesel engines conform to the emission limit values stipulated in the LCPD for combustion plants, namely those specified for boilers, which is not the case in any other Member State and which was never the intention of the Maltese legislator. Similarly, gas engines were required to conform to emission limit values for gas fired combustion plants. The amendment made through the Limitations of Emissions of Certain Pollutants into the Air from Large Combustion Plants (Amendment) Regulations (LN2/08) removed gas engines and diesel engines from the scope of the Limitations of Emissions of Certain Pollutants into the Air from Large Combustion Plants Regulations (LN329/02).

Since the Limitations of Emissions of Certain Pollutants into the Air from Large Combustion Plants (Amendment) Regulations (LN2/08) removed both diesel engines and gas engines from the scope of the Limitations of Emissions of Certain Pollutants into the Air from Large Combustion Plants Regulations (LN329/02), Enemalta Corporation felt that it was necessary to issue a clarification notice in order to inform bidders of the legislative change that had occurred in the meantime, and to fully conform with Clause EP.2.1 of the Invitation to Tender (ITT). Clause EP.2.1 of the ITT states that "All proposed plant must comply with the airborne emission limit values of the LCPD 2001/80/EC as transposed into Maltese national legislation L.N.329 of 2002...". It must be noted that this condition that all proposed plant must comply with the Limitations of Emissions of Certain Pollutants into the Air from Large Combustion Plants Regulations (LN329/02) remained unchanged throughout the tendering process.

Clause EP.2.1 also adds a descriptive table specifically listing the emission limits in absolute figures, which table merely reproduces the emission limit values applicable under national law

(LN329/02) at the time when the ITT was issued by Enemalta Corporation. The emission limit values previously applicable to diesel and gas engines under national legislation were no longer applicable, as a result of the amendments contained in the Limitations of Emissions of Certain Pollutants into the Air from Large Combustion Plants (Amendment) Regulations (LN2/08). Since Clause EP.2.1 of the ITT stated that all proposed plant must comply with the emission limit values of the LCPD as transposed into Maltese national legislation, on 7 January 2008, Enemalta Corporation issued a clarification notice informing the bidders of the legislative changes that had taken place subsequent to the issue of the invitation to tender. A copy of the relative communication is being attached for the Commission's information. It would not have been sufficient for the clarification notice to simply inform bidders that the emission limit values for diesel and gas engines previously specified by law were no longer applicable; it was also necessary that the awarding authority address the lacuna thus created by indicating new emission limit values that the bidders would be required to adhere to, in conformity with the amended legislation.

The aim of the clarification notice was twofold: primarily to notify all bidders of the legislative change, and the impact of such change on the specifications; and secondly to extend the period for submission of final bids and provide for a further session of negotiations, with a view to allowing all bidders to update their positions in the light of the amended legislation. The modifications to the table listing emission limit values in the ITT was, therefore, not an arbitrary or discriminatory change in technical specifications by Enemalta, but was on the contrary a lawful rectification necessitated by the change in national legislation.

To this end, Enemalta Corporation carried out a review of other applicable EU legislation. The only EU wide legislation which covered diesel and gas engines was the Long Range Transboundary Air Pollution Protocol (LRTAP)² and Directive 2008/1/EC concerning integrated pollution prevention and control (IPPC Directive). Consideration was also given to the requirements of meeting the National Emission Ceilings Directive (NEC)³. In the case of the LRTAP, the only limits set are for emissions of NO_x, whilst in the case of the IPPC Directive the use of Best Available Technology (BAT - as described in the LCPD Bref document⁴) is required, with emission limit values set accordingly.

After a review of these two instruments, it was determined that for liquid fuel fired diesel engines, the use of BAT would lead to lower emissions⁵ and hence Enemalta Corporation selected emission limit values achievable through the use of BAT as listed and described in the LCPD Bref document. In the case of SO₂ emissions, where emission limit values were not given in the LCPD Bref document or in the LRTAP, Enemalta Corporation made use of the emission limit values specified by the German TA Luft⁶. Consequently the clarification notice issued by Enemalta Corporation informed all bidders of the above mentioned legislative change, and the consequent review of emission limit values for liquid fuel fired diesel engines.

In the case of gas fuel-fired gas engines (which were also excluded from the scope of the Limitations of Emissions of Certain Pollutants into the Air from Large Combustion Plants Regulations (LN329/02) by means of the Limitations of Emissions of Certain Pollutants into the

² Council Decision of 13 June 2003 on the accession of the European Community, to the Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-Level Ozone (2003/507/EC)

³ Directive 2001/81/EC of 23 October 2001 on national emission ceilings for certain atmospheric pollutants.

⁴ Reference Document on Best Available Techniques for Large Combustion Plants.

⁵ The emission limit values in the LRTAP (applicable for NO_x only) are in fact higher than the emission limit values achievable by BAT in the LCPD Bref document.

⁶ Technische Anleitung zur Reinhaltung der Luft (Technical Instructions on Air Quality Control)

Air from Large Combustion Plants (Amendment) Regulations (LN2/08)), it was also determined that the use of BAT would lead to lower emissions⁷ and hence it was decided to specify emission limit values achievable through the use of BAT. However, in the course of this review, Enemalta Corporation found that the emission limit values originally specified in the ITT, which were based on the emission limit values applicable to gas fired combustion plant under the LCPD, were consistent with the use of BAT for gas engines (given that the use of natural gas leads to negligible emissions of both SO₂ and dust), and hence no review of these emission limit values was necessary. This is the reason why the exception to the applicability of the LCPD to gas engines brought about by the Limitations of Emissions of Certain Pollutants into the Air from Large Combustion Plants (Amendment) Regulations (LN2/08) did not translate itself into an actual change in the emission limit values for gas engines – not because the legislative amendment was not also made applicable to gas engines (as the Commission claims in page 3, points 3 and 4), but simply because when Enemalta Corporation came to review the emission limit values specified for gas engines in application of the legislative amendment resulting from the Limitations of Emissions of Certain Pollutants into the Air from Large Combustion Plants (Amendment) Regulations (LN2/08) and in accordance with the same methodology used for diesel engines, Enemalta Corporation found that the emission limit values originally specified in the ITT for gas engines, were consistent with the use of BAT for gas engines, and therefore no actual review was necessary. Thus, in deciding whether a revision of the emission limit values for diesel and gas engines was necessary, the same objective criterion was used in both cases viz. the use of Best Available Technology ('BAT'). The use of this common criterion resulted in a need to revise the emission limit values for diesel engines but not in the case of gas engines. There was, therefore, no discriminatory treatment between gas engines and diesel engines. It is also pertinent to note that no bids proposing gas engines were submitted⁸.

Whereas the amendments made by the Limitations of Emissions of Certain Pollutants into the Air from Large Combustion Plants (Amendment) Regulations (LN2/08) only affected diesel engines and gas engines, that is, internal combustion engines and not specifically diesel powered plants (which would also include diesel fired gas turbine plant), the legislative amendments had no effect on emission limit values for gas turbines whether fueled by gas or liquid fuel. In fact, the legislative amendment in question excludes from the scope of the Limitations of Emissions of Certain Pollutants into the Air from Large Combustion Plants Regulations (LN329/02) "plants powered by diesel, petrol and gas engines"; gas turbines were not excluded from the scope of the Limitations of Emissions of Certain Pollutants into the Air from Large Combustion Plants Regulations (LN329/02).⁹ Therefore, it would not have been legitimate to review the emission limit values specified for gas turbines since the exception brought about by the legislative amendment in question did not cover gas turbines.

Emission limits for gas turbines, whether fueled by gas or liquid fuel, are specified, subject to certain conditions, in Annexes IV, V and VI of the Limitations of Emissions of Certain Pollutants into the Air from Large Combustion Plants Regulations (LN329/02). The amendment by virtue of the Limitations of Emissions of Certain Pollutants into the Air from Large Combustion Plants (Amendment) Regulations (LN2/08) did not change any of these limits for gas turbines; nor were gas turbines excluded from the application of the Limitations of Emissions of Certain Pollutants into the Air from Large Combustion Plants Regulations (LN329/02) as were diesel and gas engines. Therefore, in the case of the single bid submitted containing an offer for a gas turbine-powered plant, the emission limit values stipulated in the ITT, which correctly reproduced those

⁷ The emission limit values specified for gas engines in the LRTAP, which also was only applicable only to NO_x emissions, were higher than those achievable by use of BAT.

⁸ Only two technologies were being offered by the different bidders, namely diesel engines or gas turbines.

⁹ Regulation 2(a) of LN 2/08 "Plants powered by diesel, petrol and gas engines irrespective of the fuel used, shall not be covered by these regulations."

applicable to gas turbines in the Limitations of Emissions of Certain Pollutants into the Air from Large Combustion Plants Regulations (LN329/02) according to the conditions set in the LCPD and annexes, remained valid. This is effectively why the clarification notice issued by Enemalta did not contain any revision of the emission limit values with regard to gas turbine powered plants. Consequently, there was no discriminatory treatment whatsoever by the contracting authority in this respect either. One should also keep in mind that, in order to give bidders the opportunity to compete in a just and fair manner, the deadline for the submission of the final bids was extended by four weeks. This extension was adequate for the purpose, so much so that no objections were received in this regard, notwithstanding that the bidders had several opportunities to raise objections following the issue of the clarification notice of 7 January 2008, as explained in greater detail in section III below.

Thus, not only was there no discriminatory treatment, but the four-week extension of the period for submission of the final bids and the possibility of a further session of negotiations was made applicable to all bidders, even to those whose bid was not actually affected by the review in emission limit values.

It should be clarified that a gas turbine is technically a combustion turbine where fuel (either liquid or gas or both) is burnt in a combustion chamber. The exhaust gases from the combustion of the fuel are used to rotate a turbine. A typical example would be aircraft jet engines, which are 'gas turbines' operating with JET A1, a liquid fuel (kerosene). Furthermore, in Malta the five gas turbines (GE frame 6) all operate using diesel fuel. On the other hand, a gas engine is an internal combustion engine (a spark ignition engine) which uses gas as its fuel. It is similar to a petrol engine.

It should also be noted that both the LCPD and the IPPC Directives, as well as the proposed new Industrial Emissions Directive (IED), respect the basic fact that emission limits are set according to both the technology and the fuel being used. There is no single emission limit value which is applicable to all technologies or fuels. There are objective circumstances that justify treating different technologies and fuels differently, thereby resulting in the setting of differentiated emission limit values. This clearly cannot amount to discriminatory treatment.

The Detailed and Final Bid submissions were deposited at the Department of Contracts within the Ministry of Finance, the Economy and Investment on 4 March 2008. The documentation and data were examined and clarification queries were sent to all the bidders. Following the receipt of replies to these queries, during the second week of May 2008, further analysis was carried out and all four bidders were called for final negotiation meetings. One set of meetings was held with Bateman and Socoin and two sets of meetings were held with both MAN and BWSC. Neither Bateman nor Socoin requested a second set of meetings. The minutes of each meeting were recorded.

Following these meetings, and as agreed during the negotiations, BWSC, Bateman and MAN made further improvements to their offers in order to address the concerns raised by Enemalta Corporation. Bidders submitted revised final bids which were technically compliant with Enemalta Corporation's requirements. Socoin did not renew the bid bond and also informed Enemalta Corporation that they were not interested in pursuing the procurement process.

The technical evaluation report was prepared on 22 October 2008. On 28 November 2008, Bateman wrote to Enemalta Corporation, claiming that they had identified some innovative ideas to impact positively on the cost schedule and requesting, by 'return urgent mail' a meeting with Enemalta to present their 'constructive ideas and suggestions'. This suggestion was not entertained and the technical evaluation report was presented to the Department of Contracts and

approved by the General Contracts Committee on 16 December 2008. The results were published and the bidders were invited to present any objections to these results by 23 December 2008. Since no such objections were presented, on 24 December 2008 the bidders were instructed to submit their financial / commercial offer by 3 February 2009.

III. Claim concerning obligations under Article 49 of Directive 2004/17/EC in conjunction with Article 1(1) and (3) of Directive 92/13/EEC

Article 1(3) of Directive 92/13/EEC has been transposed into Maltese legislation through Regulation 83 of the Public Contracts Regulations (LN177/05) which provides that any tenderer who feels aggrieved by a proposed award of a contract and any person having or having had an interest in obtaining a particular public supply, public service or public works contract and who has been or risks being harmed by an alleged infringement may, within ten calendar days of the publication of the decision, file a notice of objection at the Department of Contracts or the contracting authority involved as the case may be. Such notice of objection shall only be valid if accompanied by a deposit equivalent to one per cent of the estimated tender value, provided that in no case shall the deposit be less than €450 or more than €58,000. The Head of a contracting authority shall immediately notify the Director that an objection has been filed with his authority thereby immediately suspending the award procedure. The Department of Contracts or the contracting authority involved, as the case may be, shall be precluded from concluding the contract during the period of ten calendar days allowed for the submission of appeals. The award process shall be completely suspended if an appeal is eventually submitted. Regulations 83(2) and (3) explain in detail the procedures to be followed should an appeal be filed.

It is to be noted that in accordance with the Public Contracts Regulations, calls for tenders with an estimated value of €600,000 and over proceed in accordance with the three package contracting procedure. This means that the evaluation of tenders is carried out in three stages. Package 1 relates to the bid bond while package 2 concerns the technical solution and package 3 deals with the financial offer. At every stage, bidders are given the opportunity to file an objection should they disagree with any of the decisions taken. On 16 December 2008, the General Contracts Committee discussed and approved a recommendation that only three companies were technically compliant. A notice in this regard was published by the Department of Contracts and each bidder was informed of this decision and of their right of appeal. No objection in respect of the technical evaluation was ever filed. This effectively means that each and every bidder was satisfied with the result of the technical evaluation.

No objections were filed in accordance with Article 83 of the Public Contracts Regulations (LN177/05) either throughout the tender procedure or following the award of the contract.

Article 49(1) of Directive 2004/17/EC was also transposed into Maltese legislation by means of Article 49(1) of the Public Procurement of Entities operating in the water, energy, transport and postal services sectors Regulations (LN178/05).

Article 49(1) of these Regulations, like Article 49(1) of Directive 2004/17/EC, requires the contracting entity to "inform" the economic operators involved of the award of the decision without specifying the exact means of how this information is to be conveyed. In line with Article 49(1) of the Regulations and Article 49(1) of Directive 2004/17/EC, the Department of Contracts informed the bidders as per the standard notification procedure used in Malta: the award notice was published on the public notice board at the Department of Contracts and on its website on the same day. All bidders to the tender were represented in Malta by agents familiar with the notification procedure used. It should also be noted that the website on which the tender award notice was published, recorded more than 2,900 hits during the period during which appeals could

be filed following the award of the tender. These bids originated from twenty-six different countries including Germany, Hungary, India, Israel, Italy, Ivory Coast, Malta and the United Kingdom.

As regards the Commission's allegation that there was a violation of Clause CC.1.19 of the instructions to bidders, it is submitted that the manner in which the Department of Contracts proceeded to inform all bidders of the award decision in question, which was the standard notification procedure known to all the agents of the economic operators involved, satisfies the requirements of this particular clause. In any case, in the event that any of the bidders felt that their right to appeal or to an effective review had been in any way prejudiced as a result of the manner in which this particular clause of the instructions to bidders was implemented, they had every right and every opportunity to protect their claimed interests by filing an objection in terms of Article 83 of the Public Contracts Regulations or by lodging an action before the Courts of Malta. In any case, an alleged violation of Clause CC.1.19 of the instructions to bidders does not give rise to an alleged violation of Article 49 of Directive 2004/17/EC.

On 27 May 2009, one of the three short-listed bidders, Bateman Litwin (BL), lodged a judicial protest concerning this tender and a counter judicial protest was lodged in reply by the Maltese authorities on 15 June 2009. However, it should be noted that the judicial protest lodged by Bateman was never followed by the lodging of a formal legal action by either Bateman or any of the other bidders. Nor was an objection in terms of Article 83 of the Public Contracts Regulations ever filed by any bidder. In fact, there has not been any attempt by a bidder or any person having an interest in the contract to try to halt the signing or the execution of this contract.



TONIO BORG

Enclosures: Clarification Notice issued by Enemalta Corporation on 7 January 2008

Copy: Michel Barnier, Commissioner for Internal Market and Services, European Commission

AMENDMENT AND CLARIFICATIONS TO THE TECHNICAL SPECIFICATIONS DOCUMENT FOR LOCAL GENERATION CAPACITY FOR ENEMALTA CORPORATION GN/DPS/8/2006

SECTION EP

Emissions for Diesel Engine Fired Plant

Due to recent amendments in the Maltese legislation, the following clarification to the specification is being issued to all Bidders to the tender for Local Generating Plant GN/DPS/8/2006.

Legal Notice L.N. 329 of 2002 has been amended by L.N.2 of 2008. This amendment can be seen at <http://www.doi.gov.mt/EN/legalnotices/2008/01/LN%202.pdf>

Therefore the emission limits as listed in section EP.2.1 of the specification shall not apply to diesel engine fired plants.

As a result, the emission limits for all plants powered by diesel engines and running on liquid fuels, as listed in section EP.2.1 are no longer applicable and such diesel engine powered plants shall now comply to the following emission limits as shown in table EP.2.101 below.

These emission limits are listed in table EP.2.101 without prejudice to any other emission limits applicable to diesel engine plant as listed elsewhere in the specification.

Pollutant	Emission limit Value	Remarks
SO ₂	300 mg/Nm ³ (O ₂ content 5%)	
NO _x measured as NO ₂	400 mg/Nm ³ (O ₂ content 5%)	
Dust	81mg/Nm ³ (O ₂ content 5%)	Unit operating on Gasoil with specification as per clause GI.1.1.1
	135 mg/Nm ³ (O ₂ content 5%)	Unit operating on HFO with specification as per clause GI.1.1.2

Table EP.2.101.

It is to be noted that this amendment does not affect the emissions limits applicable to gas turbine powered and other combustion plant. Therefore for plants powered by gas turbines, or other combustion plant, the emission limits as listed in section EP.2.1 of the specification, are still valid.

SECTION CC

Extension to Tendering Period

Due to the above issue, it has been decided that the tendering period shall be extended by four (4) weeks and the closing date and time for the submission of the Detailed and Final Bids shall now be 10.00 am local time on Tuesday 4th March 2008.

The Detailed and Final Bids shall be marked and deposited at:

Bids for Local Generating Capacity for Enemalta Corporation
Contract No. GN/DPS/8/2006 &CT 2491/06
Department of Contracts,
Notre Dame Ravelin,
Floriana CMR 02,
MALTA.

Third Set of meetings

A third set of meetings shall be held with each of the bidders. Each bidder shall have access to a number of meetings each of 2 day duration. These meetings shall be held up to the 15th February 2008. Bookings for no more than two meetings will be accepted, subject to a first come first served basis and availability of the dates requested. Meetings will be held on normal working days between Monday to Friday (both inclusive).

The booking of these meetings shall be carried out through e-mails.

The e-mail shall be titled: GN/DPS/8/2006 BOOKING THIRD SET OF MEETINGS

and shall be sent to Francis.Darmanin@enemalta.com.mt.

Written Queries

The closing date for the submission of any written queries by any of the bidders is 15th February 2008 as stated in the timetable below. Enemalta Corporation will respond to such written queries by 22nd February 2008. These dates are written in the timetable below.

No communication whatsoever is to be undertaken or accepted after the above dates.

Timetable.

The time table as listed in clause CC.1.0 of the Specification is thus amended as follows:

All dates in DD/MM/YYYY format.

	DATE	TIME
Initiation of Third Set of Negotiations	16/1/2008	09.00 hrs
End of Third Set of Negotiations	15/02/2008	16.00 hrs
Closing date by which any Bidder is to submit written queries	15/02/2008	16.00 hrs
Closing date by which Enemalta Corporation is to reply to queries	22/02/08	16.00 hrs
Deadline for submission of Detailed and Final Bids	04/03/2008	10.00 hrs
Detailed and Final Bid opening session	04/03/2008	10.00 hrs
Expected date of Notification of Award to Successful Bidder	15/08/2008	-

All other clauses as listed in section CC which have not been amended by this document remain valid.