

EUROPEAN COMMISSION

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Dear Minister,

I would like to draw your attention to the procedure carried out by Enemalta for the award of a contract for increasing the local generating capacity at the existing power plant station in Delimara (value: €165 million) and for a contract concerning the maintenance of such additional power plant (value: €18 million).

Enemalta is the public organisation responsible for the generation and distribution of electricity in Malta. Set up by an Act of Parliament in 1977, Enemalta Corporation remains the main provider of energy generation and distribution in Malta.

On 18 November 2006 Enemalta published a request for proposals for a "supply" contract for increasing the local generating capacity with additional power plant, to be awarded following a negotiated procedure. The contract notice published in the EU Official Journal referred to the need that the additional plant met the two following requirements: i) guaranteeing a minimum output of 100MW and ii) operating on liquid fossil fuels as the main energy source. The technical specifications of the tender contract contained, *inter alia*, a section, EP.2, relating to emission limit values that the proposed plant had to comply with, according to environmental EU legislation, in particular the EC Large Combustion Plant Directive ("LCPD")<sup>1</sup>. The specifications laid down in section EP.2 distinguished between: i) emission limit values for light distillate fuel gas turbine plants and ii) emission limit values for all other liquid fuel fired plant. Respect of environmental compliance was a *condicio sine qua non* for the acceptance of any bid.

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<sup>1</sup> Directive 2001/81/EC of the European Parliament and of the Council of 23 October 2001 on national emission ceilings for certain atmospheric pollutants. OJ L 309, 27/11/2001, p.22.

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Following an invitation to tender to the short listed bidders, negotiations were held in the period October 2007 to February 2008 with the 4 short listed bidders that had submitted valid preliminary bids. Of the three bidders considered to be technically compliant, one contained an offer for a gas turbine powered plant, while the other two bids were based on diesel engine powered plants.

The Commission requested the Maltese authorities to provide some clarifications on this tender procedure by letter of 24 June 2009, to which the Maltese authorities replied by letter of 23 July 2009. According to the Maltese authorities, in January 2008 Legislation L2/98 was adopted, amending law LN 329/02, which had transposed the LCPD in Maltese law. As the LN 329/02 had failed to provide for an exception to the applicability of the LCPD for "diesel engines, petrol and gas powered plants", Law L2/98 provided for such exception and therefore correctly transposed the LCPD Directive on this point.

A modification in the emission limits of the technical specifications occurred, likely between January and February 2008. Such modification provided that the original emission limit values were not applicable anymore to plants powered by diesel engines and that new increased limit values applied to such plants. The deadline for the submission of final bids was extended by 4 weeks, namely until 4 March 2008. On 3 April 2009 the contract was awarded to the company that offered the bid considered to be the most advantageous, based on a diesel engine powered plant. The decision was published on 3 April 2009 on the notice board and on the website of the contracting authority, providing for a delay of 10 days for appeals. The unsuccessful bidders were therefore not directly informed by the awarding authority of the adoption of the decision.

Enemalta is a contracting entity responsible for the generation and distribution of electricity in Malta and therefore subject to the public procurement provisions of Directive 2004/17/EC<sup>2</sup>, pursuant to Article 2 linked to Article 3 of that Directive.

Despite the contract notice referring to a "supply contract", the contract for increasing the local generating capacity with additional power plant and the contract for maintenance of that plant constituted a single tender procedure whose main object was a works contract, within the meaning of Article 1(2)b of Directive 2004/17/EC. Such works contract clearly exceeded the relevant thresholds applicable to works contracts at the time when the contract was signed (April 2009), namely €5 150 000.

As to the change in the technical specifications, on the basis of the available information, the Commission observes the following:

1) The change concerned a very important aspect of the technical specifications, namely the emissions limit values for the plant. Respect of environmental compliance was a *conditio sine qua non* for the acceptance of any bid.

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<sup>2</sup> Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors. OJ L 134, 30.4.2004, p. 1.

2) The change in the technical specifications occurred at a very late stage, just few days before the expiry of deadline for the receipt of the final bids so that the deadline for submission of the final offers was extended by four weeks. The change was not necessary to comply with European legislation, the LCPD, as the Maltese authorities seem to indicate in their reply of 23 July 2009. Such change was introduced by the contracting authority, in the exercise of its discretion, in order to benefit of one of the exceptions to the applicability of the LCPD, now correctly transposed into national law.

3) The emission limit values were changed only with regard to one specific technology, namely diesel powered plants, and not with regard to gas powered plants. Following the abovementioned legislative amendment the exception to the applicability of that Directive could have been applicable also to gas powered plants.

4) The change consisted in the increase of the emission limit values for the diesel plants. This constituted a clear advantage for the bidders that had presented an offer for a diesel powered plant, as the possibility for a plant to produce a higher level of emissions has a clear impact on the costs of such plant. On the contrary the emission limit values for gas powered plants were not subject to any changes.

5) The bid finally chosen as considered the most advantageous was presenting an offer for a diesel powered plant.

Article 10 of Directive 2004/17/EC provides that "*contracting entities shall treat economic operators equally and non discriminatorily and shall act in a transparent way*" and therefore ensure the respect of the fundamental principles of equality and non-discrimination stemming from Articles 18, 49 and 56 of the Treaty on the Functioning of the European Union. The Commission considers that a change in the technical specification at a very late stage of the procurement procedure could constitute a violation of the principle of equality and non discrimination.

In the circumstances of the present case, the Commission is of the opinion that the changes in the technical specifications introduced by the awarding authority with regard, in particular, to the emission values for diesel powered plants and occurred at such a late stage of the tender procedure, discriminated in favour of the bidders that presented an offer for a diesel powered plant, at disadvantage of the bidders that had presented an offer for a gas powered plants.

By having introduced those changes, which did not seem to be necessary in order to comply with the applicable environmental legislation, the awarding authority infringed, Article 10 of Directive 2004/17/EC.

With regards to the lack of notification of the contract award decision, the results of the evaluation procedure were posted online on the website of the Department of Contracts.

Article 49 of Directive 2004/17/EC provides economic operators with the right to be informed of various decisions reached by the contracting authorities, including the decision to award a contract. As explained in recital 49 of that Directive, the right of the participants to a procurement procedure to be informed of the award decision in due time

is necessary for the effective exercise of the right to seek review of the decision in question, right recognised, in particular, by Article 1 of Directive 92/13/EEC<sup>3</sup>.

As recalled by the ECJ case law this provision requires Member States to guarantee that unlawful decisions of contracting authorities can be subjected to effective review which is as swift as possible<sup>4</sup>. In the case *Commission v. Austria*<sup>5</sup> the ECJ held that the provisions of Directive 92/13/EC are intended to protect tenderers against arbitrary decisions by the contracting authority (point 20). According to the ECJ "such protection cannot be effective if the tenderer is not able to rely on those rules against the contracting authority" (point 20).

In paragraph 21 of the same judgement, the Court specified that "complete legal protection presupposes, first, an obligation to inform tenderers of the award decision. Legislation relating to access to administrative documents which merely requires that tenderers be informed only as regards decisions which directly affect them cannot offset the failure to require that all tenderers be informed of the contract award decision prior to conclusion of the contract, so that a genuine possibility to bring an action is available to them."

The ECJ held that the effectiveness of such protection depends, therefore, also on the obligation for tenderers to be informed of the award decision (see point 24 of the judgement in case C-212/02).

The instructions to bidders in the present case (see CC.1.19) had foreseen that "*when the full procurement procedure is complete the Purchaser will notify the successful bidder in writing that his bid has been successful as well as simultaneously in writing inform the unsuccessful bidders.[...] Unless there is a challenge of the award decision by any of the unsuccessful bidders within ten calendar days from the date of notification, the Contracting authority will send the contract to the bidder for signature.*" However, in violation of such clauses the contracting authority did not proceed to the information of the unsuccessful bidder but simply posted the results of the tender procedure on the website of the relevant authorities for a short period, thus frustrating the right to seek review before the Department of Contracts. Such posting does not constitute an appropriate information of bidders, guaranteeing that unlawful decisions of contracting authorities can be subjected to effective review within the meaning of Article 49 of Directive 2004/17/EC in conjunction with Article 1(1) and (3) of Directive 92/13/EEC, and therefore constitutes a violation of those Articles.

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In the view of the preceding remarks and the information available up to now, the Commission comes to the conclusion in the tender procedure of Enemalta for the construction of an additional power plant at Delimara and its maintenance that:

<sup>3</sup> Directive 92/13/EEC of 25 February 1992, coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ L 76, 23.1.1992, p. 14.

<sup>4</sup> See, in particular, Case C-470/99 *Universale-Bau and Others*, [2002] ECR I-11617, point 74, with regard to Article 1(1) of Directive 89/665, which can apply also to Article 1(1) of Directive 92/13/EEC as those two provisions are identical.

<sup>5</sup> Case C-212/02, not published.

- having the awarding authority changed at a late stage of the procedure the technical specifications only with regard to emission limit values for diesel engines plants, the Republic of Malta could have violated its obligations from Article 10 of Directive 2004/17/EC and

- having the awarding authority failed to effectively and directly inform the unsuccessful bidders about the adoption of the award decision, and therefore to guarantee that the decision can be subjected to effective review, the Republic of Malta could have violated its obligations from Article 49 of Directive 2004/17/EC in conjunction with Article 1(1) and (3) of Directive 92/13/EEC.

The Commission invites your Government, in accordance with Article 258 of the Treaty on the Functioning of the European Union, to submit its observations on the foregoing within two months of receipt of this letter.

After examining these observations, or if no observations have been submitted within the prescribed time-limit, the Commission may, if appropriate, issue a Reasoned Opinion as provided for in the same Article.

Referring to Article 4(3) of the Treaty on the European Union, the Commission further asks to provide the following information:

-the precise date of the change in the technical specifications, especially as the change in the technical specifications is not mentioned in the calendar of events related to such tender procedure submitted to the Commission;

- the status of the national appeal procedure eventually brought by the unsuccessful bidder against the award decision.

For the Commission  
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