

To : Panel on Economic Development of LegCo
Your Ref. : THB(T)CR 2/16/951/91 Pt.4
23 May 2014

Dear members of the Panel,

I refer to the letter from Transport and Housing Bureau (THB) to the Panel on 13 May 2014, which is full of rubbish and pack of lies as detailed below.

First of all, I would like to draw the attention of the Panel members to the followings :-

- (a) After the delay of high-speed rail to Guangzhou, Professor Anthony Cheung Bing-leung failed again to monitor Civil Aviation Department (CAD) in carrying out the new Air Traffic Control Centre (ATCC) project.
- (b) The delay of new ATCC project from 2012 to 2015 caused the contract price increased by HK\$89M which is more than 18.5% of the original contract price of HK\$480M.
- (c) This case is worse than the high-speed rail to Guangzhou, because CAD had purchased a risky Air Traffic Management System (ATMS) which will put the Hong Kong's air traffic and human life in danger. Details are given in Paragraphs 6-8 below.

Comments are given according to the topics in the aforesaid THB's letter

Procurement of the new system

1. CAD seemed to mislead Government Central Tender Board (GCTB) in procurement of the ATMS as follows :-
 - (a) CAD lied that the AutoTrac3 (AT3) System proposed by Raytheon was compliance with all mandatory and essential technical requirements in the tender document, otherwise GCTB would not agree to award the contract to Raytheon. In fact, the proposed AT3 System was a newly developed system with no proven performance record which was noncompliance with the essential requirements in the Clause 8.4 of the Conditions of Tender which specified that "A proposed System with no proven performance record will not be considered further". In this respect, CAD should not recommend it to GCTB for consideration.
 - (b) CAD also lied to GCTB that the increased contract price of HK\$89M after contract award was mainly for modification of Application Software to enhance the system and human-machine interface features. In fact, this cost was mainly used for rectification of numerous deficiencies in the AT3 System.

- (c) CAD seemed not to advise GCTB about the cost of the whole Application Software (should be around HK\$89M) for price comparison, otherwise GCTB would not accept such unreasonable cost of HK\$89M for simple Application Software modification work.

The requirements in the tender documents

2. The Bid Challenge No.02 of 2011 is attached for reference.
3. In Para. 19, it indicated that the Board's decisions were based on (a) the AT3 System had been approved by Airport Authority of India (AAI) and (b) CAD had conducted site visit to understand the actual performance of AT3 System operating under the live air traffic before awarding the contract to Raytheon in early February 2011. Also, from the information provided by CAD, the Board believed all sub-systems of the AT3 System possessed the necessary "proven performance record".
 - (a) In the aforesaid THB letter, under subject "Stability of the new system", CAD confirmed that the AT3 was commissioned by AAI in 2011 (actual date at Delhi Airport was in April 2011). How could AAI accept the AT3 before system commissioning. In this respect, the Board was misled that AAI had accepted the AT3 before CAD awarded the contract to Raytheon in early February 2011.
 - (b) In 3rd Paragraph of subject "Views of the air traffic controllers and overseas experience", CAD confirmed that they had visited sites of different systems in the market, such as in UK, Australia, Italy, etc. but no AT3 System site in Dubai and India. In this respect, the Board was misled that CAD had visited the AT3 System site before awarding the contract to Raytheon. Recently, Apply Daily reported that the first visit to Delhi Airport by the project staff was in 2013.
 - (c) Since there was no AT3 system in operational use in the world before CAD awarded the contract to Raytheon in early February 2011, how could the Board believe all subsystems in the proposed AT3 possessed the necessary "proven performance record".
4. In view of above, the Board seemed to be misled by CAD into making wrong decisions in the Bid Challenge No.02 of 2011.

Views of the air traffic controllers and overseas experience

5. In Para 3 of this topic, CAD said that they had conducted comprehensive market research and had visited sites of different ATMS in the market such as UK,

Australia, Italyetc. However, CAD did not visit Dubai and India, because they already knew there was no AT3 System in operation in these countries throughout the tender evaluation period in 2010. It was ridiculous that CAD finally selected AT3 System even having no idea about its actual performance under live air traffic. This is also the reason why CAD purchased the risky AT3 System.

Stability of the new system

6. CAD said that the frequent AT3 collapses at India airports were not due to wrong system design and deficiencies in the AT3 System. CAD lied that the collapse incidents were due to (a) the problematic power supply of the airport and (b) improper handling procedures of the user. These were ridiculous lies because (a) the AT3 System has its own uninterruptible power supply system which should keep the system running even the power supply at the airport failed and (b) if the system is reliable, it should not easily collapse by improper handling procedures. These proved that the new AT3 System is still immature/unreliable and also has numerous unresolved deficiencies.

7. CAD still lied that the Airport Authority of India (AAI) is satisfied with the AT3's performance. In fact, AAI is extremely disappointed with AT3's unreliable performance and had taken the following actions to get rid of it :-
 - (a) Cancelling the contract with Raytheon for provision of AT3 System at Calcutta Airport and had purchased system from Indra Company.

 - (b) Commencing the tendering exercise to replace the AT3 at Delhi Airport on 28 June 2012, a year after putting the AT3 in operational use in April 2011. The replacement contract was awarded to Indra Company.

 - (c) For air traffic safety in India, up to now, AAI is still using the unreliable AT3 in shadow mode, i.e. the main system uses AT3 software while the backup system still uses the former but reliable AT2 software.

8. Apart from above, the followings also proved that the AT3 System cannot be used in Hong Kong :-
 - (a) Since the AT3 cannot handle the air traffic at Delhi Airport with air traffic capacity of 30-35 flights/hour and 50 air traffic controller positions, how can it manage Hong Kong's dense air traffic with capacity of 68 flights/hour (even over 100 flights/hour after the 3rd runway in use) and 120 controller positions.

 - (b) After knowing the numerous unresolved deficiencies in the AT3 System, no

other airport purchases this risky system after Hong Kong purchased it in early 2011. Hong Kong is the last buyer.

9. CAD said that AAI was awarded (a) the Jane's 2012 ATC operational Efficiency Award and (b) ATC Global Awards 2013-Air Navigation Service (ANS) was due to using AT3. I wonder whether CAD has no idea about the purposes of these 2 awards or tired to use these awards to fool the members of the Panel.

(a) AAI awarded the Jane's 2012 was due to their excellent achievement in the Flight Information Region (FIR) Upper Airspace Harmonization Program at their Chennai Airport in 2011, which had no relation to the performance of the AT3 System. [Please note that the AT3 System at Chennai Airport was just put in use in end 2011].

(b) AAI awarded the ATC Global Awards 2013-ANS was due to the significant ANS initiative taken by AAI in 2012 in improving the operational efficiency and safety at their airports. This award also had no relation to the performance of the AT3.

Training arrangements for CAD staff

10. Hon. Albert Chan did not challenge CAD for sending appropriate staff to take overseas training for the need of the department. He complained about the purpose of sending Mr. Simon Li to France for one year training was mainly for promoting him to Assistant Director-General Civil Aviation (Air traffic Engineering Service) ADG(AES) post immediately after completion the training. Also, Mr Li's performance is totally disappointed in view of (a) procurement of risky AT3 system and (b) delay in operation of the ATCC. He is considered unqualified as ADG(AES).

11. Since (a) the new ATCC project was handled by both Air Traffic Engineering Division and Air Traffic Management Division and (b) the former ADG(AES), Mr. PF Wong, had worked in these 2 divisions for longtime before promoting to this post. Why promoted Mr. Simon Li (a) who had never worked in these 2 divisions, (b) had no past experience in ATCC project and (c) needed to send him to overseas training before promotion.

12. Why CAD did not promote the competent staff from either Air Traffic Engineering Division or Air Traffic Management Divisions, in particular those staff who had participated in the new airport project completed in 1998. In this respect, CAD would not waste public money to send this staff to France for one year and this staff definitely can handle the new ATCC project better than Mr. Li.

13. In letter of 5 March 2015 to Hon Emily Lau, THB said that the total expenditure on Mr. Li's course, fee, accommodation, etc, was about HK\$550,000. Why now THB suddenly changed to say that the total expenditure was about HK\$400,000. Anyway, together with Mr. Simon Li's one year full salary of more than HK\$1,000,000, CAD has spent more than HK\$1,600,000 on Mr. Li. However, in view of Mr. Li's current poor performance, it is not worth to waste such significant public money.

REVIEW BODY ON BID CHALLENGES

Bid Challenge No. 02 of 2011

**IN THE MATTER OF
THE WORLD TRADE ORGANIZATION
AGREEMENT ON GOVERNMENT PROCUREMENT**

AND

IN THE MATTER OF A BID CHALLENGE

BETWEEN

INDRA SISTEMAS S.A.

Complainant

AND

**GOVERNMENT LOGISTICS DEPARTMENT
OF THE GOVERNMENT
OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION**

Respondent

DECISION

Panel

Mr LAM Kui-po, William - Chairman
Dr CHAN Yin-nin, Sammy – Member
Mr FUNG Pak-tung, Patrick – Member

Background

1. Pursuant to an invitation to tender via a Tender Document numbered PT/0230/2009 issued by the Respondent acting on behalf of the Civil Aviation Department for the design, supply and installation of a replacement Air Traffic Management System (“ATMS”) and the provision of related services to the Hong Kong International Airport, the Complainant placed its tender in competition with others. The new ATMS is to replace the existing system which provides display services for air traffic controllers, where the present system will reach the end of its usable life in about 2013. The Complainant was informed by the Respondent on 2 February 2011 that it was unsuccessful, and that the contract was awarded to another company called Raytheon Company (“Raytheon”).
2. It is not in dispute that the tender exercise was governed by the Agreement on Government Procurement of the World Trade Organization (“GPA”) which, in simple terms, may be summarised as an effort to ensure fair dealing when government procurers select prospective suppliers which in their view would best suit their requirements.
3. As a result of the tender having been awarded to Raytheon, the Complainant lodged a complaint on 18 February 2011 to the Review Body on Bid Challenges, and this is the subject matter of the Board’s Decision today.

The Subject Matter of the Complaint

4. The Complainant’s grievance hinges on Clause 8.4 in the Conditions of Tender in the abovementioned tender number PT/0230/2009, which contains, *inter alia*, the sentence “A proposed System with no proven performance record will not be considered further”. The Complainant says that Raytheon’s ATMS,

a system named "AutoTrac III", was only in an experimental stage and so did not have any "proven performance record". The Complainant says, therefore, that the award of the contract to Raytheon was in breach of Article VIII 4.(c) of the GPA.

5. Clause 8 of the Conditions of Tender concerns the provision of track records including reference sites to prove:

(a) the tenderer has track records which show that it complies with certain mandatory requirements for the purposes of the evaluation under Stage 2 of Clause 24.1 of the Conditions of Tender, namely track records mentioned in Clause 8.1 of the Conditions of Tender;

and

(b) the tenderer has track records which can enable the Government to check upon inspection (if and to the extent it so elects to do so) that the tenderer's proposed System complies with the essential specifications for the purposes of the evaluation under Stage 3 of Clause 24.1 of the Conditions of Tender (namely track records mentioned in Clause 8.2 of the Conditions of Tender).

6. It is not disputed that the Respondent had carried out site inspections of the tenderers including Raytheon and the Complainant, and these steps were mentioned in Clauses 8.1 and 8.2 of the Conditions of Tender.

7. Clause 8:1 states, *inter alia* (paraphrased) that a tenderer must satisfy the Respondent with past experience requirements, supply evidence to show that the proposed system was capable of handling no fewer than 2,000 active flight plans at any one time during a 6-month period and the number of working positions for Air Traffic Controllers when in operation as well as the location of the relevant

Air Traffic Control centre at which the system was installed, and whether the supplier was a prime contractor or a sub-contractor in the relevant past experience.

8. Clause 8.2 states, *inter alia* (paraphrased) that any tenderer who has passed Stage 2 evaluation in Clause 24.1 may be required to enable the Government to inspect the operational equipment concerned, and a reference site must have a minimum of 20 air traffic controller working positions at the time of the visit.
9. It is also not disputed that the tests which enabled the Respondent to be satisfied about the safety of a system consisted of Factory Acceptance Tests, Site Acceptance Tests, Flight Check Acceptance Tests, Reliability Acceptance Tests, and System Integration Tests and that the subject AutoTrac III system has been used by air traffic control centres in India and Dubai.
10. The Complainant seeks a declaration from this Board that the contract with Raytheon should not be proceeded with or be rescinded, that if the Complainant had the second highest combined score then the contract should be awarded to the Complainant, and if the above cannot for any reason be implemented, then there should be a re-tender, or if everything fails then an award of damages.
11. It is not in dispute that in assessing suitability of tender, the Respondent would carry out site visits to the tenderers' premises, and that factory site visits (not "reference site" visits) had been carried out by the Respondent to all tenderers during all 3 stages of its assessment exercise, and all assessments had been made on the same basis. The Respondent has totalled the scores from the 3 visits in each tenderer's case, and eventually awarded the contract to the tenderer which scored the highest, which in this case was Raytheon.

The Issue about the Term

“Proven Performance Record” in Clause 8.4

12. The Complainant says that Raytheon’s AutoTrac III system had met with difficulties at trial in India, and that it was only in an experimental stage and had no “proven performance record”, and hence the Respondent has breached its own Tender Conditions and the GPA.

13. Several media articles submitted by the Complainant e.g. “The Times of India”, “Deccan Herald” and “The Hindu”, reported “a technical snag” for several minutes with the AutoTrac III system leading to disruption of 50 flights “on Wednesday” (the newspaper was dated Wednesday 28 July 2010) which lasted about 30 minutes but “with no disruption to any flight in any way”. The Complainant has also provided two letters written by the “Air Traffic Controllers’ Guild (India)” dated March and June 2010 respectively, which were critical of AutoTrac III, and stated that “its adoption should be held in abeyance”. The Complainant says, therefore, that AutoTrac III was not a system with a proven performance record and hence a risky system to adopt. But this Board notes that the Respondent *did not rely* on the reference site in India under Stage 2 of its assessment as to whether the conditions in the Conditions of Tender Appendix B Items 3 and 4 were satisfied, and this the Complainant was not in a position to dispute, because data existing between other tenderers and the Respondent were privy to the parties and information was not disclosable to any other party without consent.

14. The Respondent had carried out “Stage 3” site inspections at all tenderers’ factories which had passed Stages 1 and 2 of the selection process. This is not in dispute. The Respondent totalled the scores for each tenderer and awarded the contract to the tenderer with the highest overall score, which is Raytheon. This was explained to the Complainant in the Respondent’s letter dated

25 February 2011. Although the Complainant may have scored higher than Raytheon in the technical aspects of the ATMS, in relation to price it scored lower than Raytheon, and the price score had accounted for 60% of the overall score. The Complainant was not in a position to challenge the scores, and has fairly not made such a challenge. The only challenge is in the wording under Clause 8.4 as detailed in paragraphs 4 and 12 above.

15. The Respondent says that the wording "with no proven performance record" must not be taken out in isolation, but must be read in context with the wordings and spirit in Clauses 8.1 and 8.2 regarding past experience. The term "Air Traffic Management System" refers to a collection of sub-systems, and not merely the sub-system AutoTrac III. The words "with proven performance record" refers only to Stage 3 reference sites (see its letter to the Complainant dated 15 April 2011). AutoTrac III in the context of Clause 8.4 was a sub-system of an overall system under Clauses 8.1 and 8.2 where the major systems were the Surveillance Data Processing System (SDP) and the Flight Data Processing System (FDP): see the Respondent's letter to the Complainant dated 11 March 2011 at paragraph 3.2.
16. In other words, the term "proven performance record" has a wide meaning and refers to the *tenderer* as a whole, not to one particular sub-system. This Board notes that the fact that it is the *tenderer* which must have a proven track record is apparent in the Conditions of Tender Clause 24.1 Stage 3 paragraph (d), and Appendix B Items 3 and 4. This interpretation, i.e. the proven track record refers to a *tenderer* and not the AutoTrac III sub-system, is the core of the dispute to be resolved today: see the Respondent's letter to this Board dated 24 March 2011. As mentioned above, the Complainant focuses its attack on these all-important words as referring to the AutoTrac III system, while tenderer Raytheon was only a consequent target of its attack.

17. The Respondent says that *even if* the words “proven performance record” should refer to the AutoTrac III system, the system has shown a proven performance record, because it has already been adopted and functioning in India, which is supported by a media article published by “ATC Global News” reporting that “In December 2008 the AutoTrac III (AT3) systems at Dubai and Delhi successfully completed Site Acceptance Test. ... The AT3 system contains the most advanced Flight Data Processor (FDP), Surveillance Data Processor (SDP) and displays available today ...”. Under another heading there is a report on “AutoTrac III System for Dubai Successfully Completes Factory Acceptance Test” which had taken place in January (2009). Yet another article has reported “Air Traffic Control Optimum Training Solution Contract Positions Raytheon to Showcase Training Capabilities Globally”.

Findings

18. This Board accepts that the meaning of “a system with proven performance record” means “a system with a proven performance record *of the producer company which supports the fact that the relevant sub-system is safe*”. It may be that the Respondent could have used the word “Tenderer” rather than “System” in its Conditions of Tender so that the unfortunate ambiguity would not have arisen as was now seized upon by the Complainant. The Board considers that the “wider interpretation” for the word “System” to mean “the Tenderer with the umbrella System” must be correct, otherwise the Respondent could never install a new sub-system, nor can it adopt new technology, nor can the Complainant itself ever succeed in tendering a new sub-system to the Respondent, because a new sub-system by its very nature (being new) cannot possess a proven performance record unless, of course, Hong Kong is content to never be in the forefront of technology but must wait for other countries to have used any new system and for sufficient lengths of time, perhaps many months, in

order to see that this “new” technology is proven. This Board does not consider this requirement to be what the Respondent had in mind when inviting the tender in question. The insistence on interpreting Clause 8.4 to mean a *past* system with a proven performance record cannot in our view be correct.

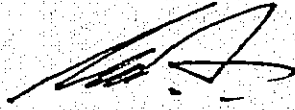
19. Even if the abovestated “wide” interpretation of the words “with proven performance record” is not accepted, this Board finds as a matter of fact, that Raytheon’s AutoTrac III system had been approved by the Indian aviation authorities, that the Respondent had conducted site visits to all the tenderers including the Complainant’s premises and those of Raytheon before the Respondent totalled the scores and accepted Raytheon’s system, and that the AutoTrac III sub-system is one which possessed the necessary “proven performance record”. Further and in any event, this Board has not seen any unfairness or bias which the Respondent had operated on any tenderer including the Complainant.

Conclusion

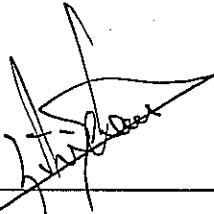
20. For the above reasons this Board can see no basis to support the Complainant’s case. The complaint is dismissed.

DATED this 21st day of September, 2011.

Signed:



Mr LAM Kui-po, William - Chairman



Dr. CHAN Yin-nin, Sammy - Member



Mr FUNG Pak-tung, Patrick - Member

REVIEW BODY ON BID CHALLENGES

Bid Challenge No. 02 of 2011

**IN THE MATTER OF
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BETWEEN

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CORRIGENDUM

The Decision made by this Panel on 21 September 2011 has the following amendments:

- (a) Paragraph 4, page 2
- “Article VIII 4.(c)” in the last line should be “Article XIII 4.(c)”.
- (b) Paragraph 11, page 3
- “during all 3 stages” in the 4th line should be “during Stage 3”.
 - “from the 3 visits” in the 6th to 7th lines should be deleted.

(c) Paragraph 15, page 5

- “major systems” in the 10th line should be “major components”.

(d) Paragraph 16, page 5

- “Respondent’s letter” in the 9th line should be “Complainant’s letter”.

Dated this 12th day of October 2011.



(Mr LAM Kui-po, William)
Chairman
Review Body on Bid Challenges