~~7.4 If a Parent Guarantee is stated to be required in the conditional acceptance of tender issued pursuant to Clause 28.2, and any of the parent guarantor(s) is an overseas company, unless and to the extent waived by the Government, a legal opinion will equally be required similar to the one described in Clause 7.2 save that references therein to "Tenderer" and "Contract"/"tender" shall mean the parent guarantor and the Parent Guarantee respectively.~~

8. Track Records

8.1 The Tenderer must satisfy the experience requirements as specified in item 3 of the list of mandatory requirements in Appendix B hereto; and it or its proposed Sub-contractor must satisfy the experience requirements as specified in item 4 of the list of mandatory requirements in Appendix B hereto.

For the mandatory requirement in item 3 of Appendix B, as evidence that the Tenderer satisfies such requirement, the Tenderer shall provide a list of reference site(s) of one or more air traffic management system(s) which the Tenderer has supplied, installed and assisted in the commissioning for the purposes of air traffic control and which have been completed within the last 10 years preceding the Tender Closing Date. The air traffic management system at any one of the aforementioned reference site(s) must have been operated as the main system in at least one (1) air traffic control centre with no less than 40 ATCC air traffic controller working positions to provide air traffic control services for no less than 6 consecutive months and have been completed within the last 10 years preceding the Tender Closing Date. In addition, the air traffic management system must have the capacity and capability to handle no less than 2,000 active flight plans at any one time during the aforementioned 6 months' period.

For the mandatory requirement in item 4 of Appendix B, as evidence that the Tenderer or its proposed Sub-contractor satisfies such requirement, the Tenderer shall provide a list of reference site(s) of one or more ultimate fallback system(s) which the Tenderer or its proposed Sub-contractor (whether then as a prime contractor or sub-contractor) has supplied, installed and assisted in the commissioning and which have been completed within the last 10 years preceding the Tender Closing Date. The ultimate fallback system in at least one (1) air traffic control centre must have been operated as the main or backup system with no less than 10 air traffic controller working positions to provide air traffic control services for no less than 6 consecutive months and have been completed within the last 10 years preceding the Tender Closing Date.

For each of the air traffic management systems and ultimate fallback systems (each "system") as mentioned above, the following information for each reference site at which such system is installed is required:

(a) name of reference site;

(b) name, address, telephone number and fax number of contact person;

(c) product name, model and version;

*委員會秘書附註：本文件只備英文本。

(d) summary of equipment, functions and services provided and its size and type, including evidence from relevant sections of the system specification to support a system capacity and capability to handle no less than 2,000 active flight plans at any one time;

(e) date of installation;

(f) number of ATCC air traffic controller working positions in operation;

(g) date of commissioning;

(h) serviceability/availability figures showing that the system was put in service for no less than 6 consecutive months any time within the last 10 years preceding the Tender Closing Date;

(i) for the air traffic management system only: the system capacity in handling active flight plans at any one time;

(j) location of the air traffic control centre at which the system is installed;

(k) date of de-commissioning, if applicable; and

(l) the role of the supplier of the above systems whether as a prime contractor or a sub-contractor.

8.2 Site visits to the factory(ies) and reference site(s) of any Tenderer who has passed Stage 2 evaluation in Clause 24.1 may be required so as to enable the Government to inspect the operational equipment as proposed in its tender in the course of the evaluation. In this regard, a Tenderer shall specify in its tender for such site visits: (a) the locations of its factory(ies), each of which shall be installed with a minimum of 5 controller working positions at the time of visit by the Government; and (b) the location of its reference site(s), each of which shall be installed with a minimum of 20 controller working positions at the time of visit by the Government.

8.3 In addition to the details required in Clause 8.1, the Tenderer shall provide documentary evidence to demonstrate its technical expertise and working experience in performing the installation and testing and providing assistance in the commissioning of the proposed System, particularly with the local on-site work experience in a multi-contractor environment to control, monitor and manage the contractors' work and activities.

8.4 The Government may, and is hereby authorised by the Tenderer to, contact any of the users whose details are provided by the Tenderer. The Government also reserves the right to request additional references and such other supplementary information either from the Tenderer or from the users as is considered necessary or desirable by the Government. In the event that the reference from a user indicates the System proposed cannot meet with the requirements in the Specifications, the Tenderer shall provide explanations and a new user reference to prove the performance of the proposed System. **A proposed System with no proven performance record will not be considered further.**

8.5 Details of experience to be provided in accordance with Clause 8 shall demonstrate that the Tenderer fulfils the mandatory requirement specified in Items 3 and 4 of Appendix B hereto. There are explanatory notes below Items 3 and 4 which further explain what experience will and will not be accepted for the purpose of determining whether the mandatory requirement has been fulfilled. The Tenderer is reminded to pay careful attention to the mandatory requirement and the notes when preparing and collating the details of experience to be submitted.

9. Particulars of Offer

9.1 A Tenderer is requested to provide in Schedule 3 the particulars of the Equipment items offered in Schedule 1 (both hardware and software).

(a) name of products;

(b) place of origin/substantial place of manufacture/development;

(c) name of manufacturer/developer;

(d) address of manufacturer/developer;

(e) brand name;

(f) model;

(g) the duration that it has been available in the market in Hong Kong or in a place other than Hong Kong;

(h) whether the relevant item is in production or in development; and

(i) the information required in Clause 9.2.

9.2 Continuous support of the System, including maintenance and enhancement of the hardware/software to meet the changing operational environment and training needs, is essential. In this respect, Tenderers shall be required to confirm in relation to each item of hardware and software (a) whether they or their Sub-contractors (if any) own the full Intellectual Property Rights subsisting in such hardware or software; and (b) whether they or their Sub-contractors (if any) have played a major role in the design and development of the relevant hardware or software, and will continue to have full control over the future enhancement, modification and maintenance of the relevant hardware or software.

9.3 For the avoidance of doubt, the Government does not intend to acquire any Intellectual Property Rights in the hardware or software to be proposed by the Tenderer in Schedule 1.

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

Tenderer A

Complainant

AND

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

Respondent

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

投標投訴審裁組織
Review Body on Bid Challenges

根據世界貿易組織政府採購協定
under the World Trade Organization Agreement
on Government Procurement

Our Ref : CR RB 02/02/2011

Tel : (852) 2398 5482
Fax : (852) 2787 7799
Email : frederickcheng@tid.gov.hk

By Fax (2 + 9 pages)

22 September 2011

To: Tenderer A *[Fax No.:]*
(Attn:)

Department of Justice *[Fax No.: 2869 0062]*
(Attn: Mr Louie WONG)

Dear Madam/Sir,

Bid Challenge against the Government Logistics Department for Breaching of the World Trade Organization (WTO) Agreement on Government Procurement (GPA)

Further to my letter of 15 August 2011, I would like to inform you that having examined the challenge lodged by Tenderer A against the Government Logistics Department for breaching of the GPA, the Panel concludes that the challenge is not substantiated. A copy of the Panel Decision is attached.

I should be grateful if you would inform me by **6 October 2011 (Thursday)** whether there is any part of the Decision that needs to be redacted in order to preserve the necessary confidentiality of the tendering process. The Panel will then consider your views and decide whether any part of the Decision should be redacted. The redacted Decision will be made available to the public upon request.

/.....

香港九龍彌敦道 700 號 17 樓
17/F, 700 Nathan Road, Kowloon, Hong Kong

Should you have any queries concerning this letter, please feel free to contact me at 2398 5482 or Mr Toby MAK at 2398 5360.

Yours sincerely,

(Mr Frederick CHENG)
Secretary
Review Body on Bid Challenges

c.c. Director of Government Logistics *[Fax No.: 2116 0103]*
(Attn: Mrs Cassandra CHUI)

Director-General of Civil Aviation *[Fax No.: 2845 7160]*
(Attn: Mr Peter YEUNG)

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

Tenderer 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 Tenderer B ("Tenderer B").

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 Tenderer B, 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 Tenderer B's ATMS,

a system named "[redacted]", 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 Tenderer B 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 Tenderer B 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 [redacted] system has been used by air traffic control centres in [redacted] and [redacted].

10. The Complainant seeks a declaration from this Board that the contract with Tenderer B 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 Tenderer B.

The Issue about the Term
"Proven Performance Record" in Clause 8.4

12. The Complainant says that Tenderer B's [redacted] system had met with difficulties at trial in [redacted], 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. "[redacted]", "[redacted]" and "[redacted]", reported "a technical snag" for several minutes with the [redacted] 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 [redacted]" dated March and June 2010 respectively, which were critical of [redacted], and stated that "its adoption should be held in abeyance". The Complainant says, therefore, that [redacted] 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 [redacted] 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 Tenderer B. This was explained to the Complainant in the Respondent's letter dated

25 February 2011. Although the Complainant may have scored higher than Tenderer B in the technical aspects of the ATMS, in relation to price it scored lower than Tenderer B 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 [redacted]. The words "with proven performance record" refers only to Stage 3 reference sites (see its letter to the Complainant dated 15 April 2011). [redacted] 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 [redacted] 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 [redacted] system, while tenderer Tenderer B was only a consequent target of its attack.

17. The Respondent says that *even if* the words "proven performance record" should refer to the [redacted] system, the system has shown a proven performance record, because it has already been adopted and functioning in [redacted], which is supported by a media article published by "[redacted]" reporting that "In December 2008 the [redacted] systems at [redacted] and [redacted] successfully completed Site Acceptance Test. ... The AT3 system contains the most advanced Flight Data Processor (FDP), Surveillance Date Processor (SDP) and displays available today ...". Under another heading there is a report on "[redacted] System for [redacted] 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 Tenderer B 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 Tenderer B's [redacted] system had been approved by the [redacted] aviation authorities, that the Respondent had conducted site visits to all the tenderers including the Complainant's premises and those of Tenderer B before the Respondent totalled the scores and accepted Tenderer B's system, and that the [redacted] 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.

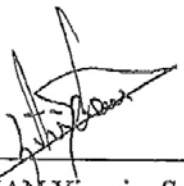
Conclusion

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

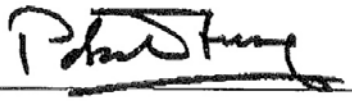
DATED this 21st day of September, 2011.

Signed: 

Mr LAM Kui-po, William - Chairman



Dr. CHAN Yin-nin, Sammy - Member



Mr FUNG Pak-tung, Patrick - Member

(26)

Review Body on Bid Challenges

Hearings

Summary of Case No. 02/2011

The Rejection of a Tender Proposal for the Design, Supply and Installation of a Replacement Air Traffic Management System and the Provision of Related Services to the Hong Kong International Airport

Company A (the complainant) lodged a bid challenge to the Review Body against the Government of the Hong Kong Special Administration Region (HKSARG) (the respondent) for breaching the Agreement on Government Procurement (GPA) of the World Trade Organization (WTO) in a tender exercise 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 alleged that the ATMS proposed by the successful tenderer did not have a proven performance record prior to the date of tender submission. As one of the Conditions of Tender provided that "[a] proposed system with no proven performance record will not be considered further", the complainant considered that the respondent had breached Article XIII.4(c) of the WTO GPA, which reads "[a]wards shall be made in accordance with the criteria and essential requirements specified in the tender documentation".

A Panel comprising the Chairman and two members of the Review Body was set up to consider the bid challenge. As the contract between the respondent and the successful tenderer had commenced, the complainant applied for no further steps to be taken by the HKSARG as a Rapid Interim Measure (RIM) with a view to preserving its business opportunity. Having considered the written representations of the respondent and the response of the complainant, the Panel decided not to recommend the respondent to implement RIM on grounds of public interest and given the correspondence thus far suggested that the issue at stake was at most a question of semantics.

Following the Panel's decision against the recommendation for an RIM, the complainant informed the Review Body that it no longer requested a hearing, but that a Paper Review would suffice. The respondent adopted a neutral position on the matter of whether a hearing should be held. The Panel then decided to consider the bid challenge based on the written submissions of both the complainant and the respondent without conducting a hearing. The decision of the Panel is summarised as follows -

1. The Panel accepted that the wording "a system with proven performance record" must be read in context with relevant provisions of the tender document, and hence the word "System" should mean "the tenderer with the umbrella System", otherwise the respondent could neither install a new sub-system nor adopt new technology, because a new sub-system by its very nature could not possess a proven performance record. The insistence on interpreting the relevant clause to mean a past system in its entirety with a proven performance record therefore could not be correct.

2. Moreover, the Panel found that the relevant sub-system of the ATMS proposed by the successful tenderer did possess the necessary "proven performance record". It had not seen any unfairness or bias which the respondent had operated on any tenderer including the complainant.

3. The Panel could see no basis to support the complainant's case and therefore dismissed the complaint.

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Last revision date: 24 October 2011