

## PUBLIC CONTRACTS REVIEW BOARD

### **Case 1699 – CT 2186/2021 – Tender for the Supply and Delivery of Submersible Pumps, Motors and Flanged Pipes to the Water Services Corporation – Lot 2 (Submersible Pump Coupled to Submersible Motor for Lapsi and Cirkewwa Plants)**

The tender was issued on the 20<sup>th</sup> August 2021 and the closing date was the 30<sup>th</sup> September 2021. The value of the tender on this Lot, excluding VAT, was € 234,300

On the 21<sup>st</sup><sup>h</sup> February 2022 J.P. Baldacchino & Co Ltd filed an appeal against the Water Services Corporation as the Contracting Authority objecting to their disqualification on this Lot on the grounds that their offer was deemed not to be technically compliant.

A deposit of € 1,172 was paid.

There were seven (7) bidders.

On the 22<sup>nd</sup> March 2022 the Public Contracts Review Board composed of Dr Charles Cassar as Chairman Mr Lawrence Ancilleri and Mr Richard Matrenza as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

#### **Appellant – J P Baldacchino & Co Ltd**

Dr Frank Testa	Legal Representative
Dr Daniel Cutajar	Legal Representative
Mr Adrian Baldacchino	Representative

#### **Contracting Authority – Water Services Corporation**

Dr Sean Micallef	Legal Representative
Ms Kirstie Grech	Member Evaluation Board
Eng Sigmund Galea	Member Evaluation Board
Eng Simon Camilleri	Member Evaluation Board

#### **Interested Bidder – Attard Farm Supplies Ltd**

Mr Nicholas Attard	Representative
Mr Joseph Attard	Representative

Dr Charles Cassar Chairman of the Hearing welcomed the parties. He noted that since this was a virtual meeting all the parties agreed to treat it as a normal hearing of the Board in line with Article 89 of the Public Procurement Regulations. He then proposed that since the submissions of the Appellant the Contracting Authority and Recommended Bidder were identical on both Lots 2 and 3 the Cases should be heard concurrently. This was agreed to by all parties. Submissions were invited.

Dr Frank Testa Legal Representative for J P Baldacchino & Co Ltd referred to the reasoned reply by the Water Services Corporation who accepted that it was disproportionate to eliminate a bid on the point of the appeal but then claimed that Appellant was disqualified on the question of the standard offered – AISI 316 instead of AISI 316L as requested in the tender specifications. Appellant claims that their offer is valid since the tender specified AISI 316L or equivalent and they had provided the equivalent.

Dr Sean Micallef Legal Representative for the Water Services Corporation said that the argument that 316 and 316L are equivalent does not hold water as in fact there is a difference in the carbon content of the product offered by Appellant. There is a difference in standards of the metal and the stainless steel offered - 316L is in fact superior to what Appellant offered in the technical offer.

Dr Testa requested that witnesses be called to testify.

Dr Gianpaolo Milan (Italian PP No B0453178) called as a witness by Appellant testified on oath that he is the Sales Manager for the Company Marly and has 26 years' experience in the products that the tender requests. He stated that he is familiar with the tender requirements and that the Contracting Authority was wrong to disqualify Appellant as its offer still meets the technical requirements. Witness demonstrated by means of illustrations that the only point that failed was the flange as their product met BS 4504 and except for the carbon content the rest of the materials are considered similar. According to the witness the main part of the product is chromium and in 316L there is less carbon but the welding in the flange produced chromium carbide in both 316 and 316L but in different amounts, and if treated properly there is no difference between the two types. After high humidity testing of both types, 316L in fact indicated rusting unless treated post welding.

Questioned by Dr Micallef, witness agreed that the only difference between the two types was the carbon content. Since top quality was required 316L without welding was acceptable but with use of the product in sea water conditions post welding treatment was required – the only difference between the two products is if welding was needed.

Dr Luca Giulietti ( Italian Driving Licence No FO237159FK) called as a witness by the Appellant testified on oath that he is a Manager of a corrosion laboratory called Eurolab. His company had carried out tests in a saline atmosphere using a special type of salt to analyse corrosion, the control performance of welding and similar tests which indicated that 316 is free of corrosion. One type of stainless steel was tested after three types of welding. The results were demonstrated in a screen shot and indicated traces of rust in 316L after 96 hours whereas 316 did not show any traces of rust in the same period.

Mr Joseph Attard Representative for Attard Farm Supplies Ltd said that all the technical information supplied was valid except on one administrative point. The Authority was specific in what they required in the tender. In Section 4.4.3 of the Specifications, it very clearly states 'stainless steel grade 316L or equivalent'. The equivalence was required in 316L. In the case of the flanges, it was mandatory, and equivalent is equal to equivalence in standard. 316L has very specific equivalent standards.

Dr Testa agreed with Mr Attard's statement, and the legal decision turns on the meaning of equivalent. What Appellant offered was a top-quality product. The Authority asked for an equivalent product and the only difference in the materials offered was in the carbon content where the difference was immaterial –

something like 0.02% - the composition is so near that it is equivalent. The part in dispute is so small as to be practically insignificant in the scheme of things. To overcome the effects of salinity both products required annealing with the Appellant offering a better solution to this problem.

Dr Micallef said that the point made by Mr Attard was very valid. The only relevance is what equivalence is procedurally correct. The standard required was 316L but Appellant offered 316 – it might be a minimal difference but it was a difference nonetheless. The ultimate use of the product is not a factor of the tender – what matters is what was requested. This is part of the technical offer with no rectification allowed. The Board can only consider the aspect that there was no indication of compliance by Appellant and thus should be disqualified.

The Chairman thanked the parties for their submissions which the Board will deliberate on and issue their decision.

End of Minutes

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**25<sup>th</sup> March 2022**

Decision

This Board,

Having noted this objection filed by J P Baldacchino & Co Ltd., (herein after referred to as appellant) on 21/02/2022, refers to the claims made by the same appellant regarding the tender listed as case No.1699 in the records of the Public Contracts Review Board cancelled by Water Services Corporation (herein) after referred to as the contracting authority) and their verbal submissions during the hearing on 22nd March 2022.

Whereby, the appellant contends that: -

A) J P Baldacchino & Co Ltd 's offer was disqualified on the question of the standard offered – AISI 316 instead of AISI 316L as requested in the tender specifications. Appellant claims that their offer is valid since the tender specified AISI 316L or equivalent and they had provided the equivalent.

B) The Authority asked for an equivalent product and the only difference in the materials offered was in the carbon content where the difference was immaterial – something like 0.02% - the composition is so near that it is equivalent

The Board also noted the letter of reply by the contracting authority dated 25th February 2022, and 2<sup>nd</sup> March 2020, together with its verbal submissions during the hearing on the 22nd March 2022.

Whereby, the Contracting Authority contends that:

A) The Authority was specific in what they required in the tender. In Section 4.4.3 of the Specifications, it very clearly states 'stainless steel grade 316L or equivalent'. The equivalence was

required in 316L. In the case of the flanges, it was mandatory, and equivalent is equal to equivalence in standard. 316L has very specific equivalent standards.

B) The only relevance is that equivalence is procedurally correct. The standard required was 316L but Appellant offered 316 – it might be a minimal difference but still a difference nevertheless. The ultimate use of the product is not a factor of the tender – what matters is what was requested

C) This is part of the technical offer where no rectification is allowed.

The Board can only consider the aspect that there was no indication of compliance by Appellant and thus should be disqualified

In conclusion after the Board considered the arguments and documentation from both parties namely the appellant and the contracting authority, it concludes that, equivalence was required in 316L. which has a very specific equivalent standard, It is different from 316 , where the L stands for ‘low carbon content’ Hence the Board opines that the Contracting Authority was procedurally correct.

The Board concludes and decides that:

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

**Dr Charles Cassar**  
**Chairman**

**Mr Richard Matrenza**  
**Member**

**Mr Lawrence Ancilleri**  
**Member**