**PUBLIC CONTRACTS APPEALS BOARD**

**Case No. 183**

**Advert No. CT/WSC/T/22/99; WSC/1119/2008**

**Tender for the Supply of DN 15 Class 2 Meters for Potable Cold Water to Water Services Corporation**

The closing date for this call for tenders which, was for a contracted estimated value of € 6,270,000 was 26.05.2009.

Six (6) different tenderers submitted their offers.

On 29.10.2009 *Messrs* Itron France (previously Actaris SAS) filed an objection against the decision by the Contracts Department after being informed by the latter that their offer was disqualified for being found technically non-compliant.

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Carmel Esposito, respectively, acting as members convened a public hearing on 27.01.2010 to discuss this objection.

Present for the hearing were:

**Itron France (previously Actaris SAS)**

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| Mr Mathias Martin | General Manager |
| Ms Muriel Dressen | Legal Counsel |
| Mr Corrado Casorzo | Product Manager |
| Mr Amirouche Bouhkari | Director of Sales Mediterranean |

**Attard Farm Supplies Ltd**

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| Mr Joseph P Attard | Managing Director |
| Mr Ricardo Guerra de Lanca Cordeiro | |

**Water Services Corporation (WSC)**

Ing Mark Perez

**Adjudication Board**

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| Ing Stephen Galea St John | Chairman |
| Mr Anthony Camilleri | Board Secretary |
| Ing Ronald Pace | Evaluator |
| Ing Saviour Cini | Evaluator |

**Department of Contracts**

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| Mr Francis Attard | Director General (Contracts) |

After the Chairman's brief introduction the appellant Company was invited to explain the motives of the objection. The parties agreed that the hearing will be held in English so that the foreigners who attended the hearing would be able to follow the proceedings.

Mr Mathias Martin, General Manager of Itron France, the appellant Company, explained that the Department of Contracts had informed them that their bid was considered technically non-compliant because the technical specifications of the water meter offered by Itron had Q3=2.5 cubic metres/hr and R=400 or Q3=1.6 cubic metre/hr and R=250 when Clause 2.1 of the tender specified that … *the meter shall have a Permanent Flow Rate (Q3) = 1.0 cubic metre per hr* … and, thus, it followed that the meter offered was not up to the requested tender technical specifications.

Mr Martin added that, on receipt of this explanation, his firm submitted full technical documentation to the Department of Contracts which demonstrated that the meter offered by his firm in fact had a permanent flow rate of 1 cubic metre per hr and since that was the only reason for disqualification it was reasonable for one to expect to be reinstated in the tendering process.

Mr Martin further explained that in their original submission they had furnished a metrological certificate, which was internationally referred to as the 'MID', which showed that the meter could function permanently at 1 cubic metre per hr.

Eng. Stephen Galea St John, Chairman of the Evaluation Board, quoted the following from clause 2.1 of the tender specifications and conditions:

> *"The meter shall have at least OIML R49-1:2006 Class '2' operational performance. The meter shall have a Permanent Flow Rate (Q3) = 1.0m3/hr. Moreover WSC is particularly interested in meters having a very low Q1, and also a very low starting flow. In fact, meters having a starting flow greater than 1.2 litres / hour and a Q3/Q1 ratio less than 250 shall not be considered"*

Mr Galea St John added that, in the original submission made by Itron France, it was indicated that the meter had a permanent flow rate (Q3) of 1.6 or 2.5 cubic meters per hour and that, for that reason only, the offer could not be considered compliant. He explained that:

(i) since consumers in Malta stored water in a roof tank, the WSC was interested in a minimum flow rate (Q1) because such meters were accurate ***and***

(ii) to achieve that level of accuracy, WSC specified a particular permanent flow rate of Q3=1 wherein it made it clear that the WSC was not interested in higher flows as that would have meant problems at lower flows.

Mr Martin stated that, whereas the contracting authority specified the permanent flow rate, it did not give the minimum flow rate. He explained that, in terms of metrology, the European standard was the *MID certificate* and in that certificate there was the permanent flow rate (Q3) and the minimum flow rate (Q1) and that if one had a Q3=1.6 cubic metre per hr or 2.5 cubic metres per hr then it followed that the meter was capable to work at 1 cubic metre per hour as requested in the tender

specifications. To illustrate his point Mr Martin explained that it was like having a car which could be driven at 100km/h and which therefore could also be driven at 50 km/h.

Regarding the minimum flow rate, Mr Martin remarked that his firm had offered a meter which had a minimum flow rate (Q1) of 6.25 litres per hr and, as a result, it was compliant with the technical specifications because in Clarification 1, dated 30th April 2009, the WSC had indicated a permanent flow rate (Q3) of 1.0 cubic metre /h but in Reply 2 it was indicated that ".. *meters having a Q3/Q1 ratio of 250 or more shall be preferred*…." which represented a minimum flow rate of 4 litres/hr but which was not obligatory but "preferred". Mr Martin further submitted that in clause 2.1 it was indicated that "… *meters having a start flow greater that 1.2 litres/hr shall not be considered*..." and claimed that the meter presented by Itron France had a start flow below 1.2 litres / hr and, as a consequence, it met that obligatory condition too.

Mr Galea St John, explained that the WSC wanted a permanent flow rate of Q3=1 cubic metre/hr and that there was only one permanent flow rate, no more and no less. He added that a higher permanent flow rate could jeopardise the minimum flow rate which was defined as the ratio between the permanent flow rate and the minimum flow rate or PR value. Mr Galea St John stated that it was true that Itron France submitted a meter having a permanent flow rate of 1.6 cubic metres/hr or Q3=1.6 with a ratio of 250 and which would equate to Q1=6.25 which, in turn, meant better performance and more accurate minimum flow.

Mr Galea St John remarked that, at the objection stage, Itron France had submitted some declarations, including a graph, which were very useful, so much so that had that graph been submitted with the original submission the Evaluation Board would have considered the offer because it, actually, pointed out that although the meter had a Q3 which was greater than 1 cubic metre/hr it actually had a ratio (between the Q3 and the Q1) that could go down to a figure that was acceptable to the WSC.

The Chairman PCAB remarked that the admission that the explanation given by Itron France rendered its bid admissible seemed *prima facie*, an indication that the original submission was technically compliant after all.

Mr Galea St John explained that, in the absence of the document submitted at the objection stage, the Evaluation Board could not safely assume that the meter complied with the given permanent flow rate.

Mr Martin intervened to remark that the contracting authority specified the minimum flow rate at 4 lites/hr in the tender document but then in the clarification (Reply 2) stated that it would 'prefer' that rate thus not making it compulsory and hence that was not a criterion to be eliminated on. He added that that amounted to a change in the criteria. Mr Martin claimed that the *MID* certificate submitted by his firm in respect of its product indicated a minimum flow rate of 6.25 litres and a permanent flow rate of 1.6 cubic metres/hr which meant that the meter could have a permanent flow rate of 1 cubic metre/hr and a minimum flow rate of 6.25 litres and so it was compliant with tender specifications.

The Chairman PCAB remarked that it appeared to him that the documentation submitted by Itron Franceat objection stage, i.e. after the closing date of tender, made reference to established standards or recognised certificates which did not amount to clarifications as such.

Mr Galea St John explained that *MID* specified a range of Q3s or permanent flow rates, ie 1.0, 1.6 and 2.5, but Itron France submitted only the 1.6 and the 2.5 while omitting the 1.0.

Mr. Galea St John was asked by the PCAB whether at this stage the appellant company were proposing any changes to the meter as originally submitted in their tender or whether they were merely submitting explanations in the form of clarifications to which the witness replied that no changes were being contemplated to the meter as originally offered.

Mr Martin opined that, since no meter producer could meet the 1.0 cubic metres/hr and the 4 litres/hr requirement, then WSC changed the specifications in the clarification by inserting the term 'preferred' and thus did not insist on the specifications which originally specified Q3/Q1 ratio.

At this point Mr Martin queried whether the compliant tenderer had submitted an MID certificate with his product indicating Q3=1 cubic metre/hr and Q1=4 litre/hr or if it simply submitted a declaration from the manufacturer.

Eng. Ronald Pace, member of the Evaluation Board, referred to the tender declaration of conformity and added that, besides the permanent flow rate (Q3), the contracting authority was very much interested in the minimum flow rate (Q1) because of the local plumbing system. The Chairman PCAB intervened and made a general remark in the sense that contracting authorities should not rest solely on declarations in the event that something went wrong but in the first place one had to seek comfort by asking for technical standards - possibly internationally recognised - to corroborate declarations made.

Mr Galea St John declared that the meter presented by the compliant tenderer did not have an *MID* certificate.

Mr Joseph Attard, Managing Director of AFS Ltd, remarked that

(i) although his supplier could provide meters with a Q3 of 1.0, 1.6 and 2.5 he submitted a meter with a Q3=1.0 as requested

(ii) the clarification did not alter the specifications with regard to Q3 but only clarified Q1 *and*

(iii) the meter had a chamber inside and the smaller the chamber the more accurate it was at low flows and that was why WSC was after Q3=1.0 and not 1.6 or 2.5.

Mr Attard acknowledged that his firm had been supplying meters to the WSC in recent years but pointed out that Actaris, which was taken over by Itron France, had

also supplied meters to the WSC for a number of years and so both suppliers were known to the WSC, the contracting authority.

Mr Ricardo Guerra de Lanca Cordeiro, also acting on behalf of AFS Ltd, agreed with Mr Martin that the durability of a product with a Q3=1.6 would cover the durability of a product with a Q3=1.0 but added that, as indicated by *MID*, the Q3 did not influence only the durability of the product but it also had a bearing on the accuracy of the product. He also agreed that the current standard in Europe was the *MID*, which came into force in 2006, but added that the certificates already issued by British Standards were still valid to bill water up to 2016. Mr Guerra de Lanca Cordeiro remarked that, after being manufactured, meters had to undergo certain tests and, in the case of Itron France, the tests were carried out on a meter with Q3=1.6. He argued that, if there was an approval for a product with Q3=2.5, then why was it necessary to have an approval for a meter with Q3=1.6? He proceeded by bringing forth the same argument in the case of a meter with Q3=1.

Mr Guerra de Lanca Cordeiro observed that the WSC had issued previous tenders for meters with Q3=1.0 which had attracted a number of compliant tenderers whereas in this case only one tenderer complied with Q3=1.

Mr Galea St John reiterated that with the information submitted, following the lodgement of the objection, he had no problem to consider further the product submitted by Itron France. However, on the information initially submitted, he would have had to make certain dangerous assumptions with which he would have felt uncomfortable. He declared that the meter presented by appellant Company remained the same throughout the whole process and that only additional information was supplied after the closing date of tender.

Mr Martin maintained that the clarifications submitted at a later stage did not alter the *MID* certificate provided in the original submission. Mr Martin agreed that the British Standard certificate was still valid to bill water but noted that the one provided by AFS Ltd showed that the meter had a Q1 of 7.5 litres / hr and a Q3 of 1.0 cubic metres/hr which rendered the Itron France meter more compliant. Mr Martin concluded that the metrological performance of the meter had to be permanently marked on it and that, in the case of the compliant meter, the markings would read Q3=1.0 and Q1=7.5 and not Q1=4.0 as per declaration.

Mr Galea St John, under oath, gave the following evidence:

- over the years the WSC has been testing various types of meters and that the brands presented by the appellant Company and by the compliant tenderer had been found to perform well; ***and***

- in this case, the compliant tenderer had submitted all the information required in the original submission whereas the appellant Company did not give all the information in the initial submission but submitted additional information at objection stage.

Referring to Clause 1.1, Mr Martin alleged that the meter presented by AFS Ltd was not compliant and called for the rejection of the relative bid whereas, on the other

hand, Mr Guerra de Lanca Cordeiro argued that there was no conflict with the standards mentioned at clause 1.1.

Mr Marco Perez, an engineer representing the WSC, assured the PCAB that the tender specifications were designed to attract as many bidders as possible and that it was surprising that there was only one compliant tenderer. Mr Perez remarked that the Evaluation Board was justified in discarding Itron France's offer on the information initially submitted, adding that other aspects had to be taken into account, such as the endurance test – which did not form part of the objection – because the results of the endurance test on a meter with a Q3=1.6 could not be transposed to a meter with a Q3=1.0.

Mr Martin concluded that during the meeting he had been making reference only to official documents, such as the *MID* certificate issued by a third party and recognised throughout the EU.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated 05.11.2009 and also through their verbal submissions presented during the public hearing held on the 27.01.2010, had objected to the decision taken by the General Contracts Committee;

- having taken note of the fact that the appellant Company's bid was considered technically non-compliant because the technical specifications of the water meter offered by Itron had Q3=2.5 cubic metres/hr and R=400 or Q3=1.6 cubic metre/hr and R=250 when Clause 2.1 of the tender specified that … *the meter shall have a Permanent Flow Rate (Q3) = 1.0 cubic metre per hr* … and, thus, it followed that the meter offered was considered by the Evaluation Board not up to the requested tender technical specifications;

- having also taken note of the fact that the appellant Company argued that (**a**) the meter offered by *Itron France*, in fact, had a permanent flow rate of 1 cubic metre per hr, (**b**) in their original submission they had furnished a metrological certificate, which was internationally referred to as the 'MID', which showed that the meter could function permanently at 1 cubic metre per hr, (**c**) whereas the contracting authority specified the permanent flow rate, it did not give the minimum flow rate, (**d**) in terms of metrology, the European standard was the *MID certificate* and in that certificate there was the permanent flow rate (Q3) and the minimum flow rate (Q1) and that if one had a Q3=1.6 cubic metre per hr or 2.5 cubic metres per hr then it followed that the meter was capable to work at 1 cubic metre per hour as requested in the tender specifications, (**e**) in Clarification 1, dated 30th April 2009, the WSC had indicated a permanent flow rate (Q3) of 1.0 cubic metre /h but in Reply 2 it was indicated that ".. *meters having a Q3/Q1 ratio of 250 or more shall be preferred*…." which represented a minimum flow rate of 4 litres/hr but which was not obligatory but "preferred", (**f**) in clause 2.1 it was indicated that "… *meters having a start flow greater that 1.2 litres/hr shall not be considered*..." and claimed that the meter presented by Itron France had a start flow below 1.2 litres / hr and, as a consequence, it met that obligatory condition too and (**g**) the clarifications

submitted at a later stage did not alter the *MID* certificate provided in the original submission;

- having heard the Chairman of the Evaluation Board state that (**a**) in their original submission the appellant Company had indicated that the meter had a permanent flow rate (Q3) of 1.6 or 2.5 cubic meters per hour and that (**b**) for the reason mentioned in (a) only, the offer could not be considered compliant and that the WSC was not interested in higher flows as that would have meant problems at lower flows, (**c**) the WSC wanted a permanent flow rate of Q3=1 cubic metre/hr and that there was only one permanent flow rate, no more and no less, (d) *MID* specified a range of Q3s or permanent flow rates, ie 1.0, 1.6 and 2.5, but Itron France submitted only the 1.6 and the 2.5 while omitting the 1.0 and (e) over the years, the WSC has been testing various types of meters and that the brands presented by the appellant Company and by the compliant tenderer had been found to perform well;

- having also heard Mr Galea Saint John state that it was true that Itron France submitted a meter having a permanent flow rate of 1.6 cubic metres/hr or Q3=1.6 with a ratio of 250 and which would equate to Q1=6.25 which, in turn, meant better performance and more accurate minimum flow;

- having also heard the Chairman of the Evaluation Board remark that, at the objection stage, Itron France had submitted some declarations, including a graph, which were very useful, so much so that had that graph been submitted with the original submission the Evaluation Board would have considered the offer because it pointed out that although the meter had a Q3 which was greater than 1 cubic metre/hr, actually it had a ratio (between the Q3 and the Q1) that could go down to a figure that was acceptable to the WSC;

- having deliberated on the fact that, through the Evaluation Board's Chairman's own admission, in the absence of the document submitted at the objection stage, the Evaluation Board could not safely assume that the meter complied with the given permanent flow rate;

- having taken cognizance of Mr Martin's query as to whether the compliant tenderer had submitted an MID certificate with its product indicating Q3=1 cubic metre/hr and Q1=4 litre/hr or if it had simply submitted a declaration from the manufacturer;

- having heard Mr Galea St John declare that the meter presented by the compliant tenderer did not have an *MID* certificate;

- having considered Mr Attard's (AFS Ltd) remarks, declarations and observations;

- having also deliberated on Mr Guerra de Lanca Cordiero's intervention during the public hearing;

- having reflected on (a) the appellant Company's representative's allegation that the meter presented by AFS Ltd was not compliant, calling for the rejection of the relative bid;

- having also reflected on a doubt cast as a result of statements made during the hearing as regards the possibility that the tender submitted by Messrs AFS Ltd might have not included all the certificates that were requested as mandatory in the tender specifications;

- having also taken note of Ing Perez's remark wherein he assured the PCAB that the tender specifications were designed to attract as many bidders as possible and that it was surprising that there was only one compliant tenderer

reached the following conclusions, namely:

1. The PCAB feels that, in the light of the admission made by the Chairman of the Evaluation Board that the explanation given by Itron France subsequent to the submission of its offer rendered the said Company's bid admissible, all seemed to be, *prima facie*, an indication that the original submission was not technically non-compliant after all.

   This Board cannot ignore the fact that, in his concluding remarks during the hearing, the Chairman of the Evaluation Board

   a. reiterated that, as a result of the information submitted to the said Board, by the now the appellant Company, following the lodgement of the objection, he, personally, had no problem to consider further the product submitted by Itron France

   b. declared that the meter presented by the appellant Company remained the same throughout the whole process and that only additional information was supplied after the closing date of tender

   This Board considers that (a) and (b) mentioned in the previous paragraph render the conclusions reached by the Evaluation Board as having been reached in a considerable hasty manner.

2. The PCAB opines that the fact that (i) the clarifications submitted by the appellants at a later stage did not alter the *MID* certificate - an internationally approved standard - provided in the original submission, is proof enough that the appellants' intentions were the same throughout the tendering / adjudication process *and* (ii) the Chairman of the Evaluation Board claimed that he has no objection with stating that, following receipt of these supporting documents, he would have had no qualms in accepting the appellants' offer, provides this Board with sufficient proof that the appellant Company's claim was justified.

3. The PCAB feels that the appellant Company's representative was more convincing in his argument when, during the hearing, the issue of submission of the *MID* certificate arose.

4. The PCAB feels that, for fairness sake, the Evaluation Board should re-examine the tender as originally submitted by Messrs AFS Ltd in order to establish whether the certificates which were listed as mandatory in the tender specifications were actually submitted by the said tenderer.

As a consequence of (1) to (4) above this Board finds in favour of the appellant Company and decides that the appellant Company's offer should be reintegrated in the process and analysed further.

In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the appellants should be reimbursed.

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| Alfred R Triganza<br>Chairman | Anthony Pavia<br>Member | Carmel J Esposito<br>Member |

*11 February 2010*