

## PUBLIC CONTRACTS REVIEW BOARD

Case No. 361

CT/4001/2011

**Tender for the Supply and Delivery of Ductile Iron Pipes to EN545 – Water Services Corporation**

This call for tenders was published in the Government Gazette on 8<sup>th</sup> February 2011. The closing date for offers was 5<sup>th</sup> April 2011.

The estimated value of this tender was €3,523,800.

Four (4) tenderers originally submitted their offers.

Saint Gobain PAM, represented by Rogonesi & Co. Ltd filed an objection on 1<sup>st</sup> August 2011 against the decision taken by the Water Services Corporation to award the tender to Sertubi SpA, represented by JP Baldacchino Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman and Mr Carmel Esposito and Mr Joseph Croker as members convened a meeting on Tuesday, 20<sup>th</sup> December 2011 to discuss this objection.

Present for the hearing were:

**Saint Gobain PAM – represented by Rogonesi & Co Ltd**

Dr Franco Vassallo	Legal Representative
Dr Joseph Camilleri	Legal Representative
Mr Roberto Ragonese	Representative

**Electrosteel Castings (UK) Ltd**

Dr Adrian Delia	Legal Representative
Not. Matthew Paris	Representative
Mr Edward Zammit	Representative

**Sertubi SpA – represented by JP Baldacchino Ltd**

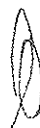
Mr Adrian Baldacchino	Representative of JP Baldacchino Ltd
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**Water Services Corporation**

Dr Neville Young	Legal Representative
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**Adujdicating Board**

Ing. Marco Perez	Chairman
Ing. Nigel Ellul	Member
Ing. Simon Camilleri	Member
Mr Anthony Camilleri	Secretary

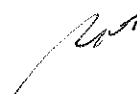


After the Chairman's brief introduction, the appellant company was invited to explain the motives of his company's objection.

Dr Franco Vassallo, legal representative of Saint Gobain PAM, represented by Ragonesi & Co Ltd, the appellant, declared that his client and another tenderer, Electrosteel Castings (UK) Ltd, were objecting on a common issue and made the following submissions:

- i. with regard to price, the tender document at volume 4 'Financial Bid' clearly indicated as follows: *'Total including VAT, duties, other taxes/charges (Delivered Duty Paid – DDP)'*;
- ii. clause 3 of the tenderer's declaration stated that the *"grand total price of our tender (inclusive of duties, VAT, other taxes and any discounts is: ..."*.
- iii. clause 17.3 of the tender document stated that *"Tenderers must quote all components of the price inclusive of taxes, customs and import duties, and any discounts. Except as may otherwise be provided for in the contract, no payment will be made for items which have not been costed"*;
- iv. according to the 'Schedule of Offers Received' published on the 9<sup>th</sup> June 2011 by the Department of Contracts, the recommended tenderer had submitted the offer of €3,495, 537.60, excluding VAT;
- v. this issue had also been raised at the clarification meeting where it had been declared that companies in EU Member States had to quote prices inclusive of VAT even though the invoices that would eventually be presented to the Water Services Corporation would be exclusive of VAT;
- vi. the purpose behind the requirement to include VAT in the prices was for the contracting authority to compare offers like-with-like;
- vii. it therefore followed that the recommended tenderer was in breach of tender conditions for having quoted a price excluding VAT and should be disqualified from the tendering process;
- viii. on the other hand, in the letter of rejection sent to his client dated 20<sup>th</sup> July 2011 the Department of Contracts indicated that the tender had been awarded to Sertubi SpA for the price of €3,495,537.60, inclusive of VAT, which contrasted with the information published on the 'Schedule of Offers Received';
- ix. argued that his client, Saint Gobain PAM, had added VAT to the price and, as a result, if one were to add 18% VAT to Sertubi's quoted price then the total price would amount to €4,124,734.37 rendering it more expensive than his client's technically compliant offer of €4,067,965 and, similarly, if one were to deduct 18% VAT from his client's quoted price then it would become cheaper than the recommended offer;

and



- x. since the sole reason why his client was not awarded the tender was that his company's offer was not the cheapest, then the contracting authority ought to review its decision and award the tender to his client as the cheapest compliant tender.

Mr Adrian Baldacchino, representing Sertubi SpA, stated that following the publication of the 'Schedule of Offers Received' by the Department of Contracts on the 9<sup>th</sup> June 2011, he had drawn the attention of the Water Services Corporation to the fact that the price quoted by Sertubi SpA had been erroneously quoted on the schedule as excluding VAT and, subsequently, the Water Services Corporation had cleared the issue with the Department of Contracts as per email dated 22<sup>nd</sup> June 2011, which had been copied to him.

The Public Contracts Review Board then referred to the original tender submission submitted by Sertubi SpA, particularly to the 'Tender Form', where in clause 3 (page 22) it indicated as follows:

*"The grand total price of the tender (inclusive of duties, VAT, other taxes and any discounts) €3,495,537.60 \*Note 1 (which read as follows):*

*According to your indications and "clarification No. 3" of the 21<sup>st</sup> March 2011, "reply 2" (copy attached) our prices are inclusive of VAT (in absence of any specific indication we applied the Maltese VAT of 18%).*

*Please note that from our point of view, this is an incorrect procedure, because both subjects are E.U. members and VAT is not applicable.*

*Our final prices to WSC have to be considered without VAT.*

*For your guidance, in our attached offers RST031011M-1<sup>st</sup> year and RST031011M-2<sup>nd</sup> year, we presented our prices without VAT as per European rules."*

Mr Baldacchino explained that, in so far as intra-community supplies are concerned, no VAT should be levied, even with regard to transport expenses from ship to Water Services Corporation stores. He stressed that in the 'Tender Form' and in Volume 4 – Financial Bid – Sertubi SpA had quoted the price inclusive of VAT and that it was the Contracts Department that had mistakenly listed Sertubi SpA's price as excluding VAT in the 'Schedule of Offers Received'.

The Public Contracts Review Board checked thoroughly the original tender submission of Sertubi SpA - even by working out the mathematical calculations of the price schedules submitted - and the Public Contracts Review Board was satisfied that the price quoted by Sertubi SpA was in fact inclusive of VAT. The Public Contracts Review Board, with the concurrence of the recommended tenderer, even allowed the appellant company's representative to view that part of the recommended tenderer's submission that clearly demonstrated that the price was quoted inclusive of VAT.

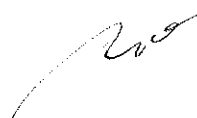
Dr Franco Vassallo claimed that on the 22<sup>nd</sup> July 2011, namely prior to lodging the appeal, his client had asked the Water Services Corporation for an explanation about the discrepancy in the recommended tenderer's price between that shown on the 'Schedule of Offers Received' dated 9<sup>th</sup> June 2011 and that given in the letter of rejection dated 20<sup>th</sup> July 2011, however, the Water Services Corporation failed to reply. Dr Vassallo could not produce evidence of that communication. He added that since his client had a time limit within which to file an appeal he had no option but to go ahead and lodge it against the payment of €35,238. Dr Vassallo appealed to the Public Contracts Review Board to keep this matter in view during its deliberations.

Dr Neville Young denied that the Water Services Corporation had received any communication from the appellant company about the price quoted by the recommended tenderer.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellant company, in terms of the reasoned letter of objection dated 1<sup>st</sup> August 2011 and through the verbal submissions made during the hearing held on the 20<sup>th</sup> December 2011, had objected against the decision taken by the Water Services Corporation to award the tender to Sertubi SpA, represented by JP Baldacchino Ltd;
- having noted the appellant firm's representatives' claims and observations regarding the fact that (a) clause 17.3 of the tender document stated that "*Tenderers must quote all components of the price inclusive of taxes, customs and import duties, and any discounts. Except as may otherwise be provided for in the contract, no payment will be made for items which have not been costed*", (b) clause 3 of the tenderer's declaration stated that the "*grand total price of our tender (inclusive of duties, VAT, other taxes and any discounts is: ...*", (c) according to the 'Schedule of Offers Received' published on the 9<sup>th</sup> June 2011 by the Department of Contracts, the recommended tenderer had submitted the offer of €3,495, 537.60, excluding VAT, (d) this issue had also been raised at the clarification meeting where it had been declared that companies in EU Member States had to quote prices inclusive of VAT even though the invoices that would eventually be presented to the Water Services Corporation would be exclusive of VAT, (e) in the appellant company's opinion, the recommended tenderer was in breach of tender conditions for having quoted a price excluding VAT and should be disqualified from the tendering process, (f) the letter of rejection sent to the appellant company dated 20<sup>th</sup> July 2011, the Department of Contracts indicated that the tender had been awarded to Sertubi SpA for the price of €3,495,537.60, inclusive of VAT, which contrasted with the information published on the 'Schedule of Offers Received', (g) the appellant company, Saint Gobain PAM, had added VAT to the price and, as a result, if one were to add 18% VAT to Sertubi's quoted price then the total price would amount to €4,124,734.37 rendering it more expensive than the appellant company's technically compliant offer of €4,067,965 and, similarly, if one were to deduct 18% VAT from the appellant company's quoted price then it would become cheaper than the recommended offer, (h) since the sole reason why the appellant company was not awarded the tender was that its offer was not the cheapest, then the contracting authority ought to review its decision and award



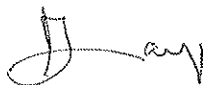
the tender to the appellant company as it was offering the cheapest compliant tender and (i) albeit on the 22<sup>nd</sup> July 2011, namely prior to lodging the appeal, the appellant company had asked the Water Services Corporation for an explanation about the discrepancy in the recommended tenderer's price between that shown on the 'Schedule of Offers Received' dated 9<sup>th</sup> June 2011 and that given in the letter of rejection dated 20<sup>th</sup> July 2011, yet, the Water Services Corporation failed to reply and since the company had a time limit within which to file an appeal it had no option but to go ahead and lodge it against the payment of €35,238;

- having considered the contracting authority's representative's submissions, particularly the fact that the Water Services Corporation was denying ever receiving any communication from the appellant company about the price quoted by the recommended tenderer;
- having also considered the recommended tenderer's representative's submissions namely that (a) following the publication of the 'Schedule of Offers Received' by the Department of Contracts on the 9<sup>th</sup> June 2011, Mr Baldacchino had drawn the attention of the Water Services Corporation to the fact that the price quoted by Sertubi SpA had been erroneously quoted on the schedule as excluding VAT and, subsequently, the Water Services Corporation had cleared the issue with the Department of Contracts as per email dated 22<sup>nd</sup> June 2011, which had been copied to Mr Baldacchino, (b) in so far as intra-community supplies are concerned, no VAT should be levied, even with regard to transport expenses from ship to Water Services Corporation stores and (c) that in the 'Tender Form' and in Volume 4 – Financial Bid – Sertubi SpA had quoted the price inclusive of VAT and that it was the Contracts Department that had mistakenly listed Sertubi SpA's price as excluding VAT in the 'Schedule of Offers Received',

reached the following conclusions:

1. The Public Contracts Review Board opines that, as a result of its thorough check of the original tender submission of Sertubi SpA - even by reworking out the mathematical calculations of the price schedules submitted, the Public Contracts Review Board is satisfied that the price quoted by Sertubi SpA was, in fact, inclusive of VAT as per tender specifications.
2. The Public Contracts Review Board feels that it would have been more practical and less time consuming and costly had the contracting authority provided the appellant company with a better transparent explanation which would, very likely, have dissuaded the company's representative/s from proceeding with the filing of the objection.

In view of the above this Board finds against the appellant company but, considering the prevailing circumstances which transpired during the hearing, recommends that the deposit paid by the latter should be reimbursed.



Alfred R Triganza  
Chairman



Carmel J Esposito  
Member



Joseph Croker  
Member

6<sup>th</sup> February 2012