

PUBLIC CONTRACTS REVIEW BOARD

Case No. 362

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 8th February 2011. The closing date for offers was 5th April 2011.

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

Four (4) tenderers submitted their offers.

Electrosteel Castings (UK) Ltd filed an objection on 1st August 2011 against the decisions taken by the Water Services Corporation to reject its offer as financially not compliant and to award the tender to Sertubi SpA represented by J.P. 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, 20th December 2011 to discuss this objection.

Present for the hearing were:

Electrosteel Castings (UK) Ltd

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

Saint Gobain PAM Ltd

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

Sertubi Spa

Mr Adrian Baldacchino	Representing J.P. Baldacchino Ltd
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Water Services Corporation

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's representative was invited to explain the motives of his company's objection.

Dr Adrian Delia, legal advisor of Electrosteel Castings (UK) Ltd, the appellant company, stated that by letter dated 20th July 2011 his client was informed that the company's offer was adjudicated to be financially not compliant – which, *per se*, meant that his client's offer had been found to be, administratively and technically, compliant - for three reasons as illustrated hereunder:-

A) Tender Form was not submitted on the original official form and substantial variations from the official form

Dr Delia, whilst conceding that the *tender form* presented by his client was not in strict conformity with the template provided in the tender document, yet, he declared that his client had provided all the information requested.

Mr Marco Perez, chairman of the adjudicating board, stated that the *tender form* submitted by the appellant company was not identical to that provided in the tender document so much so that the evaluators had to refer to other forms contained in the same tender submission to obtain certain information that should have been given in the *tender form*.

Dr Neville Young, legal advisor of the Water Services Corporation, observed that Sections A and B of the *tender form* were missing and the 'Notes 1 to 3' at page 23 did not have the relative symbol reproduced against each note – namely a dot in bold print or a dot in light print.

Dr Delia submitted that:-

- i. Sections A and B of the *tender form* referred to the name of the tenderer and the contact person which his client had given in 'Volume 4 – Financial Bid';
- ii. the only omission related to the information requested in terms of any possible *Joint-Venture* information or *Consortium Information* which in the case of his client did not apply as it had already been clearly indicated that his client was submitting the tender in the company's own right; and
- iii. whilst it was a fact that the symbols against notes 1 to 3 were missing, yet, he argued that those notes were only meant to guide the tenderer as to the instances in which one could seek a clarification.

B) Delivery linked with a full 20-Foot GB Box Container Load

Dr Delia submitted that:-

- i. the tender document at Volume 3 Part 1 (pg. 49) outlined the technical specifications, among them, the following:

"6. In accepting the conditions and specifications for this tender, the prospective contractor will be binding himself to accept partial orders throughout the 24 months covered by this contract, and

7. Minimum Partial Order: The minimum weight of pipes for a partial order shall be 50 tonnes."

- ii. the price quoted by his client only indicated that it was linked to a full 20-foot GB Box Container;
- iii. his client did not impose any limitations on the orders to be placed by the Water Services Corporation and, as a consequence, the company was not in breach of tender conditions in this regard; and
- iv. had his client breached any condition in this regard, then the company should have been disqualified for breaching a technical condition and not a financial condition, which technicality brought about the nullity of the reason for his client's exclusion raised by the contracting authority.

Dr Young remarked that the Water Services Corporation's interpretation of the appellant company's submission in this regard was that in the case that an order placed by Water Services Corporation entailed, for example, two and a half containers then the price would be linked to three containers, namely as if all three containers were fully loaded.

Mr Adrian Baldacchino, representing the recommended tenderer, remarked that this aspect, which was technically referred to as 'dead freight', had been taken into account in the price that he quoted because 'dead freight' represented a cost to the contractor once the Water Services Corporation was free to place orders from 50 tonnes upwards.

C) Price does not include any Customs Stripping Charges and Demurrage Charges

Dr Delia submitted that:-

- i. his client had indicated to the Water Services Corporation that the company's price covered the following:

"... clearance from customs and unloading at your stores would be our responsibility but this does not include any customs stripping charges and demurrage charges when these are beyond our control"

- ii. therefore, contrary to what the contracting authority was stating, the price quoted by his client did include customs stripping charges and demurrage charges but it excluded them when they were beyond his client's control;
 - iii. his client was offering - free of charge - 21 days beyond the determined date and the charges beyond the 21 days would be met by his client if the firm was at fault or by, for instance, the Water Services Corporation if it would turn out to be at fault;
- and
- iv. there was no justification to disqualify his client on this baseless claim

Dr Neville Young, representing the Water Services Corporation, remarked that INCOTERM²⁰⁰⁰ included the term 'if the parties wish to exclude from the seller's obligations some of the costs payable' and the Water Services Corporation definitely did not want to exclude any costs. He added that tenderers were not allowed to impose any conditions and, moreover, the term 'beyond our control' was very vague and, considering that the contract was worth about €3.5 million, the Water Services Corporation wanted to limit the possibility for different interpretations.

Mr Baldacchino remarked that:-

- i. at the clarification meeting it had been made clear that the price had to cover delivery to the Water Services Corporation stores;
- ii. it was therefore not permitted for one to impose conditions with regard to what might happen in the process of delivering the goods to the Water Services Corporation stores;
- iii. the price his company quoted took into account all the risks involved in the execution of the contract which, *inter alia*, affected, for example, the insurance premium; and
- iv. INCOTERM²⁰⁰⁰ stated that the exclusion of the seller's obligations from paying certain costs was conditional to the inclusion of clear wording to that effect in the contract of sale but there was no such pre-agreement in this case.

Dr Delia stated that:-

- i. in package 2 of its tender submission his client had declared that the offer was subject to *force majeure* conditions (including strikes and lockouts) as these were beyond anyone's control;
- ii. the tender document in Volume 2 Section 1 provided as follows:

“2. The place of acceptance of the supplies shall be WSC stores ... and the INCOTERM²⁰⁰⁰ applicable shall be delivery duty paid (DDP)”;

and

iii. INCOTERM²⁰⁰⁰ defined DDP as follows:

‘Delivered duty paid (DDP) means that the seller delivers the goods to the buyer, cleared for import, and not unloaded from any arriving means of transport at the named place of destination. The seller has to bear all the costs and risks involved in bringing the goods thereto including, where applicable, any duty (which term includes the responsibility for and the risk of the carrying out of customs formalities and the payment of formalities, customs duties, taxes and other charges) for import in the country of destination.’

Dr Young stated that from the appellant company’s tender submission the Water Services Corporation deduced that the appellant company was drawing a distinction between the terms ‘force majeure’ and ‘beyond our control’. Nevertheless, once the appellant company had declared at the hearing that these two terms meant one and the same thing then the Water Services Corporation had no further submissions to make in this regard.

The Chairman Public Contracts Review Board remarked that whereas the contracting authority was expected to evaluate a bid holistically, namely taking into account all three packages, on the other hand it would have been appropriate had the appellant company included this information both in packages 2 and 3 of its tender submission.

Dr Delia concluded that once the tender document provided that *“the contract will be awarded to the cheapest priced tender satisfying the administrative and technical criteria”* then this tender ought to be awarded to his client who had presented a fully compliant and a substantially cheaper tender.

D) Recommended Tenderer Quoted Price Excluding VAT

Dr Delia declared that the recommended tenderer should have been disqualified for the following reasons:

- i. volume 4 – Financial Bid – clearly indicated with regard to price ... *“Total including VAT, duties, other taxes/charges (Delivered Duty Paid – DDP)”;*
- ii. clause 3 of the tenderer’s declaration provided as follows ... *“The grand total price of our tender (inclusive of duties, VAT, other taxes and any discounts is ...”;*
- iii. clause 17.3 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 9th 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 tenderers had been informed that companies in EU Member States had to quote prices inclusive of VAT, however, 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;
- and
- vii. it therefore followed that the recommended tenderer was in breach of tender conditions for having quoted his price excluding VAT.

Mr Baldacchino stated that, following the publication of the ‘Schedule of Offers Received’ by the Department of Contracts on the 9th 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 22nd June 2011, which had been copied to him.

The Public Contracts Review Board then referred to the original tender submission presented by Sertubi SpA, particularly to the ‘Tender Form’ where in clause 3 (page 22) it indicated that:

*“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 21st 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-1st year and RST031011M-2nd year, we presented our prices without VAT as per European rules.”

Mr Baldacchino explained that, with respect of intra-community supplies, no VAT should be levied, even with regard to transport expenses from ship to the 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 thoroughly checked the original tender submission of Sertubi SpA - even by working out the mathematical calculations of the schedules submitted - and the Public Contracts Review Board was satisfied that the price quoted by Sertubi SpA was, in fact, inclusive of VAT. With the concurrence of the recommended tenderer, the Public Contracts Review Board even allowed the appellant company to view that part of the recommended tenderer's submission where the price was quoted inclusive of VAT.

Dr Delia stated that it would appear that the recommended tenderer had quoted two prices, one including VAT and one excluding VAT but the fact remained that his client's price was cheaper than that of 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 29th July 2011 and through the verbal submissions made during the hearing held on the 20th December 2011, had objected against the decisions taken by the Water Services Corporation to reject its offer as financially not compliant and to award the tender to Sertubi SpA represented by J.P. Baldacchino Ltd;
- having noted the appellant firm's representatives' claims and observations regarding the fact that (a) the appellant company was informed that its offer was adjudicated to be financially not compliant – which, *per se*, meant that the company's offer had been found to be, administratively and technically, compliant - for three reasons (1) Tender Form was not submitted on the original official form and substantial variations from the official form, (2) Delivery linked with a full 20-Foot GB Box Container Load and (3) Price does not include any Customs Stripping Charges and Demurrage Charges, (b) whilst conceding that the *tender form* presented by the company was not in strict conformity with the template provided in the tender document, yet, the appellant company declared that it had provided all the information requested, (c) Sections A and B of the *tender form* referred to the name of the tenderer and the contact person which his client had given in 'Volume 4 – Financial Bid', (d) the only omission related to the information requested in terms of any possible *Joint-Venture* information or *Consortium Information* which in the case of the appellant company did not apply as it had already been clearly indicated that the company was submitting the tender in its own right, (e) whilst it was a fact that the symbols against notes 1 to 3 were missing, yet, one had to argue that those notes were only meant to guide the tenderer as to the instances in which one could seek a clarification, (f) the price quoted by the appellant company only indicated that it was linked to a full 20-foot GB Box Container, (g) the appellant company did not impose any limitations on the orders to be

placed by the Water Services Corporation and, as a consequence, the company was not in breach of tender conditions in this regard, (h) had the appellant company breached any condition in this regard, then the company should have been disqualified for breaching a technical condition and not a financial condition, which technicality brought about the nullity of the reason for the company's exclusion raised by the contracting authority, (i) the appellant company had indicated to the Water Services Corporation that the company's price covered "... clearance from customs and unloading at your stores would be our responsibility but this does not include any customs stripping charges and demurrage charges when these are beyond our control", (j) contrary to what the contracting authority was stating, the price quoted by the appellant company did include customs stripping charges and demurrage charges but it excluded them when they were beyond its control, (k) the appellant company was offering - free of charge - 21 days beyond the determined date and the charges beyond the 21 days would be met by it if the firm was at fault or by, for instance, the Water Services Corporation if the latter would turn out to be at fault, (l) there was no justification to disqualify the appellant company on this baseless claim, (m) in package 2 of its tender submission the appellant company had declared that the offer was subject to *force majeure* conditions (including strikes and lockouts) as these were beyond anyone's control, (n) the tender document in Volume 2 Section 1 clearly provided what was meant by INCOTERM²⁰⁰⁰ and how it defined Delivered duty paid (DDP), (o) the recommended tenderer should have been disqualified due to the fact that, according to the 'Schedule of Offers Received' published on the 9th June 2011 by the Department of Contracts, the recommended tenderer had submitted the offer of €3,495, 537.60, excluding VAT, (p) at the clarification meeting tenderers had been informed that companies in EU Member States had to quote prices inclusive of VAT, however, the invoices that would eventually be presented to the Water Services Corporation would be exclusive of VAT, (q) it therefore followed that the recommended tenderer was in breach of tender conditions for having quoted his price excluding VAT and (r) it would appear that the recommended tenderer had quoted two prices, one including VAT and one excluding VAT but the fact remained that the appellant company's price was cheaper than that of the recommended tenderer;

- having considered the contracting authority's representative's submissions, namely that (a) the *tender form* submitted by the appellant company was not identical to that provided in the tender document so much so that the evaluators had to refer to other forms contained in the same tender submission to obtain certain information that should have been given in the *tender form*, (b) Sections A and B of the *tender form* were missing and the 'Notes 1 to 3' at page 23 did not have the relative symbol reproduced against each note – namely a dot in bold print or a dot in light print, (c) the Water Services Corporation's interpretation of the appellant company's submission in this regard was that in the case that an order placed by Water Services Corporation entailed, for example, two and a half containers then the price would be linked to three containers, namely as if all three containers were fully loaded, (d) INCOTERM²⁰⁰⁰ included the term 'if the parties wish to exclude from the seller's obligations some of the costs payable' and the

Water Services Corporation definitely did not want to exclude any costs, (e) tenderers were not allowed to impose any conditions and, moreover, the term 'beyond our control' was very vague and, considering that the contract was worth about €3.5 million, the Water Services Corporation wanted to limit the possibility for different interpretations and (f) from the appellant company's tender submission the Water Services Corporation deducted that the appellant company was drawing a distinction between the terms 'force majeure' and 'beyond our control' but once the appellant company had declared at the hearing that these two terms meant one and the same thing then the Water Services Corporation had no further submissions to make in this regard;

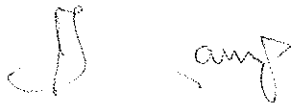
- having also considered the recommended tenderer's representative's submissions namely that (a) what was technically referred to as 'dead freight' had been taken into account in the price that the company had quoted because 'dead freight' represented a cost to the contractor once the Water Services Corporation was free to place orders from 50 tonnes upwards, (b) at the clarification meeting it had been made clear that the price had to cover delivery to the Water Services Corporation stores, (c) it was therefore not permitted for one to impose conditions with regard to what might happen in the process of delivering the goods to the Water Services Corporation stores, (d) the price that the recommended tenderer quoted took into account all the risks involved in the execution of the contract which, *inter alia*, affected, for example, the insurance premium, (e) INCOTERM²⁰⁰⁰ stated that the exclusion of the seller's obligations from paying certain costs was conditional to the inclusion of clear wording to that effect in the contract of sale but there was no such pre-agreement in this case and (f) following the publication of the 'Schedule of Offers Received' by the Department of Contracts on the 9th June 2011, the recommended tenderer's representative 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 22nd June 2011, which had been copied to him,

reached the following conclusions:

1. The Public Contracts Review Board opines that, whereas the contracting authority was expected to evaluate a bid holistically, namely taking into account all three packages, on the other hand it would have been appropriate had the appellant company included this information both in packages 2 and 3 of its tender submission as this would have avoided any misinterpretations of facts as presented to the evaluation board for review and analysis purposes.
2. The Public Contracts Review Board feels 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.

3. The Public Contracts Review Board whilst conceding that the *tender form* presented by the appellant company was not in strict conformity with the template provided in the tender document, yet, this Board is of the opinion that the format, as presented, albeit not recommended for any party to modify in any way, it still managed to provide all the information requested (e.g. that relating to 'contact person', Joint-Venture information or Consortium Information and so forth). On the other hand, this Board would not even consider the point raised relating to symbols against notes 1 to 3 which were missing in view of this issue being considered highly trivial in nature that does not even warrant any kind of deliberation by this Board.
4. The Public Contracts Review Board agrees with the appellant company, namely that, contrary to what the contracting authority was stating, the price quoted by the appellant company did include customs stripping charges and demurrage charges but it excluded them when they were beyond its control (e.g. *force majeure*). This Board disagrees with the suggestion made that the appellant company's offer was, in any way, imposing conditions with regard to what might happen in the process of delivering the goods to the Water Services Corporation stores.

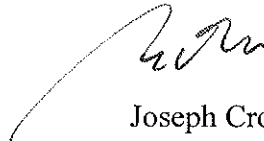
In view of the above this Board finds in favour of the appellant company and recommends that the said appellant company be reinstated in the tender evaluation process and that, as a consequence, the deposit paid by the latter should thus be reimbursed.



Alfred R Triganza
Chairman



Carmel J Esposito
Member



Joseph Croker
Member

6 February 2012