

## PUBLIC CONTRACTS REVIEW BOARD

Case No. 405

CT/WSC/T/8/2011; CT/4001/2011

**Tender for the Supply and Delivery of Ductile Iron Pipes to EN 545**

This call for tenders was published in the Government Gazette on the 8<sup>th</sup> February 2011. The closing date for this call with an estimated budget of € 3,523,800 was the 5<sup>th</sup> April 2011.

Four (4) tenderers submitted their offers.

Sertubi SpA filed an objection on the 26<sup>th</sup> March 2012 against the decision to recommend the award of the tender to Electrosteel Castings (UK) Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr. Carmel Esposito and Mr Paul Mifsud as members convened a public hearing on Wednesday, 9<sup>th</sup> May 2012 to discuss this objection.

Present for the hearing:

### **Sertubi SpA**

Dr Antoine Cremona	Legal Representative
Mr Adrian Baldacchino	Representative

### **Electrosteel Casting (UK) Ltd**

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

### **Water Services Corporation (WSC)**

#### **Evaluation Board**

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

#### **Contracts Department**

Mr Nicholas Aquilina	Representative
----------------------	----------------

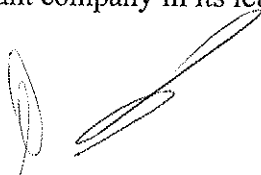


After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of his company's objection.

Dr Antoine Cremona, legal representative of Sertubi SpA, the appellant company, remarked that by letter dated 14<sup>th</sup> March 2012, the Contracts Department had informed his client that the company's offer was not successful because it was not the cheapest technically compliant offer and that the tender was recommended for award to Electrosteel Castings (UK) Ltd for the price of €3,028,303.84.

Dr Adrian Delia, legal representative of Electrosteel Castings (UK) Ltd, the recommended tenderer, intervened to point out that:

- i. a letter dated 26<sup>th</sup> March 2012 stated that the objection was being filed on behalf of JP Baldacchino Ltd as local representative and "*on behalf of Jindal Saw Italia Spa, the company that on 5th August 2011 has taken on lease the "Ductile Iron Pipe Division" of Sertubi Spa, having, its operating office at Via K L Von Bruck 32, 34144 Trieste, Italia. Such division is made of the complex of assets organized for carrying out the activities of design, manufacturing and marketing, in Italy and abroad, of ductile iron pipes, fittings and more in general of ductile iron pipeline systems manufactured in Italy under STr Sertubi © registered trademark*";
  - ii. therefore, whereas the original tenderer was Sertubi SpA, now the appellant in this tendering procedure was Jindal Saw Italia SpA or perhaps Sertubi-Jindal Saw Italia SpA as stated in the last paragraph of the same letter of objection;
  - iii. one was not contending that there was a change in the shareholding of Sertubi SpA, because that would still leave Sertubi SpA as the bidder in this tendering process since there was no provision in the tender document that prohibited the transfer of shareholding, but one was contending that Sertubi SpA had conceded or leased its ductile pipes manufacturing division to another firm, Jindal Saw Italia SpA;
  - iv. an article of an Italian newspaper confirmed that Sertubi Spa, which was facing difficulties, leased (*'in affitto'*) one of its divisions, that dealing with the manufacture of ductile pipes, to Jindal Saw Italia SpA which was a third party in this tendering procedure and, therefore, the appellant in this case was a third party and a tender could not be awarded to a third party but to a participating tenderer;
  - v. in case of award, which entity would sign the contract, Sertubi SpA or would Jindal Saw Italia SpA or Sertubi-Jindal Saw Italia SpA?;
  - vi. for all intents and purposes Sertubi SpA, the tenderer, was not the appellant in this case but the appellant was Jindal Saw Italia SpA;
- and
- vii. these declarations were made by the appellant company in its letter of objection.



Dr Cremona explained that:-

- as far he was aware, Jindal Saw Italia SpA bought the division of Sertubi SpA that manufactured ductile pipes and that, presently, the tenderer was Sertubi-Jindal Saw Italia SpA;
- the tender did not preclude changes in the shareholding of the bidder or the takeover of the bidder by a third party;

and

- the Public Contracts Review Board should allow him some time to obtain and provide legal documentation explaining the legal status/relationship of Sertubi SpA, Jindal Saw Italia SpA and Sertubi SpA-Jindal Saw Italia SpA, e.g. the agreement whereby Sertubi SpA assigned part of its operations and business, including current contracts and commitments, to Jindal Saw Italia SpA.

The Chairman Public Contracts Review Board noted that:-

- i. in this tender evaluation process the contracting authority had dealt with and evaluated Sertubi SpA and not Jindal Saw Italia SpA, which was a separate entity which the contracting authority did not take into account in the evaluation process;

and

- ii. the appellant company should have anticipated that this issue would be raised at the hearing and it was therefore expected that such appellant or the company's representative would have been prepared to answer these queries all the more when this 'lease' took place in August 2011.

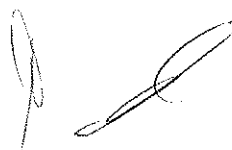
*The Public Contracts Review Board allowed Dr Cremona up to Monday 14<sup>th</sup> May 2012 to present to the said Board - copied to the recommended tenderer - the legal documentation that would explain the status of Sertubi SpA and Jindal Saw Italia SpA in the context of this tendering procedure.*

Mr Mark Perez, chairman of the adjudicating board, under oath, gave the following evidence:-

- a. he confirmed that, as far as he was aware, the tender document did not preclude changes in the shareholding of the tenderer or its takeover by another entity;

and

- b. the Water Services Corporation was in possession of documents confirming that there was an agreement dated 5<sup>th</sup> August 2011 between Sertubi SpA and Jindal Saw Italia SpA because Sertubi SpA still have running contracts with the Water Services Corporation and, as a result, the Corporation had to know about the entity that would deliver the services and the entity to which it would issue payments.



*The Public Contracts Review Board requested Mr Perez to provide it with this documentation (i.e. in respect of a business lease agreement) at the earliest opportunity.*

Mr Adrian Baldacchino, representing Sertubi SpA, under oath, gave the following evidence:-

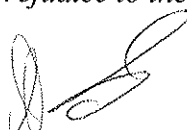
- a. he had been informed that Jindal Saw Italia SpA had taken over the operation, with all current commitments, of the ductile pipes division of Sertubi SpA and that the new set-up was styled Sertubi-Jindal Saw Italia SpA;
  - b. he could not confirm whether it was a lease, a takeover, an assignment or whatever;
  - c. Sertubi-Jindal Saw Italia SpA requested him to lodge this appeal and the €35,238 deposit required to lodge the appeal were provided by Sertubi-Jindal Saw Italia SpA;
- and
- d. he could not provide documentary evidence as to the present ownership of Sertubi SpA which had submitted a tender in this process.

At this point Dr Delia submitted the following verbal statement, namely that, notwithstanding any documentation that might eventually be provided, the facts were that the appeal had been lodged by Jindal Saw Italia SpA which was not the bidder - apparently it did not even exist as an entity - and that, should the appeal be upheld, the tender should not be awarded in favour of Jindal Saw Italia SpA but in favour of Sertubi-Jindal Saw Italia SpA.

Dr Cremona rebutted that no evidence had been produced that Jindal Saw Italia SpA did not exist.

At this point Dr Cremona made reference to EU Council Directive No 2004/17/EC and LN 178 of 2005 wherein, *inter alia*, he made the following submissions:

- a. General public procurement was regulated by LN 296 of 2010 whereas the procurement of utilities was regulated by LN 178 of 2005 (EU Council Directive 2004/17/EC) and therefore the latter regulations, which were specific to utilities procurement, had an overriding effect on the general procurement regulations laid down in LN 296 of 2010;
- b. tenders comprising products originating in third countries and relations with those countries were regulated by Reg. 58 of LN 178 of 2005 which, among other things, read as follows:-
  - (1) *This regulation shall apply to tenders covering products originating in third countries with which the Community has not concluded, whether multilaterally or bilaterally, an agreement ensuring comparable and effective access for Community undertakings to the markets of those third countries. It shall be without prejudice to the obligations of the*



*Community or of Malta with respect of third countries;*

*(2) Any tender submitted for the award of a supply contract may be rejected where the proportion of the products originating in third countries, as determined in accordance with Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, exceeds fifty per cent of the total value of the products constituting the tender. For the purposes of this regulation, software used in telecommunications network equipment shall be regarded as products;*

- c. it was retained that more than 50% of the product supplied by the recommended tenderer originated from a third country, namely India, which has only an observer status with regard to the relative World Trade Organisation (WTO) agreement on government procurement;
  - d. the purpose behind these provisions were to protect the EU industry;
  - e. the Water Services Corporation had to explain whether it had taken Reg. 58 (1) and (2) into consideration in its evaluation, which, through the term 'may', meant that the Water Services Corporation could exercise its discretion;
- and
- f. had the Water Services Corporation exercised this discretion then the recommended tenderer would have been disqualified and the tender awarded to his client.

Ing. Mark Perez remarked that:-

- i. the contracting authority dealt with this contract in terms of LN 296 of 2010 and according to the template provided by the Contracts Department and the eligibility criteria were those laid down in clause 5 of the tender document;
- and
- ii. the contracting authority did not exercise its discretion laid down in Reg. 58 (2) of LN 178 of 2006 - namely that it 'may' exclude a bidder if 50% of the latter's product originated from outside the EU - but the award criteria applied was the cheapest compliant tender.

Dr Delia argued that:-

- a. the appellant company was unsuccessful because it was not the cheapest and, as a result, it was a question of price;
- b. the objection was, however, not contesting the price but it was requesting the disqualification of the recommended tenderer;
- c. albeit one was not disputing the fact that the Water Services Corporation had the discretion to reject a tender where 50% of the supply originated from



third countries for the purposes of Reg 58 (2), yet, the Water Services Corporation opted not to exercise that discretion and, apparently, it had its reasons to act in that manner;

- d. in the letter of appeal the appellant company, conveniently, failed to refer to Reg. 58 (3) in its entirety which provided as follows:-

*(a) Subject to paragraph (b), where two or more tenders are equivalent in the light of the contract award criteria defined in regulation 55, preference shall be given to those tenders which may not be rejected pursuant to subregulation (2). The prices of those tenders shall be considered equivalent for the purposes of this regulation, if the price difference does not exceed three per cent.*

- e. his client's offer was 15.4% cheaper than that of the appellant company and, as a consequence, (1) such offer was well above the stipulated 3% difference and (2) his client's offer could not be excluded on the basis of price.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their 'letter of objection' dated 26<sup>th</sup> March 2012 and also through their verbal submissions presented during the hearing held on the 9<sup>th</sup> May 2012, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by letter dated 14<sup>th</sup> March 2012, the Contracts Department had informed the appellant company that the company's offer was not successful because it was not the cheapest technically compliant offer and that the tender was recommended for award to Electrosteel Castings (UK) Ltd for the price of €3,028,303.84, (b) as far he was aware, Jindal Saw Italia SpA bought the division of Sertubi SpA that manufactured ductile pipes and that, presently, the tenderer was Sertubi-Jindal Saw Italia SpA, (c) the tender did not preclude changes in the shareholding of the bidder or the takeover of the bidder by a third party, (d) the Public Contracts Review Board should allow the appellant company some time to obtain and provide legal documentation explaining the legal status/relationship of Sertubi SpA, Jindal Saw Italia SpA and Sertubi SpA-Jindal Saw Italia SpA, e.g. the agreement whereby Sertubi SpA assigned part of its operations and business, including current contracts and commitments, to Jindal Saw Italia SpA, (e) he had been informed that Jindal Saw Italia SpA had taken over the operation, with all current commitments, of the ductile pipes division of Sertubi SpA and that the new set-up was styled Sertubi-Jindal Saw Italia SpA, (f) he could not confirm whether it was a lease, a takeover, an assignment or whatever, (g) Sertubi-Jindal Saw Italia SpA requested the appellant company to lodge this appeal and the €35,238 deposit required to lodge the appeal were provided by Sertubi-Jindal Saw Italia SpA, (h) the appellant company could not provide documentary evidence as to the present ownership of Sertubi SpA which had submitted a tender in this process, (i) no evidence had been produced that Jindal Saw Italia SpA did not exist and (j) reference to EU Council Directive No 2004/17/EC and LN 178 of 2005 wherein, *inter alia*, the appellant company made the following submissions (1) General public procurement was regulated by LN 296 of 2010 whereas the procurement of utilities was regulated by LN 178 of 2005 (EU Council Directive 2004/17/EC) and therefore the latter regulations, which were specific to utilities procurement, had an overriding effect on the general procurement regulations laid down in LN 296 of 2010,

(2) tenders comprising products originating in third countries and relations with those countries were regulated by Reg. 58 of LN 178 of 2005, (3) it was retained that more than 50% of the product supplied by the recommended tenderer originated from a third country, namely India, which has only an observer status with regard to the relative World Trade Organisation (WTO) agreement on government procurement, (4) the purpose behind these provisions were to protect the EU industry, (5) the Water Services Corporation had to explain whether it had taken Reg. 58 (1) and (2) into consideration in its evaluation, which, through the term 'may', meant that the Water Services Corporation could exercise its discretion, (6) had the Water Services Corporation exercised this discretion then the recommended tenderer would have been disqualified and the tender awarded to the appellant company;

- having considered the contracting authority's representatives' reference to the fact that (a) he confirmed that, as far as he was aware, the tender document did not preclude changes in the shareholding of the tenderer or its takeover by another entity, (b) the Water Services Corporation was in possession of documents confirming that there was an agreement dated 5<sup>th</sup> August 2011 between Sertubi SpA and Jindal Saw Italia SpA because Sertubi SpA still have running contracts with the Water Services Corporation and, as a result, the Corporation had to know about the entity that would deliver the services and the entity to which it would issue payments, (c) the contracting authority dealt with this contract in terms of LN 296 of 2010 and according to the template provided by the Contracts Department and the eligibility criteria were those laid down in clause 5 of the tender document and (d) the contracting authority did not exercise its discretion laid down in Reg. 58 (2) of LN 178 of 2006 - namely that it 'may' exclude a bidder if 50% of the latter's product originated from outside the EU - but the award criteria applied was the cheapest compliant tender;
- having also considered the recommended tenderer 's representatives' reference to the fact that (a) a letter dated 26<sup>th</sup> March 2012 stated that the objection was being filed on behalf of JP Baldacchino Ltd as local representative and "*on behalf of Jindal Saw Italia Spa, the company that on 5th August 2011 has taken on lease the "Ductile Iron Pipe Division" of Sertubi Spa, having, its operating office at Via K L Von Bruck 32, 34144 Trieste, Italia. Such division is made of the complex of assets organized for carrying out the activities of design, manufacturing and marketing, in Italy and abroad, of ductile iron pipes, fittings and more in general of ductile iron pipeline systems manufactured in Italy under STr Sertubi © registered trademark*", (b) whereas the original tenderer was Sertubi SpA, now the appellant company in this tendering procedure was Jindal Saw Italia SpA or perhaps Sertubi-Jindal Saw Italia SpA as stated in the last paragraph of the same letter of objection, (c) one was not contending that there was a change in the shareholding of Sertubi SpA, because that would still leave Sertubi SpA as the bidder in this tendering process since there was no provision in the tender document that prohibited the transfer of shareholding, but one was contending that Sertubi SpA had conceded or leased its ductile pipes manufacturing division to another firm, Jindal Saw Italia SpA, (d) an article of an Italian newspaper confirmed that Sertubi Spa, which was facing difficulties, leased (*in affitto*) one of its divisions, that dealing with the manufacture of ductile pipes, to Jindal Saw Italia SpA which was a third party in this tendering procedure and, therefore, the appellant company in this case was a third party and a tender could not be awarded to a third party but to a participating tenderer, (e) in case of award, which entity would sign the contract, Sertubi SpA or would Jindal Saw Italia SpA or Sertubi-Jindal Saw Italia SpA?, (f) for all intents and purposes Sertubi SpA, the tenderer, was not the appellant company in this case but the appellant company was Jindal Saw Italia SpA, (g) these declarations were made by the appellant company



in its letter of objection, (h) submitted the following verbal statement, namely that, notwithstanding any documentation that might eventually be provided, the facts were that the appeal had been lodged by Jindal Saw Italia SpA which was not the bidder - apparently it did not even exist as an entity - and that, should the appeal be upheld, the tender should not be awarded in favour of Jindal Saw Italia SpA but in favour of Sertubi-Jindal Saw Italia SpA, (i) the appellant company was unsuccessful because it was not the cheapest and, as a result, it was a question of price, (j) the objection was, however, not contesting the price but it was requesting the disqualification of the recommended tenderer, (k) albeit one was not disputing the fact that the Water Services Corporation had the discretion to reject a tender where 50% of the supply originated from third countries for the purposes of Reg 58 (2), yet, the Water Services Corporation opted not to exercise that discretion and, apparently, it had its reasons to act in that manner, (l) in the letter of appeal the appellant company, conveniently, failed to refer to Reg. 58 (3) in its entirety and (m) his client's offer was 15.4% cheaper than that of the appellant company and, as a consequence, (1) such offer was well above the stipulated 3% difference and (2) his client's offer could not be excluded on the basis of price,

reached the following conclusions, namely:

1. The Public Contracts Review Board notes that during the hearing it was stated that Jindal Saw Italia SpA bought the division of Sertubi SpA that manufactured ductile pipes and that, presently, the tenderer was Sertubi-Jindal Saw Italia SpA. On the same subject matter this Board was told that the tender did not preclude changes in the shareholding of the bidder or the takeover of the bidder by a third party. However, due to the uncertain terms prevailing in the agreement reached between the two companies the Public Contracts Review Board was asked to allow the appellant company some time to obtain and provide legal documentation explaining the legal status/relationship of Sertubi SpA, Jindal Saw Italia SpA and Sertubi SpA-Jindal Saw Italia SpA, e.g. the agreement whereby Sertubi SpA assigned part of its operations and business, including current contracts and commitments, to Jindal Saw Italia SpA. Meantime, during the same hearing, this Board was informed that the Water Services Corporation was in possession of documents confirming that there was an agreement dated 5<sup>th</sup> August 2011 between Sertubi SpA and Jindal Saw Italia SpA because Sertubi SpA still have running contracts with the Water Services Corporation and, as a result, the Corporation had to know about the entity that would deliver the services and the entity to which it would issue payments. Being fully cognizant of the opaque scenario this Board acceded to request and a copy of the said lease agreement was forwarded to this Board. Following a detailed examination of content as well as a thorough deliberation on same subject matter it was resolved that Jindal has taken on lease Sertubi's 'branch of business' which includes the latter's assets and contracts. However, from the evidence produced, it appears that the two companies are distinct and therefore have separate legal personalities. The Public Contracts Review Board notes that under Part XIII of the Public Procurement Regulations, a notice of objection can be filed by a tenderer or any person having or having had an interest and therefore the submission of the objection by Jindal is valid. However the PCRB also feels that this procedure cannot be used to substitute a tenderer by another especially since a tender is evaluated also on the basis of the tenderer's technical abilities and thus the tenderer cannot be changed at a later date.
2. The Public Contracts Review Board feels that, whilst noting that Sertubi-Jindal Saw Italia SpA had requested the appellant company to lodge this appeal and the €35,238 deposit required to lodge the appeal were provided by Sertubi-Jindal Saw Italia SpA, yet



this scenario has to be taken within a context wherein, whereas the original tenderer was Sertubi SpA, now the appellant company in this tendering procedure was Jindal Saw Italia SpA or perhaps Sertubi-Jindal Saw Italia SpA as stated in the last paragraph of the same letter of objection. Undoubtedly, this Board cannot but concur with the recommended tenderer's views which, *inter alia*, claim that one (a) cannot argue that there was a change in the shareholding of Sertubi SpA because that would still have left Sertubi SpA as the bidder in this tendering process since there was no provision in the tender document that prohibited the transfer of shareholding (b) has to acknowledge the fact that Sertubi SpA had conceded or leased its ductile pipes manufacturing division to another firm, Jindal Saw Italia SpA, a different entity altogether. This Board argues that the fact that Sertubi SpA had leased one of its divisions, that dealing with the manufacture of ductile pipes, to Jindal Saw Italia SpA - a third party in this tendering procedure - gave rise to the fact that, in this particular instance, the appellant company was a third party which had nothing to do with the original bid. This Board acknowledges the fact that (a) the '*locus standi*' of the appellant company is regarded as dubious and that (b) a tender cannot be awarded to a third party but to a participating tenderer.

3. In its deliberations this Board also took cognizance of the explanation provided by the contracting authority with regard to the fact that (a) it had taken Reg. 58 (1) and (2) into consideration in its evaluation, which, through the term 'may', meant that the Water Services Corporation could exercise its discretion and (b) whilst it was a fact that, had the Water Services Corporation exercised this discretion then the recommended tenderer would have been disqualified and the tender awarded to the appellant company, yet, nevertheless, the contracting authority did not exercise its discretion laid down in Reg. 58 (2) of LN 178 of 2006 - namely that it 'may' exclude a bidder if 50% of the latter's product originated from outside the EU. As a matter of fact the contracting authority applied the cheapest compliant tender as the award criterion. At this point, on this particular issue, this Board concludes that, albeit no one was disputing the fact that the Water Services Corporation had the discretion to reject a tender where 50% of the supply originated from third countries for the purposes of Reg 58 (2), yet, it is evident that the Water Services Corporation opted not to exercise that discretion for its own reasons.
4. This Board finds it to be quite evident that the appellant company was unsuccessful because it was not the cheapest. Nevertheless, the Public Contracts Review Board also acknowledges the fact that the objection was, however, not contesting the price but it was requesting the disqualification of the recommended tenderer.

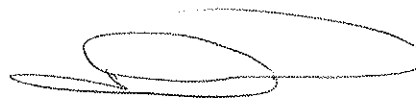
In view of the above, this Board finds against the appellant company and recommends that the said appellant forfeits the deposit paid for the appeal to be lodged.



Alfred R Triganza  
Chairman



Carmel Esposito  
Member



Paul Mifsud  
Member

9<sup>th</sup> July 2012