

## PUBLIC CONTRACTS REVIEW BOARD

Case No. 445

**WSC/T/85/11; WSC/415/2011**

**Tender for the Supply and Delivery of Submersible Pumps for Use in Sea Water Reverse Osmosis (RO) Plants**

This call for tenders was published in the Government Gazette on the 20<sup>th</sup> December 2011. The closing date for this call with an estimated budget of € 100,000 (inclusive of VAT) was the 25<sup>th</sup> January 2012.

Four (4) tenderers submitted their offers.

Pentax SpA filed an objection dated the 21<sup>st</sup> May 2012 against the decision of the Water Services Corporation to discard its offer due to lack of clarity in the quoted price and to recommend award of the tender to Zahra Enterprises Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Joseph Croker and Mr Paul Mifsud as members convened a public hearing on Thursday, 9th August 2012 to discuss this objection.

Present for the hearing were:

### **Pentax SpA**

Dr Jesmond Manicaro  
Ms Marisa La Rosa

Legal Representative  
Representative of La Rosa Trading acting on  
behalf of Pentax SpA

### **Zahra Enterprises Ltd**

Mr Alfio Zahra

Representative

### **Water Services Corporation**



Ing. Mark Perez

Representative

### **Evaluation Board**

Ing. David Sacco  
Mr Anthony Camilleri

Chairman  
Secretary



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

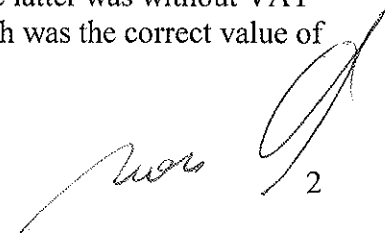
Dr Jesmond Manicaro, representing La Rosa Trading acting on behalf of Pentax SpA, the appellant company, submitted that:-

- i. by letter dated 14<sup>th</sup> May 2012 his client was informed that its offer had been disqualified due to lack of clarity in the quoted price, namely the price listed in Section C, 'Tenderer's Declaration' sub-section 3, indicated that the price included VAT, duties and taxes, whilst the total price at Schedule 3A, although numerically identical, was labelled as CFR\*;

*\*CFR stands for 'Cost and Freight' A trade term requiring the seller to arrange for the carriage of goods by sea to a port of destination, and provide the buyer with the documents necessary to obtain the goods from the carrier. Under CFR, the seller does not have to procure marine insurance against the risk of loss or damage to the goods transit during.*

- ii. Section Cm 'Tenderer's Declaration' sub-section 3 of his client's tender submission stated clearly that *'The total price of our tender (including duties, VAT, other taxes and any discounts) is: €69,264.22'*;
  - iii. Schedule 3A, 'Financial Offer' where the bidder was requested to indicate the 'Total Delivered to Pembroke RO Stores including VAT', his client again quoted the price of €69,264.22;
  - iv. Pentax SpA, being an Italian supplier, whilst it would not pay VAT on this supply since it represented an export to another EU Member State, yet, if VAT was payable in Malta by the Water Services Corporation then the quoted price of €69,264.22 plus VAT €12,467.56 would total €81,731.78 which would still be cheaper than the recommended offer;
  - v. the appellant company, being an overseas bidder with no local agent – La Rosa Trading Ltd was only a representative – were required to quote C&F prices on liner terms as per clause 2 of the 'General Conditions';
  - vi. recent calls for tenders issued by the Water Services Corporation were referring to prices DDP, namely 'delivered duty paid';
- and
- vii. his client failed to see any lack of clarity in these prices and the same appellant company could not understand why the contracting authority decided to award the tender to the recommended bidder at a higher price.

Mr Anthony Camilleri, secretary of the evaluation board, explained that although the appellant company quoted the same amount in the 'Tenderer's Declaration' and in the 'Financial Offer', the former was inclusive of VAT while the latter was without VAT and, as a result the evaluation board could not establish which was the correct value of the offer made by the appellant company.



The Chairman Public Contracts Review Board noted that:-

- a. Schedule 3A 'Financial Offer' as provided in the tender document requested a 'total which included delivery to Pembroke RO Stores and VAT', yet the appellant company added the wording 'CFR Malta/Freeport M'Xlokk' which evidently excluded transport costs to Pembroke RO Stores and VAT once CFR stood for 'Cost and Freight';
- b. granted that overseas tenderers were allowed to quote C&F prices on liner terms, then if the price quoted in the 'Financial Offer' was C&F (cost and freight) then the price declared in the Tenderer's Declaration, being identical to that of the 'Financial Offer', should have been indicated as being without VAT and not including VAT;
- c. bidders, including the appellant company, should not alter the tender document, in this case by adding 'CFR Malta' and 'CFR Malta Freeport M'Xlokk' in the 'Financial Offer' besides the fact that CFR was already catered for in the prices corresponding to items 1 and 2 (i.e. unit price excluding VAT);
- d. in the Financial Offer the Italian supplier should have quoted CFR prices in respect of the unit price of items 1 and 2, then included delivery to store and lastly included VAT charges so as to obtain the 'Total delivered to Pembroke RO Stores including VAT';

and

- e. the price in the tenderer's declaration should reflect the financial offer but, in this case, although the amounts were identical, the description of what the prices represented were not identical and bidders had to keep in mind that the evaluation board dealt with documents.

Mr Camilleri reiterated that the way the appellant company presented the price/s, the evaluation board could not figure out if the total price was indeed inclusive of VAT or not and that led to the lack of clarity in the quoted prices.

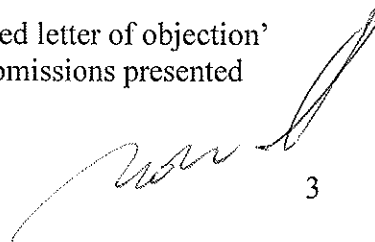
Mr Mark Perez, also representing the Water Services Corporation, the contracting authority, declared that the Corporation considered that the contents of the 'Tenderer's Declaration' overrode any other statement made in the tender submission.

Dr Manicaro submitted that from the hearing it emerged that the appeal lodged by his client was not frivolous and, as a result, called upon the Public Contracts Review Board to consider refunding the deposit should it decide against his client.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated the 21<sup>st</sup> May 2012 and also through their verbal submissions presented



during the hearing held on the 9<sup>th</sup> August 2012, had objected to the decision taken by the pertinent authorities;

- having noted all of the appellant's representative's claims and observations, particularly, the references made to the fact that (a) by letter dated 14<sup>th</sup> May 2012 the appellant company was informed that its offer had been disqualified due to lack of clarity in the quoted price, namely the price listed in Section C, 'Tenderer's Declaration' sub-section 3, which indicated that the price included VAT, duties and taxes, whilst the total price at Schedule 3A, although numerically identical, was labelled as CFR, (b) Section Cm 'Tenderer's Declaration' sub-section 3 of the appellant company's tender submission stated clearly that "*The total price of our tender (including duties, VAT, other taxes and any discounts) is: €69,264.22*", (c) Schedule 3A, 'Financial Offer' where the bidder was requested to indicate the 'Total Delivered to Pembroke RO Stores including VAT', the appellant company again quoted the price of €69,264.22, (d) Pentax SpA, being an Italian supplier, whilst it would not pay VAT on this supply since it represented an export to another EU Member State, yet, if VAT was payable in Malta by the Water Services Corporation, then the quoted price of €69,264.22 plus VAT €12,467.56 would total €81,731.78 which would still be cheaper than the recommended offer, (e) the appellant company, being an overseas bidder with no local agent – La Rosa Trading Ltd was only a representative – were required to quote C&F prices on liner terms as per clause 2 of the 'General Conditions', (f) recent calls for tenders issued by the Water Services Corporation were referring to prices DDP, namely 'delivered duty paid' and (g) the appellant company failed to see any lack of clarity in these prices and the same appellant company could not understand why the contracting authority decided to award the tender to the recommended bidder at a higher price;
- having considered the contracting authority's representative's reference to the fact that (a) although the appellant company quoted the same amount in the 'Tenderer's Declaration' and in the 'Financial Offer', the former was inclusive of VAT while the latter was without VAT and, as a result the evaluation board could not establish which was the correct value of the offer made by the appellant company, (b) the way the appellant company presented the price/s, the evaluation board could not figure out if the total price was indeed inclusive of VAT or not and that led to the lack of clarity in the quoted prices and (c) the Corporation considered that the contents of the 'Tenderer's Declaration' overrode any other statement made in the tender submission,

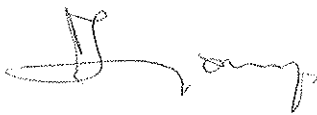
reached the following conclusions, namely:

1. The Public Contracts Review Board notes that whilst Schedule 3A 'Financial Offer' as provided in the tender document requested a 'total which included delivery to Pembroke RO Stores and VAT', yet the appellant company added the wording 'CFR Malta/Freeport M'Xlokk' which, evidently, excluded transport costs to Pembroke RO Stores and VAT once CFR stood for 'Cost and Freight'.
2. This Board observes that, being fully cognisant of the fact that overseas tenderers were allowed to quote C&F prices on liner terms, then if the price quoted in the 'Financial Offer' was C&F (cost and freight) then the price declared in the

Tenderer's Declaration, being identical to that of the 'Financial Offer', should have been indicated as being without VAT and not including VAT.

3. The Public Contracts Review Board argues that bidders, including the appellant company, should not alter the tender document, in this case by adding 'CFR Malta' and 'CFR Malta Freeport M'Xlokk' in the 'Financial Offer' besides the fact that CFR was already catered for in the prices corresponding to items 1 and 2 (namely unit price excluding VAT).
4. This Board cannot but agree with the evaluation board's assessment which placed emphasis on the fact that whilst the price in the tenderer's declaration should reflect the financial offer yet, in this case, although the amounts were identical, the description of what the prices represented were not identical and bidders had to keep in mind that the evaluation board dealt with documents.

In view of the above, this Board finds against the appellant company but it considers the filing of the appeal as not being frivolous and, as a consequence, this Board recommends that the deposit paid by the same appellant for the appeal to be lodged should be reimbursed.



Alfred R Triganza  
Chairman



Joseph Croker  
Member



Paul Mifsud  
Member

10<sup>th</sup> September 2012