

Case No. 9

Contract: CT/WSC/T/12/2003 – Tender for the supply of plastic fittings for polyethylene pipes

The Public Contracts Appeals Board, constituted of Mr. A. Triganza, who chaired the proceedings, and Messrs. A. Pavia and M. Caruana (Board Members), met on the 24th September, 2003 to consider this appeal.

The call for offers, with an estimated value of Lm 23,000 was published in the Government Gazette between 14.02.2003 and 07.03.2003 with the closing date being the 11th March 2003 following a request received by the Director of Contracts from the Water Services Corporation.

Three offers were received with the cheapest offer being submitted by Messrs. Ragonesi & Co. Ltd., representing *Polypipe Group*, for a global CIF price of Lm 20,093 (delivered Lm 20,487). The next cheapest offer was the one submitted by Messrs. AFS Ltd., representing *Atlantic Plastics (Talbot)* which amounted to Lm 26,477. Finally, another offer amounting to Lm 52,579 was received from *Messrs. E. Hawle Armaturenwerke GmbH*.

The Adjudication Panel was made up of Ing. Stefan Riolo (Chairperson), Ing. C. Camilleri and Ing. A. Camilleri respectively acting as the other members.

According to the adjudication report dated 04.05.2003 the cheapest overall offer was that submitted by tenderer Messrs. Ragonesi & Co., an offer which was however, not considered by the Adjudication Board to be up to the required specification in that it failed to meet second paragraph of clauses 2 and 5 of the technical specifications set in the tender. As a consequence, the Board decided not to consider further this offer.

According to the Adjudication Board, the two other tenderers offered items that are according to specifications.

Following a proper scrutiny of prices submitted per item stipulated in the tender conditions it was decided to recommend the award of the said tender as follows, viz:

Items 1.1 and 1.2 to *Messrs. E. Hawle Armaturenwerke GmbH* for an amount of Lm 3,138.

Items 2.1, 2.2, 2.3, 3.1, 3.2, 3.3, 4.1, 4.2 and 5.1 to *Messrs. Atlantic Plastics (Talbot)* for an amount of Lm 23,081.

Following the publication of such recommendations Messrs. Ragonesi & Co. Ltd. filed an objection with the Director of Contracts on 21st May, 2003.

The Public Contracts Appeals Board met on the 24th September 2003 to discuss the issues raised by complainant.

The following persons were also in attendance during the said hearing:

Contracts Department:

Mr Joseph V. Spiteri – Director General Contracts
Mr Joseph Meli – Assistant Director

Water Services Corporation (WSC)

Ing. Anthony Rizzo – Chief Executive
Ing. Mark Perez
Ing. Stefan Riolo
Mr Anthony Camilleri

Ragonesi & Co Ltd

Mr Roberto Ragonesi – Managing Director
Mr Andy Kirkby
Dr Norval Desira LL.D

Atlantic Plastics / AFS Ltd

Mr Joseph Attard
Mr Rob J. Hockings – International Sales Manager

Apologies were received by fax during the public hearing from Messrs. E. Hawle Armaturenwerke GmbH

Dr Norval Desira claimed that his client's objection was based on the grounds

- a. of unfair competition in respect of tenders issued by the Water Services Corporation (WSC) *and*
- b. that the leakage and security problems related to Polypipe Group's products as alleged by WSC are unfounded.

Messrs. Ragonesi's legal representative stated that over the past years certain unjust and prejudicial clauses were being included in such a manner that they favoured one competing tenderer in preference to another thus removing any possibility of fair competition. He specifically alleged that the 'O' rings requested by the WSC were of a specific measurement that only fitted a design produced by a particular manufacturer. Such design was the property of Tyco Group of Companies that amongst its ranks included four companies including Talbot.

According to the aggrieved party, the size of the 'O' rings was only specific for Malta. In fact, Dr. Desira contended, such specification was never requested in any other tender anywhere else. He maintained that due to the size of the market it is not considered commercially viable for any manufacturer to invest millions of liri to create a design/mould of such fittings to fit the sizes required by WSC. He claimed that despite the fact that his client had repeatedly formally protested with the WSC against adopting such unreasonable specification nothing was ever done.

As far as the leakage and security issue is concerned Dr. Desira stated that the Contracts Committee's directive issued to carry out the necessary tests on the fittings in real condition was totally ignored by the WSC.

He said that when it was alleged that Polypipe's fittings were "faulty", his client insisted with the WSC to carry out the necessary tests on them and when these were carried only one out of forty (40) fittings tested were found to be defective. He remarked that the fittings that failed the tests were all replaced and that to their knowledge these were, as a result, accepted by the Corporation. This was proof that the security and leakage problem was hence surmounted.

The Director General Contracts confirmed that Messrs Ragonesi & Co were having problems with submitting offers in this regard and as a result the tenderer had repeatedly lodged complaints with his Department as to the basis of how the WSC was requesting specific sizes of 'O' rings instead of others.

In order to ensure that the system was equitable to all possible bidders the DG Contracts requested the WSC to carry out tests on the products offered by Messrs. Ragonesi's principals and it was agreed that were these fittings found to comply with the specifications of the tender, the Corporation would have been obliged to issue a certificate which would have been enough for Polypipe Group to submit along with other pertinent documentation in possible future call for offers issued by the WSC. This would have enabled the Department of Contracts to refrain from being compelled to proceed with the issue of the call for offers without this problem being solved to the satisfaction of all parties concerned. As things stood, should the Department have decided otherwise the WSC would have had to resort to issuing direct orders in order to avoid stock levels from being fully depleted.

It was noted that the WSC's representatives emphatically denied Messrs. Ragonesi's accusations that implied that they preferred a particular supplier as compared to another one and also declared that they were not being exclusive but primarily aiming at improving the product they were procuring. Their interest was to allow competition besides abiding by the financial regulations.

At this stage, Mr Rizzo stated that changes in the sizes of 'O' rings were attributable solely to a leakage problem as the Corporation's personnel had identified thousands of instances where leakages had to be repaired, a high percentage of which were due to product supplied by the *Polypipe Group*.

The WSC's CEO referred to the question of certificates mentioned by the DG Contracts claiming that the Corporation was not in a position to issue open-ended certificates. He wanted to emphasise the fact that his staff carries out regular sample tests ensuring that standards, already EU compliant, are maintained.

In reply to Dr Desira's questions regarding fittings supplied by Polypipe Group, Mr Rizzo stated that they had a history of failure since, in the past, fittings of the same type failed when subjected to tests which are according to international norms. According to the WSC's CEO, similar stringent tests were also carried out periodically on other suppliers.

In his testimony, Ing Mark Perez (Manager Distribution Centre) stated that in view of the fact that cost of water production was very high the Corporation had decided to embark on a major project with the cooperation of Central Government as well as Local Councils with the primary aim being that of reducing leakages. During tests carried out it was decided that the type of water pipes/fittings had to be changed from galvanized to plastic and polyethylene was considered as being their solution. However, it transpired that the Corporation was receiving a substantial amount of complaints from Local Councils as the latter were claiming that they were spending thousands of liri in repairing damages emanating from leakages. During these tests it became evidently clear that these leakages were originating from connections from mains/tapping and house connections and as a direct consequence of these findings it was decided that fittings of a superior quality should be procured. Ing. Perez placed particular emphasis on the fact that the Corporation eliminated only inferior quality products.

In his effort to substantiate his argument, namely that competition is not stifled by WSC but, on the contrary, encouraged; as well as the fact that specifications were not tailor-made to a particular tenderer, Ing. Perez tabled various samples of 'O' produced by different manufacturers. According to the WSC engineer 'O' rings having a larger surface produced a better seal. As a matter of fact certain fittings faulted even under a 2 (two) bar pressure.

Mr. Perez stated that tenderers were requested to specify the cross-sectional area of 'O' rings used in the fittings being offered. However, he pointed out that the measurements required in the table were the minimum to include as much as possible manufacturers. He said that fittings having smaller 'O' rings did not meet WSC requirements.

When asked whether he knew that Polypipe Plc could not produce that type of 'O' ring, Ing. Perez replied that he was not in a position to answer, however he stated that they had the potential to produce it. He declared that there were various companies that could produce such 'O' rings and named Talbot, Pluson and Hawle. Yet, Dr. Desira insisted that only Tyco Group could produce such 'O' rings and that specifications were tailor-made to one design. To substantiate his argument he quoted paragraphs from a fax received from Hawle. He alleged that such specifications were based on the design produced by Talbot and Hawle. Nevertheless, WSC Engineer declared that other companies could produce same design fittings.

On his part, Mr. Ragonesi claimed that they had drawn the Department of Contract's attention and had formally lodged a protest about the size of the 'O' rings as stipulated in Clause 2 of the specifications. Polypipe Group were prepared to increase the size of 'O' rings but they could not meet the minimum as stated in the tender document. During Mr. Ragonesi's testimony, Mr Rizzo asked specific questions to the latter regarding the issue of leakages and the witness acknowledged that problems had been encountered due to the 'O' rings supplied by Polypipe.

Another witness was Mr Andy Kirkby - Export Manager for Polypipe Group. When asked about the causes for leakages and about the faulty fittings that were supplied by Polypipe Plc, he replied that it was the first time, in all of the eight years that he had been supplying to Malta, that he came across such difficulties. He stated that following tests carried out in the UK it transpired that the fault was not attributed to

the design of the fitting but in Polypipe's assembly process. Mr. Kirkby went on to state that following this incident improvement was done on quality control procedures to ensure that a flawless product would be ultimately produced.

While such tests were being carried out in the UK, senior management at Polypipe were establishing the extent of the modification required as well as the cost their firm would have had to be burdened with should it ever decide to change the size of the 'O' rings. It was amply clear that in order to accommodate the specifications as requested by local authorities, Polypipe would have had to change the whole design of the fittings. According to these two witnesses the redesigning/retooling of the fitting involved an investment of Stg. 2.5 m.

Ing. Riolo, Chairman, Adjudication Board, said that although only 1 in 40 failed, this was not acceptable for WSC as repair costs were high. He confirmed that when Polypipe fittings were tested they failed on a pressure as low as 2 bar. He did not deny that retooling of fittings was expensive! Yet, the Chairman of the Adjudication Board contended that the leakage problem was costing Malta Lm5 million annually. Specifications were changed because they wanted to decrease leakages. Thus, cost saving would be high due to fewer leakages.

Atlantic Plastic's representative, Mr.Hockings, stated that comments made about Tyco Group were misleading because one might get the impression that Talbot formed part of a monopolised company. He said that there were other companies in the Group that did not use 'O' rings for Polythene pipes. He argued that it was wrong to say that only one company had a patent for push fits because there were many imitations as one could copy the concept thereof. So, he opined that it was misleading to say that specifications were specifically made to accommodate a specific company. With regards to 'O' rings, he said that his Company had to redesign the product. It was obvious that 'O' rings' costs affected the cost of fittings. He confirmed that a bigger 'O' ring gave a better seal because surface contact was important in polythene pipes. According to Atlantic's representative the products supplied by his Company not only match the specifications and standards as requested by the WSC in Malta but manage to endure stricter tests carried out under a working pressure which is three times the level normally required by WSC.

Messrs.Ragonesi's legal representative alleged that the WSC had designed their specifications to fit the design offered only by Talbot. They requested a product which was offered only by Talbot. Were Polypipe Plc. to continue being interested in competing in local tenders in order to meet the WSC tendering requirements, it would first need to modify its design according to the product supplied by Talbot. Dr. Desira insinuated that the scope of tendering was being defeated as the Corporation was giving, directly or indirectly, a monopoly to one company. The specifications were being drawn up in such a way that WSC was eliminating fair competition.

The Director General Contracts said that, according to the financial regulations, selective call for quotations could be issued to those companies that the WSC thought could compete with the standard specifications. Such an arrangement, he contended, would exclude any possibility of monopolised tendering.

Mr Rizzo, on behalf of the WSC, stated that the appellants did not prove that WSC discriminated against Polypipe Plc. It had been proved that some parts were still

potentially defective since when tested under pressure they leaked. The WSC's CEO reiterated that in view of the huge cost element involved quality has become the primary consideration. He contended that every client could introduce additional specifications to have a better quality product and to meet his specific requirement. It had been proved that bigger 'O' rings gave better results. He denied that WSC was discriminating against any company or eliminating competition. WSC only eliminated inferior quality products from wherever they originate.

In analysing the evidence given during the hearing, the Public Contracts Appeals Board placed particular emphasis on:

- a. the premise that tests carried out on the consignment received from Polypipe Plc had a considerable failure rate irrespective of the modifications agreed upon before in the presence of the interested parties;
- b. the fact that there is more than one supplier who already satisfy what the Corporation requires;
- c. there is nothing which precludes a buyer from establishing a set of specifications as is considered necessary to meet own requirements, as long as the principle of fair tendering is maintained;
- d. the fact that there is nothing which precludes a supplier from doing all the modifications necessary to enable itself to be at par with competition when it comes to satisfying particular requests by buyer/s;
- e. the proviso that a decision on whether such modifications are deemed to be financially viable or not to a prospective tenderer/supplier has nothing to do either with the adjudication board of a particular entity as well as the appeals board following adjudication. It is contended that such matter is a commercial decision and beyond the scope of any other third party;
- f. the lack of substantiated proof that WSC officials acted in a discriminatory manner against Polypipe Plc or its local representative, particularly in view of evidence given, tests carried out between parties concerned as well as the fact that Messrs. Ragonesi has already supplied goods to the Corporation;
- g. the fact that, based on existing stringent requirements, it may be wiser for the Corporation to issue future call for offers following a selective tendering process.

Following a thorough consideration of the above the Public Contracts Appeals Board decided in favour of WSC, rejected the appeal lodged by Messrs Polypipe Group and found no particular reason why it should reimburse deposit paid by Messrs. Ragonesi in filing the objection.

Alfred R. Triganza
Chairman

Anthony Pavia
Member

Maurice Caruana
Member

Date: 08.10.2003