

PUBLIC CONTRACTS APPEALS BOARD

Case 103

CT 2478/2006 - CT/WSC/T/59/2006 - Supply and Delivery of Threaded Stopcocks

This call for tenders was published in the Maltese Government Gazette on 04.08.2006 and was issued by the Contracts Department following a request transmitted to the latter by the Water Services Corporation (WSC) on 24.07.2006.

Four (4) tenderers submitted their offers.

The closing date for this call for offers was 26.09.2006 and the original global estimated value of the total contract was Lm 84,375.

Following the publication of the *Notification of Recommended Tenderers*, Messrs Alfred *Ragonesi & Co Ltd* filed an objection on 12.02.2007 against the intended award of the said tender to Messrs *Inter-Power Ltd* (Lm 35,202).

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Edwin Muscat, respectively, acting as members, convened a public hearing on 13.04.2007 to discuss this objection.

Also present for the hearing were:

Ragonesi & Co. Ltd

Dr Franco Vassallo, LL.D.
Mr Roberto Ragonesi

Inter-Power Ltd

Mr Edward Micallef St. John

Water Services Corporation

Ing Mark Perez

Adjudication Board

Ing Tonio Muscat	Chairman
Ing Ronald Pace	Member
Mr Anthony Camilleri	Member

Malta National Laboratory Co Ltd (MNL)

Ing John Bugeja	Witness
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Following the Chairman's brief introduction, *Ragonesi & Co Ltd*'s legal representative, Dr Franco Vassallo, commenced his intervention by stating that Malta National Laboratory's documents made available to the Adjudication Board indicated that his clients' offer was in total conformity with the Tender Document's specifications and that some other stopcocks did not meet the BS1010 criteria. The appellants interpreted such documents to mean that Inter-Power Ltd's offer did not conform to specifications/standards requested.

The appellants' lawyer contended that the WSC (or any other entity) did not draw up specifications haphazardly because, as administrators of public funds, they had to procure the best quality products. Furthermore, he emphasised that when a tender document demanded certain standards, such conditions were binding both on the entity concerned as well as on prospective bidders.

Dr Vassallo explained that his clients, who continuously monitored the market, knew that the prices of those products that were manufactured according to the highest standards did not fluctuate. However, he said that such products were more expensive because, when a producer requested such high standards, they were subject to more checks and analysis.

Mr Tonio Muscat, Chairman of the Adjudication Board, responded by stating that while Dr Vassallo based his arguments on the MNL's report only, they also had certifications from independent bodies of international repute. He said that Inter-Power Ltd submitted a certification by Bureau Veritas wherein it was certified that their product conformed to the required standards. The Adjudication Board's Chairman remarked that in the MNL's report it was also stated that "the final interpretation whether sample conforms to the specification is to be taken by the client".

On cross-examination by the PCAB, Mr Muscat said that every tenderer submitted a sample which was then sent to the MNL for testing. He declared that tenderers also submitted certifications from the respective manufacturers and from recognised bodies confirming that the products were according to specifications. Also, he confirmed that the price was pivotal in their decision.

The Chairman of the Adjudication Board said that there was no specific reference in the tender document to govern the case where the certifications submitted by tenderers differed from the reports issued by the laboratory where samples were tested.

The PCAB intervened to state that the arbitrary manner by which the decision was taken was a matter of concern and that it was useless to send the sample for testing once they relied on the certifications submitted by tenderers. Mr T. Muscat explained that in sending the samples for testing, the Adjudication Board were simply following terms and conditions stipulated in the tender document.

In reply to a specific question by the PCAB regarding the substantial difference in prices between the two offers under consideration, Mr Muscat explained that the last three/ four

tenders showed that products were sometimes cheaper and in other instances were more expensive even though they were produced by the same manufacturer.

The Chairman of the Adjudication Board said that in this particular case they had two certificates, one from MNL which was based on one sample submitted with the tender and another from a reputed body which was based on a series of tests conducted during a production run. He claimed that, as far as Inter-Power Ltd's sample was concerned, only the dimension of a washer which closed the stopcock was found to be out of range and the variation was so small that it was not considered as significant to the function of the item in question. Mr Muscat said that, although it was confirmed that the size of the washer was out of the tolerance level stipulated in the standards, the dimensions were based on the previous standards which were being phased out. However, in reply to a specific question asked by the PCAB, it was declared that the standards were not changed in the interim ever since the call for offers was published and pertinent tests duly carried out.

Dr Vassallo remarked that it was clear that there was an element of recklessness on the part of the tenderer because they should have checked the stopcock before submitting it with their offer and not presenting a sample that did not even conform to the certifications attached with their tender. The appellants' legal representative maintained that, considering the fact that the WSC were accepting such a variation, it would be only fair to suggest that his clients could have offered a product that was not according to BS 1010, may be of an inferior quality, but definitely at a more competitive price. Furthermore, Dr Vassallo insisted that the Corporation should not have changed the rules of the game at the adjudication stage because otherwise they would be ignoring the principles of transparency and level playing field among all economic operators. He said that article 1 of the technical specifications clearly specified that:

‘The stopcocks are required on water services pipes, just downstream of the water meter, and shall comply as to a quality of materials, design and workmanship with BS 1010: Part 2: 1973 or its equivalent.’

Mr Edward Micallef St John, InterPower Ltd.'s representative argued that, although according to the test, their sample had failed on the dimension of the washer it did not affect the functioning of the stopcock. At this point he presented a document from the manufacturers, namely, Fornara S.p.A. wherein it was stated that:

‘The samples presented with the tender WSC are according to BS 1010: 1973 – Part 2.

According to the British Standard Institute, the size of the washer as 19.2mm is still accepted together with the new size of 18.5 etc.

We took the liberty to send you a sample with the washer size 19.2 mm since it is a fraction of a millimetre bigger and makes a better sealing.

However, we also manufacture the size 18.5 and in this regard, we can deliver according to your preference.”

Mr Micallef St John also presented a copy of an e-mail received from BSI – British Standards - wherein it was declared that *‘BS 1010-2: 1973 is still current but has been declared Obsolescent.’* He explained that this meant that the previous standards were not obsolete but were being phased out.

Ing John Bugeja, being the Engineer who tested the samples, was then asked to take the witness stand.

Ing Bugeja testified that the four stopcocks that were sent for testing to the MNL were marked 1, 2, 3 and 4 and during the said testing the tenderers were kept anonymous. He also said that sample No 1 (duly identified by the Adjudication Board’s Chairman during the public hearing as the sample submitted with Messrs Ragonesi & Co Ltd’s offer) was completely up to specification, while sample No 4 (duly identified as the sample submitted with Messrs Interpower Ltd’s offer) had the washer’s external diameter measuring 19.7 instead of the measurement as specified in the quoted BS 1010, namely anywhere falling within the range 18.3 to 18.7.

Ing Bugeja pointed out that in his report it was stated that the washers were tested ‘in received condition’ because, all things being equal, for a better analysis the said washers had to be tested immediately as soon as they are manufactured.

The PCAB asked Ing. Bugeja to state whether, according to the BS 1010 of 1973 the washer submitted as sample was acceptable. The witness replied by quoting from his report wherein he had declared that

‘As indicated some stop valves attributes did fail BS 1010 and although these might have negligible or minor effect on the intended use of the stop valves it cannot be stated that valves conformed to BS 1010.’

Ing Mark Perez, representing the WSC, argued that the tests carried out on the washers at MNL should not be taken into consideration because, in his testimony, Ing Bugeja implied that these were not carried out according to the standards.

Ing Bugeja intervened to clarify that the standards stipulated that washers were to be measured before being used.

On its part, the PCAB drew Ing Perez’s attention to the fact that the stopcocks submitted as samples were all tested under the same conditions and that, in the document presented by the representative of the Inter-Power Ltd, the supplier had confirmed that the size of the washer was 19.2mm.

When the PCAB specifically asked Ing Bugeja to declare whether, on the basis of the tests carried out, the recommended tenderer's washer conformed to the standards quoted in the tender document, the reply given was in the negative.

Ing Perez, once again interjected to declare that he was satisfied with the explanation given by Ing Bugeja, namely, that the washer submitted by Inter-Power Ltd had failed to satisfy the BS1010. However, he claimed that the washer was not up to specifications because the current standards reduced the size of the washer. Moreover, Ing Perez said that, whenever the discrepancy is considered to be a minor one, the Corporation would usually request the supplier with the cheaper offer to state whether they would be in a position to effect the necessary changes for the same price originally offered.

Dr Vassallo insisted that this was not permitted in terms of Tender regulations.

The PCAB drew the attention of Ing. Perez as well as of all those present for the hearing, that at that stage in a tendering adjudication process, contracting authorities are not allowed to negotiate with tenderers.

The PCAB ascertained that albeit, at one stage during the hearing, Ing. Perez had given the impression that the appellants' sample did not have the 'WSC' mark, Ing Bugeja confirmed that the Letter 'WSC' were included on sample No 1, namely the sample submitted with the appellants' offer.

Here, Dr Vassallo remarked that in their letter dated 26 September 2006 which was sent with their offer, there was an undertaking by his clients that the 'letters "WSC" will be 'roll stamped' on the stem of the valve.' He also continued to quote from the said letter wherein it was further stated that his clients wanted to bring to the attention of the recipients of the letter's that

"some tenderers may offer products at lower price levels from China, Italy, Spain etc. and state that these conform to BS 1010 Part 2. We too are able to offer this cheaper quality product, as the quality of brass and their performance are widely acceptable and used in the United Kingdom, but again they do not strictly conform to BS 1010 Part 2 as requested.'

In his concluding remarks, Mr Muscat said that the Adjudication Board based its decision after taking into consideration various elements, namely, (a) the report of the laboratory where samples were tested, (b) the certification by *Bureau Veritas* which confirmed that the recommended tenderer's product was according to standards and, last but not least (c) the price.

Dr Vassallo concluded by stating that, in this call for tenders, prospective bidders were requested to offer the stopcocks strictly in compliance with specific standards. He maintained that once the sample submitted by Inter-Power Ltd failed to comply with the said specifications, considering the prevailing circumstances, it was not proper for the WSC to recommend the award of this tender to Messrs Inter-Power Ltd.

He also argued that, if his clients would have been made aware that the WSC were not going to be strict on the requested standards, Messrs Ragonesi & Co Ltd could have submitted an inferior product at a cheaper price and would have been awarded the tender.

The appellants' legal representative also contended that, once his clients were excluded from participating due to a non-observance of the requested BS as stated in the Tender Document compiled by the same Corporation's technical staff members, the contracting authority should be judged as having vitiated the tendering process.

Finally, Dr Vassallo contended that his clients, the appellants, being the only tenderers who had complied with the specification, should, as a consequence, be awarded the tender.

At this stage the hearing came to a close and the PCAB members proceeded with their deliberations before reaching their decision.

Following the public hearing the Secretary, PCAB contacted Ing Tonio Muscat, Chairman of the Adjudication Board, and asked him to go to his office to show the original certificate issued by *Bureau Veritas*, a document amply referred to by Mr Muscat during the public hearing. This was necessary in view of the fact that such certificate could not be traced in the files relating to the tender in question. However, following a thorough search in the said files it transpired that the certification of the international reputed body submitted by Inter-Power Ltd in actual fact had been drawn up by SGS Italia S.r.l and not *Bureau Veritas*.

As this incident occurred after the public hearing and in the absence of most of the original participants in the said hearing, the PCAB requested Mr Muscat to sign the following declaration on the copies of the relevant documents, namely

'This is to confirm that this is the document I was referring to during the PCAB's hearing held this morning.'

Mr Muscat acceded to the PCAB's request and duly signed documents as requested.

This Board,

- 1 having noted that the appellants, in terms of their 'reasoned letter of objection' dated 14.02.2007, and also through their verbal submissions presented during the public hearing held on 13.04.2007, had objected to the decision taken by the General Contracts to award the tender to Messrs Inter-Power Ltd;
- 2 having noted appellants' claim that that Malta National Laboratory's documents made available to the Adjudication Board indicated that their offer was in total conformity with the Tender Document's specifications and that some other stopcocks did not meet the BS1010 criteria;

- 3 having considered Mr Muscat's declaration that tenderers submitted certifications from the respective manufacturers and from recognised bodies confirming that the products were according to specifications as well as the fact that the price factor was pivotal in the Adjudication Board's decision-making process;
- 4 having also reflected on Mr Muscat's explanation regarding the fact that (a) in sending the samples for testing, the Adjudication Board were simply following terms and conditions stipulated in the tender document, and (b) there was no specific reference in the tender document in case the certifications submitted by tenderers differed from the reports issued by the laboratory where samples were tested;
- 5 having considered Mr Muscat's remark regarding the fact that as far as Inter-Power Ltd's sample was concerned, only the dimension of a washer which closed the stopcock was found to be out of range and the variation was so small that it was not considered as significant to the function of the item in question;
- 6 having noted that while the size of the washer was not according to the dimensions stipulated in the standards, yet Mr Muscat also declared that the standards were not changed in the interim ever since the call for offers was published and pertinent tests duly carried out;
- 7 having taken full cognizance of the fact of Dr Vassallo's remark relating to the fact that the Corporation should not have changed the rules of the game at the adjudication stage because otherwise they would be ignoring the principles of transparency and level playing field among all economic operators;
- 8 having considered the fact that whilst Fornara S.p.A had taken the liberty to send a sample to their representatives in Malta "with the washer size 19.2 mm since it is a fraction of a millimetre bigger and makes a better sealing", yet in the same letter they also state that they manufacture the size 18.5 and in this regard, they can deliver according to InterPower Ltd's preference;
- 9 having established that, according to Ing. Bugeja, sample No 1 (pertaining to Messrs Ragonesi & Co Ltd's offer) was completely up to specifications, while sample No 4 (the sample submitted with Messrs Interpower Ltd's offer) was not according to the same specifications and this albeit such stop valves even when one considers that these might have negligible or minor effect on the intended use of the stop valves;
- 10 having acknowledged that Ing. Perez declared that he was satisfied with the explanation given by Ing Bugeja, namely, that the washer submitted by Inter-Power Ltd had failed to satisfy the BS1010;
- 11 having noted its concern about the erroneous perception that certain WSC senior management may have regarding what distinguishes a clarification from a negotiation process, the latter not being permissible at all;
- 12 having taken into consideration to appellants' legal advisor's contention that had his clients been made aware of the fact that the WSC were not going to be strict on the requested standards they could have submitted an inferior product at a cheaper price and would have been awarded the tender

concludes, that

- a. there is little comfort derived from the fact that different authorities (SGS Italia S.r.l. and MNL) have produced two different results thus making the whole process inconclusive;
- b. whilst there were other tenderers' offers which were considered to be not according to specifications, yet it seems quite evident that the Adjudication Board was more focused on the price factor rather than total adherence to specifications listed in the Tender document and this has given rise to an absence of an equitable metric amongst all participants;
- c. appellants may have been deprived from submitting a cheaper offer thus becoming more competitive;
- d. the extent of inconsistencies demonstrated by the Adjudication Board as well as the latter's blatant deviation from the Tender's specifications does not permit this Board to confirm the award of the contract to Messrs InterPower Ltd. Yet, this Board's public profile and corresponding role entrusted upon it, does not permit it to leave the price differential between the offer awarded the tender (Lm 35,202) and the offer submitted by appellants (Lm 57,290) to pass unnoticed, especially, when it appears that the Contracting Authority seems to consider scenarios which are less emphatic on supreme quality standards considering the price variance.

As a result of the above-mentioned points, this Board whilst (a) accepting in part appellants' claim requesting this Board to cancel the reward of this tender to the preferred bidder, (b) recommends a re-issue of the tender in question enabling the Contracting authority to try to have more flexibility and, at the same time, ensure level playing field amongst all potential participants, (c) recommends also that the deposit submitted by the same appellants in terms of regulation 83, be refunded.

Furthermore, this Board also suggests that the WSC management seeks further clarification from pertinent entities regarding the issue of what differentiates a clarification from a negotiation in order to avoid potential appeals in the future as well as the possibility of the same public entity contravening procurement public procedures.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

04 May 2007