

PUBLIC CONTRACTS APPEALS BOARD

Case No. 151

CT/2536/2008; CT/WSC/T/54/2008

Tender for the Supply and Delivery of Cast Iron Manhole Covers and Frames

This call for tenders was, for a contracted value of € 414,400 was published in the Government Gazette on 17.10.2008. The closing date for this call for offers was 09.12.2008.

Six (6) different tenderers submitted their offers.

On 09.03.2009 AFS Ltd filed an objection against the intended awarded of the said tender to J. P. Baldacchino & Co Ltd.

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Edwin Muscat and Mr Carmel Esposito, respectively, acting as members convened a public hearing on 06.05.2009 to discuss this objection.

Present for the hearing were:

AFS Ltd

Mr Joseph Attard	Managing Director
Mr Giorgio Minasi	Representative

Water Services Corporation (WSC)

Eng. Marco Perez	WSC Representative
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Evaluation Committee:

Eng. Stephen Galea St. John	Chairperson
Eng. Emanuel Grech	Member
Mr Anthony Camilleri	Member

J.P. Baldacchino & Co Ltd

Mr Anthony Baldacchino	Representative
Mr Adrian Baldacchino	Representative
Dr Patrick Galea	Legal Representative

Department of Contracts

Mr Francis Attard	Director General
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After the Chairman's brief introduction, the appellant was invited to explain the motives of the objection.

Mr Joseph Attard, on behalf of AFS Ltd, explained that the main reason behind his objection was that the product offered by the recommended tenderer, J.P. Baldacchino & Co Ltd, did not meet the standards referred to in clauses 2.1 and 2.7 of the tender conditions.

Mr Attard referred to clause 2.1 of the tender conditions, dealing with standards, which stated that:

The manhole top is to comply with EN 124:1994 class D 400 (test load: 400kN). It shall be manufactured from spheroidal graphite cast iron complying with grade 500-7 or 400-18 of ISO 1083. Offers are to clearly state which grade of graphite cast iron is being offered.

At this stage Mr Attard proceeded by quoting from clause 2.7 'Markings' which, among other things, stated that:

All covers are to be marked as per clause 9 of EN 124:1994...

The appellants' representative furnished those present with a copy of Standard 9 'Marking' EN 124:1994 placing major emphasis on paragraphs (c), (d) and (e) which he read out:

All covers, gratings and frames shall bear:

(c) the name and/or identification mark of the manufacturer and the place of manufacture which may be in code;

(d) the mark of a certification body;

(e) additional markings relating to the application or the owner;

Mr Attard contended that the product presented by the recommended tenderer did not meet the standards indicated in para. (c) of Standard 9. He argued that, as far as he was aware, the product offered by the recommended tenderer did not bear the name or the identification mark of the manufacturer. Mr Attard explained that an identification mark represented a sort of logo and he acknowledged that, in the letter of reply to his letter of objection, the recommended tenderer had stated that the markings – which Mr Attard confessed that he did not check himself – were on the inner part of the cover of the manhole in the form of two letters and a number. On cross examination, Mr Attard conceded that it appeared that the mark of the certification body, which was a third party control, was there albeit he had certain doubts about it.

The appellant Company's Managing Director then quoted the last part of standard 9 'Marking' of EN 124:1994:

The above mentioned markings shall be clear and durable. They shall, where possible, be visible after the unit is installed.

Mr Attard questioned why the markings were (i) placed on the inside of the manhole cover and (ii) not clearly visible given that the manhole cover and frame was as relatively large item. Mr Attard explained that the importance of these markings lay in the fact that the manufacturer of these products was held responsible, not for the first six months or so, but throughout the life of the product so much so that reliable manufacturers had an insurance to cover them against liabilities arising from product failure. He added that such markings assumed great importance in case claims would eventually be made against WSC due to manhole cover and frame failure.

Engineer Stephen Galea St. John, chairperson of the adjudicating committee, declared that the technical members who sat on the committee were satisfied that the standards set out in the tender document were met and that there were no shortcomings such as those referred to by Mr Attard.

On his part Ing. Emanuel Grech, another member of the adjudicating committee, declared that, on inspecting the sample presented by the recommended tenderer, the adjudicating committee verified that there was a code made up of two letters and a number that read SH6 that one could find on the inside part of the manhole cover.

Ing. Galea St John explained that tenderers were requested to make a declaration that their product was in conformity with tender specifications. Furthermore, the adjudicating committee had also requested a clarification as to what the code represented and that there was also the mark of the certification body. Ing Galea St John remarked that, in the circumstances, the adjudicating committee had no reason not to consider the offer made by the recommended tenderer.

At this stage the chairman and members of the adjudicating committee went through the file to see if the adjudicating committee had requested a clarification directly from the tenderer or through the Department of Contracts.

Engineer Marco Perez, representing the WSC, explained that it was normal practice that queries of a technical nature be raised by the WSC directly with the tenderer/s concerned.

Mr Adrian Baldacchino, director of J. P. Baldacchino Ltd, explained that SH6 stood for *Shau-Shan*, the place where the product was manufactured, *Hunan* referred to the province and the number 6 was the particular foundry that manufactured the product. Therefore, he argued that the code referred to the place of manufacture and to the particular foundry where the product was manufactured. Ing. Perez added that with regard to the additional marking mentioned in Standard 9, there was also the manufacturer's identification number, LH322-1. The contracting authority admitted that the clarification with regard to the code SH6 was sought and obtained directly from the tenderer.

On cross-examination, Ing Perez and Mr Baldacchino remarked that the code SH6 supplied by the manufacturer was corroborated by the certification body, Lloyds

Register Quality Assurance (LRQA), which, in effect, certified all the standards of the product, including the markings. Mr Baldacchino added that the fact that the markings were placed on the inside of the manhole cover protected the same markings from the heavy wear and tear that they would otherwise sustain by traffic and the like.

Mr Joseph Attard expressed doubts as to whether the WSC was interpreting correctly para. (c) of Standard 9. However, Ing Perez explained that H6 stood for the place of manufacture whereas 'S' stood for the identification mark of the company. Ing. Perez conceded that although the letter 'S' could stand for another company elsewhere in the world, however, the full code SH6 together with the additional markings were enough for the contracting authority to identify the manufacturer. Ing. Perez argued that the identification code had to be taken as a whole - SH6 - and not split in single letters or numbers. Mr Joseph Baldacchino, interjected to remark that SH6 was legally registered and, hence, unique otherwise the certification body would not have accepted it.

The Chairman PCAB remarked that the relevance of these markings arose in the event that a claim would be made against the WSC on these manhole covers in which case the WSC would have to be in a position to identify and trace the manufacturer without any difficulty.

Mr Joseph Baldacchino stated that the markings on the manhole cover were the basic requirements and that the contracting authority could opt for additional markings when placing the order.

The Chairman PCAB remarked that for the purposes of Standard 9 (c) the markings did not indicate a name but there was an identification mark of the manufacturer 'S' – the standard provided for the name and/or identification mark of manufacturer. He added that what had been claimed by the manufacturer needed to be corroborated by some independent source for peace of mind.

Mr Adrian Baldacchino explained that the certificate issued by Lloyds indicated that it had assessed the product types listed in the schedule with regard to the requirements of BS EN 124:1994 which included the 'markings' in their entirety. He added that the Contracts Department had a photocopy of this certificate and that the original thereof must have been retained by the manufacturer.

Ing. Perez contended that the Lloyds certification with regard to EN 124:1994 Standards covered everything, including the markings, and stressed that what was most relevant to the WSC was that, in case a claim was made against it for bad workmanship in respect of these manhole covers, the WSC would be in a position to identify and to trace the manufacturer.

At this point, the appellant Company's representative informed the PCAB that his firm did not submit the certificate of approval in respect of the product that it was offering because such a certificate was not requested in the tender document. He added that, as far as he was aware, no third party certification body would issue a blanket certification – the one produced by the recommended tenderer referred to 'product types listed' which, then again, referred to 'ductile case iron products' - but would issue one for a particular product. Mr Attard argued that he would accept the

certificate if it referred to the code of the product offered by the recommended tenderer.

The appellant Company's representative declared that he was being adamant on the markings because he suspected that the manufacturer of the product offered by the recommended tenderer was attempting not to disclose its name and, as a result, it would not be held responsible.

The Chairman PCAB remarked that it was not the function of the PCAB to investigate suspicions or allegations but the PCAB had to assess whether the marking requirements of Standard 9 (c) were met by the recommended tenderer. He added that, once the certificate of approval was not required from tenderers, then one could not discard a tenderer on something that was not required, let alone mandatory. The Chairman PCAB also argued that, perhaps, in future tenders, one should consider making the production of such independent certifications mandatory. He added that in this case, the main concern of the PCAB was to ascertain that the contracting authority had enough evidence and certifications in hand to identify the manufacturer. At this point Ing Galea St John intervened to state that in view of the certifications, the markings on the sample itself and the declarations submitted by J. P. Baldacchino Ltd, the committee had no reason to doubt as to the conformity of the product with tender specifications.

Mr Attard, the appellant Company's representative reiterated the fact that, as far as he was concerned, he was not satisfied that the specific product offered by the recommended tenderer had actually been certified by Lloyds. He added that in the case of the product that he offered, AFNOR, a third party certification body, had certified that it was in conformity with the tender specifications.

Ing. Perez remarked that with regard to the supply of products, such as manhole covers, where safety was a very important aspect, WSC would, apart from the specific product certification, invariably request - which strictly speaking covered the sample only - the quality assurance by a third party because that would provide a certification covering every batch of products supplied, namely it was a continuous certification of the process and not a once only certification.

Following Mr Attard's other objection relating to the fact that, according to the grid, the adjudicating committee considered an offer by Mr Anton Zarb when this should not have been considered because the price given by this bidder did not cover *the total cost delivered to stores* as requested in clause 3.6.1 of the tender document.

Ing. Galea St. John declared that Mr Anton Zarb had submitted three offers but, contrary to what Mr Attard was alleging, the adjudicating committee had discarded Mr Zarb's cheapest offer for having failed in other aspects of the tendering process and, in fact, the adjudicating committee had moved on to the next cheapest offer.

Mr Attard, representing AFS Ltd, stated that the standards required that a product had to be certified either with every 3,000 units manufactured or every six months of production. He declared that if the contracting authority was satisfied that it was in possession of a certification by Lloyds Register Quality Assurance (LRQA) with regard to the manhole cover and frame offered at tendering stage by the recommended

tenderer then he would recommend to the WSC the acceptance of that product. However, he contended that up till then he was not satisfied that Lloyds had certified that specific product.

On his part, Mr Adrian Baldacchino declared that they had produced the required certifications and markings with the sample submitted and that, during the contract period, each batch would be certified by Lloyds.

At this stage the public hearing was brought to a close and the PCAB proceed with the deliberation before reaching its decision.

This Board,

- having noted that the appellants, in terms of their ‘motivated letter of objection’ dated 12.03.2009 and also through their verbal submissions presented during the public hearing held on the 06.05.2009, had objected to the decision taken by the General Contracts Committee;
- having taken note of Mr Attard’s exposition of his claims or allegations, particularly the issues relating to:
 - ‘standards’, wherein he contended that the product presented by the recommended tenderer did not meet the standards indicated in para.(c) of Standard 9;
 - ‘markings’ wherein it was argued that the product offered by the recommended tenderer did not bear the name or the identification mark of the manufacturer and that the ‘markings’ were on the inner part of the cover of the manhole in the form of two letters and a number, which according to the same appellant Company were not clearly visible given that the manhole cover and frame was as relatively large item and this, despite the fact that the last part of standard 9 ‘Marking’ of EN 124:1994 states that “*The above mentioned markings shall be clear and durable. They shall, where possible, be visible after the unit is installed*”, adding that such markings assumed great importance in case claims would eventually be made against WSC due to manhole cover and frame failure;
 - the fact that, as far as he was aware, no third party certification body would issue a blanket certification (claiming that the one produced by the recommended tenderer referred to ‘product types listed’ which, then again, referred to ‘ductile case iron products’) but would issue one for a particular product;
 - the fact that in the case of the product that he offered, AFNOR, a third party certification body, had certified that it was in conformity with the tender specifications;
- having heard Ing. Stephen Galea St. John, chairperson of the adjudicating committee, declare that (a) the technical members who sat on the committee

were satisfied that the standards set out in the tender document were met and that there were no shortcomings such as those referred to by Mr Attard and (b) as regards the certifications required, the markings on the sample itself and the declarations submitted by J. P. Baldacchino Ltd, the committee had no reason to doubt as to the conformity of the product with tender specifications;

- having also taken note of Ing. Emanuel Grech's declaration that, on inspecting the sample presented by the recommended tenderer, the adjudicating committee verified that there was a code made up of two letters and a number that read SH6 that one could find on the inside part of the manhole cover;
- having noted Mr Adrian Baldacchino's (a) explanation of what SH6 stood for and Ing Perez's statement that with regard to the additional marking mentioned in Standard 9, there was also the manufacturer's identification number, LH322-1 and (b) statement that the fact that the markings were placed on the inside of the manhole cover protected the same markings from the heavy wear and tear that they would otherwise sustain by traffic and the like and (c) declaration that they had produced the required certifications and markings with the sample submitted and that, during the contract period, each batch would be certified by Lloyds;
- having observed that, during the hearing, the contracting authority admitted that the clarification with regard to the code SH6 was sought and obtained directly from the tenderer albeit both Ing Perez and Mr Baldacchino remarked that the code SH6 supplied by the manufacturer was corroborated by the certification body, Lloyds Register Quality Assurance (LRQA), which, in effect, certified all the standards of the product, including the markings;
- having also taken note of the fact that Ing. Perez argued that (a) the identification code had to be taken as a whole - SH6 - and not split in single letters or numbers and (b) the Lloyds certification with regard to EN 124:1994 Standards covered everything, including the markings, and stressed that what was most relevant to the WSC was that, in case a claim was made against it for bad workmanship in respect of these manhole covers, the WSC would be in a position to identify and to trace the manufacturer;
- having taken note of the fact that, during the hearing, the appellant Company's representative informed the PCAB that his firm did not submit the certificate of approval in respect of the product that it was offering because such a certificate was not requested in the tender document;
- having taken cognizance of Ing Perez's declaration regarding (a) not only the one relating to the certification required to cover every batch of products supplied, but also (b) the continuous certification necessary which the contracting authority would be requesting to cover the entire process;

reached the following conclusions, namely:

1. The PCAB feels that the appellant Company fell short of substantially proving failure by awarded Company to abide by terms and conditions of the tender

specifications relying, instead, on hunches, instincts, suspicions and personal opinions rather than facts. Undoubtedly, in these circumstances, this Board does not consider such factors as crucial to enable it to, objectively, determine the outcome of an appellant Company's objection.

2. The PCAB feels that, when analysing documentary evidence submitted and verbal interventions made during the public hearing, it did not come across any justified reason to doubt that the adjudicating Board had, in any way, overlooked anything when analysing the bids received, including issues concerning 'markings'.
3. The PCAB feels that, from documentary evidence already in hand, the contracting authority would be well positioned to ensure that, in the event that a claim is made against the WSC on these manhole covers, the said authority would be in a position to identify and trace the manufacturer without any difficulty.

The PCAB recommends that, in future, the WSC and any other contracting authority, should follow public procurement praxis and regulations and, at any stage of the tender adjudication process, desist from directly contacting participating tenderers but should do so through the Department of Contracts.

As a consequence of (1) to (3) above this Board finds against appellants.

In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the appellants should be forfeited.

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmelo J Esposito
Member

26 May 2009