

PUBLIC CONTRACTS APPEALS BOARD

Case No. 231

CT/2165/2009; CT/WSC/T/22/2009

Supply Tender for the Supply of DN15 Class 2 Meters for Potable Cold Water

This call for tenders was published in the Government Gazette on 3 April 2009. The closing date for this call for offers was 26 May 2009.

The estimated value of this tender was Euro 6,270,000.

Six (6) tenderers submitted their offers.

Itron of France filed an objection on the 22 July 2010 following the decision by the Contracts Department to award the tender in caption to *AFS Ltd*.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Carmel J Esposito as members convened a public hearing on Friday, 8 October 2010 to discuss this objection.

Itron France (previously named Actaris SAS)

Mr Mathias Martin	Itron Representative
Mr Amirouche Boukhari	Itron Representative
Mr Jes Farrugia	Solar Solutions
Mr David Zammit	Solar Solutions

AFS Ltd

Mr Joseph Attard	Representative
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Water Services Corporation (WSC)

Ing. Marco Perez	Manager Procurement and Stores
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Evaluation Board

Ing. Stephen Galea St John	Chairman
Ing. Ronald Pace	Member
Ing. Saviour Cini	Member
Mr Anthony Camilleri	Secretary

Department of Contracts

Mr Francis Attard	Director General (Contracts)
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After the Chairman's brief introduction as to how the hearing was going to be conducted, the appellant company's representative was invited to explain the motives of the objection. There were no objections for the proceedings to proceed in English for the benefit of the foreign representatives of Itron France.

Mr Mathias Martin, representing Itron France, the appellant company, explained that this was the first occasion that they had to appeal on the basis of the information that they obtained from the previous appeal. Mr Martin stated that to be compliant with MID Directive meant that one had to have an MID Certificate issued by a notified body. He added that the recommended tenderer did not furnish the MID Certificate by the closing date of the tender on the 26th May 2009 for the simple reason that the said bidder did not possess that kind of certificate. Mr Martin contended that, in the circumstances, the recommended tenderer was not compliant.

The appellant company's representative further explained that a manufacturer was not allowed to mark a water meter as being MID approved if that manufacturer did not have the pertinent MID certification and, as a result, such a meter could not be used in accordance with metrological regulations. He also claimed that the meter submitted by AFS Ltd had the reed switch technology which could lead to faulty signal emissions and that, in this regard, the specifications clearly indicated in clause 14.6 that "the meter must not allow false or faulty signal emissions."

Mr Martin complained that if Itron France had known that it could submit a meter without an MID certificate then it would have proposed a different and cheaper meter that would not have respected the reliability of pulse signal transmission versus magnet tampering.

The appellants' representative concluded that AFS Ltd should be disqualified as technically non-compliant and the tender be awarded to Itron France.

Ing. Stephen Galea St John, chairman of the adjudicating board, remarked that in July 2009 the adjudicating board had requested AFS Ltd to give evidence that both its options were MID approved and the reply from AFS Ltd was that in both instances the MID approval process had either started or was in the course of being initiated. He added that the contracting authority would have been satisfied if the meters were MID approved by the time the meters were delivered to the Water Services Corporation. Ing. Galea St John added that this point had been made clear in the *addendum* to the evaluation report dated 3rd August 2010 where it was recommended that "... both offers from Messrs AFS Ltd can be accepted provided that the tenderer submits an MID certificate with the first delivery for the meter selected, if this tender is awarded to this bidder."

Ing. Galea St John conceded that, although the tender document did not request the submission of the MID certificate as such, the Water Services Corporation requested MID approved meters as per clause 1.1 of the specifications (page 26) which read as follows:

"The meters shall comply with:

- *The EU Measuring Instruments Directive (MID) - 2004/22/EC*

- *The EU Council Directive No.75/33/EEC relating to cold water meters*
- *ISO4064-1 - Measurement of water flow in fully charged closed circuits - meters for cold potable water and hot water*
- *The prescription of the regulation No.49 of the OIML (International Organisation for Legal Metrology)*

Where the above standards conflict, the MID shall take precedence.”

Mr Martin replied that it would be illegal for one to claim that his meter was MID approved without having the pertinent MID certificate. The appellants’ representative pointed out that it was not enough for the tenderer to present a declaration that a product was MID approved but one had to provide an MID certificate issued by a notified body. He went further to point out that it was quite clear that, at tendering stage, the recommended tenderer did not submit such an MID certificate. Mr Martin stressed that the fact that one was in the process of applying for an MID certificate did not mean that one would necessarily obtain that certificate.

Ing. Galea St John agreed and added that that was why the recommendation for award to AFS Ltd was conditional to having the MID certification in place by the delivery date of the meters.

Mr Martin explained that MID certification was much more demanding than any other type of certification and hence that reflected itself in the price of the product. He added that if the awarded tenderer did not provide MID approved meters then those meters could not be used for billing purposes and that certification had to be presented at tendering stage. At this point Mr Martin produced a sample of the meters offered by Itron France which bore the markings of MID certification and he stressed that one could not mark one’s meters like that unless in possession of an MID certificate. Mr Martin added that the manufacturer had to possess the necessary certification to produce MID approved meters.

Ing. Galea St John remarked that a sample was requested from tenderers for the purpose of testing metrological performance however Mr Martin, on his part, intervened to contend that the MID markings were the legal way of certifying the metrological performance of the meter.

The chairman of the evaluation board conceded that the Water Services Corporation requested an MID approved meter in the tender document even though one could procure a different kind of meter given that in this regard one was going through a transition period that would end in 2016. Ing. Galea St John informed the PCAB that the evaluation was concluded in October 2009 whereas the closing date of the tender was the 26th May 2009.

Mr Joseph Attard, representing AFS Ltd, the recommended tenderer, informed the PCAB that the necessary MID certificates had been obtained by the manufacturer ‘Janz’ of Portugal. In order to corroborate his claim, Mr Attard produced certificates dated 8th April 2010, 12 May 2010, 2nd August 2010 and 16th September 2010 respectively.

Mr Martin intervened to state that he noted that the MID certificate obtained by AFS Ltd's supplier, i.e. 'Janz' of Portugal, in respect of meter type JV400 was dated April 2010 which date was almost one year after the closing date of the tender.

Mr Attard claimed that MID certification was one of the requirements set out in the tender document and that AFS Ltd had adhered to all of the rest and even submitted a declaration that its supplier was in the process of obtaining MID approval for the meters offered by AFS Ltd, which meant that the meter met MID standards even though it was not MID approved at that time. Mr Attard added that MID approval was not a legal requirement for the time being and, in fact, there were national standards that were still considered valid and, as a consequence, it was not correct to state that it was illegal to use a meter that was not MID approved.

Ing. Galea St John confirmed that for a meter to be in conformity with the MID of the EU as indicated in clause 1.1 of the tender document the meter had to have an MID certificate. He reiterated that the recommended award to AFS Ltd was conditional to the meters supplied being MID approved.

Mr Attard explained that when one considered the dates of issue of the MID certificates, which span from the 8th April to the 16th September 2010, one would note that this certification process was not tied to this particular call for tenders. Mr Attard remarked that any kind of certification, whether MID or otherwise, carried a cost.

The Chairman PCAB remarked that the point at issue was not the price but the timing, namely, whether the MID certificate had to be presented by the closing date of the tender, ie. 26th May 2009, or whether it was acceptable to present the MID certificate at a later stage, thus conditioning the award of the tender.

Mr Martin reiterated that (i) the initiation of a certification process by a manufacturer was not, *per se*, an assurance that the certificate would actually be issued and so one could not award a tender to a bidder in that situation and (ii) had Itron France been made aware of the option to present a meter without the MID certificate then they would have presented a much cheaper type of meter.

Ing. Marco Perez, representing the Water Services Corporation, the contracting authority, referred to clause 25 (at page 35) of the tender document which listed all the documentation requested in the tender specifications and conditions which did not include the MID certificate. Ing. Perez said that the MID certificate was not required at tendering stage on purpose because the Water Services Corporation was aware that a number of manufacturers were in the course of getting the MID certification and, therefore, if the Water Services Corporation had included the requirement of this certificate at tendering stage then that would have limited competition. Mr Perez added that the length of the process to obtain MID certification depended on the amount of money one was prepared to pay since the speedier the process the more money one had to pay.

Mr Martin remarked that at clause 25 it was clearly stated that the list thereat was not exclusive. Mr Martin disagreed with what Ing. Perez had just stated with regard to restricting competition because, at the closing time of the tender, there were at least

four global manufacturers, like Nitron, Hydrometer, Census and Esther, that had MID certification and, as a consequence, there was evidently enough competition on the market. Itron France's representative remarked that certification was not only a matter of money but also a matter of time because certification bodies required time to carry out the required tests.

Mr Martin also pointed out that, in this call for tenders, the contracting authority was requesting delivery within 12 weeks from the date of issue of the letter of acceptance and since the first technical report was issued in October 2009, plus another month for the opening of the financial offers, then, had Itron France not filed an objection, the goods should have been delivered around March 2010. Mr Martin remarked that at this juncture it was important for one to place emphasis on the fact that when the pertinent MID certificate was issued to the recommended tenderer this was dated May 2010.

Mr Attard remarked that if that were to be the case then AFS Ltd would have been fined the penalties contemplated in the conditions of the contract.

Ing. Galea St John stated that, with regard to the other issue of tampering raised by the appellant company, the Water Services Corporation was satisfied with the results that it had obtained from the tests carried out on the meters.

Mr Martin remarked that the meter referred to in the MID certificate of the recommended tenderer was much more advanced than the sample meter submitted with its tender submission. The appellant company's representative stated that since the meter of the recommended tenderer was not MID approved and had a pulse unit based on a reed switch technology then it was not compliant with clauses 7.2, 14.5 and 14.6 of the tender specifications. As a result, continued Mr Martin, the meter reed switch technology could be disturbed by the use of a magnet thus leading to a faulty signal emission and to erroneous readings and subsequent billing.

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 23 July 2010 and also through their verbal submissions presented during the public hearing held on 8 October 2010 had objected to the decision taken by the General Contracts Committee;
- having taken note of the appellants' representatives' (a) claim that to be compliant with MID Directive meant that one had to have an MID Certificate issued by a notified body, (b) reference to the fact that the recommended tenderer did not furnish the MID Certificate by the closing date of the tender on the 26th May 2009 for the simple reason that the said bidder did not possess that kind of certificate, (c) reference to the fact that a manufacturer was not allowed to mark a water meter as being MID approved if that manufacturer did not have the pertinent MID certification and, as a result, such a meter could not be used in accordance with metrological regulations, (d) claim that if Itron France had known that it could submit a meter without an MID certificate then it would

have proposed a different and cheaper meter that would not have respected the reliability of pulse signal transmission versus magnet tampering, (e) argument that AFS Ltd should be disqualified as technically non-compliant and the tender be awarded to Itron France, (f) contention that it was not enough for the tenderer to present a declaration that a product was MID approved but one had to provide an MID certificate issued by a notified body and that the fact that one was in the process of applying for an MID certificate did not mean that one would necessarily obtain that certificate, (g) emphasis on the fact that if the awarded tenderer did not provide MID approved meters then those meters could not be used for billing purposes and that certification had to be presented at tendering stage, (h) contention that the MID markings were the legal way of certifying the metrological performance of the meter, (i) reference to the fact that the MID certificate obtained by AFS Ltd's supplier, i.e. 'Janz' of Portugal, in respect of meter type JV400 was dated April 2010 which date was almost one year after the closing date of the tender, (j) counter argument to Ing Perez's claim relating to restriction of competition because, at the closing time of the tender, there were at least four global manufacturers, like Nitron, Hydrometer, Census and Esther, that had MID certification and, as a consequence, there was evidently enough competition on the market, (k) emphasis on the fact that when the pertinent MID certificate was issued to the recommended tenderer this was dated May 2010 and (l) remark regarding the fact that the meter referred to in the MID certificate of the recommended tenderer was much more advanced than the sample meter submitted with its tender submission;

- having also taken note of the contracting authority's (a) reference to the fact that in July 2009 the adjudicating board had requested AFS Ltd to give evidence that both its options were MID approved and the reply from AFS Ltd was that in both instances the MID approval process had either started or was in the course of being initiated, (b) claim to the fact that the contracting authority would have been satisfied if the meters were MID approved by the time the meters were delivered to the Water Services Corporation, (c) reference to the fact that, in the *addendum* to the evaluation report dated 3rd August 2010, the adjudication board recommended that "... *both offers from Messrs AFS Ltd can be accepted provided that the tenderer submits an MID certificate with the first delivery for the meter selected, if this tender is awarded to this bidder.*", namely placing emphasis that the award of the tender was conditional, (d) reference to the fact that a sample was requested from tenderers for the purpose of testing metrological performance and (e) confirmation that for a meter to be in conformity with the MID of the EU as indicated in clause 1.1 of the tender document the meter had to have an MID certificate;
- having taken cognizance of AFS Ltd's representative's (a) statement that the necessary MID certificates had been obtained by the manufacturer 'Janz' of Portugal producing certificates dated 8th April 2010, 12 May 2010, 2nd August 2010 and 16th September 2010 respectively, (b) reference to the fact that when one considered the dates of issue of the MID certificates, which span from the 8th April to the 16th September 2010, one would note that this certification process was not tied to this particular call for tenders and (c) claim that MID

certification was one of the requirements set out in the tender document and that AFS Ltd had adhered to all of the rest and even submitted a declaration that its supplier was in the process of obtaining MID approval for the meters offered by AFS Ltd, which meant that the meter met MID standards even though it was not MID approved at that time;

- having also considered Ing Perez's remarks, particularly, (a) his reference to clause 25 (at page 35) of the tender document which listed all the documentation requested in the tender specifications and conditions which did not include the MID certificate and (b) the fact that he stated that the MID certificate was not required at tendering stage on purpose because the Water Services Corporation was aware that a number of manufacturers were in the course of getting the MID certification and, therefore, if the Water Services Corporation had included the requirement of this certificate at tendering stage then that would have limited competition;

reached the following conclusions, namely:

1. The PCAB opines that the point at issue was not the price but the timing, namely, whether the MID certificate had to be presented by the closing date of the tender, namely the 26th May 2009, or whether it was acceptable for a tenderer to present the MID certificate at a later stage, thus conditioning the award of the tender. This Board feels that other potential tenderers could have decided not to participate in this tender due to the fact that they were not in possession of an MID certificate.
2. The PCAB feels that, as much as this Board does not allow that a participating tenderer to impose any type of condition in its submission to a contracting authority, likewise, one cannot accept that an adjudicating Board awards a tender on the basis of a condition or proviso imposed on a tenderer. This Board concludes that a tenderer should be substantially compliant and, in this Board's opinion, not being in possession of an MID certificate at time of original submission was against the specifications, terms and conditions of the said tender.

As a consequence of (1) to (2) above this Board finds in favour of the appellant Company.

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

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmel J Esposito
Member

25 October 2010