

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case No. 323**

#### **CT/4039/2010; CT/WSC/T/51/2010**

#### **Period Contract for the Supply of Polyethylene Pipes – Water Services Corporation**

This call for tenders was published in the Government Gazette on the 30<sup>th</sup> November 2010. The closing date for this call with an estimated budget of € 191,067 (DDP) was the 25<sup>th</sup> January 2011.

Four (4) tenderers submitted their offers.

JP Baldacchino & Co. Ltd (on behalf of Nupigeco SpA) filed an objection on the 9<sup>th</sup> May 2011 against the decision of the Contracts Department to disqualify its offer as not administratively compliant.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Edwin Muscat and Mr Joseph Croker as members convened a public hearing on Monday, 5<sup>th</sup> September 2011 to discuss this objection.

Present for the hearing were:

#### **JP Baldacchino & Co. Ltd obo its principal Nupigeco SpA**

Mr Adrian Baldacchino	Representative
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#### **General Plastics Ltd**

Mr Alan Fleri Soler	Representative
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#### **Water Services Corporation (WSC)**

##### **Evaluation Board**

Ing. Mark Perez	Chairman
Ing. Stephen Galea St. John	Member
Ing. Nigel Ellul	Member
Mr Anthony Camilleri	Secretarty

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

Mr Adrian Baldacchino, representing the appellant, made the following submissions:

- i. by letter dated 29<sup>th</sup> April 2011 the Contracts Department informed Nupigeco SpA that its offer had been disqualified after it was found not to be administratively compliant because the official 'tender form' had been left blank;
- ii. it was correct that the official 'tender form' had not been submitted but, on the other hand, Nupigeco SpA had submitted the 'tender form' on its letterhead which, he claimed, included the full contents of the official 'tender form' that formed part of the tender document;
- iii. on obtaining the electronic copy of the tender document, JP Baldacchino Ltd forwarded it to its principals Nupigeco SpA who, in turn, printed and re-submitted the declarations, including the 'tender form' contained in the tender document, on its letterhead instead of on plain paper;
- iv. the 'tender form' provided in the tender, admittedly not filled in, was also presented in the original tender submission together with the tender form duly filled on the letterhead of Nupigeco SpA;
- v. it was noted that, in the case of the tender guarantee form, the tender document requested that it had to be presented '*On the headed notepaper of the financial institutions providing the guarantee*' (page 21 of the tender document), presumably to reinforce its validity; and
- vi. his principals had indicated that when they tendered in other countries they presented certain documents on their letterhead.

Ing. Mark Perez, chairman of the evaluation board, remarked that:-

- a. when the evaluation board had noted that the 'tender form' was submitted on the letterhead of Nupigeco SpA and not on blank paper, it referred the matter to the General Contracts Committee which advised that if the text of the 'tender form' submitted by the Nupigeco SpA matched that provided in the tender document then that 'tender form' was to be considered as valid;
- b. however, on matching the wording of the two tender forms there emerged the following discrepancies:
  - i. changes were effected to the footnotes under Section A and Section C para. 11, and
  - ii. clause 3 of Section C had been modified such that the words 'duties, VAT' had been deleted.

At this point the Chairman Public Contracts Review Board observed that the *footnotes* were meant for additional information purposes as they reflected certain provisions of the public procurement regulations and/or of the same tender document – e.g. foot note 1 pertaining to the ‘tender guarantee’ was reproduced in clause 20.1 of the ‘Instructions to Tenderers’ – and, as a result, one had to examine whether the information left out was material or not. He remarked that this line of thought was also in line with the instructions issued by the General Contracts Committee as per minute 13 CT/4039/2010 dated 5<sup>th</sup> April 2011, i.e. that if the ‘tender form’ presented by the bidder had the same content as that published in the tender document then it was acceptable.

The Chairman Public Contracts Review Board added that, on the other hand, tenderers were expected to submit documentation in the format requested by the contracting authority irrespective of the format that the tenderer might have presented when tendering in other jurisdictions.

With regard to the issue of VAT Ing Perez stated that the appellant company had crossed out the words ‘duties VAT’ of clause 3 under Section C ‘Tenderer’s Declaration’ (page 19) of the ‘tender form’ which read as follows:

*‘The total price of our tender (inclusive of delivery to WSC, duties, VAT, other taxes and any discounts) is: Euro .....*’

Mr Baldacchino, an accountant by profession, remarked that:-

- i. in their tender submission it was indicated as follows:

*“The total price of our tender (inclusive of delivery to WSC, other taxes and any discounts) is Euro 173,100.00 duties and VAT of Malta Country are not included because inside EU market (they do not exist for intra-EU sales).”*

- ii. it was irregular for a supplier within an EU member state to charge VAT for the supply of goods in another EU member state;
- iii. albeit a clarification had been issued recently by the Water Services Corporation indicating that VAT was required only for price comparison purposes, yet, as far as he was aware, that clarification had been communicated after the tender in question was issued;
- iv. Volume 4 ‘Financial Bid’ (page 43 of the tender document) requested with regard to price the ‘Total DDP to WSC Stores’, where DDP stood for ‘Delivered Duty Paid’ and even in the ‘Schedule of Tenders Received’ under ‘remarks’ the price was indicated as ‘DDP to Stores or DDP Malta’, and
- v. if one were a local supplier one had to add VAT but if one were an intra-community supplier one could not include VAT – something which as a matter of fact was illegal for one to do so.

Ing. Perez remarked that:-

- a. he could not but agree with what Mr Baldacchino had said but the fact was that the Department of Contracts had been insisting that VAT and duties should be included in the price and the Water Services Corporation had to abide by those instructions;
- b. the VAT issue was causing confusion and needed to be sorted out with the competent authorities as it was likely that certain cases would eventually end up before the Public Contracts Review Board to deliberate on such VAT matters, and
- c. when the Water Services Corporation had once more referred the matter to the General Contracts Committee, this time indicating the variations between the published 'tender form' and the appellant company's 'tender form', the General Contracts Committee had agreed that the appellant company's version was not administratively compliant.

Mr Baldacchino pointed out that in the letter dated 29<sup>th</sup> April 2011 the Contracts Department only stated that 'the official tender form has been left blank' when, in fact, their principal, Nupigeco SpA, had submitted it but on the company's letterhead and not on blank paper. Nevertheless, the Contracts Department made no mention of certain footnotes that were left out or that there was an issue with regard to VAT and, as a result, one had to appreciate that he, personally, did not prepare to defend any of the details surrounding those issues.

The Chairman Public Contracts Review Board advised the Water Services Corporation officials present to take up the issue involving VAT with the VAT Department and, eventually, with the Contracts Department to come up with a satisfactory and lasting solution, perhaps even by modifying the way the schedule of prices was drawn up, with a view to avoiding unnecessary recourse to appeal.

Mr Alan Fleri Soler, representing General Plastics Ltd, the recommended tenderer, observed that the 'bid bond' was to expire on the 24<sup>th</sup> June 2011 and, as a consequence, his firm had extended it up to the 24<sup>th</sup> September 2011. At this stage Mr Fleri Soler queried whether the appellant company had, in fact, extended its 'bid bond' because if it did not then the appellant company's tender was no longer valid and there would be no point in considering its appeal any further.

Since both the Water Services Corporation and the appellant company were not in a position to confirm whether the 'bid bond' had in fact been extended by Nupigeco SpA, it was agreed that the appellants would furnish this information to the Public Contracts Review Board at a later stage.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellant's company, in terms of the reasoned letter of objection of the 9<sup>th</sup> May 2011, and through the verbal submissions made during the hearing held on the 5<sup>th</sup> September 2011, had objected against the decision of

the Water Services Corporation to disqualify its offer as the latter was found to be not administratively compliant;

- having noted the appellant firm's representatives claims and observations regarding the fact that (a) by letter dated 29<sup>th</sup> April 2011 the Contracts Department informed Nupigeco SpA that its offer had been disqualified after it was found not to be administratively compliant because the official 'tender form' had been left blank, (b) whilst it was correct that the official 'tender form' had not been submitted but, on the other hand, Nupigeco SpA had submitted the 'tender form' on its letterhead which included the full contents of the official 'tender form' that formed part of the tender document, (c) on obtaining the electronic copy of the tender document, JP Baldacchino Ltd forwarded it to its principals Nupigeco SpA who, in turn, printed and re-submitted the declarations, including the 'tender form' contained in the tender document, on its letterhead instead of on plain paper, (d) the 'tender form' provided in the tender, admittedly not filled in, was also presented in the original tender submission together with the tender form duly filled on the letterhead of Nupigeco SpA, (e) Nupigeco SpA had indicated that when they tendered in other countries they presented certain documents on their letterhead, (f) in their tender submission it was indicated that in its offer the company had excluded duties and VAT of Malta Country because inside EU market (they do not exist for intra-EU sales), (g) it was irregular for a supplier within an EU member state to charge VAT for the supply of goods in another EU member state, (h) albeit a clarification had been issued recently by the Water Services Corporation indicating that VAT was required only for price comparison purposes, yet, as far as the appellant was aware, that clarification had been communicated after the tender in question was issued, (i) Volume 4 'Financial Bid' (page 43 of the tender document) requested with regard to price the 'Total DDP to WSC Stores', where DDP stood for 'Delivered Duty Paid' and even in the 'Schedule of Tenders Received' under 'remarks' the price was indicated as 'DDP to Stores or DDP Malta', (j) in the letter dated 29<sup>th</sup> April 2011 the Contracts Department only stated that 'the official tender form has been left blank' when, in fact, their principal, Nupigeco SpA, had submitted it but on the company's letterhead and not on blank paper and (k) in the letter dated 29<sup>th</sup> April 2011 the Contracts Department made no mention of certain footnotes that were left out or that there was an issue with regard to VAT and, as a result, one had to appreciate that the appellant company did not prepare to defend any of the details surrounding those issues;
- having considered the contracting authority's representative's submissions, namely that (a) when the evaluation board had noted that the 'tender form' was submitted on the letterhead of Nupigeco SpA and not on blank paper, it referred the matter to the General Contracts Committee which advised that if the text of the 'tender form' submitted by the Nupigeco SpA matched that provided in the tender document then that 'tender form' was to be considered as valid, (b) on matching the wording of the two tender forms there emerged the following discrepancies, namely, (1) changes were effected to the footnotes under Section A and Section C para. 11, and (2) clause 3 of Section C had been modified such that the words 'duties, VAT' had been deleted, (c) with regard to the issue of VAT Ing Perez stated that the appellant company had crossed out the words 'duties VAT' of clause 3 under Section C 'Tenderer's Declaration' (page 19) of the 'tender form',

(d) albeit agreeing in principle with the appellant company, yet the fact was that the Department of Contracts had been insisting that VAT and duties should be included in the price and the Water Services Corporation had to abide by those instructions and (e) when the Water Services Corporation had once more referred the matter to the General Contracts Committee, this time indicating the variations between the published 'tender form' and the appellant company's 'tender form', the General Contracts Committee had agreed that the appellant company's version was not administratively compliant;

- having considered the recommended tenderer's representative's submissions, namely that (a) the 'bid bond' was to expire on the 24<sup>th</sup> June 2011 and, as a consequence, his firm had extended it up to the 24<sup>th</sup> September 2011 and (b) it was querying whether the appellant company had, in fact, extended its 'bid bond' because if it did not then the appellant company's tender was no longer valid and there would be no point in considering its appeal any further;
- having established that both the Water Services Corporation and the appellant company were not in a position to confirm whether the 'bid bond' had in fact been extended by Nupigeco SpA, it was agreed that the appellants would furnish this information to the Public Contracts Review Board at a later stage,

reached the following conclusions:

1. The Public Contracts Review Board acknowledges that tenderers are expected to submit documentation in the format requested by the contracting authority irrespective of the format that these tenderers might have presented such documentation in when tendering in other jurisdictions. However, in accepting the 'modus operandi' adopted by the General Contracts Committee wherein, as per minute 13 CT/4039/2010 dated 5<sup>th</sup> April 2011, the latter argued that if the 'tender form' presented by the bidder had the same content as that published in the tender document then it was acceptable, following a thorough deliberation of the documents made available to it, as well as the points raised by all interested parties before and during the hearing, this Board opines that, in this instance, the information left out by the appellant company was not considered of material importance.
2. This Board principally agrees with the appellant company's stand which contends that it is irregular for a supplier within an EU member state to charge VAT for the supply of goods in another EU member state.
3. The Public Contracts Review Board also recommends that officials from contracting authorities should take up the issue involving VAT with the VAT Department and, eventually, with the Contracts Department with a view to come up with a satisfactory and lasting solution, perhaps even by modifying the way the schedule of prices is currently drawn up, so that unnecessary recourse to appeals be avoided in the future.
4. The Public Contracts Review Board is fully cognisant of the fact that, subsequent to the hearing and, fully in line with the decision taken by this Board at the end of the hearing session of the case under review, the Water Services Corporation eventually furnished the Public Contracts Review Board with a copy of a letter

dated 23<sup>rd</sup> June 2011 from Banca di Imola SpA, on behalf of Nupigeco SpA, and a letter dated 24<sup>th</sup> June 2011 from HSBC, on behalf of General Plastics Ltd, confirming that both firms had extended their bid bond up to the 24<sup>th</sup> September 2011 after the two banks had been alerted by the Water Services Corporation on the 22<sup>nd</sup> June 2011. This development has clarified - beyond any reasonable doubt - that all parties had extended their respective bid bonds and thus equally found in conformity with tender requirements.

In view of the above this Board finds in favour of the appellant company and also recommends that the deposit paid by the latter should be reimbursed. Furthermore, this Board recommends that the appellant company be reintegrated in the tendering process for further evaluation.

Alfred R Triganza  
Chairman

Edwin Muscat  
Member

Joseph Croker  
Member

*30 September 2011*