

## **PUBLIC CONTRACTS REVIEW BOARD**

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### **Case 1081 – CT 2014/2017 – Supply and Delivery of Ductile Iron Pipes EN 545 to the Water Services Corporation**

The Publication Date of the Call for Tenders was 4 July 2017 whilst the Closing Date for Call of Tenders was 5 September 2017. The Estimated Value of the Tender, (Exclusive of VAT) was € 2,202,787.

On 4 August 2017, Ragonesi & Company Limited filed a Pre-Contractual Objection against the Water Services Corporation.

On 12 September 2017, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Carmel Esposito as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

#### **Appellant – Ragonesi & Company Limited**

Mr Roberto Ragonesi	Representative
Dr Joseph Camilleri	Legal Representative
Dr Matthew Cutajar	Legal Representative

#### **Contracting Authority – Water Services Corporation**

Ms Shirley Farrugia	Representative
Mr Jonathan Scerri	Representative
Mr Stefan Vella	Representative
Dr Christopher Vella	Legal Representative

#### **Department of Contracts**

Dr Franco Agius	Legal Representative
Dr Christopher Mizzi	Legal Representative

#### **Other Interested Parties**

Mr Edward Zammit	Representative, Electrosteel Castings Limited
Dr William Cuschieri	Legal Representative, Electrosteel Castings Limited

Following an introduction by The Public Contracts' Review Board Chairman, Dr Anthony Cassar, the Appellants were invited to make their submissions.

Dr Joseph Camilleri, the Legal Representatives for Ragonesi & Company Limited opened by saying that he was noticing that there were representatives for Electrosteel Castings Limited present for this Public Hearing. He wanted to make it clear that despite the fact that the latter company was mentioned in the Letter of Objection dated 4 August 2017, this Objection was not an attack on them but there might be instances wherein other Bidders can be also affected besides them.

Dr Camilleri explained that the discussion was about a call for Tenders to supply iron ductile pipes. There was a previous Tender similar to this; CT 2088/2014 which was awarded to Electrosteel Castings Limited. During this Tender, the Appellants have informed the Water Services Corporation that the European Union was installing procedures with regards to the anti-dumping and countervailing duties. These were tariffs imposed on product coming from outside the European Union, in this case, from India. This was imposed through a Commission Implementing Regulation (EU) 2015/1559 issued on 18 September 2015.

In a Letter dated 6 January 2016, Ragonesi & Company Limited has raised this issue with the Water Services Corporation and they were insisting that this particular element cannot be absorbed by the importing Company. If one gives his product at a particular price, this price has to change or else it will go against the EU Regulation. The Commission Implementing Regulation has imposed a counter duty of 9% on all non-EU products being imported.

Dr Joseph Camilleri has requested witnesses to be summoned in order to illustrate to the Public Contracts Review Board his client's worries since from the information which they presently have the Countervailing Duty is not going to be applied as it should be. If there was a change in the parameters of the Contract, the latter had to be dissolved and a fresh call for Tenders must be made otherwise the Tender would go against the new EU Regulations.

Ragonesi & Company Limited were worried that this problem was going to arise again in this Tender. This issue applies to all interested Bidders who import similar products. The Appellants filed this Pre-Contractual Concern to warn the Public Contracts Review Board, the Water Services Corporation and the Department of Contracts about this problem and for the latter three to address it.

At this point, Mr Jonathan Scerri, Head of Procurement at the Water Services Corporation, holding ID Card Number 559584 M was called to testify under oath before the Public Contracts Review Board.

Following Mr Scerri's testimony, Dr Franco Agius, the Legal Representative for the Department of Contracts was wondering under which section of Clause 262 of the Public Procurement Regulations issued on 28 October 2016 does this Pre-Contractual Concern falls.

Dr Joseph Camilleri, the Legal Representative for Ragonesi & Company Limited replied that the concern was based on discrimination terms since the EU Regulations impose auto dumping and countervailing on pipes coming from India since there should be a duty

imposed on the latter imports. If the Appellants were not ensuring that these Regulations were going to be applied and not circumvented, a situation is going to rise where EU imports are going to be discriminated upon since the Countervailing duty must be entered in the Financial Bid in such a way that it has to be beyond the price and not absorbed by the importer. If this does not happen, products which are imported from outside the European Union are going to get an advantage over products coming from the latter region.

Dr Franco Agius, the Legal Representative for the Department of Contracts understood that Dr Camilleri was eventually referring to Sub Clause C of Article 262 of the Public Procurement Regulations.

Dr Joseph Camilleri, the Legal Representative for Ragonesi & Company Limited added that Sub Clause E could also be relevant for their Pre-Contractual Concern.

Dr Franco Agius, the Legal Representative for the Department of Contracts disagreed with the latter statement since there was not a request to cancel the Tender. He was also still not sure whether the Appellant's Objection was valid under Article 262 (c) of the Public Procurement Regulations since there was no claim of discrimination either Administratively, Financially or Technically.

Dr Joseph Camilleri, the Appellant's Legal Representative, countered that the fact that there was no indication that the end user was going to pay the Countervailing Duty when this was insisted by the EU Regulations. Ragonesi & Company Limited have already drawn the Water Services Corporation's attention about this duty.

With regards to Financial Requirements when there is a fresh Call for Tenders, the Appellants wanted reassurance that any duty has to be included, recognised and paid by the Water Services Corporation. The Appellants were saying this not to have any change of price at Tender Stage or when the Contract is being worked out. The duty must be paid in full by the Water Services Corporation if the product is imported from India and this is the reason why Ragonesi & Company Limited feel that this Call for Tenders is a discriminatory one.

Dr Franco Agius, the Legal Representative for the Department of Contracts disagreed in principle with what Dr Joseph Camilleri was saying. Whoever was going to submit a bid will for sure include the Duty in his offer since it was part of the price. Dr Agius was not seeing which part of the Tender was prejudicing the Appellants.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether the quotations in the Tender included all Taxes and Duties for which Dr Franco Agius, for the Department of Contracts Replied in the affirmative.

Dr Joseph Camilleri, the Legal Representative for Ragonesi & Company Limited appreciated Dr Agius' arguments but insisted that his clients do not wish a repetition of what happened in the previous Tender. What the Appellants wanted to show was that in the latter Contract it was not true that the Countervailing Duty was applied because if this duty was applied, the price would have increased.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board said that the discussion was about this Tender where it was confirmed that all prices included all taxes and duties.

Dr Joseph Camilleri, the Legal Representative for Ragonesi & Company Limited asked what guarantees there were that these was going to be executed for which Dr Anthony Cassar, the Chairman of the Public Contracts Review Board replied that what interested the latter was what there was in the Tender Document. There were other remedies which can be sought if the Tender Conditions were to be broken.

Dr Franco Agius, the Legal Representative for the Department of Contracts added that he had a document which he can present and testify on it accordingly.

At this point, Dr Franco Agius, the Legal Representative for the Department of Contracts, holding ID Card Number 496577 M, testified under oath before the Public Contracts Review Board.

Following Dr Agius' testimony, Dr Joseph Camilleri, the Legal Representative for Ragonesi & Company Limited requested the Public Contracts Review Board to call a representative from the Customs Department for further questioning regarding the matter.

At this point, Mr Mark Cassar Parnis, a Principal at the Customs Department, holding ID Card 226658 M, was summoned by Ragonesi & Company Limited to testify under oath before the Public Contracts Review Board.

Following Mr Cassar Parnis' testimony, Dr Joseph Camilleri, the Legal Representative for Ragonesi and Company Limited argued that the Call for Tenders must be compliant with both the EU Regulations and the Laws of Malta. Besides any duties must be applicable. His clients were concerned that certain mistakes which happened in the previous Tender were going to be repeated in this one.

The Water Services Corporation was bounded to present some documents directly to the Public Contracts Review Board who, from the information which the Appellants submitted, got to know that in March 2016 the Countervailing duty was imposed. Dr Camilleri was wondering whether the latter duty was imposed correctly or absorbed by the client. Ragonesi and Company Limited wanted to ensure that whatever happened in the first Tender, will not happen again in future Tenders.

Dr Joseph Camilleri questioned what will happen if the present duties were increased or new duties will be imposed. His clients feel that the Tender Document rest only on general obligations which they didn't know whether they will be eventually applied.

Dr Franco Agius, the Legal Representative for the Department of Contracts said that in this case, there was no indication by Ragonesi & Company Limited of which clause from the Tender Document had to be modified. When it comes to the price, there were articles within the Tender Document, which allow some flexibility.

If one had to check what the Public Procurement Regulations say on contract modifications, legally these can be done if the Tender was prepared for them as Dr Agius had testified previously under oath. All necessary duties were being considered and therefore there is nothing which is precluding the Appellants.

Dr Christopher Vella, the Legal Representative for the Water Services Corporation referred to Article 262 (c) of the Public Procurement Regulations issued on 28 October 2016 which stated,

*“to remove discriminatory technical, economic or financial specifications which are present in the call for competition, in the contract documents, in clarification notes or in any other document relating to the contract award procedure”*

Ragonesi & Company Ltd did not indicate which clause in the current Tender Document was a discriminatory but raised point on the previous Tender which does not fall under the Public Contracts Review Board’s remit.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board said that the Appellants had every right to raise their pre-contractual concerns.

Dr Joseph Camilleri, the Legal Representative for Ragonesi & Company Limited concluded that they were not requesting the Water Services Corporation to remove any clause from the Tender Document but to add the points raised.

At this stage, the Public Hearing was adjourned to Tuesday 26 September 2017 at 09:00 wherein the Public Contracts Review Board will transmit the decision taken for this Objection verbally and then distribute a hard copy of the same to all parties concerned.

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**This Board,**

**Having noted this Pre-Contractual Objection filed by Ragonesi & Company Limited (herein after referred to as the Appellant) on 4 August 2017, refers to the Contentions made by the latter with regards to the Tender of Reference CT 2014/2017 listed as Case No 1081 in the records of the Public Contracts Review Board, issued by the Water Services Corporation (herein after referred to as the Contracting Authority).**

**Appearing for the Appellant: Dr Joseph Camilleri**

**Dr Matthew Cutajar**

**Appearing for the Contracting Authority: Dr Franco Agius**

**Dr Christopher Mizzi**

**Dr Christopher Vella**

**Whereby, the Appellant contends that:**

- a) **Their main Contention is that this Tender consists of the Procurement of Iron Ductile Pipes, which if imported from outside the European Union, will carry a tariff of 9% representing “*Anti Dumping and Counter Fading Duties*”. In this regard, Ragonesi and Company Limited maintains that this tariff should be applied and properly denoted in the Tender Dossier, so that due consideration is given to the inclusion of this charge by the Contracting Authority in its Evaluation Process. As at present, the Tender Dossier does not give an indication that such Tariff is to be included separately in the Financial Bid Form.**

**This Board also noted the Contracting Authority’s “*Letter of Reply*” dated 16 August 2017 and its verbal submissions during the Public Hearing held on 12 September 2017, in that:**

**a) The Water Services Corporation contends that the Appellant's Concern does not refer to any particular proviso in the Tender Dossier which was prejudicing the Appellants in any way. However, as stated in the Financial Bid Form, the Contracting Authority maintains that it is clearly stated that all prices must include all Taxes/Charges, other duties and discounts but exclusive of VAT.**

**This same Board also noted the Testimonies of the witness, which were duly summoned by Ragonesi & Company Limited, namely:**

- 1. Mr Jonathan Scerri;**
- 2. Dr Franco Agius;**
- 3. Mr Mark Cassar Parnis**

**This Board has also taken note of the documents submitted by the Water Services Corporation which consisted of the Financial Bid as presented in the Tender Document**

**This Board, after having considered the merits of this case, arrived at the following conclusions:**

- 1. This Board, after having examined the Tender Dossier and other relative Documentation and after having heard the submissions made by the parties concerned opines that this Pre-Contractual Concern relates to the Tariff being imposed by the European Union on imports of “*Tubes and Pipes of Ductile Cast Iron originating in India, better referred to as ‘Anti-Dumping Duty’*”**

**The main objective of this directive is to restore fair trade conditions on the European Union market and to enable EU Producers to participate on a Fair and Level Playing Field with producers outside the EU so that the imposition of this Tariff would be in the interest of the European Union industry.**

**In this particular case, this Board noted that Ragonesi and Company Limited’s concern was that, since in a previous similar Tender suspicions arose as to whether such a Tariff was considered by the Contracting Authority, in awarding the Tender. At this stage, one has to bear in mind that despite the fact that the Tender was awarded in July 2015, while such a directive was in force, this particular concern persists in this Tender. In this regard, this Board can only consider the Appellant’s concern with regards to this**

**Tender. However, it is amply clear that such a tariff has to be included, as at today.**

**This Board justifiably refers to the Financial Bid Form, precisely at the section Breakdown of Costs, wherein it is clearly indicated that the Unit Cost and the Total Cost must include taxes, charges and other duties. In this regard, this Board opines that such a mandatory condition in the Tender Dossier, does provide for all imposed duties/tariffs to be included in the price.**

**However, in this regard, this same board recommends that since the “*Anti Dumping Tariff*”, is a specific levy on imports from outside the European Union, perhaps more emphasis should be given by the Contracting Authority to ensure that such a tariff is included in the price for imports from outside the European Union.**

**At the same instance, this Board opines that it is the duty and obligation of the Evaluation Board to ensure that such a Tariff has been included in the quoted price of such imports, during the evaluation process.**

**This Board would also like to confirm that there exist no clauses or provisos in the Tender Dossier which prejudices this inclusion of this Tariff or that there is a lack of fair competition and Level Playing Field.**

**In view of the above, this Board:**

- i) Whilst acknowledging Ragonesi & Company Limited's concern, this same Board does not find any contradictory clause or proviso which hinders or precludes the inclusion of the "*Anti-Dumping*" Tariff;**
- ii) Recommends that, through a clarification note, the Water Services Corporation provides a clear condition stating that:**

***"Prices of imports from outside the European Union are to include the "*Anti-Dumping Tariff Rate, in their quoted price*".***

- iii) Recommends that the Tendering Process is to be continued.**

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Carmel Esposito  
Member

*26 September 2017*