

THE TAKEOVER PANEL

OFFERS BY
ST DAVID CAPITAL PLC ("SDC")
AND
WPD LIMITED ("WPD")
FOR
HYDER PLC ("HYDER")

The Panel met on 15 August to hear an appeal by SDC against the Executive's ruling that WPD should be allowed to proceed to announce and post an increased offer of 365p per share. The 365p per share bid was the only sealed bid submitted by 1.00 p.m. on 11 August 2000 (Day 46 of the offer timetable) under the sealed bids procedure previously announced in Panel Statement 2000/10. This appeal arose after WPD's revised offer had failed to be announced by 4.30 p.m., as specified in the sealed bids procedure.

SDC is advised by UBS Warburg ("Warburgs"). WPD is advised by Schroder Salomon Smith Barney ("SSSB"). JP Morgan and Dresdner Kleinwort Benson ("DKB") are joint Rule 3 advisers to the Hyder board.

Background to the competitive situation

On 28 March Hyder made an announcement that it was in discussions which might lead to an offer. On 18 April SDC (a company formed by Nomura International's Principal Finance Group) announced a recommended cash offer of 260p per Hyder share. SDC's offer document was posted on 28 April.

On 30 April WPD announced that it was considering making a competing offer for Hyder. On 31 May WPD announced a cash offer of 300p per share. WPD's offer

document was posted on 26 June. This reset the Code timetable for the purposes of both offers.

The SDC offer was subject to clearance by the Secretary of State under the Fair Trading Act. Clearance was obtained on 7 June. The WPD offer was subject to regulatory clearance by the European Commission and in the UK. As part of its proposals, WPD had entered into arrangements with United Utilities Plc ("UU") under which UU would purchase certain businesses of Hyder and provide operation and maintenance services to Dwr Cymru, Hyder's water utility business. WPD's offer was conditional on the UU arrangements not constituting a water merger under the Water Industry Act.

Concerns that the WPD offer might not proceed due to regulatory uncertainties meant that the Hyder board did not initially feel able to recommend WPD's offer.

On 1 August (Day 36) SDC announced an increased cash offer of 320p. The Hyder board recommended SDC's increased offer. On the same day WPD announced an increased cash offer of 340p. On the following day (2 August), the Secretary of State announced his decision that the UU arrangements did not constitute a water merger. This removed the last material regulatory uncertainty affecting WPD's offer. The Hyder board recommended WPD's 340p offer on 7 August.

On 9 August (Day 44) SDC announced an increased cash offer of 360p. By this time, the parties were in discussion with the Executive concerning the sealed bids procedure as described below. The sealed bids procedure was announced on 10 August (Day 45) at which time SDC's 360p offer was the highest bid.

Background to the sealed bids procedure

All parties agreed that the competitive bid procedure should, if possible, be brought to a conclusion on Day 46 (11 August).

Under the normal Code timetable, Day 46 is the last day on which an offeror is permitted to increase its offer. Normally, and in the absence of a sealed bids procedure, any revised offer document would need to be posted by midnight on Day 46 and, accordingly, would need to be prepared and printed ahead of this time, in readiness for posting.

Following the approach in previous cases involving competing cash offers, the Executive had discussed with all the parties the practical issues which could arise at Day 46. These discussions had commenced around Day 37 (2 August) and all parties had agreed in principle that there should be a sealed bid procedure and the desirability of achieving finality and certainty for Hyder and its shareholders on Day 46.

There were differing views concerning the respective merits of fixed and formula bids. Formula bids allow each bidder to bid a variable amount (up to its own stipulated maximum) over and above the other party's offer. A similar difference of view on the question of fixed and formula bids had been the subject of a previous appeal to the full Panel in 1998 in connection with competing offers for The Energy Group Plc ("Energy Group"). In that case, the full Panel had ruled that bids, both formula and fixed, should be permitted as announced at the time in Panel Statement 1998/8.

By 9 August (Day 44) all parties had accepted the Executive's ruling that bids, both formula and fixed, should be permitted following the approach in the Energy Group case. The Executive was aware that neither SDC nor Hyder was in favour of formula bids. No appeal was made against the Executive's ruling.

Procedures for the sealed bids

As part of the process leading to implementation of the sealed bids procedure, formal rules and procedures (the "Sealed Bid Procedures") were settled between the parties and the Executive.

The following stipulations included in the Sealed Bids Procedures are of principal relevance to this appeal:

- "No new or revised offer for Hyder may be announced by either SDC or WPD after 4.30 p.m. on 10 August, except in accordance with the following sealed bids procedure or with the permission of the Panel, which will only be given in wholly exceptional circumstances."
- "Each competing offeror must lodge its sealed bid, if any, with the Panel Executive by hand not later than 1.00 p.m. on 11 August. No further revisions will be permitted thereafter. . . ."
- "Any sealed bid will not be capable of withdrawal."
- "A sealed bid must be submitted on the prescribed form together with a Rule 2.5 announcement in terms (other than price) reviewed in advance by the Panel and the Rule 3 advisers. . . ."
- "The bid may be at a fixed or at a formula price."
- "The Panel Executive will, as soon as practicable, having taken account of the effect of any formula bids, confirm to each offeror whether it is the higher or the lower offeror and the amount of its bid. The Panel Executive will also inform the Rule 3 advisers of the level at which the higher offeror will be required to announce the final offer. The higher offeror must announce its final offer by 4.30 p.m. on Friday 11 August or if later one hour after the Panel Executive notifies that bidder that it is the higher bidder. . . ."
- "The final day for posting any increased offer will be Wednesday 16 August and Day 60 will be Wednesday 30 August."

Events prior to 4.30 p.m. on Day 46 (11 August)

On 11 August WPD (but not SDC) submitted a sealed bid before the 1.00 p.m. deadline set by the Sealed Bid Procedures. WPD was notified by the Executive at approximately 1.20 p.m. that it was the highest bidder at a price of 365p and accordingly should proceed to announce its offer.

Ahead of the deadline for the submission of sealed bids, the Executive had received and reviewed the form of announcement proposed to be issued by WPD in the event that WPD were to be the higher offeror. A form of announcement by SDC had similarly been reviewed by the Executive. The form of this announcement (the "Draft Announcement") accompanied WPD's sealed bid as required under the Sealed Bid Procedures.

Shortly after 3.00 p.m. on the afternoon of 11 August, the Executive was notified by SSSB that WPD required to make certain changes to the Draft Announcement. These changes related to new arrangements agreed between WPD and UU, and did not affect the terms of the offer. However, WPD's Draft Announcement contained a statement to the effect that its arrangement with UU remained as previously announced. This statement had by then become incorrect. Moreover, the Draft Announcement had been prepared in the form of a recommended increased offer announcement, and the announcement, and all changes, therefore required formal approval from the Hyder board.

The new arrangements between WPD and UU were only documented between 2.30 p.m. and 3.30 p.m. on 11 August. The revised wording for the relevant section of the Draft Announcement was first transmitted by SSSB (for WPD) to DKB (for Hyder) at around 4.00 p.m. This revised announcement was ready for issue to the Stock Exchange shortly after 4.00 p.m. but, following discussion between SSSB and DKB, its release was embargoed pending formal confirmation by DKB that the changes were satisfactory to Hyder.

At approximately 4.15 p.m., the Executive communicated with SSSB to chase the announcement. At this point the Executive emphasised that an announcement should go out immediately. The omission of the section concerning the new arrangements with UU was discussed and, as a result, a further announcement was prepared by SSSB. However, the release of this announcement was also held up pending DKB's confirmation that it was satisfactory to Hyder. Accordingly no announcement was issued before 4.30 p.m.

Events after 4.30 p.m. on Day 46 (11 August)

DKB confirmed Hyder's approval to an announcement soon after 4.30 p.m. The approved announcement was received by the Company Announcements Office at 4.52 p.m. but, for the reasons following, was not released.

At 4.35 p.m. the Executive received a call from Warburgs asserting that, since WPD had not announced its offer by 4.30 p.m., it had missed the deadline. Warburgs requested that no announcement on behalf of WPD be released. The Executive notified SSSB of Warburgs' objection.

Pending resolution of Warburgs' objection, it was not appropriate for WPD's announcement to be issued, notwithstanding that DKB had subsequently communicated the Hyder board's approval to the revised announcement.

During the late afternoon and evening of 11 August, the Executive invited and heard representations from all parties. During the course of this process, Warburgs (for SDC) reiterated their view that WPD should be prohibited from proceeding with its revised offer by reason of its failure to meet the 4.30 p.m. deadline for an announcement. As a result, Warburgs contended that the existing offer by SDC at 360p per share was the highest offer, and was the only offer which should be permitted to proceed.

In discussions with the Executive on the evening of 11 August, Warburgs proposed that SDC would be prepared to increase its own offer to 365p (notwithstanding that

SDC had not made any increased offer under the sealed bids procedure) provided that the Executive ruled in SDC's favour.

Having heard representations from all parties, the Executive ruled that WPD should not be prevented from proceeding with its revised offer despite the delay in the announcement. Warburgs gave formal notice to the Executive of an appeal against the Executive's ruling. Following notification by Warburgs of this appeal, the Executive issued Panel Statement 2000/11 confirming the pending appeal.

Although, as set out above, SDC had been opposed to the inclusion of a formula price (as well as a fixed price) procedure, and had contended that a fixed price procedure alone was appropriate, nevertheless SDC had accepted the proposed sealed bid procedure (including both a formula and a fixed price procedure). Warburgs had confirmed that SDC would not appeal this point. SDC, however, having taken part in setting up the sealed bid procedure, took no further part in the bidding on Day 46 until several minutes after 4.30 p.m.

SDC confirmed at the hearing that its decision not to submit a sealed bid at 1.00 p.m. was based on commercial considerations. As a result, SDC *prima facie* lost the auction.

Substance of the appeal: rulings sought by SDC

SDC sought a ruling that WPD should be prohibited from announcing any new or revised offer. In support of its case, SDC made the following proposals:

- 1 SDC confirmed its preparedness to increase its offer to 365p if the Panel were to prohibit WPD from announcing any new or revised offer.
- 2 Alternatively, SDC proposed that the Sealed Bid Procedure should be re-run, but on a basis under which only fixed price offers (but not formula offers) would be allowed. SDC proposed that any such offer should be equal to or

greater than 365p per share and on this basis committed to submit a sealed bid of more than 365p.

Decision

The central issue which the Panel therefore had to resolve was the effect of WPD's failure to announce its revised bid by 4.30 p.m. as required by the Sealed Bid Procedures. It was contended, on behalf of SDC, that the failure resulted in the revised bid being invalidated. WPD, however, contended that it did not have this effect.

It was, in the view of the Panel, unfortunate that the revised offer was not announced, as apparently it could have been, before 4.30 p.m.; and it appears to the Panel that the financial adviser to WPD was not blameless for this failure to meet the deadline. Nevertheless the Panel is of the view that, whereas the 1.00 p.m. deadline had to be strictly applied, the 4.30 p.m. deadline was a deadline of considerably lesser significance, and that it did not call for the same degree of strict application. On the facts arising in this case, it was unlikely that any prejudice would have been caused to any party by the delay between 4.30 p.m. and 4.52 p.m. when the announcement by WPD was finally received by the Company Announcements Office.

One of the main principles of the Code is that primary regard should be had to the underlying purposes involved; and in the view of the Panel that principle applies to a sealed bid procedure as it applies to the Code. Part of that purpose is to ensure that parties to a takeover do not have their legitimate expectations frustrated by a technical application of the Code (or of the sealed bid procedure). In the circumstances of this case it appears to the Panel that it would be unfair, by reason of what happened, to interpret the procedure so as to invalidate WPD's improved offer.

Accordingly, the Panel is of the view that WPD should now proceed as soon as practicable to announce and post its revised bid and that, in accordance with the terms of the Sealed Bid Procedures, SDC is prohibited from revising its existing 360p offer. The dates on which the Code days will fall will need to be re-considered. For

example, the final day for posting the revised offer will now have to be later than Wednesday 16 August (as provided for in the Sealed Bid Procedures); and other subsequent dates will also need to be re-considered. This should now be undertaken by the Executive in consultation with WPD and Hyder and their respective advisers.

Accordingly it is in these circumstances that this appeal is dismissed.

18 August 2000