

PUBLIC CONTRACTS REVIEW BOARD

Case 1672 – WSC/T/39/2021 – Tender for Supply, Delivery of Pipe Locators to the Water Services Corporation

14th January 2022

The Board,

Having noted the letter of objection filed by Ing Stephen Buttigieg acting for and on behalf of Test and Measurement Instrumentation Ltd, (hereinafter referred to as the appellant) filed on the 25th October 2021;

Having also noted the letter of reply filed by Dr Sean Paul Micallef acting for the Water Services Corporation (hereinafter referred to as the Contracting Authority) filed on the 4th November 2021;

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by representatives of the parties;

Having noted and evaluated the minutes of the Board sitting of the 11th January 2022 hereunder-reproduced;

Minutes

Case 1672 – WSC/T/39/2021 – Tender for the Supply and Delivery of Pipe Locators to the Water Services Corporation

The tender was issued on the 18th March 2021 and the closing date was the 22nd April 2021. The value of the tender, excluding VAT, was € 26,000.

On the 25th October 2021 Testing and Measurement Instrumentation Ltd filed an appeal against the Water Services Corporation as the Contracting Authority objecting to their disqualification on the grounds that their bid was considered to be administratively not compliant.

A deposit of € 400 was paid.

There were six (6) bidders.

On the 11th January 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Testing and Measurement Instrumentation Ltd

Dr Franco Galea

Legal Representative

Engineer Stephen Buttigieg	Representative
Mr Joerg Schubert	Representative

Contracting Authority – Water Services Corporation

Dr Sean Micallef	Legal Representative
Engineer Stephen Galea St John	Member Evaluation Committee
Engineer Tonio Muscat	Member Evaluation Committee
Engineer Jacques Caruana	Member Evaluation Committee
Engineer Shawn Agius	Member Evaluation Committee
Ms Christine Scicluna	Representative

Preferred Bidder – Reactilab Ltd

Dr John Gauci	Legal Representative
Mr Ramon Mizzi	Representative

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties. He noted that since this was a virtual meeting all the parties agreed to treat it as a normal hearing of the Board in line with Article 89 of the Public Procurement Regulations. He then invited submissions.

Dr Franco Galea Legal Representative for the Appellant stated that the point at issue was the disqualification based on an ISO Certificate which stated 'assembly' rather than 'manufacture'. Suppliers had confirmed that the ISO includes manufacturing. If there was any doubt the Evaluation Committee should have sought technical advice on this point. Reference was made to a similar case (AIB Brokers vs Transport Malta) where it was held that a bid should not be disqualified before clarifying submitted documents.

Dr Sean Micallef Legal Representative for Water Services Corporation said that the Evaluation Committee have to evaluate at face value. The word assembly and manufacture were not the same and evaluation had to be precise – if the bidder is claiming that he offered equivalence then the bidder had to prove it. Providing proof once the evaluation was completed is not correct as it puts the Authority at a disadvantage. No proof has been provided that the words have the same meaning or are equivalent.

Dr Galea said that it is presumed that an evaluation committee is composed of competent persons and there was no need to provide or prove equivalence as the ISO Certificate provided this. The evaluators could have asked for expert advice if they did not have the necessary expertise themselves. This was not a case of accepting things at face value.

Dr Micallef said that the Appellant should not confuse the legal argument with the role of the Evaluation Committee which was bound by self-limitation principles. It is up to the bidder to provide an explanation if something in the offer does not comply with the tender terms.

Dr John Gauci Legal Representative for Reactilab Ltd said that the distinction between manufacture and assembly is clear and if the Appellant is challenging the wording on the tender then remedies were available prior to submission of bids. Assumptions and expectations were not part of the evaluation process and the Authority followed the correct procedure in not accepting the certificate.

Dr Galea concluded by stating that the evaluators are not robots and should have used reasonableness.

The Chairman thanked the parties for their submissions and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 11th January 2022.

Having noted the objection filed by Test and Measurement Instrumentation Ltd (hereinafter referred to as the Appellant) on 25th October 2021, refers to the claims made by the same Appellant with regards to the tender of reference WSC/T/39/2021 as case No. 1672 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Franco Galea

Appearing for the Contracting Authority: Dr Sean Paul Micallef

Whereby, the Appellant contends that:

- a) The Appellant is offering pipe locators from Vivax Metrotech which is a U.S. corporation with a global sales network, European Sales and Service Centre in Germany and factory in China amongst others. The WSC is already in possession of equipment from Vivax Metrotech which was procured via public procurement.
- b) The Appellant has submitted the requested ISO 9001:2015 certificate for the production plant and this was issued by SGS (UK) with number CN 07/00475. The veracity and the scope of this certificate can be verified with SGS (UK) themselves or through their website. This certificate covers Vivax Metrotech for the “design and assembly”.

- c) The WSC adjudication board chose to discard the submitted certificate as it did not contain ad verbatim the word “manufacture” and considered that “assembly” is not equivalent to manufacture. This interpretation is erroneous. The WSC is itself ISO 9001 2015 certified and could have easily consulted their quality champion to verify such definitions and interpretation. Appellant consulted quality experts from Vivax Metrotech; SGS (UK) , local quality experts who certify companies with ISO 9001 and the terms assemble, manufacture and produce are used interchangeably to cover the same process.

The definition of assembly is:

“An assembly line is a production process whereby the manufacture of a good is a sequence of steps completed in a pre-defined sequence.”

- d) If by manufacture, the WSC is expecting that the pipe locator manufacturer produces everything in house, this is unreasonable and unrealistic to say the least. Today no manufacturer produces everything in house.

This Board also noted the Contracting Authority’s Reasoned Letter of Reply filed on 4th November 2021, its verbal submission during the virtual hearing held on 11th January 2022, in that:

- a) One must appreciate that the TEC is bound to evaluate all offers at face value and adjudicate solely on the information provided without making any assumptions, as otherwise, the same TEC would be acting *ultra vires*. It is being underlined that such action could potentially lead to a violation EU Public Procurement law and of the principles of equal treatment of all bidders, self-limitation, and transparency.
- b) Being bound by such restrictions, the TEC could only evaluate the term “assembly” on its own which, in the same TEC’s interpretation, is not the same as “manufacture”. For the TEC, the difference between “manufacture” and “assembly” is that to manufacture something is to produce things from other materials, usually on a large scale, with tools and either physical labour or machinery, whereas assembly is the “putting together” of previously manufactured items or parts.
- c) As clearly laid out under Section 3 of the Tender Document, if a bidder’s offer contains provisions or data which do not match the tender’s requirements to the letter, it is up to the same bidder to prove that such offer is equivalent to the Contracting Authority’s conditions and thus fully compliant thereto;

Where in his tender document a standard is quoted, it is to be understood that the Contracting Authority will accept equivalent standards. However, it will be the responsibility of the respective bidders to prove that the standards they quoted are equivalent to the standards requested by the Contracting Authority.

- d) Given that the Appellants did not provide any documentation together with their offer showing that “assembly” and “manufacture” can be used interchangeably, the TEC felt legally compelled to disqualify the Appellants' offer.
- e) It is to be noted that this Certification is governed by Note 2. However, a Rectification request regarding this ISO Certificate had already in fact been issued by the TEC as the Appellants had initially failed to upload the same certificate at all. Because of this ‘initial’ Rectification, the TEC could not follow up with a second Rectification request on the same subject as this is strictly prohibited in terms of Guidance Note #2 issued by the Department of Contracts.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties, will now consider Appellant’s grievances.

- a) The Board notes that:
 - i. this whole appeal revolves around the terms ‘assembly’ and ‘manufacture’.
 - ii. A rectification request was made by the Contracting Authority to the Appellant for the eventual submission of the ISO Certificate 9001:2015.
 - iii. The evaluation committee deemed these 2 terms to be distinct and separate and hence deemed the Appellant’s bid as technically non-compliant.
- b) This Board agrees with the argument brought forward by the Contracting Authority that if a rectification request was already made on a specific tender requirement, then the evaluation committee would be prohibited to request further rectifications on this same item. This as per Tender Dossier Note to Clause 5 *“Requests for Clarifications and/or Rectifications concerning a previous request dealing with the same shortcoming shall not be entertained.”*
- c) However, this Board opines that this appeal rests more on the interpretation, of the evaluation committee, given to the term ‘assembly’ as provided in the ISO Certificate as submitted by the Appellant company.
- d) This Board makes reference to the English Dictionary ‘Collins’ whereby one of the synonyms for the word ‘manufacture’ is precisely ‘assemble’.
- e) The Board opines that the ISO certificate as provided by the appellant company does in fact cover the requirements of the tender dossier and that the evaluation committee did in fact breach the principle of self-limitation when it made its own assumptions on the meaning of the phrase ‘assembly’ without proper research which was so readily available in an English language dictionary. The Board’s opinion is further substantiated by its agreement with the argument as brought forward by the Appellant that in today’s world it is inconceivable and unrealistic to assume that manufacturers would produce everything in house.

Therefore, this Board upholds Appellant's grievances.

The Board,

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) To uphold the Appellant's concerns and grievances;
- b) To cancel the 'Notice of Award' letter dated 12th October 2021;
- c) To cancel the Letters of Rejection dated 12th October 2021 sent to Test and Measurement Instrumentation Ltd;
- d) To order the contracting authority to re-evaluate the bid received from Test and Measurement Instrumentation Ltd in the tender through a newly constituted Evaluation Committee composed of members which were not involved in the original Evaluation Committee, whilst also taking into consideration this Board's findings;
- e) after taking all due consideration of the circumstances and outcome of this Letter of Objection, directs that the deposit be refunded to the Appellant.

Mr Kenneth Swain
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member