

PUBLIC CONTRACTS REVIEW BOARD

Case 1716 – WSC/T/126/2020 – Tender for the Supply and Delivery of 600mm diameter Manhole Covers and Frames for the Water Services Corporation

The tender was issued on the 21st January 2021 and the closing date was the 2nd March 2021. The value of the tender, excluding VAT, was € 380,987.

On the 10th March 2022 Ragonesi & Co Ltd filed an appeal against the Water Services Corporation as the Contracting Authority objecting to their disqualification on the grounds that their bid was deemed to be not compliant.

A deposit of € 1,900 was paid.

There were twenty (20) bids.

On the 28th April 2022 the Public Contracts Review Board composed of Dr Charles Cassar as Chairman, Mr Lawrence Ancilleri and Mr Richard Matrenza as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Ragonesi & Co Ltd

Dr Joseph Camilleri	Legal Representative
Ms Raffaella Fedeli	Representative
Mr Roberto Belli	Representative
Mr Roberto Ragonesi	Representative

Contracting Authority – Water Services Corporation

Dr Sean Micallef	Legal Representative
Eng Anthony Muscat	Representative
Eng Stefan Riolo	Representative
Perit Beverley Costa	Representative
Eng Joseph Abela	Representative
Ms Christine Scicluna	Representative

Dr Charles Cassar Substitute 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 Joseph Camilleri Legal Representative for Ragonesi & Co Ltd said that this was not the first appeal related to this call as the Board has already dealt with it in case no 1658. The previous objections are being repeated as they are relevant to this Case. The first offer was disqualified for two reasons – the angle of opening of the cover and the lack of glue on the gasket. An identical product to the one in dispute had been provided with no issues on quality, and one must query why the self-same product is found to be non-compliant and how the testing was carried out. At the previous hearing the Board ordered the re-evaluation of the tender but the bid has again been rejected for identical reasons. Appellant requested further details regarding the tests but since no reply was received this appeal which repeats some of the previous grounds followed. Appellant wishes to question witnesses regarding the tests carried out.

Dr Sean Paul Micallef Legal Representative for the Water Services Corporation stated that any reference to previous tender cannot be considered. The Corporation was not aware that, apart from the test report, more details were required. The sample used was the same one as previously tested otherwise that would have amounted to a new offer. Different persons carried out the second tests which were approved by the new Evaluation Committee.

Engineer Anthony Muscat (465162M) called as a witness by Appellant testified on oath that he was a Procurement Manager at the Water Services Corporation and was one of the engineers who had carried out the tests. He was familiar with the terms of the tender but was not in a position to confirm whether the first delivery of manhole covers from Ragonesi was conforming to the tender or not. Tests are carried out at evaluation stage and when samples are received. It is at the discretion of the Evaluation Committee as to whether to ask for samples. On this occasion testers was asked to test two items which were not compliant. The tests were carried out after ascertaining that it was the previous sample that was being tested. From the report, inclusive of photographs, that was submitted it was clear how the tests were carried out. The first test indicated an opening angle of 104.8°. When the cover was pushed further back the angle measured 108.7°; pushed further the lid opened completely and would not stay upright. The measuring instrument used was new and used the first time and was different to the instrument used in the previous test. The instrument was not checked by any third party to check calibration. Witness was fully aware of the budgetary allocation of the tender but said it was quite normal for bids to exceed the recommended figure. It was a matter for the project manager to obtain sanction and funding if the allocation was exceeded.

In reply to a question from Dr Micallef witness confirmed that tests were also carried out on the rubber gasket and it was found that this was just resting on the seating and was not glued.

This was the end of the testimony.

Dr Camilleri said that the contract was well over the budget allocation but there was no mention as to who and why this budget excess was approved – this point was relevant to the exclusion of Appellant's

bid. The test report indicates an opening angle of 108.1° but witness stated that the opening was 108.7° which appears to be the correct reading – this difference is minimal to that required, namely 110°, especially bearing in mind that a new instrument was being used. In view of the fact that Ragonesi had previously supplied this product it was requested that the tests be carried out in their presence as the previous report indicated different conclusions. The PCRB in their decision referred to the matter of the opening angle but the Authority maintain that a fresh evaluation had to be carried out which differs from the Board’s position.

Refund of the deposit is requested immaterial of whatever decision the Board reaches since the appeal is based on the failure of the Authority to provide further documentation to the Appellant. The Corporation claims that the information sought is confidential – Ragonesi simply asked for further details on how the tests were carried out and referred solely to their product. In reply Appellant was given the same reason as the first time around.

Dr Micallef stated that there was a misunderstanding regarding the information sought by Appellant. The discrepancy shown between the written report and the testimony was a simple error. The main issue of the rejection is the angle of the opening of the lid and the lack of glue on the gasket. This case is similar to PCRB Case 1291 where it was stated that the product offered was not what was requested. The Evaluation Committee is not allowed to communicate with bidders except through the EPPS and is not allowed to carry out tests in the presence of bidders. The measurements previously quoted by the manufacturer are not relevant as they were not carried out on the same sample and there is no proof that their equipment was calibrated. This is simply a case where the opening angle was not what was requested and there was no glue on the gasket.

Dr Camilleri said that the Board had not previously raised the issue of the glue. There should not be an issue on the tests carried out by the manufacturer and it would not be relevant that fresh samples are asked for when one could rely on previous products provided.

Dr Micallef pointed out that the Contracting Authority does not restrict bidders in supplying fresh samples should they so wish.

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

End of Minutes

Decision

This Board, having noted this objection filed by Ragonesi & Co Ltd., (herein after referred to as appellant), on the 10th March 2022. The objection refers to the claims made by the same appellant regarding the tender listed as case No.1716 in the records of the Public Contracts Review Board against the Water Services Corporation (herein after referred to as the Contracting Authority) and its verbal submissions during the hearing on 3rd April 2022.

Whereby, the appellant's arguments are the following:

A. That both the previous tender (WSC/T/11/2020) and the one in question (WSC/T/126/2020) have identical technical specifications, therefore if the manholes were found to be technically compliant during the previous evaluation, therefore the current one, must also be compliant with this call.

B. That, considering that hundreds of identical manhole covers were accepted by the WSC it is inconceivable how the sample was found not acceptable

C. That WSC failed to follow correctly the recommendations given by PCRB in the latter's decision of 01/12/2021 to retest the sample using professional measuring instruments since the issue of the gasket was not mentioned by them.

D. That WSC did not provide information on how the re-evaluation of the sample was carried out.

E. That the budget allocated to this contract should be divulged by the Contracting Authority in view of the more expensive offer accepted.

F. That the Appellant should at least be refunded the deposit since objection was "partly based on the failure of WSC to provide documentation which was reasonably required by Appellant to make a better assessment of whether or not to appeal."

The Board also noted the letter of reply of the 24th March 2022 by the contracting authority and the evidence of Engineer Anthony Muscat.

- A. The fact that WSC accepted to use an item supplied through an earlier tender as a sample for the current tender does not automatically imply that the sample is compliant. Each sample must be tested without considering past results, even if similar products were deemed acceptable in previous calls having identical specifications

B. As is amply evident in the report - which was conducted by WSC Engineers which were not involved in the original TEC as demanded by PCRB - the same defects have been identified; namely that;

- i) the manhole cover does not hold upright at a 110° angle.
- ii) the gasket is not glued to the cover frame to absorb traffic load shocks.

C. WSC categorically denies failing to abide by PCRB's directions to conduct fresh tests of the sample using professional measuring equipment since they were ordered to re-evaluate the Appellant's total offer.

D. Article 14 of General Rules Governing Tenders forbids any communication between the evaluation committee and the bidder and does not allow for the presence of the bidder during the testing. In addition, Section 2, Article 4 of the Tender Document specifies that, "Any communications at tendering stage shall be made through the online tendering system." Therefore, no communication by any means other than those made through the online tendering system may be addressed by the Contracting Authority.

E. Section 1, Clause 1.3 of the Tender Document highlights the following:

"The purpose of this value shall be the guidance of prospective bidders when submitting their offer and is not to be considered as a binding capping price.

Therefore, the published Estimated Procurement Value is not restrictive and final on the Contracting Authority. Economic Operators are free to submit financial offers above or below the Estimated Procurement Value. However, the Contracting Authority reserves the right to accept or reject Financial Offers exceeding the Estimated Procurement Value."

F. The claim that deposit should be refunded on the basis that the need to file this objection was "partly based on the failure of WSC to provide documentation which was reasonably required by Appellant to make a better assessment of whether or not to appeal" is being deemed unreasonable by the Contracting Authority. As explained above, the Authority has no obligation to divulge details of the evaluation process to any of the bidders.

In conclusion after the Board considered the arguments and documentation from both parties namely the appellant and the contracting authority, it concludes that the Appellant's grievances are not upheld.

The Board concludes and decides that:

- a) Does not uphold the Appellant's Letter of objection.
- b) Upholds the Contracting Authority's decision.
- c) Directs that the deposit paid by the Appellant not to be reimbursed

9th May 2022

Dr Charles Cassar
Chairperson

Mr Lawrence Ancilleri
Member

Mr Richard Matrenza
Member