

# **PUBLIC CONTRACTS REVIEW BOARD**

## **Case 1722 – CT 2185/2021 – Works – Consolidation of Existing Network for Improved Water Supply within Hamrun Area**

**16<sup>th</sup> May 2022**

The Board,

Having noted the letter of objection filed by Dr Alexander Schembri on behalf of Thake Desira Advocates acting for and on behalf of Northwind Investments Ltd, (hereinafter referred to as the appellant) filed on the 17<sup>th</sup> March 2022;

Having also noted the letter of reply filed by Dr Lara Borg, Dr John Gauci and Dr Ruth Ellul acting for Water Services Corporation (hereinafter referred to as the Contracting Authority) filed on the 25<sup>th</sup> March 2022;

Having heard and evaluated the testimony of the witness Perit Stuart Azzopardi (Representative of Northwind Investments Ltd Ltd) as summoned by Dr Alexander Schembri acting for of Northwind Investments Ltd;

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 12<sup>th</sup> May 2022 hereunder-reproduced;

### **Minutes**

#### **Case 1722 – CT 2185/2021 – Consolidation of Existing Network for Improved Water Supply within Hamrun Area**

The tender was issued on the 4<sup>th</sup> November 2021 and the closing date was the 9<sup>th</sup> December 2021. The value of the tender, excluding VAT, was € 397,610.

On the 17<sup>th</sup> March 2022 Northwind Investments 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 technically not compliant.

A deposit of € 1,989 was paid.

There were two (2) bids.

On the 12<sup>th</sup> May 2022 the Public Contracts Review Board composed of Mr Kenneth Swain 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 – Northwind Investments Ltd**

Dr Alexander Schembri	Legal Representative
Perit Stuart Azzopardi	Representative

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

Dr John Gauci	Legal Representative
Ms Beverley Costa	Chairperson Evaluation Committee

### **Preferred Bidder – Dimbros Ltd**

Dr Natalino Caruana De Brincat	Legal Representative
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### **Department of Contracts**

Dr Mark Anthony Debono	Legal Representative
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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 Alexander Schembri Legal Representative for Northwind Investments Ltd said that the appeal hinged on the interpretation of clauses regarding the list of employees. Clause 9 of the tender dossier states that the list of employees is to be submitted three weeks from the signing of the contract. Conversely, the Contracting Authority claim that Clause 4.6 requests details of key experts and other staff proposed for the execution of the contract. Appellant claims that that clause applies only for those particular staff and not for employees actually performing the contract. If, as the Authority maintains, Clause 4.6 applies to the list of employees then there is a conflict in the tender.

Dr John Gauci Legal Representative for the Water Services Corporation said that the tender is quite clear – it is asking for a list of staff and employees – if this was not clear to the Appellant it should have been clarified. Other bidders understood the requirement correctly and supplied both lists. There was no contradiction in the tender. In the submission Appellant referred to the list of employees but did not supply it. There was no obligation on the Authority to clarify this point as the tender is clear – in fact, it would have infringed the principles of self-limitation and level playing field if it had.

Dr Natalino Caruana De Brincat Legal Representative for Dimbros Ltd said that the preferred bidder associates itself with the views of the Authority. Appellant had not sought any clarification on this point. In a tender bid all information requested had to be submitted.

Dr Schembri stated that Appellant relied on Clause 11.9 which stated submission at contract time and it was up to the Evaluation Committee to request clarification why it had not been submitted.

Dr Gauci pointed out that rectification was not possible on a missing document and the onus is on the tenderer to provide it in the first place. This was a Note 3 matter.

Perit Stuart Azzopardi (91173M) called as a witness by Appellant testified on oath that he qualified as an Architect in 1995, has experience of working on major projects and completed the submission of the tender document. Witness went into detail about the difficulty of adhering with the schedule of works requirements and the difficulty of listing workers name now when they may not still be employed by the bidder in a few months' time. One can see all sorts of anomalies arising due to the high turnover of employees in the case of contractors.

This concluded the testimony.

Dr Schembri re-iterated that anomalies would arise if a listed employee was not still employed at the time of the contract. In any case why should the name of employees be divulged at the tendering stage? Clause 11.9 is the correct way of interpreting the tender.

Dr Caruana De Brincat said that it was only the Appellant who made the decision that the listing of the names was not necessary.

Dr Gauci concluded by saying that grievances had been introduced at this stage which were not part of the original appeal and Appellant was trying to justify his shortcomings. The list was required by the Authority to ensure that the bidder has the necessary personnel to carry out the contract. The list was not provided and therefore the disqualification should be confirmed.

There being no further submissions the Chairman thanked the parties and declared the hearing closed.

End of Minutes

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**Hereby resolves:**

The Board refers to the minutes of the Board sitting of the 12<sup>th</sup> May 2022.

Having noted the objection filed by Northwind Investments Ltd (hereinafter referred to as the Appellant) on 17<sup>th</sup> March 2022, refers to the claims made by the same Appellant with regards to the tender of reference CT 2185/2021 listed as case No. 1722 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Alexander Schembri

Appearing for the Contracting Authority: Dr John Gauci

Whereby, the Appellant contends that:

- a) The Contracting Authority's conclusion, on which it based its decision, that bidders had to provide an employee list concurrently with the submission of the Programme of Works, is factually incorrect;

A quick reference to section 11.9 of the tender document clearly shows that: BASIC CONTRACT DOCUMENTS TO BE APPROVED BY THE PROJECT LEADER" includes "List of Employees", and that the "Date of Submittal" of such list of employees was "3 weeks from Contract signing"

Evidently, therefore, bidders, including Appellant, were not obliged to submit their list of employees concurrently with the Programme of Works - as stated by the Contracting Authority in its decision since the tender document itself stipulated that the said list was to be submitted within three weeks from signing of the contract by the preferred bidder:

Evidently, the name of each employee is, at this stage, immaterial; hence the requirement of submitting such information only once the relative contract is signed by the preferred bidder, as stated in the tender document itself;

- b) Without prejudice to the above, it must be stressed that, at law, the technical criteria for eliminating a bid must be objective and cannot be rooted in any form of subjectivity;

A distinction thus has to be made between a failure to submit a document - such as, in this case, the Programme of Works or the Method Statement, both of which were submitted by Appellant – and submitting an unsatisfactory document;

A failure to submit a document is an objective fact that could lead to the elimination of a bidder for lack of administrative/technical compliance;

However, whether the contents of a document are satisfactory or not, and to what extent they may be deemed to be satisfactory, is a subjective value judgment that cannot lead to the elimination of a bidder;

Therefore, on an entirely without prejudice basis to that stated by Appellant under its first grievance abovestated, and only in the event that there should be - for any reason, which is not conceivable to Appellant - any doubt as to whether the employee list should have been submitted concurrently

with the Programme of Works or not, the Contracting Authority should have sought the relevant clarification or rectification from Appellant, and this within the parameters of note 2. to clause 5 of the tender document itself, which clearly states that:

*"Tenderers will be requested to either clarify/ rectify any incorrect and/ or incomplete documentation, and/ or submit any missing documents within five (5) working days from notification."*

In Appellant's humble opinion, notwithstanding the fact that no such clarification or rectification was required in this case - since the tender document makes it crystal clear that the employee list was only to be provided by the preferred bidder within three (3) weeks from the date of signing of the contract - the Contracting Authority, should have, if in doubt, requested such clarification or rectification from Appellant, which it failed to do;

- c) Without prejudice to the above, Appellant's offer was the cheapest compliant offer which was submitted by bidders in this case, and therefore Appellant should have been awarded the tender in caption;

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 25<sup>th</sup> March 2022 and its verbal submission during the virtual hearing held on 12<sup>th</sup> May 2022, in that:

- a) Firstly, WSC makes reference to Section 1, 5 (Selection and Award Requirements) (C) which enlists the specification requirements which must be satisfied for the bidder to be considered eligible for the award of the contract. This section elaborates on the technical offer being requested and specifically indicates the documents to be included in the tenderer's submission. This included but was not limited to *"(b) Graphic Work Schedule to be submitted online through the prescribed Tender Response Format and by using the Tender Preparation Tool provided. Note 3 This shall include graphic work schedule as detailed in Form - Graphic Work Schedule and Programme of Works Declaration as included in same form."*

These specifications are further elaborated upon in Section 3 (Specifications) of the Tender document, where in 4 the Tender document specifically indicates all the requirements with respect to key experts and supporting staff. In 4.6 the following is specifically requested:

*"Details of key experts and other staff proposed for the execution of the contract are to be submitted as per Form marked Key Experts and Programme of Works respectively and are to be submitted online through the prescribed tender response format at tendering stage (tender structure-technical offer)."*

As is amply evident from the quoted sections of the Tender document, details of staff together with the Programme of Works Declaration were specifically, clearly and unequivocally requested.

When one looks at the Programme of Works Declaration submitted by the Appellant, the requirement to submit the Name of Employees is manifestly apparent. Despite such, the Appellant

failed to indicate the employee names being requested while merely making reference to an employee list that it did not submit together with the Tender offer.

Without prejudice to that premised, while the Appellant now contends that in section 11.9, reference is made to a list of employees to be submitted 3 weeks from contract signing, WSC asserts that this in no way removes or diminishes the requirement as clearly and unequivocally specified for in the Tender documents and for the avoidance of doubts explains that it is normal practice for certain documents to be requested again at the actual commencement of works in view of the fact that changes may transpire from the time of bidding to the time the contract is awarded.

One cannot unilaterally opt to ignore the information being requested in the Tender document on the basis that this would also be requested upon contract award stage.

- b) With respect to the second grievance WSC asserts that no subjectivity was exercised in its determination that the Appellant was technically not compliant. As already elaborated upon in the foregoing paragraphs the Appellant was required to submit the Programme of Works Declaration with the information specifically requested therein. The information therein requested with respect to the 'Name of Employees' was simply not provided, as a result of which WSC had no option but to reject the Appellant's bid.
- c) With regards to the third grievance, the Appellant's offer was not compliant as a result of which the Appellant could not be awarded the Tender.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties including the testimony of the witness duly summoned, will now consider Appellant's grievances.

- a) This Board will make reference to the following:
  - i. Tender Dossier – Section 3 – Specification – Paragraph 4.6 - *“Details of key experts and **other staff** proposed for the execution of the contract are to be submitted as per Form marked Key Experts and **Programme of Works** respectively and are to be submitted online through the prescribed tender response format at tendering stage (tender structure-technical offer).”* (bold & underline emphasis added)
  - ii. Tender Dossier – Section – Special Conditions – Paragraph 11.9 – *“after contract award, the Contractor shall be required to prepare the following basic documents for the approval of the Project Leader, (and other Local Authorities) including but not limited to: (4) list of Employee/Workers who will be on site”*
  - iii. Programme of Works Declaration (Note 3) within which a requirement was listed as “Name of Employees”

- b) This Board agrees with the Appellant when it states that this appeal hinges on the interpretation of clauses regarding the list of employees. It also agrees that the list of employees is also required within 3 weeks from contract signing as per Tender Dossier – Section – Special Conditions – Paragraph 11.9. However, it is also this Board’s opinion that such list or rather the ‘name of employees’ was also a requirement of the “Programme of Works Declaration” which is a Note 3 document. Here the Appellant listed “As per employees list” which was not submitted at tendering stage.
- c) Reference is now made to Perit Azzopardi’s testimony under oath where he explained the difficulty of adhering with the schedule of works requirements and the difficulty of listing workers name now when they may still not be employed by the bidder in a few months’ time. This Board notes that such an issue is not within the remit of this appeal, it should have been brought forward to the attention of either the Contracting Authority by way of clarification request or else by way of a Call for Remedies before this Board in accordance with Regulation 262 of the Public Procurement Regulations. In fact, the General Rules Governing Tenders (v. 4.3) states *“The Economic Operator must provide all information and documents required by the provisions of the procurement document. All such documents, without exception, must comply strictly with these conditions and provisions and contain no alterations made by the tenderer.”*

Finally, the Board, does not uphold the Appellant’s grievances.

**The Board,**

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

- a) Does not uphold Appellant’s Letter of Objection and contentions,
- b) Upholds the Contracting Authority’s decision in the recommendation for the award of the tender,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

**Mr Kenneth Swain**  
Chairman

**Mr Lawrence Ancilleri**  
Member

**Mr Richard Matrenza**  
Member