

PUBLIC CONTRACTS REVIEW BOARD

Case 1723 – CT 2189/2021 – Supplies – Supply and Delivery of Pumps and Energy Recovery Devices for the Reverse Osmosis Plants of the Water Services Corporation – Lot 5

16th May 2022

The Board,

Having noted the appeal filed by Dr Ruben Casingena acting for and on behalf of Engineering & Technology Ltd, (hereinafter referred to as the appellant) filed on the 21st March 2022;

Having also noted the letter of reply filed by Dr Lara Borg, Dr John Gauci and Dr Ruth Ellul acting for the Water Services Corporation (hereinafter referred to as the Contracting Authority) filed on the 1st April 2022;

Having heard and evaluated the testimony of the witness Mr Jean Farrugia (Representative of Engineering & Technology Ltd) as summoned by Dr Ruben Casingena acting for of Engineering & Technology Ltd;

Having heard and evaluated the testimony of the witness Mr Castor Criado (Representative of Engineering & Technology Ltd) as summoned by Dr Ruben Casingena acting for of Engineering & Technology Ltd;

Having heard and evaluated the testimony of the witness Ing Ronald Pace (Manager at Water Services Corporation) as summoned by Dr John Gauci acting for the Water Services Corporation;

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 12th May 2022 hereunder-reproduced.

Minutes

Case 1723 – CT 2189/2021 – Tender for the Supply and Delivery of Pumps and Energy Recovery Devices for the Reverse Osmosis Plants of the Water Services Corporation.

LOT 5

The tender was issued on the 18th August 2021 and the closing date was the 30th September 2021. The value of Lot 5, excluding VAT, was € 1,427,800.

On the 21st March 2022 Engineering & Technology 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 and on the subsequent cancellation of the tender.

A deposit of € 7,140 was paid.

There were four (4) bids.

On the 12th 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 – Engineering & Technology Ltd

Dr Ruben Casingena	Legal Representative
Mr Angel Abajas Errasti	Representative

Contracting Authority – Water Services Corporation

Dr John Gauci	Legal Representative
Dr Beverley Tonna	Legal Representative
Mr Louis Pullicino	Secretary Evaluation Committee
Eng Ronald Pace	Member Evaluation Committee
Eng Kyle Alamango	Member Evaluation committee
Eng Anthony Muscat	Representative

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 Ruben Casingena Legal Representative for Engineering & Technology Ltd said that the appeal was based on the offer made on the pumps. He referred to the section headed Efficiency on pages 30 and 31 of the tender document which states that a mixing inefficiency of 7% shall be permitted. Appellant's offer fell within this range.

Dr John Gauci Legal Representative for the Water Services Corporation stated that the tender was cancelled as no valid submissions were made. The Appellant was not technically compliant as the brine flows did not meet the specifications. A witness will deal with this technical point.

Mr Jean Farrugia (281175M) called as a witness by the Appellant testified on oath that the Appellant had a letter from the pump manufacturer confirming a mixing inefficiency of 6.5% which is within the limit of 7% allowed in the tender.

In reply to a question from Dr Gauci witness stated that the letter referred to was submitted at the reasoned reply stage.

Mr Castor Criado (PP TAM 092351) called as a witness by the Appellant testified on oath that the tender specified a range of flows by the pumps. The minimal range was not covered by the pumps supplied so a clarification was sought but were advised that the information requested was confidential. Appellant was further advised that their offer did not meet the requirements following which they obtained confirmation from the manufacturers that the device will perform within the limits stated in the tender as it has a mixing inefficiency below 7%.

Questioned by Dr Gauci witness confirmed that he was an employee of the Appellant firm and that they had initially submitted a product that was rejected. When asked to clarify if Appellant wished to change their offer the same product was offered.

Engineer Ronald Pace (589364M) called as a witness by the Contracting Authority testified on oath that he is the Manager of the Desalination Plant at Water Services Corporation. He stated that the Corporation was already using similar equipment to that requested in the tender. The problem in this case is with the Technical Offer specifically regarding the flow ranges. Appellant's offer was not up to specifications. A clarification asked bidder to provide technical literature to clarify the exact offer but this was not different from the original offer. None of the other bidders provided compliant bids.

In reply to questions from Dr Casingena witness confirmed that the flow range in the offered product was not in line with the tender specifications and it was past the stage of considering different data.

This concluded the testimonies.

Dr Casingena stated that the flow, as has been shown in evidence, covered the specifications and the tender as submitted was valid.

Dr Gauci said that tenderer sought to change the flow ranges through a clarification, but then went ahead and submitted the same specifications. When it was realised that the clarification was not allowed bidder tried to change the specifications of the bid. There was no option but to cancel the procedure.

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 12th May 2022.

Having noted the [????objections/appeal] filed by Engineering & Technology Ltd (hereinafter referred to as the Appellant) on 21st March 2022, refers to the claims made by the same Appellant with regard to the tender of reference CT 2189/2021 listed as case No. 1723 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Ruben Casingena

Appearing for the Contracting Authority: Dr John Gauci

Whereby, the Appellant contends that:

- a) The proposed PX models for Lot 5, Item 9 and Item 11, will perform as per Technical Specifications.
 - i. PX-Q260 Model:

We confirm that PX-Q260 can perform at 38 m³/h per device (total 190 m³/h for 5 devices), It will perform at even higher efficiency and will increase brine mixing (Lower than 6.5%)

Guaranteed flow range per PX-Q260: 38 -59 m³/h.
 - ii. PX-Q300:

We confirm that PX-Q300 can perform at 44.44 m³/h per device (total 400 m³/h for 9 devices). It will perform at even higher efficiency and will increase brine mixing (Lower than 6.5%)

Guaranteed flow range per PX-Q300; 44.44 - 68 m³/h.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 1st April 2022 and its verbal submission during the virtual hearing held on 12th May 2022, in that:

- a) Cancellation of Procurement Procedure:

Firstly, it is important to point out that WSC exercised its right to cancel the tender process in accordance with that stipulated in clause 18 of the General Rules Governing Tenders v4.2. As stipulated in clause 18.1. *"The Central Government Authority/Ministerial Procurement Unit/Contracting*

Authority reserves the right to accept or reject any tender and/or to cancel the whole tender procedure before and after the closing established for the submission of the tenders.....” In this particular instance, cancellation occurred on the basis of clause 18.3 (a) which stipulates for a scenario where *“the tender procedure has been unsuccessful, namely where no qualitatively or financially worthwhile tender has been received or there has been no response at all.”*

b) Non-Compliance of the Objector - HP Brine Flow:

As can be noted from the Technical Questionnaire submitted by Appellant in his offers, the range of HP brine flow of the ER devices offered for Item 9 was 205-295 as opposed to the requested range of 190-285 whereas the range of HP brine flow of the E devices offered for Item 11 was 405-612 as opposed to the requested range of 400-600. It clearly results therefore that the ranges offered by the Appellant were not within the required requested range specified for each item.

Furthermore, with respect to item 9 (PX Q260) the tender specifications which requested a flow range of 190m³/hr to 258m³/hr, equated to 38m³/hr to 57m³/hr per energy recovery device. In the Appellant's offer, the Appellant indicated the flow range for a PX Q260 as 40.9m³/hr-59.0m³/hr and this is further confirmed by the performance graph it provided in its offer.

In their objection the Appellant is now saying with respect to item 9 (PX Q260) that *“We confirm that PX-Q260 can perform at 38m³/h per device (total 190m³/h for 5 devices), It will perform at even higher efficiency and will increase brine mixing.”* The Appellant also states in this respect that the *“Guaranteed flow range per PX-Q260: 38-59m³h”*

With respect to item 11 (PX Q300) the tender specifications which requested a flow range of 400m³/hr to 600m³/hr equated to 44.44m³/hr to 66.67m³/hr per energy recovery device. In the Appellant's offer, the Appellant indicated the flow range for a PX Q300 as 45m³/hr to 68.0m³/hr and this as further confirmed by the performance graph in its offer.

In their objection the Appellant is now saying with respect to item 11 (PX Q300) that *“We confirm that PX Q300 can perform at 44.44m³/h per device (total 400m³/h for 9 devices). It will perform at an even higher efficiency and will increase brine mixing.”* The Appellant also states in this respect that the *“Guarantee flow range per PX-Q300: 44.44 -68m³h.”*

The information being provided now in the Appellant's objection is therefore certainly conflicting with the information submitted in the Appellant's Tender offer. In this respect, reference is being made to Clause 12 of the General Rules Governing Tenders v4.2, wherein it is stipulated that, *“Tenderers may amend/replace or withdraw their tenders online from www.etenders.gov.mt until the expiry of the deadline for submission. No tender may be amended or withdrawn after the deadline for submission.”* as well as clause 5.3 of said general rules which states that, *“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.”

c) Rectification and Clarifications

Furthermore, it must also be pointed out that the specifications and information provided for HP brine flow range in the technical questionnaire falls within the remit of note 3 which states that *“No rectification shall be allowed. Only clarifications on the submitted information may be requested.”*

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 witnesses duly summoned, will consider Appellant’s grievances as follows:

- a) The Board notes that from the testimony under oath of Mr Castor Criado, the minimal range was not covered by the pumps supplied. Therefore, this led to technical non-compliance.
- b) In the testimony of Mr Jean Farrugia, it was confirmed that the letter confirming inefficiency of 6.5% was presented at the reasoned reply stage. Therefore, this Board opines that the evaluation committee had no visibility [??? sight] of this document at evaluation stage.
- c) The technical offer / questionnaire, which is a note 3 document, lists flow ranges which are in conflict with both the tender dossier requirements and with the letter referred to in point (b) above. Tender document required flow rates of 190-285 for Item 9 and 400-600 for Item 11. Technical Questionnaire submitted by Appellant listed 205-295 for Item 9 and 405-612 for Item 11.
- d) In the Board’s opinion, such submissions render the Appellant’s bid technically non-compliant.

Hence, this 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 cancellation 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