

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1744 – WSC/T/24/2022 – Supplies – Framework Agreement for the Supply and Delivery of Liquid Chlorine to the Reverse Osmosis Plants of the Water Services Corporation**

**20<sup>th</sup> June 2022**

The Board,

Having noted the letter of objection filed by Mr Mario Callus acting for and on behalf of Ortis Limited, (hereinafter referred to as the appellant) filed on the 12<sup>th</sup> May 2022;

Having also noted the letter of reply filed by Dr Sean Paul Micallef acting for Water Services Corporation (hereinafter referred to as the Contracting Authority) filed on the 20<sup>th</sup> May 2022;

Having heard and evaluated the testimony of the witness Ms Ingrid Borg (Representative of MCCA) as summoned by Dr Raymond Zammit acting for Ortis Limited;

Having heard and evaluated the testimony of the witness Mr Mario Callus (Representative of the Appellant) as summoned by Dr Raymond Zammit acting for Ortis Limited;

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 15<sup>th</sup> June 2022 hereunder-reproduced.

#### **Minutes**

#### **Case 1744 – WSC/T/24/2022 – Framework Agreement for the Supply and Delivery of Liquid Chlorine to the Reverse Osmosis Plants at the Water Services Corporation**

The tender was issued on the 14<sup>th</sup> March 2022 and the closing date was the 12<sup>th</sup> February 2022. The value of the tender, excluding VAT, was € 42,042.

On the 12<sup>th</sup> May 2022 Ortis Ltd filed an appeal against the Water Services Corporation as the Contracting Authority objecting to their disqualification on the grounds that the preferred offer does not conform with the tender specifications.

A deposit of € 400 was paid.

There were two (2) bids.

On the 16<sup>th</sup> June 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 – Ortis Ltd**

Dr Ray Zammit	Legal Representative
Mr Mario Callus	Representative
Mr Adrian Borg Marks	Representative

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

Dr Sean Micallef	Legal Representative
Eng Sigmund Galea	Chairperson Evaluation Committee
Ms Kirstie Grech	Secretary Evaluation Committee
Ms Diandra Briffa	Member Evaluation Committee

### **Preferred Bidder – Martin Grima Ltd**

Mr Carl Grima	Legal Representative
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Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Ray Zammit Legal Representative for Ortis Ltd confirmed that his clients appeal was based on the fact that the approval of the product by the MCCA is essential and he would be requesting confirmation from that Authority that such an essential product cannot be offered without their approval.

Dr Sean Micallef Legal Representative for the Water Services Corporation said that the pertinent clause in the tender states that the product must conform to the standards set by the European Regulations, with which the preferred bidder conforms. If it had been the case that there is only one supplier it would not have been possible to issue a tender as this goes against the PPRs. The Evaluation Committee was only obliged to ensure that the bidder declared that the product conforms.

Ms Ingrid Borg (196581M) called as a witness by the Appellant testified on oath that she represented the MCCA which is the body that authorises the use of biocidal products on the Maltese market. This authorisation was essential according to S.L. 430.09 and the product cannot be put on the market without such authorisation.

In reply to a question by Dr Micallef witness stated that presently there is only one product approved for the disinfection of drinking water.

Mr Mario Callus ( 585858M) called as a witness by Appellant testified on oath that the product offered by his firm was authorised for use by the MCCA. The tender requested an authorisation certificate and this was provided. The S.L. confirms the need for authorisation for the use of the product.

This concluded the testimonies.

Dr Zammit said that on the testimonies heard the case for the Appellant was proven. Appellant cannot be faulted that there is only one authorised supplier if others had not taken action. The Appeal should be upheld.

Dr Micallef concluded by stating that procurement cannot be through one supplier and the Contracting Authority will have to reconsider the position.

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 16<sup>th</sup> June 2022.

Having noted the objection filed by Ortis Limited (hereinafter referred to as the Appellant) on 12<sup>th</sup> May 2022, refers to the claims made by the same Appellant with regard to the tender of reference WSC/T/24/2022 listed as case No. 1744 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Raymond Zammit

Appearing for the Contracting Authority: Dr Sean Paul Micallef

Whereby, the Appellant contends that:

- a) Article 3.3.1.2 of Section 3 - SPECIFICATIONS of the tender document states: *“The liquid chlorine offered shall be authorised for the disinfection of drinking water according to the Biocidal Products Regulations (Implementation of Regulation (EU) No 528/2012) as confirmed by the Malta Competition and Consumer Affairs Authority (MCCAA).”* The public Database of Registered Biocidal Products in Malta issued by MCCAA, last updated on the 3rd May 2022, confirms that there is only one such product authorised for use in Malta. The full database is available here <https://mccaa.org.mt/Section/Content?contentId=1131>. Therefore, any chlorine offered and not backed by Registration Number 2018-04-17-B02a, does not satisfy the requirements of Article 3.3.1.2 of Section 3 of the Specifications. Messrs. GHC Gerling, Holz & Co, holders of Registration Number 2018-04-17-BOZa, informed us in writing that they only support the offer submitted by

us bearing ID 172193, for liquid chlorine originating from and supplied by them. For this reason any other offers submitted do not conform to the Tender Specifications and such products are not authorised for use in Malta.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 20<sup>th</sup> May 2022 and its verbal submission during the virtual hearing held on 16<sup>th</sup> June 2022, in that:

- a) The Appellants contend that Martin Grima Limited's ('the recommended bidders') offered product is not authorised for use in Malta by the Malta Competition and Consumer Affairs Authority (MCCAA) as was requested under Article 3.3.1.2 of the Technical Specifications, which is being reproduced for ease of reference: *"The liquid chlorine offered shall be authorised for the disinfection of drinking water according to the Biocidal Products Regulations (Implementation of Regulation (EU) No 528/2012) as confirmed by the Malta Competition and Consumer Affairs Authority (MCCAA)."*
- b) What the Contracting Authority therefore requires is that bidders confirm that their biocidal product is duly authorised for distribution in conformity with the Biocidal Products Regulations ('BPR'). Even though the recommended bidders did not refer to any confirmation thereon by the MCCAA, the declaration that their product is conformant with the BPR is enough to satisfy the Contracting Authority's. Corroborating the latter point is the fact that Question 5 of the Technical Offer only requires bidders to confirm that their product is "authorised/notified in line with the' BPR, whereas it does not require bidders to indicate confirmation of the MCCAA. It is being pointed out here that the recommended bidders confirmed once again that their product is indeed in conformity with the BPR.
- c) It is further being highlighted that the database submitted by the Appellants together with their objection was not requested by the Contracting Authority and that it cannot, therefore, be considered further or included in the evaluation process itself. The Tender Evaluation Committee ('TEC') is bound by the principle of self-limitation and must evaluate all offers at face value and adjudicate solely on the information provided at tendering stage.

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 now consider Appellant's grievances.

- a) Reference is made to Tender Dossier Section 3 – Specifications, paragraph 3.3.1.2 states *“The liquid chlorine offered shall be authorised for the disinfection of drinking water according to the Biocidal Products Regulations (Implementation of Regulation (EU) No 528/2012) **as confirmed** by the Malta Competition and Consumer Affairs Authority (MCCAA).”* (bold emphasis added)
- b) Reference is also made to the testimony under oath of Ms Ingrid Borg whereby she confirmed that *“it is the MCCAA that authorises the use of biocidal products on the Maltese market. This authorisation was essential according to S.L. 430.09 and the product cannot be put on the market without such authorisation”.*
- c) Therefore, it is this Board's opinion that:
  - i. the tender dossier is clear and unambiguous in paragraph 3.3.1.2 of section 3 that it **requires** confirmation by the MCCAA when it states *“.....as confirmed.....”*
  - ii. therefore, for a product to be technically compliant it had to be authorised by the MCCAA and a self-declaration was not sufficient in such circumstances;
  - iii. therefore, the evaluation committee did not properly interpret paragraph 3.3.1.2 of section 3
- d) Considering that:
  - i. offers by economic operators duly authorised by the MCCAA were provided;
  - ii. were lawfully possible a tender should be saved by a Contracting Authority with the tools available to it;

the argument as brought forward by the Contracting Authority whereby this procurement process is to be reconsidered, possibly cancelled and a direct order is issued, is deemed to be irrelevant. Re-evaluation of the Appellant's offer, whilst taking into consideration these findings, should be carried out.

Hence, this Board upholds the Appellant's grievance.

**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 2<sup>nd</sup> May 2022;
- c) To cancel the Letter of Rejection dated 2<sup>nd</sup> May 2022 sent to Ortis Ltd;
- d) To order the contracting authority to re-evaluate the bid received from Ortis 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**

**Mr Lawrence Ancilleri**  
**Member**

**Dr Charles Cassar**  
**Member**