

# **PUBLIC CONTRACTS REVIEW BOARD**

## **Case 1751 – WSC/T/39/2021 – Tender for Supply, Delivery of Pipe Locators to the Water Services Corporation**

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

The Board,

Having noted the letter of objection filed by Dr Luana Cuschieri on behalf of Saga Juris Advocates acting for and on behalf of Test and Measurement Instrumentation Ltd, (hereinafter referred to as the appellant) filed on the 20<sup>th</sup> May 2022;

Having also noted the letter of reply filed by Dr Lara Borg acting for the Water Services Corporation (hereinafter referred to as the Contracting Authority) filed on the 27<sup>th</sup> May 2022;

Having heard and evaluated the testimony of the witness Ms Christine Scicluna (Representative of the Contracting Authority) as summoned by Dr Franco Galea acting for Test and Measurement Instrumentation Ltd;

Having heard and evaluated the testimony of the witness Ing Stefan Riolo (Chairperson of the Evaluation Committee) as summoned by Dr Franco Galea acting for Test and Measurement Instrumentation 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 23<sup>rd</sup> June 2022 hereunder-reproduced;

### **Minutes**

#### **Case 1751 – WSC/T/39/2021 – Tender for the Supply and Delivery of Pipe Locators to the Water Services Corporation**

The tender was issued on the 18<sup>th</sup> March 2022 and the closing date was the 22<sup>nd</sup> April 2022. The value of the tender, excluding VAT, was € 26,000.

On the 20<sup>th</sup> May 2022 Test 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 offer was deemed to be technically not compliant. .

A deposit of € 400 was paid.

There were five (5) bids.

On the 23<sup>rd</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 – Test and Measurement Instrumentation Ltd**

Dr Franco Galea	Legal Representative
Eng Stephen Buttigieg	Representative

**Contracting Authority – Water Services Corporation**

Dr Sean Micallef	Legal Representative
Eng Anthony Muscat	Chairperson Evaluation Committee
Eng Stefan Riolo	Member Evaluation Committee
Ms Christine Scicluna	Secretary Evaluation Committee

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

Dr Franco Galea Legal Representative for Test and Measurement Instrumentation Ltd (TMI) stated that it is not contested that a sample was provided but Appellant was excluded from being present during its analysis. The sample satisfied the tender as it met the functional equivalent requested. This is the second appeal by TMI on this tender.

Dr Sean Micallef Legal Representative for the Water Services Corporation said that the appeal hinged on the clause, clearly stated in the tender, detailing where the accessories were to be stored. The sample provided did not provide for this. The equivalence argument was not sustainable due to the risks of theft, loss of the accessories and loss of time for the operator. The reply to the technical questionnaire and the sample do not tally.

Ms Christine Scicluna (557476M) called as a witness by the Appellant testified on oath that the Tender Evaluation Committee (TEC) evaluated six bids and requested four samples overall. The sample from TMI was available from the first tender. She confirmed that there was a total replacement of the TEC after the first appeal. The new TEC tested the sample. The problem with Appellant's bid was that the accessories were stored in a hand-held bag not in the actual instrument. After checking with a legal officer TMI's request to be present at the sample evaluation was turned down. No bidders were present at the examination of samples by the technical people.

In reply to a question by Dr Micallef witness replied that the previous decision by the PCRb was to order the Contracting Authority to carry out a re-evaluation of the bid by TMI by a new committee.

Engineer Stefan Riolo(15570M) called as a witness by the Appellant testified on oath that in total six bids had been submitted and samples requested from four of them. The sample submitted by Appellant consisted of a transmitter housed in a bag with accessories inside the bag – these were housed in a larger back with a shoulder strap. The product offered would be suitable for the Authority's requirements. Pipe locators on the market had a compartment in the transmitter to house the accessories. Having a separate bag might involve a security risk and makes it less easy for the operator to carry out its tasks.

This concluded the testimonies.

Dr Galea said that the product submitted by Appellant meets the functional equivalence of what the tender required i.e. a compartment to carry accessories. The potential for theft is minimal and there is no reason for refusing sample. Appellant requested presence at the testing stage to ensure that a proper analysis was carried out and there was no reason for refusing this. There was also no technical

reason for refusing the offer and no issue that Appellant's product made the operation more burdensome. There was too much formalisation and bureaucracy in deciding this tender which has already been appealed against once.

Dr Micallef stated that the in first appeal the PCRB decision was to examine the TMI sample. Any contact with the evaluation members is not permissible and makes the tender invalid. As regard the equivalence of the offer one must agree that function wise the offered product is the same but there was a specific requirement which limits any bidder from deciding what they can offer. The bidder is not entitled to decide how a particular product is to be used - that is the Authority's prerogative which does not decide tenders on the basis of 'close enough'. This is the principle of proportionality. If there were any doubt Regulation 262 was available to the Appellant before tendering.

Dr Galea concluded by saying that this is public procurement and the concept of functional equivalence must be observed – the scope of the tender was reached. The procedure of opening samples should be transparent.

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 23<sup>rd</sup> June 2022.

Having noted the objection filed by Test and Measurement Instrumentation Ltd (hereinafter referred to as the Appellant) on 20<sup>th</sup> May 2022, refers to the claims made by the same Appellant with regards to the tender of reference WSC/T/39/2021 as case No. 1751 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Franco Galea

Appearing for the Contracting Authority: Dr Sean Micallef

Whereby, the Appellant contends that:

- a) The decision of the contracting authority is unfounded in fact and at law and is purely based on the requirement of a technicality which was not requested in the tender specification and which is not part and parcel of the functioning of the product. Contrary to the procedure which the contracting authorities usually operate with, the contracting authority in question, requested a sample from the appellant of the product in question. The appellant duly obliged and provided a sample of the same. However, after having been requested by the appellant, the contracting

authority refused the appellant's presence during the evaluation of the product in question and a meeting with the board members, and this without any reasonable justification provided. It is clear that the product of the appellant meets all the technical criteria indicated in the tender specifications by the contracting authority. Clause 11 of the Technical Specifications holds: *"Transmitter should have space in its own casing to store the basic accessories when not in use"*.

- b) The appellant's transmitter does have space in its own casing to store the basic accessories when not in use. Rather than having space in the particular box, the appellant's product has space in the bag which comes with the box in question. Thus it is clear that the appellant's product satisfies the requirement of "space in its own casing". In addition, in any case, this particular feature does not affect the performance of the instrument. Had the contracting authority required the particular space to be in the box (rather than in its own casing), the contracting authority would have indicated this. The contracting authority decided to include this particular wording in the tender specification. Therefore, now, it cannot create a new specifications which was not particularly indicated in the tender specification, and render the appellant's bid unsuccessful, purely on this basis.
- c) It seems clear to the appellant, that from the moment of inception of this call for tenders, the contracting authority had one particular bidder in mind, to which it wanted to award the tender in question. In view of this, the contracting authority tried to create every possible obstacle to the appellant, in order to render his bid as unsuccessful without any just ground. The Public Contracts Review Board's decision tried to halt the evaluating committee's approach but the evaluating committee had once again, alleged the existence of a technical fault on the appellant's end; and this to award the tender to the bidder, which it had in mind to award to, from the first day. The appellant reiterates that the product offered by itself is technically compliant with the Technical Specifications of the Contracting Authority in the sense that the product does have space in its own casing for the storage of accessories when not in use. This is what the contracting authority had requested in the Tender Specifications and this is what the appellant had provided.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 27<sup>th</sup> May 2022, its verbal submission during the virtual hearing held on 23<sup>rd</sup> June 2022, in that:

- a) While the Appellant states in the Technical Offer submitted by it, that it does, upon provision of the sample requested it resulted that this was not the case since as it stated *ex admissis* in its Objection *"The appellant's product has space in the bag which comes with the box in question"* and therefore not the transmitter body as specifically requested in the Tender document. As a result contrary to what the Appellant states the product provided by it does not satisfy the requirement in question. Furthermore, while the Appellant tries to suggest that the wording of the particular Tender specification wasn't clear when it states that *"Had the contracting authority required the particular space to be in the box (rather than in its own casing), the contracting authority would have indicated this"*, WSC contends

that it was amply clear when it specified in Section 3 of the Tender document that the *“Transmitter should have space in its own casing”* and further specified in the Technical Offer Form that the Transmitter had to have space *“in its transmitter body ‘to store the basic accessories when not in use”*. This makes it amply clear that the space had to be in the box as opposed to the bag that comes with the box which is what the Appellant's product provides and which is why the Appellant's product is deemed technically non-compliant.

In any case, and without prejudice to the above, had there been any doubt in the Appellant's mind as to wording of the particular Tender specification, the Appellant should have availed of the clarification mechanism afforded to it.

Furthermore, the importance of the bidder's offer strictly adhering to the requirements of the Tender specifications cannot be undermined. Reference is made to Section 5 of the General Rules Governing Tenders where it is clearly stated that *“Tenderers bear sole liability for examining with appropriate care the procurement documents”*. In Section S.3 it is further stated 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.”* *Mutatis mutandis*, the item submitted in this case must have strictly complied with the conditions and provisions of the Tender document without any alterations whatsoever, which it failed to do.

- b) With reference to the sample requested, the Appellant suggests that a request for samples is *“Contrary to the Procedure which the contracting authorities usually operate with”* and further states that *“the contracting authority refused the appellant's presence during the evaluation of the product in question and a meeting with the board members, and this without any reasonable justification provided.”* With respect to the former, WSC makes reference to Section 16.3 of the General Rules Governing Tenders which states that, *“Wherever applicable, tenderers may be requested to submit samples so that the Evaluation Committee will corroborate the technical compliance of the offers received. Without prejudice to the possibility of requesting clarifications, where the samples do not corroborate the offer submitted, the tenderer shall be disqualified.”*

It is therefore not the case that samples are not normally the procedure that contracting authorities operate with, so much so that this modus operandi is clearly provided for in the general conditions which also further states that if the samples do not corroborate with the offer as is the case in question (where the item did not match the declaration made by the Appellant in the technical offer), then the tenderer is to be disqualified.

With respect to the latter, where the Appellant states that WSC refused its presence without any justification, reference is made to Section 14 of the aforementioned General Conditions in relation to *“Secrecy of the Procedure”* wherein it is stated in Section 14.1 that, *“After the opening of the tenders, no information about the examination, clarification, evaluation or comparison of tenders or decisions about the contract award may be disclosed before the notification of award.”*

And in Section 14.2 that, *“Information concerning checking, explanation, opinions and comparison of tenders and recommendations concerning the award of contract, may not be disclosed to tenderers or any other person not officially involved in the process unless otherwise permitted or required by law. Any attempt by a tenderer to approach any member of the Evaluation Committee, or of the Central Government Authority/Ministerial Procurement Unit/Contracting Authority directly during the evaluation period will be considered legitimate grounds for disqualifying his tender.”* Therefore in light of the above, what the Appellant alludes to in that it should have been present during the evaluation of the sample is not only untrue but contrary to the General Conditions Governing Tenders.

- c) Lastly, the Appellant's comment that *“in any case, this particular feature does not affect the performance of the instrument”* is not relevant since WSC and the Evaluation Committee is bound by the principle of self limitation.

Without prejudice to the above, however it is not true that this particular feature does not affect the performance of the instrument in that as the Evaluation Committee will further explain during the sitting in relation to the Objection, there are accessories that need to be connected to the transmitter only when operated in a certain manner. These accessories are preferred to be conveniently enclosed within the transmitter's casing since the detector only carries with him the transmitter and receiver along with the job and walks quite a distance in the process. Experience has shown that when such accessories are not conveniently stored within the transmitter itself, either the detector wastes time going to and from to get these items from the bag, or does not carry out the job using this method which is not good, or loses such accessories altogether. Also there have been cases whereby the bag, with accessories was left lying close to a wall as it is not practical to carry it around whilst working, and this gave rise to the theft of the bag altogether.

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) This Board will initially deal with the grievance related to the storage of ‘accessories’ of the transmitter. If this grievance is not upheld, it would be futile to enter into the other grievances on whether the Appellant should have been present at the sample testing or otherwise.
- b) Reference is made to page 12 of the tender dossier, whereby in point 11 of Section 3 it is specifically stated *“Transmitter should have space in its own casing to store the basic accessories when not in use”*. It is important to state that all the requirements of section 3 fall under the remit of Note 3.
- c) This Board opines that the arguments brought forward by the Appellant in relation to theft, functional equivalence etc are irrelevant if the product offered does not meet note 3 requirements as listed in the tender dossier.

- d) The requirement that the sample provided did not have “.....*space in its own casing to store the basic accessories.....*” has not been met. This was duly proven during the testimony under oath of Engineer Stefan Riolo. Finally, it is not the economic operators’ prerogative to decide what is ‘close enough’

Therefore, this Board does not uphold 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

**Dr Charles Cassar**  
Member