

PUBLIC CONTRACTS REVIEW BOARD

Case 1780 – CT2391/2021 – Supplies – Supply, Installation, Commissioning and Testing of a Virtual Environment and SAN Solution to the Water Services Corporation

29th August 2022

The Board,

Having noted the letter of objection filed by Dr Pauline Debono acting for and on behalf of PTL Limited, (hereinafter referred to as the appellant) filed on the 27th June 2022;

Having also noted the letter of reply filed by Dr John L Gauci and Dr Ruth Ellul acting for and on behalf of the Water Services Corporation (hereinafter referred to as the Contracting Authority) filed on the 6th July 2022;

Having also noted the letter of reply filed by Dr Adrian Mallia on behalf of Michael Kyprianou Advocates acting for and on behalf of the Computime Limited (hereinafter referred to as the Preferred Bidder) filed on the 6th July 2022;

Having heard and evaluated the testimony of the witness Mr Alexander Attard (Member of the Evaluation Committee) as summoned by Dr John L 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 18th August 2022 hereunder-reproduced.

Minutes

Case 1780 – CT2391/2021 – Tender for the Supply, Installation, Commissioning and Testing of a Virtual Environment and SAN Solution to the Water Services Corporation

The tender was issued on the 3rd January 2022 and the closing date was the 3rd March 2022. The estimated value of the tender, excluding VAT, was € 1,400,000.

On the 27th June 2022 PTL Ltd filed an appeal against the Water Services Corporation as the Contracting Authority objecting to its disqualification on the grounds that its bid was deemed to be not technically compliant

A deposit of € 7,000 was paid.

There were two (2) bids.

On the 18th August 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 – PTL Ltd

Dr Clement Mifsud Bonnici	Legal Representative
Dr Calvin Calleja	Legal Representative
Dr Pauline Debono	Legal Representative
Mr Pierre Attard	Representative
Mr Chris Demicoli	Representative

Contracting Authority – Water Services Corporation

Dr John Gauci	Legal Representative
Mr Alexander Attard	Member Evaluation Committee
Mr Mark Sammut	Member Evaluation Committee
Mr Shaun Grima	Member Evaluation Committee
Mr Louis Pullicino	Representative

Preferred Bidder – Computime Ltd

Dr Adrian Mallia	Legal Representative
Eng Stephen Vella	Representative
Mr Neil Bianco	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 and invited submissions.

Dr Clement Mifsud Bonnici Legal Representative for PTL Ltd stated that he would be relying on the written submissions as proof of the points of the appeal.

Dr John Gauci Legal Representative for the Water Services Corporation requested leave to call a witness. He stated that the reason for the disqualification was that the questionnaire format was changed by the bidder and use had been made of an URL in the submissions – something that is absolutely forbidden. Documents submitted after the evaluation also do not meet the tender requirements.

Dr Adrian Mallia Legal Representative for Computime Ltd reserved the right to make his submissions at a later stage.

Mr Alexander Attard (189575M) called as a witness by the Contracting Authority stated on oath that he is the IT Security Officer at the Water Services Corporation and was one of the evaluators. He testified that the questionnaire was substantially changed in bidder's submission by the deletion of certain columns and the inclusion of fresh ones which were not in the tender documents. Item 6.2 of the Technical Offer requested amongst others the chipset values, processors etc to which the tenderer merely replied 'yes' instead of specifying numbers and providing the technical literature. References to websites included in the submissions were not acceptable. The item on maintenance required four response times to which the bidder replied '6 hours PTR for five years'. In the documents received

later, which the Evaluation Committee does not know if it can accept, the questionnaire content did not provide the correct details.

Questioned by Dr Mifsud Bonnici the witness identified the rest of the Evaluation team and confirmed that no clarification was requested by the evaluators on the questionnaire or on the missing literature and there was no discussion among them to find out if any rectification ought to be sought on the technical literature as they had been advised that the matter was not rectifiable.

This concluded the testimony.

Dr Mifsud Bonnici said that there are two reasons for the rejection of the Appellant's bid. On the technical offer Appellant is not requesting anything except that his bid be treated equally, with transparency and compatible with the principle of proportionality. What is being asked of the Authority is that these principles are not ignored. The offer of the Appellant included technical literature which confirms that it was offering what was requested and therefore binds the bidder to supplying a particular product. What Appellant is requesting is the opportunity of a clarification to confirm total compliance. The product has not been changed and if a clarification is sought one can consider if the bid is compliant.

The use of the URL website in the tender refers to the technical literature which comes under Note 2 and strengthens the offer and it is not a big ask to clarify it as the tender allows it. Note 2 and Note 3 are a reflection of the proportionality principle which stated that the Authority must not take a decision that exceeds the desired result of the tender the main aim of which is competition. It must also be borne in mind that the offer is cheaper and once the Evaluation Committee had the remedy of clarification it would have increased competition. In PCRB Case 1653 it was shown that a technical error in offering the wrong product would give no advantage to the bidder if the correct one was substituted. In Case 440/2012 in particular paragraphs 24 and 25 it was held that disqualification is not necessary to justify fair competition. There were two offers to meet the objectives of the tender and thus proportionality should be observed.

Dr Mifsud Bonnici went on to state that regarding the response times the Board should refer to the resubmitted documents to confirm that the requirements were met. In page 26, in the Service Level Agreement it is clear that the bidder intended to comply with the hours requested as confirmed by the 'Call to Repair' hours. Cases 1634, 1657 and 1420 quoted by the other parties in their submissions do not apply to this case as the facts were different.

Dr Mallia said that the fact that the technical offer is not compliant is not contested. The primary argument is that rectifications/clarifications ought to have been sought. Note 3 related to the tender questionnaire where rectification is not allowed – this amounts to a change in the bid. Clarification to the questionnaire is tantamount to a rectification as it changes the original submission. It has been made clear that changes are requested – these are rectifications and on that basis these are not permitted.

As to the principle of proportionality, said Dr Mallia, it is clear that when the bidder makes reference to internet links the Evaluation Committee is left with no alternative as the General Rules are very clear on this point which is absolute and triggers the fundamental rules of equal treatment to be followed by every party. The Authority had no choice but to discard the offer as further indicated in the written submissions.

Dr Gauci said that one must consider if the Evaluation Committee followed the correct procedure and if they acted correctly when the bidder through a conscious act changed the format of the tables – the

Authority, in applying the binding concept of self-limitation had no alternative. Even the later submitted documents do not match the tender requirements as testified by the witness. The committee correctly carried out the evaluation and reached the right decision.

Dr Mifsud Bonnici pointed out that the URL was used merely because the documents that had to be submitted were extensive and difficult to upload. A substance over form approach gives the Contracting Authority the opportunity to look again at the bids. To identify the border between clarification and rectification one must look at Case C523/16 paragraphs 51 and 52 where it was stated that a new submission does not change the original submission so as to make appear as a new tender.

Dr Mallia concluded by mentioning that the obligation to submit a correct tender is on the bidder.

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 18th August 2022.

Having noted the objection filed by PTL Limited (hereinafter referred to as the Appellant) on 27th July 2022, refers to the claims made by the same Appellant with regard to the tender of reference CT/2391/2021 listed as case No. 1780 in the records of the Public Contracts Review Board.

Appearing for the Appellant:	Dr Clement Mifsud Bonnici, Dr Calvin Calleja & Dr Pauline Debono
Appearing for the Contracting Authority:	Dr John L Gauci
Appearing for the Preferred Bidder:	Dr Adrian Mallia

Whereby, the Appellant contends that:

- a) The Appellant has provided all the information requested both in the Tender Document under Section 3 (Specifications / Terms of Reference) and in the Technical Offer which was prepared by the Contracting Authority in the form of a questionnaire and adhering to the specifications requested in both documents. In the first part of the letter informing the Appellant of the disqualification, the Department of Contracts is stating that the Appellant has modified the Questionnaire documents by failing to provide any values where requested and answering with either a Yes or an internet link.

- b) The 'Technical Offer' document published with the 'Tender Document' included four columns namely (1) '*Item*' to indicate the Item Number, (2) '*Description of required item/ specifications*' that listed the tender specifications, (3) '*Offer's specifications are to be inserted next to each item in the space provided below*' for the Tenderer to specify its offer and (4) '*Reference in the technical literature where this is being stated/ shown (if applicable)*' in order for the tenderer to substantiate its reply.
- c) In specific instances, in the column entitled '*Description of required item/ specifications*', the Contracting Authority requested a '*Yes / No*' reply from the tenderers indicating that the tenderer will be providing the item as indicated in the column entitled '*Description of required item/ specifications*'. The Appellant adopted this methodology for all the items and specifications listed by the Contracting Authority. Therefore, through the reply inserted in the third column, the Appellant is confirming in writing to the Contracting Authority that the Appellant will be providing its product and services adhering to the description of the item and specifications set out by the Contracting Authority.
- d) Once the '*yes*' reply was included in the third column, the detail and documentation to substantiate this reply was included by the Appellant in the fourth column entitled '*Reference in the technical literature where this is being stated/ shown (if applicable)*' by either explaining the product to be submitted or else providing extracts from the documentations published by the manufacturer.
- e) The grounds of disqualification mentioned by the Contracting Authority are not mentioned in the Tender Document since the Appellant has clearly stated that it will provide all the items listed in the technical requirements and completed all the information requested. As long as the tenderer has wilfully committed in its response that it will provide the Contracting Authority with the items and specifications as requested in the Tender Document, then the offer submitted will be considered as administratively and technically compliant. Otherwise, the Contracting Authority will be simply looking at the form compared to the substance of the offer, especially taking into account that price submitted by the Appellant is €43,894.35 cheaper than that offered by Computime Limited.
- f) Specifically in relation to Item 11.12, the disqualification letter clearly shows that the Contracting Authority is erroneously concluding that the six hours being referred to in the response is referring to the response time for all types of critical level. The error may be considered as justifiable since the technical letter only refers to the acronym "CTR" but it is incumbent upon the Contracting Authority to request the Appellant to clarify what the acronym is referring to before taking the extreme measure to disqualify the tenderer submitting the cheapest offer to the Contracting Authority and ensure that genuine competition and maximum participation is safeguarded during this competitive process.
- g) This is particularly important in view of the fact that the award criterion for this tender procedure is the cheapest price. The Appellant has been confirmed as eligible to participate in this tender procedure (in view that no grounds for disqualification have been mentioned in relation to the Eligibility and Exclusion Criteria). In relation to the Specifications, the Appellant has confirmed in

the third column of the Technical Offer that its offer meets the minimum specifications that have been set by the Contracting Authority and submitted literature to "*corroborate a fully compliant technical offer*" as requested in the Tender Document. Once all these criteria were met, the contract should have been awarded to the cheapest offer, namely that submitted by the Appellant.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 6th July 2022 and its verbal submission during the virtual hearing held on 18th August 2022, in that:

a) The Contracting Authority acted correctly and within the self-limitation rules when it disqualified Appellant's bid –

As clearly indicated in questionnaire Technical Offer Point 11.12, the Contracting Authority requested that the response time must be indicated in number of hours (as numerical quantity) and not a YES or NO answer.

It is to be noted that the 6hr CTR service level back-line support from the respective device manufacturer was requested in addition to the response times required in the table found within the tender document (Service Level Agreement & Contract Duration).

Besides the evident non-conformity illustrated above, and as will be amply expounded and demonstrated during the hearing of this appeal, the Appellant has also modified the questionnaire that had to be filled in. Furthermore, instead of inserting the requested values, it simply inserted a 'yes' or a weblink.

This modus operandi shows a grave disregard on the part of the Appellant of the applicable tender rules and if the Contracting Authority had to accept a modified questionnaire which, inter alia, wasn't filled in as requested, it would have seriously breached the principles of self-limitation, transparency, and the obligation to ensure a level-playing field, which are three of the most fundamental tenets of public procurement legislation.

b) Modification of a questionnaire should lead to the exclusion of the bidder -

That, furthermore, Appellant had absolutely no right to modify the questionnaire and arbitrarily decide not to fill in the information requested. This principle has been confirmed various times by this Board, even recently in the Case 1634 MGOZ/MPU T 9/2021 - Works - Tender for the Restoration of the External Facades of the Gozo Campus of the University of Malta, Xewkija Gozo including the use of Environmentally Friendly Paint Materials decided on the 6th October 2021.

c) Appellant's argument that the Contracting Authority is obliged to clarify an erroneous / non-conforming response is simply vexatious, frivolous and has no basis at law -

Apart from the fact that the arbitrary modification of the questionnaire in itself is good enough reason to merit the exclusion of the Appellant, it is a well known principle that a bidder should

present its offer in a comprehensive, intelligible and correct manner and that it cannot expect the Contracting Authority / Evaluation Committee to rectify the bidder's shortcomings.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 6th July 2022 and its verbal submission during the virtual hearing held on 18th August 2022, in that:

a) First Reason for Disqualification: use of internet links -

The Appellant has admitted in its own appeal that it has made use of website links in the Technical Offer Questionnaire which was submitted by the Appellant as part of its offer. In other words, the Appellant has provided technical information requested in terms of the Tender Document by including website links rather than providing actual documentation or literature.

This is a course of action which is not permitted, and which must lead to the disqualification of the Appellant from this Tender process. In this context, the Board is invited to consider Section 4.5 of page 28 of the Tender Document which provides the following; *"4,5 - General Rules Governing Tendering The contents of this procurement document complement the latest version of the General Rules Governing Tenders applicable on the date of the publication of this tender, the Terms of Use and the Manual for Economic Operators applicable to Government's e-Procurement Platform (available from the Resources section of www.etenders.gov.mt)."*

It is clear, on the basis of the above, that the General Rules Governing Tenders also form part of the Tender Document and therefore the rules and conditions set forth in the General Rules Governing Tenders also apply to this Tender Document.

The General Rules Governing Tenders provide in clause 6.4 as follows: *"No .ink files or URLs are to be submitted as part of the offer. If these types of files or links are uploaded, these shall not be accessible to the Evaluation Committee they usually refer to a location on the computer of the individual who is completing the Tender Structure or else may be retrieved online. When the Evaluation Committee encounter tender submissions with these types of files, they shall have no other alternative but to reject such tenders."*

On the basis of the above, therefore, the Evaluation Committee was evidently correct to disqualify the Appellant insofar as the Appellant made use of 'website links' to provide requested information. Although no further elaboration of this point is, strictly speaking, required in order for the Board to decide this matter, it would be beneficial to include a few words explaining the impelling reasons motivating the rule set forth in clause 6.4 of the General Rules Governing Tenders quoted above. The first reason relates to the Tender process itself. The content available on a website can be changed at any time by the person who controls the website in question. Allowing a bidder to offer information to a Contracting Authority by means of a web link would therefore allow the bidder to change his bid at any time simply by changing the content available on the website. This goes against the fundamental principle that a bidder may not change his bid once the procurement

process has been closed. This is the first reason why a bidder - like the Appellant - making use of website links in his tender offer must be disqualified.

The second reason relates to the contractual process which follows the award of the tender. The Technical Offer Questionnaire submitted by the successful bidder in this Tender process (and, indeed, in any other tender process) will eventually form an integral part of the contract which will be signed between the Contracting Authority and the successful bidder.

b) Second Reason for Disqualification: Modification of Tender Offer Questionnaire -

The second reason for the Appellant's disqualification is that the Appellant made modifications to the Tender Offer Questionnaire. On this particular matter, there is clear precedent from this Board which confirms that the Evaluation Committee was correct to disqualify the Appellant for modifying the Tender Offer Questionnaire.

The Board is invited to consider what was decided in Case 1420 MEDE/MPU/JOBS+/007/2019 - Tender for the Provision of Medical Services for Jobsplus Clients in Malta and Gozo, where the Board upheld the disqualification of a bidder, inter alia, since: *“The technical questionnaire formed an integral part of the technical specifications of the tender dossier so that, strict conformity to the conditions stipulated therein had to be adhered to. Appellants failed to adhere to the instructions given in the technical questionnaire by qualifying their replies to items 14, 20, 21, 23 and 25.”*

Similar considerations underpinned the Board's decision in Case 1651 - SPD3/2021/015 Tender for the Manufacturing, Installation, Maintenance and Storage of Christmas Decorative Lighting.

c) Third Reason for Disqualification: Ambiguous answers in Tender Offer Questionnaire -

From the reasons given by the Evaluation Committee for the disqualification of the Appellant, it appears that the Appellant has given ambiguous answers to at least one question which is of critical importance to the Contracting Authority. The Evaluation Committee has in fact decided that the Appellant should be disqualified since “The Technical Offer Point 11.12 - WSC requires different response times for Critical (1hr), High 2(hr) and Medium (24h) but the bidder had replied with only a response time of 6hr for all type of critical levels which cannot be accepted.”

For the benefit of the Board, Point 11.12 of the Tender Offer Questionnaire refers to response times. A response time is the time period within which a contractor is required to respond to fault, and is therefore a critical requirement for business continuity. In this particular instance, the Contracting Authority required bidders to commit to certain stringent response times which vary, depending on the severity of the fault, from 1 hour to 24 hour.

It appears that the Appellant did not commit to this response time, and only committed to a 6 hour response time regardless of the nature of the fault, or at best included an answer which can only be defined as ambiguous and which will, for the reasons above, create contractual ambiguity to the detriment of the Contracting Authority if the Appellant's offer is accepted.

It is clear therefore that the Appellant must be disqualified from this Tender Process.

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.

Initially, this Board identifies that the most relevant aspects to be considered are the following:

- a. Response times as declared in point 11.12 of the Technical Offer Questionnaire
- b. URL links provided in the Technical Offer Questionnaire
- c. Any changes done to the Technical Offer Questionnaire
- d. Argumentation brought forward by Appellant on whether clarifications had to be sought from the Evaluation Committee instead of immediately declaring Appellant's submission as technically non-compliant.

Response time

As per the testimony under oath of Mr Alexander Attard, point 11.12 of the Technical Offer Questionnaire required four different response times to which the bidder replied 'Yes' and 'The proposed SLA covers all parts and labour with on site response and a 6 hrs CTR service level for the full 5 year period as requested'. This was deemed non-compliant by the Evaluation Committee. Any change that would have resulted in making the bid / offer technically compliant would have been a rectification, something which was not possible. Hence, in the opinion of this Board, the Evaluation Committee correctly discarded the Appellant's offer as technically non-compliant. A clarification would not have 'solved' the issue at hand and any further action by the Evaluation Committee would have been going against a fundamental principle of public procurement, i.e. Self-Limitation. Also a level playing field between all economic operators participating in the tender procedure would have been shattered.

This also as confirmed in *Rockcut Limited vs Malta Industrial Parks Ltd et* (Court of Appeal decided on 31st May 2019) whereby: *"jekk ir-regoli tas-sejba jimponu l-preżenza ta' tali tagħrif, hu mistenni li offerenti li jiebdu sehem f'dik is-sejba joqogħdu għal dawn ir-regoli. Wara kollha ir-regoli tas-sejba qegħdin hemm biex jigu mbarsa u mbux biex jigu mwarra. Biex jigi zgurati il-barsien ta' dawn il-principji, l-awtorita' kontraenti hija obbligata li tosserva strettament il-kriterji li hija stress tkun stabiliet (ara f'dan is-sens is-sentenza tad-29 ta' April 2004, il-Kummissjoni v. CAS Succhi Di Frutta S.p.A, C-496/99, punt 115)".*

URL links

The General Rules Governing Tenders state in paragraph 6.4 the following: *"No .ink files or URLs are to be submitted as part of the offer. If these types of files or links are uploaded, these shall not be accessible to the Evaluation Committee since they usually refer to a location on the computer of the individual who is completing the Tender Structure or else may be retrieved online. When the Evaluation Committee encounter tender submissions with these types of files, they shall*

have **no other alternative but to reject such tenders**". (bold & underline emphasis added). Therefore, this Board notes that such a clause is absolute and leaves no room for interpretation. When also considering that the Technical Offer Questionnaire falls under Note 3, i.e. no rectifications are allowed, such 'disqualification' of Appellant's bid is deemed to be in total congruence with normal public procurement praxis.

Changes to the Technical Offer Questionnaire and Argumentation brought forward by Appellant on clarifications

Due to the two points above, already confirming that this Board agrees with the procedure adopted by the Evaluation Committee, these two points are deemed irrelevant to proceedings.

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 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