

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1795 – WSC/T/37/2022 – Supplies - Supply and Delivery of Multistage Submersible Pumps for the New Water Polishing Plants of the Water Services Corporation – Lot 1**

**7<sup>th</sup> October 2022**

The Board,

Having noted the letter of objection filed by Dr Roselyn Borg and Dr Patrick Farrugia acting for and on behalf of Creations the Ultimate in Bathroom Elegance Limited, (hereinafter referred to as the appellant) filed on the 9<sup>th</sup> September 2022;

Having also noted the letter of reply filed by Dr Lara Chetcuti acting for and on behalf of the Water Services Corporation (hereinafter referred to as the Contracting Authority) filed on the 16<sup>th</sup> September 2022;

Having heard and evaluated the testimony of the witness Engineer Simon Camilleri (Chairperson of the Evaluation Committee) as summoned by Dr Lara Borg (formerly Chetcuti) acting for the Contracting Authority;

Having heard and evaluated the testimony of the witness Engineer Anthony Muscat (Representative of the Contracting Authority) as summoned by Dr Roselyn Borg acting for the Ultimate in Bathroom Elegance 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 4<sup>th</sup> October 2022 hereunder-reproduced.

#### **Minutes**

#### **Case 1795 – WSC/T/37/2022 – Tender for the Supply and Delivery of Multistage Submersible Pumps for the New Water Polishing Plants of the Water Services Corporation (LOT 1)**

The tender was issued on the 25<sup>th</sup> March 2022 and the closing date was the 28<sup>th</sup> April 2022. The estimated value of the tender, excluding VAT, for Lot 1 was € 49,500.

On the 9<sup>th</sup> September 2022 Creations the Ultimate in Bathroom Elegance 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 not the lowest offer.

A deposit of € 400 was paid.

There were five (5) bids.

On the 4<sup>th</sup> October 2022 the Public Contracts Review Board composed of Mr Kenneth Swain Chairman, Mr Lawrence Ancilleri and Mr Richard Matrenza as members convened a virtual public hearing to consider the appeal.

The attendance for this public hearing was as follows:

**Appellant – Creations the Ultimate in Bathroom Elegance**

Dr Roselyn Borg	Legal Representative
Mr Johan Camilleri	Representative

**Contracting Authority – Water Services Corporation**

Dr Lara Borg	Legal Representative
Eng Simon Camilleri	Chairperson Evaluation Committee
Ms Jacqueline Cassar	Secretary Evaluation Committee
Eng Joseph Psaila	Member Evaluation Committee
Eng Anthony Muscat	Representative

**Preferred Bidder – Attard Farm Supplies**

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

Dr Roselyn Borg Legal Representative for Creations the Ultimate in Bathroom Elegance said that this appeal will follow the claims in the written submissions. Tenderer was advised that his bid was fully compliant but his offer was not the lowest bid. It appears that the Evaluation Committee (EC) used different financial figures to compute the outcome. In reply to the enquiry regarding an abnormally low tender Appellant has replied and explained how the price had been computed.

Dr Lara Borg Legal Representative for the Water Services Corporation stated that the Appellant was erroneous in its view that it had submitted the lowest price since the tender was based on Annual Total Cost not the price. Clause 6.1 of the tender made this very clear. The price of the equipment was one factor but Appellant had failed to distinguish between price and cost. Its bid was not the cheapest.

Engineer Simon Camilleri (5331273M) called to testify by the Contracting Authority stated on oath that he was the Chairperson of the EC. Through a screenshare shot he explained the criteria for award as laid down in Clause 6.1 of the tender. It was not just the price that was considered but the annual total cost to operate the pumps over ten years, worked out according to the formula indicated in the tender. The same yardstick was used on all bids. The annual running costs reflects the efficiency of the equipment. An excel sheet screenshot showed the calculations on how the final costs were arrived at. On being questioned by the Chairman, Engineer Camilleri confirmed that the prices referred to by Dr Roselyn Borg, i.e. €35,172.90 of Attard Farm Supplies Limited and €24,513 of Creations the Ultimate in Bathroom Elegance only catered for the CAPEX (Capital Expenditure) part of the Total Cost but did not include the OPEX (Operating Expenditure) part of the Total Cost which is also to be considered as part of the Criteria for Award.

Questioned by Dr Roselyn Borg witness agreed that the tender stated that it was for the supply and delivery but said that he could not comment on the preparation of the tender as that was outside his

remit. On the financial evaluation Appellant has problems as the tender criteria was not based on price.

Engineer Anthony Muscat (461562M) called as a witness by the Appellant stated on oath that he agreed that Appellant's bid was the cheapest and the tender title stated supply and deliver. The letter sent on the 27<sup>th</sup> July regarding abnormally low tender was a routine process to ensure compliance.

In reply to questions by Dr Lara Borg witness said that the tender was not evaluated on the basis of the cheapest bid. The query about a possible abnormally low tender was a mere precaution to determine if the bid was acceptable.

This concluded the testimonies.

Dr Roselyn Borg said that that the evaluation was not transparent and the Appellant was disadvantaged as it was forced to appeal to establish the result on the financial values. The winning bid was not the cheapest and this objection should be upheld.

Dr Lara Borg said that the tender was not based on price but on other factors like amortisation and running costs. The formula for this was clearly explained in the tender and bidders were fully informed of this and of the award criteria. The Appeal should be rejected.

Dr Roselyn Borg noted that the only way of finding out the evaluation process was to object.

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 4<sup>th</sup> October 2022.

Having noted the objection filed by Creations the Ultimate in Bathroom Elegance Limited (hereinafter referred to as the Appellant) on 9<sup>th</sup> September 2022, refers to the claims made by the same Appellant with regard to the tender of reference WSC/T/37/2022 – Lot 1 listed as case No. 1795 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Roselyn Borg & Dr Patrick Farrugia

Appearing for the Contracting Authority: Dr Lara Borg

Whereby, the Appellant contends that:

- a) The call for tender consisted of two separate lots, and the tender concerned in this procedure was submitted in relation to Lot 1 - Multistage submersible pump types A, B & C. The sole criterion for the award of the tender was the cheapest Annual Total Cost compliant tender, in accordance with section 6 of the tender document with reference number WSC/T/37/2022.
- b) The appellants received a letter dated 30 August 2022 signed by Jacqueline Cassar (Secretary, Procurement Office) wherein it was notified that its bid (with Tender ID 172650) was successful yet not recommended for award since it was not the lowest bid, and that the contract was therefore awarded to Attard Farm Supplies Limited (with Tender ID 172899).
- c) Upon analysis of the Tender Details wherein all tenders for Lot 1 are listed, it is apparent that the tender which was awarded the contract in question was in fact not the cheapest, because the bid with tender ID 172899 submitted by Attard Farm Supplies Limited was valued at €35,172.90, whereas that of the appellants was valued at €24,513.00.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 16<sup>th</sup> September 2022 and its verbal submission during the virtual hearing held on 4<sup>th</sup> October 2022, in that:

- a) Reference is made to Section 6 of the Tender, entitled 'Criteria for Award', wherein it was amply explained that:
 

*“6.1 The award criteria shall be the cheapest Annual Total Cost compliant tender, taking into account the CAPEX and OPEX. The Total Annual Cost for award purposes shall be taken to be the sum of the Annual Amortized Capital Cost based on a useful 10-year life at an interest rate of 3.5%, and the Annual Running Energy Cost (energy cost at 0.115 Euro per kWh) assuming that the pump and motor set, shall be operating at the duty point specified.”*
- b) Objector argues that its bid of EUR 24,513.00 should have been recommended for award, since it was cheaper than that of the Recommended Bidder, whose offer was for EUR 35,172.90.
- c) However, as will be explained in more detail during the hearing of this Appeal, the Objector is solely considering the Capital price as submitted in the Financial Offer, instead of the Annual Total Cost, as required in the Tender document. Indeed, the capital price of the three pumps offered by the Objector (totalling to €24,513.00) is less than the capital price of the three pumps offered by the Recommended Bidder (totalling to €35,172.90). Nonetheless, the criteria for award reproduced above is based on a formula that ensures that both the capital costs and the operating / running costs are taken into account, so as to lead to the selection of the pumps whose combined initial and running costs make up the cheapest bid.
- d) Indeed, when calculating the Annual Total Cost as per the formula stipulated in Section 6.1 of the Tender Document, on the basis of both the technical questionnaires submitted by the bidders as well as the technical literature provided, it clearly resulted that the offer of the Recommended Bidder was the cheapest compliant offer. As a matter of fact, the Annual Total Cost of the three

pumps offered by the Recommended Bidder in Lot 1 was €99,632.47, while that of the Objector's bid was €109,684.52.

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 opines that most relevant to this appeal is the Criteria for Award as listed in paragraph 6.1 of Section 1 of the tender dossier, which stated *"The award criteria shall be the cheapest Annual Total Cost compliant tender, taking into account the CAPEX and OPEX. The Total Annual Cost for award purposes shall be taken to be the sum of the Annual Amortized Capital Cost based on a useful 10-year life at an interest rate of 3.5%, and the Annual Running Energy Cost (energy cost at 0.115 Euro per kW/hr) assuming that the pump and motor set, shall be operating at the duty point specified."* It then goes on to provide the formula for the Annual Total Cost which is *"Annual Total Cost = Annual Amortized Capital Cost + Annual Running Energy Costs"*. Therefore, there are two (2) main elements to the 'total cost', i.e. 'capital cost (CAPEX)' and 'running energy costs (OPEX)'.
- b) Therefore, this Board finds the arguments as presented by the Appellant to be somewhat superfluous as it was clearly stated that the 'Capital Cost' was only one 'ingredient' which made up the financial offer of economic operators for this tendering procedure. Through the technical literature submitted, economic operators could have easily determined the 'Annual Total Cost'. This by computing the 'Annual Running Energy Cost' together with the capital cost submitted. The formula used by the Evaluation Committee is clearly stated in page 6 of the tender dossier and therefore was available to economic operators as from the start of the tendering procedure. This was also confirmed in the testimony under oath of Engineer Simon Camilleri when he confirmed the offers / values as stated by Appellant referred only to the 'capital' expenditure aspect of the bids.
- c) The arguments brought forward on the 'Abnormally Low' queries made by the Evaluation Committee to the Appellant are also deemed irrelevant as these were done as per Regulation 243 of the Public Procurement Regulations, and in fact, at the end of the day, the Appellant's offer was deemed to be financially compliant. Therefore, the reason why they have not been awarded such a tender has got nothing to do with this abnormally low query.

When considering all of the above, 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

**Mr Richard Matrenza**  
Member