

PUBLIC CONTRACTS REVIEW BOARD

Case 1809 – WSC/T/32/2022 – Supplies – Supply and Delivery of 600MM x 900MM Manhole Frames and covers for New Water – Water Services Corporation

11th November 2022

The Board,

Having noted the letter of objection filed by Dr Ryan C. Pace acting for and on behalf of Y&P Marketing (Malta) Limited, (hereinafter referred to as the appellant) filed on the 17th October 2022;

Having also noted the letter of reply filed by Dr John L Gauci acting for the Water Services Corporation (hereinafter referred to as the Contracting Authority) filed on the 1st November 2022;

Having heard and evaluated the testimony of the witness Mr Ryan Brincat (Representative of Y&P Marketing (Malta) Limited) as summoned by Dr Ryan C. Pace acting for Y&P Marketing (Malta) Limited;

Having heard and evaluated the testimony of the witness Ing. Pierre Cassar (Chairperson of the Evaluation Committee) as summoned by Dr John L Gauci acting for 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 8th November 2022 hereunder-reproduced;

Minutes

Case 1809 – WSC/T/32/2022 – Tender for the Supply and Delivery of 600MM x 900MM Manhole Frames and Covers for New Water – Water Services Corporation.

The tender was issued on the 18th March 2022 and the closing date was the 26th April 2022. The estimated value of the tender excluding VAT, was € 145,000.

On the 17th October 2022 Y & P Marketing (Malta) 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 not technically compliant.

A deposit of € 725 was paid.

There were six (6) bids.

On the 8th November 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 – Y & P Marketing (Malta) Ltd

Dr Ryan C Pace
Mr Ryan Brincat

Legal Representative
Representative

Contracting Authority – Water Services Corporation

Dr John L Gauci
Eng Pierre Cassar
Eng Nicole Vassallo
Eng Anthony Muscat

Legal Representative
Chairperson Evaluation Committee
Representative
Representative

Preferred Bidder – Mr Anton Zarb

Mr Anton Zarb

Representative

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

Dr Ryan Pace Legal Representative for Y & P Marketing (Malta) Ltd said that the salient point of this appeal is the reason given for disqualifying the Appellant, namely; that bidder submitted EN 124-2 and not EN 124:2015 on what is a Euro standard. The Tender Evaluation Committee (TEC) did not realise that 124-2 is exactly what the Contracting Authority requested. The Authority requested ductile manhole covers (124:2015) when EN 124-2 refers exactly to ductile manhole covers which is what was asked for.

Dr John Gauci Legal Representative for the Water Services Corporation stated that Appellant was trying to convince the Board that what was offered was what had been requested. Any argument about equivalence of standard should have been made at the tendering stage – the law is clear about this. The TEC acted correctly on what is offered in Appellant's bid.

Mr Ryan Brincat (190990M) called as a witness by Appellant testified on oath that he has been the Procurement Manager at Y & P Marketing for the last two years with seven years previous experience in a similar role. According to the witness the tender requested 500 manhole covers in cast iron to standard 124. The Company quoted for this a product based on standard EN 124-2 which refers to manhole covers of cast iron which precisely refers to such covers not to an equivalent. Standard 124-2 does not refer to any other product. No clarification was sought by the Authority in this point and it only came to light on receipt of the decision letter.

Questioned by Dr Gauci witness agreed that Clause 3.1 in the tender dossier refers to EN 124:2015 but this is merely a subsection of standard EN 124-2 and also confirmed that no additional information was submitted. The Authority had not asked for literature lists so none were submitted.

Engineer Pierre Cassar (282379M) called as a witness by the Authority stated under oath that he was the Chairperson of the TEC. The Technical Compliance Check List referred to 124:2015 as EN 124-2 was an earlier version and simply stating 124-2 did not ensure that the bidder offered what was wanted. The TEC was unable to accept this. He confirmed that the preferred bidder had offered 124:2015.

In reply to questions from Dr Pace, witness said that he is not aware of standards earlier than 2015 and does not recall what other standards exist apart from 2015 or that there are six categories under the 2015 standard. The role of the TEC was to check that offer met what was requested. It was up to the bidder, according to the witness, to make the TEC aware of equivalence. Referred to Clarification Note 2 witness said that this had been drafted by the Authority not by the TEC and confirmed that the 1994 version of the standards is the only other one. Witness agreed that EN 124 must correspond only to 2015 since it is the only one since 1994 when all previous standards were superseded.

Questioned by Dr Gauci witness said that different suppliers might be using different standards and therefore the TEC had to ask for the latest one. Unless the TEC was certain that what was offered met the specifications it could not accept the product.

This concluded the testimonies.

Dr Pace said that the Chairperson of the TEC does not seem to know that the standard required splits into six categories and it was category 2 that was offered - this was not acceptable. The 1994 standard was superseded. The Chairperson confirmed that the preferred bidder supplied standard 124-2015 without knowing which classification was offered and if the product offered was what the tender requested. The standard that was offered was not equivalent but identical and clarification note 2 made it clear that the Authority was referring to 124-2. If there were any doubts the TEC was obliged to seek clarification, in which case they would have received confirmation that 124-2 refers to Class 2 of 2015. The lengthy sentence of the Appeal Court quoted in the letter of reply does not apply at all as in this case the Appellant did not offer a different product but exactly what was requested.

Mr Anton Zarb representing himself said that Appellant's offer was the cheapest but he was not aware what product had been offered. The manhole cover he offered is made of metal.

Dr Gauci said that the evaluation had been correctly carried out. Appellant is assuming that one must understand that it was offering an equivalent standard. No one knows why the 124-2 standard was offered. All Appellant had to do was to confirm that his offer was equivalent. The TEC was 100% correct in its decision.

The Chairman thanked the parties for their submissions and declared the hearing concluded.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 8th November 2022.

Having noted the objection filed by Y&P Marketing (Malta) Limited (hereinafter referred to as the Appellant) on 17th October 2022, refers to the claims made by the same Appellant with regards to the tender of reference WSC/T/32/2022 as case No. 1809 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Ryan C. Pace
Appearing for the Contracting Authority: Dr John L. Gauci

Whereby, the Appellant contends that:

- a) The Water Services Corporation, following the recommendation of the appointed Evaluation Committee, proceeded to award this supplies tender - whose sole award criterion was the price and whose estimated procurement value stood at €145,000 - to a bidder whose offer was: i) €35,000 more expensive than the offer submitted by the appellant company; and ii) €24,500 more expensive than the estimated procurement value established in the tender dossier, which value had been based on market research previously conducted by the said Corporation. The one and only justification to all this, according to the Water Services Corporation, is that *“in the technical questionnaire, bidder [Y&P Marketing (Malta) Limited] answered EN 124-2 and not EN 124:2015 as requested in clause 3.1 of the technical specifications.”*
- b) The appellant company remarks that the Contracting Authority - the Water Services Corporation - afforded great attention to the manner in which it communicated its decision to it. Although the Corporation, with its reference to the technical questionnaire submitted by the appellant company and the "shortcomings" it purportedly identified (*“answered EN 124-2 and not EN 124:2015 as requested in clause 3.1 of the technical specifications”*), seems to imply that my client's offer fell short from a technical standpoint, the same Corporation did not go as far as to state - in clear and unequivocal terms - that the appellant company was technically non-compliant. Indeed, the Contracting Authority could have never disqualified my client on the basis of technical non-compliance in view of the fact that, as will be explained throughout this notice of objection, the product offered by the appellant company is identical to the product required and requested by the tender dossier.
- c) As per the Standard Operating Procedures issued by the Department of Contracts, the evaluation of technical offers is ought (sic) to be carried out *“by a suitably competent evaluation panel and in accordance with the Public Procurement Regulations and EU principles of equal treatment, non-discrimination, and transparency”* so much so that a curriculum vitae attesting to each of the members' (of the Evaluation Committee) qualifications, experience and technical knowledge should be prepared and retained for record purposes. The appellant company believes it to be entirely incongruous for *“a suitably competent evaluation panel”* to recommend to the Contracting Authority to discard its offer only because the *“bidder [Y&P Marketing (Malta) Limited] answered EN 124-2 and not EN 124:2015 as requested in clause 3.1 of the technical specifications.”*
- d) Now *“the subject of this tender is the supply and delivery of 600MM x 900MM Ductile Iron Manhole Frames and Covers for New Water Network of the Water Services Corporation.”* To avoid ambiguities and to ensure that the supplied product - that is the *“Ductile Iron Manhole Frames and Covers”* - matches the requirements and standards expected by the Contracting Authority, the tender dossier goes on to

state that “[t]he manhole top (cover and frame) shall comply with EN 124:2015 class D 400 (test load: 400kN).” The bone of contention of this appeal, therefore, and the matter which this Honourable Board is hereby being requested to review and decide upon, is, essentially, whether the product offered by the appellant company (EN 124-2) complies with EN 124:2015.

- e) Without being overly technical, EN 124 is a European Standard - implemented in Malta as a national standard - for gully tops and manhole tops for vehicular and pedestrian areas. This European Standard, which was approved in March 2015 (hence "EN 124:2015"), consists of the following parts:
- Part 1: Definitions, classification, general principles of design, performance requirements and test methods;
 - Part 2: Gully tops and manhole tops made of cast iron;
 - Part 3: Gully tops and manhole tops made of steel or aluminium alloys;
 - Part 4: Gully tops and manhole tops made of steel reinforced concrete;
 - Part 5: Gully tops and manhole tops made of composite materials;
 - Part 6: Gully tops and manhole tops made of polypropylene (PP), polyethylene (PE) or unplasticized poly(vinyl chloride) (PVC-U).
- f) The tender dossier provides that “[w]here in this tender document a standard, brand, or label is quoted, it is to be understood that the Contracting Authority will accept equivalent standards, brands, or labels. However, it will be the responsibility of the respective bidders to prove at tendering stage that the standards, brands or labels quoted are equivalent to the standards, brands or labels requested by the Contracting Authority.” It is therefore unexplained how the Contracting Authority, as per the above-quoted excerpt of the applicable tender dossier, was willing to consider "equivalent standards" but, just like the "suitably competent evaluation panel" before it, failed to acknowledge and accept the standard of the product offered by the appellant company - EN 124-2 which corresponds to Part 2 quoted above ("Gully tops and manhole tops made of cast iron") - which is the precise and exact standard of the product requested by the same Contracting Authority ("*Ductile Iron Manhole Frames and Covers*"). Surely, a "*suitably competent evaluation panel*" needed not any further proof (other than what was submitted) that the offered product and the requested product were one and the same.
- g) It is inconceivable how a "*suitably competent evaluation panel*", lawfully required to be well-versed in all technical aspects connected to this supplies tender, failed to acknowledge that the standard of the product offered by the appellant company (EN124-2 - Gully tops and manhole tops made of cast iron) was effectively the standard required and requested by the tender dossier ("*supply and delivery of 600MM x 900MM Ductile Iron Manhole Frames and Covers*"). This is further exacerbated by the fact that the Contracting Authority subsequently proceeded to award the contract to a bidder, who has presumably offered an identical product to that of the appellant company, but who will then go on to charge the Contracting Authority an extra €35,000 - this when compared to the financial offer submitted by the appellant company. Thus, in breach of "the sole award criterion" - "the cheapest priced offer".

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 1st November 2022, and its verbal submission during the virtual hearing held on 8th November 2022, in that:

- a) When a tenderer desires to submit an offer which conforms to an equivalent standard, it is up to that bidder to demonstrate such equivalence at the moment of submission and not at a later stage or via an objection. Indeed sub-regulation 53 (9) of the Public Procurement Regulations states:
"(9) Where a contracting authority uses the option of referring to the technical specifications referred to in sub-regulation 7(b), it shall not reject a tender on the grounds that the works, supplies or services (sic) tendered for do not comply with the technical specifications to which it has referred, once the tenderer proves in its tender by any appropriate means, including the means of proof referred to in regulation 232, that the solutions proposed satisfy in an equivalent manner the requirements defined by the technical specifications."
For completeness' sake, in the same legal notice the term "standard" means a technical specification, adopted by a recognised standardisation body, for repeated or continuous application, with which compliance is not compulsory, and which is one of the following: (a) "international standard" means a standard adopted by an international standardisation organisation and made available to the general public; (b) "European standard" means a standard adopted by a European standardisation organisation and made available to the general public; (c) "national standard" means a standard adopted by a national standardisation organisation and made available to the general public.
- b) This principle has also been upheld by this Board and our Courts. By way of illustration, reference can be made to a recent judgment of the Court of Appeal (Superior), delivered on the 6th September 2022 C&F Building Contractors Limited v. Id-Direttur Generali tal-Kuntratti et.

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.

- a) Initially, this Board agrees with argumentation as brought forward by the Contracting Authority, whereby when *"Where in this tender document a standard, brand, or label is quoted, it is to be understood that the Contracting Authority will accept equivalent standards, brands, or labels. However, it will be the responsibility of the respective bidders to prove at tendering stage that the standards, brands or labels quoted are equivalent to the standards, brands or labels requested by the Contracting Authority."*, the onus of proof would rest with the respective bidder. However, and more importantly, here it needs to be ascertained whether what the Appellant offered, was in fact an 'equivalent' standard (or product), and therefore the onus of proof would rest onto its shoulders, or whether what it offered was in fact the same product and the Evaluation Committee mis-interpreted such submission.

- b) After hearing argumentation as presented from both parties of this appeal, this Board remarks that what the Appellant company offered, i.e. EN 124-2, is in fact the exact product that the Contracting Authority wants to purchase (the Contracting Authority's final objective). In fact, when quoting 'EN 124-2', the Appellant is being more detailed in its submission than the tender document itself, which quoted 'EN 124:2015'. The EN 124:2015 is 'sub-divided' into a number of different parts. Part 2, i.e. EN124-2, is the exact Ductile Iron Manhole Frame and Cover which is being requested in the tender dossier.
- c) Therefore, this Board opines, that in this appeal, we are not dealing with an issue of '*equivalent standard*' whereby the onus of proof rests with the appellant / economic operator. This was an issue which could have easily been dealt with by way of clarification to be issued by the Evaluation Committee to ascertain if the standard quoted is in fact the '2015' version. Even this issue is somewhat futile, since the '2015' version is the only one '*in vigore*' since it superseded the previous standard issued in the 1990's. It is this Board's opinion that the Evaluation Committee failed in its duties when it decided to outright dislodge such a bid without using the tool available to it, i.e. clarification request (which is allowable as per Note 3 criteria).

Therefore, this Board upholds Appellant's grievances.

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 5th October 2022;
- c) To cancel the Letter of Rejection dated 5th October 2022 sent to Y & P Marketing (Malta) Ltd;
- d) To order the contracting authority to re-evaluate the bid received from Y & P Marketing (Malta) 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 these 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

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member