

PUBLIC CONTRACTS REVIEW BOARD

Case 1405 – WSC/T/55/2019 – Tender for the Supply and Delivery of 5 Drums of Rubber Cable for WWPS Pumps for the Water Services Corporation

The publication date of the tender was the 2nd May 2019 whilst the closing date was the 30th May 2019. The estimated value of the tender (exclusive of VAT) was € 55,500.

On the 23rd September 2019 Magnetic Services Ltd filed an appeal against Water Services Corporation as the Contracting Authority on being disqualified on the grounds that their bid was technically non-compliant. A deposit of € 400 was paid.

There were eight (8) bidders.

On 17th December 2019 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Carmel Esposito as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – Magnetic Services Ltd

Dr Alessandro Lia	Legal Representative
Mr Clayton Pace	Representative

Contracting Authority – Water Services Corporation

Dr Sean Paul Micallef	Legal Representative
Ms Shirley Farrugia	Secretary Evaluation Committee
Eng Joseph Curmi	Member Evaluation Committee
Mr Christopher Sant	Member Evaluation Committee

Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties to this unusual case and invited submissions.

Dr Alessandro Lia Legal Representative of Magnetic Services Ltd said that his client was appealing because the Water Services Corporation claims that certain questions which demanded figures for an answer were replied to by a ‘yes’ or ‘no’ - he was specifically referring to the columns requiring replies to voltage columns and also others. It is not contested that the Appellants had not supplied figures for replies but in each case the question had a fixed answer and a ‘yes’ answer indicated that that figure would be supplied, as there was no alternative, so why was Appellants excluded? As an example the Board was referred to page 15 of the tender documents which shows

values already asked and the reply to it which indicates adherence. The same applies to the length of cable where a 'yes' answer indicates that that is what Appellants will supply. Whilst it is accepted that the Contracting Authority asked for stated values the level playing field was not distorted by this bid as it offered exactly what was required.

Dr Sean Paul Micallef Legal Representative of the Water Services Corporation said in certain instances the Authority required a 'yes' or 'no' answer in other places it expected values. The Authority has to ensure that the principles of self limitation, transparency and equal treatment are observed, and it cannot accept a 'yes' or 'no' answer where it asked for values.

Dr Lia stated that the answers requested were not a question of range of values – the values were fixed clearly and Appellants should not be disqualified on that basis.

Dr Micallef said that there are instances in the submissions where values were not stated and bidder did not supply. The Authority cannot infer what the Appellants meant.

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

End of Minutes

Decision

This Board,

having noted this objection filed by Magnetic Services Ltd (herein after referred to as the Appellants) on 23 September 2019, refers to the claims made by the same Appellants with regard to the tender of reference WSC/T/55/2019 listed as case No. 1405 in the records of the Public Contracts Review Board awarded by Water Services Corporation (herein after referred to as the Contracting Authority).

Appearing for the Appellants:

Dr Alessandro Lia

Appearing for the Contracting Authority: Dr Sean Paul Micallef

Whereby, the Appellants contend that:

- a) **Their offer was unjustly rejected due to the simple fact that, in the questionnaire duly submitted, they had confirmed compliance to the stipulated fixed figures therein, by stating a “yes” or “no” where applicable, instead of repeating the same figure alongside that stipulated in the same questionnaire. In this regard, they maintained that the Authority should have applied the principle of proportionality.**

This Board also noted the Contracting Authority’s ‘Letter of reply’ dated 2 October 2019 and its verbal submissions during the hearing held on 17 December 2019, in that:

- a) **The Authority insists that the Evaluation Committee had to ensure that the principles of self-limitation and equal treatment are strictly observed so that where the question asked for values, it could not accept a “yes” or “no”, as a reply.**

This Board, after having examined the relevant documentation to this appeal and heard submissions made by the parties concerned opines that the issue that merits consideration is the mode of reply, submitted by Appellants in their questionnaire.

- 1. The reasons given by the Authority for Appellants' offer rejection were the following:**

“ . For all Cables-

The WSC requested a Nominal Voltage of 400/750V while the bidder offered YES.

The WSC requested a Maximum Operating Temperature of 60 degC while the Bidder offered YES.

The WSC requested a Cable Length of 500m while the bidder offered YES.”

- 2. Appellants' reply with regards to the above-mentioned alleged deficiencies was as follows:**

		450/750V	
“ 5	<i>Normal Voltage</i>	<i>(state voltage in volts)</i>	<i>Yes</i>
		60°C	
6	<i>Maximum Operating</i>	<i>(state temperature in</i> <i>Degrees Celsius)</i>	<i>Yes ”</i>

In the items of the technical questionnaire namely, items 1.1.1, 1.1.2, 1.1.3, 1.1.4, 1.1.5 and where the stipulated length of the cable is stated as 500m, Appellants indicated a ‘Yes’ alongside the stipulated figure.

- 3. This Board acknowledges the fact that, the tender stipulated that, the bidder had to “State” in each case, however, in this particular eventuality, the questionnaire itself dictated what is being requested and confirmation of same requirements, as duly dictated, by denoting a ‘Yes’, implies that the offer does meet the particular specifications.**
- 4. This Board acknowledges the fact that the Evaluation Committee had to abide by the principles of self-limitation and equal treatment; however, in this particular tender, the parameters were dictated and instilled in the technical questionnaire itself. In this respect, the Bidder was asked to confirm whether the product being offered by the economic operator**

conforms to those indicated fixed amounts/values. The fact that Appellants had to denote the specifications of their product, by repeating the figure or by indicating a ‘Yes’, such replies, in both forms, do render the Contracting Authority’s objective in the assessment of Appellants’ bid.

5. In this particular case, the principle of proportionality should have also been applied and such principle would not have distorted the maxims of self-limitation and equal treatment for the simple reason that, the technical specifications did not consist of a range of values or an unspecified amount. The technical questionnaire dictated fixed figures and confirmation of these was sought by the Authority. The fact that Appellants denoted a ‘Yes’ alongside each fixed figure is a confirmation, in substance, that Appellants will deliver their product with the specifications as duly stipulated in the questionnaire.

6. It must also be mentioned that the Contracting Authority has an obligation to strike a balance between the actual requirements, as stipulated in the technical questionnaire and the interest of the potential

economic operator to participate in the tender, so that the Authority should address a proportional approach.

In conclusion, this Board opines that,

- a) Although, the instructions, as indicated in the technical questionnaire denoted that the bidder had to “State” the relative figure alongside that stipulated in the same document, the inclusion of a ‘Yes’ signifies that the product being offered meets the same specifications as those stated.**

- b) It acknowledges the good intentions of the Evaluation committee to adhere to the principles of self-limitation and equal treatment, however, since the dictated specifications represented fixed values/ figures, the inclusion of a ‘Yes’ alongside each item represented adherence to same stipulated figures.**

- c) By applying the principle of proportionality in this particular instance, the principles of self-limitation and equal treatment will not be affected, as one has to take into account that Appellants’ offer is not being altered in substance but only in form.**

In view of the above, this Board,

- i. upholds the Appellants' contention,**
- ii. does not uphold the Contracting Authority's decision in the award of the tender,**
- iii. directs that Appellants' offer be re-integrated in the evaluation process,**
- iv. directs that the deposit paid by Appellants be fully refunded.**

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Carmel Esposito
Member

7 January 2020