

PUBLIC CONTRACTS REVIEW BOARD

Case 1572 – WSMQ 018/254/2020 – Quotation Request for the Supply and Delivery of two (2) one thousand litre (1000L) IBC Containers of Havoline DELO XLC Pre-Mix 40/60 to be used within the Ecohive Complex Maghtab, Malta

2nd June 2021

The Board,

Having noted the letter “Call for Remedies” filed by Dr John L. Gauci on behalf of Dr John L. Gauci & Associates acting for United Equipment Company Ltd, (hereinafter referred to as the Appellant) on the 16th April 2021;

Having also noted the reasoned letter of reply filed by Dr Gavin Gulia on behalf of Gulia & Busuttill Advocates acting for Wasteserv Malta Ltd on the 20th April 2021;

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by the legal representatives of the parties;

Having noted and evaluated the minutes of the Board sitting of the 1st June 2021 hereunder-reproduced.

Minutes

Case 1572– WSMQ 018/254/2020. Call for Quotations for the Supply and Delivery of Two (2) One Thousand Litre (1000L) IBC Containers of Havoline DELO XLC Pre-mix 40/60 to be used within the Ecohive Complex Maghtab, Malta

Remedy Prior to the Closing Date of a Call for Competition

The call for Quotations was published on the 1st April 2021 and the closing date was the 28th April 2021. The value of the tender was € 6052.50

On the 16th April 2021 United Equipment Co (UNEC) Ltd filed an appeal against Wasteserv Malta Ltd as the Contracting Authority objecting to the terms of the Call on the grounds that it was discriminatory and restricted competition.

A deposit of € 400 was paid.

On 1st June 2021 the Public Contracts Review Board (PCRB) composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Mr Richard Matrenza as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellant – United Equipment Co (UNEC) Ltd

Dr John L Gauci	Legal Representative
Mr Andrew Portelli	Representative

Contracting Authority – Wasteserv Malta Ltd

Dr Gavin Gulia	Legal Representative
Ms Stephania Scicluna Laiviera	Representative
Ms Branica Xuereb	Representative
Mr Nathan Gatt	Representative
Mr Anthony Camilleri	Representative
Mr Karl Mizzi	Representative
Mr Carlos Galea	Representative

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties. He noted that since this was a virtual meeting all the parties agreed to treat it as a normal hearing of the Board in line with Article 89 of the Public Procurement Regulations. He then asked Appellant’s representative to make his submissions.

Dr John L Gauci Legal Representative for UNEC Ltd said that Appellants request was meant to open competition and referred to local and European regulations restricting tenders that requested particular brands and on the obligation to ask for equivalent products. There are many products on the market similar to the one requested in the call for quotations, although a clarification requested indicated that the Contracting Authority would not accept alternatives. The reason the Authority gave for seeking exclusivity was not sufficient ground for this requirement. Reference was made to past cases heard by the Board and which were detailed in the appeal letter.

Dr Gavin Gulia Legal Representative for Wasteserv Malta Ltd said that he agreed with the facts as stated and referred the Board to his written reply giving the reason why exclusivity was requested and necessary.

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

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 1st June 2021.

Having noted this ‘Call for Remedy Prior to the Closing Date of a Call for Competition’ filed by United Equipment Company Ltd (hereinafter referred to as the Appellant) on 16th April 2021, with regard to the tender of reference WSMQ 018/254/2020 listed as case No. 1572 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr John L. Gauci

Appearing for the Contracting Authority: Dr Gavin Gulia

Whereby, the Appellant contends that:

- a) The Contracting Authority is only interested in the Havoline brand.
- b) The request for the provision of a product with a specific brand name is unlawful, discriminatory and abusive in terms of both local and EU legislation. This as per:
 - i. Regulation 53(6) which states *“Technical specifications shall afford equal access of economic operators to the procurement procedure and shall not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.”*;
 - ii. Regulation 53(8) which states *“Unless justified by the subject-matter of the contract, technical specifications shall not refer to a specific make or source, or a particular process which characterises the products or services provided by a specific economic operator, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. Such reference shall be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject matter of the contract pursuant to sub-regulation (3) is not possible. Such reference shall be accompanied by the words ‘or equivalent’ .”*
- c) That the coolant is not brand specific but specification and performance specific.

This Board also noted the Contracting Authority’s Letter of Reply dated 20th April 2021 and its verbal submission during the virtual hearings held on 1st June 2021, in that:

- a) The coolant in the system is Havoline DELO XLC Pre-mix 40/60. Following the manufacturer’s instructions, the same brand and type of coolant is to be utilised as it has to be mixed with the coolant already present in the existing systems. Failing to do so will heavily increase the risk of destructing the componets of the system.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties, will consider Appellant’s grievances, as follows:

- a) The Board makes reference to PCRБ case 1275 were it was decreed:

“This Board would respectfully refer to the basic principles which should be adhered to when the Contracting Authority stipulates the technical specifications, in that, they should:

- *be precise in the way they describe the requirements;*
- *be easily understood by the prospective Bidders;*

- *have clearly defined, achievable and measurable objectives;*
- ***not mention any brand names or requirements which limit competition or if brands are mentioned, include the term “or equivalent”;***
- *provide sufficient detailed information that allows Bidders to submit realistic offers.”*

One of the main pillars of Public Procurement is open competition. The Board opines that no proof was put forward and / or presented by the Contracting Authority for the need to have a brand specific product supplied. Moreover, the Tender Document failed to include the term **“or equivalent”**, thereby did not provide an opportunity to other economic operators to participate in the tender in question. This is deemed to stifle competition.

The Board upholds Appellant’s grievance.

The Board,

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) Upholds the Appellant’s concern;
- b) To direct the Contracting Authority to remove the discriminatory technical specification present in the Call for Quotation Document (specific brand name) or to include the term “or equivalent” and
- c) In view of the above considerations, the Board furthermore orders that the deposit paid by the appellant upon filing of this Call for Remedies should be refunded.

Mr Kenneth Swain
Chairman

Dr Charles Cassar
Member

Mr Richard Matrenza
Member