

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1657 – WSC/T/64/2021 – Supplies – Supply and Delivery of Cesspit Level Monitoring Sensors including Online Portal for the Water Services Corporation**

**29<sup>th</sup> November 2021**

The Board,

Having noted the letter of objection filed by Dr Stanley Joe Portelli on behalf of Iuris Advocates acting for and on behalf of Harbour Solutions Ltd, (hereinafter referred to as the appellant) filed on the 3<sup>rd</sup> September 2021;

Having also noted the letter of reply filed by Dr Sean Paul Micallef acting for Water Services Corporation (hereinafter referred to as the Contracting Authority) filed on the 9<sup>th</sup> September 2021;

Having also noted the letter of reply filed by Dr Clement Mifsud Bonnici and Dr Antoine Cremona on behalf of Ganado Advocates acting for and on behalf of IOT Malta Limited (hereinafter referred to as the Preferred Bidder) filed on the 10<sup>th</sup> September 2021;

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 23<sup>rd</sup> November 2021 hereunder-reproduced;

#### **Minutes**

#### **Case 1657–WSC/T/64/2021. Tender for the Supply and Delivery of Cesspit Level Monitoring Sensors including Online Portal for the Water Services Corporation.**

The tender was published on the 16<sup>th</sup> June 2021 and the closing date was the 30<sup>th</sup> July 2021. The value of the tender excluding VAT was € 320,000.

On the 3<sup>rd</sup> September 2021 Harbour Solutions Ltd 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 technically not compliant.

A deposit of € 1600 was paid.

There were four (4) bidders.

On 23<sup>rd</sup> November 2021 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 – Harbour Solutions Ltd**

|                     |                      |
|---------------------|----------------------|
| Dr Stanley Portelli | Legal Representative |
| Eng Ruben Curmi     | Representative       |

**Contracting Authority – Water Services Corporation**

|                        |                      |
|------------------------|----------------------|
| Dr Sean Paul Micallef  | Legal Representative |
| Mr Trevor Chircop Bray | Representative       |
| Eng Anthony Muscat     | Representative       |
| Mr David Pace          | Representative       |

**Preferred Bidder – IOT Malta Ltd**

|                           |                      |
|---------------------------|----------------------|
| Dr Clement Mifsud Bonnici | Legal Representative |
| Mr Reuben Camilleri       | 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.

Dr Stanley Joe Portelli Legal Representative for Harbour Solutions Ltd said that the appeal hinged on the interpretation of the reply to question 12 in the Technical Questionnaire where Appellant had inserted the words ‘CE Confirmed’ which indicates that all the requested markings were covered. The CE mark is the only authorised certification and is an assurance that all the markings are included.

Dr Sean Paul Micallef Legal Representative for the Water Services Corporation said that the Evaluation Committee does not read between the lines as to the interpretation of the words ‘CE Confirmed’. The Appellant’s declaration confirms that the product is CE certified but does not confirm that the other markings are there. So this turned on a question of clarification or rectification. Rectification was not possible in view of Note 3 restrictions whilst clarification would have run the risk of turning a non-compliant tender into a compliant one. The actions the Authority could take were therefore very limited.

Dr Clement Mifsud Bonnici Legal Representative for IOT Malta Ltd stated that the confirmation by the Appellant varies from the tender request – there is, for example, no confirmation that the WSC logo would be included. This is not just a matter of an incomplete answer but according to Regulation 9.4 of the General Rules covering Tenders bidder is bound to accept automatically all the rules of the tender dossier. Appellant did not raise any valid point why the tender should be saved – proportionality does not apply in this case as this was not an instance where an error was made but an intentional statement. Following the *dictum* in CJEU Case 131/16 (paragraph 31) if a change appears to make the bid seem as a new tender it is unfair on the compliant bidders.

Dr Portelli said that the reply in question is on a technical point and therefore the use of the word ‘confirmed’ means total confirmation of the full list of items required and it is not a matter of clarification or rectification as it is all there.

Dr Mifsud Bonnici said no indication was given that the WSC logo was included and if the change was accepted it would be a new tender.

Dr Sean Micallef said that the evaluation was based on what was offered and the principles of self limitation and equal treatment applied. It was not clear from the submissions that all the required markings would be supplied.

The Chairman thanked the parties for their submissions 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 23<sup>rd</sup> November 2021.

Having noted the objection filed by Harbour Solutions Ltd (hereinafter referred to as the Appellant) on 3<sup>rd</sup> September 2021, refers to the claims made by the same Appellant with regards to the tender of reference WSC/T/64/2021 listed as case No. 1657 in the records of the Public Contracts Review Board.

|  |                           |
|--|---------------------------|
| Appearing for the Appellant:             | Dr Stanley Joe Portelli   |
| Appearing for the Contracting Authority: | Dr Sean Paul Micallef     |
| Appearing for the Preferred Bidder:      | Dr Clement Mifsud Bonnici |

Whereby, the Appellant contends that:

- a) Tender was not being awarded to Harbour Solutions Ltd for the reason that the answer to the requirement in question 12 of the Technical Questionnaire was incomplete.
- b) That the requirement set in question 12 of the Technical Questionnaire was to “*confirm presence of markings as requested*”, to which my clients answered: “*Confirmed CE Certified*”;
- c) That it is amply clear that rather than giving an incomplete answer, the Appellant added the words 'CE Certified', which in simple terms should be interpreted that they confirm the presence of markings as requested since they are CE Certified.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 9<sup>th</sup> September 2021 and its verbal submission during the virtual hearing held on 23<sup>rd</sup> November 2021, in that:

- a) The Contracting Authority was requesting a confirmation from the bidders that the markings listed under Clause 3.5 of the Tender Specifications would be provided.

3.5 Markings

3.5.1 The devices shall be marked with a WSC logo. Furthermore, on the body or the face of the devices, the following marking shall be made:

- Type/model of device
- Symbol of manufacturer
- Part Number
- Indication of battery
- CE Marking

- b) The members of the Tender Evaluation Committee here agreed that the answer presented by the bidders does not confirm, or otherwise, that the above-listed markings would be provided. What this answer specifies is that these bidders are confirming that their product is CE Certified - nothing more, nothing less. A CE Certified product does not necessarily include all the markings listed above and certainly not one with the Contracting Authority's Logo. As such, the TEC could not deem this offer to be compliant

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 10<sup>th</sup> September 2021 and its verbal submission during the virtual hearing held on 23<sup>rd</sup> November 2021, in that:

- a) That in item 12 of the Technical Questionnaire (which is a Note 3 matter), the Appellant wrote "*Confirmed CE Markings*" when asked to confirm "presence of markings as requested" in terms of technical specification 3.5.1. The Water Services Corporation (the 'Contracting Authority') found this to be an "incomplete answer", and therefore, the bid was deemed to be technically non-compliant.
- b) The "CE Marking" was one of 6 markings required by the Contracting Authority, and hence, the Appellant not only failed to confirm that its offer will provide the 6 markings necessary, but actually, went out of its way to state that it will only provide the "CE Marking".
- c) The Preferred Bidder submits that the Appellant not only failed to provide the required clear and unequivocal confirmation under Item 12 by way of a "complete answer", but proceeded to make, what is effectively a prohibited, reservation under the public procurement rules. The law is clear that any disagreement, contradiction, alteration or deviation in the bid from the tender specifications shall disqualify the bidder.

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 in their entirety.

The Board notes:

- a) That in the Technical Questionnaire, which is a 'Note 3' document, in Technical Requirement 12, entitled 'Confirm presence of markings as requested', in reference to Clause 3.5.1, the Appellant submitted "confirmed CE Certified".
- b) That the Tender Dossier, in Section 3 Clause 3.5.1, required devices to be marked with a WSC logo, together with 5 more markings, one of them being CE Marking.
- c) That the Evaluation Committee correctly interpreted the Appellant's submission "confirmed CE Certified" as referring to only 1 particular requirement of clause 3.5.1 above mentioned. Considering that the issue at hand is a 'Note 3' item, doing otherwise would have been going contrary to the principle of Self Limitation.
- d) That in this specific situation, only a rectification could have made this bid technically compliant. Faced with a 'Note 3' situation, the Evaluation Committee acted proportionately and diligently.

Finally, the 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