

PUBLIC CONTRACTS REVIEW BOARD

Case 1658 – WSC/T/126/2020 – Supply and Delivery of 600mm Manhole Covers and Frames for the Water Services Corporation

1st December 2021

The Board,

Having noted the letter of objection filed by Mr Roberto Ragonesi acting for and on behalf of Ragonesi & Co Ltd, (hereinafter referred to as the appellant) filed on the 7th 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 16th September 2021;

Having heard and evaluated the testimony of the witness Ing. Nigel Ellul (Member of the Evaluation Committee) as summoned by Dr Joseph Camilleri acting for Ragonesi & Co Ltd.

Having heard and evaluated the testimony of the witness Mr Alessandro Benedetti (Representative of Agent Company for the Appellant) as summoned by Dr Joseph Camilleri acting for Ragonesi & Co Ltd;

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 23rd November 2021 hereunder-reproduced;

Minutes

Case 1658–WSC/T/126/2020. Tender for the Supply and Delivery of 600mm Diameter Manhole Covers and Frames for the Water Services Corporation

The tender was published on the 27th January 2021 and the closing date was the 2nd March 2021. The value of the tender excluding VAT was € 380,987.

On the 7th September 2021 Ragonesi & Co 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 € 1904.94 was paid.

There were twenty (20) bidders.

On 23rd 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 – Ragonesi & Co Ltd

Dr Joseph Camilleri	Legal Representative
Mr Roberto Ragonesi	Representative
Mr Roberto Belli	Representative

Contracting Authority – Water Services Corporation

Dr Sean Paul Micallef	Legal Representative
Eng Nigel Ellul	Evaluator
Mr Charles Camilleri	Representative
Ms Shirley Farrugia	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. 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 Joseph Camilleri Legal Representative for Ragonesi and Co Ltd said that Appellants offer had been turned down due to the manhole cover offered not meeting the Contracting Authority's stipulations regarding the angle of opening and the gasket. Appellant did not submit sample in this tender as it was an identical manhole with identical requirements to ones already provided in previous tenders. Appellant directed the Authority to the products already supplied and was therefore very surprised when the offer was rejected.

Although it is unusual to refer to previous tenders, this case is different as the Water Services Corporation at Appellant's request agreed to assess this offer on products supplied previously – this makes what happened before relevant as identical products could not suddenly fail to meet the requirements. This was not an issue of testing a new product.

Dr Sean Micallef Legal Representative for the Water Services Corporation stated that legally previous calls could not be considered and what happened previously does not matter and that is the reason why the request for data had been turned down. The product offered failed on two criteria – the lid opening angle and the gasket. Appellant had the choice of providing a new sample or of testing a previously supplied product which latter option was accepted. The sample was therefore only valid for this particular call. The documentation was correct but the sample failed for the reasons given.

Engineer Nigel Ellul (341166M) called as a witness by Appellant explained on oath how the testing of the sample was carried out – namely the sample from the last lot, with Ragonesi's name imprinted on the lid, was tested by the Evaluation Committee jointly. The angle of opening was found to be different from the tender requirement (104 instead of 110°) and when they tried to pull off the gasket there was no resistance which indicates that it was not glued. Only one sample was tested.

Questioned by Dr Micallef witness said that he did not know the date when the last lot was supplied but it was 'recently'. Storage did not affect the quality of the product or the glue.

At this stage Dr Camilleri made a request for the documents of the previous tender to be made available to him together with the result of the sample tested.

The Chairman proposed a short recess to enable the Board to consider the request.

On resumption the Chairman stated that the Board noted the request by Dr Camilleri regarding documentation with regard to the previous tender WSC/T/11/2020. The Board notes that the sole premise of today's hearing is to hear the appeal on tender WSC/T/126/2020. Therefore, the Board is of the opinion that it is not within its remit to issue such a ruling on documentation relating to past tenders. Such a request should have been made to the Contracting Authority and it is such Authority that is to decide whether it wants to divulge such information or otherwise. The Board will proceed with hearing this case.

Mr Alessandro Benedetti (DA 94672BX) called as a witness by Appellant testified on oath that having looked at the Test Result he held that all results in the test should have been listed instead of just stating 'Passed'. Also there was no picture of the item tested. He was the designer of the product which had been checked for conformity and function with close checking during production. The angle of opening of the lid had been checked at 110° (illustration provided) and the gasket was usually glued to frame with a small quantity of glue in case it needed to be changed but one still had to pull the gasket to remove it.

In reply to questions from Dr Micallef witness continued that the illustration showed the same model as supplied to the Appellant but his company also produced other models with different angles according to customers' requirements. There was strict testing during the production stage and witness did not feel that a fault could happen in production as the same mould was used throughout. The glue was enough to stop the gasket coming off by itself but strong enough to take traffic loads.

That completed the testimonies.

Dr Camilleri said that this appeal hinges on the issue of the sample. Witness Mr Benedetti confirmed that manufacturer's tests were in line with what the WSC required. The test carried out by the Authority on only one sample was not confirmed by photographic proof and no indication was given as to how the test was carried out, whereas the supplier had supplied proper proof. The test result provided by the Authority does not conform to the testimony given by Engineer Ellul that the Evaluation Committee was involved in the testing. Bidder had already supplied 2,700 items of the same product with no complaints received and the proof provided by the Authority was insufficient.

Dr Micallef stated that the sample indicated that the product was not compliant and the Evaluation Committee cannot refer to past contracts or infer anything from previous tenders and must observe procurement principles. In PCRB Case 1291 it was held that even a minimal difference still made the offer not compliant. The Authority can only rely on the sample tested.

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

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 23rd November 2021.

Having noted the objection filed by Ragonesi & Co Ltd (hereinafter referred to as the Appellant) on 3rd September 2021, refers to the claims made by the same Appellant with regards to the tender of reference WSC/T/126/2020 listed as case No. 1658 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Joseph Camilleri

Appearing for the Contracting Authority: Dr Sean Paul Micallef

Whereby, the Appellant contends that:

- a) When the WSC requested us to submit a sample, we informed them (as had also been written in our offer on our submitted Financial Bid form), that we had already supplied a large number of identical manholes to them, under tender WSC/T/11/2020, which was awarded to us in 2020. Despite this, we asked them whether they still required a sample. They replied to us, through the ePPS and advised us that a sample for this tender was not requested from us.
- b) In view of the above and given that both Section 3 Clause 1 g (iii) and Section 3 Clause 1 h (iii) were, word-for-word identical, in both tenders (see attached copies of technical specifications for both tenders), that is in both WSC/T/126/2020 (under review) and WSC/T/11/2020 (which was awarded to us last year), we fail to understand how our sample could have ever had these above-mentioned discrepancies, when hundreds of our identical manholes were delivered, accepted and paid for by the WSC under contract WSC/T/11/2020.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 16th September 2021 and its verbal submission during the virtual hearing held on 23rd November 2021, in that:

- a) When a request for sample/s is made, bidders are given the opportunity to either submit a new sample or, as is the case here, notify the Contracting Authority that the latter may test a similar sample which had been supplied by the same Economic Operator in response to a previous CT. WSC accepted to test a previously-supplied manhole cover & frame as requested by the Appellant, notwithstanding that the latter was given the opportunity to submit a new sample.

- b) The Tender Evaluation Committee (hereinafter "TEC") cannot evaluate quotations based on offers submitted in response to previous calls, even where these have identical provisions. Each offer must be evaluated at face value vis-à-vis the Technical Specifications listed in the Dossier. If a particular offer is found to be non-compliant, the TEC cannot reverse its decision by basing its adjudication on a similar offer presented by the same bidder in a previous CfT. On that note, it is being highlighted that each CT must be evaluated independently from any other CT even if the two are identical. Each TEC is bound by the principle of self-limitation which, if violated, would lead to further breaches of other principles such as those of transparency and of equal treatment of bidders.
- c) Lastly, the Appellant claims that his offer was more economically advantageous than the one being recommended for award. Whilst this is true, an offer must be both administratively and technically compliant before its economic aspect is even considered. In other words, an offer is not included in the final ranking unless it is fully compliant with the required Selection and Award criteria.

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 consider Appellant's grievances in their entirety.

This Board makes reference to:

1. The reply provided by the Contracting Authority on the clarification entitled "Sample – Ragonesi and Co. Ltd", whereby it was stated *"Dear Sir, Reference is being made to your reply regarding our request for sample. Kindly note that your request to use a manhole cover already submitted by your good self through tender WSC/T/11/2020 has been met and therefore there is no need to send another sample"*.
2. The fact that both clauses, i.e., Section 3 Clause 1(g)(iii) and Clause 1(h)(iii), being the reasons for technical non-compliance, are identical in both tenders having reference WSC/T/126/2020 and WSC/T/11/2020.
3. The testimony under oath of Ing. Nigel Ellul whereby he stated that the test on the sample was done by all the members of the Evaluation Committee concurrently, i.e. all were present for the test undertaken.
4. That however, the "Test Result" report is only signed by a Mr Rudolph Falzon – 'Team Leader – Test Room' and by none of the members of the Evaluation Committee.
5. The testimony under oath of Mr Alessandro Benedetti whereby he also presented factual proof that the cover holds upright open at an angle of 110 degrees.

Therefore, this Board opines that:

1. Due to the Contracting Authority agreeing in the Clarification notice to use a 'sample' from the previous tender lot, that the technical clauses of tender WSC/T/11/2020 are deemed to be relevant to the case in hand.
2. Due to the fact that no proof was brought forward by the Contracting Authority that the product held in hand for tender WSC/T/11/2020 was ever defective, that the Contracting Authority is content that the product achieves / meets those technical specifications.
3. Due to the evidence of Mr Alessandro Benedetti and the "Test Result" report issued by the Contracting Authority not being endorsed by the Evaluation Committee, that doubts arise on the test performed on the sample used.

Therefore, this Board upholds the 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 28th August 2021;
- c) To cancel the Letters of Rejection dated 28th August 2021 sent to Ragonesi and Co. Ltd;
- d) To order that a proper measurement is made of the angle of opening of the sample provided using a professional measuring instrument; To order the contracting authority to re-evaluate the bid received from Ragonesi and Co. 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 this 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

Mr Lawrence Ancilleri
Member

Dr Charles Cassar
Member