

# **PUBLIC CONTRACTS REVIEW BOARD**

## **Case 1863 – WSC/T/84/2022 – Framework Agreement for the Supply and Delivery of PPR Manifolds to the Water Services Corporation**

**8<sup>th</sup> May 2023**

The Board,

Having noted the letter of objection filed by Dr Stefan Camilleri on behalf of Camilleri Cassar Advocates acting for and on behalf of Ferox Trading Limited, (hereinafter referred to as the appellant) filed on the 3<sup>rd</sup> April 2023;

Having also noted the letter of reply filed by Dr John L Gauci on behalf of Dr John L Gauci & Associates acting for the Water Services Corporation (hereinafter referred to as the Contracting Authority) filed on the 13<sup>th</sup> April 2023;

Having heard and evaluated the testimony of the witness Ing Chris Galea (Representative of Ferox Trading Limited) as summoned by Dr Stefan Camilleri acting for Ferox Trading Limited;

Having heard and evaluated the testimony of the witness Ing Stephen Galea St. John (Chairperson of the Evaluation Committee) as summoned by Dr John L Gauci acting for the Water Services Corporation;

Having heard and evaluated the testimony of the witness Ing Shawn Agius (Representative of the Water Services Corporation) as summoned by Dr John L Gauci acting for the Water Services Corporation;

Having heard and evaluated the testimony of the witness Ing Jacques Caruana (Member of the Evaluation Committee) as summoned by Dr John L Gauci acting for the 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 2<sup>nd</sup> May 2023 hereunder-reproduced;

### **Minutes**

#### **Case 1863 – WSC/T/84/2022 – Supplies – Framework Agreement for the Supply and Delivery of PPR Manifolds for the Water Services Corporation**

The tender was issued on the 14<sup>th</sup> September 2022 and the closing date was the 14<sup>th</sup> October 2022. The estimated value of the tender excluding VAT, was € 283,180.80.

On the 3<sup>rd</sup> April 2023 Ferox Trading Ltd filed an appeal against the Water Services Corporation as the Contracting Authority on the grounds that their bid was deemed to not satisfy the technical specifications.

A deposit of € 1415.90 was paid.

There were seven (7) bids.

On the 2<sup>nd</sup> May 2023 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Mr Richard Matrenza as members convened a virtual public hearing to consider the appeal.

The attendance for this public hearing was as follows:

**Appellant – Ferox Trading Ltd**

Dr Stefan Camilleri Cassar	Legal Representative
Mr Chris Galea	Representative
Mr Vinayak Panday	Representative

**Contracting Authority – Water Services Corporation**

Dr John Gauci	Legal Representative
Eng Stephen Galea St John	Chairperson Evaluation Committee
Eng Jacques Caruana	Evaluator
Eng Anthony Muscat	Representative
Eng Shawn Agius	Representative
Ms Christine Scicluna	Secretary Evaluation Committee

**Preferred Bidder – Wurth Ltd**

Mr Arthur Calleja	Representative
Eng Keith Farrugia	Representative
Eng Chris Cutajar	Representative

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

Dr Stefan Camilleri Cassar Legal Representative for Ferox Trading Ltd requested that witnesses be heard before making his submissions.

Mr Chris Galea (254977M) called to testify by the Appellant stated on oath that he is an engineer by profession and General Manager of the parent company of Ferox Trading Ltd. On a screen shot he demonstrated the product which is the object of this appeal. Appellant fully dealt with the tender requirements and on a drawing supplied indicated how the measurements of the manifold were met. The Water Services Corporation complained that that the joints in the manifold were not exactly at an angle of 90° but the distance between the joints was as requested and still allowed the water meters to be connected. Some warping had occurred when the product was heated. The variances were only slight as shown in a table displayed and there was still room to fit the meters despite the smaller spacing.

In reply to questions from Dr Gauci, the Legal Representative for the Contracting Authority, witness stated that two samples had been provided which were subsequently retrieved from the Authority. He agreed that variances were indicated in all measurements in the samples and that no clarifications had been sought to find out if tolerances were acceptable.

Engineer Stephen Galea St John (369465M) called to testify by the Authority stated on oath that he was the Chairperson of the Evaluation Committee. He said that the Appellant seemed to have decided what was acceptable and required in his submission. It was very clear that the branches from the manifold were not at an angle of 90° - this made them too close and not acceptable for practical and aesthetic reasons. In a screen shot witness indicated the risks of the outlets being too close. The

samples provided were requested back by the Appellant after the testing process. Attempts to fix meters to the faulty samples indicated that they would be too close.

Engineer Shawn Agius (298990M) called as a witness by the Authority testified on oath that when the samples were tested the indication was that the space between the outlets was restricted.

Engineer Jacques Caruana (272997M) called to testify by the Authority stated on oath that he was one of the Evaluators and that the space between the outlets was insufficient and that when the manifold was fixed to the wall there was insufficient space to fix piping.

Questioned by Dr Camilleri Cassar witness said that the manifold was not measured by the Evaluation Committee but in the Test Room. The difference between the outlets had to be 120mm but the difference in the angles affected this distance being more pronounced the longer the manifold was – this was not conducive to the WSC requirements.

This concluded the testimonies.

Dr Camilleri Cassar stated that the sample satisfied the tender and the Authority's drawing had been followed. The 90° requirement in the tender was not clear to which angle of viewing it referred to and 90° on the horizontal did not affect the use but was merely unesthetic. The technical perspective was fully compliant and meters could actually be fitted since manifolds were never fixed flush to a wall.

Dr Gauci said that the tender was specific and no deviation was allowed. It was very clear from the submitted sample that there were variations when the tender did not allow tolerances. The aesthetic argument is not valid as the decision is based on practicality and functional use whilst the price argument is irrelevant. The Evaluation Committee had no alternative but to reject this bid.

The Chairman 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 2<sup>nd</sup> May 2023.

Having noted the objection filed by Ferox Trading Limited (hereinafter referred to as the Appellant) on 3<sup>rd</sup> April 2023, refers to the claims made by the same Appellant with regards to the tender of reference WSC/T/84/2022 listed as case No. 1863 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Stefan Camilleri

Appearing for the Contracting Authority: Dr John L Gauci

Appearing for the Preferred Bidder: Mr Arthur Calleja

Whereby, the Appellant contends that:

- a) In terms of the Technical Specifications established in the relative Tender Document, specific reference is being made to article 8 of Section 3 on page 12 of the Tender Document, the product specifications had to have the following: *“The outlets are to be fusion welded at 90 degrees (perpendicular) to the main feeder pipe and shall be aligned along the length of the pipe.”* Notwithstanding the fact that Ferox's offer was technically compliant on all the issues of substance and notwithstanding the fact that it was the cheapest offer, its offer was rejected on the basis that the outlets on the sample provided were not 90 degrees to the main feeder pipe.
- b) At the outset it must be stated that when samples are manufactured these are done by (sic) hand and consequently it is next to impossible to have a perfect 90 degrees angle. Once an order is made then the machine or jig is calibrated accordingly and all the fusion welding on all the products order is done accurately and according to spec.
- c) Without prejudice to the above, Ferox submits with respect that when you are talking about a product that needs to be manufactured it is very uncommon to have technical specifications which do not allow for tolerance. Tolerances are not only common in manufacturing but rather very important.
- d) Tolerances are important in manufacturing since they determine exactly how much room for error you have when you manufacture each part. When you appreciate the vital role that tolerances play in the manufacturing process, you'll design higher quality products and make fewer costly manufacturing mistakes. So much so that even the manufacturing standard for the pipes being offered, namely ISO 15874 provides for a tolerance range.
- e) In the case at hand even though article 8 refers to 90 degrees as the angle at which the outlets are to be fusion welded to the main feeder pipe, it is also true that this specification is not critical in that it has absolutely no effect on the function of the product being supplied.
- f) Had the said specification been so critical for the Contracting Authority refers (sic) to it would have undoubtedly been included in the Technical Offer Form/questionnaire which each tenderer was obliged to fill in. From a simple analysis of the technical questions inserted in the said form it is very clear which were the technical specifications which for the Contracting Authority were no (sic) negotiable.
- g) Here we have a situation where the Contracting Authority is prepared to pay an extra €117,898.39 basing itself on a visual examination of a sample and on the fact that in their view the sample is not complaint (sic) with a technical specification which has absolutely no bearing on the functionality, performance and durability of the product.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 13<sup>th</sup> April 2023 and its verbal submission during the virtual hearing held on 2<sup>nd</sup> May 2023, in that:

- a) The sample submitted by Objector was not compliant to the technical specifications and therefore the Evaluation Committee was right in recommending the exclusion of Objector. Clause 8 of the Technical Specifications clearly state that "The outlets are to be fusion welded at 90 degrees (perpendicular) to the main feeder pipe and shall be aligned along the length of the pipe" Clause 8 of the Technical Specifications. It is evident, and also admitted, by Objector in its Objection that the sample provided was not in conformity with the tender specifications. In fact, as will be amply demonstrated during the hearing, the issue in this case is not about the components being out of angle by a fraction of a degree measurable by a sophisticated instrument. The angular defect was easily visible to the naked eye, without having to resort to any measuring. This was further amplified when an attempt was made to install water meters on this manifold. The angular defect resulted in some meters not fitting next to each other. This obviously defeats the whole purpose of having such a manifold. With regards to the comment that the requested 90-degree angle is not critical, such comment is unfounded both legally and factually. First of all, as has been confirmed by this Board and also by our Courts, it is not up to the bidder to decide unilaterally to ignore a mandatory specification. Secondly, from a factual and technical point of view, the manifold is a part of a potable water service connection, and if the angle is not correct. the meters connected to it would not be properly aligned. Besides, as happened during the testing of the sample, there is the further possibility of not being able to install the water meters due to such misalignment. Furthermore, it goes without saying that the fact that any requirement is not included in the technical questionnaire does not render it superfluous. Indeed, any comment in relation to the fact that Objector's offer was cheaper than the recommended bidder's offer is simply irrelevant in this case since the Contracting Authority is bound to discard any non-compliant offer such as the one offered (sic) by the Objector in this case.
- b) Objector actually withdrew the sample that had been submitted. The Contracting Authority deems that such modus operandi while the tender process is still suspended in view of this current Objection, in itself, actually disqualifies the Objector since the resubmission of fresh sample is not allowed under public procurement legislation. Indeed, as often ruled by the European Court of Justice, a tender cannot be amended after it has been submitted, whether at the request of the contracting authority or at the request of the tenderer concerned. Therefore where the contracting authority regards a tender as failing to meet the technical requirements of the tender specifications, it cannot require the tenderer to provide clarification (vide, inter alia, judgment in Manova, C-336/12, EU:C:2013:647, para. 31 and the case-law cited therein).

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 now Appellant's grievances.

- a) During the testimony under oath of witness Ing Chris Galea, it was the same witness that, *ex admisissis*, agreed that variances (to the 90° specification) were indicated in all measurements taken by him on the sample supplied.
- b) This Board has time and time again provided its judgement that it is not up to the economic operator to decide which criteria are to be deemed of ‘substance’ or otherwise!
- c) The tender document was inexplicably clear that *“the outlets are to be fusion welded at 90 degrees (perpendicular) to the main feeder pipe.....”* No variations were included within such criterion. Moreover, it is to be noted that the appellant did not make a request for clarification to ‘double check’ whether any variations and / or tolerances were allowed.
- d) The Evaluation Committee, therefore, observed one of the main principles of Public Procurement, i.e. achieving a level playing between all participating economic operators, when it deemed such sample as being technically non-compliant for the reasons provided.
- e) All other arguments, regarding the financial offer, are deemed irrelevant if a bid does not ‘pass’ the test of technical compliance.

Therefore, this Board does not uphold 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 to Wurth Limited,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

**Mr Kenneth Swain**  
Chairman

**Mr Richard Matrenza**  
Member

**Mr Lawrence Ancilleri**  
Member