

PUBLIC CONTRACTS REVIEW BOARD

Case 1864 – WSC/T/84/2022 – Framework Agreement for the Supply and Delivery of PPR Manifolds to the Water Services Corporation

5th May 2023

The Board,

Having noted the letter of objection filed by Mr Nicholas J. Attard acting for and on behalf of Attard Farm Supplies Limited, (hereinafter referred to as the appellant) filed on the 3rd 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 13th April 2023;

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 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 2nd May 2023 hereunder-reproduced;

Minutes

Case 1864 – 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 14th September 2022 and the closing date was the 14th October 2022. The estimated value of the tender excluding VAT, was € 283,180.80.

On the 3rd April 2023 Attard Farm Supplies Ltd filed an appeal against the Water Services Corporation as the Contracting Authority on the grounds that their bid was rejected as it was deemed to be not the cheapest.

A deposit of € 1415.90 was paid.

There were seven (7) bids.

On the 2nd 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 – Attard Farm Supplies Ltd

Mr Joseph Attard
Mr Nicholas Attard

Representative
Representative

Contracting Authority – Water Services Corporation

Dr John Gauci
Eng Stephen Galea St John
Eng Jacques Caruana
Eng Anthony Muscat
Ms Christine Scicluna

Legal Representative
Chairperson Evaluation Committee
Evaluator
Representative
Secretary Evaluation Committee

Preferred Bidder – Wurth Ltd

Eng Keith Farrugia
Eng Chris Cutajar

Representative
Representative

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

Mr Joseph Attard, Representative of Attard Farm Supplies Ltd stated that he was a Director of the Appellant Company and the appeal was as a result of the curt reply received from the Authority in correspondence requesting information on the award of the tender.

Dr Gauci Legal Representative for the Appellant said that Appellant's bid was not the cheapest and it was informed accordingly. There was a request for further information on the winning bid – it now transpires that the claim is that the sample was not according to tender requirements with the allegation that this winning bid is not compliant. The Identification Number to which Appellant refers to in Clause 4 of the Technical Specifications does not apply in the case of samples. The objection fails on the grounds that the pressure test and Identifier number were not required in the case of the sample as the Authority carried out its own quality assurance testing.

Engineer Stephen Galea St John (369465M) called to testify by the Authority stated on oath that he was the Chairperson of the Evaluation Committee and that the pressure test had been carried out on the sample by the Authority. A pressure test and identifier number was requested in the tender but not at the evaluation stage., The unique identifier number was not required at evaluation as only one sample was involved. Incidentally, the sample tested did carry a number. The information request was in fact for the identifier number.

In reply to questions from Mr Attard witness said that a test certificate was not requested as the specifications indicated that the testing would be done by the Water Services Corporation. The certificate would only be required after approval of the tender.

This concluded the testimony.

Mr Attard said that the concern was that the technical specifications referred to manufacturer and supplier and the tender requires the manufacturer to provide certification. The Authority refers to ISO 9001 and therefore it is the manufacturer that has to provide the certification – the lack of this does not provide proof that ISO requirements have been met. The only valid testing is the one done by the manufacturer – this is not a case of discretion as claimed as it is clear that the test carried out supplants the manufacturer's test. There is a distinction between a manufacturer and a supplier and the tender demands a manufacturer's test.

Dr Gauci said that the Evaluation Board has discretion that unless it has been very obviously not carried out correctly cannot be discarded by the Board. In the case of the sample the Authority carried out its own test. In the case of quantity purchasing to avoid having to test each individual manifold certification and number identifier is necessary. The sample tested did in fact have an identifier number which ties it in with the manufacturer. The contestation of the contract is not a matter to be considered at this stage and the award should be respected.

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 2nd May 2023.

Having noted the objection filed by Attard Farm Supplies Limited (hereinafter referred to as the Appellant) 3rd April 2023, refers to the claims made by the same Appellant with regards to the tender of reference WSC/T/84/2022 as case No. 1864 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Mr Joseph Attard

Appearing for the Contracting Authority: Dr John L Gauci

Whereby, the Appellant contends that:

- a) At tender stage, a sample was requested by the Water Services Corporation ("Contracting Authority"), in order to "supplement the technical offer submitted" as per Section 5 - Selection and Award Requirements, Section C, Pt iii.
- b) Tender requirements highlighted in Section 3 - Specifications/Terms of Reference, Pt 4 read as follows: *"4. The manifolds shall have a minimum pressure rating of 10 Bar and shall be pressure tested by the supplier. The supplier shall submit with each manifold a signed certification of the pressure test. In this regard, each manifold shall have a permanently marked unique identification number and the pressure certificate is to relate to each manifold accordingly."*
- c) On the basis of the fact that a sample is intended to be representative of the larger scope of supply and is to be made available to a buyer to (sic) prior to committing to a purchase and in light of the aforementioned requirements, a request for information was submitted to the contracting authority titled Request for information.

- d) The reply received from the Contracting Authority failed to address the following: A) Whether the recommended bidder's offer included a sample with a unique and permanently marked identification number and; B) Whether said sample was assembled and tested within the facility covered by the ISO 9001:2015 Certification which was also requested by the Contracting Authority.
- e) Moreover, we contend that at tender stage, the Contracting Authority did not state whether there was a waiver on the requirements for such markings and pressure test certificate to be presented together with sample.
- f) It is important to note that an identification number (also referred to as a serial number) is not merely a superficial marking, but a strict quality control measure intended to identify a product, whether this is a sample or part of the final supply. Said serial number allows the contracting authority to correlate test certificate at time of sample evaluation, on delivery, and at any point during the service life of, in this case, an assembly fabricated from various components.

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

- a) Recommended bidder's offer, in particular the sample provided, is compliant with the tender request. As a preliminary note it is a well known principle that this Board and the Courts, being bodies of revision, cannot be requested to discard the technical competence, discretion and deliberation of the Evaluation Board unless a serious and manifest breach is proven (vide inter alia judgment delivered by the First Hall of the Civil Court on the 26th June 2014, in the names C. P. E. S. Company Limited vs Kummissarju tal-Pulizija u d-Direttur Generali tal-Kuntratti).
- b) As to the merits, however, and without prejudice to the above, Objector's grievance is also factually and legally incorrect. Objector bases its objection on Clause 4 of the Technical Specifications of the Tender. This clause states *"The manifolds shall have a minimum pressure rating of 10 bar and shall be pressure tested by the supplier. The supplier shall submit with each manifold a signed certification of the pressure test. In this regard, each manifold shall have a permanently marked unique identification number and the pressure certificate is to relate to each manifold accordingly."* The rationale behind this requirement is one of quality control, i.e. ensuring that each and every manifold supplied is individually tested (rather than having sample testing which could still result in a small quantity of defects getting through). As will be explained during the hearing, the Evaluation Board conducted its own quality assurance testing. Thus, any quality assurance certification, at tendering stage is irrelevant, superfluous and was not requested of bidders. Submitting such certification at tendering stage only demonstrates the bidder's capability to submit such certification, which can still be attained by the bidder if awarded the contract. As to the arguments regarding the unique identifier, it is to be noted that the sample submitted by the recommended bidder did actually have such an identifier permanently marked on

it. However and in any case, this is irrelevant at evaluation stage as only one sample from each bidder was requested.

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 witness duly summoned, will consider now Appellant's grievances.

- a) The bone of contention in this appeal revolves around point 4 of Section 3 – Specifications / Terms of Reference in the tender document. After thorough analyses, this Board fully agrees with the statement made by the Chairperson of the Evaluation Committee, Ing Stephen Galea St John, when he stated “..... *the pressure test had been carried out on the sample by the Authority. A pressure test and identifier number was requested in the tender but not at the evaluation stage.*”
- b) The above statement shows that the sample provided by the preferred bidder, was in fact properly tested, in respect to the pressure it can operate at, by the Contracting Authority, as per the General Rules Governing Tenders paragraph 16.3.
- c) Moreover, even though, this Board agrees with the Contracting Authority, that the identifier number was also not a requirement at evaluation stage / sample testing stage, it was none-the-less provided within the sample submitted. This as stated under oath by Ing Stephen Galea St John.
- d) Same argument applies to the pressure certificate, which was not required at evaluation stage / sample testing stage but is referring to a post evaluation criteria to be abided by the successful bidder.

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