

PUBLIC CONTRACTS REVIEW BOARD

Case 1865 – CT3029/2022 – Works – Supply and Application of Lining of Three Reservoirs and Associated Works at Lapsi RO Plant and Pembroke RO Plant of the Water Services Corporation – Lot 1

8th May 2023

The Board,

Having noted the letter of objection filed by Dr Daniel Buttigieg on behalf of Fenech & Fenech Advocates acting for and on behalf of ACHV 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 Architect Mark Frendo (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 4th May 2023 hereunder-reproduced;

Minutes

Case 1865 – CT 3029/2022 – Works - Supply and Application of Lining of Three Reservoirs and Associated Works at Lapsi RO Plant and Pembroke RO Plant of the Water Services Corporation.

LOT 1

The tender was issued on the 15th September 2022 and the closing date was the 27th October 2022. The estimated value of the tender for Lot 1 excluding VAT, was € 78,000.

On the 3rd April 2023 ACHV Ltd filed an appeal against the Water Services Corporation as the Contracting Authority on the grounds that their bid on Lot 1 was rejected as it was deemed to be not technically compliant.

A deposit of € 400 was paid.

There were six (6) bids.

On the 4th May 2023 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a virtual public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – ACHV Ltd

Dr Daniel Buttigieg	Legal Representative
Mr Gian Luca Vella Valletta	Representative

Contracting Authority – Water Services Corporation

Dr John Gauci	Legal Representative
Dr Sean Paul Micallef	Legal Representative
Eng Ronald Pace	Evaluator
Architect Mark Frendo	Evaluator
Architect Paul Aquilina	Evaluator
Ms Kirstie Grech	Secretary Evaluation Committee

Preferred Bidder – Malta Pro Waterproofing Ltd

Dr Antoine Bonello	Representative
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Department of Contracts

Dr Mark Anthony Debono	Legal Representative
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Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and prior to inviting submissions proposed that the Appeals on Lot 1 and Lot 2 be heard together since the grounds for appeal were similar. This was agreed to by all parties.

Dr Daniel Buttigieg Legal Representative for ACHV Ltd said that the basis of the appeal was along the lines of the letter of objection submitted. The total time frame for the project was eight weeks and the Appellant included the preparatory work within those eight weeks. This substituted one part of the project for another but completion would still be within the time frame requested. The two operations had been combined but the end product would be completed within the set time. The work method statement was deemed to have failed to include certain information. The work method area is a reservoir which has limited space and is clear where the work is to be undertaken. The environment management plan can only be produced after the input of professional personnel such as an architect once the contractor was on site. There is no point in submitting method statements until a full and proper survey is made by responsible personnel. If the Water Services Corporation were not satisfied by the submissions they ought to have sought clarification from the bidder.

Dr John Gauci Legal Representative for the Water Services Corporation said that the facts as outlined by Appellant were agreed with. The graphic work schedule submitted seems to ignore the tender requirements since without authority Appellant combined the two operations into one. It is clear that the second phase proposed an intervention running in excess of six weeks which was not acceptable. The fact of this overrun is accepted by the Appellant. The method statement lacked the necessary information. The tender provided enough information to enable the necessary reports to be submitted without the use of experts. The very succinct reference to the environmental method did not offer anything. The Evaluation Committee could not ask for any rectification on these points as they came within Note 3 restrictions.

Architect Mark Frendo (93486M) called as a witness by the Contracting Authority stated on oath that he was one of four Evaluators and that the tender was clear that two weeks were allowed for

preparation. The time limits were vital as they affect the service given to the public. It was crucial that the actual work was carried out in 42 days. The method statement, which came under Note 3, was important as it ensured that the work was carried out correctly. There was nothing offered in the way of a method statement and risk assessment which if submitted would have allowed, according to the tender, changes as the work progressed. Risks could have been foreseen with later clarifications if necessary.

In reply to questions from Dr Buttigieg witness said that during the preparatory period the plant would still be operating and the six weeks had to start on the date specified. The six week time frame was crucial and any extra days on site prejudiced the Authority. Note 3 binds the Authority's hands to the set times. As regard the method statement there were certain requirements and the risk assessment had to be done prior to the bid, with revision allowed if necessary.

This concluded the testimony.

Dr Buttigieg said that the points on which the Appellant was held to be not compliant should not have led to disqualification. The Authority would not have been prejudiced by the combination of the two phases of the project whilst the omissions on the methodology statement could have been clarified.

Dr Antoine Bonello Representative for Malta Pro Waterproofing Ltd said that his Company had not had any difficulty in separating operations. The risk assessment had been completed by a Health & Safety officer whilst the method statement and the environmental report had been produced by professional people. If bidder had any doubts about the terms of the tender there was always the possibility of seeking clarification under Regulation 262 of the PPR. This solution is confirmed in the decision in PCRB Case 1416.

Dr Gauci said there was a clear admission by the Appellant that the tender terms had not been followed contrary to the principles enshrined in public procurement regulations. Witness had confirmed that near to nothing had been submitted regarding the method statement except a succinct note on the environmental method. The decision of the Authority was justified.

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 4th May 2023.

Having noted the objection filed by ACHV 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 CT3029/2020 – Lot 1 listed as case No. 1865 in the records of the Public Contracts Review Board.

Appearing for the Appellant:

Dr Daniel Buttigieg

Appearing for the Contracting Authority: Dr John L Gauci

Appearing for the Preferred Bidder: Dr Antoine Bonello

Whereby, the Appellant contends that:

- a) ACHV Limited's offer was primarily refused because according to the department, the intervention in the reservoir according to the Graphic Work Schedule submitted required 46 days which is longer than the 6 week time-frame imposed in the tender. However clause 32 of the tender document issued clearly states that the time-frame imposed by tender document is 8 weeks, that is, 2 weeks for preparatory works and the remaining 6 weeks for the actual work. This is in line with Graphic Work Schedule submitted by ACHV Limited, which clearly indicates that the first 2 weeks are effectively preparatory works, and the remaining time-frame shall be used for actual works. In effect ACHV Limited's bid requires a lesser time frame than that imposed in the tender document, since the appellant plans to finish all works, including preparatory works within 46 days, that is 6 weeks and a half as opposed to the 8 weeks allowed in the tender. The fact that the department did not assess that the preparations should be included in the overall time-frames, and effectively did not realise that the preparatory works were part of the same Graphic Works Schedule, shows that a superficial assessment was made on ACHV Limited's offer, and this to public's detriment due to the fact that the refusal of ACHV Limited's offer will effectively lead to a more expensive bid with a lengthier process.
- b) The same superficial assessment was made when the appellant's bid was refused on grounds that ACHV Limited's work method statement did not include some information allegedly required. First and foremost the department is incorrect to state that ACHV Limited did not include the risk assessment work method area and the environmental management required in his method statement.
 - i. With regards to the work method area, this request was effectively superfluous since the tender was issued for the restoration of the entire reservoir and therefore the area of the entire reservoir, as indicated on the plans is assumed to be used. No machinery or personnel whatsoever will be outside the reservoir. The only divergence from this relates to cleaning of any debris or material, whereby a low loader will be loaded with jumbo bags as they are being taken out of the reservoir, and will leave immediately. This divergence is indicated in the method statement.
 - ii. The environmental management of the site has also been included in the method statement on the first page. It is good to note that the tender document in this regards is not in line with the law since it does not impose a Site Waste Management Plan.
 - iii. With regards to risk assessment, this cannot be done by the contractor but by a competent health and safety consultant and this after the health and safety officer inspects the site in

detail. A simple site visit lasting a bit over half an hour, weeks before the tender is submitted, by the tenderer and not by a certified health and safety officer, is not sufficient to produce an adequate risk assessment report.

- c) In any case, without prejudice to the above, these alleged shortcomings could have easily been remedied had the had the (sic) department asked for further clarifications, more so when the tender document itself states that the method statement needs to be revised prior to works initiating. In any case, a work method statement is not the responsibility of the contractor, but rather the responsibility of the architect in charge of the project in conjunction with the health and safety officer, since all works have to be done under the supervision and instruction of the architect.

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 4th May 2023, in that:

- a) First grievance –

The Graphic Work Schedule submitted by Objector showed an intervention of reservoir of 46 days which is more than the 6 weeks of the stipulated timeframe specified in the tender document section 2 article 32: period of execution.

Clause 32 of the Tender Document states as follows:

“Article 32: Period of Execution of Tasks - 32.1 The performance period shall be eight weeks (per lot) from commencement date. These are to be divided into:

- Two (2) weeks for the setting up of site and any other necessary preparatory tasks. During this period, the reservoirs would not be accessible, and tasks carried out shall not have any effect whatsoever on the operation of the plant.*
- Six (6) weeks for the actual intervention on the reservoirs.*

Work on the reservoirs can be carried out on a 24/7 working basis if Contractor deems it necessary. However, this has to be catered for at bidding stage and any additional costs incurred in this regard are to be included in the offered price. Should the contractor wish to work nights and weekends, this has to be clearly indicated in the Programme of works.”

It is clear that the Gantt Chart submitted by the Objector indicates a physical intervention which amounts to six and a half weeks (6½) in the sense that the physical intervention will commence on the 26th November 2022 with a handover on the 11th January 2023. This exceeds the permissible six weeks which was clearly set for the actual works on site in the Tender document (and this due to operational exigencies). Thus the 'extra' days foreseen by the Objector cannot be bridged over to the operator phase. Reference is also made to the principle of self-limitation which precludes

Contracting Authorities from considering bids which deviate from the clearly set rules and which principle also applies in relation to mandatory time-frames set in the tender document.

b) Second grievance –

Furthermore, the Work Method Statement submitted lacked necessary detail as it did not mention the below points: i) Risk Assessment ii) Work method area required iii) Environmental Management

Reference is made Clause 4.4 of the Tender.

As to the risk assessment, Objector seeks to justify its shortcoming by alleging that it did not have enough time during the site visit to evaluate the site. Nevertheless, this requirement is clearly a mandatory one and the Objector couldn't simply ignore this requirement and then seek to justify its breach by raising an argument at appeal stage, especially when it had the opportunity to ask for all the clarifications it deemed fit to request.

Similarly, with respect to 'work method area required', this was a mandatory condition and a bidder cannot unilaterally not abide by the tender conditions and then try to dismiss a requirement as superfluous at appeal stage.

In relation to environmental considerations, bidders had to include, in their method statement, *"all relevant details necessary for effective environmental management for the execution of the works, the work site and disposal of waste generated during the works"*

The only reference in the Bidder's offer to environmental considerations is the following extract found in the Surface Preparation part:

"To decrease the overall environmental impact of this process, the Project Manager who is BREEAM certified shall carry out close inspection of these works, as per BREEAM standards defined in relation to these works. All local legislation and ERA regulations shall be adhered to."

Certainly such a generic statement does not satisfy the tender requirement of *"all relevant details necessary for effective environmental management for the execution of the works, the work site and disposal of waste generated during the works"*

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) First grievance –

Reference is made to article 32 of the tender dossier which states the following:

“Period of Execution of Tasks –

32.1 The performance period shall be eight weeks (per lot) from commencement date. These are to be divided into:

- Two (2) weeks for the setting up of site and any other necessary preparatory tasks. During this period, the reservoirs would not be accessible, and tasks carried out shall not have any effect whatsoever on the operation of the plant.*
- Six (6) weeks for the actual intervention on the reservoirs.*

Work on the reservoirs can be carried out on a 24/7 working basis if Contractor deems it necessary. However, this has to be catered for at bidding stage and any additional costs incurred in this regard are to be included in the offered price. Should the contractor wish to work nights and weekends, this has to be clearly indicated in the Programme of works.”

It is this Board’s opinion that what the tender required was crystal clear and unambiguous. There was a specific period of six (6) weeks allotted for the ‘actual intervention’ on the reservoirs.

The Appellant’s submitted Gantt Chart does not respect this six (6) week period as it goes over the stipulated time frame allotted. The fact that the ‘preparatory’ period of two (2) weeks will be shortened by the Appellant and hence the total period of eight (8) weeks would still be respected, is deemed, by this Board, to be irrelevant. In similar circumstances, this Board has been adamant that it is not up to the respective economic operators to decide on which clauses are significant or otherwise or their interpretation to be altered. More so, when no clarifications would have been sought by the economic operators to the contracting authority.

As stated by the witness, Architect Mark Frendo, under oath, the period of six (6) weeks was essential to be adhered to due to the operational requirements of the contracting authority. Such requirement certainly did not impinge or restrict competition.

Hence this Board does not uphold Appellant’s first grievance.

b) Second grievance –

Similar to first grievance above, this Board opines that it is not up to the respective economic operators to decide which clauses are significant or otherwise. A number of documentation was required to be submitted, i.e. work method area required, environmental management and risk assessment. Two of these documents were not submitted in their entirety whilst a third document was not deemed thoroughly detailed by the Contracting Authority.

Without going into the matter of the ‘third’ document, it is sufficient to analyse the situation with the ‘work method area’ and the ‘risk assessment’. These documents were not submitted. Arguments brought forward by Appellant are not upheld by this Board. It is to be noted that these requirements were listed under Note 3 and therefore not rectifiable. A clarification would not have sufficed to bring the bid in a ‘compliant’ status.

Hence this Board does not uphold Appellant’s second grievance.

The Board,

Having evaluated all the above and based on the above considerations, concludes and decides in relation to Lot 1:

- 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 Malta Pro Waterproofing Ltd,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member