

PUBLIC CONTRACTS REVIEW BOARD

Case 1875 – WSC/T/32/2022 – Supplies – Supply and Delivery of 600mm x 900mm Manhole Frames and Covers for New Water – Water Services Corporation.

5th June 2023

The tender was issued on the 18th March 2022 and the closing date was the 26th April 2022. The estimated value of the tender excluding VAT, was € 145,000.

On the 21st April 2023 Ragonesi and Co Ltd filed an appeal against the Water Services Corporation as the Contracting Authority on the grounds that the tender had been cancelled .

A deposit of € 725 was paid.

There were six (6) bids.

On the 30th May 2023 the Public Contracts Review Board composed of Dr Charles Cassar 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 – Ragonesi and Co Ltd

Dr Joseph Camilleri	Legal Representative
Mr Roberto Ragonesi	Representative

Contracting Authority – Water Services Corporation

Dr John L Gauci	Legal Representative
Architect Mark Frendo	Chairperson Evaluation Committee
Eng Simon Camilleri	Evaluator
Eng Jacques Caruana	Evaluator

Interested Party

Mr Anton Zarb

Dr Charles Cassar Acting Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Joseph Camilleri Legal Representative for Ragonesi and Co Ltd said that following a request for the reason for the cancellation of the tender, his client was simply referred to the General Rules. Subsequently the Contracting Authority gave exact reasons which indicated that discrepancies in the clarifications issued had been noticed. The tender was therefore cancelled as provided for in Article 18.3 of the General Rules Governing Tenders version 4.6. Appellant is contesting this as the Authority is relying on a ground of

cancellation which was not applicable at the time. The applicable version – 4.4 made no reference to the discrepancy in the clarifications. The Authority in their letter of reply claim simply that the list of grounds for cancellation is not exhaustive. The Authority tied its decision on a regulation that did not exist at the time and there is no justification for them to claim that the list can be added to or deducted from because it is not exhaustive.

Architect Mark Frendo (934368M) called as a witness by the Appellant stated on oath that the discrepancy in the clarifications came to light during the second evaluation. He was only involved in the second evaluation which was carried out by a fresh evaluation committee (EC).

In reply to questions from Dr Gauci, the Legal Representative for the Water Services Corporation (WSC), witness said that the EC realised that bidders could have been misguided by the discrepancy in the wording in the two clarifications dealing with the weight of the manhole covers. This was not a question of compliance and it was just as possible for the EC to use version 4.4 as 4.6 to cancel the tender. Once the technical evaluation was started it was completed but once the discrepancy was discovered the process was stopped and no further decisions taken.

Further questioned by Dr Camilleri witness said that the technical evaluation was completed and that the tender was not cancelled because of any difference in the weights. Clarification 1 referred to manhole cover itself whilst Clarification 2 referred to frame and cover.

This concluded the testimony.

Dr Camilleri stated that he had a problem with what had just been stated in evidence. Clarifications should be clear. Both clarifications were issued prior to the call for bids and so bidders were aware of them and one cannot accept that the clarifications were not agreeing with the tender terms. Clarification 1 distinguished between two weights. The words ‘manhole cover alone’ excluded the frame. Contrary to what the WSC claim, they are here creating an injustice as they are penalising bidders through the cancellation of a tender. The procedure followed is erroneous as it is based on non-existing clauses in the General Rules.

Dr Gauci said that the EC had acted diligently and fairly to all as they had removed an obstacle which might have prevented others who might have wanted to participate – they removed any unclarity or uncertainty in line with EU directives. Quoting articles from the General Regulations does not alter the principles of Public Procurement Regulations. Both sets of General Rules allow the cancellation of a tender and the reasons indicated are not exhaustive. The fact that it was known that there was an irregularity made it difficult to evaluate the bids. There are several authoritative sources backing this decision to cancel as quoted in the Authority’s letter of reply. All the Authority is asking is to remove the anomaly by issuing a tender with clearer details. The facts are that the EC could not proceed to evaluate even if the General Rules did not allow cancellation. PP Regulation 90.3 gives the Board power to order cancellation and the wisest decision is to cancel and to have clear yardsticks.

Dr Camilleri concluded by saying that the Appellant does not agree that the use of the word ‘may’ means that the Authority must cancel. In the original tender there was a

distinction in Section 3 which covered both cover and frame – the clarification merely clarified this point.

The Chairman thanked the parties for the submissions and declared the hearing closed.

End of Minutes

Decision

This Board, having noted the objection filed by Ragonesi & Co Ltd. (herein after referred to as appellant), on the 21th April 2023. The objection refers to the claims made by the same appellant against the Water Services Corporation regarding the cancellation of tender listed as case No.1875 in the records of the Public Contracts Review Board.

The Board also noted the letter of reply by the Water Services Corporation (herein after referred as the Contracting Authority) dated 2nd May 2023, together with its verbal submissions during the hearing on the 30th May 2023.

The Board also took cognisance of the Minutes of the meeting of the 30th May 2023 appended above, all further documentation, the verbal submissions and the testimony of the witness called to testify.

Whereby,

The Appellant contended that:

In cancelling the tender under Article 18.3 of the General Rules Governing Tenders the Contracting Authority applied the wrong version (version 4.6 rather than version 4.4) which led it to rely on a ground of cancellation which was not available under the applicable General Rules at the time the tender was evaluated..

The Contracting Authority argued that:

- A. The newly appointed evaluation committee (as per PCR B ruling) in the course of carrying out the technical evaluation noticed that the specifications vis-a-vis the answer to question No. 3 in Clarification No 1 and answer to question No. 1 in Clarification No.2 which both dealt with the weight of the manhole covers were contradicting and therefore misleading and could have misguided bidders. The whole point of the cancellation was to ask the Board to remove an anomaly which could lead to lack of clarity and uncertainty by issuing a fresh tender. The Evaluation committee could not proceed to evaluate the tender because of this discrepancy.

- B. The list of possible reasons cited in both quoted versions of the General Rules Governing Tenders are not exhaustive and in any case they do not alter the principles of Public Procurement Regulations which gives the Board powers to cancel a tender.

The Board considered the arguments and documentation from both parties, and is of the view that the clarifications were misleading, thus making the evaluation of bids difficult and could have deterred other bidders from competing. In line with the principle of the PPR of fairness, transparency and equal treatment the Board feels that the cancellation of the tender is equitable and correct.

The Board therefore concludes and directs that:

- a) Does not uphold the Appellant's Letter of objection.
- b) Upholds the Contracting Authority's decision to cancel the Tender and to issue a fresh tender bearing in mind the need for clear and specific requirements
- c) Directs that the deposit paid by the Appellant not to be reimbursed

Dr Charles Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Richard A Matrenza
Member