

PUBLIC CONTRACTS REVIEW BOARD

Case 1911 – CT 2350/2022 – Supplies – Supply and Delivery of Pumps and Energy Recovery Devices for the Reverse Osmosis Plants of the Water Services Corporation.

18th September 2023

LOT 5 – Energy Recovery Devices

The tender was issued on the 1st December 2022 and the closing date was the 31st January 2023. The estimated value of this Lot, excluding VAT, was € 1,427,800.

On the 28th July 2023 Engineering & Technology Ltd filed an appeal against the Water Services Corporation as the Contracting Authority objecting to their disqualification on the grounds that their offer was not the most cost effective.

A deposit of € 7,139 was paid.

On the 14th September 2023 the Public Contracts Review Board composed of Dr Charles Cassar as Chairman, Mr Lawrence Ancilleri and Mr Richard Matrenza as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Engineering & Technology Ltd

Dr Joanne Farrugia	Legal Representative
Mr Jean Farrugia	Representative
Mr Angel Abajas	Representative

Contracting Authority – Water Services Corporation

Dr John L Gauci	Legal Representative
Eng Stephen Galea St John	Chairperson Evaluation Committee
Mr Louis Pullicino	Secretary Evaluation Committee
Eng Kylie Alamango	Evaluator
Eng Mark Bugeja	Evaluator
Eng Emanuel Grech	Evaluator
Eng Liana Saliba Gazzano	Representative
Eng Anthony Muscat	Representative

Preferred Bidder – Flowserve Spain S.L.

Mr Andrea Tesoro	Representative
Mr Andrea Caruso	Representative
Ms Miriam Merono	Representative
Dr H J B Hipco	Representative
Mr Hector Herrero	Representative
Mr Victor Ruiz	Representative

Department of Contracts

Dr Mark Anthony Debono

Legal Representative

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

Dr Joanne Farrugia Legal Representative for Engineering & Technology Ltd requested that a witness be heard.

Mr Angel Abajas (PP PAM 759336 – Spain) called as a witness by the Appellant confirmed on oath the contents of the Affidavit dated 18th August 2023 filed earlier with the submissions. He stated that he has ten years' experience of working for Energy Recovery Inc. Witness referred to the new device offered by Flowserve which was only launched two years ago. This was confirmed in a press release referring to the device as new. This information is also obtained from the Flowserve site on the internet. There are several technical differences from the old model in the new device such as pressure increase, operating pressure, a weight increase of 16% and in the manufacturing materials. In fact there is a different system of manufacturing the product. A hotel in Mexico had to replace Flowserve equipment as it failed in use.

Questioned by Dr John Gauci Legal Representative for Water Services Corporation, witness stated that Flowserve was using the product patented as Isobarix but could not state if the claimed changes were technical improvements. Witness agreed that the new device had higher specifications to the older model but again insisted that he did not know if these changes were improvements.

Engineer Kylie Alamango (441788M) called to testify by the Water Services Corporation stated on oath that he was one of the evaluators and was a mechanical engineer in reverse osmosis and that according to the documents submitted in their offer Flowserve Spain met all the requirements and specifications of the tender. Performance was proved by the number of documents submitted of installations carried out. The Isobarix patent allowed Flowserve to use it and this gave the Tender Evaluation Committee (TEC) the assurance that the product was reliable. The technical specifications of the product offered were higher than requested in the tender. The changes referred to by the previous witness give a better performance and exceed expectations.

Questioned by Dr Farrugia witness said that the references provided had not been checked.

In reply to a question from Dr Gauci witness stated that according to the Department of Contracts the references supplied had to be accepted as part of the self-declarations made by the bidder.

This concluded the testimonies.

Dr Farrugia said that whilst the Appellant accepts the using of the patent it remains the fact that there has been changes and several deficiencies have been noted in the new equipment besides a model change. Appellant does not accept that change means improvement. Flowserve themselves admitted that there were improvements but this could have been to rectify previous flaws and no proof has been provided that the device is a better product. Reference was again made to the need to replace equipment at a hotel.

Changes to the XPR model cannot be used to justify Flex models. Flowserve bid is not compliant.

Dr Gauci stated that the point of this exercise is simply to prove that what was requested in the tender was provided and there is no reason to exclude Flowserve. The improved product is not a new invention from scratch and the TEC had no reason not to award the tender on the basis of the submissions made. The tender was rightly awarded.

Dr Farrugia said that there were changes and therefore the performance criteria were not known.

Dr Gauci pointed out that the performance criteria were a matter of contractual remedies not of this Board. This appeal deals with the evaluation and contractual obligations has nothing to do with it. If the product does not function properly there are other remedies which come later. One cannot foresee future problems at this stage.

Dr Hipco and Mr Herrero both representing Flowserve Spain re-iterated that they accept that Flow Flex is similar to Isobarix and that improvements have been carried out but this was a normal process in the life of a product. The technique is unchanged.

There being no further submissions the Chairman thanked the parties and declared the hearing closed.

End of Minutes

Decision

This Board, having noted this objection filed by Engineering & Technology Ltd (herein after referred to as the appellant), on the 28th July 2023. The objection refers to the claims made by the same appellant against the Water Services Corporation (herein after referred to as the contracting authority) regarding the tender listed as case No.1911 in the records of the Public Contracts Review Board. and its verbal submissions during the hearing on 14th September 2023

The Board also noted the letter of reply by the Contracting Authority dated 4th August 2023, together with its verbal submissions during the hearing on the 14th September 2023, and the submissions made by the preferred bidder during the hearing, as well as the testimonies of Mr Angel Abajas on behalf of the appellant and Engineer Kylie Alamango on behalf of the Contracting Authority.

Finally the Board took into consideration the Minutes of the hearing of the Board on the 14th September 2023 appended above.

Whereby,

The Appellant contended that :

- A. The product offered by preferred bidder was not compliant due to the fact that whilst using the existing patent which is acceptable, changes has been made to the product being offered and thus rendering the product a new one and does not satisfy the technical criteria of operating reliably and satisfactorily for at least five (5) years .

The above was counter argued by the Contracting Authority as follows;

A. According to the submission made by the preferred bidder, the product offered was compliant as it has been in the market for at least five years

B. Changes in the product which were meant for improvement do not render such a product a new product but were a normal process in the life of a product.

After the Board considered the arguments and documentation from both parties, the testimonies of the witnesses and the preferred bidder's submissions and taking note of the replies of the preferred bidder in the Technical Questionnaire (page 3) , the Board's view was that the Appellant's claim is not sustainable.

The Board concludes and decides that:

- a) Does not uphold the Appellant's Letter of objection.
- b) Upholds the Contracting Authority's decision.
- c) Directs that the deposit paid by the Appellant not to be reimbursed

Dr Charles Cassar

Chairperson

Mr Lawrence Ancilleri

Member

Mr Richard Matrenza

Member