

PUBLIC CONTRACTS APPEALS BOARD

Case No. 17

CT 2640/02, Advertisement 124/2003, WD 761/2002/2 - Supply of *Submersible Pumps* for Pembroke Wastewater Pumping Station.

The call for offers, with an estimated value of Lm 26,335 was published in the Government Gazette on the 9th May, 2003 following a request received by the Director of Contracts from the Works Division, Ministry for Resources and Infrastructure.

Four offers were received with the cheapest offer being the one submitted by Messrs. Rodel Limited for a total average price of Lm 9,106.23 (inc. VAT). The other offers included the next cheapest submitted by Messrs AFS Limited (Lm 33,923.06 incl. VAT) followed by the one submitted by Messrs. Engineering and Technology Ltd (Lm 35,002.00).

The offer submitted by Messrs Rodel Limited was found not to cover several of the items requested in the tender conditions and specifications and as a consequence was discarded on the basis of various clauses.

Following evaluation of the offer submitted by Messrs AFS Limited, although found to be complete (i.e. it covers all requested items) yet it was found to be void of the requested information vis-à-vis stainless steel pipe work and fittings, ventilation system/s and manhole covers. Following clarifications sought by the Adjudication Board, it was decided that apart from the initial reservations, it eventually also transpired that AFS Limited 'have arbitrarily changed the type of product they had offered in their original submission, namely the pump type offered'. Therefore, in view of the discrepancies as submitted by Messrs. AFS Limited the Board decided to discard also this offer.

On the other hand, the Adjudication Board considered the offer submitted by Messrs. Engineering & Technology to be in conformity with the tender specifications.

Following the decision taken by the Contracts Committee to award this tender as recommended by the Adjudication Board, Messrs. AFS Limited filed a notice of objection with the Contracts Department on 24th May 2004.

The Public Contracts Appeals Board (PCAB) met on 9th June, 2004 to discuss the objection raised by AFS Limited against the decision of the General Contracts Committee to award the tender to Messrs Engineering and Technology Ltd (E & T Ltd).

Mr. A. Triganza chaired proceedings accompanied by Messrs. A. Pavia and E. Muscat who formed the other Board members.

During the hearing

- a. the Water Services Corporation (WSC) was represented by Ing. Mark Peres
- b. Mr. Joseph P Attard (Managing Director) represented Attard Farm Supplies Ltd
- c. Mr. Paul Farrugia (Managing Director) represented Messrs Engineering and Technology Ltd (E & T Ltd)

Following a brief introduction by the Chairman of this Board, Mr Joseph P Attard, Managing Director, AFS Ltd, stated that an integral part of the Company's business was the pumping sector which included the supply of drainage pumps.

Mr Attard claimed that in this particular tender the offer submitted by AFS Ltd was cheaper (Lm 33,923 vis-à-vis Lm 35,002) than the one submitted by their competitor, namely Messrs Engineering and Technology and technically, quality standard is according to specifications. Yet, it was not recommended for the award of this contract. As a consequence, management felt aggrieved enough to lodge this objection with the Contracts Department on 24.06.2004

When Mr Attard made reference to the technical details of the tender documents, he alleged that the specifications were based on those pertaining to a particular product of a specific company. He said that the tender requested specific criteria for the flow of water and head (pressure of water) within the prescribed parameters, namely 65 l/s at 44.2 lt and 97 l/s at 34.62 lt. He said that these hydraulic calculations were computed by their engineers as requested in the tender in order to verify the design and hydraulic load and to determine the size of the pump. At this stage Mr Attard questioned why the tender specifically requested 97 l/s at a particular point and not, say, 95 l/s or perhaps, 100 l/s. He said there were many companies which manufactured pumps, and for copyright reasons, two companies could never have a product, in this case pumps, which had hydro-electric combination having the same figures. The 65 l/s was not objectionable because one could take a point in a performance curve that gave that flow but no other pump would give a flow of 97 l/s at another point in the same curve. He said that the hydraulic efficiency of the pumps offered by his company exceeded the minimum 60% requested in the tender.

With regard to the 'free passage' which determined the space to allow a passage for solids, AFS's representative said that they had chosen an impeller with a free passage of 100mm against the requested minimum of 90mm. He claimed that the word '*throughlet*', which meant 'going through something', was chosen to orientate the tender towards a specific brand as it was only used by one particular company. The terms frequently and commonly used internationally were 'free passage', 'solids handling passage' and 'free ball passage'. He asked Ing. Peres, representing the WSC, to explain (a) why the Corporation used the word '*throughlet*' and (b) to enlighten those present as to how the Corporation's technical people arrived at '90mm'. Mr Attard said that the minimum size of the free passage was normally 100mm so as to reduce the possibility of blockage as well as enable anyone to mitigate overall maintenance costs.

The appellant inquired why WSC requested that the impeller should *'be of cast iron to BS 1452, Grade 260'*. He said that 75% of European pumps' manufacturers refer to European norms and not to British Standards. However, he acknowledged the fact that the tender was issued when Malta was not yet a member of the European Union. He alleged that the grade chosen by the WSC was a standard used in brochures of the same company referred to earlier adding that there were three types of commonly used cast iron.

AFS Ltd.'s Managing Director insisted that the terminology used in the tender document was not chosen by coincidence but because it was used by a particular company.

Then Mr Attard made reference to paragraph 4.6 of the tender document, which stated that *'The pump casing bottom shall be equipped with a replaceable wear ring.'* He failed to understand why the WSC had requested a replaceable wear ring taking into consideration the fact that nowadays most of the companies used adjustable plates instead. He declared that their product did not need wearing. He proceeded by questioning why this was included in the specifications when it was overruled at adjudication stage.

He alleged that for many years the Drainage Department had chosen one particular brand/product and as a consequence specifications were still being oriented towards one product. He appreciated that WSC engineers may prefer products with which they are familiar such as

- a. interchangeability
- b. a better (overall) after sales service
- c. a universal type of installations

Yet, if this were to be the case, then one should reflect as to how pertinent it is to issue a public call for tenders under similar circumstances.

Finally, Mr Attard made reference to paragraph (5) of his motivated letter of objection wherein it was stated that *'In the final adjudication report the term 'arbitrary' is used vis-à-vis the pumps model offered at tender stage and model at clarification state'*. He insisted that the only model offered was the one listed in their original tender namely ABS Pump Model AFP1555 M 550/4-52Ex. He asked Ing Peres to clarify the matter as the Board might have misinterpreted the model number terminology.

He concluded by declaring that the minimum requirements were met or exceeded and that they were offering the better pump.

Ing Mark Peres, representing the WSC, emphasised the fact that the Corporation is never biased towards any company while writing specifications for tenders. He argued that when it indicated the minimum size of the impeller *'throughlet'* to be 90mm, it in no way implied an exclusion of a *'throughlet'* of 100mm.

However, he stated that the offer submitted by Messrs AFS Ltd was considered by the Adjudication Board not to be compliant with specifications following analysis of the technical information submitted by the tenderer at clarification stage. Ing Peres said that on 10 September 2004 AFS Ltd furnished the Corporation with a graph having a

pump with a characteristic curve that was different from that included in their original offer.

Here, Mr Attard intervened and claimed that the queries raised were of an electrical nature. He confirmed that the pumps offered were explosive proof. He added that the Adjudication Board had accepted the performance curves submitted with their original tender. However, AFS's Managing Director admitted that when asked to clarify certain issues which were totally unrelated to the matter, he erroneously submitted the wrong performance curves which may have ultimately mislead the Board. However, he contended that unfortunately the Board put more weight on the highlighted part of the graph rather than on what was written in their letter. He declared that he submitted the performance curve of another pump by mistake but it was quite obvious that he had made a genuine mistake. Furthermore, the clarification was not even sought with regards to the performance curve and so it happened that his Company was penalised for submitting something that was not even requested. As a consequence, Mr Attard alleged that the Adjudication Board discarded AFS's tender in order to enable the latter to ensure that the pumps in question would be bought from traditional sources. In order to substantiate his claim, Mr Attard tabled a drawing which was attached to the tender documents and which he claims to be a precise copy of a drawing pertaining to a particular company.

Ing. Peres confirmed that AFS's original curve was acceptable and that their offer was cheaper. Also he accepted AFS Ltd's declaration during the hearing that the Company had committed a mistake and that, in retrospect, the Adjudication Board should have noticed the mistake and finally agreed with a remark passed by the Chairman of the PCAB, namely that considering the circumstances, the Adjudication Board should have sought a further clarification from Messrs AFS in regard.

Ing Peres opined that in future the specifications should be revised and improved upon in such a way to ensure that they are more generic and not so restrictive.

Mr Paul Farrugia, Messrs Engineering and Technology's Managing Director, said that his Company, which was previously known as *Malta Installations*, has been active in this business since the early sixties with ongoing direct involvement in various Government projects, including schools, factories, the power station, distribution systems and so forth.

Mr Farrugia stated that his company introduced the submerged pumps in Malta and that they used both 'throughlet' and 'wearing impellers'. Contrary to what was stated by AFS Ltd, Mr Farrugia claimed that every pump had a 'throughlet' and that this terminology was widely used. He contended that in view of the new technology the width of the passage was no longer important. He insisted that the fact that the WSC used the said terminology in their specification did not necessarily mean that they were taken from their catalogue.

In evaluating the oral and written rendition of facts, the Public Contracts Appeals Board

- a. took note of the fact that during the hearing it became evidently clear that at clarification stage Messrs. AFS Ltd committed a gross mistake by submitting erroneous details relating to ‘performance curves’ especially when one considers that no clarification was being sought in regard as it had already been favourably considered by the Adjudication Board when the original offer was submitted;
- b. took cognisance of the fact that in the Adjudication Board’s report of the 3rd October 2003 the latter stated that whilst “ *the tenderer should be advised that literature and information submitted now shall be considered final and no further clarifications shall be allowed*”, yet it seems quite unnatural for a business entity to re-submit additional details not sought by the Board and, to add insult to injury, structured in a way which disqualifies it from a favourable adjudication;
- c. considered Ing. Peres’ testimony as crucial in this respect with the WSC’s representative agreeing that it would have been more practical and justified for the Adjudication Board to seek a further clarification from the appellant rather than discarding the offer altogether;
- d. took note of the fact that whilst there may not be an element of bias whilst writing specifications, yet it seems quite evident that the terminology used was quite linear with a more familiar one used by a particular supplier on a particular brand / product type. Whilst this should not be construed as implying unethical practices, yet it also raises a question as to why does the Corporation resort to an open public tender policy when, perhaps, a direct order would be more opportune especially when possible preferences may have already been expressed. Yet, once a tender is formally issued then no tenderer should be unduly penalised.
- e. took note of Ing. Peres’s opinion, namely, that in future the specifications should be revised and improved upon in such a way to ensure that they are more generic and not so restrictive

The Public Contracts Appeals Board, having gone through the arguments presented, both in favour and against the Contracts Committee’s decision, considered that the objection raised by Messrs. AFS Ltd. was effectively and intrinsically justified. As a consequence the Board decided in favour of appellant.

Alfred R. Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

Date: 21st June, 2004