

PUBLIC CONTRACTS REVIEW BOARD

Case No. 353

WSC/T/35/2011

Tender for the Supply of UPS and IT Equipment for ARMS Ltd

This call for tenders was published in the Government Gazette on 3rd June 2011 . The closing date for offers was 22nd June 2011.

The estimated value of this tender was €39,600 (Lot 1 – €25,600; Lot 2 – €14,000).

Six (6) tenderers submitted their offers.

Messrs Constant Power Solutions Ltd filed an objection on 3rd August 2011 against the decision taken by the Water Services Corporation to disqualify its offer as technically non compliant and to recommend award of tender to Sirap Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman and Mr Carmel Esposito and Mr Joseph Croker as members convened a meeting on Monday, 12th December 2011 to discuss this objection.

Present for the hearing were:

Constant Power Solutions Ltd

Mr Alexander German	Managing Director
---------------------	-------------------

Sirap Ltd

Mr Jay Deveraux (Jade) Attard	Representative
Mr Tonio Paris	Representative

ARMS Ltd / Water Services Corporation

Adjudicating Board

Mr Mark Lupi	Chairman
--------------	----------

After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of the company's objection.

Mr Alexander German, acting on behalf of Constant Power Solutions Ltd, the appellant company, made the following submissions:-

- i. by letter dated 27th July 2011 the Water Services Corporation had informed him that his company's offer had been disqualified from this tendering process as it was considered to be, technically, non-compliant for the following reasons:-
 - a. outside the stipulated power range (i.e. from 10 to 12 kVA) as per clause 2.0 of the technical specifications;
 - b. an audible acoustic noise of less than 61 dBA which is above the stipulated limit of 60 dBA as per clause 2.4;
 - c. a centralised LCD control screen while the specifications clearly stipulated that each UPS module shall be provided with an LCD panel in front of each UPS module as per clause 2.8.4.
 - ii. the variations between what the company offered and the specifications in the tender document were considered trivial and it appeared that those specifications were set to fit those of the product offered by the recommended tenderer;
 - iii. an identical tender had already been issued but with a different power rating and when prospective tenderers, including the same company, had enquired with the contracting authority about the power rating, the reply they received was that the contracting authority required a particular size, namely that each module had to be 12 kVA;
 - iv. explained that there were other 12 kVA products on the market but they were not modular, i.e. the restrictive nature of the specifications emerged when one took the power rating specification in conjunction with other specifications;
 - v. the appellant company had offered a better product but not with the exact specifications laid down in the tender document, i.e. with 15 kVA power which provided for less modules, increased power and redundancy;
- and
- vi. the award criterion was the cheapest administratively and technically compliant tender and the appellant company's offer was much cheaper than the recommended bid.

Mr Mark Lupi, chairman of the adjudicating board, offered the following explanations:-

- a. the power range rating requested was not 12 kVA but between 10 to 12 kVA;

- b. according to the technical officer who drew up the technical specifications there was more than one supplier who could furnish the requested items;
 - c. apart from the recommended tenderer, another bidder, Elektra Ltd, had offered the same product and the contracting authority was aware of other suppliers who could have participated but, somehow, they opted not to take part;
 - d. contrary to what the appellant company's representative had stated, the fact that his company's product was a 15 kVA module instead of 10 to 12 kVA was rather a disadvantage to the contracting authority because in case one of them failed that meant that there would be more load failure than if a 10 to 12 kVA module were to fail;
 - e. the acoustic noise level was only slightly above that stipulated and did not make much difference although it still was beyond the limit set in the tender;
- and
- f. the appellant company provided a central LCD panel whereas the tender requested an LCD panel for each of the modules.

Mr Tonio Paris, representing the recommended tenderer, remarked that:-

- a. there were various products on the market but his firm opted to offer a model that suited the tender specifications;
- b. his firm could have offered the product presented by the appellant company but, albeit cheaper, it was not technically compliant;
- c. his firm had no exclusivity arrangement with regard to the supply of this equipment and, in any case, it was hardly possible to have such an arrangement according to EU regulations;
- d. the contracting authority declined to furnish his company with certain details about the appellant company's offer so that its representative/s could prepare a case for this hearing.

At this point the Chairman, Public Contracts Review Board, made the following comments:-

- i. if the appellant company had proof that the tender specifications were discriminatory in regard to other suppliers then, prior to the closing date of the tender, it had the opportunity to request that the tendering process be stopped so that this issue would be investigated;
- ii. once a tenderer opted to take part in a tendering process then this would have implied that the said participant would have accepted the tender conditions and specifications. In similar circumstances these issues need to be raised at the opportune stage, namely, prior to the closing date of the tender, and not at the end of the process, at appeal stage;

iii. one had to keep in view that it was up to the contracting authority to set the specifications of the product it intended to purchase and bidders had to offer products that met, at least, the minimum requirements, but it was certainly not up to the bidders to set their own specifications irrespective of whether they intended to offer products of a superior quality;

and

iv. the contracting authority could not pass on confidential or commercially sensitive information of a bidder to its competitors.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellant company, in terms of the reasoned letter of objection dated 3rd August 2011 and through the verbal submissions made during the hearing held on the 12th December 2011, had objected against the decision taken by the Water Services Corporation to disqualify its offer as technically non compliant and to recommend award of tender to Sirap Ltd;
- having noted the appellant firm's representatives claims and observations regarding the fact that (a) the Water Services Corporation had informed the company that its company's offer had been disqualified from this tendering process as it was considered to be, technically, non-compliant due to the following reasons, namely (1) outside the stipulated power range (i.e. from 10 to 12 kVA) as per clause 2.0 of the technical specifications, (2) an audible acoustic noise of less than 61 dBA which is above the stipulated limit of 60 dBA as per clause 2.4, (3) a centralised LCD control screen while the specifications clearly stipulated that each UPS module shall be provided with an LCD panel in front of each UPS module as per clause 2.8.4, (b) the variations between what the company offered and the specifications in the tender document were considered trivial and it appeared that those specifications were set to fit those of the product offered by the recommended tenderer, (c) an identical tender had already been issued but with a different power rating and when prospective tenderers, including the same company, had enquired with the contracting authority about the power rating, the reply they received was that the contracting authority required a particular size, namely that each module had to be 12 kVA, (d) there were other 12 kVA products on the market but they were not modular, i.e. the restrictive nature of the specifications emerged when one took the power rating specification in conjunction with other specifications and (e) the appellant company had offered a better product but not with the exact specifications laid down in the tender document, i.e. with 15 kVA power which provided for less modules, increased power and redundancy, (f) the award criterion was the cheapest administratively and technically compliant tender and the appellant company's offer was much cheaper than the recommended bid;
- having considered the contracting authority's representative's submissions, namely that (a) the power range rating requested was not 12 kVA but between 10 to 12 kVA, (b) according to the technical officer who drew up the technical specifications there was more than one supplier who could furnish the requested items, (c) apart from the

recommended tenderer, another bidder, Elektra Ltd, had offered the same product and the contracting authority was aware of other suppliers who could have participated but, somehow, they opted not to take part, (d) contrary to what the appellant company's representative had stated, the fact that his company's product was a 15 kVA module instead of 10 to 12 kVA was rather a disadvantage to the contracting authority because in case one of them failed that meant that there would be more load failure than if a 10 to 12 kVA module were to fail, (e) the acoustic noise level was only slightly above that stipulated and did not make much difference although it still was beyond the limit set in the tender and (f) the appellant company provided a central LCD panel whereas the tender requested an LCD panel for each of the modules;

- having also considered the recommended tenderer's representative's submissions namely that (a) there were various products on the market but his firm opted to offer a model that suited the tender specifications, (b) his firm could have offered the product presented by the appellant company but, albeit cheaper, it was not technically compliant, (c) his firm had no exclusivity arrangement with regard to the supply of this equipment and, in any case, it was hardly possible to have such an arrangement according to EU regulations and (d) the contracting authority declined to furnish his company with certain details about the appellant company's offer so that its representative/s could prepare a case for this hearing,

reached the following conclusions:

1. The Public Contracts Review Board opines that if the appellant company's representative/s had proof that the tender specifications were discriminatory in regard to other suppliers then, prior to the closing date of the tender, it had the opportunity to request that the tendering process be stopped so that this issue would be investigated.
2. The Public Contracts Review Board feels that once a tenderer opted to take part in a tendering process then this would have implied that the said participant would have accepted the tender conditions and specifications. In similar circumstances these issues need to be raised at the opportune stage, namely, prior to the closing date of the tender, and not at the end of the process, at appeal stage.
3. The Public Contracts Review Board argues that one had to keep in view that it was up to the contracting authority to set the specifications of the product it intended to purchase and bidders had to offer products that met, at least, the minimum requirements, but it was certainly not up to the bidders to set their own specifications irrespective of whether they intended to offer products of a superior quality.

In view of the above this Board finds against the appellant company and recommends that the deposit paid by the latter should not be reimbursed.

Alfred R Triganza
Chairman

Carmel J Esposito
Member

Joseph Croker
Member

26th December 2011