

PUBLIC CONTRACTS REVIEW BOARD

Case No. 615

CT 3058/2013

Tender for the Supply of Ultra Filtration and Reverse Osmosis Modular Units for Water Reclamation Use.

The tender was published on the 21st June 2013. The closing date was the 20th August 2013.

The estimated value of the Tender was €7,548,631.10 (Inclusive of VAT).

Three (3) bidders had submitted an offer.

On the 7th October 2013, Messrs. Guillaumier Limited, as representative in Malta of Beijing Grant Membrane Separation Equipment Co. Ltd, filed an objection against the rejection of their bid as being technically non-compliant, and against the proposed award to Protecno Srl.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Monday 21st October 2013 to discuss the appeal.

Present for the hearing:

Beijing Grant Membrane Separation Equipment Limited - Appellant

Ing. Marco Cremona	Representative
Dr Jonathan Thompson	Legal Representative
Dr Ingrid Cini	Legal Representative

Protecno Srl. - Preferred Bidder

Mr Sergio Sangervasi	Representative
Mario Callus	Representative

Water Services Corporation - Contracting Authority

Ing. Mark Perez	Secretary, Evaluation Board
Ing Robert Schembri	Member Evaluation Board
Ing David Sacco	Member Evaluation Board
Ing Noel Formosa	Member Evaluation Board
Mr Jonathan Scerri	Representative
Dr Aaron Mifsud Bonnici	Legal Representative
Dr Matthew Grech	Legal Representative

Department of Contracts

Mr Jonathan Barbara	Representative
Ms Marisa Gauci	Representative

Following a brief introduction, the Chairman invited the appellant's representative to make his submissions on the objection.

Dr Jonathan Thompson, on behalf of appellant company, Beijing Grant Membrane Separation Equipment Limited said that appellant's objection is based on two grounds, the first on the unjust disqualification of appellant's bid and the other is based on the recommendation based on the best price offers. From the letter received on the 6th September 2013 it is clear that the appellant's offer was discarded because of two grounds, appellant's experience as contractor and the minimum number of treatment plants submitted. Dr Thompson contends that appellant was unjustly disqualified as the company's offer contained all the necessary documentation, and if there was anything that was not clear, then the evaluation board should have asked appellant for clarification. The tender documents required that bidders show that they had experience by listing projects that were valued at over €15,000,000 in total. With the tender submission, appellant had submitted a list containing four pages of various programmes carried out by it. In pages one and two, the amount of work value is written down. It is admitted that the value of the works was omitted for the projects listed in the next two pages. The projects however had value attributed to them and therefore, should the contracting authority have had any doubts about these amounting to €15,000,000, it should have asked for clarification. And appellant would have shown, as has been shown after the tender award, that the listed projects did exceed €15,000,000. It can also be seen from the financial offer made by appellant that works carried out by appellant exceeded €15,000,000. Regarding the second reason for disqualification, Dr Thompson continued, that it seems that the contracting authority failed to take into consideration a number of plants submitted by appellant that gave the capacity of the said plants in cubic metres per hour instead of cubic metres per day. A simple multiplication could easily have cleared the matter. Section 4 of the tender specifications in fact stated that equivalent standards would be acceptable. Even here a simple clarification would have removed any doubts and avoided client's disqualification. Finally, Dr Thompson said that appellant also contested the recommendation of the award of the best price offer because the offer indicated by the preferred bidder was around €8,000,000 whilst that made by appellant is €6,000,000 which is about €2,000,000 cheaper. Thus contends that since his client's bid should not have been disqualified, then the tender should have been awarded to appellant whose offer was cheaper.

Engineer Mark Perez on behalf of the contracting authority remarked that the present tender, being a three package tender, the offers are first tested administratively, then for the technical compliance and lastly the financial offers are examined. In this tender, the stage reached is the financial stage, but the present objection is about the technical compliance stage. The contracting authority's interpretation of the Regulations for Public Procurement is that the period allowed to bidders to file an objection on the technical compliance has lapsed and the appellant failed to submit an objection within that legal time-frame. He contended that the present objection was filed outside the legal time-frame.

Each tender was evaluated for the technical capacities first. A tender requisite was that bidders had to have carried out works amounting to more than €15,000,000 during 2010, 2011 and 2012. However from the documents submitted with the appellant's bid, it can be seen that the works performed by appellant amounted to around €9,000,000. Furthermore appellant submitted a list of plants supplied by it in the proper form, but no value of the works was given. Appellant submitted also another list that was not the proper form, which showed other plants. But again no value of the works was written down. The prescribed form only listed plants amounting to €9,000,000. The other projects were not on the prescribed form and did not indicate the value of the projects. Contrary to what was said in

the letter of objection, the applicable note is not number two (2) as alleged, but note three (3). Note three does not allow any rectification but only clarification, and the evaluation board could not thus ask the appellant to provide the missing values, as this would have been rectification.

Dr Aaron Mifsud Bonnici on behalf of the contracting authority explained that part of the works were listed on the prescribed form while other works were listed in a separate list, but this list did not show any values for the projects. The appellant listed the plants that had the required information on the prescribed form and the plants not showing the value in another list that was not on the prescribed form. The applicable note for Clause 7.1 is note three which allows no rectification. In the objection the wrong note is cited when it was claimed that the evaluation committee should have asked for a clarification on this point. The evaluation board assumed that appellant could have had some reason for not showing the values in the list submitted.

Engineer Mark Perez then explained the second reason why the appellant's bid was disqualified. Tender requested that bidders had to show they had provided at least two treatment plants that treated effluent via UFs and RO. The capacity rate of appellant's submitted plant list was not the reason for disqualification as alleged in the letter of objection. The reason for this disqualification was purely technical because from the list submitted by appellant, the evaluation board could not identify which.

Engineer David Sacco on behalf of the contracting authority said that the evaluation board could only identify one of the plants submitted by appellant as being an urban treatment plant that treated the effluent waste water. Other plants were listed but these were not considered relevant as they were not plants that treated waste water.

Dr Aaron Mifsud Bonnici explained that appellant had submitted a detailed list of plants it supplied, but there was only one of these that treated effluent as required by this tender, the other plants treated something else and could not be taken into consideration.

Engineer Mark Perez continued that the appellant's financial offer was not the cheapest, as was claimed in the letter of objection. The instructions to tenderers show the award criteria, and these criteria take into consideration not only the capital cost of the offers, but also the running costs. The tender explains in detail how the costings are to be worked out, so that all bidders would be on an equal footing. Appellant if fact worked out these costings according to the award criteria. Basically the offers had to be assessed for the cost of treating each cubic metre of water. Appellant worked out this cost at between €0.6 and €0.53, while that of the recommended bidder amounts to €0.45 per cubic metre of treated water. Thus appellant's offer was the cheapest on capital expenditure, but dearer for running costs.

Dr Aaron Misfud Bonnici reiterated that appellant's financial offer was more expensive, and that appellant had filed an appeal under Article 84 when the tender was a three package tender and falls under Article 83. Dr Mifsud Bonnici contends that therefore, the appeal should have been filed within 10 days from the letter disqualifying appellant. Since this was not done then the appeal was not valid. Although the hearing heard submissions regarding the technical capacity of appellant, the Board should not have gone into these, as the appeal was not valid. And it is this point that will have to be decided first by the Public Contracts Review Board, if there is a valid objection or not.

Dr Jonathan Thompson insisted that Article 84 of the Public Procurement Regulations does not prohibit and appeal at this stage for three package tenders. In fact Article 83 even allows an objection to be filed again under Article 84 by any person who had filed an appeal under Article 83 and which appeal had already been rejected by the PCR. As regards the note qualifying Clause 7.1 of the tender document, he insisted that the note which follows the paragraph in question is in fact note 2. Therefore since note 2 allows both clarifications and rectification, then this should have been applied. The onus on the contracting authority was therefore to ask for clarification. Under note 3, clarification could also have been requested. Had this been done, the contracting authority would have been referred to the appellant's financial statement, which indicated that the works carried out by it exceeded €15,000,000.

Tender document specifies that the waste treatment plants had to be capable of treating waste water effluent via UF and RO. From the presentation submitted with the letter of objection, it can be seen that the treatment plants there indicated show that these are UF and RO treatment plants, and here again, a clarification would easily have explained the matter.

Regarding the reason that the financial evaluation had to consider running costs as well, Dr Thompson alleged that since his client's bid was discarded at the second, technical evaluation stage, then the appellant's financial bid, the third stage, should not have been available for the evaluation board, and the board could not assess the running costs of appellant's offer. The present objection was based on the capital price submitted by appellant. The running costs were not shown on the notice board. Appellant's third envelope was not opened, so he could not see how the appellant's running costs were evaluated.

Engineer Mark Perez explained that at the technical evaluation stage, appellant's offer regarding the financial running costs was already available to the evaluation board. This had been made available by the appellant company itself, Beijing Grant. In fact this goes against the regulations and the evaluation board could have disqualified the relative offer immediately for divulging information from the 3rd package beforehand. Appellant company itself submitted the costings with the technical offer. This fact was in fact confirmed in the letter of objection.

Dr Thompson for the appellant stated that the letter of objection was based on the information given by the contracting authority, and this did not include any information about the running costs reason. The running costs do not form a part of the objection. This was new information given now during the hearing. It was a surprise for his client that although its capital price offer was twenty five percent lower than that of the preferred bidder, it was considered to be more expensive.

The Chairman remarked that this Board was here to see that things were done properly, and in this case, and in his opinion they were. The evaluation board acted with diligence when the maintenance costs of appellant were also considered.

Engineer David Sacco on behalf of the contracting authority explained that capital costs would have to be amortized over the number of years the equipment would be estimated to last. Thus the difference of around two million would have to be divided by around fifteen years, while the running costs would be multiplied by the same number of years.

The Board, at the request of the Chairman was shown the workings of the running costs for both the appellant and the preferred bidder.

Dr Thompson for appellant stated that his client, being excluded, risked being harmed as envisaged in Regulation 84, and so had a right to appeal under the same regulation.

Mr Mario Callus on behalf of the preferred bidder referred to Clauses 33 and 34 of the tender document explained that any objection had to be filed under Regulation 83, this being a three package tender so the procedure used by appellant objection under Regulation 84 was not correct.

Dr Aaron Mifsud Bonnici finally explained that this tender will be using European Union funds that could be lost if not finished on time, and therefore asked for the case to be treated with urgency.

The hearing was at this point brought to a close.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 7th October 2013 and also through the verbal submissions presented by same during the hearing held on 21st October 2013, in that:

- a) The Appellant claimed that his offer's disqualification was unjustified.**
- b) The Appellant's Bid was the cheapest.**
- c) The Evaluation Board of the Contracting Authority should have asked for clarifications on the missing information in the Appellant's Tender document.**
- d) Article 84 of the Public Procurement Regulations does not prohibit any appeal at this stage for the three package tender.**
- e) The specifications in the tender document required that the waste treatment plants had to be effluent via UF and RO systems. In this regard, the plants indicated by the Appellant in the tender document did conform to such specifications.**
- f) The Appellant also objected to the fact that the Appellant's bid price was already known to the Evaluation Board prior to the third stage of the evaluation process.**
- g) The Tender document did not include any indication of the running costs of the plant.**

Having considered the Contracting Authority's verbal submissions presented by same during the hearing held on 21st October 2013, in that:

- a) **The Appellant failed to object within the legal time frame.**
- b) **All bidders were obliged to provide proof that during the years 2010, 2011 and 2012, they had carried out projects the grand total of which exceeded Euros 15,000,000. In the Appellant's case this amounted to Euros 9,000,000.**
- c) **The list of plants which the Appellant was required to submit with the tender document was not accompanied with the values of each plant as was mandatorily requested in the tender document.**
- d) **The Tenderers were mandatorily required to list and identify at least two such treatment plants supplied by same. However in the Appellant's bid, only one plant could be identified to satisfy the requirements of the tender conditions.**
- e) **The Evaluation Board of the Contracting Authority took also into account the running costs apart from the original capital outlay the plant itself.**
- f) **When the overall costs are taken into account over the amortisation period of the capital outlay, the Appellant's bid did not turn out to be the cheapest.**

Reached the following conclusions:

- 1. **This Board, having considered the fact that there was a substantial price difference between the Appellant's offer and that of other Bidders , felt the duty to indulge further into the technical aspect of the Appellant's bid and in this respect this Board decided to carry on with the hearing.**
- 2. **In fact, it was through the verbal submissions made by both the Appellant and the Contracting Authority that the following conclusions could be deduced:**
 - i) **It became apparent that the Appellant did not submit all the information as laid out in the Tender Document.**
 - ii) **The Appellant's Bid failed on technical grounds in so far as proof of values of plants installed during the 2010, 2011 and 2012.**
 - iii) **The Appellant's bid did not conform with the mandatory condition that the tenderer had to provide proof and location of at least two similar plants provided by same.**
- 3. **Although the original capital outlay of the Appellant's offer was much cheaper than those of other Bidders, The Evaluation Board of the Contracting Authority, quite diligently, took also into account the maintenance costs of the plant over the amortisation period of the Plant.**

- 4. In any Public expenditure, where heavy capital outlays are involved, it is most essential that the capital outlay is amortised. It is also of the utmost importance that all maintenance costs are allocated over the amortisation life of the relevant equipment. It is through this economic principle that any Evaluation Board can assess who is the cheapest.**
- 5. The Board also noted that the running costs of the Appellant's tender were submitted by the manufactures of the same plant themselves.**
- 6. When taking all factors into account, apart from the technical aspect, it can be easily assessed that the Appellant's bid was not the cheapest.**

In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar
Chairman

Dr. Charles Cassar
Member

Mr. Lawrence Ancillieri
Member

29 October 2013