

PUBLIC CONTRACTS REVIEW BOARD

Case No. 779

CT 3223/2014

Tender for Telemetry Outstations and Motor Control Panels, Gozo (Water Services Corporation).

The tender was published on the 21st November 2014. The estimated value of the Tender is €488,584.00 (Exclusive of VAT).

On the 2nd February 2015 Alfatrade Limited filed a Pre-Contractual concern in terms of Regulation 85 of the Public Procurement Regulations.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Wednesday the 11th February 2015 to discuss the objection.

Present for the hearing were:

Alfatrade Limited - Appellant

Mr Ignatius Licari	Director
Dr John Licari	Representative
Mr Paul Licari	Director
Dr Jonathan Thompson	Legal Representative

Water Services Corporation - Contracting Authority

Ing Mark Perez	Representative
Mr Anthony Camilleri	Representative
Mr Steve Dimech	Representative
Mr Antoine Psaila	Representative

Department of Contracts

Ms Michelle Lunetti	Procurement Manager
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Dr Jonathan Thompson on behalf of appellant firm submitted that his client had noticed that certain conditions and specifications in the tender document tend to favour one brand while excluding other brands. His client also noticed that certain criteria as written are tantamount copies of datasheets of a particular brand, thus limiting choice.

Dr John Licari on behalf of the appellant explained that he was an electrical engineering consultant. He filed copies of technical specifications that would show that the tender specifications were copied from a particular brand of specifications.

Ing Mark Perez explained that the tender closing date was extended because there had been a clarification and not enough time to answer it. The pre-contractual concern was filed during the period of the extension and the extension had not been issued because of the concern.

Dr John Licari for the appellant continued that the sequence of parameters of the programmable logic controller were the same in the tender and in the specific bidders. Regarding the PLC he submitted that at page 14 of the tender document, article 2 item 1, memory size and voltage – 20kB Battery backed RAM; 10kB user program; 10kB user data. This tallies exactly with the specifications of the Micrologix 1400 controllers, marked as A.:

Tender document page 15:

- a) Item 10 Serial port. One RS 486 One RS 232C – these tallies with B;
- b) Item 11 serial protocols. Modbus RTU master or slave – this tallies with C;
- c) Item 12 Ethernet port. One 10/100 supporting Ethernet/IP and Modbus TCP/IP communications with DHCP or static IP configuration – these tally with D and E;
- d) Item 17 Programming. Ladder diagram programming software windows XP and windows 7 compatible; Online monitoring capability – these are the same as those for RSLogix 500 and micrologix 1000 controller. Datasheet 3 and 4.

He contended that the tender should at least have included “or equivalent” when listing the above requirements. Regarding item 17, programming, he could not understand why the tender had limited the choice for just this language and thus excluding better brands that used a different programming language.

Ing Mark Perez on behalf of the contracting authority agreed that the parameters of the tender were copy and paste; but not exclusively from Allen Bradley. There were a number of suppliers who offered the same features. When asked to mention some other suppliers, he said that this was information concerning commercial interests and while he was willing to divulge this to the Chairman, he did not wish to do so publicly. He stressed that there were other suppliers involved. He also explained that the present tender is not only for the supply of the PLC but for panel of which the PLC just formed a component. Allen Bradley was not the only supplier of the PLC used by the contracting authority. Mitsubishi also had tendered for a previous tender and found to be technically compliant. They were not awarded because their offer had not been the cheapest. The contracting authority uses other brands of PLC and not only Bradley's. The brand name of these PLCs is not public domain, only the supplier is, because the tender had been for panels and not just PLCs. He said that each and every tender published carries a note that explains that “*where in this document a standard is quoted, it is*

understood that the contracting authority will accept an equivalent standard”, and this was in the present tender. The present tender requested open protocol software.

Dr John Licari continued his submission on the HMI, the Human Machine Interface. He contended that the tender specifications were identical to those of Allen Bradley’s.

- i) Item 1 size 5 inch. – Bradley’s 5.7 inches;
- ii) Resolution: 320 x 249 or better – Bradley’s the same;
- iii) Type: monochrome or grey scale – Bradley’s the same;
- iv) Operator input: touch screen – Bradley’s the same;
- v) Display screens: 25 screens – Bradley’s the same;
- vi) Communication port: Ethernet - Bradley’s the same

Furthermore the tender requires that the HMI must be of the same make/manufacturer of the PLC. He understood that this could be because of compatibility but he contends that it could have been worded differently. For example, it could have been stated that the HMI had to be fully compatible with the PLC offered. This was further restricting the bidders’ choice.

Dr Jonathan Thompson explained that this “must” was in fact favouring some bidders. It excluded other bidders who could offer products with similar specifications.

Ing Mark Perez insisted that this was not so. The parameters chosen were not exclusive. Many PCs on the market have the same specifications. The parameters indicated in the tender document were always qualified as being the minimum. This meant that other products with better specifications would be accepted. The panels in question were of a strategic national importance, and the contracting authority needed a guarantee that all the parts were compatible with each other and would work together. This could and would affect the entire island’s water supply. The contracting authority had obtained technical opinions from outside the corporation and was assured that the items were available from different suppliers and manufacturers, even for example from Mitsubishi. The contracting authority did not want to take risks about compatibility.

Dr John Licari for the appellant said that in that case the contracting authority should have insisted on full compatibility and not stating that the two parts have to be by the same manufacturer. He contended that since Alan Bradley’s equipment was totally compliant then other bidders offering the same or better specifications had to perform offer higher prices.

Ing Mark Perez for the contracting authority said that the contracting authority wanted to get the best value for money. Regarding the PLC and HMI he said that these parts of the panels needed to communicate between them and therefore must be totally compatible. In case of malfunctioning you could not have them from different manufacturers.

Dr Jonathan Thompson said that the contracting authority had assumed that BMIs supplied by other bidders would be incompatible.

Dr John Licari for the appellant said that he still had to explain two other concerns. The variable speed drive was also copy and paste from the Bradley specifications. He referred to clause 3.8 item 2 of the tender regarding the Reflected Wave Reduction Module and page 29 of the tender. This was American terminology used by Rockwell and AB, and is not used in Europe. In fact this was the subject of a clarification in a previous tender issued in 2011. Item 3 of the same 3.8 required that the mounting of the Reflected Wave Reduction Module should be in such a way that an installer could not have to remove the steel back plate in order to replace the device. He asked for the reason why this was included in the tender.

Ing Mark Perez insisted that the specifications were based on the technology known to the contracting authority. The tender contained a lot of specifications and bidders could have asked if other products would be acceptable. There were instances, in previous tenders, where some of the items offered were found to be acceptable following clarifications.

At this point the hearing was closed.

Second Hearing:

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members reconvened the hearing on Wednesday 11th March 2015 to discuss the report of the expert appointed by the Board.

Present for the second hearing were:

Alfatrade Limited - Appellant

Mr Ignatius Licari	Director
Dr John Licari	Representative
Mr Paul Licari	Director
Dr Jonathan Thompson	Legal Representative

Water Services Corporation - Contracting Authority

Ing Mark Perez	Representative
Mr Anthony Camilleri	Representative
Mr Steve Dimech	Representative
Mr Antoine Psaila	Representative

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The Chairman explained that Board had appointed an expert to help the Board and that this expert had finalised his report. The expert would, during the hearing, clarify and reply to any query made regarding his report, which had been distributed to the parties involved.

Dr Jonathan Thompson declared that the report recognized the fact and confirmed that the tender specifications favoured one of the bidders thus reducing the competition in the process. He said that he wanted to enquire from the expert whether he was aware that during the first hearing, the contracting authority had admitted that the specifications had been copied from the data sheet of Allen Bradley.

Professor Ivan Grech, the engineering expert appointed to assist the Board, under oath replied that he was not aware. Replying to questions by Mr Paul Licari he said that the tender asked for IP 64 and thus there were no problems. The tender requested and RH of up to 95 because of water ingress. Replying to a question by Dr John Licari for the appellant he said that it did not make sense to have two ventilation openings in the panel if requesting an HMI with IP 66.

At this point Dr John Licari declared that appellant agreed with the expert's report.

Ing Mark Perez, on behalf of the contracting authority corrected the impression given by appellant in that the contracting authority did not admit copying the specifications from Allen Bradley but admitted having used and copied specifications from several manufacturers. He stated that the contracting authority agreed with the report submitted by the expert Professor

Ivan Grech but explained that from 44 pages of technical specifications contained in the tender document, the contestation is only on the contents of about half a page. The contracting authority is suggesting the issue of a note to bidders that reflected the suggestions made by the expert. He said that the contracting authority accepts the recommendations of the report practically in their entirety since in doing so the scope of the tender would not be changed. A change of scope would entail a re-issue of the tender.

Professor Ivan Grech replying to a question by Dr Jonathan Thompson confirmed that Ethernet IT is a protocol offered by Rockwell. He also confirmed that there are other valid protocols.

At this point the hearing was brought to a close.

This Board,

Having noted the Appellant’s “Pre-contractual Concern”, in terms of the “Letter of Objection” dated 2 February 2015 and also through the Appellant’s Verbal Submissions during the hearings held on 11th February and 11th March 2015 had objected as follows:

- a) The Appellant contends that certain conditions and technical specifications as laid out in the Tender Document were inclined to favour a particular brand of product and in this regard, the same Authority would exclude other brands which could provide the same, or equivalent, product;**
- b) The fact, that some Technical Specifications were copied from those of one of the bidders is unacceptable as this approach would limit the principle of Fair Competition and Transparency.**

Having considered the Contracting Authority’s verbal submissions during the hearings held on 11th February and 11th March 2015, in that:

- a) The Contracting Authority insisted that although it confirms that the parameters of the Technical Specifications of the Tender were significantly copied, these were not exclusively from the bidder mentioned by the Appellant; namely “Allen Bradley”**
- b) The Contracting Authority maintains that its sole objective was to get the best value for money and the Technical Specifications dictated in the Tender Document were formulated on the technology known by the Contracting Authority. It was not the intention of the Contracting Authority to give an advantage to any one of the bidders.**

Reached the Following Conclusions:

- 1. Since the main issues raised during this Appeal were purely of a Technical nature, this Board opined to appoint a Technical Expert to determine whether;**
 - 1a. The Technical Specifications as laid out, in the Tender Document contained a “copy and paste” of the Technical Specifications of one of the bidders, namely Allen Bradley;**

- 1b. To confirm whether the Technical Specifications could have been drafted in a more generic way so as to cater for similar alternative products.**
- 2. From the report submitted by the Technical Expert, Profs. Ivan Grech, it transpired that certain technical requirements could have provided for an “or equivalent” clause so as not to limit the scope of competition and transparency. In fact the expert’s report and submissions during the second hearing held on the 11th March 2015, confirmed that the Technical Specifications as laid out in the Tender Document did in fact tend to advantage Allen Bradley’s offer. This Board notes that the Technical Expert did vividly confirm that other Technical Alternatives were available on the market. In this regard, the Board accepts the Expert’s Report.**
- 3. After having exhausted all the Clarifications of the Technical Specifications laid out in the Tender Document, this Board opines that:**
- 3a. The report drawn up by the Expert appointed by this same Board proves to be justifiably credible and is being accepted by both the Contracting Authority and the Appellant Company;**
- 3b. This Board also notes with satisfaction the Contracting Authority’s positive approach and consent to rectify, through an addendum, changes in the Technical Specifications of the Tender Document. This will be done to conform to the Technical Expert’s suggestions.**

The procedure should be adhered to since the proposed changes in the Technical Specifications of the Tender Document will not alter the scope or the activity of the Tender. This Board opines that the Contracting Authority should issue an addendum to the Technical Specifications of the Tender taking into account the suggestions drawn up by the appointed Expert; which were accepted by both the Contracting Authority and the Appointed Company.

Dr. Anthony Cassar
Chairman

Dr. Charles Cassar
Member

Mr. Lawrence Ancillieri
Member

18 March 2015