

PUBLIC CONTRACTS REVIEW BOARD

Case No. 805

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 6th April 2015 Alfatrade Limited filed another 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 Tuesday the 5th May 2015 to discuss the objection.

Present for the hearing were:

Alfatrade Limited

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

Water Services Corporation

Mr Mark Perez	Representative
Mr Steve Dimech	Representative
Mr Antoine Psaila	Representative

The Chairman, Public Contracts Review Board declared that it was the Board's policy not to give postponements to hearings once the date was appointed. He stated that the policy is to allow such postponements only in cases of ill health. He insisted that this policy did not mean that the Board was removing any rights of parties to be represented by the Legal Counsel of choice. He made this remark in view of certain correspondence between the Board and the appellant's representative.

The Chairman then invited the appellant's representative to make submissions on the concerns raised by appellant, limiting himself to the actual points which were considered to give undue advantage to any other bidder. He said that the expert that had been appointed by the Board in the previous appeal was present to help the Board in understanding the technical points that would be raised.

Dr Jonathan Thompson for the appellant explained that following the last decision, the contracting authority had made some clarifications but the appellant still felt that these were not enough to allay any concerns that the specifications were such to advantage Allan Bradley products. Dr Jonathan Thompson submitted that:

- i) Ethernet/IP is a trademarked brand of industrial network, yet the tender insists on requesting bidders to provide this industrial network when others may provide similar or equivalent industrial networks giving the same result. This point alone shows that the tender is biased. Since this was unjustified it will result in unfair competition.
- ii) Variable speed drives: The contracting authority failed to change the original specifications as had been suggested by the Board appointed expert.

Professor Ivan Grech, the engineering expert appointed to assist the Board, under oath and replying to questions by Dr Thompson re point i), said that it could be that the contracting authority had other equipment which needed to be interfaced, and thus necessitated Ethernet IP.

Mr Antoine Psaila on behalf of the contracting authority, addressing point i), explained that Ethernet IP is essential for the contracting authority since it has other equipment that requires this protocol to run. The units would be integrated with the existing reverse osmosis plant which runs in Ethernet IP.

Dr Paul Licari for the appellant rebutted this and claimed that a clarification note in the tender had declared that the system would not be connected to any existing system.

Dr Thompson declared that any restrictions should have been specified beforehand but the contracting authority had not asked for compatible products but insisted on a specific product.

Professor Ivan Grech, replying to questions by the Board, stated that the Ethernet IP protocol is mainly tied with Rockwell. The contracting authority's existing equipment has this protocol but there are certain interfaces or gateways available that can link it with different protocols.

Mr Mark Perez on behalf of the contracting authority explained that this protocol is a machine language used by the machines, and using a different protocol, whilst possible, is not feasible. The Ethernet IP was created by an association of manufacturers and is "open source" which means that it can be used by everyone.

Mr Antoine Psaila said that the contracting authority was not saying that appellant's protocol

was not acceptable but that for it to integrate with the existing system; it has to have an interpreter, a gateway. This interpreter is a piece of hardware.

Prof Ivan Grech explained that if a different protocol is used this required additional equipment, the interpreter, obviously at greater expense. Answering a question by the Chairman, he said that the specification does not limit competition. Replying to questions by Dr Thompson, he said that Ethernet IP has a certain element of propriety meaning. Ethernet network is not the same as Ethernet IP. The protocols are not the same.

Mr Antoine Psaila insisted that the contracting authority needed to use this protocol.

There was a free for all discussion with the final result that the parties did not agree on the first point of concern raised by the appellant.

Mr Mark Perez on behalf of the contracting authority proposed some changes in the specifications to address points 2 and 3 of the concerns. And the appellants accepted these changes. Re point 4 however he said that this had not been raised in the first case. He declared that the contracting authority was willing to hear the proposals of appellant of items deemed to be not open enough and would adjust accordingly through clarifications.

Dr Thompson insisted that appellant did not want to make suggestions but contended that the appellant's concerns stood. The contracting authority should specify its needs, with the bidders then offering freely. The tender gives advantage to certain bidders because the specifications are identical to datasheets of a specific company, the tender as drafted favours one company. The specifications are taken from the datasheets of three companies represented in Malta by the same agent. Here he exhibited four pages of documents from EtaS&S Limited and the tender document. These are supplied by Allan Bradley.

At this point the hearing was brought to a close.

This Board,

Having noted the appellant's second 'Pre contractual concern' dated 6th April 2015 and also through appellant's verbal submissions during the hearing held on 5th May 2015, had objected to the decision taken by the pertinent authority, in that:

- a) **Appellant contends that although some rectifications were suggested during the last sitting held on 11th February 2015, there still remained other items from this technical specifications that were more or less advantageous to one of the bidders; namely 'Allan Bradley'.**

Having considered the contracting authority's verbal submissions during the hearing held on 5th May 2015, in that:

- a) **The contracting authority maintains that since the tendering equipment had to form part of a protocol, the required equipment had to be integrated with the existing reverse osmosis plant runs in a specific protocol.**

Reached the following conclusions:

1. **This Board notes that this tender is EU funded. It also points out that it is the responsibility of all parties concerned, to ensure that these funds are utilised. From the submission made during these three hearings by both the appellant**

company and the Contracting Authority, this Board is justifiably and credibly convinced that no matter what rectifications are made to the technical specifications, technical litigations will persist as to what parameters should have been dictated in the tender document, to ensure a 'Generic' parameters so as to allow for bidders to provide an alternative equipment without limiting the scope of competition. This Board also justifiably notes that the contracting authority did not draft the technical specifications of this tender to advantage any bidder but included specifications which were known to the authority. In this regard, this Board opines that the Contracting Authority acted in an honest and fair manner in the evaluation process, however there were instances where same included technical specifications that could have favoured a particular bidder. At the same time, this Board is convinced that these inclusions, which were exhibited during the third hearing of this appeal, were done in good faith and not otherwise.

2. This Board, after having heard all the submissions made by both the appellant company and the contracting authority, strongly believes that any more rectifications to the technical specifications of the tender document would be futile, as other conflicting concerns would be forthcoming from contending bidders, which in the end, would jeopardise the loss of 'EU funding'.

In this regard, this Board is responsibly recommending the following action:

- a) The Contracting Authority should appoint an independent 'technical expert' to draft the technical specifications of a 'New Tender Document' to ensure that:
 - i) The technical specifications should allow for alternative equipment which is compatible with the present equipment, yet at the same time fully technically compliant. The cost of this outside professional service should be borne by the Contracting Authority. This recommendation should ensure a 'zero tolerance influence' of what is actually required by the contracting authority.
 - ii) The appointed technical expert should also be allowed to take note of the appellant's grievances.
3. Last but not least, this Board appreciates the positive and cooperative attitude shown by the contracting authority during these three hearings. This Board is justifiably convinced of the Contracting Authority's main intension, ie to ensure that this tender is financed through EU funds.

In view of the above, this Board recommends that the action plan as stated above is activated as soon as possible in the National Interest, so that EU funds are not forfeited. To this effect, this Board recommends the cancellation of the present tender and a re-issue of a new tender having technical specifications along the lines suggested above.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

14 May 2015