

Following an introduction by The Public Contracts' Review Board Chairman, Dr Anthony Cassar, the Appellants were invited to make their submissions.

Dr Norman Vella, the Legal Representative for EWAN Engineering Manufacturing submitted that they felt the need to file an Objection because they disagreed with the decision taken by the Water Services Corporation on 16 February 2017 to recommend TALIS UK for the Award.

The Appellant submitted that his offer was 22% cheaper than the one submitted by the Recommended Bidder. He confirmed that they offered a fully technically compliant product and submitted a complete set of documentation as required in the Tender Document. The latter's requirements have been fully adhered by EWAN Engineering Manufacturing in their bid and the documents were mainly summarized in the Technical Questionnaire which was fully answered by the Appellants and in support they have also submitted the necessary documentation which were already accepted for another Tender and for which they were the incumbents.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, intervened by saying that the main issue here was whether EWAN Engineering Manufacturing have submitted the necessary documentation or not.

Mr Jonathan Scerri, representing the Water Services Corporation, replied that according to the Letter of Objection dated 23 February 2017, the issue here concerns one technical aspect of the Tender which was the reason why the Appellant's offer was deemed to be non compliant by the Evaluation Board; namely the negative pressure. The Technical Dossier in Section 4 Clause 3 talks about device working pressure, device testing pressure. One of the sentences mentioned in this clause was the negative pressure.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked then the Contracting Authority whether in this regard, the Appellants did not submit the necessary information regarding the negative pressure for which Mr Jonathan Scerri, representing the Water Services Corporation replied that the latter was neither mentioned in the Technical Questionnaire nor in the Technical Literature submitted by the Appellant.

Mr Scerri continued by submitting that faced with this shortcoming, the Evaluation Board had requested permission to clarify the matter with the Appellant from the Department of Contracts but this was denied on the basis that the data requested was technical data which fell under Note 3 which states that,

“No rectification shall be allowed. Only clarifications on the submitted information may be requested”

The Contracting Authority's representative continued by stating that the Technical Questionnaire as submitted by EWAN Engineering Manufacturing does not have a negative pressure while all the other offers which were deemed to be compliant had their data corroborated from the submissions found in the offer.

Dr Norman Vella, representing the Appellants, said that they were maintaining that the questionnaire only asked for information on the working pressure of the fitting in terms of ISO 3458 but not on the other items mentioned in Section 4 Clause 3 of the Technical

Specifications. The Technical Questionnaire did not ask specifically any information or did not require any information from the bidders regarding negative pressure. That was the only reason, according to the Appellants, why the Contracting Authority has omitted this detail in the questionnaire.

Dr Anthony Cassar asked the Water Services Corporation whether the questionnaire did not contain any information requested with regards to the negative pressure for which Mr Jonathan Scerri for the Contracting Authority replied that the questionnaire stated that the heading was “*Working Pressure on Fitting*”.

The Appellant’s offer quoted the test pressure, the working pressure, the pushing joint pressure but did not quote the negative pressure, which was requested under Clause 3 of the Technical Specifications. The Tender required a working pressure on the fitting, continued Mr Jonathan Scerri for the Water Services Corporation. EWAN Engineering Manufacturing quoted on working pressure, testing pressure and pushing joint but there was also the negative pressure which was quoted in the same clause.

The Contracting Authority continued by saying that the latter was not inserted in the questionnaire. If the negative pressure was at least inserted somewhere else in the Appellant’s offer, the Evaluation Board would have accepted this but the questionnaire was a shortcut for the Bidders to submit their data.

Dr Anthony Cassar, the Chairman for the Public Contracts Review Board asked whether in the original Tender Document the negative pressure was requested for which Mr Jonathan Scerri for the Contracting Authority replied that it was stated in Clause 3.

Dr Norman Vella for EWAN Engineering Manufacturing countered that this was mentioned amongst other things but it was not specifically requested in the Technical Questionnaire. The Contracting Authority’s representatives disagreed with this statement.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board queried whether the negative pressure was included in the Technical Specifications of the Tender Document for which Mr Jonathan Scerri for the Water Services Corporation insisted that it was included in Clause 3 of the Tender Document.

Dr Norman Vella for the Appellants argued that there were many other things besides the negative pressure which were mentioned under Clause 3 and which were not included in the questionnaire.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board commented that the negative pressure was included and the issue was regarding the non-submission of the latter.

Dr Norman Vella for EWAN Engineering Manufacturing remarked that ISO 3458 does not deal with negative pressure and the question was that if the Water Services Corporation wanted to consider the negative pressure aspect, they should have included it in the technical questionnaire as another question.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board then queried whether Section 4 of the Tender Document referred to the negative pressure for which Dr Norman Vella for the Appellants said that although it did, that doesn’t mean that because the

Contracting Authority didn't mention it, the Appellants did not comply with it. It was a wrong assumption from the latter to conclude that by not mentioning it, this means that the Appellants were not compliant. If the Contracting Authority wanted something specifically they should have asked for it.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board remarked that it was not a matter of assumption in this case because it was missing information which attain to technical specifications. The latter falls under Note 3 which says that no rectifications or clarifications can be made.

If it was either not a missing information or not technical, a clarification could have been made but this was a technical specification, hence neither rectifications nor clarifications could have been made.

Dr Norman Vella for the Appellants replied that if there was a technical specification which would require a specific answer, there should have been a specific question for it and this was the only reason why EWAN Engineering Manufacturing has decided to file an Objection. If the Contracting Authority would have asked for it, the Appellants would have definitely answered.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board remarked that the Contracting Authority did ask for it for which Dr Norman Vella for EWAN Engineering Manufacturing said that the Water Services Corporation did not answer it in the Technical Questionnaire.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board noted that the negative pressure was included in Section 4.

Mr Jonathan Scerri, representing the Water Services Corporation, said that the Technical Questionnaire is a tool that the Contracting Authority provides to the Bidders to try and assist in submitting the offer but the Technical Specifications in Section 4 are the requirements of the Bidder to submit the offers. In the Technical Specifications it was pretty clear what the requirement was and the Evaluation Board was faced with missing data

Dr Norman Vella for the Appellants felt that the Contracting Authority's reasoning was an absurd one. If the latter required a complete word by word confirmation that all the word by word specifications mentioned in the Tender Document were going to be respected, they could have required a signature on all relevant pages by the Appellant or else they could have produced another sheet where the prospective Bidders would have signed a declaration that they were going to be compliant and in that way there wouldn't have been the risk of missing out on anything.

The Appellant argued that the only logic here is that the questions from the Technical Questionnaire were answered in an honest way. If the negative pressure aspect wasn't important enough to be included as a specific question in the Technical Questionnaire, with the same reasoning the Water Services Corporation could have included a similar request and they would have got a confirmation of Technical Compliance from EWAN Engineering Manufacturing. Dr Norman Vella was wondering why they were to be penalised for any shortcomings made in the Technical Questionnaire.

Mr Jonathan Scerri for the Contracting Authority pointed out that there were no omissions and that the negative pressure was requested and that other bidders complied with all the requirements needed by the Water Services Corporation.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board remarked that he was talking mainly about the Tender Document which clearly mentioned the negative pressure.

Dr Norman Vella, representing the Appellants replied that the Water Services Corporation could have easily included a section where Bidders would have signed the full specification page and in that way they would have got a full word by word confirmation. By omitting some things from the Technical Questionnaire, this gave rise to issues which could have been detrimental to the Contracting Authority since now they will be spending 22% more by awarding the contract to TALIS UK.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board said that he was sure that it was in the interest of the Contracting Authority to save money for which the latter agreed and added that it was also clearly stated in the Tender Document. Dr Norman Vella for EWAN Engineering Manufacturing replied that maybe the omission was accidental.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board continued by saying that the latter had to deal and assess whether the evaluation process was made in a proper and justifiable way. Dr Norman Vella for the Appellants countered that the Contracting Authority should have asked for a sample, test it and draw their own conclusions.

Ing Stefan Riolo representing the Water Services Corporation said the working pressure of the fitting means that the fitting run under three bar or two bar and then the shuttle of supply it will be either in zero or negative value. When one says working pressure or fitting, it is the whole spectrum of the pressure which varies from negative to positive. When one writes down working pressure or fitting, this must include all aspects of the pressure.

Ing Riolo assured everyone present that this was a very important aspect for the Contracting Authority since if you close all the water supply, you can find negative pressure and if there is a strong water run-off this will be absorbed by the system to the detriment of the customers. This was very important for the Water Services Corporation and Ing Riolo then proceeded by warning that one cannot assume that the fitting is ISO 3458 caters also for negative pressure and this is also included when it comes for negative pressure or fitting.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, queried whether the working pressure included the whole configuration. Mr Jonathan Scerri for the Water Services Corporation confirmed this and added that the questionnaire was referring to the whole clause.

Dr Norman Vella, representing EWAN Engineering Manufacturing said that the test involving ISO 3458 doesn't include negative pressure so as the engineers said that the negative pressure was important for the Contracting Authority and that it required a specific configuration, it makes even more sense that they should have included it in the Technical Questionnaire.

The Appellants continued by saying that the issue evolved on the question regarding negative pressure and that this was not included as a separate question, or technical requirement in the Technical questionnaire and were wondering what held them from including this question in the latter.

At this stage, the Public Hearing was adjourned to Tuesday 4 April 2017 at 09:00 wherein the Public Contracts Review Board will transmit the decision taken for this Objection verbally and then distribute a hard copy of the same to all parties concerned.

This Board,

Having noted this Objection filed by EWAN Engineering Manufacturing (herein after referred to as the Appellant) on 23 February 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference WSC 687/2016 listed as Case No 1031 in the records of the Public Contracts Review Board, awarded by the Water Services Corporation (herein after referred to as the Contracting Authority).

Appearing for the Appellant: Dr Norman Vella

Appearing for the Contracting Authority: Mr Jonathan Scerri

Ing Stefan Riolo

Whereby, the Appellant contends that:

a) **EWAN Engineering Manufacturing** has submitted all the documentation requested in the Tender Document. They are also contending that their offer was the cheapest fully compliant offer. In this regard, the Appellant disagrees with the Water Services Corporation's decision to discard his offer.

This Board also noted the Contracting Authority's "*Letter of Reply*" dated 6 March 2017 and its verbal submissions during the Public Hearing held on 28 March 2017, in that:

a) The Water Services Corporation maintains that in both the literature and the Technical Questionnaire duly submitted by the Appellant, the latter failed to substantiate compliance with the "*Negative Pressure*" requirements as dictated in Clause 3, Section 4 of the Tender Document, hence the missing Technical Information could not qualify the Appellant's Offer as being Technically Compliant.

This Board, after having treated the merits of this case, arrived at the following conclusions:

1. This Board, after having examined the relative documentation and heard the submissions made by all parties concerned, would like to respectfully emphasize the fact that the Tender Document is the

official document which specifies and dictates the conditions and Technical Specifications which the prospective Bidder is bound to comply with. In this particular case, Section 4 Clause 3 of the Tender Document specifically states that,

“The working pressure of the fittings shall be at least 16 Bar. The fitting is to pass a test pressure at 24 Bar. Further, the push in joint of the fitting shall pass a one hour pressure test at 32 bar. The test pressure procedure shall be specified in ISO 3458. The fittings shall not allow external ground water to enter the pipeline through the joint when the pipeline is empty or subject to negative pressure when the ground water is at a pressure of 0.3 bar. The seal of the push in joint and strap mounting seal shall be so designed so as to be leak free even when used with pipes having minor defects such as surface scratches, slight pipe ovality and oversize. The joints are to be thrust resistant so as to prevent pull-out of pipe end from joint”

It is ample clear that the description in this Section of the Tender, specifies the components of the “Working Pressure” of the fittings. This section also describes the exact procedure to be adopted and the application of the relative fittings.

The issue of the “*Negative Pressure*” is given as due importance and enough evidence that in this regard, the requisite information regarding the “*Negative Pressure*” was an important part of the requested equipment.

In this respect, this Board is convinced that the information relating to the “*Negative Pressure*” aspect was mentioned and specified in the Tender Document.

2. This Board would like to also refer to the Technical Questionnaire wherein the information submitted on the “*Working Pressure of Fitting*” by EWAN Engineering Manufacturing. The latter quoted three components namely:

- a) Working Pressure – 16 Bar;
- b) Test Pressure – 24 Bar;
- c) Push in Joint Pressure Test for One Hour – 32 Bar;
- d) EWAN Engineering Manufacturing did not submit any information about negative pressure;

From the Technical Point of view, it was credibly explained that when one requests the working pressure of the fittings, one is

implicating the fitting run under three bar or two bar plus the shuttle of supply which will be either in zero or negative value and in this regard, this Board justifiably notes that EWAN Engineering Manufacturing failed to submit the Technical Information regarding the negative pressure as requested.

At the same instance, this Board would like to respectfully point out that this missing information formed an integral part of the Technical Specifications as dictated in Section 4 Clause 3 of the Tender Document.

This Board also notes that Clause 3 of the Technical Questionnaire was referring to the whole component which includes the “*Negative Pressure*” measurement as well. This Board has also taken note of the importance of the “*Negative Pressure*” measurement as well.

This Board has also taken note of the importance of the “*Negative Pressure*” issue in that one cannot assume that the fitting, ISO 3458 also caters for “*Negative Pressure*” and this component is included.

This Board would like to justifiably emphasize the fact that it is most important for prospective Bidders to delve into the Technical details

as dictated in a Tender Document so that, the submission of all information as requested, so that the offer represents what is being required by the Contracting Authority.

On the other hand, a prospective Bidder must appreciate and respect the fact that the Evaluation Board, in its assessment, had to abide by the conditions laid out in the Tender Document and must follow the procedure as stipulated in the Public Procurement Regulations.

In this particular case, this Board, after taking all the facts and submissions into consideration, opines that the Evaluation Board carried out its evaluation process in a fair and just manner and that the Appellant did not submit, in full, what was requested in the Technical Specifications, hence missing documentation.

In view of the above, this Board finds against EWAN Engineering Manufacturing and recommends that the deposit paid by the latter should not be refunded.

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member

4 April 2017