

PUBLIC CONTRACTS REVIEW BOARD

Case 1036 – CT 3033/2016 – Supply & Delivery of Surface Pumps to the Water Services Corporation

The Publication Date of the Call for Tenders was 16 September 2016 whilst the Closing Date for Call of Tenders was 27 October 2016. The Estimated Value of the Tender, (Exclusive of VAT) was € 123,250.

Seven (7) Bidders have submitted Twenty-Eight (28) Offers for this Tender.

On 20 March 2017, JP Baldacchino Co Ltd filed an Objection against the decision of the Water Services Corporation to award Lot 1 to Attard Farm Supplies Ltd for the price of € 9,9197.98 (Exclusive of VAT) and Lots 3 and 4 to KSB Italia S.p.A for the price of € 41,270 and € 23860 respectively against a deposit of € 3,600.

On 6 April 2017, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Carmel Esposito as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

Appellant – JP Baldacchino Co Ltd

Mr Adrian Baldacchino	Representative
Mr Giampaolo Milan	Representative
Dr Jonathan Abela Fiorentino	Legal Representative

Recommended Bidder for Lot 1 – Attard Farm Supplies Ltd

Mr George Mangion	Representative
Mr Paul Refalo	Representative

Recommended Bidder for Lots 3 & 4 – KSB Italia S.p.A

Ing Patrick Spiteri Staines	Representative
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Contracting Authority – Water Services Corporation

Ing Joseph Curmi	Chairperson, Evaluation Board
Mr Vincent Bezzina	Member, Evaluation Board
Ing Steve Dimech	Member, Evaluation Board
Ing Antoine Psaila	Member, Evaluation Board
Ms Shirley Farrugia	Representative
Mr Jonathan Scerri	Representative

Department of Contracts

Ms Doreen Seracino	Procurement Manager
Dr Christopher Mizzi	Legal Representative

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

Dr Jonathan Abela Fiorentino, the Legal Representative for JP Baldacchino Co Ltd opened up by saying that the Tender had four lots and they were appealing on the decisions taken in Lots 1, 3 and 4 despite the fact that his client's offer was the cheapest one by a great margin particularly in the latter two lots. Apparently, the Water Services Corporation rejected the Appellant's offer because it was deemed to be technically non-compliant. Besides, the Contracting Authority has misinterpreted the Technical Literature which JP Baldacchino Co Ltd has submitted.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether this was a technical matter for which Dr Jonathan Abela Fiorentino, on behalf of the Appellants replied in the affirmative while adding that the discussion centred about the supply of water pumps.

The Tender Document specifically requested for water pumps which were capable of operating with variable speed drives. This was something which JP Baldacchino Co Ltd were capable to do according to their offer. The latter had submitted different literatures which included those by their Italian manufacturers who produce this type of machinery and which gave general information on how their brand's machinery works.

In the general section there was a part which said that the pumps submitted can be supplied with forced ventilation. According to the Appellants, the Contracting Authority did not understand correctly this statement since they understood that the pumps which JP Baldacchino Co Ltd were offering were capable to be used with speed drives only if they use forced ventilation.

The leaflet submitted states that forced ventilation would have been produced if requested. The Appellants' Legal Representative continued by stating that the Water Services Corporation has assumed that the pumps which his clients submitted work only with forced ventilation which was not the case.

Dr Jonathan Abela Fiorentino then referred to the letter which they received from the Water Services Corporation on 28 November 2016 which *inter alia* requested,

“Kindly confirm whether the motor is capable to operate in conjunction with a Variable Speed Drive as stated in Section 4 Clause 6.0, Item 6.3”

JP Baldacchino replied back through a letter on 2 December 2016 where *inter alia* they stated,

“We confirm that the motors proposed are capable to operate in conjunction with a variable speed drive as stated in Section 4 – Clause 6.0 – Item 6.3”

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked the Contracting Authority whether they can confirm this. Mr Jonathan Scerri, on behalf of the Water Services Corporation, replied in the affirmative.

Dr Jonathan Abela Fiorentino, the Legal Representative for JP Baldacchino Co Ltd then proceeded by referring to point 9 of the Reasoned Letter of Reply issued by the Department of Contracts and the Water Services Corporation dated 30 March 2017 which stated that, *“This point is essential to understand the reasons which brought about the disqualification of the Bidder since, whilst it is not disputed that the pumps offered by the Appellant can operate with a variable speed drive. It is also true that such pumps cannot achieve this specification unless they are accompanied by forced ventilation.”*

According to JP Baldacchino Ltd, this is not the case since the forced ventilation is just an additional product which was not needed for this Tender. It was only mentioned in the leaflet since the company which supplied it offered this type of product.

At this point, Mr Adrian Baldacchino, director of the Appellants JP Baldacchino Co Ltd, holding ID Card number 484172 M was summoned to witness under oath before the Public Contracts Review Board.

Following Mr Baldacchino’s testimony, Mr Giampaolo Milan, holding Passport Number YB 0453178, Sales Manager of Marly SpA was also summoned to witness by JP Baldacchino Co Ltd under oath before the Public Contracts Review Board.

At the end of Mr Milan’s testimony, Mr Jonathan Scerri, representing the Water Services Corporation said that as Dr Mizzi has stated previously the rectification was asked for two reasons:

1. To submit the frequency chart health which was not submitted in JP Baldacchino Co Ltd’s original offer. This was eventually submitted by the Appellants against the administrative fee of € 50.00;
2. The Forced Ventilation question which was raised in the previous testimonies by Mr Baldacchino and Mr Milan.

This shows the problems which the Evaluation Board has met when evaluating the Appellant’s offer. The Evaluation Board was faced with a problem when seeing the latter’s Technical Questionnaire wherein it was stated that his product works in conjunction with the Variable Speed Drives while in the Technical Literature there was an indication that the standard product is there for standard voltages while in order to work with the requested product an optional is needed.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board said that this was interpreted.

Mr Jonathan Scerri for the Water Services Corporation replied by saying that if JP Baldacchino Co Ltd wrote that this would work without forced ventilation, they would have considered their offer.

At this point, Ing Antoine Psaila, a member of the Evaluation Board holding ID Card 32274M was summoned by the Department of Contracts and the Water Services Corporation to testify under oath before the Public Contracts Review Board.

At the end of Ing Psaila’s testimony, the Public Hearing was adjourned to Tuesday 18 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 JP Baldacchino Co Ltd (herein after referred to as the Appellant) on 20 March 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference CT 3033/2016 listed as Case No 1036 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 Jonathan Abela Fiorentino

Appearing for the Contracting Authority: Dr Christopher Mizzi

Whereby, the Appellant contends that:

- a) His offer was rejected due to alleged assumption that the water pump offered could not operate at variable speed, as requested in the Tender Document, without the use of forced ventilation. In this regard, JP Baldacchino Co Ltd maintains that his offer included pumps which can be operated at variable speed without the use of forced ventilation;**

b) The Literature submitted by the same, consisted of a General Brochure which showed the products manufactured by the suppliers. In this regard, this Appellant refers specifically to page 21 of the brochure wherein the options available were misinterpreted as operational requirements.

This Board also noted the Contracting Authority's "*Letter of Reply*" dated 30 March 2017 and its verbal submissions during the Public Hearing held on 6 April 2017, in that:

a) The Water Services Corporation maintains that from the Literature submitted it was denoted that to operate at variable speeds, JP Baldacchino Co Ltd's offer had to apply Forced Ventilation. In this regard, the Evaluation board had to assess the Appellant's Bid on the information submitted by the latter bearing also in mind that the Technical Literature forms part of the Tender Document.

This same Board also noted the Testimonies of the witness namely:

- a) Mr Adrian Baldacchino duly summoned by JP Baldacchino Co Ltd's
Legal Representative;**
- b) Mr Giampaolo Milan duly summoned by JP Baldacchino Co Ltd;**
- c) Ing Antoine Psaila duly summoned by the Department of Contracts
and Water Services Corporation.**

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

- 1. This Board would like to first and foremost, emphasize that in
arriving at its decisions, great importance was given to the testimony
of the witnesses who explained in great detail the Technical Aspect
and function of the water pumps presently being requested by the
Water Services Corporation. In this regard, this Board is also
comforted by the Technical Justifications given by the Technical
Witnesses which enabled this Board to arrive at its deliberations.**

2. With regards to JP Baldacchino Co Ltd's First Grievance, this Board, after having examined the relative Technical Literature which they have submitted and with particular reference to the reasons given by the Water Services Corporation for rejecting their offer, justifiably opines that the main issue under this Appeal boils down to the Technical Literature and the interpretation thereof, with particular reference to page 21 of the brochure submitted by the Appellant, under Note B.

From the Technical Explanations given by the witnesses, it has been credibly established that the Water Pumps which were being tendered for, had to operate at variable speed without the use of "*forced ventilation*".

On the one hand, the Contracting Authority is maintaining that JP Baldacchino Co Ltd's product cannot operate at variable speed without the application of "*forced ventilation*" as indicated in the Technical Literature submitted by the Appellant who on the other hand is insisting through the testimony of his technical expert that the water pumps offered can operate at variable speed without the use of "*forced ventilation*".

In this regard, this Board would like to refer to the clarification note issued by the Water Services Corporation on 28 November 2016, wherein it was requested:

“Kindly confirm whether the motor is capable to operate in conjunction with a variable speed drive as stated in Section 4 Clause 6.0, Item 6.3”.

On receipt of this clarification, JP Baldacchino Co Ltd replied and confirmed, to the letter, that the offered motors do conform to Section 4, Clause 6.0 and Item 6.3.

This Board would also like to respectfully refer to the Clause 6.3 of Section 4 of the Tender Document which requested that

“The motor offered shall be capable of withstanding up to 15 starts per hour and shall be capable to operate in conjunction with a Variable Speed Drive”.

In this respect, this Board notes that nowhere is the issue of “*Forced Ventilation*” raised. At the same instance, through the reply to the Clarification, confirmation that the motor can operate at variable speed was re-affirmed by JP Baldacchino Co Ltd.

In this respect, through the credible testimony given by the Appellant's expert, this Board is comforted by the fact that the water pumps offered by the latter are technically compliant and can operate at variable speed without the use of forced ventilation. In this regard, this Board upholds the Appellant's First Contention.

- 3. With regards to the Appellant's Second Grievance, this Board, as had on numerous occasions, would like to reaffirm that the Technical Literature requested in a Tender process does form part of the Tender Document. When such an information is dictated in a Tender, its purpose is to confirm that what is being offered by the Bidder complies with what is being supplied by the same and in this respect, this Board acknowledges the fact that the Evaluation Board has to rely on the information submitted by the Bidder.**

However, in this particular case, this Board notes that through the clarification, the Evaluation Board already had the assurance that the motors conformed with the dictated specifications except for the fact that in the opinion of the Water Services Corporation, the Technical Literature submitted indicated that the water pumps offered had to operate with the use of "*forced ventilation*".

In this Board's opinion, this is the issue why the Contracting Authority's discarded the Appellant's bid. First of all, it has been credibly established that the Technical Literature submitted by JP Baldacchino Co Ltd consisted of a General Brochure showing all the products which the Overseas supplier can provide so that there is no particular specification which denotes that the water pumps being supplied must be forced ventilated to operate at variable speeds.

At the same instance, this Board would like to refer to page 21 of the submitted brochure, where in note B it was stated "*forced ventilation for variable speeds*"

From the Technical Submissions made during the Public Hearing for this Appeal, the Technical Witness credibly explained that this clause does not imply that forced ventilation must be applied for variable speed motors but rather that the supplier can also provide forced ventilation for certain variable speed motors, which in the expert's Technical Opinion is a very rare eventuality.

In this regard, this Board opines that Clause B of the Technical Literature did not imply that the motor being supplied by JP Baldacchino Co Ltd had to operate at variable speeds with forced ventilation. At the same time, this Board was not presented with

justifiable and credible evidence that the Appellant's product had to operate with forced ventilation. In this regard this Board upholds JP Baldacchino Co Ltd's Second Grievance.

In view of the above, this Board finds in favour of JP Baldacchino Co Ltd and recommends that:

- a) The award for Lots 1, 3 and 4 for this Tender are to be revoked;**
- b) JP Baldacchino Co Ltd's offer is to be reintegrated in the Evaluation Process;**
- c) The deposit paid by JP Baldacchino Co Ltd is to be fully refunded.**

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Carmel Esposito
Member

___ *April 2017*