

not compliant – as for example, cabinet dimensions which had infinitesimal differences from those requested. The tender requested an audible acoustical noise of 50 dB which does not make sense as no Ups uses this noise level. Again the 68 dB noise level requested was not suitable for use in an office but in an electrical room. He accepted that he had overlooked inserting replies to technical question D6 but the replies were covered in the technical literature.

Mr Jonathan Scerri, Procurement Manger of the Water Services Corporation started by stating that Appellant had made two separate offers but had based his appeal globally on both bids. Both bids (TID 97972 and TID 97962) were non-compliant but the reasons for refusal were not identical. TID 97972 which had been placed third in order of qualification offered dimensions that did not meet specifications and audible acoustical noise levels totally different to what was specified. Clarification was not possible as this would have been a rectification of the bid.

The Chairman pointed out that the specifications must be followed exactly. The Evaluation Committee could not ask for clarification of technical points. If any clarification was required it should be sought prior to tendering. The facility of a Call for Remedy was also available to the bidder.

Mr Jonathan Scerri, resuming his submission said that in the Technical Questionnaire question D6 had been left blank although bidder claims that this point was covered in the literature submitted with the bid. As regard TID 97962 the requested specifications regarding harmonic distortions had not been met as well as required noise levels making the bid technically not compliant. The tender had been cancelled and will be re-issued.

The Chairman mentioned that the Contracting Authority had to follow exactly the tender specifications and that applied just as well to the bidder and to the evaluation committee – self limitation. All too often the remedies available to the bidders were not being used. He then thanked the parties for their submissions and declared the hearing closed.

This Board,

having noted this Objection filed by Constant Power Solutions, (hereinafter also referred to as the Appellants), on 26 November 2018, refers to the contentions made by the same Appellants with regards to the cancellation of Tender of Reference WSC/T/65/2018 listed as Case No 1245 in the records of

the Public Contracts Review Board and issued by the Water Services Corporation.

Appearing for the Appellants: Mr Alexander German

Appearing for the Contracting Authority: Dr Sean Paul Micallef

Whereby the Appellants contend that:

- a) their offer was deemed as technically non-compliant due to minor differences in dimensions and which will not affect the utilisation and objective of the tender requirement. In this regard, the Appellants maintain that, in these circumstances, the Contracting Authority should have sought clarifications.**

This Board has also noted the Contracting Authority's "*Reasoned Letter of Reply*" dated 6 December 2018 and its verbal submissions during the Public Hearing held on 18 December 2018, in that:

- a) The Contracting Authority insists that both Appellants' offers, (TID: 97972 and TID: 97962) were not technically compliant for different reasons, as stated in the "*Letter of Rejection*". In this regard, clarifications were not permissible as otherwise this would have represented rectification of both bids.**

This Board, after having examined the relevant documentation to this Appeal and heard submissions made by the parties concerned, opines that the only issue that deserves consideration is the submission made by the Appellants.

This Board would respectfully point out that the technical specifications are not capriciously dictated and they are stipulated in accordance with the exigencies of the Authority. At the same instance, the technical specifications serve as an effective tool to treat all offers on a level playing field, so that they form the core of what is actually being requested by the Contracting Authority.

This Board would also point out that the principle of self-limitation must be respected and adhered to by both the Contracting Authority and the prospective Bidder as such basic principles ensure the application of the principle of transparency. It must also be noted that the technical specifications, so dictated in a Tender Dossier, must be strictly adhered to, unless there are circumstances where the Tender accepts alternative products rendering the same objectives as those specified in the Tender Document.

In this particular case, the reasons for the discarding of the Appellant's offer were the following:

- **“Tender ID 97972**

- *Section 4 specification B8 requested a maximum cabinet dimension of WxDxH – 1100mm x 1000mm x 2200mm. Offered unit had dimensions of 600mm x 1050mm x 2000mm.*

- *Specification K3 requested an audible acoustical noise of less than or equal to 50dB at 1 metre. Offered unit had a noise of less than 65 db.*

- *There was no reply to Technical Questionnaire question D6.*

- **Tender ID 97962**

- *Section 4 specification D6 requested an output voltage harmonic distortion of less than 2 per cent. Offered unit had a value of less than or equal to 3 per cent.*

- *Specification K3 requested an audible acoustical noise of less than or equal to 50dB at 1 metre. Offered unit had a noise of less than 65 db.*

- *Specification D4 requested an output power factor of greater than 0.9 Unit offered had a PF of 0.9*

- *There was no reply to Technical Questionnaire question D6.”*

From the above vivid reasons for the Appellants’ bid disqualification, this Board notes that the latter’s offer varied from the dictated specifications and Constant Power Solutions did not reply to the clarification requests, namely questions B6 and D6.

This Board also considered the Appellants’ admission in that, although they had overlooked inserting replies to the technical questions, the information was made available in the technical literature so submitted. In this regard, this Board, would point out that literature, when requested, serves as an assurance that what the Bidder had declared in the technical offer, is available on the market and the product’s specifications are those and the same as declared in the Bidder’s offer. In this particular case, the technical

specifications were not included in the technical offer and the fact that such information was contained in the literature does not make the technical offer complete.

This Board would emphasize that it is the responsibility and obligation of the prospective Bidder to adhere and comply with the dictated technical specifications. In this regard, regrettably, this Board is being faced with appeals relating to technical non compliance of offers which can be avoided.

This Board opines that the Appellants were aware of the fact that their offer's technical specifications are different from those so dictated in the Tender Dossier and in this respect, he had the remedies to seek any clarifications or make recommendations prior to the closing date of his submissions, however such remedies were not availed of by the Appellants.

This Board would also point out that the Evaluation Committee is bound to adhere to the following directives relating to the clarifications, the latter of which should not result in a:

- 1. conversion of a non-compliant offer into a compliance with the mandatory technical specifications;**
- 2. change in the quoted price, (except for arithmetical errors).**

This Board opines that in this particular case, any clarifications regarding the technical specifications of the Appellants' offer would have breached one of the above mentioned directives and in view of the above, this Board:

i) does not uphold the contentions made by Constant Power Solutions;

ii) upholds the decision of the Water Services Corporation in the cancellation of the Tender;

iii) recommends that fifty per cent (50%) of the deposit paid by the Appellant, that means two hundred Euro (€ 200) is to be refunded.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

8th January 2019