

PUBLIC CONTRACTS REVIEW BOARD

Case 1274 – WSC/T/91/2018 – Supply & Delivery of Uniforms with Low level of Toxic Substances for the Regions, Treatment Plants & Reverse Osmosis Plants of the Water Services Corporation

The publication date of the call for tenders was the 7th September 2018 whilst the closing date of the call for tenders was 5th October 2018. The estimated value of the tender (exclusive of VAT) was € 129,488.36

On the 24th January 2019 In Design (Malta) Ltd filed an appeal against the Water Services Corporation as the Contracting Authority objecting that their bid was found to be not technically compliant. A deposit of € 650 was paid.

There were four (4) bidders.

On 5th March 2019 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – In Design (Malta) Ltd

Dr Maximilian Ebejer	Legal Representative
Ms Samantha Reed	Representative

Contracting Authority – Water Services Corporation

Dr Sean Paul Micallef	Legal Representative
Ms Kirstie Grech	Secretary Evaluation Committee
Mr Chris Agius	Member Evaluation Committee
Mr Mario Ellul	Member Evaluation Committee
Mr Ryden Spiteri	Member Evaluation Committee
Mr Jonathan Scerri	Representative

Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties and invited them to make their submissions.

Dr Maximilian Ebejer Legal Representative for In Design (Malta) Ltd stated that Appellants tender had been rejected on two points – on one item they had made a correct but qualified

submission and on the other item they submitted a product which was considered to be a major change to the tender.

The technical offer requirement with regard to the short sleeve shirts (Item 2) was correctly submitted at 100% fabric composition, but Appellants suggested a proposal that an 80/20 fabric be used, while the long sleeved shirts (Item 3) was correctly submitted at 80/20 composition in line with an earlier clarification. In respect of Item 2 Appellants had merely made a proposal but submitted the correct product. The evaluation committee should have asked for a clarification because the proposal did not change anything. With regard to Item 3 the technical specification was for a 100% fabric but after clarification an 80/20 substitute was accepted. The clarification form is an integral part of the tender documents but the Contracting Authority raised the argument as to whether this was a major or minor amendment. According to preamble 81 of the EU Directive 2014/24 a change is only major if through its implementation it attracts additional participants – which was not the case here.

Dr Sean Micallef Legal Representative for the Water Services Corporation said that the clarification was agreed to encourage participation.

The Chairman stated that a clarification was part of the tender and the point to consider was if the tender was changed drastically by that clarification – in this case it appeared to have changed only the material composition in the specification. A proposal in a bid was equivalent to a change in the terms of the tender and should have been made as a clarification before the bid.

Mr Jonathan Scerri Representative of the Water Services Corporation said that the Contracting Authority did not accept the clarification or the proposal in the case of Item 2 – the specifications were drawn up with a particular purpose.

Dr Ebejer in conclusion said that Appellants were requesting that the points raised be clarified and if their submissions were in order.

The Chairman thanked the parties for their submissions and declared the hearing closed.

This Board,

having noted this Objection filed by In Design (Malta) Limited, (herein after also referred to as the Appellants) on 24 January 2019, refers to the claims made by the same Appellants with regard to the Tender of Reference WSC/T/91/2018 listed as Case No 1274 in the records of the Public Contracts

Review Board, issued by the Water Services Corporation, (herein after also referred to as the Contracting Authority).

Appearing for the Appellants: Dr Maximilian Ebejer

Appearing for the Contracting Authority: Dr Sean Paul Micallef

Whereby, the Appellants contend that:

- a) their main grievance is that they made a proposal in their offer with regards to the material of the uniforms, the latter of which would not affect a change in the attainment of the objective of the Contracting Authority and such a proposal was deemed to be a technically non-compliant issue. In this regard, the Appellants maintain that their offer should be re-assessed.**

This Board also noted the Contracting Authority's 'Letter of Reply' dated 6 February 2019 and its verbal submissions during the Public Hearing held on 5 March 2019, in that:

- a) the Water Services Corporation contends that the Evaluation Committee deemed the Appellants' proposal to represent a deviation from the stipulated technical specifications of the Tender Document. In this regard, the Contracting Authority, through a clarification note, confirmed that the material being produced by Appellants is acceptable**

so that, if the Public Contracts Review Board finds that such a proposed change in the stipulated technical specification will not breach the Public Procurement Regulations, the Contracting Authority is willing to reconsider the Appellants' offer.

This Board, having examined the relevant documentation to this Appeal and heard submissions made by the parties concerned, opines that the issue that merits consideration is whether In Design (Malta) Limited's proposal with regards to the technical specifications of the material of the uniforms meets the Tender Requirements.

- 1. First and foremost, this Board would respectfully point out that, proposals with regards to the technical or the financial aspects to the stipulated specifications and conditions do represent a qualification to the specifications of the Tender. On the other hand, to avoid such ambiguities which, in the long run, will render their offer non-compliant, bidders should avail themselves of the remedies prior to the closing date of submissions of offers, by seeking clarifications as to whether the technical specifications of the product being offered, is compatible with what is being requested;**
- 2. At the same instance, any clarifications which are duly approved by the Contracting Authority also form part of the Tender. In this particular**

case, this Board would refer to the Clarification Request No 1 dated 25 September 2018, with particular reference to questions 4 and 5, as follows:

“Question 4:

Long Sleeve Polo Shirt – What is the fabric type? Fleeceback Sweatshirt, or Pique Polo Shirt (same as short sleeve)?

Reply 4:

Any of the two options are acceptable to the WSC

Question 5:

Typically for a long Sleeve item Polo Shirt/Sweat Shirt, in dark colours like you have requested, we recommend a 80 Cotton/20 Polyester, or 60 Cotton/40 Polyester for increased stability in washing, and better colour fastness. Can we propose alternative compositions?

Reply 5:

An alternative composition up to 80% Cotton/20% polyester will be deemed acceptable”

Although the Tender Document requested that the material of the uniforms should be 100% cotton, the Contracting Authority confirmed that the material 80% Cotton and 20% Polyester is also acceptable. At this particular stage of the process, the technical specifications of the

Tender were modified to an extent where the principle of proportionality prevails. Such an inclusion of technical specifications must also apply to all participating bids. In this respect, this Board does not deem that an acceptance of an alternative composition of material will change the substance form of the product being requested so that, such an acceptance on the part of the Evaluation Committee, does not, in any way, breach the principles of equal treatment and self limitation.

3. In conclusion, this Board opines that:

- a) Clarification Note 1 dated 25 September 2018, formed part of the conditions of the Tender Document;**
- b) the acceptance of an alternative type of material does not constitute a major change, so long as, it is applied to all competing bids.**

In view of the above, this Board,

- i) revokes the decision taken by the Water Services Corporation to cancel the Tender;**
- ii) directs that the offer submitted by In Design (Malta) Limited is to be re-integrated in the evaluation process;**
- iii) directs that the evaluation process is to be resumed by re-assessing all the offers submitted, taking into consideration the clarification reply confirming that, the composition of uniform material consisting of 80%**

cotton and 20% polyester is acceptable, for both short and long sleeve shirts;

iv) directs that the deposit paid by the Appellants is to be fully refunded.

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member

14th March 2019