

PUBLIC CONTRACTS REVIEW BOARD

Case 1275 – WSC/PMC/02/2019 – Preliminary Market Consultation for the Supply, Delivery and Commissioning of an 88kVa (PRP) Diesel Generator FG Wilson Model P88-3 for the Water Services Corporation

Call for Remedies before the Closing Date for Competition

The publication date of the call for Preliminary Market Consultation (PMC) was the 22nd January 2019 whilst the closing date of the call was 12th February 2019.

On the 8th February 2019, United Equipment Co (UNEC) Ltd filed a Call for Remedy against the Water Services Corporation as Contracting Authority complaining that the consultation eliminates competition.

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

The attendance for this public hearing was as follows:

Appellants – United Equipment Co Ltd

Dr John L Gauci	Legal Representative
Dr Ruth Ellul	Legal Representative
Mr Peter Kristensen	Representative

Contracting Authority – Water Services Corporation

Dr Sean Paul Micallef	Legal Representative
Mr Jonathan Scerri	Representative

Dr Anthony Cassar, Chairman of the Public Contracts Review Board, welcomed the parties and invited submissions.

Dr John Gauci Legal Representative for United Equipment Company Ltd said that the precontractual remedy being sought was in respect of a specific model of a generator. Since Appellants represent four different brands of generators they requested clarification and enquired if a different model to the one specified would be considered. The Corporation replied that they would only consider the specified model. This goes against the basic principle that a tender cannot identify a specific brand and is discriminatory and unlawful. The concept of a PMC does

not exist in law and this in reality is a call for quotations as the General Information published makes too clearly. The name of the brand has to be removed and the competition opened up.

Dr Sean Micallef Legal Representative for the Water Services Corporation said that the PMC is actually referenced in the law as an instrument to gather information or check the market availability of a product before the call for competition. The Contracting Authority needs a back up for an existing generator, and hence the specific brand required. The issue of the PMC is to find out if there are other suppliers of Wilson generators and find out prices and therefore open up competition. The PMC was published merely to establish if it was technically and economically feasible to get a particular brand of generator through open competition. The conditions in the published information were indicative not binding.

Dr Gauci re-iterated that requesting a particular brand was discriminatory – if the specifications were not met then exclude. This was contrary to regulation 53 (8) of the Public Procurement Regulations and was prohibited. The details and conditions mentioned in the PMC made it obvious that it was a tender. The Corporation was not consulting – it was requesting quotations.

Mr Jonathan Scerri Representative of the Water Services Corporation said that the procedure used is a market exercise to identify suppliers not to award a contract. The law allows a call for a particular brand if it is required for technical reasons.

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

This Board,

having noted this Call for Remedy filed before the Closing Date for Competition by United Equipment Limited (herein after also referred to as the Appellants) on 8 February 2019, refers to the claims made by the same Appellants with regard to the Tender of Reference WSC/PMC/02/2019 listed as Case No 1275 in the records of the Public Contracts Review Board, and issued by the Water Services Corporation (herein after referred to as the Contracting Authority).

Appearing for the Appellants:

Dr John L Gauci

Dr Ruth Ellul

Appearing for the Contracting Authority:

Dr Sean Paul Micallef

Whereby, the Appellants contend that:

- a) **their main concern refers to the fact that, the Contracting Authority requested only one specific model. In this respect, the same Authority is breaching the basic principles in that, it is not only restricting competition but also specifying the brand.**

This Board has also noted the Contracting Authority’s ‘Letter of Reply’ dated 18 February 2019 and its verbal submissions during the hearing held on 5 March 2019, in that:

- a) **The Water Services Corporation contend that since the equipment being requested represents a back-up for an already existing product and or technical reasons, same brand of the equipment is being called for. At the same instance, the Contracting Authority insists that such a request is only a Preliminary Market Consultation.**

This Board, having examined the relevant documentation to this “*Call for Remedy*” and heard submissions made by the parties concerned,

opines that the issue that merits consideration is the specific brand of equipment being requested by the Water Services Corporation.

1. This Board would respectfully refer to the basic principles which should be adhered to when the Contracting Authority stipulates the technical specifications, in that, they should:

- be precise in the way they describe the requirements;**
- be easily understood by the prospective Bidders;**
- have clearly defined, achievable and measurable objectives;**
- not mention any brand names or requirements which limit competition or if brands are mentioned, include the term “or equivalent”;**
- provide sufficient detailed information that allows Bidders to submit realistic offers.**

At this stage of consideration, this Board would refer to Clause 4.1 (Section B – General Information) wherein it is clearly stipulated that:

“4.1 Economic Operators are to fill in the document entitled ‘Form-Price Quotation’ so as to indicate a total price for a new FG Wilson 88 KvA sound-attenuated generator including its supply, delivery and commissioning, as described under (i) purpose above”

In this regard, the Water Services Corporation is restricting quotations for the supply of only one brand of generator, thus eliminating the

possibility of obtaining quotation for other types of generator which could achieve the same objective.

2. The Contracting Authority maintains that since this market consultation refers to a back-up generator to an already existing one, the latter of which is of a brand “*Wilson*”, any additional equipment in this regard, should be of the same brand, for known technical reasons, such as spare parts and maintenance.

This Board acknowledges the fact that additional or ancillary equipment to already existing installed equipment would, in certain instances, make sense if the entire equipment configuration is composed of the same brand. However, one must also acknowledge and appreciate that this Preliminary Market Consultation involves a future Public Procurement, so that, although the latter is not a Tender, it should also follow the rules stipulated in the Public Procurement Regulations, in that, the technical specifications so stipulated in this same Preliminary Market Consultation must provide room and space for alternative and equivalent equipment of other brands which, would achieve the same objective and functions. In this regard, this Board opines that the fact that the Preliminary Market Consultation is for a

backup to an existing generator, does not justify the non-inclusion of other equivalent equipment in the consultation request.

- 3. This Board noted that the purpose of issuing this particular Preliminary Market Consultation was to seek quotations and sound the market for the future procurement of the generator and the inclusion of a call for equivalent equipment in the latter, would definitely serve the purpose of obtaining the necessary information and prices of what is available on the market so that, the Contracting Authority will be in a better situation to assess its future intended procurement.**

In conclusion, this Board opines that:

- a) the Preliminary Market Consultation issued by the Water Services Corporation for a call for quotation breaches the principle of open competition;**
- b) the fact that the Market Consultation is for a back-up equipment to an already existing one, does not justify the non-inclusion of equivalent equipment of other brands;**
- c) although the Consultation, at this particular stage cannot be regarded as a Procurement Tender, it is intended to consult the market for a future Public Procurement so that the rules and regulations of the same should be adhered to.**

In view of the above, this Board,

- i) upholds the contentions made by United Equipment Company Limited;**
- ii) directs that the technical requirements and specifications of the generator be construed to imply and allow other equivalent equipment of different brands to participate in this Preliminary Market Consultation;**
- iii) directs that the Preliminary Market Consultation is to be adjusted accordingly through a clarification note.**

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Richard A Matrenza
Member

20th March 2019