

## **PUBLIC CONTRACTS REVIEW BOARD**

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### **Case 1291 – WSC/Q/62/2018 – Supply and Delivery of Lubricant Grease for the Water Services Corporation**

The publication date of the call for tenders was the 19<sup>th</sup> November 2018 whilst the closing date of the call for tenders was 10<sup>th</sup> December 2018. The estimated value of the tender (exclusive of VAT) was € 9,739.

On the 11<sup>th</sup> February 2019 Mr Edward Zammit trading as Valdro filed an appeal against the Water Services Corporation as the Contracting Authority objecting that his bid had been excluded as it was technically non-compliant. A deposit of € 400 was paid.

There were three (3) bidders.

On 26<sup>th</sup> March 2019 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

#### **Appellants – Edward Zammit trading as Valdro**

Dr William Cuschieri	Legal Representative
Dr Mary Gauci	Legal Representative
Mr Edward Zammit	Representative

#### **Contracting Authority – Water Services Corporation**

Dr Sean Paul Micallef	Legal Representative
Eng Charles Camilleri	Chairperson Evaluation Committee
Ms Christine Scicluna	Secretary Evaluation Committee
Eng Ronald Pace	Member Evaluation Committee

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

Dr William Cuschieri Legal Representative of Valdro said that in this tender for the supply of lubricant grease his client had been disqualified following additional information he had supplied in reply to a clarification note. Appellant's offer was technically compliant and both the samples list and the financial bid were in order. The product in dispute was lubricating grease in 125 grams (grms) tubes which product was identical to previous tenders supplied to the Water Services Corporation (WSC). The WSC were erroneous in claiming that cross referencing to previous

tenders was not allowed as in para 1.7c(ii) of the tender they themselves had requested cross reference numbers in lieu of literature. Following a clarification note Appellant confirmed that he was supplying 125 millilitres (mls) tubes as previously supplied. This was not acceptable to the WSC although this had been previously supplied as evidenced by documents in past tenders. The difference between grams weight and millilitres volume was minimal and immaterial – something like a specific gravity of .01. This was a clear case where substance should prevail over form (reference to PCRB Case No 1208). There was no added cost to the WSC but they state they do not agree, without giving a reason. Appellant’s bid was more economically advantageous over the preferred bid.

Dr Sean Micallef Legal Representative of the Water Services Corporation said that the financial offer could not be considered as the bid was deemed not technically compliant. The tender requested offers in grms when the Appellant offered mls. Reference to literature submitted in previous tenders was misleading as it made reference to 125mls bottles and not 125 grms tubes. Bidder was therefore asked to clarify this point and again confirmed that he was supplying the former containers. The WSC wanted 125 grms tubes whilst the manufacturer confirmed that they were supplying containers of 127.5 grms – this was unacceptable on the basis of self-limitation. The evaluation committee must ensure compliance with the tender specifications and this bid was not 100% compliant. It was a mistake to cross reference with a previous tender as there was an error in that submission.

Dr Cuschieri said that this was a storm in a teacup as the difference between bidder’s offer and tender specifications was minute. Appellant was correct in making cross references to previous successful bids which did not seem to create any problems. His client’s bid was the cheapest and ought to be considered.

The Chairman said that the objective of a tender was that the desired result is achieved. In this instance comparison between the offer and the specifications is easy to make and there must be self-limitation on the part of the contracting authority. He then thanked the parties for their submissions and declared the hearing closed.

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**This Board,**

**having noted this Objection filed by Edward Zammit Trading as Valdro (herein after referred to as the Appellants) on 11 February 2019, refers to the claims made by the same Appellants with regard to the Tender of Reference WSC/Q/62/2018 listed as Case No 1291 in the records of the Public Contracts**

**Review Board, and awarded by Water Services Corporation (herein after referred to as the Contracting Authority).**

**Appearing for the Appellants: Dr William Cuschieri**

**Appearing for the Contracting Authority: Dr Sean Paul Micallef**

**Whereby, the Appellants contend that:**

- a) **their main concern refers to the fact that, their offer was rejected due to the alleged claim that they referred to previous supplies, so that Item 2 was quoted in tubes of 125ml (volume) instead of 125g (weight). In this respect, the Appellants maintain that their offer was fully compliant and in actual fact, they were offering more than the volume requested, so that the Evaluation Committee should have abided by the principle of “*substance over form*”.**

**This Board also noted the Contracting Authority’s ‘*Reasoned Letter of Reply*’ dated 21 February 2019 and its verbal submissions during the hearing held on 26 March 2019, in that:**

- a) **the Contracting Authority insists that the Appellants’ offer related to tubes of 125ml and not 125g, as duly dictated in the Tender Document so that the Evaluation Committee had to abide by the principle of**

**self-limitation, thus rendering the Appellants’ offer as technically non-compliant.**

**This Board, after having examined the relevant documentation to this Appeal and heard submissions made by the parties concerned, opines that the issue that merits consideration is the validity of the Appellants’ submission with respect to Item 2, in the financial bid.**

**1. This Board would first and foremost refer to Paragraph 7 (c) (ii) as follows:**

*“(ii) Literature as per Form marked “Literature List” is to be submitted with the technical offer at tendering stage. Alternatively, an Economic Operator can quote a reference number under which he/she has already supplied items so that there would be no need to submit literature. No changes to the information provided in the Literature submitted will be allowed. Literature submitted shall be rectifiable only in respect of any missing information”*

**The above mentioned clause specifically allows economic operators who had already supplied the requested product to be exempted from submitting technical literature, so that, they may only quote the reference to the Tendered supplies in this respect. The Appellants’ “*samples list*” also declared that the lubricant grease being quoted is identical to that previously supplied against Q/10/2018 – WSC/1017/17 – LA 258/18 – PD 4800017093 – dated 29/05/2018, so that, the Appellants’ abided by Paragraph 1.7 (c) (ii)**

- 2. This Board would also refer to the Tender Requirements, in that, the stipulated volume was expressed in grams and not millimetres, so that the comparison to the previous supply, which was expressed in millimetres, was not the same measuring volume and at this particular stage of consideration, the Evaluation Committee abided by the principle of self-limitation.**
- 3. From documentation and submissions made, this Board was made aware that the difference between grams weight and millilitres volume was minimal, amounting to 0.1. In this regard, this Board considers that, what is important, at evaluation stage, is not the difference in measurement or additional benefits which the Appellants' offer included, but rather the practicality and possibility of comparing the differently expressed volumes, without breaching the principle of equal treatment and transparency.**
- 4. This Board also notes that the Appellants were requested to clarify, yet again, their forthcoming reply, confirmed that they will be supplying containers in millilitres which, when converted, represent 127.5 grams per container. In this regard, this Board acknowledges the fact that the Appellants' offer is beneficial to the Contracting Authority, however, it must not divert from the basic principle of self-limitation imposed on**

**both the bidders and the Contracting Authority. In this respect, this Board would refer to a judgement delivered by the Court of Appeal on 24 June 2016 with regard to the case Transport Services for Disabled Persons vs Director General Contracts:**

*“Jibqa’ l-fatt pero’, li għalkemm il-vetturi offruti kienu “the best value for money”, ma humiex konformi ma’dak mitlub. Din il-Qorti, f’każijiet simili, mhux l-ewwel darba li kkonfermat il-prinċipju li offerent, anke jekk joffri prodotti aħjar, għandu jkun skwalifikat jekk il-prodott offrut ma jkunx skont kif indikat fis-sejha. Il-prinċipju ta’trasparenza jrid li l-kumitat t’evalwazzjoni jimxi mad-dettalji tekniċi kif imniżżla fid-dokumenti tas-sejha, u mhux jiddeċiedi li jagħżel liema li jidhirlu li hi l-aħjar offerta.”*

**The above mentioned judgement re-affirms the importance of self-limitation, as through the latter maxim, the principles of equal treatment and transparency will follow.**

- 5. With regards to the Appellants’ contention, in that, the principle of “*substance over form*” should prevail, this Board would respectfully point out that the latter principle should not be applied whilst, at the same instance, the principles of equal treatment and transparency are breached. In this particular case and under these circumstances, this Board does not find any justifiable cause to uphold the Appellants’ contention.**

**In conclusion, this Board opines that:**

- a) the specifications and conditions which form part of the Tender Document must never be compromised, so that, if the Tender Document**

**dictated that the supplies must be expressed and delivered in grams (weight), then such specifications cannot be changed during the evaluation stage;**

- b) the Appellants referred to previous supplies, knowing that such supplies were delivered in volume of 125ml whilst the Tender Document stipulated a weight of 125g. At the same instance, the fact that the difference between these two measurements is negligible, does not justify compliance with what the Tender Document stipulated;**
- c) the Evaluation Committee could not disregard the principle of self-limitation as this would have breached the other principles of equal treatment and transparency;**
- d) having taken the above considerations, this Board cannot find any justification for the application of the principle of “*substance over form*”;**
- e) it is the responsibility and obligation of the Bidder to ensure that his submissions are in accordance with what has been stipulated in the Tender Document.**

**In view of the above, this Board,**

- i) does not uphold the contentions made by Edward Zammit Trading as Valdro;**

**ii) upholds the Water Services Corporation's decision in the award of the Tender;**

**iii) directs that the deposit paid by the Appellants should not be refunded.**

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Lawrence Ancilleri  
Member

*9<sup>th</sup> April 2019*