

PUBLIC CONTRACTS REVIEW BOARD

Case 1373 – WSC/T/26/2019 – Tender for the Supply and Delivery of ø600MM and ø900 MM Manhole Covers and Frames for the Water Services Corporation

The publication date of the tender was the 1st March 2019 whilst the closing date was the 29th March 2019. The estimated value of the tender (exclusive of VAT) was € 79,200 (for Lot 1).

On the 3rd September 2019 3Tech Ltd filed an appeal against the Water Services Corporation as the Contracting Authority on the grounds that their bid was rejected as it was deemed technically non-compliant. A deposit of € 400 was paid.

There were six (6) bidders.

On 25th October 2019 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Carmel Esposito as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – 3 Tech Ltd

Dr Alessandro Lia	Legal Representative
Eng Joseph Bugeja	Representative

Contracting Authority – Water Services Corporation

Dr Sean Paul Micallef	Legal Representative
Eng Stefan Cachia	Chairperson Evaluation Board
Ms Shirley Farrugia	Secretary Evaluation Board
Eng Charles Camilleri	Member Evaluation Board
Eng Stephen Galea St John	Member Evaluation Board
Eng Nigel Ellul	Member Evaluation Board

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

Dr Alessandro Lia Legal Representative for 3 Tech Ltd stated that subsequent to their letter of disqualification of the 19th August 2019 the Contracting Authority in a letter dated 12th September 2019 indicated another reason for rejection not mentioned in their original letter – namely that the manhole cover offered was not equipped with a locking mechanism.

The Chairman pointed out that this was contrary to Public Procurement Regulations and the Board will not discuss any points not included in the original rejection.

He then thanked Appellants for their submissions and declared the hearing closed.

End of Minutes

Decision

This Board,

having noted this objection filed by 3 Tech Ltd (herein after referred to as the Appellants) on 3 September 2019, refers to the claims made by the same Appellants with regard to the tender of reference WSC/T/26/2019 listed as case No. 1373 in the records of the Public Contracts Review Board, awarded by Water Services Corporation (herein after referred to as the Contracting Authority).

Appearing for the Appellants: Dr Alessandro Lia

Appearing for the Contracting Authority: Dr Sean Paul Micallef

Whereby, the Appellants contend that:

- a) Subsequent to the alleged reasons given by the Authority, in their ‘Letter of Rejection’ dated 19 August 2019, same Authority indicated another alleged reason for Appellants’ offer rejection, in their ‘Letter of Reply’ dated 12 September 2019. In this regard, Appellants**

maintain that such an action instituted by the Authority breaches blatantly the principles of the Public Procurement Regulations.

This Board also noted the Contracting Authority's 'Letter of Reply' dated 12 September 2019 and its verbal submissions during the hearing held on 25 October 2019, in that:

- a) The Authority acknowledges and confirms that, after being shown a video of how Appellants' product is managed, same Authority deems Appellants' offer to be compliant with clauses 1 (g) (iii) and 1 (g) (ix) of section 4 of the tender dossier. However, due to an oversight by the Evaluation Committee, they failed to include that, Appellants' offer was not compliant with clause 1 (g) (vii) relating to the availability of a locking mechanism.**

This Board, after having examined the relevant documentation including the evaluation report it is noted that, the Contracting Authority is retrieving the alleged reasons given for Appellants' offer rejection, as stated in its communication dated 19 August 2019.

However, in the Authority's 'Letter of Reply' dated 12 September 2019, same is raising a new reason why Appellants' offer is not technically compliant.

1. First and foremost, this Board would respectfully point out that, its remit is to review the tendering and evaluation procedures duly adopted by the Authority and also to ensure that the methods so applied, conform with the Public Procurement Regulations.

2. It must also be stated that, the Authority has the right to file a written reply to the objection so submitted by the economic operator. However, it must also be said that, the contents of a such a reply must directly or indirectly refer to the reasons given for Appellants' offer rejection, given by the same Authority in its 'Letter of Rejection'.

3. In this particular case, this Board notes that the reason given by the Authority in its 'Letter of Rejection' refers to:

"However, I regret to inform you that the tender submitted by your firm was not successful for the following reasons:

- The cover does not hold upright at an angle greater or equal to 110 degrees as per clause g.iii of the technical specifications neither does it lock in the vertical position as per clause g.ix of the technical specifications."*

So that the Authority, during its deliberation found that Appellants’ offer was not compliant in this respect only. It must also be stated that after being shown a video of how Appellants’ product is managed, the Contracting Authority acceded to the fact that Appellants’ offer was compliant.

- 4. In its ‘Letter of Reply’ dated 18 September 2019, the Authority raised a fresh reason for deeming Appellants’ product as non-technically compliant, as follows:**

“Nevertheless, there was an oversight during the Evaluation process, wherein, not all clauses for disqualification were listed in the justification. In fact, apart from the above mentioned reasons (which have now been clarified), the offered manhole cover was also found to be non-compliant with Section 4, Clause 1(g)(vii) as it is not equipped with a locking mechanism as was specifically requested. For this reason, the offered product still cannot be deemed to be technically compliant as it does not conform with all the requirements set out in the Technical Specifications.”

- 5. After having examined the evaluation report, this Board could not identify such a deficiency being claimed by the Authority, so that, same**

Board is not comfortably assured that the evaluation process was carried out after the members of the Evaluation Committee examined all documentation of the offers and carried out an objective assessment of Appellants' offer.

In conclusion, this Board opines that:

- a) It has been established and confirmed by the parties concerned that the alleged reasons for Appellants' offer rejection, are being withdrawn by the Authority, so that Appellants' offer is compliant in this respect.**

- b) It will disregard the fresh reason given by the Authority for Appellants' offer non-compliance, as stated in its 'Letter of Reply' dated 18 September 2019. In this regard, this Board notes that no reference was made to such a deficiency in Appellants' product, in the evaluation report duly signed by the three Evaluators of the Committee.**

In view of the above, this Board,

- i) does not uphold the Contracting decision in the award of the tender,**

ii) upholds Appellants' contentions and directs the Authority to re-integrate Appellants' offer in the evaluation process,

iii) directs that the deposit paid by Appellants should be fully refunded.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Carmel Esposito
Member

7 November 2019