

PUBLIC CONTRACTS REVIEW BOARD

Case 1432 – WSM 029/107/2019 – Tender for the Supply and Delivery of 3 Brand New Mobile Atomisers to be used for Odour Mitigation at Wasteserv’s Marsa Thermal Treatment facility

The tender was published on the 9th October 2019 and the closing date of the call for tenders was the 30th October 2019. The estimated value of the tender (exclusive of VAT) was € 47,100.

On the 17th February 2020 Joseph Cachia & Son Ltd filed an appeal against Wasteserv Malta Ltd as the Contracting Authority objecting to their disqualification on the grounds of their bid being deemed to be technically non-compliant. A deposit of € 400 was paid.

There were five (5) bidders.

On 5th March 2020 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 – Joseph Cachia & Son Ltd

Dr Maurice Meli	Legal Representative
Ms Maronna Filletti	Representative
Ms Daniela Caruana Sciberras	Representative
Mr Gerard Vella	Representative

Recommended Bidder – SELF

Mr Peter Boot	Representative
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Contracting Authority – Wasteserv Malta Ltd

Mr Louis Borg	Chairperson Evaluation Board
Ms Salome Catania	Member Evaluation Committee
Mr Ryan Cauchi	Member Evaluation Committee
Mr Noel Ciantar	Member Evaluation Committee

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

Dr Maurice Meli Legal Representative for Joseph Cachia & Son Ltd sought permission to call a witness.

Mr Louis Borg (294548M) called as a witness by the Public Contracts Review Board testified on oath that he was the Chairperson of the Evaluation Committee. He stated that when the evaluation committee considered the technical offer and came across a measurement of 2.8mm it raised questions. However clause 7 note 3 prevented them from seeking any changes. The advice of the Department of Contracts was to invoke note 3.

The Chairman said that there existed both local and European court cases which determined that when an offer was ambiguous the contracting authority had the responsibility and duty to clarify such ambiguity. In this case a measurement of 2.8mm was certainly ambiguous. Note 3 applies if everything else is in order and there are no doubts or ambiguities – in that case there is no need for any clarifications. In this instance there is ambiguity and a clarification should have been sought. Principle of proportionality should have been applied.

Dr Meli confirmed that the mistake was in the technical offer. The law provides for situations where clarifications can be sought and where proportionality should prevail.

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

End of Minutes

Decision

This Board,

having noted this objection filed by Joseph Cachia & Son Ltd (hereinafter referred to as the Appellants) on 17 February 2020, refers to the claims made by the same Appellants with regard to the tender of reference WSM 029/107/2019 listed as case No. 1432 in the records of the Public Contracts Review Board awarded by Wasteserv Malta Ltd (hereinafter referred to as the Contracting Authority).

Appearing for the Appellants:

Dr Maurice Meli

Appearing for the Contracting Authority: Mr Louis Borg

Whereby, the Appellants claim that:

- a) **Their main contention refers to the fact that, inadvertently, in their technical offer from, they denoted a measurement of 2.8mm instead of 2.8m, although their technical literature showed the compliant length. In this regard, Appellants maintain that, this was an obvious mistake and the Evaluation Committee should have requested a clarification.**

This Board also noted the Contracting Authority's 'Letter of reply' dated 19 February 2020 and its verbal submissions during the hearing held on 5 March 2020, in that:

- a) **The Authority insists that Appellants' technical offer stated a length of 2.8mm for the atomiser mast and the technical offer falls under 'Note 3', so that the Evaluation Committee had no other option but to deem Appellants' offer technically non-compliant.**

This same Board also noted the testimony of the witnesses namely;

Mr Louis Borg, Chairman of the Evaluation Committee duly summoned by the Public Contracts Review Board.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by the parties concerned, including the testimony of the witness duly summoned opines that the issue that merits consideration is Appellants' technical offer.

- 1. It is a fact that, technical offers fall under clause 7 (Note 3) whereby the Evaluation Committee is prevented from making any changes to the technical offer as duly submitted by a bidder.**
- 2. On the other hand, clarifications can only be sought by the Authority on the bidder's submitted documentation. In this particular case, Appellants stated a length of 2.8mm of the atomizer's mast which, at face value, glaringly represents a ridiculous length. At the same instance, it can be obviously conceived that Appellants, inadvertently added an extra m., in their technical offer, not to mention that a pole having a length of 2.8mm refers to the impossibility.**
- 3. This Board also noted that, the technical literature submitted by Appellants showed the length of the mast to reach a maximum height of 2.8m, which is compliant with the tender requirements. From such a technical literature, the Evaluation Committee could easily assert that the**

stated length in Appellants technical offer, was an obvious clerical mistake. In this respect, this Board would respectfully refer to Regulation 62 (2) of the Public Procurement Regulations, as follows:

“(2) Where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous or where specific documents are missing, contracting authorities in terms of the procurement document may request the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit: Provided that such requests are made in full compliance with the principles of equal treatment and transparency.”

The above-mentioned clause allows the Evaluation Committee to clarify ambiguities in an offer. In this particular case, it was obvious that, apart from the fact that a height of 2.8 mm does not exist, a 2.8m height is quoted in the submitted technical literature.

- 4. In this particular case, this Board opines that the principle of substance over form should prevail whilst the Evaluation Committee should have acted in a proportional manner, as the denoted 2.8mm is definitely an obvious genuine clerical error.**

In conclusion, this Board opines that:

- a) Appellants' denoted 2.8mm height of atomizer mast is obviously an inadvertent and ridiculous mistake.**

- b) The technical literature submitted by Appellants showed the compliant length of the mast and from such documentation, the Evaluation Committee could notice that, an extra 'm' to the figure denoted in the technical offer was erroneously inserted.**

- c) The principles of 'Substance Over Form' and 'Proportionality' applies in this particular case.**

In view of the above, this Board,

- i. upholds the Appellants' contentions,**

- ii. does not uphold the Contracting Authority's decision in the award of the tender,**

iii. directs that Appellants' offer be re-integrated in the evaluation process,

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

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Carmel Esposito
Member

12 March 2020