

PUBLIC CONTRACTS REVIEW BOARD

Case 1442 – CT 2359/2019 – Tender for the Supply, Delivery, Installation and Certification of Container canopies of Different Sizes for Wasteserv Malta

The tender was published on the 14th November 2019 and the closing date of the call for tenders was 17th December 2019. The estimated value of the tender (exclusive of VAT) was € 372,000.

On the 6th April 2020 United Equipment Co Ltd filed an appeal against Wasteserv Malta Ltd as the Contracting Authority objecting to their disqualification on the grounds of being technically non-complaint and on the cancellation of the tender. A deposit of € 1,860 was paid.

There was only one (1) bidder.

On 7th May 2020 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public virtual 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
Mr Andrew Portelli	Representative
Mr Stefan Borg	Representative

Contracting Authority – Wasteserv Malta Ltd

Mr Martin Casha	Chairperson Evaluation Committee
Mr Kristian Zammit	Member Evaluation Committee
Mr Noel Ciantar	Member Evaluation Committee
Mr Christopher Grech	Member Evaluation Committee

Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties and invited submissions. He noted that since this was a virtual meeting all the parties had agreed to treat this as a normal meeting of the Board.

Dr John Gauci Legal Representative of United Equipment Co Ltd (UNEC) said that the company had been excluded on three grounds that the materials offered were not technically compliant – it will be shown during the course of this appeal and through the testimony of a witness that the decision was not justified.

Mr Peter Kristensen called as a witness by Appellant testified on oath that they had offered alternative materials which were superior to those requested and at the same price. UNEC had no problem supplying what the Contracting Authority requested. The different standard of fire-retardant material offered fully complied with the specified DIN 4102 B1, whilst the literature submitted showed the list of standard sizes of canopies as there was insufficient time to produce one showing special sizes, and after clarifications had been sought the requested changes met the requirements of the tender.

Mr Martin Casha Senior Procurement Manager at Wasteserv Malta Ltd and Chairperson of the evaluation committee said that it was the responsibility of the mentioned committee to ensure that the submissions by bidders were in line with the tender requisites. On the matter of the PVC the tender requested a thickness of 610 grms/m². Appellants offered a different thickness. Instead of disqualifying bidders the committee requested them to indicate compliance in their literature submitted. Instead Appellants sent another set of literature without stating that they were in a position to supply requested PVC. After the evaluation had been concluded an offer was received to supply what was requested.

On the question of fire retardant material, again confirmation that the certificate was equivalent to the tender request was received after the completion of the evaluation. On the problem with the literature the committee asked for a declaration from the manufacturer that they could supply the desired sizes – instead Appellants changed figures on the literature previously supplied. All three clarifications were received after the evaluation was complete. Bidders had the option of using a precontractual concern to find out if they could supply alternatives to the tender requirements but they did not avail themselves of this facility.

Asked to testify by Appellants Mr Casha (43457M) on oath said that the compliance lists submitted by Appellants were qualified. The literature supplied by bidders indicated that some figures from the original literature had been changed and bidder failed to confirm that it was original literature. It was the bidders' (and not the Contracting Authority's) responsibility to confirm that the fire retardant material was the correct one.

In reply to a point made by Mr Kristensen that the dimensions on the canopy were indicated in the drawing, Mr Casha mentioned that the tender requested literature which although submitted could not be accepted as it had been altered.

Dr Gauci said that on the first reason for exclusion bidders had shown that they had offered a better quality product and there was no reason to exclude. On the second reason, in line with Regulation 53.10 of the Public Procurement Regulations there was no need to provide equivalent proof on International standards, whilst in the case of the third point, Dr Gauci cited PCRB Case 469 of 2012 wherein it was decided that if the bidder stuck to the specifications but these disagreed with the literature he should be given the option of sticking to the specifications. For all above reasons there was no need to cancel the tender.

Mr Casha stated that the evaluation committee had to abide and was bound by the rules. Reaching an agreement with the bidder instead of cancelling the tender would create other problems as it would be acting against the possibility of excluding other prospective bidders who might have been interested in bidding if the terms were otherwise.

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

End of Minutes

Decision

This Board,

having noted this objection filed by United Equipment Co Ltd (hereinafter referred to as the Appellants) on 6 April 2020, refers to the claims made by the same Appellants with regard to the tender of reference CT 2359/2019 listed as case No. 1442 in the records of the Public Contracts Review Board.

Appearing for the Appellants: Dr John L. Gauci

Appearing for the Contracting Authority: Mr Martin Casha

Whereby, the Appellants contend that:

- a) They had offered a product which is superior than that requested in the tender document and since Appellants maintain that they were fully compliant, the cancellation of the tender is not justified.**

This Board also noted the Contracting Authority's 'Letter of reply' dated 13 April 2020 and its verbal submissions during the hearing held on 7 May 2020, in that:

a) The Authority insists that Appellants' product did not conform with the technical specifications of the tender document. Furthermore, the Authority contends that every effort, was made, on its' part to save the offer but Appellants still failed to abide by the mandatory conditions and technical specifications. Since there was only one offer for this procurement, the Evaluation Committee had no other option but to cancel the tender.

This same Board also noted the testimony of the witnesses:

Mr Peter Kristenson duly summoned by United Equipment Co Ltd

Mr Martin Casha 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 witnesses duly summoned opines that, the issue that merits consideration is the submissions made by Appellants.

1. Under section 4 – Technical Specifications of the tender document, it was specifically requested that the container canopy should be ‘Heavy Duty Quality 610 g/m² PVC cover. In this regard, Appellants qualified their offered specification, in this regard, by stating that:

“The cover is a superior 350 g/m² HDPE. This has 4x the trapezoidal strength. Please refer to the accompanying quotation”.

- 2. It is a universally accepted legal maxim in Public Procurement that, the tender document dictates what the Contracting Authority requests from potential bidders and such requirements contain technical specifications which will achieve the Authority's objectives. In this regard, this Board notes that Appellants, in their submissions, failed to conform with the required thickness of 610 g/m², in fact, they offered a different thickness, so that, at this stage of consideration, Appellants were not compliant in this respect.**

- 3. With regard to Appellants' submission as to 'Fire Retardant Material', Appellants had the responsibility and obligation to provide sufficient evidence that, the compliance of the certificate from the 'California Fire Marshall Board' was equivalent to the standard as duly dictated in the tender document and in this regard such mandatory evidence was not provided, so that, again, Appellants failed to conform with such a requirement.**

- 4. With regard to the height of the small canopy, Appellants declared that their product was in conformity with the technical specifications, yet such a declaration was not confirmed through the technical literature submitted by same, so that, the Evaluation Committee could not confirm that what was being offered by Appellants could be supplied.**

- 5. With regard to the technical literature, this Board, as stated on numerous occasions, would respectfully point out that, as and when technical literature is requested by the Authority, such documentation is not capriciously stipulated. The technical literature provides evidence enough to enable the Evaluation Committee to be reassured that what the bidder has offered is available on the market with the same specifications as those stipulated in the tender dossier. From the evaluation report and submissions made by the Authority, this Board credibly establishes that Appellants also failed in this regard, as their technical literature did not confirm what they declared to be supplying. Although, the technical literature was a holistic data of what products are manufactured by the supplier, Appellants should have submitted a declaration from the manufacturer that they can supply the product with the same specifications as those dictated in the tender dossier and in this respect, Appellants failed to submit such documentation.**
- 6. With regard to the claim that, the product being offered by Appellants is of a superior quality, this Board would point out that the Evaluation Committee is bound by the principle of self - limitation and cannot change the goal posts during the evaluation process. The tender document, for justifiable reasons, requested particular technical specifications, so that these specifications must**

be evidently met and in this regard, Appellants failed to comply with such a requirement.

- 7. With regard to Appellants' contention that every effort should be made to save the offer, this Board notes that, the Evaluation Committee made all its possible endeavours to save Appellants' offer, yet Appellants did not submit what they were asked to do, except for additional information in their objection letter.**

In conclusion, this Board opines that:

- a) With regard to the type of canopy material for both large and small canopies, Appellants' submissions were not in conformity with the stipulated technical specifications.**
- b) With regard to the standard of the 'Flame- Retardant', Appellants failed to provide evidence of the equivalence of the certificate issue by the 'California Fire Marshall Board'.**
- c) The technical literature submitted by Appellants did not confirm the dictated technical specifications of the product they declared to be supplying.**

- d) The alleged claim that Appellants' offered product is of a superior quality does not justify the incidence of non-compliance with the requirement as specified in the tender dossier.**
- e) After having examined the evaluation report, this Board upholds the fact, that the Evaluation Committee took all the necessary action to save Appellants' offer, however, the latter's response was not compliant.**

In view of the above, this Board,

- i. does not uphold Appellants' contentions,**
- ii. upholds the Contracting Authority's decision in the award of the tender,**
- iii. directs that the deposit paid by Appellants should not be refunded.**

Dr Anthony Cassar
Chairman
14May 2020

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member