

PUBLIC CONTRACTS REVIEW BOARD

Case 1506 – WSC/T/37/2020 – Tender for the Supply and Delivery of Variable Speed Drives and Soft-Starters for the Water Services Corporation (Lot 3)

The tender was published on the 23rd April 2020 and the closing date of the tender was the 8th June 2020. The estimated value of the tender (exclusive of VAT) for Lot 3 was € 19,100

On the 8th October 2020 JMARTANS Automation Ltd filed an appeal against the Water Services Corporation as the Contracting Authority objecting to their disqualification on the grounds that their bid was not administratively compliant.

A deposit of € 400 was paid.

There were eight (8) bidders.

On 26th October 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 – JMARTANS Automation Ltd

Dr Mark Muscat	Legal Representative
Dr Jonathan De Maria	Legal Representative

Contracting Authority – Water Services Corporation

Dr Sean Paul Micallef	Legal Representative
Eng Joseph Psaila	Member Evaluation Committee
Eng Steve Dimech	Member Evaluation Committee
Mr Mario Ellul	Member Evaluation Committee
Ms Christine Scicluna	Representative

Recommended Bidder – Calleja Ltd

Mr Stephen Calleja	Representative
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Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties. He noted that since this was a virtual meeting all the parties agreed to treat it as a normal hearing of the Board. He then invited submissions.

Dr Mark Muscat Legal Representative for JMARTANS Automation Ltd stated that during the evaluation procedure there was a change of tender requirements through the request that bidder had to supply a certificate that he was an authorised dealer of the product. Bidder provided the CE certificate but the request for the further certificate altered a crucial point in that the adjudication was now not on the bidder but on the parts requested. Article 230 of the Public Procurement Regulations state clearly what the Contracting Authority can request but it does not include the certificate requested. The EU website stated that the EU conforming certificate covers all the points requested by the Authority including the genuineness of the parts, and they should have requested a sample – more so since Appellants’ offer cheaper was than the successful bid.

Dr Jonathan De Maria Legal Representative for JMARTANS Automation Ltd said that Appellants expected the Authority to adhere to the tender terms which made their offer viable and technically met the terms of the tender and it was only the later clarification from the Authority that disqualified the bid.

Dr Sean Paul Micallef Legal Representative for the Water Services Corporation stated that disqualification was not on a technical issue but an administrative one. Page 4 of the tender clearly specifies that the bidder had to supply a certificate from the mother company declaring that the parts being supplied are genuinely produced according to their designs and specifications. If this was not clear to bidder he should have requested clarification or a pre-contract remedy. To assist the Appellants in complying with the tender the Authority sent a clarification but they only resubmitted the CE certificate which confirms that the product is compliant with European standards. Once the administrative evaluation failed, the bid could not be taken further.

Dr Muscat said that Article 146 of the Public Procurement Regulations says that tenders may not involve changes that distort competition. The effect of the clarification was that it limited the bids to one offer and the Authority was not acting in order in changing the certification to one on the genuineness of the product.

Dr Micallef said that the clarification did not change the terms of the tender as the requirement for the mother company certificate was in the original tender. This is not a case of limiting offers as there are several manufacturers/distributors of these products and hence there is no discrimination.

Dr Muscat commented that although there are various suppliers of the parts in question, the decision of the Contracting Authority was still restricting purchases of parts from wholesalers – it is their interpretation of the particular clause that is wrong and restrictive.

The Chairman pointed out that the principle of self-limitation applied to the evaluators and they were bound to abide by the tender terms.

Engineer Joseph Psaila (173479M) called as a witness by the Public Contracts Review Board testified on oath that he was an evaluator in this tender. He testified that the CE certificate does not provide what the tender requested in regard to the certification required from the mother company which was essential to ensure that no refurbished or obsolete products were supplied but only recently manufactured goods and where an uninterrupted chain from manufacturer to supplier could be established. Wholesalers could

indeed supply the goods as they usually held a certificate from the mother company that they were authorised suppliers.

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 JMARTANS Automation Ltd (hereinafter referred to as the Appellants) on 8th October 2020, refers to the claims made by the same Appellants with regard to the tender of reference WSC/T/37/2020 listed as case No. 1506 in the records of the Public Contracts Review Board recommended for award by Water Services Corporation (hereinafter referred to as the Contracting Authority).

Appearing for the Appellants: Dr Mark Muscat

Dr Jonathan De Maria

Appearing for the Contracting Authority: Dr Sean Paul Micallef

Appearing for the Preferred Bidder: Mr Stephen Calleja

Whereby, the Appellants contend that:

- a) Their main concern refers to the fact that, their offer was discarded due to the alleged fact that they did not submit a certificate from the mother company**

stating that, (i) the product being offered is in accordance with their design and specifications and (ii) that, they were the authorised distributors of the product. In this regard, Appellants maintain that, apart from the fact that they submitted a CE certificate for the parts, the requirement of the certificate from the mother company confirming that they are the authorised distributors, altered the requirements of the tender.

This Board also noted the Contracting Authority's 'Letter of reply' dated 19th October 2020 and its verbal submissions during the virtual hearing held on 26th October 2020, in that:

- a) The Authority maintains that, in accordance with article 5 b (ii), Appellants were in duty bound to submit a valid certificate from the mother company confirming that, the parts being supplied are in accordance with its designs and specifications. In this regard, Appellants, even after a clarification request, failed to submit such documentation so that, the Evaluation Committee had no other option but to deem Appellants' offer as administratively non-compliant.**

This same Board also noted the testimony of the witness namely:

Engineer Joseph Psaila, evaluator duly summoned by the Public Contracts Review Board.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties, including the testimony of the witness duly summoned opines that, the issue that merits consideration is whether Appellants' offer was in compliance with article 5B(ii) of the tender dossier.

1. This Board would refer to article 5b(ii) which states that:

“(ii) Declaration concerning Selection Criteria

A Valid Certificate from the Mother Company declaring that the parts being supplied are genuinely produced according to her designs and specifications;”

It is vividly being requested that, the bidder must produce a certificate from the mother company confirming that, the parts are in accordance with its designs and specifications. Such a mandatory request from the Authority is justifiably requested for them to ensure that, what has been declared to be provided by the bidder can be confirmed by the manufacturer that the specifications are in accordance with such declared specifications.

- 2. Appellants, in this regard, submitted a CE certificate of the product and maintain that, such a certificate does confirm that, the parts are in accordance with EU standards and fulfil all the requirements relating to technical specifications, so that, the Authority was assured that, what was being declared to be delivered, complied with requirements of the tender document. On the other hand, the Authority insists that the CE certificate does not**

conform with what was requested in article 5b(ii) and in this respect, Appellants' offer was administratively non-compliant.

- 3. With regard to this particular issue, this Board confirms that, the CE certificate does not represent a certificate from the mother company confirming the designs and technical specifications. This Board also notes that, during the evaluation stage, Appellants were given the opportunity to rectify their offer, through clarification No. 2 with stated the following:**

“JMARTANS AUTOMATION LTD

Clarification No 2

Dear Sir Madame,

The certificate we're requesting is a declaration issued by the mother company confirming that the bidder is an authorized distributor of mother company products or that the bidder is authorized to offer / sell genuine mother company parts / products to third parties.

Thanks”

Such a clarification request from the Authority included the request of a certificate from the same mother company, to confirm that, the bidder is an authorized distributor of the company's product. In this regard, this Board notes that, the issue of distributorship was not mentioned in clause 5b(ii) and through such a clarification, same clause was extended to include such a request, as appropriately indicated in Appellants' reply, as follows:

“Dear Sir/Madam,

According to Section 1 Clause 5B(ii), the bidder is required to supply a certificate from the mother company declaring that the parts being supplied are genuinely produced according to her designs and specifications’. For this reason we submitted the EU conformity certificates (attached), declaring that the mother company is genuinely producing the devices according to its standards, as requested by the above mentioned clause.

A letter from the mother company declaring that the bidder is authorized distributor is a completely different matter. Section 1 Clause 5B(ii) makes no reference to the bidder itself and to the fact that the bidder has to provide a certificate proving that it’s an authorized distributor.

In fact, what you’re requesting will not prove that the components are produced according to mother company design and specifications.”

- 4. With regard to the inclusion of ‘Distributorship’ certificate, this Board opines that, such a condition should have been stipulated in article 5B(ii) of the tender document and not included as an additional requirement, through a clarification, at evaluation stage. Same Board notes that, a substantial number of offers were disqualified for the non-submission of the same requested certificate of distributorship. On the other hand, if the Authority, insisted that bidders must provide a certificate from the mother company to confirm**

‘Authorised Distributorship’, it should have stated such a requirement through a clarification note, prior to the closing date of the offers, but not during evaluation stage. One must also point out that, such an inclusion will suppress open competition so that, provisions must be made for the participation of bidders who can also submit such certification from wholesalers, provided the latter can produce the relative certificates from the mother company.

In conclusion, this Board opines that:

- a) The CE certificate submitted by Appellants is not an equivalent certification to a ‘Valid Certificate from the Mother Company Confirming Designs and Specifications of the Product being Offered’.**
- b) The inclusion of a certificate from the mother company confirming authorised distributorship of the product, was effected through a clarification at the evaluation stage, hence a change of goal posts.**
- c) Any alteration and / or additional inclusions in clause 5B(ii) should have been stipulated prior to the closing date of offers and not during the evaluation process.**
- d) The Evaluation Committee should have applied the principle of self-limitation so that, article 5B(ii) should be interpreted to mean ‘A Certificate from the**

Mother Company Certifying Designs and Specifications of the Product being Offered', only.

- e) A substantial number of offers were discarded for the non-submission of the same documentation which was not stipulated in article 5B(ii).**

In view of the above, this Board,

- i. does not uphold the Contracting Authority's in the recommendation of award,**
- ii. directs that, the tender for Lot number 3 be cancelled,**
- iii. directs, that the conditions in the new tender be specific and direct to conform with the considerations taken by this Board,**
- iv. directs that the deposit paid by Appellants be fully refunded.**

Dr Anthony Cassar
Chairman
30th October 2020

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member