

PUBLIC CONTRACTS REVIEW BOARD

Case 1659 – WSC/T/126/2020 – Supply and Delivery of 600mm Manhole Covers and Frames for the Water Services Corporation

9th December 2021

The Board,

Having noted the letter of objection filed by Dr John L Gauci on behalf of Dr John L. Gauci & Associates acting for and on behalf of United Equipment Co. (UNEC) Ltd, (hereinafter referred to as the appellant) filed on the 7th September 2021;

Having also noted the letter of reply filed by Dr Sean Paul Micallef acting for Water Services Corporation (hereinafter referred to as the Contracting Authority) filed on the 16th September 2021;

Having heard and evaluated the testimony of the witness Mr Peter Kristensen (Representative of the Appellant company) as summoned by Dr John L Gauci acting for United Equipment Co. (UNEC) Ltd.

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by representatives of the parties;

Having noted and evaluated the minutes of the Board sitting of the 23rd November 2021 hereunder-reproduced;

Minutes

Case 1659–WSC/T/126/2020. Tender for the Supply and Delivery of 600mm Diameter Manhole Covers and Frames for the Water Services Corporation

The tender was published on the 27th January 2021 and the closing date was the 2nd March 2021. The value of the tender excluding VAT was € 380,987.

On the 7th September 2021 United Equipment Co (UNEC) Ltd filed an appeal against the Water Services Corporation as the Contracting Authority objecting to their disqualification on the grounds that their bid was deemed to be technically not compliant.

A deposit of € 1904.94 was paid.

There were twenty (20) bidders.

On 23rd November 2021 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – United Equipment Co (UNEC) Ltd

Dr John Gauci	Legal Representative
Mr Andrew Portelli	Representative

Contracting Authority – Water Services Corporation

Dr Sean Paul Micallef	Legal Representative
Eng Nigel Ellul	Evaluator
Mr Charles Camilleri	Representative
Ms Shirley Farrugia	Representative

Preferred Bidder – Attard Farm Supplies

Mr Joseph Attard	Representative
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Interested Party – Ragonesi & Co Ltd

Mr Roberto Ragonesi	Representative
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Mr Kenneth Swain 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 in line with Article 89 of the Public Procurement Regulations.

Dr John Gauci Legal Representative for United Equipment Co (UNEC) Ltd said that the appeal was about the factual issue that no third party certification had been submitted by Appellant who had in fact submitted an ISO Certificate certified by a third party. The Contracting Authority failed to take note of this and sought a rectification so that Appellant resubmitted the same certificate as the initial one. The ISO certificate is a third party certification in itself.

Dr Sean Micallef stated that there is a misunderstanding by Appellant as to what the tender requested. There is a difference between an ISO and what the tender additionally requested. The Authority wants to establish if the bidder is allowed to participate on the basis established by the tender. The technical ISO is different since what the tender requires is a confirmation from a third party beyond the ISO that the bidder is EU compliant with the specific requirements. Instead what Appellant uploaded was the same ISO as the initial one. As this was a rectification the Authority could not ask a second time. If the requirement was not clear the bidder did not query the point at tender publication stage or seek a precontractual remedy.

Mr Peter Kristensen (10588A) called as a witness by the Appellant said that he is the General Manager of UNEC and was responsible for submitting the tender. ISO 9001 is not to do with the product and what was requested had been submitted certified by an organisation in Turkey.

Dr Gauci asked the Board to limit itself to what was requested and what was submitted. The Authority claim that the ISO certificate was not submitted but this had been uploaded and the testimony just heard confirms that the submissions were correct.

Dr Micallef concluded by saying that other bidders had submitted the requested proper third party certificate which the bidder failed to do.

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

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 23rd November 2021.

Having noted the objection filed by United Equipment Co. (UNEC) Ltd (hereinafter referred to as the Appellant) on 7th September 2021, refers to the claims made by the same Appellant with regards to the tender of reference WSC/T/126/2020 listed as case No. 1659 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr John L Gauci

Appearing for the Contracting Authority: Dr Sean Paul Micallef

Whereby, the Appellant contends that:

- a) Whereas by means of a letter dated 28th August 2021 (hereinafter 'Exclusion Notice'), Objector was informed that its offer was not successful for the following reasons:
"The following technical rectification was deemed necessary: 3rd party certification not submitted in literature. The outcome was deemed to be unacceptable and thus offer is being considered non-compliant for the following reason: 3rd Party Certification not submitted even after rectification dated 22/4/21."
- b) The Exclusion Notice is factually and legally unfounded since the necessary certification was duly provided both originally and confirmed upon rectification request - That Objector fails to comprehend how the Contracting Authority can veritably assert that the third party certification was not submitted. Indeed, by means of a rectification request the Contracting Authority had requested the following: *"Question 1: Third Party Certification for ISO 9001 adherence has not been uploaded. Kindly submit IS) adherence certification as requested in Literature List Item 1.4."*
- c) That by means of its communication dated 28/04/2021, Objector had replied as following: *"Answer 1: UNEC Ltd. had submitted the ISO 9001 document within the Technical section of the XML file i.e., Criterion I1.4) Upload third party certification for ISO9001 adherence (as per literature List Item 1.4) at bid submission stage. We are hereby re-submitting the documentation for your perusal"*.
- d) That together with its reply, Objector resubmitted a copy of the FQC Certificate of Istikamet Döküm Anonim Sirketi according to the scope ISO 9001:2015, and which certificate had already

been submitted with the original offer. Therefore, Objector maintains that the only ground of exclusion is, first of all, factually unfounded and consequently legally unfounded.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 16th September 2021 and its verbal submission during the virtual hearing held on 23rd November 2021, in that:

- a) As can be corroborated from the attached Literature List, WSC requested a *'Third Party certification for ISO 9001 adherence'* as part of the Technical Offer in terms of Section Clause 1 d. of the Tender Document which is being reproduced verbatim below for ease of reference: 1. Manhole Covers and Frames: 600mm diameter - d. *Products have to be certified for adherence to ISO 9001 by a third party such as Afnor NF or equivalent.*
- b) 'ISO 9001' refers to the ISO 9001:2015 (or equivalent) certification as was requested in Section 1, Clause 5. (B) (i) of the Tender Document. By correctly submitting this certificate under the Administrative Section, together with all other requirements under this same section, the Appellants confirmed that they are eligible to participate in the CT as an Economic Operator.
- c) The abovementioned '3rd Party Certification' is however an altogether different (yet directly related) document. The scope of this certification is to certify that the product offered by the bidders does in fact meet the requested European standards. It is being clarified that the ISO 9001:2015 certificate is not the 3rd party certificate which is being requested in the Technical Section. As was made amply clear under Clause 1d. of the Technical Specifications, this document must be issued by a 3rd party (such as Afnor NF) to officially certify that the product being offered does in fact meet the European standard requested, normally by integrating the existing ISO procedures to achieve the technical results pertaining to the standards.
- d) In this case, the Appellants had initially submitted the ISO 9001 certificate instead of the 3rd Party Certificate. Given that this document is governed by Note 2, the Appellants were given the chance to rectify their offer by submitting the correct certificate but, notwithstanding, the same ISO 9001 certificate was provided once again. As a Rectification request cannot be issued on a previously-rectified matter, the TEC had no option but to deem the offer as technically non-compliant. One should mention here that if Economic Operators have any queries regarding any CfT provision, they may request a Clarification at Tendering Stage. If the Clarification provided by the Contracting Authority is still deemed to be unsatisfactory; the prospective tenderers may, prior to the closing date of a call for competition, file a reasoned application before the PCRB in terms of Public Procurement Regulations. Given that the Appellants did not avail themselves of such remedies prior to their submission, it cannot be argued at this stage that the Tender clause was unclear or otherwise unjust. Such matters must be discussed during the CT's publication period and not during/after the evaluation period.

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, will now consider Appellant's grievances.

- a) The main and only issue to consider is the "third party certification for ISO 9001 adherence" which was requested by the 'Literature List' (Note 2) of the Tender Dossier.
- b) A rectification request was made by the Contracting Authority following the administrative evaluation of the Appellant's bid. This since the Appellant had initially submitted the ISO 9001 certificate instead of the 3rd Party Certificate.
- c) As a reply to the rectification request, the Appellant re-submitted the same ISO 9001 certificate which was initially deemed as non-compliant.
- d) This Board deems the 'ISO 9001 certificate' and the '3rd Party Certificate' as separate documentation. This as evidenced by the bids of other prospective bidders.

Therefore, the Board, does not uphold the Appellant's grievances.

The Board,

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) Does not uphold Appellant's Letter of Objection and contentions,
- b) Upholds the Contracting Authority's decision in the recommendation for the award of the tender,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Mr Lawrence Ancillieri
Member

Dr Charles Cassar
Member

