

PUBLIC CONTRACTS REVIEW BOARD

CT 3054/2020

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HDPE Pipes Distribution Network for New Water from Sant' Antnin Treatment Plant (M'scala) to Bulebel, Tas-Silg and Habel Abjad Reservoirs through Horizontal Directional Drilling – Water Services Corporation

Case 1551

DATE:25th March 2021

This Board,

Having noted the Appeal filed by PR20JV, (hereinafter referred to as the Appellant) and the contents of the correspondence sent by Dr Beryl Jean Buttigieg on behalf of appellant and received by the Board on the 22nd February 2021.

Having also noted that the Contracting Authority replied to the Appeal by reply filed by Dr Sean Paul Micallef on behalf of the Water Services Corporation on the 4th March 2021.

Having also noted the reply filed by Dr Maurice Meli on behalf of Bianco Impianti Srl on the 3rd March 2021.

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

Having noted and evaluated the minutes of the Board sitting of the 18th March 2021

hereunder re-produced:

Case 1551 – CT 3054/2020 – HDPE Pipes Distribution Network for New Water from Sant’ Antnin Treatment Plant (M’scala) to Bulebel, Tas-Silg and Habel Abjad Reservoirs through Horizontal Directional Drilling – Water Services Corporation

The tender was published on the 12th October 2020 and the closing date was the 17th November 2020. The value of the tender was €4,708,500 (excluding VAT).

On the 22nd February 2021, PR20JV filed an appeal against the Water Services Corporation as the Contracting Authority objecting to their disqualification on the grounds of being technically not compliant

A deposit of €23,542 was paid.

There were two (2) bidders.

On 18th March 2021, the Public Contracts Review Board (PCRB) composed of Dr Ian Spiteri Bailey 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 – PR20JV

Dr Beryl Buttigieg Legal Representative

Contracting Authority – Water Services Corporation

Dr Sean Paul Micallef	Legal Representative
Eng Stefan Cachia	Chairperson Evaluation Committee
Mr Louis Pullicino	Secretary Evaluation Committee
Eng David Sacco	Member Evaluation Committee
Perit Beverley Costa	Member Evaluation Committee
Mr Kevin Brincat	Member Evaluation Committee
Eng. Anthony Muscat	Representative

Preferred Bidder – Bianco Impianti SRL

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

Dr Ian Spiteri Bailey 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 Beryl Buttigieg Legal Representative for PR20JV said that the decisions in cases quoted in the letter of reply of the Contracting Authority do not truly reflect the situation in this case.

Dr Buttigieg insisted that the form requested in the tender by the Authority regarding 'key experts' states that it is to be submitted only for individuals who are public administration employees. None of the key experts proposed to be used are public employees and the easiest course would have been for the Authority to clarify if this was the case. The claim by the Authority that Appellants failed to submit this form was incorrect as it was not required or applicable.

The claim that the CV of Jake Grixti was not comprehensive is also incorrect. All that is asked for on page 31 of the tender document is for a '**Mason** with a licence to practice as a mason....'. There is no requirement for details of experience or personal qualities. The Authority was perfectly in order to ask for a copy of the mason's licence but details of experience was not a requirement.

The Authority failed to point out that the lack of a signature in the case quoted by them (PCRB Case 1109) referred to the complete technical offer and not merely to a document as the Quality Assurance (QA) plan, where the failure could easily have been rectified. Reference was made to CJEU Case 131/16 which in paragraph 29 *inter alia* states that equal treatment does not exclude clarification or amplification of clerical errors so long as such changes do not appear to produce a new tender. The claim that rectification could not be requested due to Note 3 restrictions must be taken in the context and perspective of the CJEU judgement.

Dr Sean Paul Micallef, Legal Representative for the Water Services Corporation, stated that Note 3 does not allow the Authority to ask for rectification. The principles of self-limitation and equal treatment must apply and since the form demanded a signature, which was not supplied, then the Authority is obliged to disqualify.

In the case of the self-declaration form for key experts, the Authority asked for rectification once it was not originally submitted but this rectification was not replied to and was either forgotten, omitted or ignored. It is a rule that if there is no response to a clarification then the bid must be disqualified.

The clause regarding key experts in the tender makes it clear that the contractor was obliged to engage people with in-depth experience and a proven track record (page 30). In regard to the mason not even basic details were provided. Note 2 to Clause 5 can change incomplete or incorrect documentation submitted whilst Note 3 can only ask for clarification on what

has been submitted without any changes being made. Thus, the Authority cannot change a non-compliant bid to a compliant one.

Dr Maurice Meli Legal Representative for Bianco Impianti SRL said that his client was in agreement with the Authority's contention that any rectification requested must be answered. A scant CV was not acceptable for a tender of this calibre. The lack of a signature on the QA is not a clerical error as it infringes a serious and cardinal point of the tender. In the case CT 3120/12 the lack of a signature was accepted only as it was impossible to obtain a signature.

Dr Buttigieg stated that the lack of a signature is a clerical error and a request for clarification would not change the substance of the bid. Note 3 has to be taken in the context of CJEU judgements provided the substance is still there. Overriding this point is the fact that the overall declaration when submitting the tender was signed.

Dr Meli concluding by saying that the latter point just made is absurd and dangerous to sustain.

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

End of Minutes

Hereby resolves:

That the appellant was disqualified by correspondence dated 12th February 2021 on the basis of having been technically non-complaint due to three listed reasons, namely (a) QA Plan not signed and dated, (b) Missing Signed Self Declaration for all key experts after rectification has been requested and (c) CV for Jack Grixti is not comprehensive after rectification has been requested.

That on the same date, by letter addressed to Bianco Impianti Srl, the same was informed that it was awarded the tender.

The Board shall consider separately all three reasons listed by the contracting authority as being the basis for making the tender submission by the appellant technically non-compliant, although it is clear that even if one of the three subsists, then the contracting authority's decision would still be deemed valid and be confirmed.

(a) QA Plan not signed and dated

The appellant argues that the QA Plan was submitted as was required but that the tender document did not state that the tenderer would be disqualified if the same document is not signed and dated. In the Appeal/letter of objection, appellant argues that the QA Plan may easily be deemed to have been signed and dated once it was submitted.

In this respect the contracting authority states that a signature, or any other detail which is clearly and specifically requested in the tender documents, is not some optional formality which can be disregarded by bidders.

The preferred bidder on the other hand re-iterated that the lack of signature and date on the QA Plan was a cardinal omission. It argues that Quality Assurance is a cardinal pre-requisite for any tender, more so in this tender, where the contracting authority must be assured of the works and materials provided by each bidder. It furthermore submits that the mere fact that the objector is endorsing the contents of the tender with his signature crystallises the essential importance of a signature.

The preferred bidder as well as the contracting authority made reference to cases previously decided by this Board and this Board sees no reason why it should depart from the line of reasoning taken in such decisions.

In this regard, this Board would like to opine that once the fact that the Tender Document is accepted to be a contract, (which is a basic fact), then such a contractual obligation has to be endorsed to signify acceptance of the conditions of the Tender Document and also to confirm that his offer is, as stated.

Furthermore, this Board opines that the contracting authority is correct in its assessment to the effect that “*the tender evaluation committee could not ask the appellants to rectify their submission in order to add or change any details contained therein as this is accompanied by note 3*”.

To this effect, this Board shall confirm the first ground for making the appellant’s bid technically non-compliant.

(b) Missing Signed Self Declaration for all key experts after rectification has been requested

In respect of this second basis by the contracting authority for claiming the appellant's bid to be technically non-compliant, the appellant argues that these self-declaration forms were intended to be submitted only by Key Experts who were employed in the public administration – and given that none of the appellant's key experts were so employed, then there was no need for such declarations to be submitted.

The contracting authority on its part argued that, irrespective of that, the tender document requested the filing of such forms. It states that such forms were important to be filled in and duly submitted, if anything, as they would serve to inform the contracting authority that none of the bidder's key experts was in fact employed in the public administration. It furthermore submits that the appellant was in any case asked to rectify – but the appellant failed to do so.

The appellant confirms that no reply was given in rectification on the basis that once none of its key experts were employees in the public administration, then that was not required.

The Board refers to art. 16.1 of the **General Rules Governing Tenders V3.0** of April 2019 which specifically states that when a rectification is requested, the bidder is to reply within 5 days and *failure to comply shall result in the tender offer not being considered any further*.

The Board deems that it was not up to the bidder to decide on whether or not to submit the forms, but once requested, the bidder was obliged to submit as required, otherwise, the bidder would automatically be deemed to be technically non-compliant in terms of the rule above quoted.

To this effect, the Board shall also confirm the second ground for making the appellant's bid technically non-compliant.

(c) CV for Jack Grixti is not comprehensive after rectification has been requested

Whereas the above reasoning is equally applicable to this specific ground and hence the Board has no option but to also confirm this ground for making the appellant's bid technically non-compliant, the Board would like to emphasize that the c.v. provided in respect of the mason leaves much to be desired and contracting authorities do well to ask for a rectification when faced with such poor documentation, in this case, the mason's c.v.

Whereas the appellant basis its argument on the fact that the “*tender did not require any particular experience for stone mason*” – the Board cannot but note the following.

- (i) Whereas it is true to say that in the case of other key experts the tender document might have specifically stated the need for experience, in the case of a mason, no such specific reference to experience was made, however, one cannot omit the importance of the umbrella clause with which section A.02 commences, namely that the contractor shall engage staff with “*in depth experience*”.
- (ii) Irrespective of the above, there remains, in the Board's view, the lack of adherence of the appellant with the request to rectify an otherwise insufficient c.v. provided, on the basis of which, it was justifiably concluded by the contracting authority that the c.v. submitted “*was not comprehensive*”.

The Board us has no option but to confirm also the third reason given by the contracting authority for concluding that the appellant's bid was technically non-complaint.

The Board will thus dismiss the Appeal and confirm the contracting authority's conclusions and decisions.

The Board,

Having evaluated all the above concludes and decides:

- a) To dismiss the appeal submitted by PR20JV, and
- b) To confirm all three grounds listed in the contracting authority's letter of the 12th February 2021 to the appellant as making the latter's bid technically non-compliant, and
- c) To order that the deposit paid by the appellant upon filing of this appeal should not be refunded back to the same appellant.

Ian Spiteri Bailey
Chair

Dr Charles Cassar
Member

Lawrence Ancilleri
Member