

PUBLIC CONTRACTS REVIEW BOARD

Case 1611 – WSC/T/25/2021 – Works - Consolidation of Existing Network for Improved Water Supply within Fgura Area – Phase 6 – Pjazza Redent Gauci, Triq il-Kitba by Water Services Corporation

20th September 2021

The Board,

Having noted the letter of objection filed by Mr Gilmour Cauchi acting for and on behalf of Northwind Investments Ltd, (hereinafter referred to as the appellant) filed on the 7th May 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 17th May 2021;

Having heard and evaluated the testimony of the witness Mr Gilmour Cauchi (employee of the Appellant company) as summoned by Dr Alexander Schembri acting for Northwind Investments Ltd.

Having heard and evaluated the testimony of the witness Mr Stephen Galea St John (Chairman of the Evaluation Committee) as summoned by Dr Sean Paul Micallef acting for Water Services Corporation;

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 27th July 2021 hereunder-reproduced;

Minutes

Case 1611 – WSC/T/25/2021. Works – Consolidation of Existing Network for Improved Water Supply within Fgura Area – Phase 6 – Pjazza Redent Gauci, Triq il-Kitba by the Water Services Corporation

The tender was published on the 4th March 2021 and the closing date was the 29th March 2021. The value of the tender was € 255,555.

On the 7th May 2021 Northwind Investments Ltd filed an appeal against the Water Services Corporation as the Contracting Authority objecting to their disqualification on the grounds that the offer was not technically compliant.

A deposit of € 1,280 was paid.

There were four (4) bidders.

On 27th July 2021 the Public Contracts Review Board (PCRB) composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Mr Richard Matrenza as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellant – Northwind Investments Ltd

Dr Alexander Schembri	Legal Representative
Mr Philip Axiak	Representative

Contracting Authority – Water Services Corporation

Dr Sean Micallef	Legal Representative
Mr Stephen Galea St John	Chairperson Evaluation Committee
Mr Louis Pullicino	Secretary Evaluation Committee
Mr James Agius	Member Evaluation Committee
Mr Gordon Delia	Member Evaluation Committee

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. He then asked Appellant’s representative to make his submissions.

Dr Alexander Schembri Legal Representative for Northwind Investments Ltd stated that the facts are not contested – the Quality Assurance Systems document was missing. However the Contracting Authority accepts that there were problems with the EPPs system at the time to the extent that they granted an extension of the dates for submission of documents. Appellant has confirmation that the document was submitted and it was only on receipt of the evaluation decision that they find out that the document in question was missing.

Dr Sean Micallef Legal Representative for the Water Services Corporation said that this missing document came under Note 3 of the Instructions to Tenderers and thus the Authority could not ask for a rectification. It was correct that the Department of Contracts had problems with the system such that an extension was granted to all bidders. The Authority is not aware of the reasons why the document was not uploaded but they had no choice as they can only evaluate on what is submitted.

Mr Gilmour Cauchi (224090M) called as a witness by Appellant testified on oath that he is employed by Northwind Investments and said that he collected all the information necessary to compile the tender bid and submitted it. The submission was on the 16th March and the documents submitted included the Quality Assurance System which was uploaded with the rest of the documents. Confirmation was received that the upload was successful (At the hearing an e-mail was exhibited confirming receipt of tender). Documents were uploaded individually and the receipt indicated that there was a 100% upload. It was only when the Authority’s decision was received that the Company became aware that the document was missing. Witness stated that the e-mail exhibited did not list individual documents submitted but simply that the overall packaged had been received.

Mr Stephen Galea St John (369465M) called as a witness by the Authority testified on oath that he was a Professional Manager at the Water Services Corporation and was the Chairperson of the

Evaluation Committee. He stated that the EPPs indicated that the Quality Assurance document was attached but there was no such attachment.

Questioned by Dr Schembri witness said that at the time he was not aware that there were problems with the EPPs. He agreed that Appellant's offer was the cheapest by some € 14,000.

Dr Schembri said that Appellant cannot contest that the document was not received although uploaded and therefore the matter is beyond the control of bidder. Reference was made to PCRB Case 950 of 2016 where a clarification note was missed and only came to light when bidder was notified of it by the Contracting Authority. It is regrettable that a cheaper bid had to be turned down.

Dr Micallef said that the facts in the mentioned Case were not similar. The Authority had no option but to reject the offer since one document albeit uploaded was missing. The value of the tender has no bearing on the decision until the offer is declared technically compliant.

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

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 27th July 2021.

Having noted the objection filed by Northwind Investments Ltd (hereinafter referred to as the Appellant) on 7th May 2021, refers to the claims made by the same Appellant with regards to the tender of reference WSC/T/25/2021 listed as case No. 1611 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Alexander Schembri

Appearing for the Contracting Authority: Dr Sean Paul Micallef

Whereby, the Appellant contends that:

- a) The Quality Assurance Systems Document has been available prior to submission of tender. There is a probability that this was not uploaded correctly in the tender preparation tool prior to

submitting the tender. There were also technical difficulties during the closing date of tender proposals.

- b) This was most probably a human error or technical issue.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 17th May 2021 and its verbal submission during the virtual hearing held on 27th July 2021, in that:

- a) Appellant was deemed not compliant as the 'Quality Assurance Systems' document requested under Section 1, Clause 5(c)(i)(b) of the Tender document was not submitted.
- b) As correctly indicated by the Appellant, some technical issues were being experienced by all ePPS users a few days before said deadline. More specifically, the Department of Contracts (DoC) IT Unit notified all ePPS users on the 24th March 2021 that some technical difficulties had been reported the day before (i.e. 23th March 2021) and were being investigated accordingly. It was subsequently communicated by DoC's IT Unit that the deadline for all tenders closing on the 25th March 2021 was to be extended up to the 29th March 2021. These instructions were promptly adhered to by the Contracting Authority.
- c) Hence it follows that the omission of the 'Quality Assurance Systems' document by the Appellant cannot be justified by such technical problems given that all Economic Operators were given ample time to revise and finalise their submissions if so required.
- d) The Evaluation Committee could not ask the Appellant to rectify their submission by submitting the missing document given that the latter is governed by Note 3.
- e) The Evaluation Committee is bound to evaluate all offers at face value and adjudicate solely on the information provided.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties, will consider Appellant's grievances, as follows:

The Board notes that:

1. A bid proposal was submitted by the Appellant company for tender reference WSC/T/25/2021.
2. As stated under oath, Mr Gilmour Cauchi confirmed that he had submitted all documents required in the ePPS system.
3. Technical issues were experienced on the ePPS system on the 23rd March 2021. This was notified by the Department of Contracts (DoC) IT Unit.

4. Tender submissions deadline date was extended to 29th March 2021 as instructed by DoC. The Contracting Authority duly complied.
5. Mr Stephen Galea St John stated under oath that there was in fact an attachment where the 'Quality Assurance Systems' document was supposed to be attached but it transpired that this 'attachment' was only a one (1) liner, hence not a Quality Assurance Systems document. The Evaluation Committee could not ask the appellant to rectify the situation as such document falls under category of 'Note 3'.

After evaluating all of these matters, this Board decides that the Evaluation Committee observed the concept of 'Self Limitation' in that it could not approach the Appellant company to request this document to be presented at evaluation stage.

This more so when;

- a) that approach would have led to a rectification of the bid, something which is not permissible under 'Note 3';
- b) as stated under oath by Mr Stephen Galea St John there was in fact an 'attachment' but not relating and / or including the Quality Assurance Systems document and
- c) the Contracting Authority did observe the instructions issued by the DoC whereby an extension was duly provided to all prospective bidders for their tender bid submissions.

Finally, 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 Ancilleri
Member

Mr Richard Matrenza
Member