



with no qualifications. A Clarification Note issued subsequently confirmed that Appellants had to submit a sample bag of pre-crushed material.

Dr Sean Paul Micallef Legal Representative for Water Services Corporation said that the whole point of asking for a sample was to ascertain what bidders would be supplying. Item 2.3 of the Terms of Reference indicated that the material must be better or equal as that of the sample. The sample therefore had to meet the complete offer but in this case it failed.

Dr Galea contended that the sample quality was not mandatory – the Contracting Authority had simply asked for a sample and Appellants would have had no difficulty in meeting any specific requirement had this been indicated.

Eng Sigmund Galea (4290880M) called as a witness by the Public Contracts Review Board testified on oath that he was one of the Evaluators. He agreed that two out of the three bids submitted had been disqualified as the submitted sample had not met the expected specification and both had not met the expected gauge. The Committee felt that the samples submitted were not acceptable and recommended cancellation of the tender.

Questioned by Dr Galea witness stated that the term pre-crushed does not necessarily mean that the material had to be of the required size.

The Chairman noted that efforts should always be made to save a tender and the Evaluation Committee could have practiced self limitation by asking for further samples from all bidders since the Clarification Note issued was not very clear. He then thanked the parties for their submissions and declared the hearing closed.

End of Minutes

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## **Decision**

**This Board,**

**having noted this objection filed by Little Rock Quarry Ltd (hereinafter referred to as the Appellants) on 24<sup>th</sup> June 2020, refers to the claims made by the same Appellants with regard to the tender of reference WSC/T/19/2020 listed as case No. 1490 in the records of the Public Contracts Review Board.**

**Appearing for the Appellants: Dr Carmelo Galea**

**Appearing for the Contracting Authority: Dr Sean Paul Micallef**

**Whereby, the Appellants contend that:**

- a) Their offer was rejected due to the alleged reason that their sample was not in compliance with the specifications stipulated in the tender document. In this regard, Appellants maintain that, there were no specifications mentioned or indicated in the ‘Sample Form’ and Appellants submitted the sample of crushed material, as requested.**

**This Board also noted the Contracting Authority’s ‘Letter of reply’ dated 20<sup>th</sup> July 2020 and its verbal submissions during the virtual hearing held on 16<sup>th</sup> September 2020, in that:**

- a) The samples were requested by the Authority to confirm that the product being offered by the bidders conform to the technical specifications of the tender document. In this regard, Appellants’ sample did not conform to article 2.3 of the ‘Terms of Reference’, so that, the Evaluation Committee had no other option but to deem Appellants’ offer technically non-compliant.**

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

**Engineer Sigmund Galea, 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 the parties concerned including the testimony of the**

witness duly summoned opines that, the issue that merits consideration is the sample submitted by Appellants.

1. This Board would respectfully refer to the ‘Sample List Form’ instructing the bidders to submit a sample, as follows:

*“List of samples to be submitted within ten (10) calendar days from when notified to do so:*

*Tender Title: FRAMEWORK AGREEMENT FOR THE SUPPLY AND DELIVERY OF HARD STONE SAND IN 25KGS BAGS FOR THE WATER SERVICES CORPORATION*

*Reference Number: WSC/T/19/2020*

| <i>Item</i> | <i>Description</i>   | <i>Reference in Tender Dossier</i> |
|-------------|--|------------------------------------|
| <i>1</i>    | <i>one bag of the Raw Material of the product being offered (Pre-Crushed)”</i> | <i>Section 1 Clause 5C (ii)</i>    |

2. The above instructions make reference to ‘Section1 Clause 5C(ii) of the terms of reference, being shown below:

*“(ii) Samples as per Form marked ‘Sample List’ may be requested during the adjudication stage to supplement the technical offer submitted. If requested, the Samples must be submitted within ten (10) calendar days of being notified to do so.*

*(Note 3) If Samples are not submitted within the specified timeframe, offer will not be considered further.*

*The Contracting Authority reserves the right to carry out destructive testing on samples submitted. Therefore, the Contracting Authority cannot be held responsible whatsoever for any damages which may have occurred to samples during their testing.*

*Samples may be withdrawn within fifteen (15) days from the lapse of the objection period upon presentation of the official receipt 'Sample Submitting Form'. Notwithstanding, the Contracting Authority may withhold such sample/s if an objection has been filed for the respective offer. Uncollected samples will be forfeited.*

*Samples submitted by the successful bidder will be retained by the Contracting Authority."*

**The above-mentioned clause does not state that, the samples must conform to articles 2 and 3 of the 'Specifications' as duly stipulated in the 'Terms of Reference' of the tender document.**

- 3. At the same instance, this Board would refer to the request note sent by the Authority for the submission of samples, viz:**

|                      |                               |
|----------------------|-------------------------------|
| <i>"EO Name</i>      | <i>Little Rock Quarry Ltd</i> |
| <i>Request Title</i> | <i>Request for Samples</i>    |

*Dear Sir/Madam,*

*In terms of Section 1, Clause 5(C)(ii) of the tender document, you are being kindly requested to submit a sample of one (1) bag of the raw*

*material of the product (pre-crushed) being offered as listed in 'Form – Samples List'.*

*Request description: The sample, which is being requested without any commitment whatsoever on the part of the Corporation, has to reach the following address:*

*WSC Kordin Test Room,  
Zona Industrijali ta' Kordin  
Paola  
Attn: Mr Rudolph Falzon (Tel No: 22442128)''*

**Again, this Board notes that, the request for the sample does not indicate that the sample must confirm with the technical specifications as duly declared by Appellants, in their 'Technical Questionnaire'. What was being requested was, a sample of pre-crushed material as listed in 'Samples List Form', the latter of which is indicating what is to be supplied.**

- 4. It is the norm and objective that, whenever the Authority requests samples, such sample must depict what is being offered by the Bidder, however, the Authority's request for the sample should be explicit to the effect that same samples must conform with the particular clause denoting the technical specifications. In this particular case, the Authority's request for the samples was quite vague and misleading in that, the Authority requested a sample of pre-crushed material. At the same instance, this Board noted the testimony of**

Engineer Galea, who confirmed that, the term 'Pre-Crushed' does not necessarily imply that the material had to be in conformity with the required specifications.

5. This Board also note that, two bidders participating in this tender, defaulted in the quality of the submitted samples and the common issue arose due to the fact that the Authority's request for samples was not explicitly indicating a reference to the actual technical specification of the tender document.

In conclusion, this Board opines, that:

- a) The request for the samples was specifically for pre-crushed material only.
- b) The reference made, in the request, to section .1, clause 5 C (ii) does not stipulate that the sample must conform with the technical specifications as shown in article 2 of the technical questionnaire.
- c) Since two of the offers experienced the same difficulty in their submission of samples and the offers are now public, it would be more appropriate and opportune for the Contracting Authority to endeavour to save the offers, by requesting a re-submission of samples to comply strictly with the technical specifications as declared by same in their submitted technical questionnaire.
- d) The request will not amount to a rectification on any of the bids, as all the offers misunderstood what was intentionally being requested by the Authority

**and the original request for samples was somewhat misleading, so that a level playing field will be maintained.**

**In view of the above, this Board,**

- i. does not uphold the Contracting Authority's decision to cancel the tender,**
- ii. upholds Appellants' contentions,**
- iii. directs that, the Authority issues a 'Request for Samples' from all the participating bidders, clearly and explicitly informing the bidders what the Authority expects from such submission of samples,**
- iv. directs that, after receipt of samples, a re-evaluation of all the offers be carried out,**
- v. directs that the deposit paid by Appellants should be fully refunded.**

Dr Anthony Cassar  
Chairman  
*18<sup>th</sup> September 2020*

Dr Charles Cassar  
Member

Mr Lawrence Ancilleri  
Member