

PUBLIC CONTRACTS REVIEW BOARD

Case No. 491

MRRA/W/417/2009/2

Period Contract for the Hire of Hydraulic Excavators to the Manufacturing and Services Directorate

This call for tenders was published in the Government Gazette on the 20th July 2012. The closing date for this call with an estimated budget of € 57,800 was the 10th August 2012.

Six (6) tenderers submitted their offers.

Vella Group Ltd filed an objection on the 9th October 2012 against the decision of the Ministry for Resources and Rural Affairs to disqualify its offer and to recommend the award to WB Construction Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Carmel Esposito and Mr Joseph Croker as members convened a public hearing on Thursday, 15th November 2012 to discuss this objection.

Vella Group Ltd

Dr Kenneth Grima	Legal Representative
Mr John Mary (Jimmy) Vella	Director

WB Construction Ltd

Dr Victor Scerri	Legal Representative
Mr William Bugeja	Representative

Ministry for Resources and Rural Affairs

Evaluation Board

Mr Martin Grech	Chairman
Mr Paul Formosa	Member
Mr Ernest Johnson	Member
Mr Joseph McKeon	Member
Ms Graziella Zammit	Secretary



After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of the company's objection.

Dr Kenneth Grima, legal representative of Vella Group Ltd, the appellant company, made the following submissions:

- i. by email dated 2nd October 2012 the appellant company was informed that its offer was adjudicated to be technically non-compliant because only two of the three excavators requested were in accordance with specifications;
- ii. the contracting authority was requesting that the bidder should have not less than three excavators with an engine power greater than 90 hp (67 kW) as per clause 8.4.2.5 of the technical specifications;
- iii. the appellant company was contending that the reason given for its non-compliance was factually incorrect for the following reason:-
 - the appellant company submitted two (2) hydraulic excavators Caterpillar 225 having 135 hp engine power;
 - although the original technical specifications submitted with regard to hydraulic Caterpillar models 120B (1 in number) and 215 (2 in number) indicated that the engine power was 84hp and 85hp respectively, in effect, these excavators had been modified such that their engine power was increased to over 90 hp as indicated in the signed 'Specifications Form' presented with the tender submission;
- iv. apart from being common practice and, certainly not unheard of, that machinery could be upgraded by the replacement of certain mechanical part and that was what the appellant company did to the Caterpillar models 120B and 215, yet the original specifications issued by the manufacturer did not reflect these modifications but the signed 'Specifications Form' did;
- v. these excavators did not have a log book because they were not used on the road, yet the modified specifications of these machines were verifiable by a mechanical engineer on inspecting the machines and on checking the documentation concerning the upgrade which the appellant company kept at its offices;
- vi. the appellant company's offer at €22.50/hr was substantially lower than the recommended offer of €28/hr;
- vii. the appellant company submitted the second cheapest offer out of seven offers (six bidders with one submitted two offers) but the cheapest offer (Tender No. 5) of €21.97/hr was rejected because it was found to be not compliant – according to the evaluation report after verification of the literature and on inspection;
- viii. one might perhaps concede that the evaluation board was not entirely incorrect if one had to rely solely on the manufacturer's original specifications



presented with the tender submission, however, on the other hand, one should not discard or ignore the 'Specifications Form' which was a signed declaration by the bidder and which was, likewise, included in the company's tender submission;

and

- ix. the appellant company's contention was that the evaluation board, faced with a discrepancy between the manufacturer's technical specifications and the 'Specifications Form' signed by the bidder - which clearly indicated that all excavators offered had the engine power over 90 hp - could have or should have sought a clarification/rectification from the bidder as per clause 2.1.3 which, in turn, referred to clause 1.2.9 the 'Specification Form' or could have even carried out an inspection of the machines as per tender conditions.


Mr Martin Grech, chairman of the evaluation board and engineer by profession, explained that:-

- a. the tender specifications laid down that no less than three excavators had to have 90 hp engine power or more;
- b. the appellant company had offered two excavators having 135 hp engine power whereas the technical literature of the other two models indicated that their engine power was below 90hp;
- c. the evaluation board did not inspect the appellant company's machines but in that case it relied on the submitted manufacturer's technical specifications and that it only inspected those of the recommended bidder to make sure that the machines offered did in fact respect tender specifications;

and

- d. the appellant company might be correct in its claim that it had upgraded the Caterpillar models E 120B and 215 but it did not present any proof to that effect in its tender submission.

Dr Grima reiterated that the appellant company was not questioning the evaluation board's observation, namely that, in certain instances, the manufacturer's technical specifications indicated engine power below 90 hp but, what it was questioning was its final decision to reject the appellant company's offer when it had in its possession a signed declaration from the appellant company that all the excavators had their engine power in excess of 90 hp, which declaration was reflecting a state of fact, without resorting to a clarification and/or without carrying out an inspection of the machines which were allowed by regulations and tender conditions.



At this point the hearing came to a close.

This Board,

- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated the 8th October 2012 and also through its representatives verbal submissions presented during the hearing held on the 15th November 2012, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by email dated 2nd October 2012 the appellant company was informed that its offer was adjudicated to be technically non-compliant because only two of the three excavators requested were in accordance with specifications, (b) the contracting authority was requesting that the bidder should have not less than three excavators with an engine power greater than 90 hp (67 kW) as per clause 8.4.2.5 of the technical specifications, (c) the appellant company was contending that the reason given for its non-compliance was factually incorrect for the following reason (A) the appellant company submitted two (2) hydraulic excavators Caterpillar 225 having 135 hp engine power and (ΔΔ) although the original technical specifications submitted with regard to hydraulic Caterpillar models 120B (1 in number) and 215 (2 in number) indicated that the engine power was 84hp and 85hp respectively, in effect, these excavators had been modified such that their engine power was increased to over 90 hp as indicated in the signed 'Specifications Form' presented with the tender submission, (d) apart from being common practice and, certainly not unheard of, that machinery could be upgraded by the replacement of certain mechanical part and that was what the appellant company did to the Caterpillar models 120B and 215, yet the original specifications issued by the manufacturer did not reflect these modifications but the signed 'Specifications Form' did, (e) these excavators did not have a log book because they were not used on the road, yet the modified specifications of these machines were verifiable by a mechanical engineer on inspecting the machines and on checking the documentation concerning the upgrade which the appellant company kept at its offices, (f) the appellant company's offer at €22.50/hr was substantially lower than the recommended offer of €28/hr, (g) the appellant company submitted the second cheapest offer out of seven offers (six bidders with one submitted two offers) but the cheapest offer (Tender No. 5) of €21.97/hr was rejected because it was found to be not compliant – according to the evaluation report after verification of the literature and on inspection, (h) one might perhaps concede that the evaluation board was not entirely incorrect if one had to rely solely on the manufacturer's original specifications presented with the tender submission, however, on the other hand, one should not discard or ignore the 'Specifications Form' which was a signed declaration by the bidder and which was, likewise, included in the company's tender submission, (i) the appellant company's contention was that the evaluation board, faced with a discrepancy between the manufacturer's technical specifications and the 'Specifications Form' signed by the bidder - which clearly indicated that all excavators offered had the engine power over 90 hp - could have or should have sought a clarification/rectification from the bidder as per clause 2.1.3 which, in turn, referred to clause 1.2.9 the 'Specification Form' or could have even carried out an inspection of the machines as per tender conditions and

(j) the appellant company was not questioning the evaluation board's observation, namely that, in certain instances, the manufacturer's technical specifications indicated engine power below 90 hp but, what it was questioning was its final decision to reject the appellant company's offer when it had in its possession a signed declaration from the appellant company that all the excavators had their engine power in excess of 90 hp, which declaration was reflecting a state of fact, without resorting to a clarification and/or without carrying out an inspection of the machines which were allowed by regulations and tender conditions;

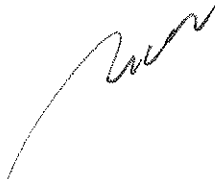
- having considered the contracting authority's representative's reference to the fact that (a) the tender specifications laid down that no less than three excavators had to have 90 hp engine power or more, (b) the appellant company had offered two excavators having 135 hp engine power whereas the technical literature of the other two models indicated that their engine power was below 90hp, (c) the evaluation board did not inspect the appellant company's machines but in that case it relied on the submitted manufacturer's technical specifications and that it only inspected those of the recommended bidder to make sure that the machines offered did in fact respect tender specifications and (d) the appellant company might be correct in its claim that it had upgraded the Caterpillar models E 120B and 215 but it did not present any proof to that effect in its tender submission,

reached the following conclusions, namely:

1. The Public Contracts Review Board recognizes the fact that the tender specifications laid down that no less than three excavators had to have 90 hp engine power or more.
2. The Public Contracts Review Board establishes that the fact that, whilst it is true that the contracting authority is claiming that the appellant company might be correct in its claim that it had upgraded the Caterpillar models E 120B and 215 but it did not present any proof to that effect in its tender submission, yet one has to consider all within the context that the submission of corroborative documentary evidence was not mandatory, so much so that it was only the appellant company that ended up submitting such material.

As a consequence, this Board cannot accept a scenario that just because a participating tender submitted an additional document which was not mandatory, providing information which, partially, did not conform to the declaration made by the same participating tenderer in the 'Specification Form', the appellant company ended up being rejected whilst all the other bidders which did not submit any such non-mandatory corroborative documentation were allowed to proceed in the evaluation process. This Board feels that, in this instance, the evaluation board could have, at least, sought further clarification.

3. The Public Contracts Review Board acknowledges the fact that the appellant company is correct in claiming that, in this instance, the evaluation board could have carried out an inspection of the machines as per tender conditions similar to the inspection carried out on recommended tenderer.



In view of the above this Board finds in favour of the appellant company and not only recommends that the deposit paid by the same company for the appeal to be lodged should be reimbursed but that the appellant company's bid be reintegrated in the tender evaluation process.

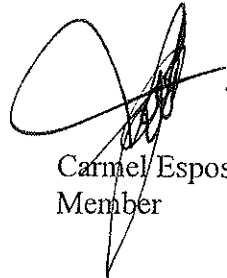


Alfred R Triganza
Chairman

20 November 2012



Joseph Croker
Member



Carmel Esposito
Member