

PUBLIC CONTRACTS REVIEW BOARD

Case No. 701

WSC 387/2013

Tender for the Supply of Repair Clamps.

The tender was published on the 30th August 2013. The closing date was the 27th September 2013.

The estimated value of the Tender was €40,000 (Excluding VAT)

Six (6) offers have been received for this tender.

On the 19th February 2014 Ignazio Anastasi Limited filed an objection against the disqualification of their offer.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Tuesday the 20th May 2014 to discuss the objection.

Present for the hearing were:

Ignazio Anastasi Limited - Appellant

Mr Marc Anastasi	Director
Dr Robert Abela	Legal Representative
Dr Veronique Dalli	Legal Representative

Idro Gas Engineering Europa S.A.S - Preferred Bidder

Mr Adrian Baldacchino	Representative
Dr Christine Calleja	Legal Representative

Water Services Corporation - Contracting Authority

Ing. Mark Perez	Chairman Evaluation Board
Mr Anthony Camilleri	Secretary Evaluation Board
Ing. Stephen Galea St. John	Member Evaluation Board
Mr Joseph Gregoraci	Member Evaluation Board
Ing. Ronald Pace	Member Evaluation Board

Superior Pipeline Products Limited - Interested Party

Mr Joseph Bugeja	Representative
Dr Robert Tufigno	Legal Representative

The Chairman made a brief introduction and invited appellant's representative to make his submissions.

Dr Robert Abela on behalf of the appellant said that he would first like to hear the testimony of his client's representative.

Mr Marc Anastasi, Id No. 4945587M Managing Director at the appellant firm under oath said appellant had submitted tenders for the contracting authority before. A few weeks ago appellant had submitted another tender number 30/2013 with the same authority. The tender form had been filled exactly the same as that of the present tender. The tender conditions were also identical but the other tender was for M caps. The appellant had filled in the form exactly as in the present case. There had been no difficulties in that tender. The appellant had not been awarded that tender because it did not have the lowest offer. No issues regarding of the filling of forms had been raised by the contracting authority.

In the present tender appellant's bid was disqualified because *"price quoted is in DAP and not DDP as requested in the instructions to tenderers and the VAT was only calculated on ex-works prices, i.e excluding the €2,900 DAP charges. Editing of the Financial Offer is not acceptable."* On being asked to compare the present tender's financial offer with that of the tender 30/2013 he stated that these offers were identical and filed copies of both financial offers and the tender conditions of 30/2013.

Mr Mark Perez on behalf of the contracting authority read out what the evaluation board had reported in the evaluation report: "The evaluation committee checked the technically compliant tenders for arithmetic errors. No errors were noted. However, the cheaper offer submitted a Financial Offer form that is not in accordance with the requirements of the tender conditions. The final price quoted was DAP and not DDP terms as requested in the Instructions To Tenderers and the VAT was only calculated on ex-works prices, i.e. excluding the €2,900 DAP charges. Therefore, this correction would have obtained a total of €36,786.09 rather than €36,264.09." The evaluation board corrected the bid amount to reflect the additional VAT. But this had to be confirmed first. The evaluation report continued: "A request to clarify this issue with the economic operator was submitted to the Departmental Contracts Committee on the 10.10.13 and the reply from the DCC dated 21.10.13 was that 'bidder had tampered with the Financial Offer Form and the WSC is to take the necessary measures'." The evaluation board then had no other option but to disqualify appellant's offer.

Dr Robert Abela again referred to the previous tender number 30/2013 where no such action had been taken although the Financial Bid had been similarly altered. He claimed that the evaluation board had acted correctly when adjusting arithmetically appellant's offer. He insisted that the contracting authority would have saved some €9,000. DDP meant delivery duty paid and since the product was going to be supplied from England and thus incurred no duties and taxes. The VAT had been correctly assessed by appellant while the additional VAT on the €2,900 had been assessed by the evaluation board. Although according to the VAT Department there is no VAT imposed on freight. However the appellant's offer would still have been cheapest.

Dr Christine Calleja on behalf of the preferred bidder insisted that the previous tender was irrelevant in assessing the present objection. The present case deals with a bidder who was declared non-compliant. If the contracting authority wanted prices quoted DDP and the appellant gave the prices DAP then the appellant's tender was non-compliant. It is not relevant whether the offer was more advantageous.

Mr Adrian Baldacchino for the preferred bidder said that although he sympathized with the appellant on the matter, he referred to another tender where it was the preferred bidder who had changed the financial bid form and was disqualified. This Board had rejected the preferred bidder's objection. He explained that there could be a case of triangulation where a product was imported into England from say, China and was then re-imported to Malta. In that case it was the DDP that was required.

At this point the hearing was closed.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 14th February 2014 and also through Appellant's verbal submissions during the hearing held on 20th May 2014, had objected to the decision taken by the pertinent Authority, in that:

- a) The fact that importation from Europe did not contain any duty in the Appellant's Bid price. Appellant's offer was the cheapest, and the 'price' was the awarding criteria of this tender.**
- b) Appellant submitted the Bid price with the conditions slightly altered to that as dictated in the form of 'Financial offers – breakdown of costs – to reflect the conditions related to quoted prices.**

Having considered the Contracting Authority's verbal submissions during the hearing held on 20th May 2014, in that:

- a) Appellant's bid price was not in accordance with the conditions as laid out in the tender document. In this regard, the Evaluation Board had no other option but to disqualify Appellant's offer.**

Reached the following conclusions:

- 1. This Board opines that a Prospective Bidder has no right to alter or vary in whatsoever manner the conditions of the bid price as laid out in the tender document. If the Prospective Bidder has any difficulty or query in stating his Bid price, he can ask for clarifications prior to the submission of his tender.**
- 2. This Board also opines that the tender document is a contract between the Contracting Authority and the Prospective Bidder. It is the Contracting Authority who issues the conditions to be dictated in the tender document and not otherwise. In this respect, the Appellant infringed this basic condition by altering the condition of his Bid Price.**

In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar
Chairman

Dr. Charles Cassar
Member

Mr. Lawrence Ancilleri
Member

4 June 2014