

PUBLIC CONTRACTS REVIEW BOARD

Case No. 256

WSM/189/2010

Period Contract for the supply and delivery of Sodium Bicarbonate (NaHC03) to the Marsa Thermal Treatment Facility

This call for tenders was published in the Government Gazette on 24^h August 2010. The closing date for this call for offers with a department estimate of € 120,000 (exclusive of VAT) was 14^h September 2010.

Five (5) tenderers had originally submitted their offers.

W.J. Parnis England Ltd filed an objection on 18th November 2010 against the decisions of the contracting authority to disqualify its offer and recommend the award to Chemic Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Joseph Croker as members convened a public hearing on Monday, 31st January 2011 to discuss this objection.

Present for the hearing were:

W.J. Parnis England Ltd

Dr Joseph Camilleri	Legal Representative
Mr Mark Grima	Representative
Mr Robin Parnis Englan	Representative

Chemic Ltd

Mr Victor Chetcuti	Representative
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WasteServ Malta Ltd

Dr Victor Scerri	Legal Representative
Mr Peter Vella	Chief Operations Officer

Evaluation Board

Ms Daniela Grech	Member
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After the Chairman's brief introduction, the appellant company was invited to explain the motives of its objection.

Dr Joseph Camilleri, legal representative of WJ Parnis England Ltd, the appellant company, declared that this objection concerned a technical aspect regarding the solubility of sodium bicarbonate which one could determine by using two methods, i.e. either

- a. weight/volume, which, in this case, would work out at 96g/1000ml @ 20° C or
- b. weight/weight which would work out at 89g/1000g @ 20° C

Dr Camilleri added that once one has a particular substance one could not alter its characteristics. The appellant company's legal representative maintained that the product offered by his client met the tender specifications.

Dr Camilleri claimed that there was a mistake in the tender document. The Chairman Public Contracts Review Board remarked that if a mistake was detected in the tender document then the tenderer should have pointed it out or asked for a clarification prior to the closing date of the tender. The appellant company's legal representative replied that his client noted this discrepancy at the time the tender was awarded.

Mr Robin Parnis England, also representing the appellant company, stated that his firm had participated in tenders for the supply of this product for the previous five years and that this issue did not crop up before even though his firm had made its submissions both in weight/weight and weight/volume methods. Furthermore, he stated that in 2007 his firm had been awarded this tender with a submission identical to this one.

Mr Mark Grima, another of the appellant company's representatives during this hearing and a chemist by profession, remarked that, with regard to sodium bicarbonate, it was either weight/volume 96g/1000ml @ 20° C or weight/weight 89g/1000g @ 20° C because a substance had its physical properties which could not be altered. Mr Grima declared that he used international references, as everyone in the sector would, and he admitted that it was an oversight on their part that they assumed that the product was described correctly.

Mr Edwin Muscat, a Public Contracts Review Board member, noted that, according to the evaluation report, out of five bidders, it was only the appellant company that submitted a weight/weight description.

Ms Daniela Grech, a member of the adjudicating board, remarked that the procedure laid down that in the case of any grey areas in the tender document the bidders had the opportunity to seek a clarification from the contracting authority but no such clarifications were sought in this instance. She added that, during the adjudication process, the board followed the specifications published in the tender document and it resulted that, whereas the contracting authority requested a substance of 96g/1000g, the appellant company indicated 89g/1000g which, evidently, did not match the specifications and that was the reason that led to the appellant company's disqualification.

Ms Grech stated that the awarded tenderer had attached the specifications of the product it offered - the product data sheet - where it was clearly indicated that the solubility in water was 96g/1000g at 20° C as requested in the tender document at clause 8.3.1.6. She added that there might have been a question of interpretation of the solubility given by the contracting authority because, effectively, 1g

= 1 ml of water. Ms Grech observed that the appellant company did insert a note where it tended to disagree with certain parts of the tender document but the said appellant failed to point out any different stand with regard to product solubility.

Mr Peter Vella, representing the contracting authority, declared that what the contracting authority asked for did, in fact, exist and it was quite clear so much so that the other four tenderers submitted the solubility requested but the appellant company submitted something different with no accompanying explanation/s.

Dr Camilleri admitted that the matter might have been clarified at an earlier stage, however, he held that it was emerging that what was requested in the tender and the product offered by his client had the same characteristics.

Mr Grima submitted an international reference document in respect of sodium bicarbonate CAS No. 144-55-8 (OECD SIDS).

It was observed that the same CAS No. 144-55-8 also featured on the product data sheet of the recommended tenderer.

Mr Vella and Ms Grech conceded that the product offered by the appellant company represented what the contracting authority was requesting in the tender. Yet, they also argued that the fact remained that the product description submitted by the appellant company with regard to the solubility did not match that requested in the tender document. Mr Vella further stated that he did not consider it fit for the contracting authority to ask for a clarification on something that was written down so clearly both in option 1 and in option 2.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated 18th November 2010 and also through their verbal submissions presented during the hearing held on 31st January 2011, had objected to the decision taken by the pertinent authorities;
- having noted the appellant company's representatives' (a) reference to the fact that this objection concerned a technical aspect regarding the solubility of sodium bicarbonate which one could determine by using two methods, i.e. either (1) weight/volume, which, in this case, would work out at 96g/1000ml @ 20° C or (2) weight/weight which would work out at 89g/1000g @ 20° C, (b) claim that once one has a particular substance one could not alter its characteristics and that they met the tender specifications, (c) claim that there was a mistake in the tender document but they noted this discrepancy at the time the tender was awarded and (c) admission that that it was an oversight on their part that they assumed that the product was described correctly;
- having considered the contracting authority's representative's (a) remark that the procedure laid down that in the case of any grey areas in the tender document the bidders had the opportunity to seek a clarification from the contracting authority but no such clarifications were sought in this instance, (b) claim that, during the adjudication process, the board

followed the specifications published in the tender document and it resulted that, whereas the contracting authority requested a substance of 96g/1000g, the appellant company indicated 89g/1000g which, evidently, did not match the specifications and that was the reason that led to the appellant company's disqualification, (c) reference to the fact that the awarded tenderer had attached the specifications of the product it offered - the product data sheet - where it was clearly indicated that the solubility in water was 96g/1000g at 20° C as requested in the tender document at clause 8.3.1.6, (d) reference to the fact that albeit the appellant company did insert a note where it tended to disagree with certain parts of the tender document yet the said appellant company failed to point out any different stand with regard to product solubility, (e) emphasis on the fact that what the contracting authority asked for did, in fact, exist and it was quite clear so much so that the other four tenderers submitted the solubility requested but the appellant company submitted something different with no accompanying explanation/s and (f) claim that whilst the product offered by the appellant company represented what the contracting authority was requesting in the tender, yet, it was also a fact that the product description submitted by the appellant company with regard to the solubility did not match that requested in the tender document,

reached the following conclusions, namely:

1. The Public Contracts Review Board feels that, whilst it is a fact that whereas the contracting authority requested a substance of 96g/1000g, the appellant company indicated 89g/1000g which, evidently, did not match the specifications and that was the reason that led to the appellant company's disqualification, yet, this Board opines that, the fact that, during the hearing, the same contracting authority's representatives' claimed that the product offered by the appellant company represented what the contracting authority was requesting in the tender document, is enough for this Board to conclude in favour of the appellant company, regardless of the contracting authority's insistence that the product description submitted by the appellant company with regard to the solubility did not match that requested in the tender document.
2. The Public Contracts Review Board feels that the offer as submitted by the appellant company was enough to enable the contracting authority to deliberate differently.

In view of the above this Board finds in favour of the appellant company and recommends that the said company's offer be reintegrated in the adjudication process.

Furthermore, the Public Contracts Review Board recommends that the deposit paid by the appellants should be reimbursed.

Alfred R Triganza
Chairman

Edwin Muscat
Member

Joseph Croker
Member

16 February 2011