

PUBLIC CONTRACTS REVIEW BOARD

Case No. 668

CT 4043/2013

Framework Agreement for the Supply of Ductile Iron Fittings.

The tender was published on the 20th March 2013. The closing date was the 14th May 2013. The estimated value of the tender was €349,000.

Five (5) bidders had submitted their offer.

On the 16th December 2013 J.P. Baldacchino & Co Limited filed an objection against the rejection of its offer as being not the cheapest offer and the proposed award to Superior Pipeline Products Limited.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Thursday 20th February 2014 to discuss these concerns.

Present for the hearing were:

J.P. Baldacchino & Co Limited - Appellant

Mr Adrian Baldacchino	Director
Dr Stephen Muscat	Legal Representative

Superior Pipeline Products Limited - Preferred Bidder

Mr Joseph Bugeja	Representative
Dr Robert Tufigno	Legal Representative

Water Services Corporation - Contracting Authority

Ing Mark Perez	Chairman Evaluation Board
Mr Jonathan Scerri	Secretary Evaluation Board
Mr Chris Agius	Member Evaluation Board
Mr Nigel Ellul	Member Evaluation Board
Mr Anthony Camilleri	Representative

Department of Contracts

Ms Caroline Debono	Procurement Manager
Ms Emily Magro	Procurement Manager

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

Dr Stephen Muscat on behalf of the appellant said that the contracting authority to ensure supply of these fittings and pipes, over a period of eighteen months by issuing such tenders and subsequently making orders for material as required. It results that the recommended bidder made an offer of over €260,000 while appellant offered €264,000 and at this stage there is a difference between bids of around €4,000. But appellant firm had also offered a discount of 8% provided the contracting authority ordered full container loads of material. The evaluation board deemed the appellant's offer, while being compliant, as not being the cheapest offer. In fact appellant's offer was both technically and administratively compliant. He contended that appellant's offer was the cheapest when taking into consideration the 8 % discount and the evaluation board was wrong when deciding otherwise.

Dr Stephen Muscat continued that the preferred bidder, when referring to Clause 3 – “Partial Orders,” interpreted this as meaning that the contractor had to accept partial orders. The preferred bidder also referred to clause 1.3 – ‘Instruction to Tenderers’ which deals with the unloading of containers. Clause 3 of the tender preamble states *“partial orders in accepting the conditions of this tender, the prospective contractor will be binding himself to accept partial orders of one or more items of the schedule.”* The schedule mentioned here is that submitted by the bidders in their bids. In the present case, this schedule lists a great number of items. The appellant he said, interpreted this to mean that the contracting authority could order part consignment of one of the items listed, but this would still be a container load. Partial Orders did not mean part container loads. There were commercial reasons for the contracting authority to order full container loads because the 8% discount would come into effect. He insisted that the contracting authority should order full container loads and thus obtain a cheaper price. This would amount to around €16,000 cheaper than the offer by the preferred bidder. There were also other practical and economic reasons for ordering full containers. According to the tender the minimum order would be of €50,000 but this does not make any sense.

The Chairman at this point wished to make some questions of the contracting authority.

Ing. Mark Perez, the Chairman of the Evaluation Board, on behalf of the contracting authority, replying to questions by the Chairman said that ordering container full loads made sense in some cases while it did not in other cases. Each order had to be assessed according to circumstances. When ordering full container loads one had to take into consideration the storage costs of the items ordered and one has to make certain forecast decisions that are sometimes tricky. The contracting authority has restricted storage facilities.

Dr Stephen Muscat for the appellant made reference to previous similar tenders, because the contracting authority needs regular supplies of the material. It resulted that the contracting authority had nearly always ordered full container loads and this had become the accepted practice. He cited a similar tender CT WSC/T/8/2011 where the appellant in that case had offered full container loads. In that case before this Board, the contracting authority did not submit any objections regarding container loads. The appellant in that case had offered different prices for container loads as in the present case, and the fact had not been an issue and the then objector was awarded the tender.

Ing Mark Perez said that it was true that the contracting authority had been ordering full

containers but in the last tender, the incumbent supplier, Electro Steel was not recommended because its offer included container loads. The contracting authority does not want full container loads. But Electro Steel had objected before this Board and won its objection. The contracting authority still held that it could not be bound by container loads but had to abide by the Board's decision. Furthermore should the evaluation board had taken account of the 8% discount, problems would have arisen regarding the payment of orders made, since if orders were issued on less than container full, the prices paid would be higher than those of the preferred bidder's. The contracting authority cannot be bound to order full containers.

Mr Jonathan Scerri on behalf of the contracting authority said that when the evaluation board encounters a bid involving discounts it has to refer to clause 17.5 of the Instructions to Tenderers. This clearly states that any discount is offered, this must be absorbed in the rates of the bill of quantity or the financial statement. The evaluation board could thus not take the discount into consideration.

Mr Mark Perez insisted that the discount offer was conditioned and would be difficult to implement since it covered only full containers. A comparison of the bids on a like with like basis could not be carried out, since the contracting authority could make orders for less than a container.

Mr Adrian Baldacchino on behalf of the appellant said that this is the third time that appellant had participated in such a tender. He said that appellant took into consideration the previous tenders and objections when submitting the present bid. A previous tender was awarded, following an objection, where the then appellant had offered precisely a discount on container loads and won the case and tender. The present appellant in that case had offered a fixed price. Having learnt from that episode, the appellant made a similar conditioned bid in the present case since it had become the accepted practice to offer discounts only if full containers were ordered.

Mr Mark Perez for the contracting authority remarked that the tender and objection referred to by Mr Baldacchino was for pipes. The present tender was for fittings and the authority could not be bound to order container loads of fittings.

Dr Stephen Muscat for the preferred bidder said that the appellant had asked for information from the contracting authority whether the discount had been taken into consideration in the evaluation or not. He said that the contracting authority failed to give an answer and his client thus had to file this objection.

Dr Robert Tugigno on behalf of the preferred bidder said that the tender in the case cited by appellant was not identical to the present tender and in any case each tender had to be adjudicated in its own merits. Appellant's bid, when examined in detail does not really give a discount but a consideration of a discount. This is not the same and should not be considered as being the same. At evaluation stage, the evaluators could not determine how the orders would be made, and therefore could not work out if the discount would apply or not. The evaluation board could thus not assess the cheapest offer. The appellant's offer also imposes conditions on the contracting authority to order full containers.

The hearing was at this point brought to an end.

This Board,

Having noted the Appellant's objection , in terms of the 'Reasoned Letter of Objection' dated 16th December 2013 and also through Appellant's verbal submissions during the hearing held on 20th February 2014, had objected to the decision taken by the pertinent Authority, in that:

- a) Appellant Company had also included an 8% discount on 'full container loads' deliveries. The Contracting Authority did not take this discount into consideration.**
- b) Appellant's bid was technically compliant and had the Evaluation Board took the discount offered; Appellant's bid would have been the cheapest and fully compliant.**
- c) Appellant contends that in accordance with clause 1.3 of the Instructions to tenderers, the latter had to accept 'partial orders'. In this regard, partial orders do not mean partial container loads.**

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

- a) The Contracting Authority could not be restricted to orders on a 'full container load' basis. Apart from other factors mainly the lack of storage facilities.**
- b) The discount offered by the Appellant was not practical to implement as this was only and solely condition to orders on a 'Full container load' basis and not on partial orders which the Contracting Authority would be opting for.**

Reached the following conclusions:

- 1. From the submissions made by both the Appellant Company and the Contracting Authority, it was made evidently clear that the discount offered by Appellant was conditional and in this regard the Contracting Authority cannot be bound to order ' Full container load' deliveries.**
- 2. The reasons given by the Contracting Authority for not taking into account the discount offered by the Appellant were practical and valid.**
- 3. The past 'full container load' deliveries were for pipes. The present tender in question is for fittings which entail a more complex exercise for the Contracting Authority to forecast the requirements in order to accommodate the 'Full load container' offer.**

- 4. Appellant should have sought clarifications prior to submission of the tender document.**

In view of the above, this Board finds against the Appellant Company, however, due to circumstances, this Board recommends that the deposit paid by the Appellant be reimbursed.

Dr. Anthony Cassar
Chairman

Dr. Charles Cassar
Member

Mr. Richard A. Matrenza
Member

25 March 2014