

PUBLIC CONTRACTS REVIEW BOARD

Case No. 790

WSC 575/2014

Tender for the Supply of DN 20 Class 2 Water Meters to the Water Services Corporation.

The call was published on the 28th November 2014. The closing date for the call was on the 8th January 2015. The estimated value of tender was €75,000.00 (Exclusive of VAT).

Three (3) offers had been received for this tender.

On the 30th January 2015 Joseph Cachia & Son Limited filed a letter of objection against the rejection of its offer as being technically non-compliant.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Wednesday the 11th March 2015 to discuss the objection.

Present for the hearing were:

Joseph Cachia & Son Limited - Appellant

Ms Maronna Filletti	Director
Mr Norman Miller	Representative
Dr Mark Simiana	Legal Representative
Dr Pierre Lofaro	Legal Representative

Attard Farm Supplies Limited - Preferred Bidder

Mr Joseph P Attard	Director
Mr Paul Refalo	Representative

Water Services Corporation- Contracting Authority

Mr Anthony Muscat	Chairperson Evaluation Board
Mr Anthony Camilleri	Secretary Evaluation Board
Mr Stephen Galea St John	Member Evaluation Board
Mr Mark Perez	EU Funding

Department of Contracts

Mr Kevin D'Ugo	Procurement Manager
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The Chairman made a brief introduction and asked the appellant's representative to make his submissions.

Dr Pierre Lofaro on behalf of the appellant asked the Board to hear the testimony of Ms Maronna Filletti who would explain facts.

Ms Maronna Filletti, ID No 786760M on behalf of the appellant, under oath explained that she was an Executive Director with the appellant firm. She stated that the tender had requested meter body length to be 190mm, clause 4.9 and appellant had erroneously quoted a body length of 165mm in the tender submission. This was done by mistake as appellant would not have submitted a non-compliant meter length if aware it was not compliant. She admitted that the appellant's compliance sheet showed 165 mm writer but the other supporting documentation was correct, and was for a length of 190mm. Appellant, when submitting the tender, through an oversight, omitted checking the information that had been given by the supplier, and submitted these as received. All the other specifications submitted by appellant referred to the correct length of 190 mm. Furthermore, appellant had submitted items according to the required standard and quoted the MIB standard. The tender had not asked for the production of certificates but appellant had declared the standard of the meters as per clause 2.1, and did not produce a certificate since none were requested. She explained that the literature submitted by appellant with the tender however, contained references to both 165 mm and 190 mm long meters. However the technical specifications submitted referred to 190 mm.

Ing. Mr Mark Perez on behalf of the contracting authority stated that on examining the letter of objection, it can be seen that the product offered by the appellant would have been compliant, but the evaluation board when adjudicating did not have this information available. Evaluation had to be done on what was submitted. The information before the evaluation board was that the meter was 165 mm long. Speaking about the MIB certification he said that the tender allowed for equivalent submissions but required that in such cases, the bidders had to show and prove that their submissions were equivalent. Appellant's tender application did not include any note of equivalence or proof of compliance. The evaluation board did not feel the need of clarification regarding the 165 mm since the appellant's tender was perfectly clear.

Ms Maronna Filletti, replying to remarks by the Chairman said that the appellant did not need to prove equivalence since the tender had asked for a standard and the appellant had complied and provided everything that had been requested. Certification was not included in the list of literature. Appellant had also submitted the requested metrological curve which proved compliance.

Dr Pierre Lofaro for the appellant insisted that the contracting authority should have been knowledgeable that the standard quoted by appellant was in fact compliant.

The Chairman remarked that in the tender Section 4 of the technical specifications there is a note that clearly explains *that "where in this tender a standard is quoted, it is to be understood that the Contracting Authority will accept equivalent standards. However, it will*

be the responsibility of the respective bidders to prove that the standards they quoted are equivalent to the standards requested by the Contracting Authority.”

Ms Maronna Filletti reiterated that it was not asked for. She also insisted that appellant had submitted the metrological curve that was requested. The literature showed that the meter submitted by appellant was available in both 165 and 190 lengths. It did not make sense to submit a 165 long meter in this case.

Mr Joseph Attard, Managing Director, on behalf of the preferred bidder made reference to a previous case 655 where the preferred bidder had objected to the award to Polidano Brothers in an analogous situation. This Board had decided that “incorrect information is not missing information.” The Board had decided that *“This Board notes that due to inefficient compilation of data to be submitted in the tender document, the appellant failed to provide a clear and vivid description of the product being offered by the same appellant.”* He contended that what was valid then is still valid in today’s case.

Dr Mark Simiana for appellant explained that there were two types of mistakes – one type that significantly affects the offer, the other type is subject to rectification. In giving too much weight to some mistakes the contracting authority is putting itself in a position to lose an advantageous offer. In the present case it was clear that meters should be 190 mm long. The technical specifications of the meters submitted by the appellant were the same except for the length. Thus it is clear that the submission of 165mm meters was a mistake. It was the appraisal by the contracting authority that was wrong since the contracting authority had enough submitted literature from the appellant to reach the conclusion that what was submitted was equivalent. Appellant chose to prove equivalence through the submitted literature and not through a certificate. Certificates were not demanded but it was left up to bidders to provide proof of equivalence.

Ms Maronna Filletti insisted and reiterated that appellant had submitted the metrological curve.

At this point the hearing was closed.

This Board

Having noted the Appellant’s objection in terms of the “Reasoned Letter of Objection” dated 29th January 2015 and also through the Appellant’s verbal submissions during the Public Hearing held on 11th March 2015 had objected to the decision taken by the Pertinent Authority in that:

- a) **Although the Appellant had erroneously quoted a meter body length of 165mm, the supporting Documentation and Technical Specification accompanying the Tender Document was correct, in that the same Documentation referred to the Body Length of 190mm. This was purely an oversight on the part of the Appellant and the same claims that the Contracting Authority should have asked for a clarification;**
- b) **The Appellant also contends that they were not required to prove the equivalent of the standard Body Length as dictated in the Tender Document since the Tender requested a Standard and that the one submitted was in fact compliant.**

Having considered the Contracting Authority’s verbal submissions during the Public Hearing held on 11th March 2015, in that:

- a) The Contracting Authority maintains that the Evaluation Process had to be processed on the Information submitted by the Appellant. The latter submitted a Body Length of 165mm and not 190mm as dictated in the Tender Document;**
- b) The Appellant did not submit any indication or note of Equivalence of standard as was clearly indicated in Section 4 of the Tender Document.**

Reached the Following Conclusions:

- 1. With regards to the Appellant’s First Contention, this Board has on many instances emphasised the fact that incorrect technical information submitted by an appellant in a Tender Document does not amount to an error or an oversight. The Evaluation Committee has to adjudicate on the specific information submitted in the Appellant’s Tender Document. At the same time, this Board opines that the Evaluation Committee could not have asked for clarification of the Body Length of the Meter. If the Evaluation Committee asked for such a clarification, this would have represented a “rectification”, which would not be acceptable with regards to the “Transparency and Fairness” of the Evaluation Process. In this regard, this Board does not uphold the Appellant’s First Contention;**
- 2. With respect to the Appellant’s Second Contention, this Board would point out that Section 4 of the Technical Specifications, a clear and specific note was included which stated that “Where in this Tender, a standard is quoted, it is the responsibility of the respective Bidders to prove that the standards quoted by the same are equivalent to those requested by the Contracting Authority”. This Board opines that it was credibly proven that the Appellant Company failed to submit such information and in this regard, this Board does not uphold the Appellant’s Second Contention**

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 Ancillieri
Member

27 March 2015