

PUBLIC CONTRACTS REVIEW BOARD

Case No. 841

WSC 696/2012

Tender for the Supply of Hydraulic Jackhammers.

The tender was published on the 12th April 2013. The closing date was the 24th May 2013. The estimated value of tender is €84,746.00 (Exclusive of VAT).

Five (5) offers had been received for this tender.

On the 23rd March 2015 Swaey Brothers Limited filed an objection against the decision of the Contracting Authority to disqualify their tender.

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 18th August 2015 to discuss the objection.

Present for the hearing were:

Swaey Brothers Limited:

Mr Quentin Vella	Representative
Mr Mario Magri	Representative
Dr Massimo Vella	Legal Representative

Guillaumier Limited:

Mr Anthony E Guillaumier	Representative
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Water Services Corporation:

Mr Stefan Riolo	Chairperson Evaluation Board
Ms Maruska Bonnici	Secretary Evaluation Board
Mr Stephen Galea St John	Member Evaluation Board
Mr Sigmund Galea	Member Evaluation Board
Mr Joseph Gregoraci	Member Evaluation Board
Mr Jonathan Scerri	Representative

Following a brief introduction by the Chairman, the Appellant's representative was invited to make his submissions.

Dr Massimo Vella for the Appellants explained that their tender had been disqualified because "*the hammer operating pressure is rated between 95 – 110 bar which is less than that requested in clause 4.5.3 which stipulate 100 – 150 bar.*" He referred to a report drawn up by an engineer Mario Magri which states that since the equipment submitted by the Appellant operated between 100 and 110 bar it was compliant with the tender requisites.

Mr Mario Magri ID No. 34573M, a Mechanical Engineer, under oath, stated that he had prepared a report at the request of Appellants. The tender requested a range from 100 to 150 bar while the Appellants offered equipment that operates between 95 to 110 bar. This means that during use, this equipment delivers 110 bar maximum which is within the nominal pressure range requested. The nominal pressure is the pressure generated when the equipment is being used.

Dr Massimo Vella for the Appellants referred to a statement by the manufacturer which confirms that the equipment is compliant since the tender requested a range and the equipment fell within this range.

Mr Jonathan Scerri on behalf of the Contracting Authority explained that they desired equipment within a range. The Evaluating Board had wanted to ask the Appellants clarification on the working pressure of their equipment but their request was refused by the DCC since it seemed that the submitted equipment did not meet specifications and there was no need for clarifications.

Mr Stefan Riolo for the Contracting Authority, replying to the Chairman, explained that the Contracting Authority wanted equipment that when used without any load gave 100 bar and when loaded reached 150 bar. The authority wanted a heavy duty hammer and preferred equipment that reached 150 bar so a nominal pressure of 100 to 150 was requested. Appellants offered equipment that gave from 95 to 110 but this was the working pressure and not the nominal. The Evaluation Board wanted to ask for clarification but was advised not to.

Dr Massimo Vella contended that the tender mentioned working pressure and there was a certain ambiguity in the wording. It could be that a clarification was in order but an incorrect decision was taken not to ask this.

The Chairman asked the Contracting Authority's representative whether a pressure of 110 bar worked and could be used for the purpose required.

Mr Stefan Riolo for the Contracting Authority said that this was between 100 and 150 so it would suffice.

Mr Tony Guillaumier on behalf of the Preferred Bidder contended that Appellant should have asked for clarification if he had any difficulty on the specifications.

At this point the hearing was closed.

This Board,

Having noted that the Appellant's objection, in terms of the "Reasoned Letter of Objection" dated 23rd March 2015 and also through the Appellant's verbal submissions during the Public Hearing held on the 18th August 2015, had objected to the decision taken by the Contracting Authority, in that:

- a) The Appellant contends that his offer was discarded due to the fact that the "Hammer operating pressure", offered by the Appellant, was in the range of between 95-110 bar whilst the requested range was between 100-150 bar. In this regard, the Appellant claims that the specifications of the product does fall within the stipulated range;**
- b) The Appellant also claims that if in doubt, the Evaluation Committee could have asked for a clarification.**

Having considered the Contracting Authority's verbal submissions during the Public Hearing held on 18th August 2015, in that:

- a) The Contracting Authority dictated a range of 100-150 bars to ensure proper execution of works to be carried out by the equipment being tendered for;**
- b) The Evaluation Committee confirmed that it was willing to ask for clarification however, this was rejected by Higher Authority, as the Appellant's offer was deemed to be "Administratively non compliant".**

Reached the following conclusions:

- 1. With regards to the Appellant's first grievance, this Board justifiably contends that the Technical Specifications of the Tender dictated a range of 100-150 bar. In this Board's opinion, a range constitutes a set of limited measurements through which the equipment can operate. The range quoted by the Appellant was 95-110 bar so that the maximum of 110 bars does in fact, fall within the dictated range of 100-150 bar.**

Through credible technical submissions made by the Contracting Authority, this board was also comforted by the Contracting Authority's admission that the Appellant's offer was within the dictated range of 100-150 bar and the same equipment was also suitable for the Tendered Supply. In this regard, this Board upholds the Appellant's first grievance.

- 2. With regards to the Appellant's second grievance, this Board justifiably notes that the Evaluation Committee was willing to ask for clarifications, however, their request was turned down by Higher Authority. In this regard, this Board opines that the decision for the Evaluation Committee to ask for clarification was not only correct but appropriate, just and transparent.**

This Board contends that a clarification would have been the appropriate action, due to the fact that the Evaluation Committee would have clarified and confirmed information submitted by the Appellant and not otherwise. In this

regard, this Board upholds the Appellant's second grievance.

In view of the above, this Board recommends that:

i) The Appellant's offer be re-integrated in the Evaluation Process;

ii) The deposit paid by the Appellant Company is to be reimbursed

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancillieri
Member

1 September 2015