

## **PUBLIC CONTRACTS APPEALS BOARD**

### **Case No. 236**

#### **Adv. CT/491/2009; CT/2731/2009**

#### **Provision of an inspection report on playing field sites within Malta and Gozo Local Councils responsibilities**

This call for tenders was published in the Government Gazette on 18 December 2009. The closing date for this call for offers was 2 April 2010.

The estimated value of this tender was Euro 56,000.

Eleven (11) tenderers submitted their offers.

JGC Ltd filed an objection on 28 June 2010 against the decision to re-issue the call for tenders since none of the bidders were compliant with tender conditions and specifications.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Carmel J Esposito as members convened a public hearing on Wednesday, 27 October 2010 to discuss this objection.

Present for the hearing were:

#### **JGC Ltd**

Dr Rita Mifsud	Legal Representative
Mr Simon Micallef	Managing Director
Mr Pierre Cuschieri	Technical Manager

#### **Local Government Department**

##### **Adjudicating Board**

Mr Silvio Frendo	Chairman
Mr Pio Farrugia	Member
Mr Mark Mizzi	Member

#### **Department of Contracts**

Mr Francis Attard	Director General (Contracts)
-------------------	------------------------------

After the Chairman's brief introduction as to how the hearing was going to be conducted, the appellant company's representative was invited to explain the motives of the objection.

Dr Rita Mifsud, legal representative of JGC Ltd, the appellant company, explained that, by letter dated 12<sup>th</sup> June 2010, the Contracts Department informed her client that its offer was not compliant due to the non submission of (i) proof of level of satisfaction of its clients in similar services and (ii) proof of financial and economic standing as per clause 4.5 of the tender document.

### ***Proof of Level of Satisfaction of Clients in Similar Services***

Dr Mifsud submitted that the level of inspections hitherto carried out in Malta were not up to the standard requested in the tender document – Playground Equipment Standards EN 1176, 1177 and 14960 listed at Annex III of the tender document - and, as a result, her client could not and, in fact, did not, submit the proof requested but, instead, opted to submit ample proof as submitted by their partner, namely, RoSPA Playsafety Ltd of the UK (Royal Society for the Prevention of Accidents), which entity had a track record in Europe, together with details of specific projects undertaken by same for several different clients.

Mr Simon Micallef, Managing Director of the appellant company, confirmed that the inspections to playgrounds carried out locally were not of the standard required in the tender document however the ROSPA representative that his firm was going to bring over was an authority in this field. Mr Micallef added that, over and above the tender requirements, his firm was also offering to train local staff so that, in the future, such inspections would be undertaken by local personnel.

On his part, Mr Pierre Cuschieri, Technical Manager of JGC Ltd, remarked that there were only about 25 registered playground inspectors in Europe who could effect the inspections up to the standards indicated in the tender document.

Mr Silvio Frendo, Chairman of the adjudicating board, stated that clause 4.6 (c) provided for:

*“Proof of number of similar services completed by tenderer including proof of level of satisfaction of their clients”*

Mr Frendo remarked that the contracting authority did not, specifically, request services rendered at the level indicated in the tender but the request was left open for bidders to include any kind of similar services. The same contracting authority's representative added that the appellant company did not submit anything in this regard but only a list of works carried out by ROSPA, its subcontractor, which, then again, was not accompanied by certificates that demonstrated proof of the level of satisfaction attained and duly confirmed by the latter's clients.

## ***Proof of Financial and Economic Standing***

Dr Mifsud referred to clause 4.5 of the tender document which read:

*“To be eligible for participation in this tender procedure, tenderers must prove to the satisfaction of the Contracting Authority that they comply with the necessary legal, technical and financial requirements and have the wherewithal to carry out the contract effectively.”*

and submitted that the contracting authority did not specify what type of proof/documentation was required as it should have done according to Regulation 50 which read as follows:

*“(1) Proof of economic operator’s economic and financial standing may, as a general rule, be furnished inter alia, by one or more of the following:*  
*(a) appropriate statements from banks, or where appropriate, evidence of relevant professional indemnity insurance;*  
*(b) the presentation of balance-sheets or extracts therefrom, where publication of the balance sheets is required under company law in the country in which the economic operator is established;*  
*(c) a statement of the economic operator’s overall turnover and, where appropriate its turnover in respect of the products, works or services to which the contract relates for the three previous financial years depending on the date on which the economic operator was set up or the economic operator started trading, as far as the information on these turnovers is available.*

*(4) Contracting authorities shall specify in the contract notice or in the invitation to tender, which references mentioned in subregulation (1) have been chosen and which must be provided, and of any others it deems fit.”*

Dr Mifsud remarked that her client did not submit any proof of financial and economic standing because it was not specified in the tender document.

The same appellants’ legal representative added that another point was that JGC Ltd was registered in January 2009 and, as a consequence, the audited accounts were not available by the 2<sup>nd</sup> February 2010, the closing date of the tender. Dr Mifsud confirmed that no note was inserted in the tender submission to that effect and, at this stage, she appealed to the PCAB to consider the spirit of the law in the sense that, shortly after the closing date of this tender, guidelines were issued and, eventually, the regulations were amended to provide for a measure of flexibility and for the outright rejection of tenders on purely administrative shortcomings to be avoided.

Mr Micallef remarked that it was a great pity that his firm was being disqualified on administrative grounds when it was equipped and prepared to render a service of the highest standard.

*At this point during the hearing it was noted that, practically, all the tenderers failed to submit proof of financial and economic standing.*

The Chairman PCAB remarked that, even if the tender document did not specify the documents required as proof of financial standing, the fact remained that it did request proof to that effect and, therefore, the options open to the tenderer were either for the latter to ask for a clarification or else to submit document/s that it felt presented proof enough as to its economic standing in which case the contracting authority would have had to consider it since it was not specific in its request. The Chairman PCAB continued his intervention by stating adding that it was not an option for the tenderers to disregard completely clause 4.5 because that was required to render the bidder eligible to participate and, besides, the contracting authority had the right to establish that the awarded tenderer had, among other things, the financial stability to execute the contract.

The Chairman PCAB stated that the adjudicating board had to evaluate amongst alternative bids on the basis of the documentation submitted and according to regulations in force at the time of adjudication and to ensure a level playing field among all participating tenders.

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 1 July 2010 and also through their verbal submissions presented during the public hearing held on 27 October 2010 had objected to the decision taken by the General Contracts Committee;
- having taken note of the appellants’ remarks in respect of the fact that (a) the level of inspections hitherto carried out in Malta were not up to the standard requested in the tender document – Playground Equipment Standards EN 1176, 1177 and 14960 listed at Annex III of the tender document, (b) it could not and, in fact, did not, submit the proof requested but, instead, opted to submit ample proof as submitted by their partner, namely, RoSPA Playsafety Ltd of the UK (Royal Society for the Prevention of Accidents), which entity had a track record in Europe, together with details of specific projects undertaken by same for several different clients, (c) over and above the tender requirements, the company was also offering to train local staff so that, in future, such inspections would be undertaken by local personnel, (d) the contracting authority did not specify what type of documentary proof/of financial and economic standing was required as it should have done according to Regulation 50 and (e) JGC Ltd was registered in January 2009 and, as a consequence, the audited accounts were not available by the 2<sup>nd</sup> February 2010, the closing date of the tender;
- having also taken note of the contracting authority’s representatives’ (a) claim that the contracting authority did not, specifically, request services rendered at the level indicated in the tender but the request was left open for bidders to include any kind of similar services and (b) claim that the appellant company did not submit any proof of number of similar services completed by tenderer but only a list of works carried out by ROSPA, its subcontractor, which, then

again, was not accompanied by certificates that demonstrated proof of the level of satisfaction attained and duly confirmed by the latter's clients;

- having taken cognizance of the fact that the appellant company's representatives confirmed that no note was inserted in the tender submission regarding the lack of formal financial reporting information available to company management which prevented the latter from providing required evidence of its financial standing;
- having duly considered the appellant company's plea for the PCAB's consideration to be within the spirit of the law in the sense that, shortly after the closing date of this tender, guidelines were issued and, eventually, the regulations were amended to provide for a measure of flexibility and for the outright rejection of tenders on purely administrative shortcomings to be avoided,

reached the following conclusions, namely:

1. The PCAB regards the submission of documentary evidence corroborating the level of satisfied clients as something which could have easily been clarified by the appellant company. Indeed, any submissions made, albeit with all the best of intentions, necessitate the prior attainment of the formal endorsement of the respective contracting authority and no bidder should expect to, arbitrarily, decide what is best or not. This Board argues that tender specifications are, generally, expected to be met by all participants and that whoever feels that any of such specifications cannot be met or may be can be adhered to in a better way should first, formally, address such issue with the competent authority.
2. The PCAB feels that even if the tender document did not specify the documents required as proof of financial standing, the fact remained that it did request proof to that effect and, therefore, the options open to the tenderer were either for the latter to ask for a clarification or else to submit document/s that it felt presented proof enough as to its economic standing in which case the contracting authority would have had to consider it since it was not specific in its request. This Board cannot tolerate an instance wherein a participating tenderer decides, arbitrarily, what to insert or not in a tender document duly submitted to a contracting authority.
3. The PCAB opines that an adjudicating board had to evaluate amongst alternative bids on the basis of the documentation submitted and according to regulations in force at the time of adjudication thus ensuring a level playing field among all participating tenders. As a consequence, at this juncture, this Board cannot allow the introduction of new legal provisions published after the closing date of this particular call or new operational praxis.

As a consequence of (1) to (3) above this Board finds against the appellant company.

In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the said appellants should not be reimbursed.

Alfred R Triganza  
Chairman

Edwin Muscat  
Member

Carmel J Esposito  
Member

*12 November 2010*