

PUBLIC CONTRACTS REVIEW BOARD

Case No. 504

06/2012

Tender for the Supply & Installation of Playing field equipment, soft flooring and fencing in Gnien Prof. Anton Tabone and Gnien Mons. Guzeppi Minuti

This call for tenders was published in the Government Gazette on the 11th September 2012. The closing date for this call with an estimated budget of € 60,000 was the 12th October 2012.

Seven (7) tenderers submitted their offers.

FGL Commercial Sales Ltd filed an objection on the 1st November 2012 against the decision of the Contracts Department to recommend the award to JGC Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Joseph Croker and Mr Carmel Esposito as members convened a public hearing on Friday, 7th December 2012 to discuss this objection.

FGL Commercial Sales Ltd

Dr John Gauci	Legal Representative
Dr David Zahra	Legal Representative
Mr Gordon Dimech	Representative
Mr Tony Bonello	Representative

JGC Ltd

Mr Pierre Cuschieri	Representative
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Birzebbuga Local Council

Mr Victor Bugeja LP	Legal Representative
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Evaluation Board

Mr Joseph Farrugia	Mayor
Mr Joseph Baldacchino	Councillor
Mr Emmanuel Mangion	Councillor
Mr Carol Muscat	Councillor
Ms Maria Galea	Executive Secretary



After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of the company's objection.

Dr John Gauci, legal representative of FGL Commercial Sales Ltd, the appellant company, made the following submissions:

- i. by letter dated 29th October 2012 the appellant company was informed that the award of the tender was recommended in favour of JGC Ltd;
- ii. according to Reg. 28 (3) of the Public Procurement Regulations the contracting authority would have to determine the award of public contracts on the following criteria: (a) the most economically advantageous offer or (b) the lowest price offered compliant with the tender specifications;
- iii. in this case, the contracting authority did not indicate the criteria it intended to apply, including the relative weighting on such aspects as experience and price, as per Regs. 28 (4) and (5) of the Public Procurement Regulations, and, as a consequence, this tender should have been awarded to the lowest priced compliant tender;
- iv. according to clause 12 of the tender document the award was to be made on the basis of the most favourable tender, provided that the tender has been submitted in accordance with the requirements of the tender document;
- v. the price quoted by the appellant company was €94,117.84 whereas the recommended offer amounted to €108,111.85 or about €14,000 more expensive as per 'Schedule of Tenders';
- vi. the contracting authority brought forward the following reasons to justify the award, namely:-
 - a. *Il-Kuntrattur għandu esperjenza vasta u hadem f'bosta Kunsilli Lokali ta' Malta u Entitajiet tal-Gvern* – this was not a selection criterion and, for that matter, even the appellant company had considerable experience in this sector;
 - b. *Il-Bord ipprefera jmur għall-apparat tal-plastik fuq apparat tal-metal jew injam minhabba esperjenza li għandu fuq manutenzjoni* – according to page 45 of the tender document the materials had to be plastic or timber or metal but nowhere in the tender document was it laid down that the equipment had to be made of plastic or that preference would be given to equipment made of plastic;
 - c. *Il-kuntrattur rakkomandat ta diversi xelti għal kull talba u deskrezzjoni fid-dettall fuq kull item fejn il-Bord seta' jkollu stampa cara ta' x'inhu jagħzel* – even the appellant company had provided a lot of details including pictures and technical literature;
 - d. *Għalkemm ma kienx l-orhos offerent, it-prezz kien kompetenti* –

besides making no sense, it was not a question of a 'competent price' (perhaps a more appropriate term would have been 'competitive') because the tender had to be awarded to the cheapest compliant tender;

- vii. *Il-Kuntrattur offra* maintenance agreement *ghal 12-il xhar u training lil Kunsill Lokali fuq* inspection *tal-Playing Fields* – this was not requested in the tender document and, as a result, the appellant company should not be excluded because it did not offer what was not requested in the first place.
- viii. it was evident that the appellant company had submitted a compliant tender with the cheapest price and should therefore be awarded this contract.

Mr Victor Bugeja, representing the contracting authority, submitted that:-

- a. after evaluating the tenders received on a like-with-like basis in terms of material and type of equipment – not according to the global figure quoted - it emerged that the difference between the recommended offer, €87,189,96, and the appellant company's offer, €87,783,15, amounted to a mere €600 or so;
 - b. the contracting authority was not bound to accept the lowest offer so much so that Clause 11 of the tender document provided that *'The local council shall have the right to reject any or all the tenders and The local council is not bound to accept any tender'*;
 - c. the fact that the tender document requested equipment made of plastic or metal or timber meant that the contracting authority was inclined to consider those types of equipment and materials but then it would select the most suitable item/s;
- and
- d. it turned out that, during evaluation, most of the items proposed by the appellant company were made of wood whereas those proposed by the recommended tenderer were made of plastic and when considering the eventual maintenance costs, the experience of the bidders and the minor overall price difference, the local council decided in favour of JGC Ltd.

Ms Maria Galea, executive secretary of the Birzebbuga Local Council, explained that the playing area was divided into various sections and for each section bidders were requested in the bill of quantities to propose different types of equipment, such as a swing, a climber, a slide and so on, made of plastic or wood or metal and then the local council would choose one of them, say, a swing, and, for overall pricing purposes for that particular section, only the price of the swing of all the bidders would be taken into account – eliminating from the equation the other equipment not chosen for that particular section. She added that when that exercise was carried out on a like-with-like basis in respect of all the sections the overall price difference between the offers of recommended bidder and the appellant company was reduced to about €600.

The Chairman Public Contracts Review Board remarked that:-

- i. such considerations as preference to plastic over timber and metal due to maintenance costs should have been included from the start in the tender document otherwise, as things stood, items made of wood or metal were equally compliant and bidders tended to offer the cheapest compliant items;
 - ii. if bidders were requested to, preferably, offer items made of plastic then a bidder might have offered more than one option, say, one of plastic items and another of wooden or metal items;
- and
- iii. it was not acceptable for the contracting authority to express its preference to plastic - even if, possibly, such preference could have made much more sense - during the evaluation process but, for the sake of fairness and transparency, such preferences should have been laid down in the tender document.

Mr Bugeja stated that:-

- a. it was the intention of the contracting authority to inquire what the market had to offer in terms of playing field equipment and that was the reason why the specifications were left rather open;
- b. the appellant company offered certain attractive items which deserved consideration but the tender was issued in such a way that it had to be awarded to one bidder and not split between more than one bidder;
- c. the evaluation board had to have a measure of discretion and that was reflected in clause 11 of the tender document otherwise one might as well conduct the evaluation through a computerised process.

The Chairman Public Contracts Review Board remarked that in order to obtain feedback as to what the market had to offer the contracting authority should have issued a call for expression of interest as part of its market research and not a call for tenders. He added that the remit of the Public Contracts Review Board was to ascertain that the tendering process was fair and transparent to all and not to replace the evaluation board by re-examining the bids received.

Dr Gauci noted that the tender specifications were drawn up by Architect William Lewis, the same person who drew up the technical evaluation on behalf of Birzebbuga Local Council and once at technical evaluation stage Architect Lewis considered plastic items better than wooden or metal items then he ought to have inserted such a preference in the tender specifications. He added that difference in the prices quoted was about €14,000 and, apparently, it was only during evaluation that there was some sort of re-evaluation of the prices in which case the appellant company's offer remained the cheapest, even if by €600.

At this point the hearing came to a close.

This Board,

- having noted that the appellant company, in terms of their 'reasoned letter of objection' dated the 1st November 2012 and also through their verbal submissions presented during the hearing held on the 7th December 2012, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by letter dated 29th October 2012 the appellant company was informed that the award of the tender was recommended in favour of JGC Ltd, (b) according to Reg. 28 (3) of the Public Procurement Regulations the contracting authority would have to determine the award of public contracts on the following criteria (1) the most economically advantageous offer or (2) the lowest price offered compliant with the tender specifications, (c) in this case, the contracting authority did not indicate the criteria it intended to apply, including the relative weighting on such aspects as experience and price, as per Regs. 28 (4) and (5) of the Public Procurement Regulations, and, as a consequence, this tender should have been awarded to the lowest priced compliant tender, (d) according to clause 12 of the tender document the award was to be made on the basis of the most favourable tender, provided that the tender has been submitted in accordance with the requirements of the tender document, (e) the price quoted by the appellant company was €94,117.84 whereas the recommended offer amounted to €108,111.85 or about €14,000 more expensive as per 'Schedule of Tenders', (f) the contracting authority brought forward the following reasons to justify the award, namely, (1) *Il-Kuntrattur għandu esperjenza vasta u hadem f'bosta Kunsilli Lokali ta' Malta u Entitajiet tal-Gvern* – this was not a selection criterion and, for that matter, even the appellant company had considerable experience in this sector, (2) *Il-Bord ipprefera jmur għall-apparat tal-plastik fuq apparat tal-metal jew injam minħabba esperjenza li għandu fuq manutenzjoni* – according to page 45 of the tender document the materials had to be plastic or timber or metal but nowhere in the tender document was it laid down that the equipment had to be made of plastic or that preference would be given to equipment made of plastic, (3) *Il-kuntrattur rakkomandat ta diversi xelti għal kull talba u deskrizzjoni fid-dettall fuq kull item fejn il-Bord seta' jkollu stampa cara ta' x'inhu jagħzel* – even the appellant company had provided a lot of details including pictures and technical literature, (4) *Għalkemm ma kienx l-orħos offerent, it-prezz kien kompetenti* – besides making no sense, it was not a question of a 'competent price' (perhaps a more appropriate term would have been 'competitive') because the tender had to be awarded to the cheapest compliant tender, (5) *Il-Kuntrattur offra maintenance agreement għal 12-il xhar u training lil Kunsill Lokali fuq inspection tal-Playing Fields* – this was not requested in the tender document and, as a result, the appellant company should not be excluded because it did not offer what was not requested in the first place, (g) it was evident that the appellant company had submitted a compliant tender with the cheapest price and should therefore be awarded this contract, (h) the tender specifications were drawn up by Architect William Lewis, the same person who drew up the technical evaluation on behalf of Birzebbuga Local Council and once at technical evaluation stage Architect Lewis considered plastic items better than wooden or metal items then he ought

to have inserted such a preference in the tender specifications and (i) the difference in the prices quoted was about €14,000 and, apparently, it was only during evaluation that there was some sort of re-evaluation of the prices in which case the appellant company's offer remained the cheapest, even if by €600;

- having considered the contracting authority's representative's reference to the fact that (a) after evaluating the tenders received on a like-with-like basis in terms of material and type of equipment – not according to the global figure quoted - it emerged that the difference between the recommended offer, €87,189,96, and the appellant company's offer, €87,783,15, amounted to a mere €600 or so, (b) the contracting authority was not bound to accept the lowest offer so much so that Clause 11 of the tender document provided that '*The local council shall have the right to reject any or all the tenders and The local council is not bound to accept any tender*', (c) the fact that the tender document requested equipment made of plastic or metal or timber meant that the contracting authority was inclined to consider those types of equipment and materials but then it would select the most suitable item/s, (d) it turned out that, during evaluation, most of the items proposed by the appellant company were made of wood whereas those proposed by the recommended tenderer were made of plastic and when considering the eventual maintenance costs, the experience of the bidders and the minor overall price difference, the local council decided in favour of JGC Ltd, (e) the playing area was divided into various sections and, for each section, bidders were requested in the bill of quantities to propose different types of equipment, such as a swing, a climber, a slide and so on, made of plastic or wood or metal and then the local council would choose one of them, say, a swing, and, for overall pricing purposes for that particular section, only the price of the swing of all the bidders would be taken into account – eliminating from the equation the other equipment not chosen for that particular section, (f) when that exercise was carried out on a like-with-like basis in respect of all the sections the overall price difference between the offers of recommended bidder and the appellant company was reduced to about €600, (g) it was the intention of the contracting authority to inquire what the market had to offer in terms of playing field equipment and that was the reason why the specifications were left rather open, (h) the appellant company offered certain attractive items which deserved consideration but the tender was issued in such a way that it had to be awarded to one bidder and not split between more than one bidder and (i) the evaluation board had to have a measure of discretion and that was reflected in clause 11 of the tender document otherwise one might as well conduct the evaluation through a computerised process,

reached the following conclusions, namely:

1. The Public Contracts Review Board disagrees with the contracting authority's stand wherein it was claimed that it was the intention of the contracting authority to inquire what the market had to offer in terms of playing field equipment and that was the reason why the specifications were left rather open. This Board recognizes the fact that such considerations as, for example, preference to plastic over timber and metal due to maintenance costs, should have been included from the start in the tender document otherwise, as things stood, items made of wood

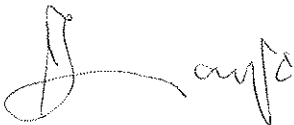


or metal were equally compliant. The Public Contracts Review Board concurs with the point raised by the appellant company, namely that whilst, according to page 45 of the tender document, the materials had to be plastic or timber or metal, yet, nowhere in the tender document, was it laid down that the equipment had to be made of plastic or that preference would be given to equipment made of plastic.

This Board contends that it was not acceptable for the contracting authority to express its preference for plastic - even if, possibly, such preference could have made much more sense – during the evaluation process but, for the sake of fairness and transparency, such preferences should have been laid down in the tender document.

2. With regard to observations made by the evaluation board relating to level of experience, namely, *Il-Kuntrattur għandu esperjenza vasta u ħadem f'bosta Kunsilli Lokali ta' Malta u Entitajiet tal-Gvern*, this Board agrees with the argument presented by the appellant company, namely that this was not a selection criterion and, for all that matters, even the appellant company had considerable experience in this sector.
3. The Public Contracts Review Board argues that, in order to obtain feedback as to what the market had to offer, the contracting authority should have resorted to other means which would have been more transparent and less costly for all potential interested parties. This Board cannot allow for such insensitivity towards the waste of such human and financial resources to pass unnoticed. As a matter of fact, the Public Contracts Review Board would like to express its total reservations regarding such practices being adopted which could very well lead to lack of a fully transparent 'modus operandi'.
4. This Board, whilst agreeing with the contracting authority's observation, namely that the evaluation board had to have a measure of discretion, yet, it also contends that this has to be taken within the scope of the specifications as formally presented by the contracting authority.

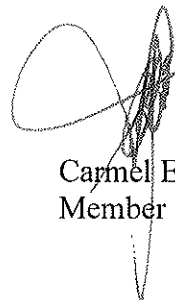
In view of the above this Board finds in favour of the appellant company and, apart from recommending that the deposit paid by the same appellant company for the appeal to be lodged should be reimbursed also recommends that the appellant company's bid be reintegrated in the evaluation process.



Alfred R Triganza
Chairman



Joseph Croker
Member



Carmel Esposito
Member

14 December 2012