

PUBLIC CONTRACTS REVIEW BOARD

Case No. 582

MXLC 02/2013

Tender for Upgrading and Embellishment of Play Area at il-Maghluq Marsaxlokk.

The tender was published on the 8th March 2013. The closing date was the 9th April 2013.

The estimated value of the Tender was €82,000 - €120,000 (Exclusive of VAT).

Four (4) bidders submitted their offers.

On the 30th April 2013, L&S Technical Consulting Limited filed an objection, against a decision by the contracting authority, Marsaxlokk Local Council to award the tender to JGC 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 August 2013 to discuss the appeal.

Present:

L&S Technical Consulting Limited - Appellants

Mr Leslie Pavia	Representative
Dr John Bonello	Legal Representative

JGC Limited – Recommended Bidder

Mr Pierre Cuschieri	Representative
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Marsaxlokk Local Council – Contracting Authority

Mr Edric Micallef	Mayor
Mr Duncan Hall	Executive Secretary
Dr Luciano Busuttil	Legal Representative
Arch William Lewis	Representative

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

Dr John Bonello on behalf of the appellant company stated that the main issues of contention in this tender arose after the adjudication of the tender. During the bidding stage there had been some requests for clarification about which there were some doubts. When the award was published it became evident that this tender had a basic problem that was crucial in Public Procurement. i). Bidders were asked to submit variant solutions in a way that precluded comparison of "like with like". The way the tender was formulated and the information given by the contracting authority to the bidders allowed them to give variant solutions, so in the adjudication stage it became impossible to compare bids on a level playing field. Tenderers could offer different options. ii). The way the Bills of Quantities were given allowed subjective criteria in the adjudication stage. It is the prerogative of the contracting authority to ask for the equipment it needs, and so it should have been more specific in the specifications. iii). Another issue is that when clarifications were requested, the resulting explanations were not sent to all the bidders, as required by the Regulations. iv). Yet another issue was about the requested quantities. These were greater than what was in fact required. Citing for example the fencing, where more than double the amount required was requested. The offer by bidders was per meter run, but bidders could obtain a more favorable price when purchasing greater quantities, so when delivery of smaller amounts was made they would be out of pocket. Dr Bonello explained that this being a relatively small tender, the smallest difference in price had a more pronounced effect. He insisted that adjudication of the tender was made on subjective issues.

Dr Luciano Busuttill for the contracting authority started by explaining that the clarifications were sent to the appellant and produced copies of the relevant emails.

Dr John Bonello explained that the clarifications to appellant's queries were only sent to appellant and were not sent to all the other bidders as required by Regulations. Clarifications became part of the tender document and so the contracting authority had to inform all the bidders.

Mr Duncan Hall, the Executive Secretary of the Marsaxlokk Local Council confirmed that request for clarification had been received from appellant, but as the law only permits addenda to the document up to seven days before the closing date, and the appellant's request came in late, there was no time to circulate to all bidders, since the seven day period had elapsed. Rather than leaving appellant without reply, it was decided to give him the information requested. This was of minimum importance regarding the Bills of Quantity. It had been made clear in the Bills of Quantity that the measurement and quantities were only given as guidance.

Dr Luciano Busuttill said that the tender gave bidders a template of what was needed and left it up to them to propose solutions. Adjudication had to take into consideration the Local Council's needs and constraints. The Council's Architect studied all the bids tendered and drew up a report. The Council then adjudicated the tender basing this on the Architect's report. He claimed that the deposit made by appellant in this case was not according to regulations and also that the appellant had submitted two Bills of Quantity within the same

tender, and this was also not according to the tender document.

Dr John Bonello stated that the submissions made by the contracting authority confirm the assertion the appellant made in the appeal, that the way the tender was formulated did not allow for comparison of like with like. The fact that the contracting authority left it to bidders to propose a playground solution, and had not given specific directions, rendered the tender impossible to adjudicate. He cited an example of one of the bidders who was disqualified because the roundabout he offered was too small. The specifications should have been more specific.

On being asked by the Board Chairman, Mr Duncan Hall explained that the preferred bidder was the only one who was fully compliant. He was administratively compliant and technically compliant and his offer was according to the relative standard.

Dr John Bonello claimed that some items offered by the preferred bidder do not conform to the requested standards as per Clause 2.01.01 of the tender documents. He cited the pavement as an example of this non-conformity.

At this point the Board asked for the presence of the Architect who made the evaluation report so that he could inform the Board of the veracity of this assertion by appellant, and to confirm that the preferred bidder's offer was compliant.

Mr Pierre Cuschieri, for the preferred bidder stated that the flooring offered by appellant was according to standard, EN1176, and thus was as requested in the Bills of Quantity and compliant. He stated also that the tender was clear in asking for one option per tender, and no bidder could submit two options. Appellant gave two options and therefore was not compliant.

Mr Leslie Pavia, appellant stated that he gave two options (Bills of Quantity) and wrote a letter explaining why. One BOQ was according to the request by the contracting authority and the second one was according to what the appellant thought was necessary.

Mr Duncan Hall explained that while tender allowed bidders to file more than one bid but made it clear that this could not be done in the same tender document.

Dr Luciano Busuttil said that rather than disqualify appellant's bid because he gave two BOQs, the Council decided to consider the offer that agreed most with what the contracting authority was requesting.

The hearing was adjourned to the 17th September 2013 in order to hear the testimony of the Local Council's Architect.

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The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members re-convened a hearing on Tuesday 17th September 2013 to hear the testimony of Mr Edward Lewis, the Council's Architect.

Present:

L&S Technical Consulting Ltd. - Appellants

Mr Leslie Pavia	Representative
Dr John Bonello	Legal Representative

JGC Limited – Recommended Bidder

Mr Pierre Cuschieri	Representative
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Marsaxlokk Local Council – Contracting Authority

Mr Edric Micallef	Mayor
Mr Duncan Hall	Executive Secretary
Dr Luciano Busuttil	Legal Representative
Arch. William Lewis	Representative

In his introduction, the Chairman made it clear that this hearing was convened just to hear Mr William Lewis testify under oath as all necessary submissions by the parties involved had been heard during the previous hearing.

The Chairman of the Public Contract Review Board asked the witness whether L&S Technical Consultancy Limited, appellants' bid was technically inferior to that of the preferred bidder.

Architect William Lewis, under oath, stated that the tender was based on a "design and build" principle. Although a basic plan had been given in the tender document, a certain leeway had been given to all bidders to make their offers according to what they deemed appropriate, and then the contracting authority would choose whatever it considered best for the people of Marsaxlokk and visitors to that locality. The preferred bidder, for example offered a merry-go-round, multi-purpose structures, swings, four springers, hopscotch and climber. Appellant on the other hand offered a merry-go-round, two springers, multi-purpose structure and swings. Thus appellants offered less equipment. The Council had proposed fifteen lamp-posts for lighting the area. Appellants proposed to reduce the number of lights but failed to provide a plan that showed how this lesser number of lamps would affect the garden. Present standards require that such play areas be enclosed and have gates and barriers for safety. While the preferred bidder's offer included both gates and barriers, no mention of gates or barriers was made in the appellants' offer. Technical specifications required that the proposed equipment had to be clearly sign-posted showing the ages of children who may use it. Again appellants bid did not mention these, while the preferred bidders had included them.

Dr John Bonello on behalf of the appellants, asked Mr Lewis to explain how they adjudicated the tender on a like with like basis as is normally done in Government tenders when, as witness stated, bidders had a free hand in making their proposals.

Mr William Lewis explained that as he had stated before, the contracting authority had issued a basic plan and basic Bills of Quantity. The contracting authority also had a fixed budget and thus the best proposal obtainable within that budget was chosen. Replying to a question by Dr Luciano Busuttil, the contracting authority's representative, witness confirmed that as appellant had filed two quotes, one higher than the other, the evaluation was made based on appellants' lowest offer.

At this point the hearing was brought to a close.

This Board,

Having noted the Appellant's objection , in terms of the 'Reasoned Letter of Objection' dated 29th April 2013 and also through the Appellant's verbal submissions during the hearing held on 20th August 2013, had objected to the decision taken by the pertinent Authority, in that:

- a) The method by which the tender was issued allowed for freedom of expression of how the project was to be addressed.**

- b) To this effect, there were no parameters to compare the tenders on a 'like with like' basis. So that, adjudication was on a subjective basis.
- c) Specific specifications should have been established by the Contracting Authority in the tender document to avoid any misinterpretation of the contents in the tenderers' bids.
- d) When clarifications were requested by bidders, there was no response from the Contracting Authority.
- e) The requested amenities enlisted in the tender document were by far greater than what was actually required.

Having considered the Contracting Authority's verbal submissions presented by same during the hearing held on 20th August 2013, in that:

- a) The Contracting Authority confirmed that the requested clarifications originated only from the Appellant.
- b) The regulations permit that additional information can only be given to the tenderer up to seven days before the closing date of the tender. This clarification was given to the Appellant and this referred to the 'Bill of Quantities'
- c) The Contracting Authority indicated to all tenderers the requirements which were to be bidden for. It also gave an outline and indications of the basic amenities in the tender document itself.
- d) The Preferred Bidder was administratively and technically compliant in all respects.
- e) The Contracting Authority also confirmed that the Preferred Bidder's offer was according to the required safety standards.

This Board requested that a technical expert be brought before the same Board as a witness and during the hearing held on Tuesday 17th September 2013, the technical expert justified in great detail why the Evaluation Committee of the Contracting Authority opted for the Preferred Bidder's offer.

Reached the following conclusions:

1. After having heard the technical evidence, under oath, the witness of the Contracting Authority, explained clearly and specifically that the objective of the Contracting Authority was to allow for freedom of expressions and ideas from all bidders, yet outlining the basic requirements.
2. The requirements in the tender document did not, in any way, limit the scope of competence of the prospective tenderers, in their presentation or proposals of their offers.
3. The Preferred Bidder's offer included more equipment, more lighting of the area and more safety precautions. These three attributions should also be considered to fulfil the objectives of the tender.
4. The Preferred Bidder's offer was the only bid which was fully compliant.

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. Richard A. Matrenza
Member

1 October 2013