

PUBLIC CONTRACTS REVIEW BOARD

Case No. 798

FTS 143/2014

Tender for Patterned Safety Rubber Tiles at Various Schools in Malta.

The tender was published on the 14th November 2014. The closing date was the 5th December 2014. The estimated value of tender is €65,121.78(Exclusive of VAT).

Four (4) bidders had submitted bids for this tender.

On the 21st January 2015 JGC Ltd. filed an objection against the decision of the Contracting Authority to disqualify their tender for 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 Tuesday 14th April 2015 to discuss the objection.

Present for the hearing were:

JGC Limited - Appellant

Mr Simon Micallef
Dr Sefora Agius

Director
Legal Representative

Foundation for Tomorrow's Schools - Contracting Authority

Mr Joseph Zerafa Boffa
Mr Ivan Zammit

Chairperson Evaluation Board
Secretary Evaluation Board

There was no one present on behalf of the preferred bidder 389 Limited.

The Chairman, following a brief introduction, invited Appellant's representative to make her submissions on the objection.

Dr Sefora Agius on behalf of her client JGC Limited said that Appellant's tender was found to be technically non-compliant because the tiles submitted had a Critical Fall Height of 1.5m instead of the requested 1.8m. She explained that with the offer Appellant had submitted the product literature from the manufacturer, together with a laboratory test result and a product description prepared by Appellant. This description through a clerical error indicated the tiles' Critical Fall Height to be 1.5 meters. The rejection of the offer was based on this description. The other documentation and test certificate submitted had clearly indicated that the product's CFH was more than the requested 1.8 meters. The Evaluation Board itself was aware of this because it was indicated in the letter of rejection; the board should have seen that this was the result of a clerical error.

Dr Agius continued that the documents submitted by Appellant always indicated a tile thickness of 45mm always had a CFH of 2.3 or 2.2 meters, that is greater than the requested specifications. She reiterated that the evaluators should have noticed this clerical error by Appellant when describing the product as having a CFH of 1.5 meters. Appellant had previously supplied the same type of tiles. Since the Evaluation Board had raised doubts about these conflicting submissions, then, it followed that the Appellant should have been asked for clarification. Clause 16 of the tender is qualified by note 3 and therefore clarification was admissible. The preferred bidder's offer was higher priced than the Appellant's.

Mr Ivan Zammit on behalf of the Contracting Authority explained that the Evaluation Board had noted the discrepancy. In the product description submitted at page 2 it is clearly stated that the Critical Fall Height for 45 mm tiles was 1.5 meters, and this was highlighted. The test certificate referred to 5 types of tiles but nowhere was indicated which of these types was being offered by Appellant. Since the technical submission sheet was clear, that 1.5 meters CFH were offered, the evaluation had to be done on that; and in this case no rectification was allowed. It was the bidders' responsibility to submit the correct information. The Evaluation Board could not declare Appellant's offer as being technically compliant, and no clarification was in order.

The Chairman remarked that a clarification on submitted information was not allowed.

Dr Sefora Agius for the Appellant reiterated that the submitted documents should have been taken into consideration holistically by the evaluators. In the documents obtained from the manufacturer, laboratory tests and the warranty always referred to 45mm thick tiles, being type3 and type 4. These two types always fell within the correct range of Critical Fall Height of more than 1.8 meters. It was only in the document prepared by Appellant that it was erroneously indicated that the CFH was 1.5 meters. So it was clearly a clerical error since Appellant could not offer different specifications for a product from that supplied by the manufacturer.

Mr Simon Micallef for the Appellant said that the fact that a wrong description of the product was erroneously submitted should not disqualify the Appellant. He said that the Public Contracts Review Board should examine the specifications of the test result of the technical report where it could be seen that the qualities of the tiles surpass those requested in the specifications. He agreed that a typing error was made when preparing the product

description sheet but the manufacturer data sheet should be given more weight, and prevails over the other data supplied by the bidder himself.

Mr Ivan Zammit for the Contracting Authority declared that the manufacturer test results were considered by the evaluators, but the information about which tile was in fact being offered did not result, was not given. The tender had asked for the production of technical literature from the manufacturer and not for documents prepared by the bidder himself. Bidders should be responsible for their submissions and mistakes and not the evaluators.

Dr Sefora Agius explained that the certificates by TuvNord and the data sheet by Miroad both show that for 45 mm tiles, the types would be either type 3 or type 4 and the CFH value for these two types are both over 1.8 meters.

The Chairman asked the Appellant if the tender submitted clearly indicated which tile was being offered.

Mr Simon Micallef for the Appellant replied that the tile offered was the 45 mm tile. And while the description said its CFH was 1.5, the literature from manufacturer said the CFH was 2.3.

Dr Sefora Agius insisted that the Contracting Authority should have asked the Appellant which of the two tiles was being offered.

Perit Joseph Zerafa Boffa for the Contracting Authority explained that the fact that the 45 mm tile indicated in the description sheet clearly showed 1.5 CFH and this was in fact highlighted. Since this was very clear the Evaluation Board stopped there.

At this point the hearing was closed.

This Board,

Having noted the Appellant's objection, in terms of the "Reasoned Letter of Objection", dated 19th January 2015 and also through the Appellant's Verbal Submissions made during the Public Hearing held on the 14th April 2015, had objected to the decision taken by the Pertinent Authority, in that:

- a) The Appellant contends that his offer was unfairly discarded due to an inadvertent "oversight". However, the Contracting Authority should have easily noted from the manufacturer's literature and also from the Laboratory results that the Appellant's offer was "ultra" technically compliant;**
- b) The Appellant also maintains that, had the Evaluation Board took careful notice of the technical literature and the Laboratory's report, the same Board should have, if in any doubt, a clarification from the Appellant;**

Having considered the Contracting Authority's "Letter of Reply" dated 18th March 2015 and the verbal submissions made during the Public Hearing held on the 14th April 2015, in that:

- a) The Contracting Authority maintains that it was the Appellant himself who**

highlighted the Technical Specifications to read “Critical Fall Height for 45mm tiles was 1.5 meters”. The Evaluation Committee based its assessment on the declaration made by the Appellant himself;

- b) The Contracting Authority insists that it could not ask for any clarification as no correction to the submitted Technical Specifications was possible.

Reached the Following Conclusions:

1. This Board respectfully refers to Part I Section 3 of the Tender Document whereby there was a mandatory obligation for the Tenderers to submit “Detailed Manufacturer’s Technical Literature” so that the Evaluation Board would ensure “Technical Compliance” of the product being offered by the respective tenderer. In this regard, this Board justifiably opines that the “Manufacturers’ Technical Literature”, as requested in Part 1 Section 3 of the Tender Document which was the crucial document for the Evaluation Board to rely on. With regards to the Technical Compliance of the Tenderer’s product, this Board opines that the Evaluation Board placed great emphasis on the Technical Literature which was compiled by the Appellant himself and ignored the Technical Specifications as dictated in the Manufacturer’s Technical Literature and the certification drawn up by TUV Nord, whose documentation credibly proves that the Appellant’s offer was technically compliant. In this regard, this Board upholds the Appellant’s First Contention;
2. With regards to the Appellant’s Second Contention, this Board opines that in this particular case, since there was ample documentation for the Evaluation Board to assess correctly the “Technical Compliance” of the Appellant’s product, the question of clarification does not ensue. In this regard, this Board does not uphold the Appellant’s Second Contention.

In view of the above, this Board finds in favour of the Appellant’s first contention, which this Board justifiably deems is the crucial factor for the assessment of the “Technical Compliance” of the Appellant’s product and recommends as follows:

- i) The Appellant’s offer to be re-integrated in the Evaluation Process;
- ii) The deposit paid by the Appellant to be reimbursed

Dr. Anthony Cassar
Chairman

Dr. Charles Cassar
Member

Mr. Lawrence Ancillieri
Member

21 April 2015