

PUBLIC CONTRACTS REVIEW BOARD

Case No. 909

MLC 06/2015

Tender for the Provision of Play Equipment and Ancillary Items for Gnien il-Qighan, Triq Qasam Barrani, Mellieha.

The Tender was published on the 28th August 2015. The closing date was on the 5th October 2015. The estimated value of the Tender was €32,798.41 (Exclusive of VAT)

Seven (7) offers had been submitted for this Tender.

On the 21st December 2015 JGC Limited filed an Objection against the decision taken by the Contracting Authority to award the Tender to Gokker Limited for the sum of €18,172.67.

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 the 3rd March 2016 to discuss the Objection.

Present for the hearing were:

JGC Limited:

Mr Simon Micallef	Director
Dr Alex Schembri	Legal Representative

Gokker Limited:

Mr Kurt Michael Buttigieg	Director
Mr Kenneth Fenech	Director
Dr Stefan Zrinzo Azzopardi	Legal Representative

Kunsill Lokali Mellieha:

Mr Clayton Bartolo	Deputy Mayor
Me Carmel Debono	Executive Secretary
Mr Joseph Attard	Contracts Manager
Dr Alfred Abela	Legal Representative

The Chairman made a brief introduction and then invited the Appellant's representative to make his submissions.

Dr Alex Schembri on behalf of the Appellant said that the Objection was based on two grievances. The first grievance was about the fact that no reasons were given to the Appellant why its offer was discarded. There was enough jurisprudence that stated that Contracting Authorities are bound to give clear reasons. In the present case the reasons were only supplied through the Contracting Authority's Letter of Reply.

One of these was that since the Tender specifications had asked for the play house to have the shape of a "pirate ship" and only the Recommended Bidder's offer was in this shape. He contended that the Tender had not specifically asked for the play house to be in the shape of a "pirate" ship but that it had to be in the shape of a "ship". Appellant's three offers were in fact in other shapes of a ship which include a Viking Ship and a Luzzu. Thus this was not a valid reason for rejecting the Appellant's offer.

The second reason given by the Contracting Authority was that the present tiling was sufficiently thick and that therefore there was no need to replace it. However the Tender as issued included the provision and installation of safety tiles. Thus if the cost of tiles offered by the Recommended Bidder was excluded, the Appellant's offer would be cheaper.

This amounted to a moving of goal-posts which was not allowed. Apart from this, Following an inspection of the site, it is clear that the present tiles are not safe and needed to be replaced. Dr Schembri filed some photographs of the existing tiles. The Tender specifications regarding tiling should not be changed.

Finally he contended that the Contracting Authority had not conformed with the Tender Document:

- i) by including the word "pirate" before ship;
- ii) by deducting the cost of tiles from the Recommended Bidder's offer when the cost of tiles was a Tender requisite.

Dr Alfred Abela on behalf of the Contracting Authority explained that the removal of tiles from the cost of the equipment was never decided upon; the Contracting Authority never intended to change the specifications regarding the safety tiles. Regarding the Appellant's first grievance he said that the evaluation process and the decision were all held in public and in a transparent manner, and everyone could have attended.

There had also been live streaming. The eventual decision had also been published and the Appellant was free to examine everything. JGC Ltd could have attended these sessions. They also alleged that the Tender had only mentioned a ship. The latter in fact indicated the equipment to be in the shape of a ship, not a boat.

The offers made by the Appellant were not clear in that they were of ships although one was indicated as being a Viking ship. At this point Dr Abela showed the Board photographs of the Appellant's offers that, he claimed were clearly not of ships. Images of the Recommended Bidder's equipment were also shown.

Dr Abela contended that one had also take into consideration the visual impact of the

equipment. The Recommended Bidder's offer visually filled up more of the available space. The Contracting Authority considered the offer by Gokker Ltd as more suitable.

PCRB Chairman remarked that the Letter of Rejection must also give the reasons for such rejection and this was a requirement set by law. He asked if the specifications only mentioned "ship".

Dr Alex Schembri for the Appellant replied that the specifications asked for "ship" and the latter had submitted three offers including one of a Viking ship and one of a Luzzu. Two of the Appellant's submissions were cheaper than the Recommended Bidder's and the safety tiles were included in the bids. The Tender had specified that the play area of the ship had to be limited to 105 square meters including the safety surrounding area.

Perit Joseph Attard, ID No. 090880M, contracts manager with the Contracting Authority, under oath said that he had prepared the Evaluation Report. He confirmed that the Tender specifications included the safety tiles. He had been present during the adjudication but had no vote. He confirmed that the area where the "ship" had to be installed was specified by the Contracting Authority and that the Appellant's offers complied with these specifications.

Replying to questions by Dr Alfred Abela about his report to the Contracting Authority, the witness said that the Contracting Authority's intention was to replace the existing playground with a ship play house, or anything with maritime connections. He confirmed that the Appellant's submissions had all dealt with the sea. The submitted designs by the bidders were then compared, taking also into consideration the cost. The size of the Recommended Bidder's equipment fell within the size requirements. Perit Attard also agreed that two of the offers by the Appellant (option 1 and 2) were cheaper than that of the Recommended Bidder.

Dr Alfred Abela for the Contracting Authority explained that the garden where the equipment is being installed was in a prominent position and wanted to upgrade it. Apart from providing enjoyment for the children it wanted something eye catching and prestigious.

Dr Alex Schembri for the Appellant remarked that apparently, during adjudication, the idea of a pirate ship became attractive. But the Tender Document did not mention "pirate" as part of the required specifications. He contended that his client, JGC Ltd had submitted two offers that were compliant with the specifications and cheaper.

Dr Stefan Zrinzo Azzopardi on behalf of the Recommended Bidder said that while the Appellant had made three offers, the Recommended Bidder had submitted only one. The prices offered differed according to the quality of the equipment submitted. The area to be used had been specified as 11 meters by 9.5 meters and his client had chosen to fill up as much of this space as possible. He invited the Board to compare the equipment supplied by the Recommended Bidder with that offered by the Appellant to see if the sizes varied. It could then be seen that the Contracting Authority chose the equipment that filled the empty area.

Dr Alfred Abela contested the fact that the Contracting Authority had to choose the cheapest offer. Otherwise the Appellant would not have submitted three options with different prices.

Mr Simon Micallef for JGC Ltd said that the area available had to include a safety area around the perimeter of the equipment. A larger ship required a larger area around for safety.

It was absolutely necessary for the equipment to have a safety area around it as otherwise falling children would be injured.

Perit Joseph Attard, on being recalled under oath, said that the Recommended Bidder's equipment allowed for a safety area around it. Only the whole area was specified. The area of the equipment itself was not specified.

At this point the hearing was closed.

This Board,

Having noted the Appellant's Objection, in terms of the "*Reasoned Letter of Objection*" dated 21 December 2015 and also through their verbal submissions during the Public Hearing held on 3 March 2016, had objected to the decision taken by the Pertinent Authority, in that:

- a) The Appellant Company contends that apart from the fact that the Contracting Authority did not state the specific reasons why his offer was discarded, the latter was informed of the reasons why did this happen in the Contracting Authority's "*Letter of Reply*", where the Local Council decided on a design of a "*Pirate Ship*", although the Tender Document did not specify this specific detail;**

- b) The Appellant also maintains that the Tender Specifications dictated a requirement for "*Ship*" and they had submitted three options, which were cheaper than the offer submitted by Gokker Ltd;**

c) JGC Ltd also contends that the Tender Document also dictated the inclusion of tiles. In this regard, the Appellants confirm that their offered price did also include the replacement of the present safety tiles;

d) The Appellant contends that the Evaluation Board had decided on the design of the ship during the Evaluation Stage.

Having considered the Contracting Authority's "*Letter of Reply*" dated 28 December 2015 and also through their verbal submissions during the Public Hearing held on 3 March 2016, in that:

a) Kunsill Lokali Mellieha maintains that since the "*set up*" of the equipment was to be situated in a prominent area, the same Contracting Authority had to choose the most attractive proposed design of the shop to be installed in this play area.

Reached the following conclusions:

1. With regards to the Appellant's First Grievance, this Board had on many occasions and adjudications stressed the cardinal importance

of the obligation which the Contracting Authorities have to give the specific reasons why any bids were going to be discarded.

This Board opines that it is an improper procedure for the Appellant to get to know the reasons why his offer was discarded only through the “*Letter of Reply*” sent by the Contracting Authority. In this regard, this Board justifiably upholds the Appellant’s Grievance.

With regards to JGC Ltd’s contention that the Tender Document did not specify that the design of the ship to be constructed should be a “*Pirate Ship*”, this Board opines, that the merits of this Appellant’s Grievance will be treated later on.

- 2. With regards to the Appellant’s Second Grievance, this Board, after having examined the relative documentation of this Tender and heard credible submissions by JGC Ltd, does in fact, credibly asserts that the Tender Document did not dictate a specific design of a particular sea vessel.**

The Tender Document dictated the design and execution of the Tendered works without specifying the nature of the shipping vessel to be included in the layout of the play area. In this regard, this

Board justifiably confirms that the Tender Document requested a design of a “*ship*” and not a “*boat*” as was suggestively opined by the Evaluation Committee during the Adjudicating Stage.

In this regard, this Board opines that it is not a proper procedural manner to dictate what type of “*Boat*” is to be chosen during the Evaluation Stage. The fact that no indication was given in the Tender Document about the type of sea vessel to be offered, is deemed to be highly suggestive. In this regard, this Board justifiably upholds JGC Ltd’s Second Grievance.

- 3. With regards to the Appellant’s Third Grievance, this Board through the Contracting Authority’s Technical Witness, under oath, credibly established that the Technical Specifications of the Tender Document did, in fact, include the replacement of the existing safety tiles.**

At the same instance, the Technical Witness, Perit Joseph Attard, confirmed that their intentions were to replace the tiles. The same architect also confirmed that, JGC Ltd’s offer was fully compliant and that the letter’s equipment fell within the dictated parameters. It was also established that the Appellant’s offer was cheaper than that of the Recommended Bidder.

This Board is credibly convinced that the price quoted by the Appellant Company included the replacement of the tiles of the play area. In this regard, this Board upholds the Appellant's Third Grievance.

- 4. With regards to JGC Ltd's Fourth Grievance, this Board, from the submissions made by all interested parties, justifiably opines that, the Tender Document did not specify the design inclination and whether the design was to be of a ship or a boat.**

The decision to opt for a "*Pirate Ship*" during the Evaluation Stage was highly subjective, in that it limited the "*Spirit of Competition*" to such an extent that the respective bidder who submitted a design of a "*Pirate Ship*", whether he was compliant or the cheapest would have the unmerited advantage over the other bidders.

This Board also credibly notes that the statement made by the Technical Expert, Perit Joseph Attard, did not collaborate with the Technical details as dictated in the Tender Document and that this same document stipulated a condition that, "*The play house shall have the shape of a ship*".

The same condition in the Tender Document did not specify what kind of a ship design had to be indicated in the submission of the prospective bidders. In this regard, this Board, after having examined the submissions made by all parties concerned, justifiably opines, that the Technical Specifications, as dictated in the Tender Document, did, in actual fact, referred to the marine vessel to be deployed as a “*ship*” and not a “*boat*”.

This Board recognises the difference between a “*ship*” and a “*boat*” and is also credibly aware that the Evaluation Board opted for the design and construction of a “*Pirate Ship*” yet, the same Contracting Authority opted for a design depicting a “*Luzzu*”, which in maritime terms is considered as a “*Fishing Vessel*” – a boat.

In view of the above, this Board finds in favour of the Appellant Company and recommends that:

- i) The Tender is to be re-issued to reflect the exact dimensions for the play area together with the legally required safety area, so that all prospective bidders will be aware of their obligations;**

ii) This Board would also credibly insist that no change of “*Goal Posts*” is done by the Evaluation Board at evaluation stage. At the same instance, this Board opines that the Tender Document should specifically indicate what the Contracting Authority’s preference of the “*Marine Craft*” is and in addition to this recommendation, a distinction should also be made between a “*Ship*” and a “*Boat*”.

iii) The deposit paid by the Appellant is to be fully refunded.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Richard A Matrenza
Member

15 March 2016