

PUBLIC CONTRACTS REVIEW BOARD

Case 1131 – MGOZ/MPU T/49/2017 – Tender for the Surfacing Works of Multi-Purpose Pitches at the Sports Complex, Gozo

The publication date of the call for tenders was the 21st November 2017 whilst the closing date of the call for tenders was the 6th December 2017. The estimated value of the tender (exclusive of VAT) was € 102,498.

There were three (3) bidders on this tender.

Three Eight Nine Company Ltd filed an appeal on 18th January 2018 against the Contracting Authority's decision that their tender had been rejected as it was considered that their technical specification were not compliant.

On 13th February 2018 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Carmel Esposito as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellant – Three Eight Nine Limited

Mr Etienne Borg	Representative
Mr Joe Borg	Representative

Recommended Bidder – Urban Play Solutions

Perit Daniel Cordina	Representative
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Contracting Authority – Ministry for Gozo

Dr Francelle Saliba	Legal Representative
Mr Dane Zammit	Chairman Evaluation Board
Mr Joseph Piscopo	Secretary Evaluation Board
Mr Christian Cordina	Member Evaluation Board
Mr Aleandro Zammit	Member Evaluation Board
Mr Manwel Sultana	Representative
Mr Joseph Cutajar	Representative
Perit Mario Cordina	Representative

The Chairman of the Board, Dr Anthony Cassar, before inviting the parties to make their submissions made a brief comment regarding the necessity for the Contracting Authority to avoid errors when compiling their Evaluation Reports to avoid derogatory remarks by the Courts of Law should a case be taken further.

Mr Etienne Borg, Representative of Three Eight Nine Company Ltd, said that his Company's tender had been disqualified on a minor point, namely that the base course material they offered was slightly heavier than the tender specification.

The Chairman reminded Appellant of the necessity of following the tender specifications scrupulously.

Continuing Mr Borg mentioned that the basis of the refusal of their tender was that their base course was 400 gms/lit heavier but this was compensated by the top layer which was 900 gm/lit lighter – overall this made a minimal difference; in fact less than one half of a kilo per square metre.

Dr Francelle Saliba, Legal Adviser to the Contracting Authority, said that the Appellant had not followed the technical specification. Their legal responsibility had been to follow the specification exactly. What they were now indirectly asking is for the Authority to alter its specifications to meet the tenderers' products. In support of her claim that tender documents cannot be changed Dr Saliba quoted PCRB decisions in Cases number 1064, 1109 and 1014. She then asked the Chairman permission to introduce a technical witness.

Perit Mario Cordina (509378M) testified on oath that the requested thickness of the base layer which was to be used to cover a multi-purpose court was important. They had set the thickness range as wide as possible not to exclude anyone. On past experience it was the view of the Authority that the thickness and the base weight both mattered.

Mr Joe Borg, representative of Three Eight Nine Ltd made reference to previous contracts they had successfully fulfilled using the same product. He said that thickness does not make a difference and in one case their product had lasted over seven years.

The Chairman thanked the parties for their submission and declared the hearing closed.

This Board,

**Having noted this Objection filed by Three Eight Nine Company Limited,
(herein after referred to as the Appellants), on 18 January 2018 refers to the**

contentions made by the latter with regards to the award of Tender of Reference MGOZ/MPU/T/49/2017 listed as Case Number 1131 in the records of the Public Contracts Review Board, awarded by the Ministry for Gozo, (herein after referred to as the Contracting Authority)

Appearing for the Appellant: Mr Etienne Borg

Appearing for the Contracting Authority: Dr Francelle Saliba

Whereby, the Appellant contends that:

- a) Although their offer was not in accordance with the Technical Specifications as stipulated in the tender dossier, overall, this resulted in a minimal difference in the quality of the offered product.**

This Board also noted the Contracting Authority's "*Reasoned Letter of Reply*" dated 24 January 2018 and its verbal submissions during the Public Hearing held on 13 February 2018, in that:

- a) The Ministry for Gozo maintains that it is the responsibility of the Appellants to adhere to the specifications as dictated in the Tender Document. In this regard, Three Eight Nine Company Limited's offer did not meet the Tender's specifications and the Evaluation Board had no other option but to deem the Appellants' offer as technically non-compliant.**

This same Board also noted the testimony of the witness, namely, Perit Mario Cordina who was duly summoned by the Public Contracts' Review Board.

This Board, after having examined relevant documentation pertaining to this Appeal and after having heard the submissions made by all parties concerned, including the Testimony of the Technical Witness, opines that the issue of this Appeal is the disqualification of Three Eight Nine Company Limited's offer due to the non-adherence to the Technical Specifications as duly dictated in the Tender Dossier.

- 1. One has to appreciate that the technical specifications in a Tender Document, are not capriciously laid out but are formulated by the Authority to ensure transparency and to establish the technical criteria of the product being produced. In themselves, the technical specifications create the yardstick by which the principle of "*Level Playing Field*" is safeguarded.**

In this particular case, it was credibly established and also confirmed by the same Appellants that their offer contained technical specifications which were slightly different from those dictated in the Tender Document, namely that the Appellants' product had base course bulk density of 550 g/l whilst the Tender specified 510 +/- 5 g/l. At the same

instance, this Board noted the testimony of Perit Mario Cordina, who confirmed without reservation that the Appellants' product was not in accordance with the Technical Specifications as specified in the Tender Dossier.

At this point in time, this Board notes that Appellants are raising technical issues and justifications which could have been clarified, if not solved, prior to the submission of their offer. It must be justifiably noted that Three Eight Nine Company Limited were well aware of the requested Technical Specifications and they had all the remedies to ensure that their offer, adhered to the specifications requested, by seeking a clarification prior to the submission of the same.

However, same Appellants did not avail themselves of such remedies. At the same instance, Three Eight Nine Company Limited could have filed for remedies prior to the closing date of the call for competition and this Board notes that no such requests were submitted. At the same instance, this Board was not presented with any credible evidence by the Appellants to justify that their product was technically compliant.

In view of the above, this Board,

i) Does not uphold the Three Eight Nine Company Limited's contentions;

ii) Recommends that the deposit paid by the same Appellants is not to be refunded.

Dr Anthony J Cassar
Chairman

Dr Charles Cassar
Member

Mr Carmel Esposito
Member

20th February 2018