

PUBLIC CONTRACTS REVIEW BOARD

Case 1132 – 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.

Projekte Global Ltd filed an appeal on 15th January 2018 against the Contracting Authority's decision that their tender had been rejected as it was considered that their technical specifications were not compliant, against a deposit of € 540.

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 – Projekte Global Ltd

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| Dr Matthew Paris | Legal Representative |
| Mr Desmond Mizzi | Representative |

Recommended Bidder – Urban Play Solutions

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| Dr Lycia Cordina | Legal Representative |
| Perit Daniel Cordina | Representative |

Contracting Authority – Ministry for Gozo

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| 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 |

After a short introduction, Dr Anthony Cassar, Chairman of the Public Contracts Review Board, invited the parties to make their submissions.

Dr Matthew Paris, Legal Representative for Projekte Global Ltd, started by stating that on the 8th January 2018 Appellant was notified that their tender had been disqualified as the literature submitted was technically non-compliant. They were obviously aggrieved by the decision as they had submitted the lowest offer and they feel they should have been awarded the tender. The technical offer consisted of a certain number of documents which *inter-alia* confirmed that tenderer would fulfil all obligations under the tender and they would supply any information requested. On that point only, the Contracting Authority has remedies if the tenderer does not supply what has been requested. Appellant accepted every condition in the tender and confirmed that they would abide by them.

Dr Paris tabled a paper sent by the Authority requesting his client to submit literature within 5 days of a stated date, and tabled also a Report submitted to the Contracting Authority being a record of all requested documents. He then went on to detail all documents submitted, including Test Report EN14877, and including a record of tests carried out by independent testing houses. He referred to the case of Cherubino Ltd vs Contracting Authority in the Court of Appeal where the Court confirmed that it would not judge on the parameters requested by the Contracting Authority, and that there cannot be subjectivity in public procurement.

Dr Paris then exhibited a sample of the product in contention. In explaining the make-up of the product he said that there was flexibility in producing it and consequently his client could provide the exact product required.

The Chairman asked if the Appellant had abided by what the Authority had specified.

In response Dr Paris sought permission to put forward a witness.

Mr Desmond Mizzi (465463M), on oath stated that he was a Director of Projekte Global Ltd and had been responsible for running it for twenty years; the tender requested the thickness of both the top and both layers and the bulk density of the layers. Appellants' offer had been refused on three points:

- erroneous conclusion regarding the thickness (6 to 8mm) as this referred to 'wear course' not product structure;
- the Authority should have known that 'bulk density' can vary according to thickness of product;

- instead of asking for ‘bulk density’ the Authority should have stipulated ‘granule size’ which dictates the weight of the material

Witness confirmed that the Authority never sought clarification on any point and that the documents presented to the Board were the same as those submitted in the tender document.

Dr Francelle Saliba, Legal Representative for the Ministry for Gozo, said that if the Appellant was not clear as to what was required they should have sought clarification. Further, the product data sheet supplied was incongruent with what was requested, and the Applicant had admitted that the submitted literature was an example rather than an exact specification, and was thus invalid.

Perit Mario Cordina (509378M), Representative for the Ministry for Gozo, testified on oath that the Authority had asked for material thickness and density within a certain range, and any tenderer had to submit documents stating that their product fell within that range. In reply to questions from Dr Paris, witness confirmed that the literature supplied by Appellant confirms that the product meets all test requirements for the purpose for which it was intended.

Ms Saliba asked to produce a further witness.

Mr Dane Zammit (134098M) stated on oath that he was the Chairman of the Evaluation Board. After preliminary confirmation regarding bulk density and wear course thickness, witness stated that he agreed with the test reports and the standards therein submitted by tenderer; however the data sheets on the bulk density and thickness of the base course did not agree with those specified in the tender. This specified a density of 510 (\pm) 5 gm/l but tenderer had offered 435 gm/l. Questioned by Dr Paris regarding what his client had offered, witness confirmed that a thickness of 10mm had been offered, however this was contradicted by figures shown in the System data Sheet which showed different figures. Dr Paris pointed out to the witness that what the latter had quoted referred to a different product.

Dr Lycia Cordina, Legal Representative for Urban Play Solutions, the Recommended Bidder, said that the Appellant’s submissions had misguided the Board. There were two essentials in the tender – thickness and density and this latter point had been ignored by the Appellant. The preferred bidder had gone to the trouble of complying on both counts and therefore should not be disadvantaged.

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

This Board,

Having noted this Objection filed by Projekte Global Limited, (herein after referred to as the Appellant), on 15 January 2018, refers to the contentions made by the same Appellant with regards to the award of Tender of Reference MGOZ/MPU/T/49/2017 listed as Case No 1132 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: Dr Matthew Paris

Appearing for the Contracting Authority: Dr Francelle Saliba

Whereby, the Appellant contends that:

- a) Their offer was rejected on the alleged grounds that their product did not meet the technical specifications with regards to “*bulk density*” and “*thickness of wear course*”. In this regard, Projekte Global Limited refer to the documentation and declaration whereby they bound themselves to offer the product in accordance with all the technical**

specifications and to abide by all the conditions laid out in the tender dossier;

- b) The Appellants also maintain that if the Contracting Authority had any particular doubts on the information so submitted, the Evaluation Board should have sought clarifications.

This Board also noted the Contracting Authority's "*Letter of Reply*" dated 23 February 2018 and its verbal submissions during the Public Hearing held on the 13 February 2018, in that:

- a) The Ministry for Gozo insist that the Appellants' offer failed to abide by the dictated technical specifications with regards to "*bulk density*" and "*thickness of wear course*" so that, the Evaluation Board had no other option but to deem the Appellants' bid as being technically non-compliant.

This same Board also noted the testimonies of the Witnesses namely:

1. Mr Desmond Mizzi duly summoned by Projekte Global Limited;

2. Architect Mario Cordina duly summoned by the Ministry for Gozo;

3. Mr Dane Zammit, duly summoned by the Ministry for Gozo

At the same instance, this Board took note of the documents submitted during the Public Hearing by the Appellants which consisted of:

i) Copy of a Clarification submitted to the Ministry for Gozo;

ii) Copy of Bulk Density Certificate and other Technical Data.

This Board, after having examined the relevant documentation to this Appeal and heard submissions made by all the interested parties, including the testimonies of the witnesses duly summoned, opines that the main issue of this appeal is to establish whether the offer submitted by Projekte Global Limited, with regards to “*bulk density*” and “*thickness of wear course*” of the product, meets the technical specifications as stipulated in the tender dossier.

1. This Board would, first and foremost, refer to the directive issued by the European Union with regards to the drafting of the technical conditions in a tender document. In brief, technical specifications should define the characteristics of the product or supply of works that the Public Authority intends to procure. At the same instance, the technical specifications should be regarded as a major important section of the tender dossier and in this respect, should describe the product to be provided, and the levels and standards of the output that is required.

In general, one must acknowledge and appreciate that the technical specifications so dictated in a tender document, have a direct influence on the price. Technical specifications should be drafted in accordance with the following basic guidelines:

- Be precise in the way that describes the requirements;**
- Be easily understood by the prospective bidders;**
- Have clearly defined, achievable and measurable objectives;**

- Not mention any brand or requirements which might limit competition or if brands are mentioned, include the term, “*or equivalent*”,
- Provide sufficient detailed information that allows bidders to submit realistic offers.

In this particular case, this Board would respectfully refer to Section 4 of the Technical Specifications, with particular reference to item 2 (e) which specifically states that:

“Base Course: Mixture of SBR shredded rubber

i) Bulk Density: 510 +/- 5g/l;

ii) Thickness: 10 +/- 1mm”

The above mentioned section of the technical specifications clearly dictates that the product to be offered must have the above technical features. In this regard, this Board credibly established that the Appellants’ product contained technical features which were not within these specified parameters so that

such a deficiency was the determining factor as to why the Ministry for Gozo rejected the Appellants' product.

At the same instance, this Board justifiably notes that the dictated specifications were precise and easily understood by the bidders, so much so, that other bidders conformed to all the standards which stipulated together the particular section 2 (e).

From the testimony of Architect Mario Galea, it was also established that the dictated range of "*bulk density*" and "*thickness of wear course*" were so dictated in order not to limit the scope of competition. In this respect, this Board credibly notes that the specifications were clearly defined and enabled the bidders to submit realistic offers, with full knowledge of what was required.

2. With regards to the Appellants' claim that from the documentation submitted, namely the certificates of conformity with EN 14877:2013 and DN 18035-6:2014-12, justified the fact that their product was compliant with what was requested in Clause 5.1 a, b and c, this Board would also take into consideration that nowhere, in the certificates of conformity was there the mention regarding the "*bulk density*" and

“thickness of wear course”. At the same instance, the technical literature so submitted by the Appellants confirmed that the *“bulk density”* of the product was 435 g/l and not 510 +/- 5 g/l and the *“thickness of the wearing layer”* was 6-8 mm and not 10 +/- 1mm.

This Board would also refer to the testimony of the witness namely Mr Dane Zammit who confirmed that the Evaluation Board was well aware that the certifications of conformity submitted by the Appellants confirmed only that Projekte Global Limited’s product conformed with the standards so tested for and not to the *“bulk density”* and *“thickness of wear layer”* as duly dictated in the tender document. In this respect, this Board took notice of this testimony which stated:

“Allura meta ġejna fil-Bord, ahna meta tlabna l-Literature, il-Literature irid jagħmel it-Technical Specifications kollha. U meta thares fit-Technical Specifications Sezzjoni 2 fejn hemm “Product” f’ paġna 22, 2.1 “Poured-In-Place Playground Surfacing – Material Characteristics”, il-Literature irid jaqbel mal-ispecifications kollha.”

Further on, the same witness stated,

“Qabel mat-Test Report, ma’ dawk l-iStandards iva. Ahna mhux fuq hekk ma kienx compliant. Id-data fuq il-Bulk Density u l-ħxuna.”

This Board would also refer to page 24, item 5, which states that:

“The below information/datasheet must be submitted, if and when requested, highlighted in order and according to the technical specifications above.” In other words, the data sheet in the technical literature should agree with the specifications as mentioned in clause 5.1 (c), wherein the Manufacturer data sheet is being referred.

This Board, as had on many occasions, would respectfully emphasize that the technical literature forms part of the technical offer and it should also be acknowledged that whenever such documentation is requested, the latter must conform with what has been declared to be offered technically including what was dictated with regards to “*bulk density*” and “*thickness*”. In this regard, this Board opines that Projekte Global Limited’s offer failed to meet the requested density and thickness of the product so that the latter’s first contention is not upheld.

- 3. With regards to the Appellants’ Second Contention, this Board would justifiably point out that the Evaluation Committee could not ask for rectifications on the documents submitted by Projekte Global Limited but had to evaluate on the data and information which the Appellant**

duly submitted. In this regard, this Board would point out that it was the responsibility of the Appellants to ensure that their submission conform to the technical requirements of the Ministry for Gozo and not for the Evaluation Committee to seek further information on a non-compliant submission.

On the other hand, the Appellants had all the remedies, prior to their submission of their offer, to clarify any doubts or misunderstandings on the technical specifications as stipulated in the tender document; however such remedies were not availed of by the Appellants and in this regard, this Board does not uphold the latter's second contention. At the same instance, the Appellants could have also highlighted the equivalency factor in their original submission, however no such declaration was made by the same.

In view of the above, this Board:

- i) Upholds the decision of the Ministry for Gozo in the award of the tender;**

ii) Does not uphold the Appellants' contentions;

iii) Recommends that the deposit paid by Projekte Global Limited should not be refunded.

Dr Anthony J Cassar
Chairman

Dr Charles Cassar
Member

Mr Carmel Esposito
Member

22nd February 2018