

## **PUBLIC CONTRACTS REVIEW BOARD**

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### **Case 1239 – MEDE/MPU/DES 010/2018 –Tender for the Supply, Delivery and Installation of Sensory Equipment for Sensory Rooms at the National School Support Services within MEDE - TOYS**

The publication date of the call for tenders was the 20<sup>th</sup> September 2018 whilst the closing date of the call for tenders was 8<sup>th</sup> October 2018. The estimated value of the tender (exclusive of VAT) was € 70,000.

On the 5<sup>th</sup> November 2018 Be Independent filed an appeal against the Ministry for Education and Employment as the Contracting Authority objecting to being disqualified on the grounds that their offer was not compliant. A deposit of € 400 was paid.

There were three (3) bidders.

On 4<sup>th</sup> December 2018 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Richard A Matrenza as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

#### **Appellants: Be Independent**

Dr Carlo Bisazza	Legal Representative
Mr Edward Tanti	Representative
Ms Christine Tanti	Representative

#### **Recommended Bidder: Unicare Ltd**

Mr Chris Lia	Representative
Ms Josette Agius	Representative

#### **Contracting Authority – Ministry for Education and Employment**

Dr Dennis Zammit	Legal Representative
Ms Sandra Cortis	Chairman Evaluation Committee
Ms Elena Zahra	Member Evaluation Committee
Ms Liliana Agius	Member Evaluation Committee
Mr Abraham Cassar	Member Evaluation Committee

Dr Anthony Cassar, Chairman of the Public Contracts Review Board, welcomed the parties and invited them to make their submissions.

Dr Carlo Bisazza Legal Representative of Be Independent said that his client was appealing on two grounds: that his offer was the cheapest and he had submitted all specifications requested therefore making him technically compliant. If there had been any missing items then the Contracting Authority could have asked for clarifications, but nonetheless his clients' presentation had been correct and he should not have been disqualified.

Dr Dennis Zammit, Legal Representative of the Ministry for Education and Employment said that the Appellants had specified code numbers for certain items offered from a catalogue which had not been supplied. In lieu he had submitted photocopied self-made pages from that catalogue with codes missing in the literature text. The Contracting Authority could not ask for clarifications as this would have changed the technical offer.

The Chairman pointed out that the technical specifications in any tender come under Note 3 which states that no clarifications or rectifications can be made. The literature from the manufacturer must match the technical offer as it cannot be changed.

Ms Sandra Cortis, Chairperson of the Evaluation Committee stated that three code numbers had been submitted in the technical offer listing two specific items in the bid – the code number for the balls used in the crash pit had not been quoted. The requirement was for four items but only three had been quoted for.

Mr Edward Tanti (291272M) called to testify by Dr Bisazza stated on oath that he had completed the technical offer as requested. He had submitted two types of literature – scanned copies of the relevant pages of the catalogue and self-made copies which he included with code and page numbers in the technical literature. The self-made literature indicated that the balls were included.

Dr Zammit pointed out that in the case of the Bubble Tube witness had indicated two code numbers, for the tube and the padding but should have quoted code number 901210 which meant that the platform for this equipment would be included. On the question of the Crash Pit witness had listed code number for the pit, the slide and the floor mat but there was no reference to the plastic balls which had a separate code number

Witness intervened to say that the crash pit (Item 151410) included the plastic balls but this was contradicted by Dr Zammit, who said that the brochure states 'Balls sold separately'.

Dr Bisazza stated that there had been too much focus on missing code numbers. With regards to the plinth the Evaluation Committee should have looked at the compound order – if offered as an integral item one does not have to state the individual parts.

Dr Zammit stated that the catalogue states clearly that the ‘Platform must be ordered separately’ it was not part and parcel of the padding as claimed by Appellant.

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

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**This Board,**

**having noted this Objection filed by Be Independent Limited, (hereinafter also referred to as the Appellants) on 5 November 2018, refers to the contentions made by the same Appellants with regards to the award of Tender of reference MEDE/MPU/DES/010/2018 listed as Case No 1239 in the records of the Public Contracts Review Board, awarded by the Ministry for Education and Employment, (hereinafter also referred to as the Contracting Authority).**

**Appearing for the Appellants:**

**Dr Carlo Bisazza**

**Appearing for the Contracting Authority:**

**Dr Dennis Zammit**

**Whereby the Appellants contend that:**

- a) **their offer was the cheapest and fully compliant. In this regard, the Appellants maintain that if the Contracting Authority deemed that there were missing items in their offer, the latter should have asked for clarifications;**
  
- b) **they submitted two sets of literature, one of which was self composed copies and this contained all the details which were requested by the Contracting Authority.**

**This Board has also noted the Contracting Authority’s “*Reasoned Letter of Reply*” dated 12 November 2018 and its verbal submissions during the public hearing held on 4 December 2018, in that:**

- a) **the Ministry for Education and Employment maintains that the Appellants offered an interactive tube, (Code No 901209) and padding, (Code No 303005) without a platform, the latter item forming a part of the equipment;**
  
- b) **the Contracting Authority also noted that contrary to what the Appellants claimed, the “*crash pit*”, (Code No 151410), did not include**

**the plastic balls, and the brochure indicated clearly that the balls are sold separately.**

**This same Board has also noted the testimony of the following witnesses:**

- 1. Ms Sandra Cortis, duly summoned by the Ministry for Education and Employment;**
- 2. Mr Edward Tanti, duly summoned by Be Independent Limited.**

**This Board after having examined the relevant documentation and heard submissions made by the parties concerned, including the testimony of the witnesses, opines that the main issue of this Appeal is the content of the submissions made by Be Independent Limited.**

- 1. First and foremost, this Board would point out that, whenever the Literature is requested, the latter documentation is not required for pictorial illustration only but more importantly for the technical specifications, the latter of which should collaborate with the declared specifications as so submitted by the Bidder. The technical literature**

**will serve as an assurance to the Contracting Authority that the product which the Bidder had declared to offer exists, is available on the market and conforms with the technical specifications as dictated in the Tender Dossier, so that such literature, when requested, forms part of the technical specifications of the Tender.**

**As stated above, the Literature forms part of the Technical Specifications and the latter is governed by notes to clause 7 Note 3 which specifically states that,**

***“No rectification shall be allowed. Only clarifications on the submitted information may be requested.”***

**In this particular case, Be Independent Limited’s offer included an interactive tube of code 901209 and padding of code 303005 however, from the literature submitted, the latter shows that code 303005 does not include the platform, in fact, the code number which includes the platform shows 901210. This Board opines that, under these circumstances, the Appellants failed to provide the proper literature with the correct corresponding code number, and in this particular**

**case, there was missing documentation so that any clarification would have resulted in a rectification which is not allowed.**

**The same argument applies to Item 2 (Ball Pool) where no supporting technical literature was provided. With regards to this particular issue, this Board notes that the code given by the Appellants indicated that the balls are sold separately and above all the catalogue was not submitted. In this regard, this Board is credibly convinced that Be Independent Limited failed to supply the manufacturers' catalogue and from the self made literature submitted the code numbers reference to both the platform and the ball pool were not included therein and in this regard, this Board does not uphold the Appellants' first contention.**

- 2. With regards to Be Independent Limited's second contention, this Board would respectfully point out that when the technical literature is requested, the latter documentation should represent the manufacturers literature and not a "*self made*" one, so that, as stated above, the Ministry for Education and Employment is assured that the manufacturer's product is in accordance with the requirements of the latter's objectives. At the same instance, this Board was not presented**

**with any credible justification as to why the manufacturer's catalogue was not submitted.**

**This Board, as it had on many occasions, would stress the importance which the Bidder must consider and appreciate in sending the correct information, in the first place and should also avail himself of the remedies available and if in doubt, the Appellants, in this particular case, had the opportunity to clarify any misunderstanding of what the Tender Dossier requested and this Board notes that such remedies were not availed of by the former. At the same instance, the Evaluation Committee must be faithful to the conditions and requirements of the Tender Document in that, they are bound to apply the principle of self-limitation, and in this regard, this Board is credibly convinced that the Evaluation Committee acted in a proper, just and transparent manner, in that, due to missing information which could not be rectified, the Evaluation Committee, quite appropriately, deemed the Appellants' offer as being technically non-compliant and in this respect, this Board does not uphold the latter's second contention.**

**In view of the above, this Board,**

**i) does not uphold the contentions made by Be Independent Limited;**

**ii) upholds the Ministry for Education and Employment's decision in the award of the Tender;**

**iii) recommends that the deposit paid by the Appellants should not be refunded.**

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Richard A Matrenza  
Member

*18<sup>th</sup> December 2018*