

PUBLIC CONTRACTS REVIEW BOARD

Case 1246 – MT/193/2017/4 –Tender for the Provision and Installation of Play Equipment in Dom Mintoff Garden, Paola (Re-Issue)

The publication date of the call for tenders was the 21st August 2018 whilst the closing date of the call for tenders was 11th September 2018. The estimated value of the tender (exclusive of VAT) was € 120,000.

On the 19th November 2018 Salvin Ltd filed an appeal against the Ministry for Tourism as the Contracting Authority objecting to being disqualified on the grounds that their offer was technically and financially not compliant. A deposit of € 600 was paid.

There were three (3) bidders and four (4) bids.

On 20th December 2018 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri 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: Salvin Ltd

Dr Duncan Borg Myatt	Legal Representative
Eng Matthew Spiteri	Representative

Recommended Bidder: AMB JV

Mr Santo Salvatore Portera	Representative
----------------------------	----------------

Contracting Authority – Ministry for Tourism

Dr Christopher Vella	Legal Representative
Mr Dolan Debattista	Chairman Evaluation Committee
Ms Graziella Genius	Secretary Evaluation Committee
Mr Mark Camilleri	Member Evaluation Committee

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

Dr Duncan Borg Myatt Legal Representative of Salvin Ltd started by asking for sight of the minutes of the Evaluation Committee, stating that the reason for his request will become

obvious. The letter of rejection sent to Appellant did not indicate the outcome to his clients' bid. At one point the letter stated that the bid was not technically compliant – which means it should have been stopped at that stage. Despite this it then goes on to say that the bid had failed the financial test as well. On the technical failure three points were raised – and he wondered on which of these points his clients had been disqualified.

The Chairman said that needless to say the Board had studied the papers in this case and had noticed the points raised by Dr Borg Myatt. He proposed that the hearing concentrates on the technical compliance aspect and carefully examines submissions on the three grounds on which the bid had been rejected.

Dr Borg Myatt requested that the Board hears the evidence of a technical person from the Evaluation Committee.

Mr Mark Camilleri (438485M) testified on oath that he was a Senior Manager at the Ministry for Tourism and a member of the Evaluation Committee.

Questioned by Dr Borg Myatt, witness stated that the reason for the rejection of the bid by Salvin Ltd was that the Evaluation Committee did not have enough details on the fixing methods of the play equipment. Clarification had been sought from various bidders since the Committee had to be confident that the equipment would be properly fixed. The clarification received from bidder was perfectly identical to the submissions made in the original bid and had been received in time. (Reference was made to various diagrams filed with the tender bid). Witness re-iterated that the fixing methods were not clear as only diagrams had been supplied and there was no description of fixing and no reference to the sunken foundation method.

Witness confirmed that there was no professional technical person on the Evaluation Committee to interpret the diagrams, although if they wanted they could have used the services of an architect. He agreed that the decision of the Committee was based purely on subjective views and no architect's opinion had been sought. The fixing method proposed in the original submissions was repeated after the clarification and there was no indication that the sunken foundation method was going to be used. After a further document from the tender dossier (Reply to clarification by Salvin Ltd dated 12th October 2018 – document numbered 45 in dossier) was shown to witness he agreed that the sunken foundation method was being proposed for both units.

On being questioned by Dr Christopher Vella, Legal Representative for the Ministry of Tourism, witness stated that the technical specifications stipulated the fixing methods to ascertain that they were meeting the Health & Safety requirements. Only diagrams had been submitted when the Committee was expecting texts describing the installation method, and therefore they had to assume certain facts but the Committee was not prepared to make assumptions. In the personal opinion of witness the fixing methods were not descriptive.

Referring to further diagrams (HAGS) Dr Borg Myatt pointed out to witness that these showed ground level, foundations below ground and depth of foundations – he therefore asked – what more did the witness want?

Witness agreed that the tender stipulated that bidders had to provide original manufacturers' warranty and certificates for the equipment, and this was mandatory and had to be submitted with the tender bid. Asked if the preferred bidder had provided these original documents witness replied that the Evaluation Committee accepted that it was sufficient to provide declarations that warranties would be available. When asked further to state whether the preferred bidder had provided original warranty and certificate witness stated that he needed to refer to the Evaluation file.

A short adjournment was ordered by the Chairman to enable the witness to pursue the necessary files.

After the resumption there was a discussion regarding the validity of documents submitted by the preferred bidder and witness testified that the latter did not have the necessary warranties and certificates. However, he further stated that the Committee was comfortable with the declarations from the preferred bidder although these only promised that warranties and certificates will be provided instead of actually providing them at the time of the offer as stipulated in the tender.

The Chairman pointed out that declarations are not warranties and the tender required original manufacturers' documents. Both bidders and evaluators had to be faithful to the tender documents. Legally and technically these had not been submitted by the preferred bidder. To adhere to the Public Procurement Regulations the tenderer is bound totally by mandatory conditions.

Dr Borg Myatt said that witness had claimed that tender conditions had not been met as the details supplied had been insufficient. The decisions of the Evaluation Board had all been based on opinions with no attempt to consult a technical person – evaluators were not 'au fait' with technicalities and therefore unable to judge. It was obvious from evidence heard that the diagrams provided had not been understood. The Board has seen for themselves that there are mandatory shortages in the submissions of the preferred bidder.

Dr Vella said that basic documents required had not been submitted. No text accompanied the diagrams indicating the method of fixing and the Evaluation Committee could not understand them. There was no need to refer to a technical person to reach a decision as diagrams had been sent in isolation. PPR bound a bidder to submit a full, complete and clear offer. One could not keep asking for clarifications of clarifications. The Board recently decided in the Huawei Case that only one clarification was allowed. The Bidder had not submitted a full bid and his offer thus failed.

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

This Board,

having noted this Objection filed by Salvin Limited, (hereinafter also referred to as the Appellants) on 19 November 2018, refers to the contentions made by the latter with regard to the award of Tender of Reference MT/193/2017/4 listed as Case No 1246 in the records of the Public Contracts Review Board, and awarded by the Ministry for Tourism, (hereinafter also referred to as the Contracting Authority).

Appearing for the Appellants

Dr Duncan Borg Myatt

Appearing for the Contracting Authority:

Dr Christopher Vella

Whereby, the Appellants:

- a) refer to the *“Letter of Rejection”* dated 9 November 2018, wherein they were informed that they did not submit sufficient descriptive information regarding the fixing methods of the equipment. In this regard, the Appellants maintain that the requested information was supplied through the technical literature duly submitted whereby specific diagrams of the fixing methods were clearly illustrated. The Appellants also maintain that the composition of the Evaluation Committee did not include a technical person who could interpret the diagram supplied relating to the fixing method.

This Board has also noted the Contracting Authority’s “*Reasoned Letter of Reply*” dated 29 November 2018 and also its verbal submissions during the Public Hearing held on 20 December 2018, in that:

a) The Ministry for Tourism insist that the Appellants failed to submit descriptive text of the diagrams relating to the fixing method of the equipment. In this regard, the Appellants were given the opportunity to clarify this situation; however, they submitted documents identical to their original diagrams, so that their offer was deemed to be technically non-compliant;

b) The Contracting Authority also contends that the Appellants’ offer was not the cheapest; in fact, it exceeded the budget allocated for this Tender.

This same Board has also noted the testimonies of the witness namely, Mr Mark Camilleri, member of the Evaluation Committee, duly summoned by Salvin Limited.

This Board, after having examined the relevant documentation to this Appeal and heard submissions made by the parties concerned, including the

testimony of the witness, opines that there are two issues which deserve due considerations, namely:

1. **The Technical Compliance of Salvin Limited's Offer**

2. **The Administrative Compliance of AMB JV's Offer, (the Preferred Bidder)**

1. **The Technical Compliance of Salvin Limited's Offer**

This Board would refer to the technical reason, why the Appellants' offer was discarded as follows:

“Item No 1.1 of the Literature List:

Item requested: Detailed Literature including images and specifications of the play equipment systems including fixing methods.

The Evaluation Committee has further requested: To submit the play systems' 'fixing methods', as these could not be found in the Literature submitted.

Reason for non-compliance: The Evaluation Committee deemed that insufficient details were provided for the fixing methods and none of the details requested in Section 4 Article 4.7.5 were included.”

It is evidently clear that the Ministry for Tourism, quite appropriately requested literature which shows how the equipment will be fixed to the ground. From documentation made available to this Board, the latter would refer to Diagram of Reference 2/9 duly submitted by Salvin Limited in their offer, which shows specifications with measurements, as to how the equipment will be fixed to the ground. Although, the diagram is of a technical nature, the pictorial illustration does refer to the fixing of the equipment and the mode of structure which will be employed.

In this regard, this Board opines that had there been a technical person on the Evaluation Committee, the said diagram would have been readily assessed and interpreted to determine whether such a diagram gives the necessary pictorial illustrations and specifications as requested in the clarification requests. This Board took note of the testimony of the

witness namely, Mr Mark Camilleri, who, when asked as to whether a technical opinion and advise was sought, the witness confirmed that there was no professional technical person on the Evaluation Committee to interpret the diagram and also confirmed that the decision of the Evaluation Committee was based purely on subjective views and at the same instance, no opinion of either an architect or an engineer had been sought.

This Board, as it has on many occasions, would emphasize the importance of involving professional technical people during the Evaluation process. Such professionals, in their field, need not be members of the Evaluation Committee, but can act as advisors so that the same Evaluation Committee would be in a position to select the most advantageous offer in an objective and transparent manner.

In this particular case, this Board has credibly established that the decision to discard the Appellants' offer on the mentioned technical grounds, was highly subjective, as the technical interpretation of Diagram of Reference 2/9 was not assessed by a proper person who has

the necessary technical know-how to determine whether such a diagram satisfies the information which the Committee had requested.

At the same instance, no technical justification was presented by the Ministry for Tourism to substantiate the alleged fact that Diagram 2/9 did not provide the necessary information as requested in the clarification. In this regard, this Board is not comfortably assured that the fixing methods, as proposed in the said diagram were not clear enough and no sunken foundation method has not been so indicated, as the diagram itself was not assessed by a proper technical person.

With regards to the Ministry of Tourism's contention that Salvin Limited's offer exceeded the allotted budget, this Board does not find a justifiable reason to treat such a consideration, due to the simple fact that, if the Evaluation Committee deemed the Appellants' bid to be technically non compliant, the Evaluation process relating to the same offer should have stopped at that stage and not considered the financial aspect of a deemed technically non-compliant offer. On this latter aspect, this Board would also note that the estimated value of the Tender was € 120,000, whilst the Appellants' offer was € 122,152, thus representing an insignificant excess over the budget.

2. The Administrative Compliance of AMB JV's Offer

This Board, as it has on many occasions, would emphasize the obligation of both the Contracting Authority and the bidder to strictly abide by the principle of “*self limitation*”. One has to acknowledge and appreciate that the Tender Document is a contract between the Contracting Authority and the bidder, so that, the conditions, as stipulated and described in the Tender Document, must be strictly adhered to and respected by both parties, in all respects.

This Board would respectfully refer to Clause PE 5 Warranty under Section 4 of the Tender Document, as follows:

“PE.5 Warranty

All structural components must carry a minimum of fifteen (15) year warranty while steel must carry a minimum of twenty five (25) years warranty against defects.

Rubber Safety Flooring shall have a Minimum warranty period of two (2) years.

Longer warranties for specific parts will be given preference, and warranty certificate must originate from play equipment manufacturer. Delivery of spare parts must be done within 1 week of request.

Manufacturer's certificates and warranties to be submitted with tender bid."

It is evidently clear that the manufacturer's certificates and warranties were mandatory conditions and had to be submitted with the original Tender Bid.

From documentation and submissions made during the Public Hearing, this Board noted that AMB JV submitted a declaration that they will provide the necessary certificates and warranties and in this respect, this Board opines that, in actual fact, the Preferred Bidder did not submit the warranties as duly dictated in the Tender Document. At the

same instance, this Board became aware of the fact that the Evaluation Committee accepted the declarations submitted by the Recommended Bidder in this regard. From the testimony of Mr Mark Camilleri, it was confirmed that the AMB JV did not submit the necessary warranties and certificates and the Evaluation Committee felt comfortable when accepting the Bidder's declaration.

In this particular case, this Board opines that the Evaluation Committee failed to apply the principle of self limitation and equal treatment by accepting documentation which was not originally requested and which substituted incorrectly the mandatory documents as stipulated in the Tender Document. In this regard, this Board would also point out that the Evaluation Committee should not have considered a "*Declaration to Supply*" when the Tender stipulated "*Submission with the Bid*".

In view of the above, this Board,

- i) cancels the Ministry for Tourism's decision in the award of the Tender;
- ii) instructs the Contracting Authority to appoint an Evaluation Committee differently composed, to include the professional service and

know-how of a technical person and to take into consideration this Board's findings;

iii) instructs the Ministry for Tourism to re-integrate Salvin Limited's offer in the evaluation process;

iv) recommends that the deposit paid by the Appellants should be fully refunded.

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Richard A Matrenza
Member

10th January 2019