

PUBLIC CONTRACTS REVIEW BOARD

Case 1301 – MEDE/MPU/FTS/027/2018 – Tender for the Provision of Rubber Soft Flooring at Marsascala New Primary School (Malta)

The publication date of the call for tenders was the 15th September 2018 whilst the closing date of the call for tenders was 15th October 2018. The estimated value of the tender (exclusive of VAT) was € 89,910

On the 4th March 2019, Projekte Global Ltd filed an appeal against the Foundation for Tomorrow's Schools as Contracting Authority objecting that their bid was rejected as their offer was technically non-compliant. A deposit of € 675 was paid.

There were four (4) bidders.

On 16th April 2019 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:

Appellants – Projekte Global Ltd

Dr Massimo Vella	Legal Representative
Dr Jacques Farrugia	Legal Representative
Ms Ann Degiovanni	Representative
Mr Laurel Benoit	Representative
Eng Konrad Maistre	Representative
Mr Desmond Mizzi	Representative

Contracting Authority – Foundation for Tomorrow's Schools

Dr Lara Chetcuti	Legal Representative
Eng Simon Scicluna	Chairperson Evaluation Board

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

Dr Massimo Vella Legal Representative for Projekte Global Ltd said that the tender in this Case requested compliance with BS EN14877 which referred to a synthetic surface covering for outdoor playground but also stipulated that the surface had to have a Critical Fall Height (CFH) (BS EN1177) factor of 800mm. These tender specifications were conflicting as BS 14877 is a standard used for hard sports surfaces with no reference at all to CFH. The Contracting Authority requirement to have 14877 specifications with the addition of a CFH of 800mm did not make sense. Technical witnesses will testify

that combining these two standards was an impossibility as sports surfaces cannot provide CFH – one can either have one of the other. Appellants had been disqualified due to a fundamental mistake in the tender specifications. The Authority in clarification Note 2 (page 5) refers to BS 1177 which is the standard for CFH. This standard cannot fulfil both functions and is a crucial point as it would make the winning bid also non compliant.

Engineer Laurel Benoit, called as a witness by the Appellants testified on oath that he had spent the last twenty years in the flooring industry. He was a technical expert in this field and was involved in the launching of the specifications for European standards on sports flooring. BS 14877 was the standard for sports flooring - to meet this standard several tests, such as friction, tensile strength absorption, ball bounce were required, but CFH was not one of them. BS 14877 and BS 1177 were two completely different things with the former not being thick and absorbent enough to fulfil the purpose of the latter. To reach CFH standards one has to increase the thickness of the material to have shock absorption and resistance to tensile strength. Generally BS 14877 comes in 3 or 6 cm thickness depending on the use of weight on surface. BS 1177 has a safety factor, with a thickness of between 600 and 800mm and is used in flooring in children's playgrounds. When questioned witness stated that to his knowledge there was no one single product which meets both standards, and that product Flexotop complies with BS 1177 but not 14877.

Engineer Konrad Maistre (210167M) called as a witness by the Appellants testified on oath that he has 15 years experience in the playground sector. He was the first person to have competency certification by the then Malta Standards Authority, and he currently certifies Government indoor and outdoor playgrounds according to the Malta Competition and Consumer Affairs Authority (MCCAA) standards. BS 1177 refers to safety standards to protect children avoid permanent injury and is specified by the MCCAA in the case of children's playgrounds. . There is an anomaly in the tender as BS 14877 and BS 1177 are not compatible, and it is not possible to meet the same standards for both. Witness was not aware of any products which meet fully both standards. When questioned witness stated that point 5 of the tender documents requires full compliance with BS 14877 and it was not possible to combine materials from the two different standards – put simply BS 1177 ensures safety and BS 14877 ensures bouncing of balls.

Engineer Simon Scicluna Representative of the Foundation for Tomorrow's Schools intervened to say that the tender was written with a view to provide lasting surfaces and provide CFH. It was a mistake by the Authority to refer in Clarification Note 2 to equivalence of products, and it was subsequently revoked.

Dr Vella said that the specifications referred to something other than a playground – the Contracting Authority tried to create a hybrid product. Both expert witnesses mentioned the impossibility of combing both functions – the tender refers to BS 14877 in its entirety in two places and Appellant had been disqualified because their bid meets only one standard. It is highly likely that the winning bid also does not tick all the boxes.

Dr Lara Chetcuti Legal Representative of the Foundation for Tomorrow's Schools said that if the specification in the tender were not coherent Appellant had option of seeking remedy at precontractual stage. BS 14877 only applied in the installation and workmanship stage with the CFH

stage to follow. According to the testimony of Engineer Maistre it was possible to combine both products without meeting all the standards. What the Contracting Authority was asking is that both standards live together in line with the literature submitted as will be confirmed by the next witness.

Eng Simon Scicluna (214374M) called as a witness by the Contracting Authority said under oath that he wanted to clarify a point – namely that this tender solely dealt with the playground surface. Appellants did not indicate that they would use BS 14877 as the tender stipulated and had thus been disqualified. Both standards under discussion can co-exist. The Contracting Authority will require from the successful bidder certification from a competent authority that they satisfy the terms of the tender thus ensuring long life and product safety. The Foundation had discussed with an expert from the United Kingdom, Mr Mark Harrison, that there would not be any problem in mixing the standards to achieve a product that would absorb a fall of 80cms – it was left to the bidder to achieve the thickness of the surface.

In reply to questions from Dr Vella witness stated that, on the evaluation committee, there was no specialists with competence in judging on materials. Although he could not recall if the products offered by the preferred bidder were certified as accredited by any organisation the evaluation committee were satisfied that they met the tender specifications.

The Chairman requested that a hard copy of the advice from Mr Harrison is to be filed with the Board.

The Chairman then thanked the 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 Appellants) on 4 March 2019, refers to the claims made by the same Appellants with the regard to the tender of reference MEDE/MPU/FTS/027/2018 listed as case no 1301 in the records of the Public Contracts Review Board, and awarded by Foundation for Tomorrow's Schools (herein after referred to as the Contracting Authority).

Appearing for the Appellants: Dr Massimo Vella
Dr Jacques Farrugia

Appearing for the Contracting Authority: Dr Lara Chetcuti

Whereby, the Appellants contend that:

- a) Their main objection refers to the fact that, whilst the tender document stipulated that the surface of the material must have a ‘critical fall height’ (CFH) factor of 800 mm, the same document requested that standard BS 14877 be applied in this regard. Appellants maintain that such a dictated standard does not provide for CFH while BS EN 1177 was the appropriate standard which the Authority should have stipulated. At the same instance, the Appellants’ offer was rejected for the simple reason that they quoted standard BS EN 1177, which is the suitable standard applied for material installed in playgrounds.

This Board also noted the Contracting Authority’s ‘Letter of Reply’ dated 30 January 2019 and its verbal submission during the hearing held on 16 April 2019, in that:

- a) The Authority insists that reference to standard BS 14877 related only to the installation and workmanship stage. At the same instance, the

Authority consulted an expert who confirmed that both standard BS 14877 and BS EN 1177 are compatible with each other.

This same Board also noted the testimony of the witnesses namely:

Engineer Laurel Benoit – Duly summoned by Projekte Global Limited

Engineer Konrad Maistre – Duly summoned by Projekte Global Limited

Engineer Simon Scicluna – Duly summoned by Foundation for Tomorrow's Schools.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by the parties concerned, including the testimony of the technical witnesses duly summoned, opines that the issue that merits consideration in this particular case, is the 'Standard' which was stipulated in the tender document, with particular reference to the 'Critical Fall Height' (CFH), the contents of which are of a highly technical nature, so that this Board had to rely substantially on the testimony and explanation given by the technical witnesses.

- 1. First and foremost, this Board justifiably established that the tendering works are for the provision of rubber soft flooring to be installed at a**

primary school which in turn is to be used as a playground area. At the same instance, this Board takes into consideration the fact that, such a flooring will be utilized by children of a tender age where accidents are, as much as possible, to be prevented so that, the stipulated condition with regards to 'Critical Fall Height' (CFH) must be strictly respected and in this case, the Authority dictated a CFH of 800mm.

- 2. The tender document stipulated standard BS 14877 and although, through a clarification reply, it was confirmed that BS EN 1177 was acceptable to the Authority, this confirmation was later reversed so that BS 14877 remains as the standard to be adopted in the supply and installation of the rubber flooring.**
- 3. Appellants' contention, in this regard, is that, BS 14877 does not provide for a CFH of 800mm; in fact, Appellants maintain that BS 14877 is applied where sporting contests are performed such as tracks and are more adapted to cater for the proper hardness of the rubber flooring to ensure proper bounciness of the ball. In this respect, Appellants insist that the proper standard which should have been stipulated by the Authority, is BS EN 1177 which provides for the dictated CFH and is therefore suitable for a playground. At this stage of consideration, this Board would refer**

to an extract from the testimony of Engineer Konrad Maistre, who is also a person qualified to certify playground safety features, as follows:

“Avukat: Inġinier, l-ewwel net, li xtaqt nistaqsik x’hinu x-xogħol tiegħek fejn jidhlu sports ground u play grounds u x’hinuma l-expertise tiegħek u kemm ilek f’dan is-settur?

Xhud: Ilni nahdem f’dan is-settur għal 15-il sena. Kont l-ewwel bniedem hawn Malta li gejt certifikat li nista nahdem fuq playground equipment. Kont gejt nominat bhala competent person min-naha dak iz-zmien tal-Malta Standards Authority li illum hija l-MCCAA. Illum il-gurnata nagħmel u nicertifika għan-nom tal-Gvern centrali l-playgrounds tiegħu, m’għandhomx x’jaqsmu ma dawk tal-Local Councils. Kont wiehed minn dawk li stabilixxejna wkoll, hawn Malta hargu standards min-naha tal-MSA, wiehed ta’ outdoor playground u kont wiehed minn dawk li kkontribwejt għalihom.

Avukat: Familjari mal-istandards 14877 ta’2013 u ma 1177 ta’ 2018 u jekk iva x’hinuma dawn iz-zewg standards u għal xiex jirreferu?

Xhud: Iva familjari hafna magħhom. L- istandard 1177 jirreferi għas-safety surfaces ngħidu ahna ta’ playground equipment, specifkament outdoor playground equipment fejn dan l-istandard jidhol fid-dettal biex jipprotegi lit-tfal li jkunu qegħdin jilgħabu fil-playgound mill allahares qatt jaqgħu u jahbtu rashom u jekk inti tahbat rasek ma xi haga iebsa, tista thalli permanent damage u dan li jagħmel il-cushioning apposta. Ma jfissirx li bniedem ma jistax jikser idejh. Dak huwa l-1177. IL-14877 huwa standard li m’għandu xejn x’jaqsam ma playgrounds. Jiddependi biss fuq logħob ta’ athletics, tennis, again outdoor imma m’għandux xejn x’jaqsam ma safety.”

Furthermore, the same witness stressed the fact that BS EN 1177and

BS 14877 are not compatible with each other as follows:

Avukat: it-tender in kwistjoni li jirrigwarda provision ta’ rubber soft flooring at Marsascula new primary school, jitlob compliance kompleta ma

BS EN 14877 ta' 2013 kif ukoll fl-istess hin li r-rubber flooring irid ikollu critical fall height ta' 800mm. Xi tighidilna fuq dawn iz-zewg kriterji?

Xhud: Iva meta rajthom l-ewwel darba jiena indunajt li kien hemm daqxejn ta' anomalija. Ghax wahda mhix kompatibbli mal-ohra. IL-14877 hija track standard li ma jidhlux fih il-critical fall height. Pero l-critical fall height ahna norbtuh mal-1177. Kien hemm anomalija li ovjament kellhom jiccekkjaw u jitolbu daqxejn ta' izjed informazzjoni ghala hemm insemija t-tnejn ghax ghalija ma taghmilx sens.

4. The Authority, on the other hand, is insisting that, the objective of the tender was to provide soft flooring for a playground, having other equipment normally associated with such a facility and in this respect, an extract from the testimony of Engineer Simon Scicluna will confirm such an issue, as follows:

Xtaqna illi niccara punt biex kif jghidu fl-Ingiliz we do not miss the wood for the trees. L-iskop illi hareg it-tender huwa ghal playground surface. Jigifieri ntuzat hafna l-kelma hawn hekk playground playground u l-istandard li ssottometta l-kollega tieghi l-inginier Maistre fuq l-istandards tal-playground. Playground maghmul minn hafna affarijiet. Ghandek l-equipment li jtilghu fuqu t-tfal, li jilghabu bih, il-fence li jkun hemm, id-dawl li jkun hemm u jkun hemm ukoll il-wicc li inti tilghab fuqu. Mela rridu naghamlu distinzjoni bejn playground u l-affarijiet li jkun hemm go fih u playground surface. Dan it-tender hareg biex isir is-surface, il-wicc tal-playground u mhux l-affarijiet l-ohra. Issa kif qalet tajjeb l-avukatessa ahna llum qed nitkellmu fuq post li gara fl-evaluation. Il-kumitat li evalwa, li jien kont ic-chairman tieghu, kellu tender, kellu l-offerti. Wahda mill-prerekwiziti illi kien hemm fit-tender kienet illi l-wicc li jrid jinhadem u jrid jigi offrut, ghandu jissodisfa l-istandard 14877.

5. This Board was also made aware of the fact that, although the members of the Evaluation Committee were not technical, same Committee sought the advice from a certain Mr. Mark Harrison, the latter having

wide experience in working with synthetic sports surfaces, as duly confirmed by the Chairperson, Engineer Simon Scicluna, as follows:

- Avukat: L-FTS ukoll staqsiet l-espert fuq il-coherence ta'dawn iz-zewg*
- Avukat: Domanda diretta*
- Avukat: L-FTS ikkonfermat dwar il -coherence ta' dawn iz-zewg specifications?*
- Xhud: Iva l-FTS ivverifikat u tkellmet ma espert mill- UK illi ghandu esperjenza kemm fil-manifattura ta dawn it-tip ta' ucuħ kif ukoll fl-ittestjar tagħhom u dan l-espert irrispondiha li ma jara ebda problema li kif inkiteb it-tender għandu jkun hemm standard jikkontradixxi lil xi standard iehor.*
- Chairman; Għandek bil-miktub?*
- Xhud: Għandi email.*
- Avukat: Ikolli bzonn naraha ftit.*
- Chairman: Jigifieri lill-espert kellimtuh intom fuq il-materjal. Ma kellimtuhx fuq il-critical fall uaffarijiet hekk.*
- Xhud: L-espert staqsejniah ghidnilu isma, għandi hawn hekk."*

In this regard, this Board requested the detailed advice given by Mr. Harrison and this Board was presented with correspondence between the Authority and Mr. Harrison, which makes no reference to the fact that BS 14877 provides for a minimum CFH of 0.8mm. In this respect, this Board notes that Mr. Harrison did not submit a detailed explanation as to how standard BS 14877

will satisfy the requirements and objectives of the tender. In fact, the correspondence consisted of the two e-mails, as follows:

Request by Authority:

“Subject: BS 14877 and BS 1177

Mark,

I have a personal query related to a past design & build tender.

The suppliers were asked to construct their in-situ soft surfaces according to BS 14877. No thickness was specified however a minimum CFH of 0.8mm was requested.

Do you see any problem with this?”

Reply by Mr. Harrison:

“Subject: BS 14877 and BS 1177

No, Simon, I don't see any problem with this.

For a D&B tender it is usually preferable to state the performance requirements and allow the Contractor to decide on the required thickness (provided there is also requirement for verification of the performance on completion).

I didn't take that approach for the St Paul's Bay specification because of the need to match the thickness of the areas of different types of E-layer.

Regards

Mark Harrison”

In conclusion, this Board opines that:

- a) The safety of the end users of such a playground surface, is the most dominant aspect of this appeal, so that this Board's concern is to ensure that the material to be provided by the Authority must provide a 'Critical Fall Height' of 800mm and in this regard, this Board is more comfortable to accept the credible testimony of Engineer Konrad Maistre, who explained vividly that BS 14877 is more appropriate for the track surfaces and does not provide for a CFH of 800mm.
- b) The correspondence between the Authority and Mr. Harrison is very brief and sketchy and technical information on the use of standard BS 14877 for playground surfaces is lacking.
- c) The Authority, in drafting the technical specifications, should seek expert advice on the application of surfaces for playground with the inclusion of the proper standard to be applied.

In view of the above, this Board,

- I. Does not uphold the Contracting Authority's decision in the award of the tender.

II. Upholds the Appellants contentions and directs that the deposit paid by Appellants' should be fully refunded.

III. Directs that the tender be cancelled.

IV. Directs that proper technical specifications be formulated to reflect this Board's considerations, when the tender is re-issued

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Carmel Esposito
Member

14 May 2019

