

PUBLIC CONTRACTS REVIEW BOARD

Case No. 375

KLM/2011/06

Tender for the Upgrading and Embellishment of Play Area at Misrah Mifsud Bonnici, Marsascala

The closing date for this tender which was published on the 10th May 2011 was the 9th June 2011.

The estimated value of this tender was € 150,000 – € 180,000.

Five (5) tenderers submitted their offers.

Messrs Reactilab Ltd filed an objection on 24th October 2011 against the decisions of Marsascala Local Council to disqualify its offer as technically non-compliant and to recommend award to JGC Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman and Mr Carmel Esposito and Mr Paul Mifsud as members convened a meeting on Friday, 27th January 2012 to discuss this objection.

Present for the hearing:

Messrs Reactilab Ltd

Dr John Gauci	Legal Representative
Mr Stephen Debono	Representative

Alhag (Malta) Ltd

Mr Matthew Spiteri	Representative/Engineer
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JGC Ltd

Mr Pierre Cuschieri	Representative
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Marsascala Local Council

Dr Susann Agius	Legal Representative
Mr Aaron Abela	Technical Advisor

Evaluation Board

Mr Mario Calleja	Mayor
Mr Charlot Mifsud	Deputy Mayor
Mr Lawrence Ciantar	Councillor
Mr George Farrugia	Councillor
Mr John Baptist Camilleri	Councillor
Mr Josef Grech	Executive Secretary



After the Chairman's brief introduction, the appellant was invited to explain the motives of his objection.

Late Notification

Dr John Gauci, legal representative of Reactilab Ltd, the appellant company, observed that, just then, a letter dated 25th January 2012 from Marsascala Local Council in reply to his client's appeal was being circulated when, the analysis report, dated 6th December 2011, which his client received on the 19th January 2012 only made reference to his appeal to the exclusion of Marsascala Local Council's letter of reply and the second appeal lodged by Alhag (Malta) Ltd on the same case. Dr Gauci claimed that, as a result, he did not have the time to properly prepare his client's case.

Dr Susann Agius, legal representative of the Marsascala Local Council, remarked that the Council was not formally notified of the date of the appeal but it learned about it on the 19th January 2012 and hence it had tabled an *interim* letter of reply

The Public Contracts Review Board took note and informed that it would look into the matter while appealing for the appellant company's sense of comprehension as the Public Contracts Review Board was still settling down in its new premises besides taking on new staff members.

The parties were allowed a few minutes to consider the correspondence in question following which all parties concerned agreed that they were adequately enabled to present their respective arguments.

Dr Gauci made the following submissions:

- by letter dated 14th October 2011 the Marsascala Local Council had informed his client that its offer had been found to be technically non-compliant for the following reasons:

“you did not provide play equipment for the age group between 13 and 15 years (teens) as clearly indicated in Art. 2.01.02 of the General Specifications, and

you did not supply a detailed and itemised bill of quantities as indicated in mandatory submittals checklist”.

- on requesting more details as to the reasons for rejection, his client was then furnished with that part of the evaluation report pertaining to its own bid which read as follows:-

“Reactilab has provided the cheapest offer for this particular section. The tenderer is offering amongst others two sets of swings, seat springs, slide, a swing for the disabled persons, a play structure and a seesaw which are all certified according to the required standards. The safety rubber tiles are also according to the necessary specifications. Unfortunately, the tenderer did not provide something innovative in his design and did not cater anything specific for teens between 13-15 yrs old as shown in the

technical description of the equipments. The idea of introducing two sets of swings (four in total) which are all similar does not indicate a vast choice of equipment or anything original. Therefore, in my opinion, this particular design neither provide a unique playing field nor attract children of different ages as listed in the tender."

1) Bidder did not provide play equipment for the age group between 13 and 15 years

Dr Gauci made the following submissions:-

- i. it would therefore appear that his client was disqualified not because the firm's bid did not provide play equipment for the age group 13-15 but because it did not indicate a vast choice of equipment or anything original;
- ii. the tender document did not indicate the items of equipment that the bidder had to provide or that the bidder had to provide innovative equipment;
- iii. once his client offered equipment for the 13-15 age group and it was compliant then the contracting authority had no right to disqualify his client's bid for something that was not requested in the tender document, e.g. the provision of innovative equipment;
- iv. his client made the following declaration at para. 2.01 (1) of the bill of quantities, viz:

"The set of swings will be mounted side by side with 4 in total rubber flat seats with chains for teens aged between 13 and 15 years of age".

Dr Gauci claimed that a declaration by the tenderer carried weight;

- v. his client had offered a kind of swings which were suitable for ages 0 to 4, 3 to 8 and even 13 to 15 depending on the type of seat that would be used otherwise the frame of the swing was a common feature;
 - vi. it turned out that, after all, the contracting authority did not exclude his client for the non-submission of equipment for age group 13 to 15 but for not submitting anything original, when the latter was not requested in the tender document;
- and
- vii. his client's bid was compliant and the cheapest and, as a consequence, his client should be awarded the tender.

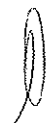
On her part, Dr Agius made the following counter submissions:-

- a. the Marsascalea Local Council had appointed Mr Aaron Abela to draw up a technical report on the tender submissions received and then the Marsascalea Local Council considered the report and made its decisions thereon;

- b. the Marsascala Local Council's letter dated 14th October 2011, at no point in time, did it state that the appellant firm's bid was rejected for lack of originality but, simply, because the firm did not provide adequate play equipment for the age group 13 to 15 years, apart from the other issue arising from the bill of quantities;
and
- c. what the appellant company had, in fact, submitted were two (2) Seats Swing Comet Cod. 240 which, according to the manufacturer, could be used by children aged 0 to 4 and 3 to 8 but there was no indication from the manufacturer that these swings were meant for teenagers aged 13 to 15 years.

Mr Aaron Abela, technical adviser to Marsascala Local Council, explained that:-

- i. the Marsascala Local Council categorised the age groups as follows, 2 to 5, toddlers and infants, 5 and 13, juniors, and 13 to 15, teens as per clause 2.01.02;
- ii. the bidders were left free to make their submission with each age group being allotted a segregated area and with each age group being given the same degree of importance;
- iii. besides play equipment, where some bidders included technological/interactive games, the tender requested other works/services, e.g. lighting, rubber tiling and CCTV equipment;
- iv. it was correct that the appellant company made a declaration at para. 2.01 (1) of the bill of quantities that the "*set of swings will be mounted side by side with 4 in total rubber flat seats with chains for teens aged between 13 and 15 years*" but that declaration was not backed by literature from the manufacturer as was the case with the swings that the firm had offered for age groups 0 to 4 and 3 to 8 years;
- v. the appellant company submitted a swing seat which was, evidently, an enlarged picture of the same swing seat used for age groups 0 to 4 and 3 to 8 and attributed it to the swing that would be used by 13 to 15 year olds without corroborating its declaration by the manufacturer's;
- vi. the manufacturer's certification was required for such purposes as safety, liability, insurance and similar matters;
- vii. the tenderers were even requested to present a 'site plan', split into different sections, according to the three different age groups given and indicating the equipment for each section. It turned out quite clearly from the information given by the appellant company, continued Mr Abela, that for the 13 to 15 year age group the company presented the same swing as that for age groups 0 to 4 and 3 to 8 with the same code 240 with the difference being that the same picture of the seat was enlarged however without the manufacturer's literature certifying that the swing was suitable for 13 to 15 year olds, which certification was presented for the other age groups;



viii. the appellant company was not excluded because its bid did not offer innovative equipment - that was an additional note that he, personally, had inserted in his report on the overall offer submitted by the appellant company - but because it did not submit any play equipment for 13 to 15 year olds accompanied by the manufacturer's technical literature;

and

ix. clause 2.01.01 referred to standards, clause 2.01.04 referred to the documents required from the bidder and the tender document also requested certification of conformity with the standards.

The Chairman Public Contracts Review Board remarked that, albeit the declarations made by the tenderer carried their weight, yet, in certain circumstances, declarations were required to be backed up technical literature and/or manufacturer's certification. He added that it appeared that technical literature was not mandatory and, as a consequence, there could be no exclusion on documentation that was not requested in the first place. Yet, nevertheless, it also appeared that what the appellant company submitted by way of equipment for 13 to 15 year olds did not match the standards requested.

Mr Abela declared that the play equipment for 13 to 15 year olds presented by the appellant company did not match the technical data which the company gave on the 'site plan'. He added that the appellant company understood what was required of the bidders at clause 2.01.02 so much so that it presented what was required for age groups 2 to 5 and 5 to 13 years, namely the 'site plan' along with the equipment accompanied by the manufacturer's technical data and ISO certificate, but the said company failed to do the same with regard to age group 13 to 15.

Dr Gauci, when pressed, stated that his client did have the manufacturer's certificate that the swing presented was suitable for 13 to 15 year olds but his client did not have that certificate with him at the hearing. He maintained his client had submitted what was requested in the tender document.

Mr Josef Grech, Executive Secretary of the Marsascala Local Council, confirmed that Mr Aaron Abela was engaged as technical adviser on this tender to prepare a report on the bids submitted which the Marsascala Local Council then examined and decided upon. He added that the reasons for disqualification were the non-submission of play equipment for 13-15 year olds and the non-submission of the itemised bill of quantities.

2) Bidder did not supply a detailed and itemised bill of quantities

Dr John Gauci made the following submissions:-

a. the relevant extract from the evaluation report stated that:

"One must also remark that although the bill of quantities is comprehensive, most items are grouped together. Thus not all the items have a separate rate or amount as was requested."



- b. by the contracting authority's own admission the bill of quantities submitted by his client was comprehensive, so much so that each item was extensively described but the prices were given in groups, e.g. item 1 to 11 were grouped together under 'Playing Field Areas for the price of €31,000;
- c. the mandatory submittals' checklist of the tender document stated that '*The tenderers are to provide, inter alia, "a, detailed Bill of Quantities outlining description of items, quantity, rate and their respective sub-total";*
- d. the contracting authority did not provide the bill of quantities in the tender document and, as a result, the bidder had to submit his company's own and that was what his client did;

and

- e. the Courts have already pronounced themselves in this regard in the sense that a tenderer could not be excluded for omitting something that was not requested in the tender document or by regulations and in the case of his client (i) no request for innovative equipment was made in the tender document and (ii) the detailed bill of quantities requested had been submitted.

On her part Dr Agius submitted that:-

- i. clause 1.03 stated, among other things, that the "*bidder must present with this tender a detailed complete Bill of Quantities, outlining each item provided together with their respective item's rate, quantity and total amount for each item.*"
- ii. the bill of quantities submitted by the appellant company was descriptive but, apart from not including the price for each item, it aggregated a number of items, e.g. under 2.01 (1) no less than 11 items were grouped together under 'Playing field areas' and a total price of €31,000 was quoted;
- iii. the term 'Playing field area' was an entire category in respect of which one could not quote a rate whereas the items were, a swing, a seesaw, a slide and so forth in respect of which a unit rate, a quantity and a total were requested;

and

- iv. the way the appellant company presented its bill of quantities did not allow the contracting authority to know the price of a swing, a slide or a seesaw.

Mr Abela remarked that the contracting authority requested the cost of each item, namely a swing, seesaw, slide etc, for the following reasons:-

- a. in case the contracting authority would, eventually, need to replace an item it had to know the unit price;

and



- b. when taking up an insurance policy to cover this playing field, the Marsascala Local Council had to present the cost of each item so that when placing a claim with the insurance firm for damages caused to a particular item of equipment it would claim either a replacement or the cost thereof.

The Chairman Public Contracts Review Board observed that, once the appellant company gave the total price for the category 'Playing field areas', it could have given the cost of each item under that category once the individual items made up the category.

At this point the hearing was brought to a close.

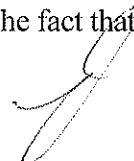
This Board,

- having noted that the appellant company, in terms of the reasoned letter of objection dated 22nd November 2012 and through the verbal submissions made during the hearing held on 27th January 2012, had objected against the decisions of Marsascala Local Council to disqualify its offer as technically non-compliant and to recommend award to JGC Ltd;
- having noted the appellant firm's representatives' claims and observations regarding the fact that (a) by letter dated 14th October 2011 the Marsascala Local Council had informed the appellant company that its offer had been found to be technically non-compliant due to the fact that (1) it did not provide play equipment for the age group between 13 and 15 years (teens) as clearly indicated in Art. 2.01.02 of the General Specifications and (2) it did not supply a detailed and itemised bill of quantities as indicated in mandatory submittals checklist, (b) it would appear that the appellant company was disqualified not because the firm's bid did not provide play equipment for the age group 13-15 but because it did not indicate a vast choice of equipment or anything original, (c) the tender document did not indicate the items of equipment that the bidder had to provide or that the bidder had to provide innovative equipment, (d) once the appellant company offered equipment for the 13-15 age group and it was compliant then the contracting authority had no right to disqualify its bid for something that was not requested in the tender document, e.g. the provision of innovative equipment, (e) the appellant company had declared that the "set of swings will be mounted side by side with 4 in total rubber flat seats with chains for teens aged between 13 and 15 years of age", (f) the appellant company had offered a kind of swings which were suitable for ages 0 to 4, 3 to 8 and even 13 to 15 depending on the type of seat that would be used otherwise the frame of the swing was a common feature, (g) it turned out that, after all, the contracting authority did not exclude the appellant company for the non-submission of equipment for age group 13 to 15 but for not submitting anything original, when the latter was not requested in the tender document, (h) the appellant company's bid was compliant and the cheapest and, as a consequence, it should be awarded the tender, (i) when pressed, the appellant company's representative claimed that they did have the manufacturer's certificate that the swing presented was suitable for 13 to 15 year olds but his client did not have that certificate with him at the hearing, (j) by the contracting authority's own admission the bill of quantities submitted by the appellant company was comprehensive, so much so that each item was extensively described but the prices were given in groups, e.g. item 1 to 11 were grouped together under 'Playing Field Areas for the price of €31,000, (k) the contracting authority did not provide the bill



of quantities in the tender document and, as a result, the bidder had to submit his company's own and (l) the Courts have already pronounced themselves in this regard in the sense that a tenderer could not be excluded for omitting something that was not requested in the tender document or by regulations and, in the case of the appellant company (1) no request for innovative equipment was made in the tender document and (2) the detailed bill of quantities requested had been submitted;

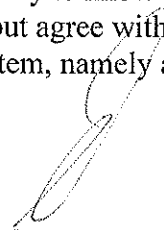
- having considered the contracting authority's representative's submissions, namely that (a) the Marsascula Local Council had appointed Mr Aaron Abela to draw up a technical report on the tender submissions received and then the Marsascula Local Council considered the report and made its decisions thereon, (b) the Marsascula Local Council's letter dated 14th October 2011, at no point in time, did it state that the appellant firm's bid was rejected for lack of originality but, simply, because the firm did not provide adequate play equipment for the age group 13 to 15 years, apart from the other issue arising from the bill of quantities, (c) what the appellant company had, in fact, submitted were two (2) Seats Swing Comet Cod. 240 which, according to the manufacturer, could be used by children aged 0 to 4 and 3 to 8 but there was no indication from the manufacturer that these swings were meant for teenagers aged 13 to 15 years, (d) the Marsascula Local Council categorised the age groups as follows, 2 to 5, toddlers and infants, 5 and 13, juniors, and 13 to 15, teens as per clause 2.01.02, (e) the bidders were left free to make their submission with each age group being allotted a segregated area and with each age group being given the same degree of importance, (f) besides play equipment, where some bidders included technological/interactive games, the tender requested other works/services, e.g. lighting, rubber tiling and CCTV equipment, (g) whilst it was correct that the appellant company made a declaration at para. 2.01 (1) of the bill of quantities that the *"set of swings will be mounted side by side with 4 in total rubber flat seats with chains for teens aged between 13 and 15 years"* yet that declaration was not backed by literature from the manufacturer as was the case with the swings that the firm had offered for age groups 0 to 4 and 3 to 8 years, (h) the appellant company submitted a swing seat which was, evidently, an enlarged picture of the same swing seat used for age groups 0 to 4 and 3 to 8 and attributed it to the swing that would be used by 13 to 15 year olds without corroborating its declaration by the manufacturer's, (i) the manufacturer's certification was required for such purposes as safety, liability, insurance and similar matters, (j) albeit the tenderers were even requested to present a 'site plan', split into different sections, according to the three different age groups given and indicating the equipment for each section yet it turned out quite clearly from the information given by the appellant company that for the 13 to 15 year age group the company presented the same swing as that for age groups 0 to 4 and 3 to 8 with the same code 240 with the difference being that the same picture of the seat was enlarged however without the manufacturer's literature certifying that the swing was suitable for 13 to 15 year olds, which certification was presented for the other age groups, (k) the appellant company was not excluded because its bid did not offer innovative equipment - that was an additional note that Mr Attard, personally, had inserted in his report on the overall offer submitted by the appellant company - but because it did not submit any play equipment for 13 to 15 year olds accompanied by the manufacturer's technical literature, (l) clause 2.01.01 referred to standards, clause 2.01.04 referred to the documents required from the bidder and the tender document also requested certification of conformity with the standards, (m) the play equipment for 13 to 15 year olds presented by the appellant company did not match the technical data which the company gave on the 'site plan' and this despite the fact that it was



amply clear that the appellant company had understood what was required of the bidders at clause 2.01.02 so much so that it presented what was required for age groups 2 to 5 and 5 to 13 years, namely the 'site plan' along with the equipment accompanied by the manufacturer's technical data and ISO certificate, but the said company failed to do the same with regard to age group 13 to 15, (n) clause 1.03 stated, among other things, that the "*bidder must present with this tender a detailed complete Bill of Quantities, outlining each item provided together with their respective item's rate, quantity and total amount for each item.*", (o) the bill of quantities submitted by the appellant company was descriptive but, apart from not including the price for each item, it aggregated a number of items, e.g. under 2.01 (1) no less than 11 items were grouped together under 'Playing field areas' and a total price of €31,000 was quoted, (p) the term 'Playing field area' was an entire category in respect of which one could not quote a rate whereas the items were, a swing, a seesaw, a slide and so forth in respect of which a unit rate, a quantity and a total were requested and (q) the way the appellant company presented its bill of quantities did not allow the contracting authority to know the price of a swing, a slide or a seesaw

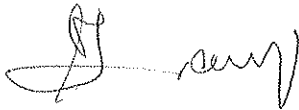
reached the following conclusions,

1. The Public Contracts Review Board opines that, albeit the declarations made by the tenderer carried their weight, yet, in certain circumstances, declarations were required to be backed up by technical literature and/or manufacturer's certification and this would be a case in point.
2. The Public Contracts Review Board feels that, whilst it appeared that technical literature was not mandatory and, as a consequence, there could be no exclusion on documentation that was not requested in the first place, yet, it also appeared to be evident that what the appellant company submitted by way of equipment for 13 to 15 year olds did not match the standards requested. This Board agrees with the evaluation board's interpretation of facts wherein, *inter alia*, it was amply clear that the appellant company had understood what was required of the bidders at clause 2.01.02 so much so that it presented what was required for age groups 2 to 5 and 5 to 13 years, namely the 'site plan' along with the equipment accompanied by the manufacturer's technical data and ISO certificate, but the said company failed to do the same with regard to age group 13 to 15.
3. The Public Contracts Review Board argues that the points raised by the contracting authority relating to the fact that it had been claimed that the appellant company had not submitted itemised bill of quantities were highly pertinent and credible, especially in consideration of the fact that, whilst clause 1.03 stated, among other things, that the "*bidder must present with this tender a detailed complete Bill of Quantities, outlining each item provided together with their respective item's rate, quantity and total amount for each item.*", yet, it was evidently clear that the bill of quantities submitted by the appellant company was descriptive and, apart from not including the price for each item, it aggregated a number of items, e.g. under 2.01 (1) no less than 11 items were grouped together under 'Playing field areas' and a total price of €31,000 was quoted. Undoubtedly, it is a fact that the way the appellant company presented its bill of quantities did not allow the contracting authority to know the price of a swing, a slide or a seesaw. Indeed, this Board cannot but agree with the reasons for the contracting authority requesting the cost of each item, namely a



swing, seesaw, slide and so forth, namely, e.g. (a) in case the contracting authority would, eventually, need to replace an item it had to know the unit price and (b) when taking up an insurance policy to cover this playing field, any entity, in this case the Marsascala Local Council, had to present the cost of each item so that when placing a claim with the insurance firm for damages caused to a particular item of equipment it would claim either a replacement or the cost thereof. This Board concludes that, considering that the appellant company gave the total price for the category 'Playing field areas', it could have given the cost of each item under that category once the individual items made up the category.

In view of the above this Board finds against the appellant company and recommends that the deposit paid by the latter should not be reimbursed.



Alfred R Triganza
Chairman



Carmel J Esposito
Member



Paul Mifsud
Member

6 February 2012