

## PUBLIC CONTRACTS REVIEW BOARD

Case No. 395

**PARK/23/2011/14**

**Tender for the Supply, Delivery and Installation of Play Equipment for the Petting Farm Ta' Qali**

This call for tenders was published in the Government Gazette on the 20<sup>th</sup> January 2012. The closing date for this call with an estimated budget of € 35,000 (items 1 and 2) was the 7<sup>th</sup> February 2012.

Four (4) tenderers submitted their offers.

Be Independent Ltd filed an objection on the 7<sup>th</sup> March 2012 against the decisions of the Ministry for Resources and Rural Affairs to disqualify its offer as technically non-compliant and to recommend the award of item 1 to JGC Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr. Carmel Esposito and Mr Joseph Croker as members convened a public hearing on Thursday, 12<sup>th</sup> April 2012 to discuss this objection.

Present for the hearing:

### **Be Independent Ltd**

Dr Antoine Cremona	Legal Representative
Dr Julienne Portelli Demajo	Legal Representative
Mr Edward Tanti	Director
Ms Christine Tanti	Representative

### **JGC Ltd**

Mr Pierre Cuschieri	Representative
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### **Ministry for Resources and Rural Affairs**

Dr Lara Pace	Legal Representative
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### **Evaluation Board**

Mr Herman Galea	Chairman
Mr Emanuel Borg	Member
Mr Norbert Testa	Member
Ms Charmaine Debono Fenech	Member



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

Dr Antoine Cremona, legal representative of Be Independent Ltd, the appellant company, stated that by letters dated 29<sup>th</sup> February 2012, the contracting authority had informed his client that the company had been awarded item 2 of the tender whereas its offer for item 1 was considered to be non-compliant because it did not comply with specifications at Clause 8.5 and 8.6.1, namely, that (a) it was not intended for the required age bracket, (b) farms animals were not at its focal and (c) it did not have more than one play facility.

**A) Required Age Bracket**

Dr Cremona submitted that:-

- i. with regard to the required age bracket clause 8.5 stated, among other things, that "*... The Challenge Capacity of the play equipment (integrated and/or single challenge) shall be appropriate for children of ages between 3 and 12 years....*"
  - ii. the items offered by his client indicated the following age brackets, namely 1 to 3 years - 2 to 7 years and 6 to 15 years;
  - iii. as a result, his client not only did cover the age bracket laid down in the tender document but went even beyond because the items offered, effectively, covered ages 1 to 15 years;
- and
- iv. in terms of safety it was questionable how an item could be used simultaneously by children whose age ranged from 3 to 12 years considering the substantial age difference.

Dr Lara Pace, legal representative of the contracting authority, contended that the age bracket proposed by the appellant company did not correspond to the specifications laid down in clause 8.5, namely 3 to 12 years. She added that whenever the contracting authority required playing equipment for ages 1 to 3 years and beyond 12 years it had included those age groups in the specifications but, in this call for tenders, it was made clear that the items were intended for children aged 3 to 12 years.

At this stage the Public Contracts Review Board (a) queried whether each item offered had to cater for children aged 3 to 12 years old in which case it could be rather dangerous to have 3 year olds playing on the same playing equipment as 12 year olds, (b) questioned if it was an established standard for such items to cater strictly for the age bracket of 3 to 12 years or if some overlap was permissible and (c) noted that the items offered by the appellant company, collectively, catered for the requested age group of 3 to 12 years with a measure of overlap.

Mr Herman Galea, chairman of the adjudicating board, remarked that one item could offer different play facilities, with one facility catering for, say, 3 to 6 year olds, e.g.

building blocks or small slide, with another facility catering for 7 to 12 year olds, e.g. bigger slide and rope climbing, and such items were certified by the competent authorities.

**B) Farm animals were not at focal points**

Dr Cremona submitted that:

- a. whilst the swings (product code 1113B) proposed by his client had a crab on top of a pole, yet a note was inserted in the appellant company's original submission stating that it could be substituted by other animals according to the request of the client;
  - b. the combined wave slide, vertical climb and overhanging wheel holds (product code 8160B) had butterflies on top of the poles which could be substituted by other animal features according to the request of the client;
  - c. the combined items with four to five play panels (product code 7065 A and C), namely, slides, rotating balls, bubble panel, climbs and so forth, included some animal features in the shape of a dog which could also be replaced by any other animal as per client's request;
- and
- d. although his client submitted photographic images of the items offered, yet some could be custom built for the client.

Mr Galea explained that:-

- i. clause 8.6.1 provided as follows:-  

*'Structures of Animal Shapes with integrated play equipment: Given the challenge comprehensive aspect of this equipment, areas marked as "A" and "B" on Annex "A" shall be reserved for either single (stand alone) play equipment, or a combination of animal forms with integrated play equipment. The ground area available for this play equipment is of approximately 50m<sup>2</sup> each (zone "A" and zone "B" on Annex A). This equipment shall take at least 2 users at a time, using two different challenges integrated within the same animal shape.'*
- ii. clause 8.4 laid down that ... *"The tenderer must submit photographic and technical details of all the equipment that is being proposed. Failure to submit such details shall render the offer invalid";*
- iii. from the photographic images presented by the appellant company it emerged that the items offered were not 'structures of animal shapes with integrated play equipment';

- iv. the tender specified that the item had to be in the form of an animal and the animal had to be the main attraction for the children such that it would capture their imagination and attention;
  - v. it was evident from the images provided by the appellant company that the items offered did not have animals as their focal point;
- and
- vi. with regard to item 2, the appellant company had submitted what was requested, namely animal related items, and, as a result, the said firm was awarded the tender.

Dr Pace remarked that:-

- a. the tender was very specific both in clause 8.5 which stated “*Such equipment shall have as a focal aspect, a form of farm related animal (such as: cow, sheep, pig, pony etc)*” and even at clause 8.6.1 which stated that the main feature/attraction had to be the animal-like structure and that the integrated play equipment was more of an accessory to the main structure;
  - b. one had to constantly keep in view that these items were required for a petting farm and not for a playing field and that was why ‘animals’ were the focal point;
- and
- c. a swing having a crab on the pole did not represent a ‘structure of animal shape with integrated play equipment’.

*At the request of the appellant company, the Public Contracts Review Board went through the offer submitted by the recommended tenderer and viewed what items the company offered with regard to item 1 of the tender. The Public Contracts Review Board noted that the items offered by the recommended tenderer had visibly and unmistakably the animal structure as their focal point with integrated play equipment in the form of slides, climbing and descending ropes and so forth.*

**C) Items offered did not have more than one play facility**

Dr Pace stated that clause 8.5 laid down that such “*equipment shall have as a focal aspect, a form of a farm related animal (such as: cow, sheep, pig, pony etc.) and an array of play facilities (such as: swing, slide, shoot, climbing ladder, see-saw etc) integrated within, or around it.*” She explained that product code 1113B represented a swing with no other play facilities or else it was left up to the contracting authority to integrate it with other play facilities.

Dr Cremona remarked that:-

- i. clause 8.5 also provided that single “*challenge play equipment (always with farm animals as a focal aspect) would also be considered*”;

- ii. the other combined items offered by his client did provide more than one play facility

and

- iii. clause 8.5 included such terms as 'play equipment closely related to farm animals' and 'play facilities .... integrated within or around it (animal related form)' which could be interpreted in different ways and, therefore, in the appellant company's tender submission the latter remained faithful to tender specifications.

Dr Pace reiterated that different provisions of the tender document made it amply clear that the contracting authority was requesting structures with animal shapes as the focal point with the integrated play equipment being an ancillary aspect.

### *Price*

The Public Contracts Review Board noted that the department's estimate for items 1 and 2 was €35,000.

Dr Cremona pointed out that the price of €8,740 offered by his client was substantially cheaper than that of the recommended tenderer, namely, €29,500 and that the award criterion was the cheapest price and not the most economically advantageous tender. He added that his client opted to offer those items in order to be competitive in terms of price.

Dr Pace responded that prior to being considered in terms of the price, a bid had to first satisfy the technical specifications.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their 'letter of objection' dated 6<sup>th</sup> March 2012 and also through their verbal submissions presented during the hearing held on the 12<sup>th</sup> April 2012, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by letters dated 29<sup>th</sup> February 2012, the contracting authority had informed the appellant company that it had been awarded item 2 of the tender whereas its offer for item 1 was considered to be non-compliant because it did not comply with specifications at Clause 8.5 and 8.6.1, namely, that (1) it was not intended for the required age bracket, (2) farms animals were not at its focal and (3) it did not have more than one play facility, (b) with regard to the required age bracket the items offered by the appellant indicated the following age brackets, namely 1 to 3 years - 2 to 7 years and 6 to 15 years and, as a result, the said appellant company did not only cover the age bracket laid down in the tender document but went even beyond because the items offered, effectively, covered ages 1 to 15 years; (c) in terms of safety it was



questionable how an item could be used simultaneously by children whose age ranged from 3 to 12 years considering the substantial age difference, (d) whilst the swings (product code 1113B) proposed by the appellant company had a crab on top of a pole, yet a note was inserted in the company's original submission stating that it could be substituted by other animals according to the request of the contracting authority, (e) the combined wave slide, vertical climb and overhanging wheel holds (product code 8160B) had butterflies on top of the poles which could be substituted by other animal features according to the request of the client, (f) the combined items with four to five play panels (product code 7065 A and C), namely, slides, rotating balls, bubble panel, climbs and so forth, included some animal features in the shape of a dog which could also be replaced by any other animal as per client's request, (g) although the appellant company submitted photographic images of the items offered, yet some could be custom built for the client, (h) clause 8.5 also provided that single "*challenge play equipment (always with farm animals as a focal aspect) would also be considered*", (i) the other combined items offered by the appellant company did provide more than one play facility, (j) clause 8.5 included such terms as 'play equipment closely related to farm animals' and 'play facilities .... integrated within or around it (animal related form)' which could be interpreted in different ways and, therefore, in the appellant company's tender submission the latter remained faithful to tender specifications, (k) the price of €8,740 offered by the appellant company was substantially cheaper than that of the recommended tenderer, namely, €29,500 and that the award criterion was the cheapest price and not the most economically advantageous tender and (l) the appellant company opted to offer those items in order to be competitive in terms of price;

- having considered the contracting authority's representatives' reference to the fact that (a) the age bracket proposed by the appellant company did not correspond to the specifications laid down in clause 8.5, namely 3 to 12 years, (b) whenever the contracting authority required playing equipment for ages 1 to 3 years and beyond 12 years it had included those age groups in the specifications but, in this call for tenders, it was made clear that the items were intended for children aged 3 to 12 years, (c) one item could offer different play facilities, with one facility catering for, say, 3 to 6 year olds, e.g. building blocks or small slide, with another facility catering for 7 to 12 year olds, e.g. bigger slide and rope climbing, and such items were certified by the competent authorities, (d) clause 8.4 laid down that ... "*The tenderer must submit photographic and technical details of all the equipment that is being proposed. Failure to submit such details shall render the offer invalid*", (e) from the photographic images presented by the appellant company it emerged that the items offered were not 'structures of animal shapes with integrated play equipment', (f) the tender specified that the item had to be in the form of an animal and the animal had to be the main attraction for the children such that it would capture their imagination and attention, (g) it was evident from the images provided by the appellant company that the items offered did not have animals as their focal point, (h) one had to constantly keep in view that these items were required for a petting farm and not for a playing field and that was why 'animals' were the focal point, (i) a swing having a crab on the pole did not represent a 'structure of animal shape with integrated play equipment', (j) whereas clause 8.5 laid down that such "*equipment shall have as a focal aspect, a form of a farm related animal (such as: cow, sheep, pig, pony etc.) and an array of play facilities (such as: swing, slide, shoot, climbing ladder, see-saw etc) integrated within, or around it*", yet product

code 1113B offered by the appellant company represented a swing with no other play facilities or else it was left up to the contracting authority to integrate it with other play facilities and (k) prior to being considered in terms of the price, a bid had to first satisfy the technical specifications,

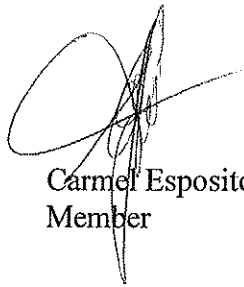
reached the following conclusions, namely:

1. The Public Contracts Review Board took note of the fact that the items offered by the appellant company, collectively, catered for the requested age group of 3 to 12 years with a measure of overlap.
2. The Public Contracts Review Board, whilst agreeing with appellant company's statement that the award criterion was the cheapest price, yet is also fully cognisant of the fact that, prior to being considered in terms of the price, a bid has to first satisfy the technical specifications.
3. The Public Contracts Review Board noted that, unlike those offered by the appellant company, the items offered by the recommended tenderer had, visibly and unmistakably, the animal structure as their focal point with integrated play equipment in the form of slides, climbing and descending ropes and so forth. It is a fact that whilst clause 8.4 laid down that ... *"The tenderer must submit photographic and technical details of all the equipment that is being proposed. Failure to submit such details shall render the offer invalid"*, yet, from the photographic images presented by the appellant company it emerged that the items offered were not 'structures of animal shapes with integrated play equipment', hence the reason why, for example, a swing having a crab on the pole did not represent a 'structure of animal shape with integrated play equipment'.

In view of the above, this Board finds against the appellant company and recommends that the deposit paid by the appellant to file the objection be forfeited.



Alfred R Triganza  
Chairman



Carmel Esposito  
Member



Joseph Croker  
Member

2<sup>nd</sup> May 2012