

## PUBLIC CONTRACTS REVIEW BOARD

Case No. 825

CT 3241/2014

**Tender for the Restoration of Paved Passageways and Existing Pilasters, Installation of Trellis and Laying Services Pipes in Informal Garden Using Environmentally Sound Materials at Villa Francia Estate, Lija.**

The tender was published on the 16<sup>th</sup> January 2015. The closing date was the 26<sup>th</sup> February 2015. The estimated value of tender is €348,572.00 (Exclusive of VAT).

Four (4) offers had been received for this tender.

On the 15<sup>th</sup> May 2015 John Micallef Builders Limited filed an objection against the decision of the Contracting Authority to reject their tender as being administratively non-compliant.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Tuesday 7<sup>th</sup> July 2015 to discuss the objection.

Present for the hearing were:

### **John Micallef Builders Limited:**

Mr Michael Cardona	Representative
Mr Kenneth Cauchi	Representative
Mr Lawrence Vassallo	Director
Dr Reuben Farrugia	Legal Representative

### **Vaults Co Limited:**

Mr Ivan Farrugia	Representative
Dr Alessandro Lia	Legal Representative

### **Restoration Directorate:**

Mr Mark Azzopardi	Chairman Evaluation Board
Ms Tabitha Dreyfuss	Member Evaluation Board
Ms Jean Frendo	Member Evaluation Board
Mr Stephen Pulis	Member Evaluation Board
Dr Fiorella Fenech Vella	Legal Representative

### **Department of Contracts:**

Mr Jason Grech	Representative
Mr Kevin D'Ugo	Procurement Manager
Dr Fiona Cilia Pulis	Legal Representative
Dr Christopher Mizzi	Legal Representative
Dr Franco Agius	Legal Representative

The Chairman made a brief introduction and asked the Appellants' representative to make his submissions.

Dr Reuben Farrugia on behalf of the Appellants remarked on the unreliability of the e-tendering system and stated that while his clients' tender had been rejected because some of the uploaded documents could not be opened and because the financial bid did not contain the Bill of Quantities with rates, his clients had regularly uploaded all the required documents. Regarding the Bill of Quantities Doc AC 2, an email sent to the Department of Contracts by the Helpdesk confirms that the Bill of Quantities had been received because it was the fourth document listed in that email. This email confirms that the documents had been uploaded and received by the Contracting Authority. The Contracting Authority claims that the files were corrupted.

The Chairman remarked that the bidders should follow the correct procedure to upload documents in an e tender.

Dr Reuben Farrugia contended that the Contracting Authority in similar cases should seek clarifications from the bidder in question. He contended that according to the Appellants' system the uploading process had been completed.

Mr Kenneth Cauchi ID no. 517587 M on behalf of the Appellant, under oath stated that Appellant had received confirmation that the files had been uploaded. He said that together with the letter of objection the Appellants had enclosed a CD that shows the dates on which the relative files had been modified. This refers to the date and time of the upload and means that the files were not corrupted. He is an IT engineer. The document AC 2 shows that documents had been uploaded and he could state this because of the files extensions that are .docx, .zip and .xlsx which was the BOQ. The guidelines given by the Contracting Authority had been followed and the confirmation of uploading had been received. The files were freely accessible. The email marked AC2 states that the files were uploaded from a remote location. This meant that there were copies of the files on the server. An email marked JM2 shows the receipt of the uploaded files. Replying to questions by Dr Christopher Mizzi for the Contracting Authority said that AC2 does not refer to a location address but to a file. Replying to Dr Franco Agius he said that the double slash means the location of the file in question. The first part shows the server, which in this case was JMICALLEFSERV. However this did not mean that the files were on the server. RedirectedFolders means that the path is also local. The files were located both on the server and on the desktop. He insisted that the files did not originate from the server. Replying to Dr Alessandro Lia for the Preferred Bidder he admitted that any file with an extension .docx could be uploaded and receives confirmation of successful delivery. There was no restriction on the type of uploaded files. The successful upload did not refer in any way to the content. He did not agree that a file uploaded from a pc belonging to Dr Lia would have " C:\ xxxx\desktop\etc." He insisted that offline files keep the same path of the server but would be also copied locally.

Mr Michael Cardona ID No. 221282M on behalf of the Appellant under oath that he had uploaded the tender and the documents in question had been uploaded from the desktop of my computer. Replying to a question by Dr Franco Mizzi who showed him a document he said that J:\Michael\etc referred to the path of his computer. Replying to Dr Lia he stated that at the time of the tender submission only two computers were used. No one had access to his computer and he knows that there were copies of the files uploaded in the server.

Mr Jason Grech ID 185078M, an ICT Applications Officer on behalf of the Contracting

Authority said that the Evaluation Board had asked his help in order to open the documents in question. He could not open the files and had contacted Eurodynamics who manage the system and these informed us that they could not open the files. Their reply was AC2 and told us that the files were corrupted since the bidder had not followed instructions because the files had not been saved locally. Unless instructions are not followed the system could not function properly. At this point he was shown two documents; doc Y shows a path “J:\Michael\Tenders\Old”. This meant that the files clearly shows that the path used were from a shared folder and not stored locally on the submitting PC. This was not according to instructions and not compatible. From doc AC2 it results that the files were not stored locally since \\ two backslashes means that the storage was not local. Replying to Dr Farrugia he explained that offline files are stored locally. AC2 confirms that the four documents listed therein had been received in some form. The path of these files refers to the fact that these were not stored locally. We could not open the files and had to refer to Eurodynamics.

Dr Reuben Farrugia for the Appellant said that the Contracting Authority is assuming that it is the Appellants’ fault while the Appellants are claiming that it is the Contracting Authority’s, and demands that an expert be appointed.

Mr Mark Azzopardi ID No. 35047M, Chairperson of the Evaluation Board under oath filed a screen shot that shows that the Evaluation Board could not access the bill of quantity from the financial bid.

At this point the hearing was adjourned pending the appointment of an expert.

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**Second Hearing – 16th July 2015:**

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Thursday 16<sup>th</sup> July 2015 to continue hearing the objection.

The expert appointed by the Board filed his report and all interested parties were given a copy. Dr Reuben Farrugia for the Appellant asked that he be given some time to examine the report before asking the expert some questions. The hearing was adjourned to the 23<sup>rd</sup> July 2015.

**Third Hearing – 23<sup>rd</sup> July 2015:**

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Thursday 23<sup>rd</sup> July 2015 to continue hearing the objection.

Present for the hearing were:

**John Micallef Builders Limited:**

Mr Michael Cardona	Representative
Mr Kenneth Cauchi	Representative
Mr Lawrence Vassallo	Director
Dr Reuben Farrugia	Legal Representative

**Vaults Co Limited:**

Mr Ivan Farrugia	Representative
Dr Alessandro Lia	Legal Representative

**Restoration Directorate:**

Ms Tabitha Dreyfuss	Member Evaluation Board
Mr Stephen Pulis	Member Evaluation Board
Dr Fiorella Fenech Vella	Legal Representative

**Department of Contracts:**

Mr Richard J Abela	Representative
Mr Kevin D'Ugo	Procurement Manager
Dr Fiona Cilia Pulis	Legal Representative
Dr Christopher Mizzi	Legal Representative
Dr Franco Agius	Legal Representative

The Chairman invited the parties present to make any questions to the expert that the Board had appointed.

Mr David Mifsud, ID No. 209079M, Head of Technical Services at the University of Malta, the expert who was appointed by the Board and who had prepared the necessary report, under oath testified:

Replying to questions by the Appellant's representative Dr Reuben Farrugia, he stated:

- i) That no. The files in question did not arrive at the Department of Contracts;
- ii) That the package had become corrupted before the uploading was carried out. What in fact had been uploaded had been the corrupt copies contained in the package;
- iii) Four files of some sort were uploaded and delivered to the Department of Contracts in the package and recorded by the e-tendering system;
- iv) The file containing the Key Experts file was delivered but could not be read by the evaluation committee. He himself however had succeeded in reading it;
- v) Appellant had attached files for the Desktop;
- vi) He explained that the system required the downloading of the "Tender Preparation Tool" before bidders could bid. This tool packaged the files comprising the tender into one package or envelope;
- vii) Whoever prepared Appellant's bid used good documents but during the packaging these became corrupted. The files became corrupted when the tool was used;
- viii) He confirmed that the data on the CD submitted with the letter of objection and the uploaded data were originally the same. The files on the CD had not been altered;
- ix) That although the system explained that files to be uploaded had to be local, he felt that the system could be improved;
- x) Most users assume that the Desktop is located on the PC itself but Appellant's system is such that the desktop is on the server and this can be seen from the QNC path; the system used for e tendering does not point out any error when bidders do not follow instructions, and does not check the files;
- xi) The address of the case in question states "Mydocuments\Desktop" but this is not necessarily located on the user PC's local drive;
- xii) The corruption occurred on the bidder's laptop through the tool.

Replying to questions by Dr Franco Agius on behalf of the Contracting Authority, the witness stated that:

- a) The corruption was caused by the location of the files to be uploaded;
- b) The Bidders were instructed that files for uploading had to be located locally;
- c) The Bidders were informed of the danger if they uploaded files from a network drive or shared folder – the manual stated “ to pack a tender the tender has to be saved at the work station of the user”;
- d) The person submitting the tender used Windows that is located over a network and did not follow the instructions;
- e) The supplier was aware of a problem when a mapped network was used;
- f) Four files were uploaded into the system but the contents could not be ascertained;
- g) He had managed to open the Bill of Quantity which consisted of 4 XL sheets but these were empty and did not contain any data;
- h) Some files in the technical offer could not be opened, some could be opened but contained corruption;
- i) The ordinary user or evaluators could not access the data. The Coordinator could only open the Key Experts document.

Replying to questions by Dr Fiorella Fenech Vella witness said that the programs he used to open the documents, Unzip and Zipinfo are not window based but Unix based and he still could not open all the files.

Replying to Dr Alessandro Lia for the Preferred Bidder he said that the foreign supplier was aware of certain problems. The Contracting Authority had advised bidders that files to be uploaded had to be stored locally and not shared. It was the person who managed the Appellant’s IT system who decided where the shared files are stored and the users did not necessarily know their files were shared. The tool does not recognize the uploaded file types and whoever made the bid could not realize that the files he was uploading were shared on a network.

Replying to Dr Reuben Farrugia for the Appellant he said that normally the user does not realize the path of the files he was uploading. Going back through the directories could show this but most users did not do this.

Replying to the Chairman he said that if a bidder follows the instructions to the letter the same problem could occur since it is normally assumed that the mydocuments folder is situated locally.

Replying to Dr Farrugia he said that the user did not follow instructions if his Desktop was

located on the server and not on his laptop or PC.

At this point the hearing was closed

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**This Board,**

**Having noted the Appellant's objection in terms of the "Reasoned Letter of Objection" dated 15<sup>th</sup> May 2015 and also through the appellant's verbal submissions during the Public Hearing held on the 7<sup>th</sup> July 2015 had objected to the decision taken by the Pertinent Authority, in that:**

- a) **The Appellant claims that his bid was rejected due to the simple fact that the Contracting Authority claims that the Appellant's offer could not be downloaded on the receiving end of the E-Tendering system. The Appellant maintains that all the documents had been uploaded and received by the Contracting Authority. In this regard, the latter is claiming that the files sent by the Appellant were corrupted but according to the Appellant's system, the uploading process was completed;**
  
- b) **The Appellant contends that the "Guidelines" given by the Contracting Authority had been followed and the confirmation of uploading had been received by the latter. The documents were uploaded from one source and that is from where the E-Tendering process was directed from. The Appellant also claims that he has submitted a CD where all contents were submitted in the Tender.**

**Having considered the Contracting Authority's "Letter of Reply" dated 30<sup>th</sup> June 2015 and also through the verbal submissions during the Public Hearing held on 7<sup>th</sup> July 2015, in that:**

- a) The Contracting Authority strongly maintains that it could not open the files submitted by the Appellant. In this regard, the Appellant's offer could not be processed;**
  
- b) The Contracting Authority also contends that the CD which the Appellant claims to have sent was not received with the Tender Document but rather with the Objection. In this regard, the CD was not in possession of the Evaluation Committee at the time of the Adjudication of the Appellant's Tender;**

**This Board, contends that due to the very high technical nature of this Objection, an independent IT Expert would be appointed by this Board and all parties to this Tender agreed to accept the latter's opinion.**

**This Board would respectfully point out that the "Expert", namely, Mr. David Mifsud of ID No 209079 (M), Head of the Technical Services at the University of Malta was appointed by this Board and submitted his report dated 16<sup>th</sup> July 2015, on the specific parameters given by this Same Board to investigate and locate the cause why the Appellant's files could not be downloaded at the receiving end.**

**From the expert's report and the latter's verbal submissions during the Hearing held on the 23rd July 2015, this Board is justifiably comforted to deliberate its adjudication as follows:**

- 1. With regards to the Appellant's first contention, this Board after having examined the Expert's report and his verbal submissions opines that, first and foremost, the files submitted by the Appellant through the E-Tendering procedure, could not be downloaded by the Contracting Authority, (the Receiving End). This fact has been confirmed by the IT Expert. This means that the files in question did not arrive at the Department of Contracts.**

**The files sent by the Appellant Company were corrupted before the uploading of same was carried out. The system itself necessitated the downloading of the "Preparation Tool", prior to the submission of the offers by the bidders. Through the Expert's submissions, this Board is credibly convinced that the files became corrupted when the "Tender Preparation Tool" was applied by the Appellant.**

**It was affirmed that the corruption occurred on the Bidder's laptop when using the Tender Preparation Tool. In this regard, this Board does not uphold the Appellant's first contention.**

- 2. This Board, after having heard credible submissions by both the Contracting Authority and the Expert appointed by this Board, justifiably opines that, the Contracting Authority did give specific guidelines to be followed when applying the E-Tendering procedure. The guidelines so issued specifically stated that the files to be uploaded had to be Local. It has been credibly and technically proven that this was not carried out by the Appellant.**

**The Bidders were advised that the files to be uploaded had to be stored locally and not shared. This was not strictly adhered to by the Appellant in submitting his bid through the “E-Tendering System”. This event was also confirmed through a reply to a query made by the Contracting Authority to the “Service Providers”, namely “European Dynamics”, through an e-mail dated 16<sup>th</sup> July 2015 wherein, they confirmed that the Appellant had uploaded the file from a “Shortcut file” or from a shared network, hence, resulting in the files being corrupted.**

**In this regard, this Board is justifiably convinced that the Appellant did not follow the correct guidelines for the submission of his bid under the “E-Tendering Process”. This Board is also justifiably convinced that the CD submitted by the Appellant was not accompanied with the submitted Tender Document and it was only presented with the objection. At the same time, this Board credibly opines that the Guidelines given to prospective E-Tenderers are not capriciously dictated, but they are laid out to avoid any such circumstances.**

**This Board also notes that those bidders who followed the said Guidelines as instructed by the Contracting Authority did not encounter problems with regards to the uploading or documentation and transmitting the same information at the receiving end. In this regard, this Board does not uphold the Appellant’s second grievance.**

- 3. On a general note, this Board after having heard submissions by both the Appellant Company, the Contracting Authority and the appointed Expert, firmly asserts that:**

- a) **There exists a clear manual of “Guidelines to E-Tenderers” of how to apply the system in submitting an “E-Tender”;**
  
- b) **It has also been credibly proven that the Appellant did not follow the instructions given in the said manual;**
  
- c) **This Board would emphasize the fact that the Evaluation Committee acted in a just and fair manner, in that, it could not adjudicate a Tender which was not received and where the documentation could not be downloaded through no fault from the receiving end i.e. the Contracting Authority.**

**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.**

Dr. Anthony Cassar  
Chairman

Dr. Charles Cassar  
Member

Mr. Lawrence Ancillieri  
Member

*5 August 2015*