

PUBLIC CONTRACTS REVIEW BOARD

Case 1051 – CT 3029/2016 – Project Management and Technical Supervisory Services for the Paola Primary Health Care Southern Regional Hub Project

The Publication Date of the Call for Tenders was 30 March 2017 whilst the Closing Date for Call of Tenders was 13 June 2017. The Estimated Value of the Tender, (Exclusive of VAT) was € 1,913,315.

On 12 May 2017, Environmental Management Design Planning filed a Pre-Contractual Objection against the Foundation for Medical Services.

On 8 June 2017, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

Appellant – Environmental Management Planning Design

Ms Catherine Grech	Representative
Perit Mariello Spiteri	Representative
Dr Franco Galea	Legal Representative
Dr Louise Spiteri	Legal Representative

Contracting Authority – Foundation for Medical Services

Ms Marion Rizzo	Representative
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Department of Contracts

Ms Ninette Gatt	Procurement Manager
Dr Franco Agius	Legal Representative
Dr Christopher Mizzi	Legal Representative

Following an introduction by The Public Contracts' Review Board Chairman, Dr Anthony Cassar, the Appellants were invited to make their submissions.

Dr Franco Galea, the Legal Representative for Environmental Management Design Planning opened by saying that as they have stated in their Letter of Objection dated 11 May 2017, there was an indication that the Financial Requirements of the Tender Document indicated that for a Consortium or a Joint Venture, the minimum credit facility for this Tender was of € 500,000. This has led to the Appellants to seek a clarification from the Contracting Authority who on 9 May 2017 which in Answer 6d it stated,

“The Tenderer must submit a statement by a recognised bank certifying such credit facilities. In this case of a Consortium/Joint Venture, the aforementioned statement must cover all members/companies forming the Consortium/Joint Venture”.

Dr Galea continued by saying that this goes against both the Public Procurement Regulations and the spirit of the Tender. He then proceeded by referring to Paragraph 7 of the Reasoned Letter of Reply issued by the Department of Contracts which *inter alia* stated that

“The Contracting Authority would be liable to monitor one Economic Operator possibly being a joint venture, and its credit facility should be one that covers the entire joint venture”.

The Appellants feel that this argument is irrelevant since according to the Tender Document, the Contracting Authority can either control the Bid Bond or the Performance Bond whilst showing that throughout the five years of the contract, one should have enough cash flow generating to honour the Tender.

The Reasoned Letter of Reply does not indicate that the Contracting Authority will give 10% of pre-financing. The Joint Venture was going to bring enough documents to show that they have enough finances to honour the deal. The same venture was to be created for this Tender's purposes only and since it does not have any bank accounts it will automatically have a credit facility.

Dr Franco Galea also referred to Article 235 of the Public Procurement Regulations where it indicates that in economic and technical matters, each Bidder could rely on a third party, hence the Contracting Authority binding the latter. This was a Tender for the management of this project.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts countered that the only concern which the Contracting Authority had was that there was no declaration of assets with a declaration of credit facility. The Department of Contracts' main problem was that in the case of a Joint Venture being awarded the contract, it cannot control who does the work since that is the discretion of the Joint Venture itself.

Dr Franco Agius, a second Legal Representative from the Department of Contracts added that in order to have a pre-financing, there should be collateral. This does not necessarily help the cash flow since the Bidder usually binds it with a Bid Bond. The Government requests a credit facility in order to be sure that any prospective Bidder has the required financial muscle for this type of project which was a project management of a medical centre.

Another point raised by the Appellants was the duration of the Credit Facility, continued Dr Agius. It was made exactly to ensure that there were going to be no problems or changes

from the Contractors. This intended the Government to hedge its risks and also ensure that any prospective Bidder was good enough to honour the deal.

Dr Franco Agius continued by saying that with regards Article 235, there were particular sections regarding the Joint Venture which permit the Authorities to impose *ad hoc* conditions where needed. Unlike what the Appellants' Legal Representative was saying, the spirit of the Public Procurement Regulations encouraged Equal Treatment, Proportionality and Non Discrimination and these were bound by the context of the Project.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board remarked that the Appellant was a Joint Venture and that the Contracting Authority was requesting that there are guaranteed facilities to confirm that there are enough finances.

Dr Franco Agius, the Legal Representative for the Department of Contracts, replied that one had in a Joint Venture not everybody has the same strength but that each member had a percentage for which he was responsible.

Dr Franco Galea for Environmental Management Design Planning countered that the Tender does not permits this.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked who was going to bid in this case for which Dr Franco Galea, the Appellant's Legal Representative, replied that it was a Joint Venture.

On the other hand, Dr Franco Agius for the Department of Contracts countered that whoever had the most financial muscle had to take the lead.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board noted that the concept was one of a Joint Venture and therefore the Contracting Authority had to ensure that the Joint Venture had a facility requirement.

Dr Franco Agius, the Legal Representative for the Department of Contracts said that what the latter was requesting was that in case of a Joint Venture, at least one of the members is financially strong enough to honour the deal.

Dr Franco Galea, the Legal Representative for Environmental Management Planning Design said that the Department of Contracts did not understand where the problem came from. What his clients were requesting was to allow them to get sufficient proof that they have enough credit facilities from different banks not only from one.

Dr Galea also wondered what the Department of Contracts can do apart from retrieving the Performance Bond. The Tender Document does not allow the work to be divided and it clearly indicates that the Department of Contracts do not want to have multiple partners and this was why it was required that the partners were to be bound in a solid Joint Venture.

Dr Franco Galea then proceeded to refer to page 7 of the Tender Document which requested any prospective Bidder to submit the financial statements for the last three years together with sufficient proof that the cumulative turnover for these years amounted to € 300,000. In case of a Maltese Bid, these proofs had to come from the Malta Financial Services Authority wherein the Appellants were going to get the reports from both parties.

Dr Franco Agius, the Legal Representative for the Department of Contracts referred to Regulation 58 (2) of the Public Procurement Regulations which *inter alia* stated that,

“Where necessary, the Authorities responsible for the Tendering Process may clarify in the Procurement Documents how groups of economic operators are to meet the requirements as to economic and financial standing or technical and professional ability referred to in Regulation 217 provided that this is justified by Objective Reasons and is proportionate”.

The financial statements requested, continued Dr Agius, give a clear picture of the financial situation of the prospective Bidder. The credit facility had to last for the entire duration of the Tender. With regards the Bid Bond issue from different banks, the Contracting Authority was requesting that the Credit Facility had to extend to the different members of the Joint Venture.

Dr Franco Galea, on behalf of the Appellants, said that the important thing for the Contracting Authority was to satisfy the € 500,000 Credit Facility. How this was to be eventually satisfied was up to the prospective Bidder. Dr Galea added that this Appeal could be of interest to other Bidders not only for the Appellant.

Dr Franco Agius, the Legal Representative for the Department of Contracts concluded that the € 500,000 credit facility was essential for them because it gives them peace of mind that for the duration of the Contract the project was to keep going.

At this stage, the Public Hearing was adjourned to Thursday 15 June 2017 at 09:00 wherein the Public Contracts Review Board will transmit the decision taken for this Objection verbally and then distribute a hard copy of the same to all parties concerned.

This Board,

Having noted this Pre-Contractual Objection filed by Environmental Management Design Planning (herein after referred to as the Appellant) on 12 May 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference CT 3029/2016 listed as Case No 1051 in the records of the Public Contracts Review Board, issued by the Foundation for Medical Services (herein after referred to as the Contracting Authority).

Appearing for the Appellant: Dr Franco Galea

Appearing for the Contracting Authority: Dr Franco Agius

Dr Christopher Mizzi

Whereby, the Appellant contends that:

- a) His main concern refers to the reply to a Clarification made by themselves whereby the Contracting Authority confirmed that:

“The Tenderer must submit a statement by a recognised Bank certifying such credit facilities. In the case of a Consortium/Joint Venture, the aforementioned statement must cover all members/companies forming the Consortium/Joint Venture.”

In this regard, Environmental Management Planning Design maintain that the Foundation for Medical Services should accept a confirmation that the Consortium/Joint Venture has the credit facilities at its disposal and not including also such a statement for the individual members forming the same.

- b) The Appellants refer to Paragraph 7 of the *“Reasoned Letter of Reply”*, wherein it was stated that,

“The Contracting Authority would be liable to monitor one economic operator possibly being a Joint Venture, and its credit facility should be one that covers the entire Joint Venture.”

In this regard, Environmental Management Planning Design refer to Article 235 of the Public Procurement Regulations whereby a Bidder can rely on a Third Party with respect to economic and technical matters.

This Board also noted the Contracting Authority’s “Letter of Reply” dated 2 June 2017 and its verbal submissions during the Public Hearing held on 8 June 2017, in that:

- a) The Foundation for Medical Services contend that if such a facility is going to be divided among the members forming the consortium, the latter will not be in a position to monitor who is doing what and whether such works carried out are backed by the necessary financial facilities.**

At the same instance, the Contracting Authority insists that this condition forms part of the selection criteria which cannot be changed after the publication of the Tender.

b) The Contracting Authority also insist that in accordance with Regulation 58 (2) of the Public Procurement Regulations, where necessary, they are empowered to impose certain requirements with regards to the economic and financial standing or technical and professional ability, provided such an action on their part is justified by objective reasons and is proportionate.

In this regard, the Foundation for Medical Services maintains that it has abided by the parameters of the Public Procurement Regulations.

This Board, after having treated the merits of this case, arrived at the following conclusions:

- 1. With regards to Environmental Management Planning Design's First Grievance, this Board, after having heard the submissions made by all parties concerned, opines that the main issue at stake is the formulation of the availability of the credit facility of € 500,000 as requested by the Foundation for Medical Services and taking into account the fact that the Appellant forms part of a consortium.**

In this respect, this Board, first and foremost credibly establishes that the Bidder in this case forms part of a Consortium composed of

two members. This entity is specifically formed to submit an offer for this Tender and eventually carry out the Tendered works should the latter be awarded the contract.

At the same instance, quite properly, the Foundation for Medical Services is requesting that the award winning Bidder must have available a banking credit facility of € 500,000 throughout the duration of the execution of works.

At this particular stage of consideration, this Board is comforted by the fact that the Consortium is properly constituted, that is a contractual agreement is in existence and such an entity has been recognised by the Contracting Authority, which from submissions made, is the case. Therefore, if Environmental Management Planning Design is eventually awarded the Tender, the contractual obligations will be between the Foundation for Medical Services and the Consortium in its entirety.

The Contracting Authority is requesting evidence that the prospective Bidder must provide evidence that he has available a banking facility of € 500,000 throughout the period of execution of works. From submissions made it has been established that the Consortium is prepared to submit such a confirmation that banking

facilities are available through the members forming the same Consortium.

This Board also noted that such banking facilities being provided by the members are in favour of the Consortium. In this respect, the Board justifiably acknowledges the fact that Banks, in general, are more readily willing to lend to known customers with their previous history rather than to a newly constituted consortium/partnership.

At this stage, this Board is credibly convinced that Environmental Management Planning Design can provide the comfort to the Contracting Authority that the Consortium can provide evidence of a credit facility to carry out the Tendered Works.

In this regard, this Board opines that such a banking facility can take many forms and can arise from various sources, provided that the banking facility amounts to € 500,000 and is in favour of the Consortium with specific utilisation purpose for the execution of the Tendered Works.

In this particular case, it has been justifiably established that the Consortium can provide evidence that the latter has an available

credit facility which in total add to € 500,000, hence the all important issue of an overall credit facility can be satisfied.

Throughout the submissions made by the Foundation for Medical Services, this Board noted that the latter's main concern is the issue of monitoring who is doing what and whether the executor of the specific work has the available credit facility to finish his section of works.

In this regard, this Board opines that the Contracting Authority should monitor the Consortium and not the members who are carrying out the works. In this regard, it is the Consortium who has the sacred obligation to abide by the conditions of the Tender and to be responsible for carrying out the Tendered works in accordance with the dictated specifications.

This Board would again emphasize that once the credit facility is for the benefit of the Consortium and specifically allocated for the execution of the Tendered works, the mode and source of the same facility is not an issue.

In this regard, this Board opines that the availability of such credit facility should give ample comfort to the Foundation for Medical

Services that the Appellant has the necessary funds to execute and complete the project and in this respect, this Board upholds Environmental Management Design Planning's first Grievance.

2. With regards to the Appellant's Second Contention, in that the prospective Bidder can rely on the technical and economic capabilities of third parties, this Board would like to make reference to Regulation 58 (2) of the Public Procurement Regulation, wherein it states that:

“Where necessary, the Authorities responsible for the Tendering process, may clarify in the procurement documents how groups of economic operators are to meet the requirements as to economic and financial standing or technical and professional ability referred to in Regulation 217, provided that this is justified by objective reasons and proportionate”

In this regard, this Board would justifiably point out that the Foundation for Medical Services did not, in any way, go against the spirit of the Tender as the latter was fully empowered to impose and dictate certain conditions with regards to the financial standing and other economic factors, both on the Consortium itself and on the individual members forming the latter.

However, this Board is somewhat concerned as to the extent of the objectivity with regards to, in this particular case, the individual members' share of the Tendered works. This Board would like to justifiably point out that it is the Consortium who is tendering and it is also the same entity that will be providing enough credit facilities from the Bank/Banks to carry out the Tendered works till completion so that any monitoring of progress of work should be targeted towards the Consortium.

On a general note, this Board would like to clarify that its recommendations do not, in any way, alter or change the selection criteria but rather amplify the mode of evidence to be produced in the case of Consortiums/Joint Ventures so that the Tender's requirements will be such so as not to limit the scope of competition.

In view of the above, this Board recommends that a clarification note is to be submitted by the Department of Contracts and the Foundation for Medical Services confirming the following:

- a) That in the case of Consortiums/Joint Ventures, the evidence required to confirm availability of credit facilities amounting to €**

500,000 can be composed of more than one facility as long as the aggregate amount will be that of the same amount mentioned;

b) In the case of Consortiums/Joint Ventures, the credit facility should be in favour of the latter and for the exclusive purpose of carrying out the Tendered Works. Such facilities can be supported by the members of the Consortium/Joint Ventures however in whatsoever case; the facility must be denoted in favour of the Bidder.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

15 June 2017