

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case 1176 – CT 3055/2017 – Works Tender for the documentation and restoration of the Piano Nobile Artworks (wall paintings, wall decorations, paintings on canvas, marble flooring) in an environmentally friendly manner at the Grandmasters Palace in Valletta.**

The publication date of the call for tenders was the 17<sup>th</sup> November 2017 whilst the closing date of the call for tenders was the 19<sup>th</sup> December 2017. The estimated value of the tender (exclusive of VAT) was € 3,347,080.

There were three (3) bidders for this tender.

Tecne Joint Venture filed an appeal on 10th May 2018 against the Contracting Authority's decision to exclude their bid as technically non-compliant. A deposit of € 16,735 was paid.

On 12<sup>h</sup> June 2018 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

### **Appellant – Tecne Joint Venture**

Dr Mark Refalo	Legal Representative
Dr Federico De Feo	Representative

### **Recommended Bidder – Agius Stoneworks Ltd**

Mr Rosario Agius	Representative
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### **Contracting Authority – Ministry of Justice, Culture and Local Government**

Dr Alessandro Lia	Legal Representative
Architect Ivana Farrugia	Chairperson Evaluation Committee
Mr Keith Muscat	Secretary Evaluation Committee
Architect David Zahra	Member Evaluation Board
Architect Katya Maniscalco	Member Evaluation Board
Mr Anthony Spagnol	Member Evaluation Committee
Mr Kenneth Gambin	Representative

The Chairman of the Public Contracts Review Board, Dr Anthony Cassar, invited Appellants to make their submission.

Dr Mark Refalo, Legal Representative for Tecne Joint Venture, sought the Chairman's permission to call a witness.

Dr Federico De Feo (Italian ID 4534829AA) testified on oath that he was an employee of Tecne Joint Venture and a partner in the firm De Feo Restuari and was asked to be the Project Manager in the submission of this tender. He stated that Appellants' proposal was the only professional way to present it as there were alternative ways of doing the requested soffit hanging system and to provide a proper design. This was because there was a lot of missing information about the condition of the soffit. In his experience conditions varied especially in the substratum of the ceiling which made it difficult to decide which hanging system to use. It was necessary to remove some of the panels to establish the condition underneath them: for example the thickness of the base and if there was any water ingress. The area to be restored was around 1000 m<sup>2</sup> which represented around one third of the contract. Witness confirmed that the site meeting on the 27<sup>th</sup> November 2017 had been attended by his brother who had only been able to view the paintings from ground level.

Dr Alessandro Lia, Legal Representative of the Contracting Authority, referred the witness to the bid document and to the replies submitted by Appellant regarding the repairs to the soffit. He directed witness's attention to page 31 of their tender documents and page 24 of the bid documents which were worded exactly the same and had obviously been copied. According to Dr Lia this repetition of the wording in the bid document failed to satisfy the requirements of the Restoration Directorate as it did not provide a proper design for a soffit hanging system.

Dr De Feo contended that it was only possible to properly design and build a hanging system after dismantling the paintings on site, and this was why they had offered alternative solutions. In their tender documents they had submitted the partners' C.V.s as evidence of their past experience in similar work.

To further questioning by Dr Lia witness stated that in their clarification reply they indicated that to provide a proper design they required more information. He also said that because of the extensive experience of the partners (35/40 years in this line of work) it was possible to assess the financial cost of the hanging system and this cost was included in their bid offer. In his view the hanging system on its own represented about 10% of the financial bid.

Perit Ivana Farrugia (402273M) was the next witness. She stated under oath that she was the Chief Architect of the Restoration Directorate and Chairperson of the Evaluation Committee. The technical questionnaire in the tender required the submission of a proposal for a hanging

system. As this was not submitted a clarification note was sent to the bidder asking if they were prepared to comply. Their response was that they were not able to give a proposal due to lack of information but instead they gave several examples of previous similar work undertaken by them.

In reply to a question by the Chairman as to whether their offer as it stood met an essential part of the works required under the contract, witness stated that it was essential to also have a proposal regarding the hanging system as it was of the utmost importance to safeguard the fabric of the Palace; it was essential to identify a company able to undertake this task. Witness also confirmed that cost of the contract was an adjudication factor and that Tecne bid was administratively compliant.

Dr Farrugia, in reply to a question from Dr Refalo, confirmed that the tender once awarded, was subject to changes as approved by the Heritage Superintendence. However, she pointed out that there were two separate stages – the proposal was required at the tender stage and changes could follow at the contract stage. The Evaluation Committee was not expecting a full restoration package at the bid stage but was looking for evidence that the successful tenderer was capable of undertaking the work. (Witness made reference to Item 3 of the tender documents regarding a photographic record of the work which statement she later withdrew as she realised that she was mistaken). Witness mentioned that the tender allowed the facility of site visits or clarifications to make sure that tenderers were all kept on a level ground, and that there was only one site meeting on the 27<sup>th</sup> November 2017. This latter point was confirmed on oath by Architect David Zahra (383679M).

Dr Mark Refalo submitted that the technical requirements in the tender did not ask for a demonstration of expertise in hanging systems – merely to include provision for it. The Restoration Method statement had to have later approval and therefore it was not a technical requirement. Under the circumstances Applicant did the logical thing – he offered alternative methods to comply with the tender suggestions ‘to provide as many proposals as deemed necessary’.

Dr Alessandro Lia, Legal Representative of the Contracting Authority said that the submission of a soffit hanging system was a mandatory requirement and this was the only point to consider in this appeal. The Appellant merely copied the wording in the tender document and not only ignored the requirements under Article 7 which stated that bidder must provide details of ancillary systems, but contradicted it by stating that they will be provided at a later stage.

The Chairman thanked the parties for their submissions and declared the hearing closed.

**This Board,**

**Having noted this Objection filed by Tecne Joint Venture, (hereinafter referred to as the Appellants), on 10 May 2018 referring to the contentions made by the same Appellants with regard to the award of Tender of Reference CT 3055/2017 listed as Case No 1176 in the records of the Public Contracts Review Board, awarded by Ministry of Justice, Culture and Local Government, (hereinafter referred to as the Contracting Authority).**

**Appearing for the Appellants: Dr Mark Refalo**

**Appearing for the Contracting Authority: Dr Alessandro Lia.**

**Whereby, the Appellants contend that:**

- a) The reason given by the Contracting Authority for the rejection of their offer, whereby it was alleged that, in their offer, they have failed to submit a design for a soffit hanging system is not correct. In this regard, the Appellants maintain that, at tendering stage, it is not possible to establish which hanging system is most suitable. However,**

**Tecne Joint Venture insists that they had provided the necessary information regarding the design of a soffit hanging system, through a clarification note's reply.**

- b) The submission of a design for the soffit hanging system was not a requirement at tendering stage, but rather to be determined after the award of the tendered works.**

**This Board also noted the Contracting Authority's "*Letter of Reply*" dated 10 May 2018 and its verbal submissions during the Public Hearing held on 12 June 2018, in that:**

- a) The Contracting Authority insist that the Appellants, upon being requested to submit the design for the soffit hanging system, submitted copied paragraphs of the Tender Document itself and confirmed that they will be providing such design of the soffit hanging system, at a later stage.**
- b) The Contracting Authority maintains that the Appellants failed to supply the design for the soffit hanging system, which was mandatory at**

tendering stage and in this respect, the Evaluation Committee deemed the Appellants' offer as technically non-compliant.

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

1. Mr Federico De Feo, duly summoned by Tecne Joint Venture;
2. *Perit* Ivana Farrugia, duly summoned by Tecne Joint Venture;
3. *Perit* David Zahra, duly summoned by the Public Contracts Review Board

This Board, after having examined the relevant documentation to this Appeal and heard submissions made by the parties concerned, including the valid evidence of the technical witnesses, opines that the issues worth of considerations are:

- i) The submissions made by Tecne Joint Venture;
- ii) The Tender requirements

First and foremost, this Board acknowledges the fact that this type of tendered works calls for extra caution as to how same are to be executed,

when one considers and appreciates the priceless surroundings, which consist of a national heritage, wherein such works are to be performed. This Board also acknowledges the intense and meticulous details in which the Bidders have to go into, so as to safeguard and restore this part of National Heritage. In this regard, this Board also noted that all such works will require prior approval from Heritage Malta.

1. With regards to Tecne Joint Venture's First Contention, this Board would respectfully refer to the request for rectification issued by the Department of Contracts dated 27 February 2018 wherein it states that:

*“Reference is made to the tender in caption, and to your offer submitted to same.*

- *Kindly clarify where in your bid your Company provides the information on the proposed soffit painting hanging system requested as part of the ‘(3) Restoration Method Statement’ (being requested under ‘Technical Offer Questionnaire – Section 7 – Selection and Award Requirement of Instruction to Tenderer’ – (C) Technical Specifications: “Details and proposals of any ancillary*

*systems/materials (eg: soffit painting hanging system, etc.) and under Clarification Note Number 1 (Minutes of the site visit held on 28 November 2017), “potential bidders are to propose a design and build hanging solution of the soffit.”*

**It is evidently clear that in their original submissions, Tecne Joint Venture failed to provide this relevant information and the Evaluation Board, quite appropriately, requested a clarification as to where such requirement is denoted in their offer. In this respect, this Board would refer to the Appellants’ reply dated 2 March 2018 as follows:**

*“The requested information about the soffit painting hanging system are provided at pages 16 (“Preliminary activity before starting restoration works”) and from page 22 to page 28 (“Restoration of Soffits”) of the submitted Restoration Method Statement. During the clarification site visit, few general information about the soffit painting hanging systems were provided to the potential bidders (Dr Antonio De Feo and Ing Arch Luca De Feo were present at the meeting on behalf of Tecne JV). No details, drawings, specifications were provided. There wasn’t any possibility to see the existing hanging structure. Without specific and*

*detailed information, is not possible to make a detailed proposal about the hanging system.”*

**From the Appellants’ reply, this Board justifiably notes that bidders admitted that at this stage, it would not be professional on their part to submit designs about the anchoring systems. However, in their reply, Tecne Joint Venture referred to information submitted and from examination of the referred pages in their technical offer, this Board notes that, in essence, the Appellants’ submissions represented more or less a text from the description of the state of soffits on pages 31, 42 and 43 of the Tender Document, which definitely does not represent a design for a soffit hanging system.**

**In this regard, this Board would also refer to the Testimony of Perit Ivana Farrugia, Chief Architect, Restoration Directorate, as follows:**

*“One of the main concerns of the Contracting Authority, in this particular case, was the soffit hanging painting system and it was stressed out throughout the Tender Document there are a couple of references in the Tender Document which refers to the need for a proposal and this was*

*even stressed during the site meeting that the Contracting Authority had so the need for each Tenderer to submit a proposal was there and was clearly stated. One must keep in mind that the Contracting Authority's concern was to safeguard the Palace.”*

**Tecne Joint Venture argues that such a design requirement should have been effective at award stage. In this regard, this Board is convinced that the requirement of this design was crucial for the Evaluation Board in its deliberations in order to ensure that whoever is awarded the Tender, will deliver to the full satisfaction of the Contracting Authority and will execute the Tendered works without causing irreparable damage to this precious national heritage, so that the requested design at tendering stage was well justified.**

**On the other hand, this Board would point out that if the Appellants felt the need to clarify this requirement, they had every opportunity to apply the remedies available to them.**

**This Board also notes that the Tender Document provided clearly what was required from the Bidders, (at tendering stage), and what was**

**expected from the contractor, (at award stage), so that the Bidders were well aware of what to submit at Tendering Stage and what is requested, if they are successful and in this regard, this Board is comfortably convinced that the Bidder was knowledgeable enough of what to submit and in what form so that this Board does not uphold Tecne Joint Venture's First Contention.**

- 2. With regards to the Appellants' Second Contention, this Board has already considered and confirmed the importance for the Contracting Authority to be in possession of the design for the soffit hanging system. However, this Board would also point out that a mandatory requirement is clearly denoted in the Tender Dossier and in this particular case, there was no exception in that, the Clarification Note, which formed part of the Tender Conditions, clearly stated what was requested, that is,**

***“Potential Bidders are to propose a design and build hanging solution of the soffit.”***

**Tecne Joint Venture's claim that such a design can only be supplied as part of the deliveries, after the award of the contract. It was not the intention of the Contracting Authority, as this requirement was amply justified in that it had to be available during the evaluation stage to serve its purpose, so that the Tender Document dictated what was required at Evaluation Stage and what were the works to be performed by the successful candidate, (the Contractor), after the award stage.**

**This Board, in its deliberations, could not find any justification in the Appellants' claim and would assert that the conditions and instructions given in the Tender Dossier, followed by clarification notices, denoted clearly what was to be delivered and submitted during the tendering stage and the award stage. This Board also confirms that the requirement to provide a design and proposal for the soffit hanging system was mandatory at Tendering Stage and in this regard, this Board does not uphold the Appellants' Second Contention.**

**In view of the above, this Board,**

- a) Confirms the decision taken by the Ministry for Justice, Culture and Local Government in the award of the Tender;**
- b) Does not uphold Tecne Joint Venture's first and second contentions;**
- c) Recommends that the deposit paid by the Appellants should not be refunded.**

Dr Anthony J Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Lawrence Ancilleri  
Member

*19 June 2018*