

# PUBLIC CONTRACTS REVIEW BOARD

## Case 1163 – CT 3030/2016 – Design and Build of the Paola Primary Health Care Southern Region Hub using Environmentally Friendly Construction Materials and Products

The publication date of the call for tenders was the 19<sup>th</sup> July 2017 whilst the closing date of the call for tenders was the 14<sup>th</sup> December 2017. The estimated value of the tender (exclusive of VAT) was € 25,887,374.64.

There were five (5) bidders on this tender.

On 29<sup>th</sup> March 2018 Ergon-Technoline JV appealed against the decision of the Contracting Authority to reject their offer on the grounds that it was administratively non-complaint. A deposit of € 50,000 was paid.

On the 10<sup>th</sup> May 2018 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Carmel Esposito and Mr Lawrence Ancilleri as members convened a public hearing to discuss the objections.

### **Appellant: Ergon-Technoline JV**

Prof Ian Refalo	Legal Representative
Dr Mark Refalo	Legal Representative
Dr Robert Curcuruto	Legal Representative
Ing Christopher Sammut	Representative
Perit Mark Spiteri	Representative
Mr Gilbert Gatt	Representative
Mr Luca Di Scullio	Representative
Mr Ivan Vassallo	Representative
Mr Simon Azzopardi	Representative
Mr Ayman Khalil	Representative

### **Recommended Bidder: SP BB International JV**

Dr Joseph Camilleri	Representative
Mr Saji Unnikrishnan	Representative
Mr Gilbert Bonnici	Representative
Dr John L Gauci	Representative

**Contracting Authority: Ministry of Health**

Dr Reuben Farrugia	Legal Representative
Mr Alfred Farrugia	Chairperson Evaluation Committee
Ms Ruth Spiteri	Secretary Evaluation Committee
Ing Stephen Ellul	Member Evaluation Board
Dr Raymond Sammut	Member Evaluation Board
Ms Jelena Vasiljevic Petrovic	Member Evaluation Board
Ms Roseanne Camilleri	CEO Ministry of Health
Ms Carmen Ciantar	Project Leader Ministry of Health
Ing Andrew Vella Zarb	Chief Project Officer Ministry of Health
Ms Marion Rizzo	Head of Procurement Ministry of Health
Ms Elain Camilleri	Financial Controller Ministry of Health
Bjorn Azzopardi	Representative

**Department of Contracts**

Dr Chris Mizzi	Procurement Manger
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After a brief welcome Dr Anthony Cassar, Chairman of the Public Contracts Review Board, invited Appellants to make their submissions.

Dr Mark Refalo, Legal Representative of Ergon Technoline JV, requested permission to start his submissions by calling a witness.

Perit Mark Spiteri (409286M) testified on oath that he was engaged by the Appellants to ensure that all information requested in the tender documents was complied with. The information requested in the ESPD (European Single Procurement Document) had been submitted for each of the subcontractors. As the electronic file was too large (in excess of 10.5 MBs) the ESPDs had been combined with the Power of Attorney document. In reply to a question he confirmed that he was aware that a rectification letter had been sent from the Contracting Authority requesting submission of the ESPDs, but could not confirm that these had been sent. He testified that he was aware that it was essential to submit these under the terms of the contract. Witness stated that he was not aware that after clarification the ESPD documents were incomplete.

Dr Mark Refalo said that it was not sufficient for the Contracting Authority to state that the ESPDs were incomplete – it had to clarify/specify what details were missing. They were not claiming that the forms had not been submitted but after submission they were found to be incomplete.

Dr Reuben Farrugia, Legal Representative of the Contracting Authority, said that it seemed to him that the Appellants were expecting the Contracting Authority to hold their hand while they were filling the forms. The tender documents allowed for rectification, and the Authority had drawn the Appellants' attention to the missing forms.

Prof Ian Refalo, Legal Representative for the Appellants, pointed out that the Authority should not have misled by claiming that certain documents had to be resubmitted. If it had looked at matters correctly it should have merely asked for correction of submitted documents.

Dr Mark Refalo then moved to the second point of his objections – namely that the alleged failure on the part of Appellants to complete Part 4B.2.4 of the ESPD is not an infringement and that it conflicted with another section of the document – Part 7(B)(b)(2). There was here a conflict between minimum turnover against average turnover; this was requested to gauge the economic standing of the tenderer but it was not clear which figure was required to assess this.

Dr Reuben Farrugia pointed out that tenderer was obliged to fill part 4B.2.4 – it was an obligation not an option. Instead of seeking clarification Appellants had decided to omit that information – there was no conflict between minimum turnover and cumulative turnover – one covered one year and the other a number of years.

Moving on to his third point, Dr Mark Refalo stated that the Contracting Authority only requires information regarding subcontractors who are being relied on by the Joint Venture, and in any case the parts that were not completed were not required from the subcontractors. The relevant

parts had been completed. The tender allows bidder to replace subcontractors – the exclusion of a subcontractor does not exclude the bid.

In reply, Dr Reuben Farrugia said that it was the Appellants' decision not to fill in certain sections. They wrongly assumed that the information should not be supplied. ESPDs were requested for all subcontractors - nowhere in the tender documents was it stated that they were not to be filled in.

At the request of the Chairman, Mr Alfred Farrugia was called to testify.

Mr Alfred Farrugia (726861M) testified on oath that he was the Chairperson of the Evaluation Committee. Presented by a part of the ESPD tender documents (part 3a and 3b) by the Chairman witness was asked to confirm whether this had been received. Mr Farrugia said he was unable to confirm without referring to the extensive tender documents. At a later stage he confirmed that Part 3a and b had been completed.

The next point raised by Dr Mark Refalo regarded the objection raised by the Contracting Authority regarding the financial standing of Condotte d'Acqua S.p.a. (Condotte). According to Condotte was not one of the bidding entities and nowhere in the tender was information sought regarding its financial standing. Condotte forms part of a Group of which Ergon is one of the various subsidiaries.

Dr Reuben Farrugia said that Ergon shareholding is held by HBT; in turn HBT is 80% owned by INSO, and Condotte is the main shareholder of INSO. Condotte has applied to the Courts in Rome for protective receivership and the directors arrested. The Company has asked the Courts for protection from its creditors. Since INSO's main shareholders is technically bankrupt this has a rippling effect on its subsidiaries and it would have been a joke on the part of the Contracting Authority not to have excluded them.

Dr Mark Refalo mentioned that INSO showed that it met the necessary financial standing required by the tender. The Authority should have sought clarification rather than decide unilaterally. He requested permission to call a witness.

Dr Robert Curcuruto (Italian Identity Card No CA94569AA) testified on oath that he was the Legal Counsel of INSO and that he had provided legal services during the tendering stage. He confirmed that Condotte was seeking legal protection in the Rome Courts whilst it drew up financial plans to reorganise its debts due to its creditors. Ergon was not affected by the above as it was a different company. Witness confirmed that the President of Condotte was under house arrest in relation to the operations of Condotte. Finally witness stated that Condotte was owed several hundred million Euro from central public authorities in Italy.

Dr Mark Refalo stated that Ergon and Technoline had been involved in joint ventures for the last ten years and the Authority should not have looked into the financial standing of non-participants

in the tender as this was discriminatory. INSO who were the party that had filed the ESPD had no financial difficulties.

The final objection dealt with by Dr Mark Refalo was the alleged conflict of interest of Ing Christopher Sammut who was asked to testify next.

Ing Christopher Sammut (452574M) testified on oath that in 2015 he was asked to produce a fire report on a tender. After a change in the building project his contract was terminated by the Foundation for Medical Services in 2017. An email dated 16<sup>th</sup> May 2017 confirming this was tabled. He confirmed that in May 2017 he was still involved with the Paola Regional Health Centre on behalf of the FMS but he stated that this second project was totally different from the original and he was not involved. The only access he had to the new project was from publicly available plans. The last time he had actually worked on the project was in March 2016.

Dr Mark Refalo said that the tender states “may be excluded if conflict of interest” not “shall”, and that conflict of interest only applies if it gives the tenderer an unfair advantage. Ing. Sammut had shown that he had no involvement and he referred to certain ECJ decisions regarding conflict of interest and its effect on a tender. Conflict of interest had to be proven not alleged concluded Dr Refalo.

Dr Reuben Farrugia said that the tender specifically and categorically excludes possibility of undue advantage. The tender was issued in 2016 when Ing Sammut was in the employ of the Ministry of Health. If the PCRB were to overlook this issue it would be creating a serious precedent.

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

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**This Board,**

**Having noted this Objection filed by Ergon-Technoline JV, (hereinafter referred to as the Appellant), on 29 March 2018, refers to the contentions made by the same Appellants, with regards to the award of Tender of Reference CT 3030/2016 listed as Case No 1163 in the records of the Public Contracts Review Board, awarded by the Ministry of Health, (hereinafter referred to as the Contracting Authority),**

**Appearing for the Appellants: Prof Ian Refalo**

**Dr Mark Refalo**

**Appearing for the Contracting Authority: Dr Reuben Farrugia**

**Whereby the Appellants contend that,**

- a) The Contracting Authority was incorrect in stating that certain documents, pertaining to their offer, had to be resubmitted, as in actual fact, what the Ministry requested was a rectification of the already submitted documentation;**
- b) The information requested under Clauses 4B.2.4 and 7 (b) (b) (2) of the ESPD is conflicting and, in any case, the Appellants maintain that from the information they submitted, the Evaluation Committee could arrive at the requested data from the same provided in Part 4B.1 of the ESPD;**
- c) Contrary to what the Contracting Authority stated in their report, they had submitted the relevant information regarding subcontractors and any part thereof which was not completed, represented data which was not required from such subcontractors;**

- d) With regards to the allegations regarding the negative financial standing of Condotte D' Acque SpA, although Condotte forms part of the Ferfina Group of which Ergon is one of the subsidiaries, Condotte is not even a shareholder of Ergon;**
  
- e) With regards to Ing Sammut's conflict of interests, the latter had no involvement in the project of Paola Regional Hub, except for the fact that he was nominated as a Key Expert by the Appellants.**

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

- a) The Ministry for Health contends that the Appellants' claim that they had submitted all the requested documentation is not factual, as they were requested to submit the missing information after the closing date of the Tender;**
  
- b) The Contracting Authority insists that the Appellants were obliged to fill in Part 4B.2.4, whilst the same opted to ignore such requirements. At the same instance, the same Contracting Authority maintains that**

**there existed no conflict between the requested minimum annual turnover and the cumulative turnover;**

**c) The Contracting Authority mentions the fact that the Appellants opted to ignore certain sections of the ESPD, regarding subcontractors although this information was mandatory;**

**d) The Ministry, through a due diligent exercise, became aware that Condotte SpA is the main shareholder of INSO, the latter entity having an 80% shareholding in HBT, which, in turn, is the parent company of Ergon. At the same instance, Ergon is one of the members of the participating joint venture, ie Ergon Technoline JV. Since the Contracting Authority is knowledgeable of the fact that Condotte SpA requested Court protection from creditors, the Evaluation Board deemed that such a situation can affect the financial standing of Ergon;**

**e) The Authority also contend that Ing Christopher Sammut was employed with the Ministry of Health in 2016, the time when the Tender was issued, so that a conflict of interest does exist by contracting Ing Sammut as a Key Expert, in the Appellants' offer.**

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

- 1. *Perit* Mark Spiteri duly summoned by Ergon Technoline JV;**
- 2. Mr Alfred Farrugia duly summoned by the Public Contracts Review Board;**
- 3. Dr Roberto Curcuruto duly summoned by Ergon Technoline JV;**
- 4. Ing Christopher Sammut duly summoned by Ergon Technoline JV.**

**This Board, after having examined the relevant documentation and heard submissions made by the parties concerned, including the testimony of the witnesses duly summoned, would, prior to the considerations of the issues raised by Ergon Technoline JV, refer to the Bid Bond issued by the declared Preferred Bidder, namely SP BB International JV; such information was included in the documentation submitted to this Board by the Ministry for Health.**

**In this regard, this Board cannot but notice that the Bid Bond issued, allegedly referring to SP BB International JV, is not in accordance with the decisions taken by this Board and confirmed by the Court of Appeal. One**

**should refer to the decisions decided by this Board in Case 1043 on 9 May 2017 and Case 1066 decided on 21 July 2017, wherein it was adjudicated that the Bid Bond should be issued by the Bidder. In this particular case, the Bidder was SP BB International JV whilst the guarantee was issued by Bonnici Brothers Limited, one of the members of this Joint Venture, without stating that this Bond is issued on behalf of the latter.**

**As had been emphasized on various occasions, the Tender Guarantee, (Bid Bond) is intended as a pledge that the Tenderer will not retract his offer up to the expiry date of the guarantee, and if successful, that he will enter into a contract with the Contracting Authority. The Recommended Bidder, in this case, is SP BB International JV and nowhere is this Joint Venture mentioned in the Bid Bond issued by Bonnici Brothers Limited. In this regard, this Board noted that the Evaluation Committee failed to take this issue into consideration in the evaluation process, and such deficiency in the Evaluation Process will be reflected in the final adjudication of this Appeal.**

- 1. With regards to Ergon-Technoline JV's first contention, in that, the latter are insisting that they had originally submitted the requested information, this Board would respectfully refer to Perit Mark Spiteri's testimony, where he stated that:**

*“We submitted three particular parts for one simple reason. In the technical envelope, to use your jargon, the information to be submitted was too large, so we had to split it in three parts. I have just confirmed that in these two, (the witness here was referring to two out of three parts), of the three, the Power of Attorney and the ESPD’s were submitted and I am very happy to show this to the Board right now.”*

**On the other hand, the Ministry for Health is maintaining that the Appellants submitted the missing information, (although not complete), only after a request for the submission of ESPD’s of Technoline, EMDP Limited, Ms Luisa Fontanalier, Prisma Engineering and Ongreening, all of which were omitted from the Appellants’ original submissions.**

**In this regard, this Board would like to respectfully point out that it has been presented with numerous similar cases with regards to the submission of the requested information by the Appellants, however, unless this same Board is presented with proof or other evidence that the requested information was in fact sent and received by the Contracting Authority, the same cannot assume that Ergon-Technoline JV’s claims, in this regard, are correct and proper, however, quite appropriately, the Ministry for Health requested a rectification for the missing documentation and at this stage of consideration, this Board**

**established that after such rectification, all documentation so requested, was now made available to the Contracting Authority for the Evaluation Process.**

- 2. With regards to Ergon-Technoline JV's Second Contention, this Board would refer to Clause 7 (B)(B)(2) of the Instructions to Tenderers which states that:**

*“The minimum cumulative turnover during the past five years, (being 2011-2015) shall be not less than € 20,000,000. This information is to be submitted by filling Part 4B.1 of the European Single Procurement Document (ESPD)”.*

**The above mentioned clause clearly and vividly dictates that the Bidder must indicate the total turnover for the years 2011-2015 and which must not be less than € 20,000,000 and such information must be submitted by filling Part 4B.2.4 of the ESPD, so that, in this case, the Bidder was not given a choice and there was no room for omitting such information from the ESPD.**

**At the same instance, Part 4B.2.4 of the ESPD dictates the submission of the “average yearly turnover”, which really means that for each of the**

**years 2011 to 2015, the Economic Operator has to declare the turnover achieved during each of the years 2011 to 2015 so that the final result of such turnover is compared and agreed with the cumulative turnover so declared in Part 4B.1. Bidders who comply with such clauses and exceed the minimum requirement of € 20,000,000 will qualify to participate in the Tender.**

**In this regard, this Board finds no justifiable cause to deem such requirements as stated in Clauses 7 (B)(B)(2) and Part 4b.2.4 to be conflicting. This Board opines that the minimum cumulative turnover is the dictated benchmark to qualify whilst the purpose of indicating the yearly turnover, is mainly to assess the financial stability of the Economic Operator and whether the cumulative turnover includes any exceptional turnover in any of the particular years under review. If, on the other hand, Ergon-Technoline JV deemed clauses 7 (B)(B)(2) and 4b.2.4 to be conflicting, the latter had all the available remedies to clarify the situation prior to the submission of their offer.**

**In actual fact, after having examined the Appellants' offer, in this regard, this Board notes that the information so requested in the Tender Dossier was present but not under the appropriate section of the ESPD, namely the cumulative turnover which could have easily been assessed**

**from the information submitted by the Appellants under Part 4B.1**

**which contained the following information:**

<b>4B.1</b>	<b>1a) The Economic Operator should provide its (“general”) yearly turnover for the number of years specified in the relevant procurement documents;</b>	<b>Year 2011 Turnover € 7,371,352.00</b>
		<b>Year 2012 Turnover € 7,868,795.00</b>
		<b>Year 2013 Turnover € 7,385,143.00</b>
		<b>Year 2014 Turnover € 15,204,406.00</b>
		<b>Year 2015 Turnover € 8,921,112.00</b>

**It is evidently clear that both the annual turnover of each of the years 2011 to 2015 and the cumulative turnover could be determined easily from the above submitted information. This Board, is taking into consideration the magnitude of this particular Tender and in doing so, the Board is also applying the principle of proportionality whereby it is this Board’s opinion that, although the Appellants failed to abide by the inclusion of certain information under the appropriate section in the ESPD, the requested information was, in actual fact, available to the Evaluation Board but under a separate section of the same ESPD. One**

has to appreciate that the information so submitted by Ergon-Technoline JV is still appropriate and sufficient for attaining the objective pursued and such an acceptance of this fact does not go beyond the requirements to achieve what the Ministry for Health requested. In this regard, this Board upholds the Appellants' Second Contention.

3. With regards to Ergon-Technoline JV's Third Contention, whereby they claim that they had submitted the requested information regarding the sub-contractors, this Board was made aware, through the Authority's "*Letter of Reply*" dated 12 April 2018, that they confirmed that the omission to complete Part 4B.6.1. by INSO SpA was in fact rectified, so that this Board opines that there exists no issue in this regard.

4. With regards to the Appellants' Fourth Grievance, this Board would refer to the actual relationship between Condotte SpA and the Bidder Ergon-Technoline JV. One must acknowledge that the issue relates to the dubious financial standing of Condotte and not the Bidder. The Bidder is Ergon-Technoline JV and its composition of members consists of Ergon and Technoline Limited, so that the financial standing of these two entities should have been evaluated and established. Ergon is

**owned by HBT, the latter, in turn being 80% owned by INSO SpA which is owned by Condotte. The issue with regards to the financial standing relates to Condotte, the latter of which had applied for a standstill period to the Court of Rome for the implementation and submission of a new business, industrial and financial plan, obviously obtaining protection from creditors' claims during the period of protection. Such protection expired on 18 May 2018 which will be postponed by further 60 days under suitable circumstances.**

**At this stage of consideration, this Board would respectfully point out that such an application to the Italian courts, does not represent an application for a declaration of bankruptcy but rather an application for protection of the Courts from creditors during the period through which Condotte will prepare the restructuring exercise. From documentation available, this Board notes that Condotte is still functioning but under the administration of Court appointed experts.**

**Although there exists a very distant connection between Condotte and Ergon, this Board does not find any justifiable cause to envisage that, Condotte's present restructuring programme will affect the financial standing of Ergon-Technoline JV, the Bidder. At the same instance, this Board does not foresee deterrents for the Joint Venture in carrying out**

**its obligations as duly requested in the Tender Document. For clarity's sake, this Board is not implying in any way, that the Evaluation Committee should not carry out the necessary due diligent tests on the financial standing of the Bidders, but must also consider the fact that, under such circumstances, the principle of proportionality should prevail in the evaluation process. In this regard, this Board opines that the procedure which Condotte is undergoing for restructuring, should not throw a shadow, or bad light on the financial standing of the Tenderer, namely Ergon-Technoline JV.**

- 5. With regards to the Appellants' Fifth Contention, this Board would first consider what constitutes a conflict of interest. A conflict of interest involves a conflict between the public duty and private interests of an official, whose participation in a project could improperly influence the performance of his duties or the outcome of a public activity.**

**In this particular case, Ing Christopher Sammut was nominated as a "Key Expert" for the execution of the Appellants' offer. During the submissions and testimony of Ing Sammut, it was credibly established that he was employed with the Contracting Authority of this Tender up to May 2017.**

**At the same instance, from the testimony of Ing Sammut, this Board was made aware that, although the latter was still in employment with FMS when this specific Tender was issued, he was not involved, at all, in this particular project being tendered for.**

**This Board, after having considered Ing Sammut's testimony and various submissions regarding such an issue, opines that, although, at the time of publication of this Tender, Ing Sammut was employed by FMS, such a fact does not necessarily render that he was involved in the planning and drafting of the Technical Specifications of this project. However, at the same time, this Board was made aware that Ing Sammut was still in employment with the Foundation of Medical Services, as a consultant, having the responsibility of co-ordinating the Paola Hub. Although, the phrase "*Conflict of Interest*" is a very vague subject, this Board opines that Ing Sammut's appointment, as a key expert to the Appellant's offer, will incur a conflict of interest, as in fact the latter had access to sensitive information with regards to this project. In this regard, this Board doesn't uphold Ergon-Technoline JV's fifth contention.**

- 6. On a general note, this Board is not comfortably convinced that the Evaluation process was carried out in a transparent and diligent**

**manner and as duly noted in the opening paragraphs of this adjudication report, this Board opines that the Evaluation Committee should have adopted the principle of equal treatment throughout the assessment procedure of each offer. One must consider the magnitude of this project and the voluminous documentation which each Bidder had to provide and the respective financial outlay thereto. At the same instance, this Board also takes into consideration the fact that all the financial aspects of each Bid are known to all.**

**In this regard, this Board opines that it will not be beneficial, for the Contracting Authority to cancel the Tender, and every effort should be made to save the Tender as, in actual fact, the Tendering Procedure was correct and appropriate. However, in the opinion of this Board, the doubtful issue lies in the Evaluation Process which was carried out.**

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

**a) Has serious doubts as to how the evaluation procedure was executed;**

**b) Does not uphold the Ministry of Health's decision in the Award of the Tender;**

**c) Refers back Ergon-Technoline JV's offer, together with all the other competing Bids for re-evaluation by an Evaluation Board composed of different members, taking into consideration this Board's adjudication report;**

**d) Recommends that the deposit paid by the Appellants should be fully refunded.**

Dr Anthony Cassar  
Chairman

Mr Carmel Esposito  
Member

Mr Lawrence Ancilleri  
Member

*8 June 2018*