

PUBLIC CONTRACTS REVIEW BOARD

Case 1164 – 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 19th July 2017 whilst the closing date of the call for tenders was the 14th 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 28th March 2018 CMC di Ravenna Societa Cooperativa 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 10th 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: C.M.C. di Ravenna Societa Cooperativa

Dr Jonathan Thompson	Legal Representative
Dr Alessandro Circassia	Legal Representative
Ing Daniele Lolli	Representative
Perit John Papagiorcopulo	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 Carmen Ciantar	Project Leader Ministry of Health

Ing Andrew Vella Zarb
Ms Marion Rizzo
Ms Elain Camilleri
Bjorn Azzopardi

Chief Project Officer Ministry of Health
Head of Procurement Ministry of Health
Financial Controller Ministry of Health
Representative

Department of Contracts

Dr Chris Mizzi

Procurement Manger

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

Dr Jonathan Thompson, Legal Representative of CMC Ravenna Societa Cooperativa, stated that according to the Contracting Authority his clients had been excluded for two reasons: a failure to rectify documents and a conflict of interest. He intended to deal with the first point by requesting Mr Alfred Farrugia to testify.

Mr Alfred Farrugia (726861M) confirmed on oath that he was the Chairperson of the Evaluation Board and that that Board's interpretation of the tender documents was that section 2A.17 of the European Single Procurement Document (ESPD) had to be completed even by subcontractors whereas section 4C.9 of that document did not have to be completed as established in page 11 of the tender document. In reply to a question from Dr Thompson witness confirmed that the Contracting Authority had not requested CMC Ravenna to rectify the ESPD in all these three cases; namely Arco Costruzione Generale, Arco Costruzione Lavori Societa and Costruzione Edi Ponti. The bidders had simply been asked to submit ESPDs for the first time since they had not been submitted originally, and these had been duly submitted for each of the three subcontractors involved. To further questions by Dr Thompson, witness agreed that according to section 7B.3 of the tender two of these entities did not need to submit ESPDs as they were not subcontractors since they were not part of a group. Witness also confirmed that the Contracting Authority asked only once: either for submission or for rectification.

Dr Thompson stated that the first reason given by the Contracting Authority for exclusion of his clients was that the latter had failed to provide the information asked for. It had been established that section 2A.17 only applies to a subcontractor and therefore his clients were not obliged to submit this information; similarly in the case of section 4C.9. The tender does not provide for exclusion on the basis of missing information in the ESPDs. Clause 7 note 2 of the tender document allows clarification or submission of missing documents, and there is no limit imposed on the number of these. The Authority cannot create obstacles on administrative shortcomings, thus limiting the number of economic operators from participating. The Authority is under an obligation to request missing documents; in this case the information submitted was correct and if necessary the Authority should have sought clarification

Dr Reuben Farrugia, Legal Representative of the Ministry of Health, contended that it was a general principle in public procurement that the tenderer had to submit all requested documentation. There was a certain leeway allowing rectification and clarification. In this case CMC di Ravenna failed to submit certain documents, and when requested they were submitted incomplete. The Authority cannot be expected to rectify the faults of the tenderer. CMC di Ravenna was in a cooperative and therefore part of a group – unless ESPDs had been submitted there was no way that the Authority could decide on the commercial make up of the tenderer.

Dr Jonathon Thompson said that the Contracting Authority was obliged to look after the public interest. They were obliged, not doing favours, in seeking clarifications and it was incorrect to state that they were obliged to seek only one clarification. The extent of the tender document itself provides for corrective clarifications. He also mentioned that the reason that CMC Ravenna is a cooperative does not mean that this tender was a joint venture; there was no reason to assume this and exclude them – the Authority should have sought clarification.

Mr Anthony Farrugia was recalled to give evidence regarding the conflict of interest claim. He started by stating that he had sought information on key experts who had been involved in the Paola Hub Project (hereinafter referred to as the Hub). Perit John Papagiorcopulo was project co-ordinator of the Hub. (Witness tabled several email messages, a contract of service and an organigram). He referred to an email sent by Perit Papagiorcopulo stating that all matters regarding the Hub were to be directed through him. When questioned witness confirmed that in the contract of service there is no reference to the Hub, and that clause 7.6 in that contract related to a project at Mater Dei Hospital, but that the terms of reference had been rolled over to include the Hub. He finally confirmed that in the service contract there was no indication that it had been terminated in May 2016.

Perit John Papagiorcopulo (268357M) testified on oath that he had not been involved in the Hub, neither had he been involved in any way in the tender preparation of CMC Ravenna- his role there was to create a team of key experts. He previously had contracts with the Foundation for Medical Services at Mater Dei Hospital to complete the Medical Assessment Unit new block. He was also asked to assist with co-ordinating the application for European Union funding on the Hub. This was from the 1st December 2015 to the 4th or 8th April 2016. In that role he dealt with the Ministry of Health, the Foundation for Medical Services, the Lands Authority, Prime Health Care and various other bodies. His role was to meet tight deadlines. His involvement finished on the 4th or 8th April 2016. He agreed that in carrying out cost benefit analyses there were references to drawings of the Hub, but his role was to co-ordinate the various sources of information and for which project drawings were not needed. He went on to state that CMC Ravenna contacted him late in the day asking him to create a team of key personnel. As things turned out the Hub as now projected is nothing like the predecessor project he worked on.

Ms Carmen Ciantar (333871M) testified on oath that she was the Chief Executive Officer of the Foundation for Medical Services and deputy President of the Board. She stated that Perit Papagiorcopulo was given the role of co-ordinating the Hub. As such he was expected to assist engineers and architects to plan and design the project and this lasted till May 2016. Witness confirmed that she was not at the Foundation during the period in question.

Dr Thompson said that no evidence had been produced that Perit Papagiorcopulo was involved in the tender preparation and implementation of his clients' tender. In his previous work he was only involved in the application for funds and no evidence had been produced to the contrary. It was at the discretion of the Board to decide if there had been any involvement. Paragraph 4.1.1.3

of the tender excludes any form of collusion to gain benefit, and witness had confirmed several times the extent of his limited involvement either in the Hub or in the CMC Ravenna tender. The correct remedy was not the exclusion of the economic operator. The Authority referred to the eligibility criteria but these were not made available or included in the documents made available to the Appellant. The Authority was obliged to ensure maximum participation in public procurement, and where issues arose on administrative matters of non-compliance (unless specific clauses were included in the tender) the bidder should not be excluded and such exclusions should not apply.

In his final submission, Dr Rueben Farrugia stated that we were faced with a serious point – that of one party moving over to the other side. This was grave and unethical and could prove to be tragic to the whole procurement procedure. Perit Papagiorcopulo was the Hub co-ordinator. European Union funding demands access to detailed information – witnesses had confirmed his involvement from the inception of the project and of this there was no doubt. The e-PPS makes exclusion conditional that tenderer is agreeing and must ensure compliance. Clause 4.1.1.3 makes it clear that exclusion is the result of non-compliance. CMM Ravenna accepted responsibility for their actions.

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

This Board,

Having noted this Objection filed by CMC di Ravenna Societa' Cooperattiva, (hereinafter referred to as the Appellants) on 28 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 1164 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: Dr Jonathan Thompson

Appearing for the Contracting Authority: Dr Reuben Farrugia.

Whereby the Appellants contend that,

- a) Part IIA reference 2A.17 of the Tender Dossier, specifically states that it needs to be filled in, only in cases of subcontractors which, in their offer, were not applicable. In this regard, the Appellants insist that, if the Contracting Authority was in doubt, the latter could have requested a clarification, as duly expressed under clause 7, (note 2).**
- b) With regards to their offer's exclusion, due to the inclusion of Perit Papagiorcopulo as a "*Key Expert*" in the project, the Appellants contend that the "*Key Expert*" was not involved in the Paola Hub project.**

This Board also considered the Contracting Authority's "*Letter of Reply*" dated 13 April 2018 and its verbal submissions during the Public Hearing held on 10 May 2018, in that:

- a) The Ministry of Health insists that the Appellants were obliged to fill in all the requested information in Part 2A.17 of ARCO Costruzioni and Costruzioni Edil Ponti. The Appellants also failed to complete Part 4c.9 of the ESPD of AR.Co. Lavori Societa' Coop.**
- b) The "*Key Expert*" as nominated by the Appellants, failed the eligibility criteria as he was involved in co-ordinating the Project, Paola Hub.**

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

- 1. Mr Alfred Farrugia, Chairperson of the Evaluation Committee, duly summoned by CMC di Ravenna Societa' Cooperattiva;**
- 2. Perit John Papagiorcopulo, Nominated Key Expert, duly summoned by CMC di Ravenna Societa' Cooperattiva**
- 3. Ms Carmen Ciantar, Former Chief Executive Officer of the Foundation for Medical Services, duly summoned by the Ministry for Health.**

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 consideration of the issues raised by CMC di Ravenna Societa' Cooperattiva, 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 the 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 was 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 Bidder 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 CMC di Ravenna Societa' Cooperattiva's First Contention, this Board would, first and foremost note and consider that the Appellants' status is that of a co-operative, whereby a group of Economic Operators form a joint organisation for an economic activity. This Board would refer to Page 9 of the Tender Dossier, with particular reference to sub-clause (B)(iii) which specifically states that:**

“Part II A reference 2A.17 till 2A.17.3 need only be filled in when the Economic Operator is part of a group, consortium, joint venture or similar, (note 2).”

In this particular case, the Appellants were requested, through a rectification, to submit ESPDs of each of the subcontractors named in the Appellants’ revised ESPD. Separate ESPDs were submitted for subcontractors namely, Arco Costruzioni Generali SpA, AR.Co Lavori Societa’ Coop and Costruzioni Edil Ponti di Gela Soc Coop. During the Evaluation Process, it was noted that:

- In Arco Costruzioni’s ESPD, no details were submitted under Part 2A.17 of the same ESPD;**
- In Costruzioni Edil Ponti’s ESPD, no details were submitted under Part 2A.17 of the same ESPD;**
- In AR.Co Lavori Societa Coop’s ESPD, no details were given under Part 4C.9 of the same ESPD.**

With regards to Clause 2A.17, this Board notes that the missing details consisted of a questionnaire as to whether the Economic Operator is

participating together with others. This Board acknowledges the fact that it is the responsibility and obligation of the Bidder to provide and submit the dictated information as stipulated in the ESPD, however, in such circumstances, the Evaluation Board must assess and weigh whether the missing information invalidates the offer or not. In other words, the Evaluation Board must decide whether such missing information would render CMC di Ravenna Societa' Cooperattiva's offer invalid and unable to be assessed due to such a lack of information. In this regard, this Board also notes that the missing information could have easily be obtained after the submission of the subcontractors' ESPDs which came following a clarification on the submitted documentation. It is a maxim that every effort should be made to save an offer and in a tender of such magnitude, this Board would expect that the Evaluation Committee should apply the principle of proportionality. At the same instance, from the testimony of the witness namely, Mr Alfred Farrugia, Chairman of the Evaluation Committee, this Board was made aware that certain decisions taken by the said committee were based on assumptions and not facts. At the same time, this Board would point out that the fact that the ESPD were

not submitted in the first instance, does not imply that clarifications cannot subsequently be made after the submission of a clarification.

The same considerations apply to the missing information in Part 4c.9 in the ESPD of AR.Co Lavori Societa' Coop, which pertained to tools and equipment being used for the execution of works. This Board would refer to the ESPD of CMC di Ravenna Societa' Cooperattiva where under the same part of their ESPD, they submitted extensive information about the tools and equipment being utilised on the project. At the same instance, this Board noted that the other two subcontractors did submit details of the tools and equipment so that a Clarification, on the part of the Evaluation Board, would have established whether Part 4c.9 of all the ESPDs submitted by the Appellants and their subcontractors represented all the equipment that will be utilised on the project and in this regard, this Board notes that such an action on the part of the Evaluation Board was totally ignored. In this respect this Board is not credibly convinced that the missing information on the Appellants' part affected, in any justifiable way, the validity of their offer.

2. With regards to CMC di Ravenna Societa' Cooperattiva's Second Contention, this Board would consider what constitutes a conflict of interest. Such term represents a conflict between the public duty and private interests of an official, whose participation in a public project could improperly influence the performance of his duties and/or affect the outcome of a particular public activity.

In this particular case, Perit Papagiorcopulo was employed with the Foundation for Medical Services as a Project Co-Ordinator, with specific duties to co-ordinate and submit an EU Application for Funding for the Paola Hub Project. At this stage of consideration, this Board would respectfully point out that the duties of a co-ordinator for this project, was to collect and collate the various and exhaustive information to satisfy the laborious requirements in the application for funding and such information included plans, cost of labour, cost of materials and even projections. In this regard and from the testimony of Perit Papagiorcopulo, this Board is convinced that sensitive commercial information was in fact available to the knowledge of the Project Co-Ordinator.

Furthermore, this Board, through the testimony of the said Architect, was made aware that the Paola Hub Project was changed due to the selection of an alternative site for the same project. Although there was a change in location, the project itself, in substance remained the same and in this regard, this Board is not credibly convinced that such a change constituted various different layouts and equipment to be included in the project from that as declared in the application for funding from the European Union.

This Board would also refer to an extract from the testimony of Perit Papagiorcopulo, as follows:

Question: “*My question is, since you were the co-ordinator and all the information was passed through you as requested by your own e-mail, did you have access to the plan, details of your project, to the equipment to reach the demand of € 38 million?*”

Answer: “*During the meetings held to co-ordinate the project to fulfil the obligations for the requirements of the EU Application, during*

the meetings, drawings were presented in front of me, not in total.”

Question: *“As you were the Co-Ordinator, all the information had to be centralised with you to compile the final request for funding that is the way it was, correct?”*

Answer: *“Correct”*.

Having considered the submissions made by the parties concerned and the testimony of Perit Papagiorcopulo, this Board is credibly convinced that the inclusion of the latter as a “Key Expert” in the Appellants’ offer, does create a conflict of interest and does grant an advantage to the latter’s offer. In this regard, this Board does not uphold CMC di Ravenna Societa’ Cooperattiva’s Second Contention.

- 3. 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 Board 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) Upholds CMC di Ravenna Societa' Cooperattiva's First Contention;**

- d) Does not uphold the Appellants' Second Contention;**
- e) Refers back CMC di Ravenna Societa' Cooperattiva'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 decision;**
- f) 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