

PUBLIC CONTRACTS REVIEW BOARD

Case 1165 – 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 2nd April 2018 FMM Joint Venture 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: FMM Joint Venture

Dr Kenneth Grima	Legal Representative
Dr Carl Grech	Legal Representative
Mr Johann Farrugia	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
Ms Roseanne Camilleri	CEO Ministry of Health

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 Kenneth Grima, Legal Representative of FMM Joint Venture, (hereinafter referred to as FMM), stated that public procurement was based on the concept of best price, compliance and competence of bidder to complete contract. He then went on to relate the process of how an employee of FMM had opened the ePPS portal and downloaded the tender for the project in this case. According to the ePPS system that person (N Curmi) appears as the tenderer. When the tender documents were uploaded it specified the individual from FMM (J Farrugia) who was the point of contact in future. The Contracting Authority was therefore aware who to communicate with, but they disregarded this completely and no notification of any sort was received from them. They appear to have ignored the name given to them as the contact and the email address of J Farrugia was in fact inactivated. As a result FMM was eliminated straightaway from the competition due to administrative non-compliance. This was against basic law, let alone European competition regulations and this lack of competition affected the entire community. On a tender of this value the Contracting Authority should have been alerted at the lack of response by bidder to their communications, and should have taken some action.

Dr Reuben Farrugia, Legal Representative for the Ministry of Health, explained the operation of the ePPS system – once a user account was uploaded it had an email address attached to it. Thereafter the system automatically contacted that address. In this case bidder had used 123456 as the user account – thereafter the Authority's dealt with this user's email. Emails were correctly sent but ignored by the bidder. When after adjudication, FMM realised that the user's email was extinct (on 27th March 2018) they changed the users email account to J Farrugia and filed an appeal. The Evaluation committee cannot contact tenderers direct and for transparency and safeguards everything has to be done through the ePSS.

Mr Johann Farrugia (225874M) stated on oath that it was only co-incidentally from talking to a third person who happened to be a lawyer and who mentioned that this particular tender had gone to appeal that he had found out the situation. He followed this up by asking his lawyers to contact the Authority by email to find out the state of FMM's tender. Having found out N Curmi's password he entered her email site to discover that there were clarifications sought from the Authority which had not been dealt with. Witness also discovered that his email address and that of the administrator of FMM were marked 'inactive', which he had not been aware of previously. On the 27th March 2018 he contacted the Authority querying why his account had been deactivated, but he was not given a clear explanation. On the 3rd April 2018 he requested that the administrator' and his accounts, be reactivated.

In reply to questions from Dr Farrugia witness confirmed that up to the 27th March 2018 account 123456 had been active and used to upload the tender and that the email account of N Curmi, and only that, was attached to that user's name. Witness also confirmed that he had never entered the ePPS system to check progress on this tender. N Curmi had left the company in early 2017 but had continued to do some part-time work for FMM and had left her account active. Finally witness confirmed that he had another user account (225874).

Mr Jason Grech(185071M) testified under oath that he was the ICT Officer at the Department of Contracts. He tabled a series of documents showing the electronic audit trail regarding user name 123456. He gave details of all the logins on that account from the downloading and the uploading of the tender, to the clarifications requested by the Evaluation committee, the final information that the bid had been disqualified and subsequently the address of the email attached to the user's name. Witness explained that there was only one email address attached to this user's account and that the system automatically sent everything to that address. The only options available to the Evaluation committee under the ePPS system were to access the bid offer and to send clarifications. The bidder had the option to decide which email address to associate with the user name. Bidder had the option to associate other accounts to a user. In this case N Curmi had opted not to associate J Farrugia or the administrator to the 123456 name.

Dr Carl Grech, Legal representative of FMM Joint Venture, queried why the email accounts of J Farrugia and the administrator in the case of this tender were indicated as inactive, why they were inactivated on the day that the tender had been uploaded and if name 123456 could have activated them.

The Chairman assured both parties that all matters will be looked into before the Board made its decision. He thanked both parties for their submissions and declared the hearing closed.

This Board,

Having noted this Objection filed by FMM Joint Venture, (hereinafter referred to as the Appellants) on 2 April 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 Number 1165 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 Appellant: Dr Kenneth Grima

Dr Carl Grech

Appearing for the Contracting Authority: Dr Reuben Farrugia

Whereby the Appellants contend that,

- a) **They were not aware that, during the Evaluation Process, the Evaluation Board requested clarifications on their offer. In this regard, FMM Joint Venture maintain that their offer was not treated on the same playing field as the other competing Bids, so that their offer was disadvantaged at the administrative stage of Evaluation without their knowledge;**

- b) **The Evaluation Board should have applied the principle of proportionality in this particular circumstance.**

This Board has 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) **In requesting clarifications on the Appellants' offer, the Ministry of Health had submitted such requests on the e-mail address so chosen by the Appellants to be associated with their offer and in this regard, the Ministry for Health insists that it had acted upon the information so opted by the Appellants;**

- b) **With regards to FMM Joint Venture's Second Grievance, the Ministry for Health maintains that it had carried out the Evaluation Process in a fair and transparent manner.**

This Board also noted the testimony of the witnesses namely,

- 1. Mr Johann Farrugia, duly summoned by FMM Joint Venture;**
- 2. Mr Jason Grech, duly summoned by the Ministry of Health.**

This Board has also taken note of the documents submitted by the Ministry of Health during this Public Hearing which are the following:

- 1. Type of Activity made by user 123456 in the Electronic Public Procurement System;**
- 2. Correspondence between the Department of Contracts and Mr Johann Farrugia;**
- 3. Correspondence regarding User 123456 between the Department of Contracts and the Programmers of the European Public Procurement System;**
- 4. European Single Procurement Document submitted by C&F Building Contractors Limited;**

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 FMM Joint Venture, 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 has 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 FMM Joint Venture's First Contention, this Board, in its adjudication, had to rely substantially on the Electronic Public Procurement System's technical testimony given by the witness, namely, Mr Jason Grech. In this particular case, the Appellants are alleging**

that they did not receive any communication regarding a request for clarifications. At the same instance, FMM Joint Venture, through an audit trail of the Electronic Public Procurement System, provided concrete evidence that such requests by the Appellants were in fact submitted on 25 January 2018 and 9 February 2018. Such correspondence was activated via the email address ncurmi@fsh.com.mt, the latter of which was chosen by FMM Joint Venture to be associated with their offer. At this stage of considerations, this Board was also made aware that such an e-mail address was still active as at 27 March 2018, hence the requests of clarifications sent on 25 January 2018 and 9 February 2018 could be accessed and read.

From the credible testimony of the witness, the latter provided a vivid explanation of how the system is set up and functions through the tendering process. One of the characteristics of the system is that the Bidder, in his submission opts for a username and an e-mail address associated with such an offer. In this particular case, the Appellants chose the e-mail address ncurmi@fsh.com.mt, so that it had been credibly established that all correspondence and requests are communicated through such an e-mail. In this respect, an extract from

the testimony of the technical witness will illustrate how the system operates.

Reply: *“Is-sistema as such m’ ghandiex mohh. L-ghazla jaghmilha l-user li meta’ tefa’ l-offerta, s-sistema gieghlitu bilfors jagħzel li jassoċja ruhu. Two options kellu t-Tenderer, jew jassoċja lill-nnifsu biss, mill-grupp ta’ tlieta, (ghax tlieta kien hemm), jew it-tlieta li huma.”*

Question: *“U hu, (l-Appellant), x’ għażel?”*

Reply: *“Li jassoċja l-123456 biss.”*

Question: *“Ha nsaqsik xi haġa oħra. Meta giet submitted din it-Tender meta’ giet uploaded dan it-Tender, meta’ qed tgħid li s-sistema kienet qed tagħti l-ghazla lil dak li jkun biex jassoċja ruhu ma’ dan it-tender, hemmhekk il-users l-oħrajn, iabela@fsh u jfarrugia, dawn jiġu infurmati?”*

Reply: *“Ma jiġux infurmati.”*

From the above testimony, it is evidently clear that once a username is associated with the particular offer, only that username chosen by the Bidder to be associated with his offer is informed of any correspondence or requests. So that, in this case, the chosen username was ncurmi@fsh.com.mt and in fact, the requests for clarifications were only communicated through such an address. In this regard, this Board cannot comprehend how such a substantial Tender was not closely monitored by the Appellants, in so far as progress is concerned, and at the same instance, the user associated with the offer was still unaware of the requests for clarifications, when at the same time, such a username was still active, even after *Perit* Nadia Curmi left the employment of the Appellants.

With regards to FMM Joint Venture's claim that the Ministry of Health had two other e-mails where such clarifications could have been sent, this Board has clearly established that since the Appellants chose only one username to be associated with their offer, all correspondence was directed through the chosen e-mail address, namely, ncurmi@fsh.co.mt.

- 2. With regards to the Appellants' Second Contention, this Board opines that one has to acknowledge and appreciate the fact that, in its deliberations, the Evaluation Board has to adhere to the principle of**

self-limitation, however, after hearing all the submissions and testimony of the witnesses, this Board is convinced that the Appellants' lack of response to the request for clarifications did not occur capriciously. In this regard, this Board finds it strange and uncommon for a Bidder of a substantial Tender to ignore or disregard requested clarifications on his particular offer. In this respect, this Board would have expected that the Evaluation Committee would investigate further as to why such a Bidder is ignoring replies to clarifications on his offer.

This Board is, by no means, implying that the Evaluation Board had erred, but taking into consideration the magnitude of the Tendered Project and the possible inclusion of another offer, would render a benefit to the Contracting Authority itself. In this regard, this Board opines that a more practical communication method could have been adopted, (after the lack of response by the Appellants to the requests for clarification), so as to determine and establish why FMM Joint Venture are not replying to these clarifications, at this particular stage of Administrative Evaluation Process.

- 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 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 FMM Joint Venture'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;**

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

8th June 2018