

PUBLIC CONTRACTS REVIEW BOARD

Case 1476 – CT 2198/2019 – Tender for the Provision of Cleaning Services using Environmentally Friendly Cleaning Products to the Mental Health Services and Other Entities within the Ministry for Health (Lot 1)

The tender was published on the 14th September 2019 and the closing date of the tender was the 29th October 2019. The estimated value of the tender (exclusive of VAT) was € 7,884,955.

On the 27th July 2020 Salus Cleaning JV filed an appeal against Central Procurement and Supplies Unit as the Contracting Authority objecting to their disqualification on Lot 1 on the grounds that their bid did not satisfy the criterion for award. A deposit of € 39,424 was paid.

There were five (5) bidders.

On 24th August 2020 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellant – Salus Cleaning JV

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| Dr Alessandro Lia | Legal Representative |
| Mr Giulio La Scala | Representative |

Contracting Authority – Central procurement and Supplies Unit

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| Dr Marco Woods | Legal Representative |
| Ms Celia Falzon | Chairperson Evaluation Committee |
| Ms Rita Trickett | Secretary Evaluation Committee |
| Ms Divna Sladojevic | Member Evaluation Committee |
| Mr Lawrence Cauchi | Member Evaluation Committee |

Recommended Bidder – Servizi Malta

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| Dr Clement Mifsud Bonnici | Legal Representative |
| Mr Jason Degiorgio | Representative |
| Ms Claudine Sullivan | Representative |

Department of Contracts

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| Mr Nicholas Aquilina | Representative |
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Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties. He noted that since this was a virtual meeting all the parties agreed to treat it as a normal hearing of the Board. With regard to the preliminary note filed by Appellants he stated that the Board found no objection to appointing an expert if it is found to be necessary. He then invited submissions.

Dr Alessandro Lia Legal Representative for Salus Cleaning JV stated that the major objection of Appellants was that the evaluation committee could not open certain files in the tender submissions thus depriving them of a certain number of points in the assessment. A pen drive holding the exact same files indicated that all files could be opened correctly. The Central Procurement and Supplies Unit (CPSU) confirm the claim that certain files could not be opened – Appellants therefore request the appointment of an outside expert to give the necessary assurance regarding what transpired since they are not prepared to accept the decision of the CPSU.

Dr Marco Woods Legal Representative for the CPSU said that the Contracting Authority went to great lengths to try to open these files. The matter was referred to the Director of Contracts who in turn referred it to the system developer Euro Dynamics.

Dr Clement Mifsud Bonnici Legal Representative for Servizi Malta said that as a rule the PCRFB always rested on the decision of the system developer and he quoted several cases heard by the PCRFB which were decided on this basis. The Board needs also to consider the point regarding the absence of the NCPE certificate which will not affect the final outcome as even if the two parties were equal on points the Servizi offer was cheaper.

Dr Lia said that the NCPE certificate is a minor point. The major complaint is that a number of files will not open – this may be due to a failure in the system and hence the need for an expert to decide on this issue.

Mr David Gatt (5879M) called as a witness by the Public Contracts Review Board testified on oath that he is a Manager in the IT section of the Department of Contracts. He stated that the CPSU requested the Department of Contracts to investigate why certain files in Appellants' bid could not open. The matter was in turn referred to Euro Dynamics the systems operator. The department of Contracts cannot investigate the problem themselves as no one can access the files uploaded on the EPPS except the evaluation committee and hence the referral to Euro Dynamics.

Mr Leonidas Bardis called as a witness by the CPSU testified on oath that he is the Chief Executive Officer at Euro Dynamics and a graduate in IT and engineering. He explained that the files that could not open were corrupted at source – that is, on the work station of the bidder. The Euro Dynamics systems shuffles files from one source to another but does not in any way change them. If the files cannot open they must be corrupted as there is no processing of, or changes to, files in their system. The corruption could be due to various reasons including a virus or disk problems.

Questioned by Dr Lia witness stated that the contents of a file are not affected between uploading and down loading. There is no possibility of finding what happened on the bidders' work station as access needs to be at the very same moment when the files were uploaded on the system. One can only verify a file at the time of uploading.

In reply to questions from Dr Woods witness said that if the problem was with the server the log records would indicate this and the matter would be investigated. No errors were reported at the time of the corrupted files, and there were no problems with the other tenders. There are very small instances of corrupted files something like five out of around 8,000 tenders. The zipping of files does not affect the contents of a file.

Questioned by Dr Mifsud Bonnici witness stated that the compression of files happens at source on the bidders' computer in the tender preparation. The contents of files are not affected when decompressed and the same compression tool is used by all tenderers.

The Chairman noted that from what has been stated it appears that an outside expert cannot extract information from the system.

Dr Lia repeated his request for the appointment of an independent expert who had no interest in the outcome of the system and requested a deferment of the hearing to enable him to regularise his position if his request was refused.

Dr Mifsud Bonnici objected to the appointment of an independent expert. Euro Dynamics is an enormous and serious setup and has no interest whether Salus JV offer is accepted or not. There can be no verification of files except on those uploaded on the EPPS at that particular moment. In all the cases heard by the Board, except for one, the fault was always with the bidders. He objected to a deferment of the Case.

After a short adjournment the Chairman said that the Board had considered the submissions made and decided to appoint Mr David Mifsud as an independent expert with terms of reference to check what was likely to have gone wrong and to report back in a short period of time.

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

End of Minutes

SECOND HEARING

On the 5th October 2020 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public virtual meeting to discuss further the objections and receive the experts report.

The attendance for this public hearing was as follows:

Appellants – Salus Cleaning JV

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| Dr Alessandro Lia | Legal Representative |
| Mr Giulio La Scala | Representative |
| Ms Alexia Bongailas | Representative |
| Ms Sharon Camilleri | Representative |

Contracting Authority – Central Procurement and Supplies Unit

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| Dr Marco Woods | Legal Representative |
| Ms Celia Falzon | Chairperson Evaluation Committee |
| Mr Keith Magro | Member Evaluation Committee |
| Ms Divna Sladojevic | Member Evaluation Committee |
| Ms Rita Turchett | Representative |

Recommended Bidder – Servizi Malta

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|---------------------------|----------------------|
| Dr Clement Mifsud Bonnici | Legal Representative |
| Dr Joseph Giglio | Legal Representative |
| Mr Jason Degiorgio | Representative |

Department of Contracts

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| Mr Mark Mizzi | Representative |
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Dr Anthony Cassar Chairman of the Public Contracts Review Board remarked that this was a continuation of a virtual meeting which all parties had agreed to treat as a normal meeting of the Board and the purpose was to introduce and deal with the report of the technical expert Mr David Mifsud, requested at the first hearing.

Mr David Mifsud (209079M) called as a witness by the Public Contracts Review Board testified on oath that he is the Head of Section of the IT Technical Services at the University of Malta. He stated that he was briefed by the Public Contracts Review Board (PCRB) to examine what went wrong in the Appellants' submission in this tender. From the searches made both at Appellants' end and at the Contracting Authority it transpired that Appellants' hard disk was full at the tender preparation stage and therefore it was not possible to load all files.

Questioned at length by Dr Lia Legal Representative for Salus Cleaning JV witness stated that the files were compressed into a zip file prior to submission. The Log File keeps a record of every step in the process. This was still available and was viewed at Appellants and was also made available by the Department of Contracts. An exact simulation was impossible as when he visited Appellants, the files had been moved from the 'C' drive but the dates of the files tallied. Appellants' representative claims that he loaded the files twice and therefore it is very likely that a warning message had been relayed to him to alert him of this.

At this stage the image of the Log File was exhibited on screen.

In reply to further questions witness stated that at a certain stage a message that the hard disk was full must have been given and according to the Log File 11 minutes after a further message was given that there was a problem with the submission of files. The process found 'zero' files and packaged them as

such so that when the process was restarted using those same files in generating the zip file at the second attempt all the content files were 'zero' files as the packaging was already corrupted. The issue arose at the preparation stage since once the hard drive was full then the zip file was corrupted – at the second stage although the zip file was correct the files were corrupted and the server indicated that submission had not been in full.

In reply to questions from Dr Marco Woods Legal Representative for the Central Procurement and Supplies Unit (CPSU) witness stated that Appellants put all files together into a zip file but at the second attempt the previous files which were already corrupted were used and packaged as such.

Dr Clement Mifsud Bonnici Legal Representative for Servizi Malta asked witness to confirm the full contents of his report under oath. In reply to further questions witness stated that with regard to the file dated 28th October 2019 he could not specifically verify if there had been any modifications to it, but although it had been moved from the 'C' drive to a different one and was now nearly one year old he did not feel it made much difference. Witness said that his primary concern was to ensure that both ends had the same submission and all indications were that the files were corrupted.

Witness went on to explain the processing of how files are zipped and the size of files reduced and put all into one folder location to enable packaging compression prior to the Tender Preparation Tool (TPT) collecting all the information. In this instance the origin of the problem was linked to this process at Appellants' source.

Further questioned by Dr Lia witness said that he had never used the TPT but was familiar with it. He was not aware that in the TPT there was no reference to leaving extra space between submissions.

Mr Giulio La Scala called as a witness by Appellants testified on oath that he was the Project Manager responsible for submitting Appellants' tender. He confirmed that the uploading of the files had been done by him and that he had loaded the files twice. He originally tried to upload the files with a different tool to the one used by TPT and had been given a message to that effect. He therefore started the process again from scratch following the instruction of the TPT - this time no error messages were received. Witness stated that he did not understand the information shown earlier on screen in the Log File, but it was not correct to state that the original October file had been moved from the 'C' drive – he had simply made a copy of the original file for the use of the technical expert not to mix files. There had been no modification at all on files.

Questioned by Dr Woods witness said that on his second attempt he had selected a list of files and uploaded them.

Ms Celia Falzon (473265M) called as a witness by Appellants testified on oath that she was the Chairperson of the Evaluation Committee and currently the Chief Executive Officer at Mater Dei Hospital. She had no say in voting and her role was to consolidate the tender evaluation. She was involved in the discussion on the problem of the opening of files and through the Secretary of the Committee she had sought the assistance of the Department of Contracts on this matter.

Since no submissions were available on the Equality Mark Appellant had been awarded one (1) point. Witness explained that the tender required a statement that bidder had proof of the Equality Mark – what Appellant submitted was a document in Italian with an image pasted on a document (not even certified as a true copy) which was not acceptable and without any proof of equivalence to what was required.

In reply to a question witness confirmed that the document submitted was in the Italian language with no certification from the National Commission for Promotion of Equality (NCPE) that this was equivalent to the Equality Mark.

Mr Keith Magro (144486M) called as a witness by Appellants testified on oath that he was a member of the Evaluation Committee and employed as a Sourcing Executive at the Foundation for Medical Services but had no previous evaluating experience. In replies to questions he confirmed that the Committee was unable to open certain files submitted by Appellants and that the certificate submitted with regards to the Equality Mark was not issued by the NCPE. Witness was not aware what certificate SA 8000 is, but was aware that the documents in Italian submitted did not show any evidence that they were equivalent to the NCPE certificate. He further confirmed that there was no explanation on the image submitted by Appellants which was in Italian although the tender required submissions to be in the English language.

Ms Dvina Sladojevic (280614L) called as a witness by Appellants testified on oath that she was one of the evaluators and is the Head of POYC Business Planning at the Ministry of Health. She agreed that the Committee did not accept the certificate presented by Appellants who were awarded one (1) point as they did present a document though it was not the certificate equivalent to the Quality Mark that the Contracting Authority requested. Witness confirmed that the document submitted was in Italian but she could not recall if it was certified as a true copy.

Dr Lia said that what had become obvious at today's hearing was that there was a vast difference between the evidence heard at the first hearing and the expert's opinion today when it was found out that Appellants had ran out of disk space. The problem is that at the first attempt to submit files an error indicated that bidder was not using correct tool according to the systems TPT but this was not so. The hypothesis was that as the files were not the same as those selected the system refused them. The bidder was not expected to read the Log File but relied on the message 'successfully uploaded' as reassurance. The guidelines of the TPT although detailed make no reference to this point, and the bidder followed the instructions on the TPT when an error was indicated, redid the process and received a successful uploading message. The comment that files failed to upload should be ignored by the Board as the bidder was not aware or at fault as the system did not provide the advice that it was necessary to leave space before uploading. The Board should ask either for a re-evaluation or cancellation of the tender.

With regards to the certification equivalence, neither the Chairperson nor any of the members of the Evaluation Committee are knowledgeable on this point and this Case bears similarity to the Tal-Qroqq Sports Concession case which covered the same principle of equivalence of certificates.

Item c (i) page 17 of the tender seeks submission of the Equality Mark or equivalence, and hence there is no need for the copy submitted to be authenticated and no need to seek NCPE equivalence declaration. SA 8000 certification is an international standard whereas the Equality Mark applies only to Malta and

is far superior to requirements. It is nonsense to expect the certificate not to be in the Italian language, and the tender does not state a direction on this point – it merely asked for certification without any conditions.

Dr Woods reminded the Board that it was Dr Lia who had requested the appointment of a technical expert whose report states that the problem of corrupt files occurred at source and was attributed to the Appellants; whatever the reasons were that caused the predicament. The argument has now been turned round to blaming the preparation tool as being at fault. Mr La Scala in his testimony stated that he selected the documents and pressed upload from which it is clear that he never checked which files were submitted or confirmed that the document was complete. The confirmation of uploading which is messaged is only a receipt that an offer has been received in the system or that it is in the correct format.

It is an undoubted fact that the NCPE document which was clearly requested was not provided nor any form of equivalent document supplied and what was provided was not in the English language thus making it impossible to analyse the document submitted in lieu. Appellants' offer is not technically compliant and asking for cancellation of the tender at this stage is objected to as no reference to such a request was made in the appeal letter.

Dr Clement Mifsud Bonnici stated that the successful bidder had been awarded full marks on his submission except on the Equality Mark section where similar marks were awarded to the Appellants. If what was therefore awarded to Salus JV is not anywhere near correct one might as well stop at this point as the matter is decided. The tender asked for the NCPE certificate or equivalent. The law on this point is clear and does not need any interpretation. In paragraph 14 of the letter of reply the bidder's responsibility to show equivalence was made clear in detail, and what the Evaluation Committee knew or not about equivalence has no bearing on their role to judge if what was requested was submitted. SA 8000 does not match an NCPE certificate and is not equivalent. It is issued by an American institute and its criteria do not meet the onerous criteria set by the European Union, which criteria are reflected in the NCPE. Guidelines on points as, for example, gender equality, supply of goods and services and caring responsibilities are not found in SA 8000.

The General Rules covering Tenders, in clause 6.3 demand that documents are submitted in English for transparency and self limitation principles – PCRB Case 1053 dealt with a similar point, and the general instructions in the tender state that proof of equivalence is on the bidder. The TPT could not possibly cover every point under the sun and the process described makes it obvious that extra space is required on the computer to enable submission. The appointed expert stated that the Appellants' system is at fault as that is where the corruption occurred. Proportionality does not deem cancellation at this stage especially now when prices are in the public domain.

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

End of Minutes

Decision

This Board,

having noted this objection filed by Salus Cleaning JV (hereinafter referred to as the Appellants) on 27th July 2020, refers to the claims made by the same Appellants with regard to the tender of reference CT 2198/2019 (Lot 1) listed as case No. 1476 in the records of the Public Contracts Review Board recommended for award by Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority).

Appearing for the Appellants: Dr Alessandro Lia

Appearing for the Contracting Authority: Dr Marco Woods

Appearing for the Preferred Bidder: Dr Clement Mifsud Bonnici

Whereby, the Appellants contend that:

- a) Their main concern refers to the alleged reason given by the Authority, for the penalisation through the deduction of marks on their offer, claiming that, certain files could not be opened on the EPPS by the Authority. Appellants insist that they had submitted all the requested information through the proper channels of the system and since such an issue is of a highly technical nature, and requested that an independent IT expert should be appointed to investigate and determine the real cause of such alleged shortcoming.**

b) Appellants also insist that, they had submitted the requested certificate relating to the ‘Equality Mark’. However, since it was in the Italian language, the Authority decided to ignore it completely.

This Board also noted the Contracting Authority’s ‘Letter of reply’ dated 5th August 2020 and its verbal submissions during the virtual hearings held on 24th August and 5th October 2020, in that:

- a) The Authority maintains that, certain files from Appellants’ submissions, could not be opened on the EPPS and after further investigation carried out, it was established that, the problem originated at source. In this respect, the Evaluation Committee had no other option but to deem Appellants’ offer as incomplete, thus being allotted the corresponding proportionate marks.**
- b) With regard to the ‘Equal Mark’, Appellants submitted a certificate in the Italian language which showed no evidence that it was equivalent to that issued by the ‘National Commission for the Promotion of Equality’ (NCPE) and in this respect, Appellants were awarded a fair yet proportional mark.**

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

Mr David Gatt duly summoned by the Public Contracts Review Board

Mr Leonidas Bardis duly summoned by Central Procurement and Supplies Unit

Mr David Mifsud, (Appointed Expert) duly summoned by the Public Contracts Review Board

Mr Giulio La Scala duly summoned by Salus Cleaning JV

Ms Celia Falzon duly summoned by Salus Cleaning JV

Mr Keith Magro duly summoned by Salus Cleaning JV

Ms Divna Sladojevic duly summoned by Salus Cleaning JV

This Board has also taken note of the documents submitted by Salus Cleaning JV which consisted of an image of a ‘Log File’.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties including the testimony of the various witnesses duly summoned opines that the issues that should be treated on their merits are two-fold namely:

- a) Non-Receipt of Documentation by the Authority and**
- b) ‘Equal Mark’ certificate submitted by Appellants.**

1. Non-Receipt of all Documentation by the Authority

1.1. This Board noted that, one of the reasons why Appellants’ offer was deprived of a number of points was, due to the fact that some of the files submitted through the EPPS by Appellants, could not be opened at the Authority’s end. In this respect, this Board also noted that, the Evaluation Committee took all the necessary possible action to investigate this problem. At the same instance, this Board was requested to appoint an IT expert to examine and establish the cause of this particular technical problem and in this regard, the Board appointed

Mr David Mifsud an experienced IT programmer to examine the issue and to give his professional opinion (through a report) on his findings.

1.2. This Board would respectfully refer to extracts from the expert's testimony wherein, the source of the problem originated from Appellants' end, as follows:

“Xhud : Jiena Head of Technical Services fl- IT Services l-Universita. Ilni over 20 years nahdem l-Universita niehdu hsieb is-sistema tal-IT tal-Universita. U kemm ilni nahdem hawn iltqajt ma daqxejn sistemi u ghandi esperjenza mhux hazin. Bazikament kontu kkuntattjajtuni min-naha taghkom bhala PCRb biex nara daqxejn x'jista jkun li mar hazin fis-submission tal-bidder fejn jidher li l-evaluators ma setghux jifthu certu files

Chairman : U fl-opinjoni tieghek x'kienet ir-raguni?

Xhud : Jiena mill-informazzjoni li rajt, kemm fuq id-device tal-bidder u kemm mis-submission li tawni access min-naha tal-Contracting Authority, hemm miktub file go log file li kienet intliet il-hard disc waqt parti mill-process meta kienet qed issir it-tender preparation. Infatti kien hemm file minnhom li waqaf f'nofsu u ma giex shih u ma dak il-file kien hemm numru ta' files li gew kollha zero, kollha vojta.

Chairman : Dr Lia

Avukat : Mela inti stabbilejt illi r-raguni ghaliex dan il-compressed file. Biex kulhadd jifhem, dan il-compressed file huwa zip file jew l-ekwivalenti ta' zip file? Kif ikun?

Xhud : *Hekk hu. Dan bazikament qabel jitla' fis-sistema jghaddi min numru ta' processi. L-ahhar wiehed huwa fejn jaghmlu bhala zip file, jghaqqadhom f'salt bhala file wiehed u encrypts them u imbaghad jitla' fis-sistema*

Avukat : *U ghaliex hemm bzonn hard disc space biex isir dan il-process? Ara fhimtx tajjeb jiena. Jiena fhimt li dan it-tool jerga jidduplika l-files u allura jkollok bzonn dak l-extra space biex imbaghad jikkompresahom jew jippakkeggjahom go dan iz-zip file*

Xhud : *Iva*

Avukat : *Naqblu li hu hekk?*

Xhud : *Iva*

Avukat : *U at one point minn dak li stajt tikkonstata inti, meta kien f'dan l-istadju ta' dduplikar biex jippakkeggjahom, sab li l-hard disc, il-work station minn fejn kien qieghed jaghmel upload il-bidder intliet, ma sabx spazju iktar biex jidduplika u jippakkeggja u konsegwentement xi file kif ghidtilna inti waqaf f'nofsu, u xi files ohra, minkejja li holoqhom kienu vojta, naqblu?*

Xhud : *Iva*

Avukat : *Inti x'ghamilt biex skoprejt din?*

Xhud : *Bazikament hemm log file, kull certu steps li jaghmel it-tool, it is informazzjoni x'ghamel u m'ghamilx u dik tkun miktuba go file li l-istess file kien ghadu prezenti kemm fuq id-device ta' Mr Giulio kif ukoll gie prezentat min-naha tal-Kuntratti*

Avukat : *U dan il-log file huwa text file?*

Xhud : Iva

Avukat : Huwa text file li kien fiz-zip file innifsu jew jigi kkreat barra miz-zip file?

Xhud : Ghax hu jkun hemm zip file go zip file imma bazikament jigi kkreat apparti

Avukat : U jigi kkreat allura gol-istess package li jittella online u li jintbaghat lill-Contracting Authority

Xhud : Iva”

1.3. Furthermore, this Board was made aware through the explanation given by Mr Mifsud, how such a fault has been detected from the ‘Text file’ which represents an audit trail of the files processed by the originator, as follows:

“Avukat : Inti jigifieri tista’ tghid jekk meta sar il-process, meta sar dan il-packaging u allura t-tool sab il-hard disc mimlija, jitlax jew telax xi warning? Xi avviz? Xi haga? Jew just tnizzel fil-log file jew that’s it?

Xhud : Is-Sur Giulio kkummenta li hu ghamlu darbtejn il-process. Jigifieri xi raguni kien hemm biex ghamlu t-tieni darba. Jiena qed nimmagina li xi messagg tela. Fil-fatt fil-log hemm parti fejn jghid u dan nahseb li jitla’ l-messagg. Hu ghal xi raguni rrepetieh. Hu jghidlek your submission is rejected because you are attempting to upload a tender that was not generated by the tender preparation tool. Jigifieri dik l-ewwel darba li ghamel il-process telghalu dak il-messagg

Avukat : *Raguni differenti imma, qed nifhem sew?*

Xhud : *Il-likelihood li hu dak il-hin ma kellux spazju fuq id-disc.*

Avukat : *Qed jigi shared*

Xhud : *Jekk tinzlu 'l isfel iktar sakemm jigi 22 33 31. Hemm hekk hemm dak il-messagg ta' meta intliet il-hard disc*

Avukat : *Nizzel ftit iktar pls Carmen*

Xhud : *Issa hawn hekk within one second kien hemm messagg li kien hemm problema bis-submission.*

Avukat : *Your tender*

Xhud : *ghax imbghad hemm gap ta' 11 minutes. Waqaf hemm hekk 22 33 u imbghad iktar 'l isfel rega ghamel it-tieni attempt*

Avukat : *Mela din jidher li kienet l-ewwel tentattiv, naqblu?*

Xhud : *Iva*

Avukat : *Fl-ewwel tentattiv at 22 33 31 kif ghidtilna tajjeb inti kien hemm xi haga fil-log file bit-Taljan, spazio su disco insufficiente. Pero currently packing file, l-istruzzjoni halli nghidu hekk, baqa' ghaddej*

Xhud : *Imma imbghad ikun ippakkja zero files. Il-file sabu u it packed it.*

Avukat : *Granted. Fil-fatt mela jekk qed nifhem sew, dawk il-file minn 22 33 31 ezatt wara dak il-warning, 'l isfel gew 0 bytes*

Xhud : Hekk hu”

1.4. This Board is credibly convinced that, the files could not be opened by the Authority due to an error which occurred during the application of the Tendering Preparation Tool (TPT) in the submission of files at the original source, as asserted by the expert, Mr Mifsud, as follows:

“Xhud : Mela basically milli nista nifhem jiena huwa li hawn hekk fl-ewwel bicca jghid li l-files individwali, jigifieri dawn PDF u excel daww gew 0. Kien hemm problema wkoll meta qed jiggenera iz-zip. Iz-zip huwa collection ta’ files. Meta qed jiggenerah dak, kellu problema wkoll at this stage. Fl-istep ta’ wara bazikament iz-zip rnexxielu jikkrea shih imma l-kontenut taz-zip hemm files minnhom li kien hemm bejn 10 u 15 li bazikament il-files ippekkjahom kif sabhom, iz-zip gie shih imma l-files kienu. So fl-ewwel step, anke l-package itself kien corrupt. U fit-tieni step il-package bhala forma ta’ package kien shih imma l-kontenut ta’ go fih kien fih files vojta

Avukat : Ok. Jigifieri sa currently packing file, hemm hekk il-problema li kien sab jekk qattx il-hard disc kienet mimlija. Sa currently packing file l-ahhar wahda. Ghax inti ghidtilna li hemm hekk diga kien sab problema. Il-problema kienet ghax il-hard disc kienet mimlija, naqblu?

Xhud : Iva dak mhux error hemm hekk. Dak kien qed jipprova jippekkjah.

Avukat : F’log file iktar ‘l fuq kien hemm spazio non sufficiente

Xhud : Ezatt hemm hekk kien hemm disc full, il- hard disc mimlija

Avukat : Mela dik hija l-problema waqt il-packaging, naqblu?

Xhud : Iva fl-ewwel bicca. Dik imma l-problema hija kongunta ghax hemm hemm il-preparation u l-packaging. Jigifieri waqt il-preparation kien hemm issue u fil-packaging tkomplet ghax iz-zip file ukoll fit-tieni stage kien corrupt

Avukat : Kien corrupt ghax kienu vojta, f'dak is-sens?

Xhud : Le kien corrupt ghax iz-zip ma sarx shih. Hu ma jidhirx li t-tool jiccekkja l-file hux vojta jew le.

Avukat : U allura ghalfejn qed tghid li kien hemm corruption fit-tieni bicca?

Xhud : Ghax iz-zip ikollu certu check sum, hu jaghmel a mathematical formula biex jara bazikament li l-kontenut jaqbel. Inti tassumi li ser ikun hemm some sort of corruption u inti taghmel mathematical formula u tahdem b'numru biex tara jekk il-file baqax intatt. Issa fl-ewwel darba meta qed jaghmel dan iz-zip, kien hemm xi issue. Fit-tieni darba li qed jaghmel packaging, iz-zip file halqu tajjeb imma ovjament il-kontenut tad-dokument ma qaghadx jipprova jara l-kontenut tad-dokument. Mhux parti imma z-zip file gie kkreat shih, ma kellux corruption tat-tip li jista' jinduna bih l-algorithm u allura ghalih kien tajjeb bhala zip file.

Avukat : U l-error message your submission is rejected because you are attempting to upload a tender that was not generated by the

Xhud : By the tender preparation tool

Avukat : U ghalfejn giet hekk dik?

Xhud : Ghax iz-zip file ma kienx fih kull ma kien qiegħed jistenna fih. Jigifieri hu apparti dawn il-files tal-criterion wahda wahda, fiz-zip file ta' barra, ghax hu jagħmel il-package tal-affarijiet that you submit il-bidder himself. Imbghad hemm certu struttura, inkluz il-log file biex nagħtu eżempju, hemm xi files oħra u hu jinduna li l-istruttura mhijiex kompluta. Jigifieri s-server induna li hemm xi partijiet mill-istruttura tal-package li ma kinitx kompluta u ta dak l-error”

2. ‘Equality Mark’ Certification

2.1. With regard to Appellants’ second contention, this Board would refer to article C.1 Equal Opportunities, of the award criteria wherein the following is specifically requested:

“C.1 – Equal Opportunities

*Maximum
of 4 points*

N.B. to Sole Traders/companies with no Employees:

‘Sole Traders/Companies with no Employees’ that are sub-contracting the services to known third parties at Tendering stage, are also to provide the necessary proof/ Evidence as per the set requirements of the ‘Company with Employees’ on behalf of the sub-contractors.

The Economic Operator is to submit:

- | | | |
|--|----------------------------|---------------------------------|
| <i>i. Evidence that the economic operator is an Equal Opportunities employer in line with the Equality Mark or equivalent (Add on) (2points)</i> | <i>Maximum of 2 points</i> | <i>100% of 1% as a minimum)</i> |
|--|----------------------------|---------------------------------|

A copy of the NCPE (or equivalent) Equality Mark Certificate is to be provided.”

2.2. The above-mentioned article clearly dictates that, a copy of the NCPE (or equivalent) equality mark certificate is to be provided. Appellants submitted documentation in the Italian language without any proof of equivalency to that issued by the NCPE.

2.3. The fact that, the certificate was in the Italian language without a certified translation into the English language does breach clause 6.3 of the General Rules Governing Tenders which clearly dictates that documents are to be submitted in the English language. In this regard, Appellants were quite aware of such a provision, yet they failed to submit a translated version into English.

2.4. This Board would also respectfully point out that, the fact that Appellants are claiming that, the international standard SA 8000 (2014) is equivalent to NCPE Regulations was not actually proven and this Board would remind the Appellants that, the equivalency of such

documentation had to be certified by the NCPE and in this respect, no such certification was submitted to the Authority.

2.5. On the other hand, it is important to acknowledge that the Evaluation Committee is in duty bound to adhere to the principle of self-limitation, even so, the bidder is in duty bound to submit the information as duly dictated in the tender dossier.

2.6. This Board would also note that, if Appellants' were in doubt as to which certificate had to be submitted, they had the remedies to clarify and resolve this issue, prior to the submission of their offer, however, this Board notes that, Appellants did not avail themselves of such remedies.

In conclusion, this Board opines that:

- a) From the submission made and from the testimony of Mr Mifsud, the appointed IT expert, this Board justifiably established that, the error in submitting the files, through the EPPS system, to the Authority, occurred at source and the Authority could only retrieve the incomplete information.**
- b) The Evaluation Committee, upon realising the problem, took all the necessary appropriate action to investigate such an occurrence.**
- c) The 'Equality Mark' certification was not translated in the English language, as duly stipulated in clause 6.3 of General Rules Governing Tenders.**
- d) Appellants did not provide evidence to prove that, the submitted 'Equality Mark' documented was equivalent to that issued by the NCPE.**

- e) **The marks allotted to Appellants’ offer, with special reference to ‘Incomplete Documentation’ and ‘Equality Mark’ were proportionate and just.**
- f) **The evaluation process was carried out under the BPQR and marks proportionately allotted so that, this Board does not identify any justifiable reason whatsoever, why the tender should be cancelled. The recommended bidder credibly obtained higher percentage points in a fair and transparent adjudication process. It must also be pointed out that, under such circumstance, the Authority is in duty bound to save a compliant and the most advantageous offer.**

In view of the above, this Board,

- i. does not uphold Appellants’ contentions,**
- ii. upholds the Contracting Authority’s decision in the recommendation for award,**
- iii. directs that, an amount of three thousand Euro (€3000) from the deposit paid by Appellants, be refunded.**

Dr Anthony Cassar
Chairman
14th October 2020

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member