

PUBLIC CONTRACTS REVIEW BOARD

Case 1720 – CT2272/2021 – Tender for the Works of Construction, Mechanical, Electrical, Finishing, Apertures, Furnishing, Air Handling, Ventilation, Chilled Water, Plumbing and Passive Network Systems, Using Environmentally Friendly Construction Materials and Products for the New Accident and Emergency Waiting Area at Mater Dei Hospital – Re-issue

13th May 2022

The Board,

Having noted the letter of objection filed by Dr Stefan Camilleri on behalf of Camilleri Cassar Advocates acting for and on behalf of FM Core Limited, (hereinafter referred to as the appellant) filed on the 14th March 2022;

Having also noted the letter of reply filed by Dr Leon Camilleri acting for Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority) filed on the 23rd March 2022;

Having heard and evaluated the testimony of the witness Ing Patrick Borg Cardona (Chairperson of the Evaluation Committee) as summoned by Dr Leon Camilleri acting for Central Procurement and Supplies Unit;

Having heard and evaluated the testimony of the witness Ing Noel Psaila (Member of the Evaluation Committee) as summoned by Dr Leon Camilleri acting for Central Procurement and Supplies Unit;

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by representatives of the parties;

Having noted and evaluated the minutes of the Board sitting of the 10th May 2022 hereunder-reproduced.

Minutes

Case 1720 – CT 2272/2021 – Tender for the Works of Construction, Mechanical, Electrical, Finishing, Apertures, Furnishing, Air Handling, Ventilation, Chilled Water, Plumbing and Passive Network Systems, using Environmentally Friendly Construction Materials and Products for the New Accident and Emergency Waiting Area at Mater Dei Hospital – Re-Issue.

The tender was issued on the 17th August 2021 and the closing date was the 7th October 2021. The value of the tender, excluding VAT, was € 1,722,661.28.

On the 4th March 2022 FM Core Ltd filed an appeal against the Central Procurement and Supplies Unit as the Contracting Authority objecting to their disqualification on the grounds that their bid was deemed to be not compliant and the subsequent cancellation of the tender.

A deposit of € 8,613 was paid.

There were six (6) bids.

On the 10th May 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Ms Stephanie Scicluna Laiviera as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – FM Core Ltd

Dr Stefan Camilleri	Legal Representative
Engineer Edward Cauchi	Representative

Contracting Authority – Central Procurement and Supplies Unit and the Foundation for Medical Services

CPSU

Dr Leon Camilleri	Legal Representative
Dr Alexia Farrugia Zrinzo	Legal Representative
Engineer Patrick Borg Cardona	Chairperson Evaluation Committee
Engineer Noel Psaila	Member Evaluation Committee

FMS

Engineer Andrew Vella Zarb	Representative
Engineer Stephen Ellul	Representative
Ms Ritianne Farrugia	Representative
Mr Avner Vella	Representative

Director of Contracts

Dr Mark Anthony Debono	Representative
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Mr Kenneth Swain 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 in line with Article 89 of the Public Procurement Regulations. He then invited submissions.

Dr Stefan Camilleri Legal Representative for FM Core Ltd said that Appellant based his case on the written submissions. Appellant was advised that his bid was non-compliant as the key expert form was not signed and that key expert did not appear to have been certified as a practitioner in project management. Article 5 C (ii) in the tender just gives a list of required documents with no reference to those documents requiring to be signed. The forms are merely templates to be completed. Dr Camilleri referred the Board to Documents D and E in

his submissions where the need of a signature is specified unlike Document C which does not require a signature.

The second point of the appeal is that the key expert is not a Certified Practitioner. The tender article in question specifies two requirements – a qualification at MQF Level 6 and as a Certified Practitioner. The latter is not a qualification and no individual can be ‘in possession of it’ as the Authority claims. To satisfy the tender requirements an individual must have one or the other and not two separate qualifications held by the same person. The tender documents do not refer to ‘in possession of a Certified Practitioner’ as demanded by the Authority and this requirement can only be interpreted in one way.

Dr Leon Camilleri Legal Representative for the CPSU and the FMS stated that the key expert document was still not dealt with after a request for rectification and thus the Evaluation Committee could not consider the bid any further. The claim by Appellant that the qualifications are alternatives cannot be sustained as the tender does not state so - these are tied together and the TEC are bound by self-limitation on this point.

Engineer Patrick Borg Cardona (323669M) called as a witness by the Contracting Authority testified on oath that he was the Chairperson of the TEC. He stated that FM Core was requested to provide certain documents regarding the qualification of the key expert and on which they failed to reply. He explained that there are certain specific modules that apply to Certified Practitioners and these were not indicated in Appellant’s bid.

Questioned by Dr Stefan Camilleri witness confirmed that the key expert form did not specify that it required a signature but tender documents generally need to be signed. Witness stated that he was only involved in the evaluation of the tender and that the TEC interpreted the clause regarding qualifications as a single specific requirement. He stated that the TEC did not need, nor indeed had it checked, to verify if any practitioner modules exist.

Engineer Noel Psaila (4647M) called as a witness by the Contracting Authority testified on oath that he was a member of the TEC. He confirmed that the key expert document was not signed and stated that the TEC interpretation was that the qualifications were combined. Although highly experienced, key expert Massa did not appear to have the project management qualification. Witness stated that there are specific modules on project management provided by the University of Malta. The rectification sought on the lack of a signature and on the requested qualification were not replied to so the TEC was bound by the tender terms to disqualify.

Questioned by Dr Stefan Camilleri witness agreed that the expert form does not state that it required a signature. He went on to state that the project management course is separate from the Architecture and Civil Engineering course and exists as part of other courses. The TEC did not check if the project management module exists in the Architecture course. Witness said that the tender required a certificate quite separate from the Architectural

qualification in that the TEC wanted to ensure that the key expert's qualification covered project management. The decision to cancel the tender was not taken by the TEC.

This concluded the testimonies.

Dr Stefan Camilleri said that the anomaly regarding the signature had been clarified. It was impossible to accept the interpretation which the TEC had taken on the project management practitioner aspect. The reference made to several courses is irrelevant and what the TEC meant by Certified Practitioner has not been clarified. Once one qualifies as an Architect and Civil Engineer one does not warrant a separate qualification as a certified practitioner in project management.

Dr Leon Camilleri said the Authority accepts that there was no indication that a signature was required. The question of the Certified Practitioner was a matter of a precontractual concern (under Regulation 262) since both Appellant and the TEC were bound by the wording of the tender. Appellant claims that the required qualifications are alternatives – the tender makes it clear that this is not so and it was stated by one of the witnesses that separate modules exist covering this qualification. The qualifications required are therefore clear and there is no use contesting them now. The qualification exists and the Appellant failed to deal with it even at rectification stage. There are cases in both local and European Courts confirming the requirement to follow the principle of self-limitation.

Dr Stefan Camilleri pointed out that Appellant was not requesting a change in the tender but merely a question of accepting the different interpretation by the two sides.

There being no further submissions the Chairman thanked the parties and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 10th May 2022.

Having noted the objection filed by FM Core Limited (hereinafter referred to as the Appellant) on 14th March 2022, refers to the claims made by the same Appellant with regard to the tender of reference CT2272/2021 listed as case No. 1720 in the records of the Public Contracts Review Board.

Appearing for the Appellant:

Dr Stefan Camilleri

Whereby, the Appellant contends that:

a) **Failure to submit a signed Key Expert Form**

From the outset it must be emphasized that the Contracting Authority is not saying that the relative form was not filed, but that it was filed but not signed. The emphasis therefore here is on the lack of the signature of the Key Expert on the relative form. The Contracting Authority in its decision letter of the 4th March 2022, states that the tender submitted was not technically compliant since the "Key Expert Form", was not signed as required by article 5C(ii) of the Tender Document Selection and award Requirements).

Article 5C(ii) referred to by the Contracting Authority states the following:

"Key Experts Form, the Statements of Availability Form, the Self-declaration form for Key Experts (relating to public employees) and CV's."

Article 5C(ii) simply gives a list of certain documentation which needs to be submitted by the tenderer in connection with the Key Expert chosen by the bidder, being the following:

- i) Key Experts Form;
- ii) Statement of Availability Form;
- iii) Self-declaration Form for Key Experts (relating to public employees);
- iv) CVs.

The obligation to file the above documents is mandatory with the exception of the Self-declaration Form for Key Experts, which is to be filed only if the Key Experts chosen are public employees. First and foremost, it must be stated that article 5C(ii) simply lists the documentation and makes absolutely no reference to the necessity for these to be signed.

Secondly the forms above mentioned are drafted and provided by the Contracting Authority and the bidders or their chosen Key Experts need to fill out the forms provided.

Where the Contracting Authority requested a particular form to be signed they made sure to indicate such request on the form. The relative Key Expert/s Form does not in any way indicate that it required a signature of the key experts listed in the said form.

By comparison the Self-declaration Form for Key Experts (relating to public employees), which is to be filled out in the event that one or more of the Key Experts are employed with the Public

Administration, as well as the Statement of Availability Form, clearly indicate that it needs to be signed and dated.

Consequently, for the above reasons FM Core humbly submits that the decision made by the Contracting Authority that the tender submitted by FM Core was not technically compliant on the ground that the Key Experts Form as not signed is totally unfounded.

- b) **Lack of evidence to prove that proposed Lead Key Expert 1: Project Manager, is in possession of a Certified Practitioner of design and construction project management or equivalent as part of Bachelors or Masters Degree.**

In terms of the Selection Award Requirements the Lead Key Expert No. 1 - Project Manager, has to have the following minimum qualifications:

“[1] Warrant to practice in Malta issued by the relevant Warranting Board; and [2] Degree Qualification in Architecture and Civil Engineering or Mechanical Engineering or Electrical Engineering - MQF Level 6 or equivalent. Certified Practitioner of design and construction project management or equivalent as part of Bachelors or Masters Degree.”

From the wording of the relative article of the said Selection Award Requirements, the Lead Key Expert No. 1, that is the Project Manager, needs to satisfy two criterias:

- i. He/she needs to hold a degree qualification in either Architecture and Civil Engineering, or in Mechanical Engineering or alternatively in Electrical Engineering; and
- ii. He/she must hold a warrant to practice in Malta the said profession issued by the relevant Warranting Board.

The said clause then goes on to say that should the person proposed not be a warranted architect, Mechanical or Electrical Engineer, then he would still satisfy the criteria if he is a Certified Practitioner of design and construction project management or equivalent as part of Bachelors or Masters Degree. The Key Expert 1 proposed by FM Core, to act as the Project Manager holds the relative warrant issued by the relevant Warranting Board to practice as an architect." Furthermore she has extensive experience both in the design and construction project management." In her career the Key Expert had worked a number of large projects as lead project manager.

Based on the wording of the relative clause of the Selection Award Requirements, the person proposed by FM Core to act as Key Expert 1 - Project Management satisfies the relative criteria and consequently that the Contracting Authority was not justified in its decision that the bidder failed to satisfy the requirements imposed by the tender.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 23rd March 2022 and its verbal submission during the virtual hearing held on 10th May 2022, in that:

a) **Failure to Submit a Signed Key Expert Form**

CPSU and DOC initially submit, that although no mention has been made in the objection, this rejection was not immediate, but was made after a request for Clarification in terms of the General Rules Governing Tenders and to which the objector ailed to rectify all the indicated shortcomings;

The General Rules governing tenders in section 16.3, which deals with the Technical Stage of Evaluation provides the following; Rectifications are classified under Note 2 as follows:

2) Tenderers will be requested to either clarify/ rectify any incorrect and/ or incomplete documentation, and/ or submit any missing documents within five (5) working days from notification.

In respect to rectifications and clarifications, the processes established in Clause 16.1, shall mutatis mutandis apply to this clause.

Rectification replies must be submitted within five (5) working days from notification, and will be free of charge: failure to comply shall result in the tender offer not being considered any further.

From the objections it is amply clear that the objector is well aware that the Contracting Authority was requesting a signature on the Key Expert Form. Despite this, the objector failed to comply with the request made in the request for rectifications and did not address the request of the evaluation committee. The evaluation committee is bound by established rules that if the bidder does not comply, the tender offer shall not be considered any further. This first ground of rejection is therefore to be confirmed and objector's grievance rejected.

b) **Possession of a Certified Practitioner of Design and Construction Project Management or Equivalent as part of a Bachelors or Masters Degree**

CPSU and DOC submit that the objector is presenting a number of statements as facts, as if these form part of the tender document, when in fact these do not form part of the tender document and are merely an extended interpretation of the tender document by the objector to meet its desired end;

Regarding the Lead Key Expert 1: Project Manager, the tender documents requires as Minimum qualifications:

i) Warrant to practice in Malta issued by the relevant Warranting Board; and

ii) Degree Qualification in Architecture and Civil Engineering or Mechanical Engineering or Electrical Engineering - MQF Level 6 or equivalent. Certified Practitioner of design and construction project management or equivalent as part of Bachelors or Masters Degree.

The objector states that *"The said clause then goes on to say that should the proposed not be warranted architect, Mechanical or Electrical Engineer, then he would still satisfy the criteria if he is a Certified*

Practitioner of design and construction project management or equivalent as part of a Bachelors or Masters Degree”

With all due respect to the objector, the Selection award requirements do not state what the objector is stating. The Selection award requirements are clear in stating “*Degree Qualification in Architecture and Civil Engineering or Mechanical Engineering or Electrical Engineering - MQF Level 6 or equivalent. Certified Practitioner of design and construction project management or equivalent as part of Bachelors or Masters Degree.*”

What the above quoted requirement is stating is that, part of the course has to be a “Certified Practitioner of design and construction project management or equivalent”

No part of the requirements state that Certified Practitioner of design and construction project management or equivalent is an alternative to the warrant as claimed by the objector!

The request for rectification made it amply clear that the Certified Practitioner of design and construction project management or equivalent has to form part of the masters or Bachelors Degree by underlining and bolding the same as this honourable board will be able to see. The tender document is in this regard clear and unambiguous, however if the objector had any difficulty with such wording, the remedy under regulation 262 of the Public Procurement Regulations was at its disposal.

Moreover, in the rectification requests, the objector was also given the opportunity to rectify “*by proposing a new key expert satisfying all tender conditions*”. The objector despite being given the opportunity failed to address the indicated shortcomings and in such situation, the evaluation committee had no other alternative than to not consider the offer any further in line with the established rules

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 witnesses duly summoned, will consider Appellant’s grievances as follows:

- a) ***1st Grievance - Failure to Submit a Signed Key Expert Form*** – The Board notes that the “Key Expert/s Form”, which is a note 2 document, is a ‘template’ / ‘form’ which is provided by the Contracting Authority for economic operators to fill in. This is the same mechanism used for other forms such as the “Statement of Availability Form” and the “Public Employees Declaration Form”. In these latter 2 forms, there is a specific reference for a signature to be provided and hence one can find the appropriate space, within such form, where the Key Expert is expected to sign and confirm the submission. On the other hand, this specific requirement is not found in the “Key Expert/s Form”. This Board opines that should the Contracting Authority have wished to request

that such form is to be signed, it should have used the same methodology as for the other 2 forms. The argumentation would be different, if for example, a declaration (which is a document that the economic operator would be drafting from scratch) would have been requested from the economic operator. However, considering that this 'form' is a document provided *ab initio* by the Contracting Authority, it cannot hold liable the prospective economic operator for not providing any information which was initially not requested out of him.

Therefore, this Board will uphold this first grievance of the Appellant.

b) **2nd Grievance - Possession of a Certified Practitioner of Design and Construction Project Management or Equivalent as part of a Bachelors or Masters Degree –**

- i. From the outset, this Board will state that it does not agree with the Contracting Authority that such a grievance should have been dealt with under Regulation 262 of the Public Procurement Regulations. The Appellant is not aggrieved by the wording of the tender document or stating that it is ambiguous. Appellant is not requesting any changes to the tender dossier but thoroughly explained that their grievance is in relation to the interpretation of the tender requirements.
- ii. This Board opines, that once the Appellant is not requesting changes in the tender dossier, they are accepting the requirements therein. The Appellant made no clarification requests to the Contracting Authority in reference to this matter. Hence, it can be ascertained that they found no ambiguity and fully understood what was required out of them. The Appellant's argument is based on the following: *".....The said clause then goes on to say that should the person proposed not be a warranted architect, Mechanical or Electrical Engineer, then he would still satisfy the criteria if he is a Certified Practitioner of design and construction project management or equivalent as part of Bachelors or Masters Degree. The Key Expert 1 proposed by FM Core, to act as the Project Manager holds the relative warrant issued by the relevant Warranting Board to practice as an architect."*
- iii. The Contracting Authority / Evaluation Committee have a different interpretation in reference to these requirements. The Contracting Authority argument is based on the following: *"No part of the requirements state that Certified Practitioner of design and construction project management or equivalent is an alternative to the warrant as claimed by the objector"*
- iv. This Board is of the opinion that such requirements were to be taken in conjunction, which is the same view as was taken by the Evaluation Committee. Specific modules are provided by the University of Malta and other educational institutions. This is more so corroborated by the fact that other economic operators did satisfy this requirement of the tender dossier. Therefore, this Board notes that with the way the Evaluation Committee proceeded with evaluating all the bids in front of it, a level playing field was obtained. This is a crucial principle in public procurement.

Hence, this Board does not uphold this second grievance of the Appellant.

The Board,

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) Upholds the 1st grievance of the Appellant's in reference to the signature on the Key Expert Form;
- b) Does not uphold the 2nd grievance of the Appellant's in reference to qualifications of Key Expert 1;
- c) Upholds the Contracting Authority's decision in the cancellation of the tender,
- d) Directs that half the deposit paid by Appellant to be reimbursed.

Mr Kenneth Swain
Chairman

Dr Charles Cassar
Member

Ms Stephanie Scicluna Laiviera
Member