PUBLIC CONTRACTS REVIEW BOARD

Case No. 967 – CT 2009/2015: Tender for Public Private Partnership for the Provision of Comprehensive Services to St Vincent de Paul Long Term Care Facility.

The Tender was published on the 10^{th} November 2015. The closing date was on the 7^{th} January 2016. The estimated value of the Tender is $\notin 16,969,665.00$ (Exclusive of VAT).

Two (2) offers had been received for this Tender.

On the 3rd June 2016 CCE Joint Venture filed an Objection protesting the points assigned to it by the Evaluation Board for Technical compliance in this Three Package Tender based on the Most Economic Advantageously Tender (MEAT).

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a hearing on Tuesday the 23rd August 2016 to discuss the Objection.

Present for the hearing were:

CCE Joint Venture:

Mr Alex Tranter Mr Stephen Borg Mr Melvyn Darmanin Mr Pio Vassallo Mr Christopher Gauci Mr Ivan Zammit Mr James Sciriha Dr Massimo Vella Dr Richard Camilleri

JCL & MHC Consortium:

Mr Joshua Zammit Mr Joel Cachia Dr Ronald Aquilina Dr Mario De Marco Representative Representative Representative Representative Representative Representative Legal Representative Legal Representative

Representative Representative Legal Representative Legal Representative

St Vincent De Paul Long Term Care Facility:

Mr Mario Abela Mr John Attard Ms Audrey-Ann Bugeja Mr Joseph Grixti Mr John Cassar Mr Roger Chetcuti Dr Josienne Cutajar Dr Michael Sciriha

Department of Contracts:

Mr Anthony Cachia Ms Marisa Gauci Dr Christopher Mizzi Dr Franco Agius Chairperson Evaluation Board Secretary Evaluation Board Member Evaluation Board Member Evaluation Board Representative Representative Legal Representative Legal Representative

Representative Representative Legal Representative Legal Representative The Chairman made a brief introduction and invited the Appellant's representative to make his submissions.

Dr Richard Camilleri on behalf of CCE Joint Venture rebutted the arguments raised by the Department of Contracts in the Letter of Reply. Paragraphs 13 to 15 contended that the Tender had described the deliverables but had left it up to the bidders to structure their offers. However this obliged the Evaluation Board to act with transparency, clarity and legal certainty.

Paragraphs 16 to 20 of the Letter of Reply claim that the Evaluation is of a Technical matter and that this Board cannot enter into such matters. It also cited instances where this point had been decided but these relate to Court decisions and not to decisions made by the Public Contracts Review Board. He claimed that the Law does not preclude the Board from investigating technical matters.

Dr Camilleri then referred to paragraphs 38 to 49 of the Letter of Reply. The Department of Contracts contend that the Objection was based primarily on the argument that Appellant was not given the opportunity to rectify the offer, and cited several decisions. This was not the main reason for the Objection. CCE Joint Venture objected because when Evaluation was being carried out the evaluators ignored what was being offered by the Appellant.

If a certain leeway was allowed to bidders to structure their offer and the structure of the bid then was not clear, a clarification should have been issued. The fourth point was that the Letter of Reply had tried to add to the original justifications given for the failure of Appellant's Tender as per Letter of Rejection of the 24th May 2016. This was not permissible and should be discarded by this Board.

The Letter of Objection was based on the original justifications contained in the letter dated the 24th May 2016. It was not permissible for the Contracting Authority to change the reasons given to Appellant in the Letter of Rejection of its Tender. The principle of legal certainty definitely does not allow changing the decisions originally given to the Appellant in the Letter of Rejection.

He then gave several examples of this:

Justification as per letter of the 24th May

- a) Page 2 of the Evaluation Grid, point number 1 stated "the organization chart is not conclusive and does not contain full information of staff involved". Paragraph 23 of the Letter of Reply states that "the information submitted is not incomplete. It is simply not compliant with the specifications." then states a new justification "that it will lead cross contamination...." This new reason was not in the original Letter of Rejection;
- b) With regards to purchasing protocol at page 5 of the Evaluation Grid, the justification reason given was that there was a lack of reference to HACCP. On the other hand, paragraph 27 of the Letter of Reply added that "or included information which clearly and undoubtedly if implemented would breach the HACCP plan." Again this was a new point and was not in the Letter of Rejection;
- c) Page 5 of the Evaluation Grid said "no flow charts were given". On the other hand, Paragraph 30 of the Letter of Reply stated that "the deduction of marks was effectively done on the basis of the other justifications". This was done to counter the Appellant's Contention that marks were deducted unjustly;
- d) The first bullet point in Page 7 of the Evaluation Grid stated that "the report by CCE

did not supply convincing details and only superficial organization charts were given", while paragraph 32 of the Letter of Reply states that when compared to his organization chart, the Evaluation Board came to the conclusion that there would be a breach of the HACCP plan. Once again this is an addition to the original justifications given to Appellant where first they said that the organization chart was not good enough and now, the Contracting Authority are basing the possible breach on the said orgaigram.

Dr Richard Camilleri finally submitted that these justifications should be rejected and contended that since the Contracting Authority felt the need to add to the justification of their decision to show that something was wrong with that decision.

Dr Massimo Vella on behalf of the Appellant referred the Board to Schedule A submitted with the Letter of Objection. He claimed that as can be seen from the Evaluation Grid that had been sent to the Appellant with the Letter informing bidders of the Technical Score, in some areas, CCE Joint Venture was granted full marks while in other areas marks were deducted.

Wherever the Tender Document was clear in identifying how the points would be assigned, the Appellant was awarded full marks. In areas where the Tender was not so clear, and was subjective, the Appellant had marks deducted. This was a defect that was continued throughout the Evaluation.

Dr Vella then pointed out point by point the items where marks were deducted starting with "*Proposed Management and Staff Structure*" and rebutted, as in Schedule A, the justifications that had been given by the Evaluation Board in the Evaluation Grid for each item. However when the Contracting Authority saw the Schedule A enclosed with the Letter of Objection, it tried to raise additional matters.

Dr Vella cited for example point 2.3 where the justification was "the document highlight that the assembly supervisor will be reporting to the head chef, however in the organization chart there is no reference to such category" and rebutted this in Schedule A where it is stated that "the Assembly Supervisor reports directly to the Production Chef". Both are clearly referenced in the organization chart. It was clear in this instance that the Production Chef.

Dr Vella continued to address all the items shown as justifications in the Evaluation Grid, and where marks were deducted from Appellant's Tender, rebutting each item as per Schedule A.

Dr Vella insisted that marks were erroneously deducted from Appellant's Tender and should be added to the marks assigned to the latter. Where the Tender was vague, marks were deducted. The same rebuttals were made to the justifications brought for Purchasing Protocols in items 3.1, 3.2, 3.3, 3.4, 3.5, 3.6 and 3.7. Dr Vella filed a copy of a Food Safety manual that had been enclosed with Appellant's Tender. The latter had explained how it would be implemented. Again marks were unnecessarily deducted from his client's Tender.

The justification for item 3.5, for example, introduced a new word "*only*" when the Appellant's Tender had not used this word in relation to traceability. This was highly misleading. He then continued examining and rebutting points 4.1, 4.2, 4.3 and 4.4 by contending that the Evaluation failed to examine the manual submitted with the Tender by the Appellants regarding traceability and bar-coding that was in fact not requested in the Tender Document.

In item 4.4 what the justifications called food production zone, was in fact submitted in the Appellant's Tender as food preparation and processing area and was well defined and shown in annex K. Therefore the Evaluation Board could never say that this was not well defined.

Dr Richard Camilleri pointed out that the justifications included reference about the

Appellant had not given any information on HACCP when in fact his clients had submitted three plans; one for their plant, one for St Vincent De Paule and another for the service of food in the wards.

Dr Massimo Vella continued that marks were unjustly deducted in the section dealing with the Kitchen Maintenance Plan. CCE Joint Venture had provided a maintenance plan for all items and when an item has several sub-items, the Appellant meant to service all the subitems when indicating the main item.

The Evaluation Board tried to look for unnecessary details and misnamed things when evaluating the Appellant's offer, deducting unnecessary marks. Dr Vella reiterated that where the criteria were very clear stating that so many marks would be assigned to specific items, the Appellant obtained full marks. However where the criteria were more nebulous, marks were deducted without any justification. Furthermore he claimed that clause 7.1 of the Tender Document obliged the Contracting Authority to ask the Appellant for clarification or rectification if the Evaluation Board had any doubts on Appellant's offer. Finally Dr Vella confirmed that the annexes enclosed with the Letter of Objection from B onwards were copies of documents submitted with the Tender offer.

Dr Chris Mizzi on behalf of the Department of Contracts explained that the scope of the Tender was the production and distribution of food to patients at the St Vincent de Paul Home according to HACCP standards. The Tender did not explain how this was to be attained but left it up to the bidders themselves and was thus output oriented.

The professional bidder had to base the requirements on the desired output. The requirements were according to output indicators. Thus the organization chart submitted by the Appellant was not detailed enough. The Tender requirements arose through the output indicators and these spelled out what the organization chart had to contain. Since this was a MEAT Tender the Evaluation had to be done on the material supplied by the bidders themselves.

Bidders had to compete between themselves and the Evaluation Board's role was to choose between bidders. Both bidders had passed the fifty percent mark and where thus both technically compliant and had been awarded marks by the Evaluation Board. The letter sent to the Appellant giving information of the results of the adjudication clearly indicated the justification for the marks awarded to the Appellant.

This justification was made holistically and was not divided into separate items as the Appellant had tried to do. The Letter of Reply did not raise new justifications as alleged, but had tried to interpret the Evaluation Report. On the other hand schedule A submitted by Appellant with the Letter of Objection had included new submissions and was not just an explanation – some of the information given in this did not form part of the original offer. He said that for example 2.3 Appellant referred to production chef as head chef when in fact he was not.

Dr Michael Sciriha on behalf of the Contracting Authority stated that the Board had to base its decision on the documents submitted with the Tender only and not what the Appellant alleged or on the Contracting Authority's Letter of Reply. The Board should not turn itself into an Evaluation Board.

Mr John Cassar ID No.374950M under oath explained that he was the Technical Expert who was an advisor but not part of the Evaluation Board. Mr Cassar was given a copy of Schedule A that had been enclosed with the Letter of Objection. He said that the scope of the Tender was to afford ease of mind that the products served at the St Vincent De Paule were not cross contaminated. To this end one had to follow established rules.

Under the heading "proposed management and staff", covered by justification 2, the witness

said that from the information provided he could not be certain that the method of processing afforded ease of mind. In the organization chart there was no information on how the cooking process was being undertaken in the kitchen. The same can be said of the preparation of the products before cooking started. The organization chart failed to show who was doing what and doubts were raised that there was indicated no assignment of responsibility and that therefore anyone could be doing a particular task but not an identifiable employee. This afforded no guarantee of non cross-contamination.

The Appellant's Tender just referred to "*wet area*" and chef saucier and Mr Cassar did not understand what was meant. The production chef indicated by the Appellant was not the head chef. The production chef could be *commis* 1, *commis* 2 or *commis* 3 who is an apprentice chef. While the head chef could be a production chef, his proper task was to supervise and administer timing.

With regards to the Purchasing Protocols, Mr Cassar said that any purchases made have the safeguards and clear traceability trail in case of contamination. In point 3.3, CCE Joint Venture stated "*wherever possible*" and this sounded alarm bells because it meant that purchases would be from reliable sources when possible and not always. Point 3.5 did not give guarantees that purchases would be from reliable suppliers. The suppliers need to be certified. The HACCP plan submitted by Appellant did not show any quality control manager and the quality assurance co-ordinator submitted by CCE Joint Venture failed to name the person and failed to list his/her qualifications.

With regards to the Food Production System, under section 4, the Appellant's Tender failed to specify where the food was being prepared. There was no mention of vegetable room, butcher, hot kitchen or cold kitchen. It just mentions wet area. Thus the Evaluation Board could not be certain. Re point 4.3, the witness said that the process was not explained enough to enable the evaluators to have ease of mind that the established process would be followed.

When cross-Examined by Dr Richard Camilleri, on behalf of CCE Joint Venture, the witness said that the HACCP plan submitted by the Appellant was not linear and had no clear sequence. On being told by Dr Camilleri that the Appellant had submitted three HACCP plans, the witness stated that there is only one HACCP system and its rules and regulations had to be followed by the caterer in order to avoid cross-contamination.

Mr Cassar insisted that he had examined all the documents submitted by the Appellant. The witness knew that the HACCP should be prepared by the caterer but this has to be according to the rules. He had examined the HACCP plan submitted by Appellant who chose to divide them into three different plans.

Mr Cassar was at this point shown the HACCP manual submitted with the Appellant's Tender and confirmed that he had seen it; however he had not gone into the details. The witness had mainly relied on the organization chart and the employees. He declared that he had also seen the Key Expert submission by the Appellant. Mr Cassar said that the person indicated as manager quality control and assurance, which has an MA, was not in fact an employee and would not be present. The Tender asked for such employees.

Dr Massimo Vella, also for the Appellants, turned then to cross-examine the witness. Dr Vella asked Mr Cassar whether he was familiar with the European Union regulation 852/04 which dealt with the hygiene of foodstuffs. The witness said that he was familiar with it. He was not however familiar with the Pre-Requisite Program and he did not understand what was being pointed out.

Then Dr Chris Mizzi cross-examined again Mr Cassar. He said that the flow charts submitted by CCE Joint Venture reflected the HACCP. The Appellant had submitted a plan which showed the sequence when food was delivered at St Vincent De Paule. The organization chart had no explanation of workings at the kitchen. When shown part of the HACCP submitted by Appellant, Mr Cassar confirmed that this shows the workings; but was not satisfied that it would be followed.

Dr Massimo Vella for the Appellant submitted that from the cross-examination it resulted that the emphasis had been placed on the organization chart while the manual submitted, where detailed processes to be followed was given, was not examined in detail. The HACCP was either not seen or not taken into consideration. It was clear that the advisor could not thus offer proper advice and for this reason the Technical Assessment of the Appellant's offer was flawed. The Evaluation Board had been misguided by the advisor.

Dr Richard Camilleri stated that it is clear that the expert based all his opinions on the organization chart.

Dr Franco Agius on behalf of the Department of Contracts contended that the organization chart showed how the Appellant intended to proceed to provide the service. This however had not given the advisor peace of mind. The main request of the Tender was the provision of safe food for the patients. The kitchen aspect had been assessed by another different expert and not the witness heard. But he still had not find the necessary information and this meant that what was offered would not be provided in its entirety.

At this point the hearing was closed.

This Board,

Having noted the Appellant's Objection, in terms of the "*Reasoned Letter* of Objection" dated 3rd June 2016 and also their verbal submissions during the Public Hearing held on 23rd August 2016, had objected to the decision taken by the Pertinent Authority, in that:

a) CCE Joint Venture contend that, since the Tender had described the required output but left the mode and systems of delivery of same to the respective bidders, the Evaluation Board was obliged to act with transparency, clarity and legal certainty. The Appellant also maintains that the Public Contracts Review Board is not precluded from investigating the Evaluation procedure adopted on technical matters;

- b) The Appellant maintained that the Evaluation Board ignored the details of what was being offered by Appellant and yet again, since bidders were allowed a free hand in structuring their offer, the same Board should have asked for clarifications where the Appellant's submissions were not clear enough. In actual fact, the Appellant was given full marks where the Tender was clear enough and deducted marks where Tender requirements were vague or unclear;
- c) CCE Joint Venture contends that, in its "Letter of Reply", the Contracting Authority included additional justifications which did not form part of the justifications as listed in its "Letter of Rejection". In this regard, the Appellant maintains that this is not allowable;
- d) The Appellant insists that certain issues which were regarded as missing or unclear were contained and explained in the manual duly submitted by same;
- e) CCE Joint Venture contends that great emphasis was placed on the *"Organization Chart"* whilst the details and explanation of the process were contained in the *"Manual"* which was ignored by the Technical Advisor of the Evaluation Board;
- f) Whilst the Contracting Authority stated, in its justifications, that the Appellant did not submit information on HACCP, the Appellant

contends that he had submitted three plans, one for the Plant, one for St Vincent de Paule and another for the services of Food in the wards. In this regard as well, the Contracting Authority should have asked for clarifications.

Having considered the Contracting Authority's "*Letter of Reply*" dated 18th August 2016 and also their verbal submissions during the Public Hearing held on 23rd August 2016, in that:

- a) St Vincent de Paule contends that although the Tender Document did not dictate the methodology of the whole process to achieve the desired output but left it to the discretion of the bidders, as long as the expected standards are taken into account by the latter; the Evaluation Board was not obliged to seek clarifications to rectify the particular bid;
- b) With regards to Appellant's alleged claim that the Contracting Authority had added on new justifications for the refusal of Appellant's bid, the Contracting Authority maintains that the reasons/justifications given in the "Letter of Rejection" were holistic and not individualised, so that what the Authority is doing is to explain in more detail the same justifications given in its "Letter of Rejection";

- c) The Contracting Authority contends that although the Evaluation Board, through its appointed expert did not delve in detail in the manual duly submitted by Appellant, the Evaluation Board relied mostly on the "Organization Chart" and "List of Employees";
- d) St Vincent de Paule confirm that although the plans submitted by Appellant did reflect the HACCP, the accompanying "Organization Chart" did not indicate the application of these standards, such as workings at the kitchen, etc.

Reached the following conclusions:

1. Before treating the merits of the Contentions raised by the Appellant Company, this Board, would justifiably point out that its jurisdiction is, to assess the methodology and sequence of the Evaluation Process carried out, to ensure that there prevailed transparency, fairness and Level Playing Field. However, as per clause 85(2)(b) of the Public Procurement Regulations, this Board is also empowered to investigate any discriminatory Technical, Economic or Financial Specifications in the invitation to Tender, the contract documents or in any other document relating to the contract award procedure. In this regard, this Board, in its adjudications, will also take into consideration the Technical aspect without taking the role of an Evaluation Board. At the same instance, this same Board will also take the Technical Expert's testimony into deep consideration. 2. With regards to Appellant's first and second Contentions, this Board, after having examined the relative documentation and heard submissions made by the Appellant Company and the Contracting Authority opines that, the fact that St Vincent de Paule allowed the Bidders to draft their own methodology as to how the end product will be processed and delivered, does not necessarily imply that the onus for clarifications is on the Contracting Authority. The onus remains on the prospective Bidder to seek clarifications where doubt or misunderstanding arises. In this particular case, the Authority dictated what is to be delivered with certain conditions but left the method of processing and delivering the end product to the Bidder so that it was the responsibility of the latter to seek clarifications where matters or conditions in the Tender Document were vague or unclear.

At the same instance, this Board, after having heard submissions, finds no evidence that there existed vague or unclear conditions which might have hampered the Bidder from submitting the required end product to the Authority.

The main and sole objective of this Tender was to provide a comprehensive catering service, ie the processing and delivery of meals at an Old People's Home and in this regard, the Contracting Authority had to ensure that the service being proposed by the Bidders had to comply with the necessary regulations to deliver the output at a high level.

The information stated in the Tender Document enabled the prospective bidder to formulate their own methodology of how this service can be delivered and in this regard, the Bidder had all the remedies to ask for clarifications from the Contracting Authority prior to submission of the Tender Document. The onus was on the Bidders to clear any misunderstandings or unclear items in the Tender.

The Evaluation Board was advised by a catering expert on the Technical Issues of this Tender and from the testimony made under oath by the Technical Expert, the Appellant's offer revealed certain deficiencies when taking into account, the "*Organization Chart*" and methodology presented by Appellant.

It has been credibly explained by the Technical Expert, that the "Organization Chart" duly submitted by Appellant will lead to a breach of the HACCP plan. Various examples were given during the expert's submissions which mainly dealt with items regarding "Proposed Management and Staff", "Purchasing Protocol" and "Wet Area". In all these areas, the Technical Expert credibly explained how such deficiencies would breach the HACCP plan. It is important to note that these deficiencies, according to the Technical Expert, on

specific items, were of great importance in ensuring the output at a high level.

With regards to the allocation of marks, this Board opines that, the fact that CCE Joint Venture was given full marks on items which were clear in the Tender Document and deducted marks on items which seemed vague or unclear does not indicate that the Tender dictated ambiguous or unclear facts/conditions. If the Appellant felt that there were items in the Tender Document which were unclear he could have asked for clarifications prior to his submission of his offer.

This Board also notes that the Appellant did not raise any precontractual concern on the unclear issues which he is alleging were present in the Tender Document. In this regard, this Board does not uphold Appellant's first and second Contention.

3. With regards to Appellant's Third Contention, this Board, after having examined the relative documentation, opines that the fact that the Contracting Authority gave a more expanded explanation of the justifications on why the Appellant's Bid was rejected does not, in any way, represent or depict "*additional justifications*". From the Technical Expert's testimony and the Contracting Authority's submissions it has been proved that the alleged additional justifications were part and parcel of the main justifications' headings, such as, "*Management and Staff*", "*Purchasing Protocol*" and "*Wet Area*", so that the additional explanations and comments were purely amplification of the Evaluation Report which was communicated to the Appellant with the Letter of Rejection.

In this regard, this Board cannot find any credible evidence that the Contracting Authority submitted additional justifications and in this respect, this Board does not uphold Appellant's Third Contention.

- 4. With regards to Appellant's Fourth and Fifth Contention, this Board, after having heard the Technical Expert's submissions would treat these Contentions under two separate issues as follows:
 - i) Submission of Manual

As stated in the introductory paragraph of these adjudications, this Board had to rely heavily on the testimony given under Oath by the Technical Expert duly appointed, as advisor, by the Contracting Authority.

From his testimony, the Expert confirmed that CCE Joint Venture did submit a Manual, which depicts the method and standards through which the output product should be processed and delivered.

It was also confirmed and established that although the Expert went through the Manual, he had not gone in detail; however the same expert established his technical opinions on the "Organization Chart" submitted by the Appellant.

At this stage, one has to differentiate between a Manual and an Organization chart. A manual is a Literature wherein the procedure and guidelines of how things should be done, is laid out. Whilst an Organization chart is a detailed organisation chart whereby it is stated of how things will be done or carried out. The difference clearly illustrate that the "Organization Chart" shows exactly how the processing and delivery of food at St Vincent De Paule is to be achieved. In this regard this Board opines that the basis on which technical opinions were derived was on sound and reliable grounds.

ii) Submission of Organization chart

The purpose why a detailed Organization chart was requested was due to the simple fact that through the detailed organisation chart, one can assess the number of sections through which the process will be carried, the number of personnel that will be allocated for the project, their grade and qualifications and the flow of the process itself to achieve the desired output.

Through the Organization chart submitted by Appellant, the Evaluation Board could not ascertain and confirm exactly what the Appellant would be able to carry out in the Tendered process to its required standards.

At the same instance, this Board opines that the Evaluation Board could only assess the Appellant's offer on what has been submitted by the latter and at the same time, the Committee was not allowed to ask for information which was either not shown or information which went in breach to the HACCP plan.

From the submissions made by the Technical Expert, it was evidently proved that the plan submitted by CCE Joint Venture failed to reach the required standards relating to "*Management and Staff*", "*Purchasing Protocol*", and "*Wet Area*".

At the same time, the Appellant Company failed to prove otherwise, that is, it conforms to all the Technical Requirements of the Tender Document. In this regard, this Board does not uphold Appellant's Fourth and Fifth Contention.

5. With regards to Appellant's Sixth Contention, again, when one refers to the plans submitted, no reference was made to the "*Lift Installation*", "*Drains Installation*", "*Lighting Protection System*", "*Bathroom Pull Chord Alarm*" and the PA system. Although the said items might have been included in the Appellant's submissions, the Contracting Authority could not identify the presence of the same. If the plans for the maintenance of these four important issues were not submitted by Appellant, the Contracting Authority could not ask for clarifications on missing documentation. In this regard, this Board does not uphold Appellant's sixth Contention.

In view of the above, this Board finds against CCE Joint Venture and recommends that the deposit paid by the latter should not be reimbursed.

Dr Anthony Cassar Chairman Mr Lawrence Ancilleri Member Mr Carmel Esposito Member

20 September 2016