

19th May 2023



Re: Objection - CT2123/2022 - Tender for The Provision of Mechanical and Electrical Maintenance Services at Mount Carmel Hospital and Mental Health Centres across Malta - Central Procurement and Supplies Unit (CPSU)

Reply of the Central Procurement and Supplies Unit (CPSU) on behalf of the Department of Health to the reasoned application lodged by Mekanika Ltd (the objector).

On the 4th of August 2022 a call for tenders for The Provision of Mechanical and Electrical Maintenance Services at Mount Carmel Hospital and Mental Health Centres across Malta was published. A number of bids were submitted, an evaluation process was carried out and the offer of Anthony Falzon (A Falzon Energy Projects) (the Preferred Bidder) was recommended for award.

The sole award criterion was the price. Clause 6 of the Instruction to Tenderers provided that *"The contract will be awarded to the tenderer submitting the cheapest priced offer satisfying the administrative and technical criteria."*

The Objector's offer was not recommended for award since it was not the cheapest compliant offer.

The objector feels aggrieved with the decision of the evaluation committee and has filed the present objection based on 2 grievances, namely that the offer of the recommended bidder is; 1) abnormally low and 2) does not meet the minimum tender requirements;

CPSU respectfully disagrees and is filing the below submissions.

**Submissions**

Abnormally Low Offer

1. Primarily, CPSU submits that the primary aim of the public procurement legislation regime in Malta and throughout the European Union is that the State and ultimately, the general public obtains a service or supplies which are up to the required standards and specifications and at the best price possible. This general principle is fine tuned with other safeguards such as that against abnormally low tenders, however such safeguards should only be triggered in the general public interest;
2. The appellant claims that the fact that the estimated contract value is €1,969,440.00 and the recommended offer was that of €1,200,006.40, this must have triggered the attention of the evaluation committee and flagged as abnormally low. The offer of the objector which is €1,651,199.61 which is also considerably lower than the estimated tender value. CPSU submits that the evaluation committee has examined in depth and requested clarifications from all the bidders at evaluation stage in order to ascertain compliance with all tender condition and conditions at law;

3. Regulation 243 of the Public Procurement Regulations provides that:

*243.(1) Contracting authorities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services.*

4. The objectors are claiming that it should have appeared to the evaluation committee that the offer of the recommended bidder was abnormally low. CPSU disagrees and this because there was no reason why the evaluation committee should have suspected this. The recommended bidder's offer was 61% of the estimated contract value which in the opinion of the evaluation committee is a reasonable percentage considering that prices in today's market are very competitive.

5. The law does not provide a definition of abnormally low prices and does not even provide for any guidelines (mandatory or recommendations) on how to identify abnormally low prices, however this Honourable Board had identified a number of methods how an evaluation committee can flag a potentially abnormally low offer, in case number 1140 delivered on the 15th of March 2018, in an objection relating to cleaning services, when it stated that:

*In practice, methods are often used for the identification of tenders that appear to be abnormally low, such as:*

*• An analysis of the price (Costs) proposed by an economic operator, is made in comparison with the objective of the particular procurement;*

*• A comparison is carried out between the tendered price and the estimated value of the tender so that an assessment of the proportion of deviation from the estimated price is established;*

*• A comparison is made of the offer with the average of the other quoted rates for the same procurement.*

6. The first bullet point has been duly analysed and assessed by the evaluation committee which ascertained even as above stated, by means of evaluation clarifications that the recommended bidder satisfies the minimum tender criteria and budgeted all its expenses for the minimum tender criteria in its financial bid form.

7. In this regard, the objector makes a number of assumptions, such as that the recommended bidder does not own the tools and equipment required for the performance of the work requested – this is purely speculative and lacks and basis.

8. Moreover, the fact that the objector is attempting to use in his advantage the fact that he is the incumbent does not help its position at law;

9. With regards to the comparison to the estimated contract value, apart from the fact that 61% of the estimated contract value, although low is not 'abnormally low', CPSU also submits that the estimated contract value is usually calculated on the contract value of the incumbent economic operator which is Mekanika Ltd, thus the objector

has a bearing on the allegedly 'apparent abnormally low offer' of the recommended bidder.

10. With regards to the average of the quoted rates, it is submitted that only 4 offers were submitted which were all very different, with the highest offer being €5,403,146.25. This would drastically increase the average in a way that the other offers would not be reasonable in comparison to the average;
11. If one had to eliminate the highest offer and take an average of the other 3 offers, this would be €1,606,881. The offer of the recommended bidder is circa 75% of this average value and is therefore in CPSU's humble opinion within the parameters of reasonableness and acceptability considering that all the mandatory criteria have been budgeted;
12. Additionally and in conclusion, CPSU submits that the law does not prohibit low tenders, but only requires that potentially abnormally low are flagged and if need be disqualified. Since the objector is claiming abnormally low, it must duly prove and substantiate, since no evidence on such claim has yet been presented;
13. In view of the above the grievance of the objector should be rejected. Should however this Honourable Board decide that it should have appeared to the evaluation committee that the bid of the recommended tenderer or any other tenderer could possibly be abnormally low and that the evaluation committee should have asked for justifications in term of regulation 243 of the Public Procurement Regulations, then this Honourable Board should refrain from deciding on the objector's second and third demand and refer the tender for re-evaluation instructing the evaluation committee to ask for justifications on the quoted price

#### Technical Compliance

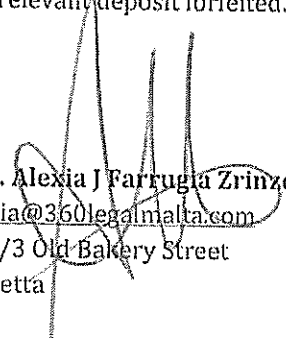
14. The objector claims that the recommended bidder is not technically compliant because it does not possess the level of experience requested in article 5(c) of the tender document. Article 5(c) of the tender document is the list of key experts – The same list of Key experts provides that the same person can occupy more than one key expert role except for the Health and Safety Officer.
15. The Objector submits that *'the recommended bidder does not have the necessary experience with some of the maintenance services set out in article 4.2.3 of Section 3 of the Tender Document'*. CPSU submits that this claim is purely speculative, because the objector can never know the expertise that the recommended bidder possesses. Additionally the list in clause 4.2.3 of the tender document is only an indicative list.
16. The preferred bidder has satisfied to the best judgment of the evaluation committee, all the technical criteria of the tender including all the expertise, technical and Key Roles;
17. Additionally the claims of the objector are purely speculative and should these speculations materialise this would be a matter of execution of contract which is a matter between the contracting authority and the contractor – this falls outside the remit of this objection and respectfully, of this Honourable Board.

18. CPSU submits that since the recommended bidder fulfils all of the requirements of the tender, the evaluation committee or this Honourable Board, should not reject the offer of the recommended bidder or cancel the award simply because the objector has "*reasonable suspicion that the recommended bidder will not be in a position to meet such requirement*"

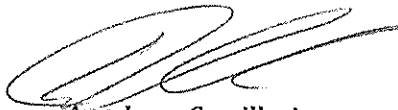
19. For these reasons this second grievance should also be rejected.

CPSU is hereby reserving its right to present further evidence both written and orally to further their submissions in relation to this objection.

In view of the above, the objection lodged by the objector ought to be rejected in full, whilst the decision of the Contracting Authority and the Evaluation Board confirmed, and the relevant deposit forfeited.



Avv. Alexia J. Farrugia Zrinzo  
[alexia@360legalmalta.com](mailto:alexia@360legalmalta.com)  
204/3 Old Bakery Street  
Valletta



Avv. Leon Camilleri  
[leon@360legalmalta.com](mailto:leon@360legalmalta.com)  
204/3 Old Bakery Street  
Valletta