

PUBLIC CONTRACTS REVIEW BOARD

Case 1881 – SPD 8/2022/181 – Tender for the Supply, Delivery, Maintenance and Commissioning of Two Rigid Hull Inflatable Boats (RHIB) for the Department of Fisheries and Aquaculture

9th June 2023

The Board,

Having noted the letter of objection filed Mr Matthew Vella acting for and on behalf of Polaris Marine Services Co. Ltd, (hereinafter referred to as the appellant) filed on the 21st April 2023;

Having also noted the letter of reply filed by Mr Bjorn Callus acting for the Department of Fisheries and Aquaculture (hereinafter referred to as the Contracting Authority) filed on the 28th April 2023;

Having also noted the letter of reply filed by Dr Colin Deguara acting for United Equipment Co. Ltd (hereinafter referred to as the Preferred Bidder) filed on the 28th April 2023;

Having heard and evaluated the testimony of the witness Mr Matthew Vella (Representative of Polaris Marine Services Co. Ltd) as summoned by Dr Chris Cilia acting for Polaris Marine Services Co. Ltd;

Having heard and evaluated the testimony of the witness Mr William Vella (Representative of Polaris Marine Services Co. Ltd) as summoned by Dr Chris Cilia acting for Polaris Marine Services Co. Ltd;

Having heard and evaluated the testimony of the witness Mr George Ebejer (Secretary of the Evaluation Committee) as summoned by Dr Edric Micallef Figallo acting for the Department of Fisheries and Aquaculture;

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 6th June 2023 hereunder-reproduced.

Minutes

Case 1881 – SPD8/2022/181 Tender for the Supply, Delivery, Maintenance and Commissioning of Two Rigid Hull Inflatable Boats (RHIB) for the Department of Fisheries and Aquaculture.

The tender was issued on the 7th December 2022 and the closing date was the 30th January 2023. The estimated value of the tender, excluding VAT, was € 320,000.

On the 21st April 2023 Polaris Marine Services Co Ltd filed an appeal against the Department for Fisheries and Aquaculture as the Contracting Authority objecting to their bid being rejected as it was deemed to be technically non-compliant.

A deposit of € 1,600 was paid.

There were five (5) bids.

On the 6th June 2023 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a virtual public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Polaris Marine Services Co Ltd

Dr Chris Cilia	Legal Representative
Mr Matthew Vella	Representative

Contracting Authority – Department of Fisheries and Aquaculture

Dr Edric Micallef Figallo	Legal Representative
Dr Audrey Balzan	Legal Representative
Mr George Ebeyer	Secretary Evaluation Committee
Ms Ritalin Magro	Evaluator
Mr Jean Paul Bonnici	Evaluator

Preferred Bidder – United Equipment Co Ltd (UNEC)

Dr Colin Deguara	Legal Representative
Mr Gilbert Bonnici	Representative
Mr Peter Kristensen	Representative

Department of Contracts

Dr Mark Anthony Debono	Legal Representative
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Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Chris Cilia Legal Representative for Polaris Marine Services Co Ltd stated that Appellants will be following the submissions made in their letter of objection on the three reasons for their disqualification. The point regarding the erroneous date on the award letter was not being pursued. The point regarding the positioning of the logo sticker was a minor point – the Appellant had opted to have it fixed on the console so that it would be visible from the front and this made more sense. An offer which was € 120,000 cheaper merited more consideration since it was identical to what was requested. The cabin stipulations offered allowed alternative configurations and uses according to the weather conditions. The tender definitions were not clear and the use of the words ‘cuddy cabin’ was not the correct description as according to the Appellant this meant a cabin used for overnight use, fishing, storage or sleeping under deck at the back of the boat. Despite this, bidder understood what was meant in the tender and this was provided. Appellant’s bid was refused as it was asked to provide literature and diagram when Clarification Note 2 asked only for literature, which was submitted. Appellant offered a design showing a closable, removable cabin. The third reason for refusal was on the declared colour of the tube.

Dr Edric Micallef Figallo Legal Representative for the Department of Fisheries and Aquaculture said that the points regarding the positioning of the logo and the colour of the tubes were not determinant in the evaluation of the tender. A cuddy is a small cabin on a boat but the configuration offered by the

Appellant does not indicate a closed cabin. The view of the Evaluation Committee was that the offer did not match the requirements of the tender.

Dr Colin Deguara Legal Representative for United Equipment Co Ltd said that at this stage the preferred bidder would be relying on the written submissions.

Dr Cilia requested the testimony of witnesses.

Mr Matthew Vella (358387M) merely stated on oath that the tender was prepared by Mr William Vella who is more suited to testify on the points at issue.

Mr William Vella (351497M) called to testify by the Appellant stated on oath that he has a degree in Marine Engineering and a Masters in Marine Structures and had prepared the tender submission. The tender said the cuddy had to be watertight and removable, closable and had a cover. This is what was submitted following Clarification Note 2. All the above points were provided including a transparent cover and facility to attach the cabin to the boat. What was proposed meets the industry's practice. In summer the covers can be stored away whilst in winter when fully deployed they provide a solid cabin with access to the rest of the boat. The cabin offered is much in use for pleasure and commercial vessels.

In reply to a question from Dr Micallef Figallo witness said that when covers are attached the cabin is water tight. A question from Dr Deguara elicited the reply that a cuddy and a T-top cover are not the same thing.

Mr George Ebejer (50584M) called to testify by the Contracting Authority stated on oath that he was the Secretary of the Evaluation Committee. The best position for the logo sticker was not up to the bidder to decide but one had to follow what was stated in the tender and Appellant's decision was not technically acceptable. The tender requested a cuddy pilot cabin but the technical offer by the Appellant shows a canopy which can be altered into a cabin – this does not satisfy the technical aspect. The reply to a clarification on this point produced the same answer. It is immaterial if the offer is cheaper if it does meet the technical requirements.

Replying to questions from Dr Cilia, witness said that the logos had to be fixed on the consoles for the reason that when the cabin covers were removed the logos would otherwise not be seen. The diagram from Appellant indicates an aluminium framework and a set of covers – this is not a cabin. Witness replied that he was not able to comment on the competence of the members of the Evaluation Committee.

Questioned by Dr Micallef Figallo witness said that the offer of Appellant was a T-top canopy.

This concluded the testimonies.

Dr Cilia said that dealing with small points like the colour of the tubes shows the '*forma mentis*' of the evaluators and how they were bearing on the side of caution. They do not seem to have understood what the tender requested. Nowhere does the tender state that the logo had to be on the side of the boat. The Authority demanded a water tight cabin – it had to be closable and removable and that is what Appellant offered which once fully deployed would be all-weather. The Evaluation Committee did not fully appreciate that Appellant's offer was the only one fully compliant. The Appellant hopes that the Board will fulfill the aims of the Public Procurement Regulations by accepting this appeal and awarding Appellant the tender.

Dr Deguara pointed out that Appellant's request was inadmissible as it was not in the Board's power to award tenders. The error on the date of the appeal letter was agreed as irrelevant and this was

backed by past PCRB cases. . As far as the claims on the positioning of the logo was concerned Appellant was trying to equate cabin with console. It was convenient for Appellant to quote technical literature but then suggest that it should be ignored. The technical literature is there to corroborate the technical offer and the Evaluation Committee could not ignore all these shortcomings. The Authority cannot keep asking questions to regularise the Appellant's position again confirmed in recent PCRB NQUAYMT case. Witness confirmed that a canopy and a cabin are not the same thing but totally different. Appellant appears to have decided what it was that the Authority wanted – since their offer was not compliant the difference in price is irrelevant. The principle of self-limitation bound the Contracting Authority to the terms of the tender requirements. The Evaluation Committee likewise had to practice self-limitation.

Dr Micallef Figallo concluded by saying that he supported the points made by Dr Deguara. Technical specification 3.1.12 asked for a closable cabin with access and this is what had to be provided. As for the rest the Authority rested on the written submissions.

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 6th June 2023.

Having noted the objection filed by Polaris Marine Services Co. Ltd (hereinafter referred to as the Appellant) on 21st April 2023, refers to the claims made by the same Appellant with regard to the tender of reference SPD 8/2022/181 listed as case No. 1881 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Chris Cilia

Appearing for the Contracting Authority: Dr Audrey Balzan & Dr Edric Micallef Figallo

Appearing for the Preferred Bidder: Dr Colin Deguara

Whereby, the Appellant contends that:

- a) First grievance - Polaris would like to draw the attention of this Honourable Board to the fact that the date indicated on the Award Notice, wherein it was stated that the Department Contract Committee has agreed with the recommendation to award the tender to United Equipment Co. (UNEC) Ltd for the price of EUR399,861.08 (that is, some EUR120,000 higher than the price

quoted by Polaris) is the 6th January, 2023 ! This when the date of closure of the tender was 30th January, 2023 and Polaris' first clarification was submitted on the 23rd February, 2023!

- b) Second grievance - Bidder was asked to submit Literature which include the Logos required on the vessels as requested in item 1.2 of the Literature List and as per item 3.1.6 of the Technical Offer. In this regard, as confirmed in the DOC letter dated 11th April, 2023, Polaris confirmed that a total of three logos shall be affixed to each vessel and further confirmed that the (2x) DFA Control logos shall be along both sides of the tube. However, it is stated in the DOC letter of the 11th April, 2023, and this would appear to be one of the reasons for which Polaris' procurement proposal was excluded as technically non-compliant and a bidder who submitted a bid which is some EUR 120,000 more expensive is being recommended to be awarded this tender, the (1x) EMF logo was drawn onto the navigation console and not on the cabin, as requested in item 3.1.6 of the Technical Offer.
- c) Third grievance - Bidder was asked to submit literature containing specifications and diagrams of the cuddy pilot as requested in item 1.5 of the literature list and item 3.1.12 in the technical offer. In this regard, the DOC in its letter of the 11th April, 2023 remarks that Polaris' response stated that it will provide a t-top canopy that can be turned into a closable cabin by means of a transparent all round plastic cover but - and this would appear to be another frivolous reason for which Polaris' bid was excluded as technically non-compliant *"the diagram submitted does not depict either a cuddy cabin or the closable plastic as submitted in the response"* Once again, one would struggle to identify a more facetious reason to exclude Polaris' procurement proposal as technically non-compliant, and to choose, instead, to award the tender to a tenderer who has submitted a bid which is EUR 120,000 more expensive for the same vessels which Polaris was (and of course still is) prepared to supply!
- d) Fourth grievance - Bidder was asked to submit literature showing the colour of the tubes and cuddy pilot cabin as per literature item 1.1 of the literature list and item 3.1.3 of the technical offer. In this regard, the DOC in its letter of the 11th April, 2023 remarks that Polaris' response stated that the tube colour will be blue, but the diagram submitted does not show that the tubes are in fact blue !! Of the three frivolous reasons quoted by DOC to exclude Polaris' bid as technically non-compliant, this reason (the term 'reason' is being used in the widest sense possible, as in reality this reason is devoid of any reasonableness, and hence constitutes no 'reason' at all) must certainly take first prize !!

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 28th April 2023 and its verbal submission during the virtual hearing held on 6th June 2023, in that:

- a) As shown, date on Award Notice is indeed showing the 6th of January 2023 which is way before the date of closure of the Tender. This cannot be possible since the opening of the offers through the EPPs system can only be implemented after the closing date has elapsed. Therefore, the date

of the 6th January 2023 on the Award Notice was a genuine typing error and which had no bearing whatsoever on the evaluation process or the award itself.

- b) The objector failed to pass the technical criteria and thus could not be evaluated any further irrespective of the offer being submitted unlike the preferred bidder that satisfied both the administrative and technical criteria and thus could be evaluated further. Therefore, the grievance of the objector on this matter is unfounded in fact and at law, while the recommended bidder's bid was in full satisfaction of all the tender requirements whilst the objector's was not.
- c) Contrary to the submissions of the objector, the reasons of the tender evaluation committee provided are not frivolous. On the contrary, the tender evaluation committee has through the evaluation process, acting diligently and in utmost observance to the general principles of equal treatment, self-limitation and proportionality unlike what the objector is alleging. According to rule 17.5 of the General rules governing tenders, it is provided that the economic operator, who is both administratively and technically compliant, and that submits the cheapest offer shall be awarded the contract. Therefore, the Objector is to understand that decisions are not taken merely on the value but bids are to first fully satisfy all the requirements laid down in the Tender for which his offer did not comply as being specified further under points 6 and 7 hereunder.
- d) Whilst bidder, as stated by his own good self, complied with addressing the rectification by submitting: no matter how 'incidentally' yet still incorrect; ' drawing showing this logo on the console rather than on the cabin' is also undoubtedly very careless in such circumstances and which undoubtedly cannot reflect much positive attributes on the bidder's pretended meticulous attention to detail. Nonetheless the TEC points that this did not constitute a substantial reason for the exclusion of Polaris Marine Service Co Ltd. and the TEC did not base its final decision on this account.
- e) As per Annex 2, submitted by the bidder objecting to this tender evaluation process and award, Polaris Marine Services Co. Ltd., offered a T-top canopy and not a weather tight CUDDY CABIN as was SPECIFICALLY requested. Bidder objecting to this Tender Award, submitted an offer with a t-type canopy whereas item 3.1.12 of the technical offer clearly and specifically requested a CUDDY CABIN not a T-top canopy that can be turned into a closable cabin with the use of a plastic cover. From replies to clarifications and diagrams provided, the bidder in question did not satisfy the requirements of the Contracting Authority.

The Contracting Authority submits that Section 3 of the Tender Document - Specifications, it is stated *“However, it will be the responsibility of the respective bidders to prove that the standards, brands or labels they quoted are equivalent to the standards requested by the Contracting Authority.”* Consequently, since the tenderer did not provide what had been requested in terms of the terms of the tender, this being subject to Note 3, the Tender Evaluation Committee could not request a rectification.

Without Prejudice to the above, the TEC still submits that the preferred bidder fulfilled all administrative and technical criteria whereas Polaris Marine Services Co Ltd did not pass the technical criteria since his bid offered a T-top canopy and not a weatherproof CUDDY CABIN.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 28th April 2023 and its verbal submission during the virtual hearing held on 17th May 2023, in that:

a) First grievance –

The error of the date in the award notice is clearly a *lapsus calami*.

b) Second grievance –

It is evident that by what the same appellant is stating, inconsistencies arise. Will the 'logo' be affixed on the cabin or on the console?

The fact that the appellant's bid was the lowest, public procurement still requires bids to be fully technically compliant and evaluation committees are not obliged to try save a tender bid at any costs!

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 now consider Appellant's grievances.

- a) **First grievance (Date of Award Notice)** – This Board opines that the erroneous date stated in the Award Notice, i.e. 6th January 2023, is clearly a *lapsus calami* and such issue does not merit any further consideration.
- b) **Financial considerations** – it has been stated on more than one occasion, by this Board and by the Court of Appeal, that in order to proceed to the financial evaluation process, an economic operator needs to be both administratively and technically compliant. Therefore, any arguments brought forward in relation to the price submitted, are being deemed irrelevant to proceedings.
- c) **Third grievance (Cuddy cabin)** – It is the same appellant that states that according to them a 'cuddy cabin' "*was not the correct description*" as it should be "*... under deck at the back of the boat*", but then they failed to request a clarification before submitting their bid. Moreover, witness Mr William Vella, under oath, stated that a T-top cover and a cuddy are not the same thing. None-the-less, even though technical specification 3.1.12 clearly requested a 'Cuddy pilot cabin', they submitted a bid with a 'T-top cover'. It is this Board's opinion that the Evaluation Committee correctly practised the principle of self limitation by proceeding in the way they did. The Board therefore, does not uphold this grievance of the appellant.
- d) **Second & Fourth grievance** – due to the fact that the 'third' grievance above has not been upheld, these two (2) grievances (second & fourth) are being deemed irrelevant.

The Board,

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

- a) Does not uphold Appellant's Letter of Objection and contentions,
- b) Upholds the Contracting Authority's decision in the recommendation for the award of the tender to United Equipment Co (UNEC) Ltd,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member