

Public Contracts Review Board  
Department of Contracts  
Notre Dame Ravelin  
Floriana VLI2000



17<sup>th</sup> August 2023

Dear Sirs,

**RE: SPD6/2023/026 - TENDER FOR THE REMOVAL AND DELIVERY OF OLD BUOYS TO TM STORES AND THE SUPPLY, DELIVERY, INSTALLATION AND MAINTENANCE OF NEW FAIRWAY BUOYS AT XEMXIJA FOR A PERIOD OF THREE YEARS**

**Introduction:**

1. This is a Reply by Transport Malta (the Contracting Authority) to an objection filed by Sammut Marine Limited (The Appellant) pursuant to the Tender in Caption.
2. The Objection was served on the Contracting Authority by email of the 7<sup>th</sup> August 2023.
3. The Contracting Authority had decided that the bid filed by the Appellant was technically non-compliant. The non-compliance was on the basis that:

*"the Bidder failed to complete in full the technical offer as was requested. No reference was made to where the information is available in the technical literature which resulted in the disqualification of the offer."*

4. Amongst the technical information which the appellant (qua bidder) was required to submit, there was a TECHNICAL OFFER QUESTIONNAIRE which was subject to Note 3. The Questionnaire itself provides by way of introduction and unambiguously that:

*"The technical offer falls under Note 3, thus, the information/technical specifications provided in the below table shall not be subject to rectifications. Therefore, bidders that fail to complete in full, submit and upload the requested information will be deemed as non-compliant and will result in disqualification of their offer."*



5. The Questionnaire contained a column with the title **Reference in the technical literature where this is being stated/shown (if applicable)**. Appellant did not provide any information under this column except for certain parts where he inserted the phrase "N/A". however no information as to where the information is being shown was provided for paragraphs 1 to 10 (both inclusive), 14 and 18.
6. On the basis that the required information was not given the Contracting Authority has decided that the bid is technically non-compliant.
7. Appellant is aggrieved by this decision and contends that the Contracting Authority should at least have granted the Appellant the right to clarify his offer.

### **Discussion**

8. As already noted note 3 does not allow any rectification.
9. In this respect it is averred that the omission of information expressly required in a specific format cannot be rectified. The Appellant has not answered an express question that was made to him. He now contends that the Contracting Authority should ask him to "clarify" the answer. In reality what Appellant is asking for is an opportunity to "rectify" the omission. There is nothing to clarify; here we are not talking about an ambiguity or a mistaken reference that needs to be clarified. The issue that the Tribunal has before it is that the appellant failed to answer an express question. The Appellant now wants an opportunity to "rectify" this by being given a fresh opportunity to answer the question.
10. Note 3 does not allow any rectification. In paragraph 4 above one finds the relevant note reproduced verbatim. It is stated in a very clear and unambiguous manner that the bidder will not be allowed to rectify omissions in the response to the bid. *"Therefore, bidders that fail to complete in full, submit and upload the requested information will be deemed as non-compliant and will result in disqualification of their offer."*
11. The reference to proportionality, with all due respect, is uncalled for. The rules were made for all the bidders. The principle of proportionality requires that all bidders be treated equally. Should the Contracting Authority have allowed the Appellant to "rectify" his bid then this would necessarily prejudice other tenderers who would have made complete and fully compliant submissions *ab initio*.
12. The Court of Appeal has had occasion to comment on this matter on a number of occasions. In a recent case, NQUAYMT v. Aġenzija għal Infrastruttura Malta et 35/22/1 (decided by the Court of Appeal on the 22<sup>nd</sup> June 2022) it was held that:

*"Din il-Qorti mhux l-ewwel darba li tirribadixxi li kull oblatur irid, sa mill-bidu nett mal-offerta tiegħu, isegwi rigorożiment dak li trid is-sejha għall-offerti u m'għandux jippretendi li jiġi mitlub "jirrangà" l-offerta biex ikun kompatibbli ma' dak mitlub."*

13. The facts of the above quoted case are somewhat more complex than those before the Tribunal today. In the quoted case the tenderer had been allowed to both clarify and rectify his offer (in so far as note 3 was not applicable) and still failed to supply the required information. However the basis of the court's reasoning would still be applicable to the present case. The court expressly held that:

*6. Ir-riferenza li għamel il-Bord għall-każ ta' "Tideland Signal" huwa barra minn loku, għax hawn mhux każ ta' "tender is ambiguously drafted", iżda l-każ fejn il-konsorzju appellat kien negligenti u naqas milli jinkludi informazzjoni importanti, avolja ngħata żewġ ċansijiet biex jagħmel dan. Il-bord ta' evalwazzjoni ppermetta mhux biss rettifika imma anke kjarifika mingħand oblatur wiehed, u ma kellux obbligu jibqa' jitlob spjegazzjoni mingħandu. Il-bord ta' evalwazzjoni huwa wkoll marbut bit-termini tad-dokumenti tas-sejha, u kien imur kontra l-prinċipju ta' trattament raġonevoli u trasparenza li kieku ta preferenza ta' trattamenti lill-oblatur wiehed.*

*7. Il-fatt li kellha tintgħażel l-orħos offerta, ma jfissirx li din kellha tiġi aċċettata akkost ta' kollox. Jekk offerta mhix konformi mat-tender dossier jew ma tissodisfax ir-rekwiżiti tal-istess, għandha titqies non-compliant u tibqa' monka, u mhux imħollija għax tista' tiġi rranġata. Dan ċertament mhux l-ispirtu tal-proporzjonalita'.*

14. In a more recent judgment in the names Fremond Limited (C 20339) v. L-Aġenzija għas-Servizzi tal-Qorti u Dipartiment tal-Kuntratti, 542/22 (decided by the Court of Appeal on the 20<sup>th</sup> March 2023) the court expounded on this principle. The complainant in that appeal was alleging that the contracting Authority ought to have allowed it to make a clarification.
15. The Court held as follows:

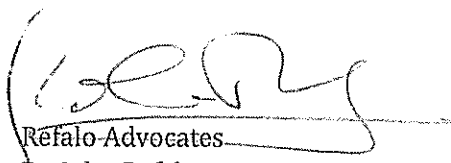
*"8. L-awtorità kontraenti ma setgħetx lanqas titlob rettifika peress li din l-informazzjoni kienet parti mill-offerta teknika (Note 3), u s-sejha kienet speċifika fejn tgħid li ebda rettifika ma kienet permessibbli għall-informazzjoni mitluba f'dik in-nota. F'kull każ, din il-Qorti osservat kemmil darba li meta d-dokumenti tas-sejha jitolbu ċerta informazzjoni, din trid tingħata kif mitlub, aktar u aktar meta dik l-informazzjoni tkun indikata bħala mandatorja."*

16. The above is stated without prejudice to the fact that the remedy sought by the appellant is that of "rectification" which is not allowed. On this point the Contracting Authority certainly does not agree with the submissions made in paragraph 8 of the Appeal document in the sense that, with all due respect, the Contracting Authority cannot be instructed to seek the rectification of a Note 3 document.



## Conclusion

17. In view of the submissions made herein and whilst reserving the right to bring the evidence and make those further submissions permissible according to law, the contracting authority respectfully submits that the Tribunal should reject the objection filed with the Appellant with costs.



Refalo-Advocates  
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