



Public Contracts Review Board
Department of Contracts
Notre Dame Ravelin
Floriana VLI 2000

7 August 2023

Dear Sirs,

Re: 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 (the "Tender")

1. We have been instructed by Sammut Marine Limited (C-82608) (the "**Appellant**") to file this objection in terms of Regulation 270 of the Public Procurement Regulations (the "**PPR**") in connection with the above-captioned Tender.
2. The Appellant is laying out the factual matrix surrounding the objection in chronological order:
 - a. 17 May 2023: the Sectoral Procurement Directorate on behalf of Transport Malta (the "**Contracting Authority**") issued the Tender with an Estimated Procurement Value of €270,000;
 - b. 16 June 2023: on the Tenders Opening Date, it transpired that the Contracting Authority received offers from three different economic operators;
 - c. 28 July 2023: the Appellant received a rejection letter (attached and marked as "**Document SML1**") from the Contracting Authority whereby it was informed that:

[The] bidder was not found to be technically compliant. 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.

3. The Appellant is aggrieved by the decision of the Contracting Authority to find that its bid is technically non-compliant and is hereby filing this objection to overturn the recommendation of award of the Tender.

4. The Contracting Authority has decided that the Appellant's bid is technically non-compliant because its technical offer, specifically the technical offer questionnaire which is a Note 3 document, did not contain any cross-reference to the technical literature.
5. The decision to declare the Appellant's bid as technically non-compliant is in breach of the principle of proportionality. Regulation 39(1) of the PPR clearly stipulates that '*contracting authorities [...] shall act in a transparent and **proportionate manner***'. The principle of proportionality requires that measures adopted by contracting authorities, including those adopted during the evaluation process, do not exceed the limits of what is appropriate and necessary in order to achieve the objectives pursued and that when there exists a choice between several appropriate measures, recourse must be had to the least onerous one.
6. Any uncertainties that the evaluation committee may have harboured in relation to the Appellant's offer could have been proportionately resolved via the clarification route or even the rectification route, as shall be submitted below. This would have been sufficient to achieve the objective of the Tender, that is, the procurement of the supplies for the cheapest price.
7. *In arguendo*, even if the Appellant's bid was technically non-compliant in terms of a mandatory Note 3 requirement, the Contracting Authority should have allowed the Appellant to clarify its Tender, without any substantial modifications to the content of the technical offer, in application of the principle of proportionality. The evaluation committee was duty bound to request a clarification from the Appellant with respect to the technical literature which was *already* submitted with the Appellant's bid. This expressly provided for in the Notes to Clause 5 of the Tender Dossier:

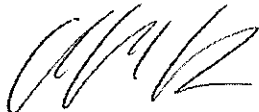
*3. No rectifications shall be allowed. **Only clarifications on the submitted information may be requested. Tenderers will be requested to clarify the submitted information** within five (5) working days from notification. [emphasis added]*
8. In any case, and in recent decisions delivered by this Board and also by the Court of Appeal, contracting authorities have been instructed to seek even the rectification of a Note 3 document on condition that no advantage be given to the bidder.
9. The Contracting Authority's decision exceeds what is appropriate or necessary for the evaluation procedure to achieve the objective of the Tender. Further, the evaluation committee opted for the most onerous route of excluding the Appellant's bid rejected the appellant's bid rather than pursue less onerous routes.

10. For these reasons, and others that may be brought in due course of the case, the reason for rejection is unfounded and ought to be quashed.

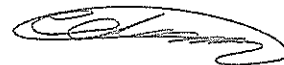
THEREFORE, in view of the above and for other reasons that may be adduced at law at the sitting to be set by the Public Contracts Review Board, the Appellant humbly submits that the same Board should, subject to any declaration or order that it deems fit and opportune:

- (a) declare that the Contracting Authority's decision of 28 July 2023 was illegal and consequently proceed to quash it;
- (b) cancel and revoke the proposed award of the Tender to the Recommended Bidder;
- (c) give any and all necessary instructions and directions to the Contracting Authority on the evaluation of the Appellant's bid;
- (d) order the refund of the deposit paid to the Appellant.

Yours sincerely,
Ganado Advocates



Dr. Clement Mifsud-Bonnici
(cmifsudb@ganado.com)



Dr. Calvin Calleja
(ccalleja@ganado.com)



DOCUMENT SML1

28th July 2023

Sammut Marine Limited
Tender ID 194316

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

Dear Sir/Madam,

Thank you for participating in the above-mentioned procurement procedure.

We regret to inform you that the offer submitted was not technically compliant.

The main reason why your procurement proposal was non-compliant is as follows:

Bidder was not found to be technically compliant. 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.

The procurement was recommended for award to **Polaris Marine Services Co Ltd - Tenderer's ID 194311 for the amount of €259,700.00 excluding VAT**, this being the cheapest priced offer satisfying the administrative and technical criteria.

If you intend to object to this decision, the Public Procurement Regulations allow for an official objection which in this case has to be lodged electronically with the Public Contracts Review Board by sending an email on info.pcrb@gov.mt by **12:00hrs (noon) of Monday 7th August 2023** against a deposit of **€1,350**.

Payments are to be made through bank transfer in terms of the following details:

Name of Account Holder	Cashier Malta Government
Name of Bank	Central Bank of Malta
Address of Bank	Castille Place, Valletta
Account Number	40001EUR-CMG5-001-H
BIC	MALT MT MT
IBAN Code	MT55MALT011000040001EURCMG5001H
Bank Code	01100

The official recommendation for award schedule 'Award Notice' can be accessed on the website: www.etenders.gov.mt and is also being attached for ease reference.

Yours sincerely,

SPD 6 (signed)
f/Sectoral Procurement Directorate

BOV

Bank of Valletta

Bank of Valletta p.l.c

Registration Number: C 2833

Registered Office: 58 Zachary Street, Valletta VLT 1130 - Malta

Pay third party

Printed by: Mr. David Sammut

Printed on: 07/08/2023 - 08:07

Document ID: 17011455

Transaction details

Beneficiary name:	Cashier Malta Government
Relation:	Administrative Services
Reason:	Other
Payment details:	Objection to SPD6/2023/026
Currency:	EUR Euro
Beneficiary IBAN/Account:	MT55MALT011000040001EURCMG5001H
Beneficiary IBAN/Account type:	Valid IBAN of country - Malta
Bank name:	Other bank
Bank address / Bank's BIC:	Let the bank apply the beneficiary bank BIC
Beneficiary address:	No
From account:	5001351954 1 (EUR)
Charges should be paid by:	Shared - I pay BOV charges; Cashier Malta Government pays the beneficiary bank charges
Amount:	EUR 1,350.00
BOV to transfer the money:	as soon as possible
Receiving bank to get the money as:	normal priority payment
Saved template:	no

Additional information

Credit amount:	EUR 1,350.00
Debited amount (excluding charges):	EUR 1,350.00
Estimated amount to be withdrawn from account:	EUR 1,354.00
Transaction charge:	EUR 4.00

Transaction result

Status:	Your instructions have been processed successfully.
Transaction ID:	130486768