

**DINGLI & DINGLI**  
LAW FIRM

12th October, 2023

**Public Contracts Review Board**  
**Department of Contracts**  
**Notre Dame Ravelin**  
**Floriana**  
**VLT 2000**



Dear Sirs,

Re:- SPD6/2023/045 - TENDER FOR PROVISION OF SERVICES TO UNDERTAKE A FEASIBILITY STUDY EXPLORING VARIOUS WASTE MANAGEMENT APPROACHES IN THE MALTESE ISLANDS

1. Introduction

1.1. We have been instructed by **EMCS Advisory Ltd**, bearer of tenderer ID **000196355** (hereinafter "the Appellants") to file this objection in terms of Regulation 270 of the Public Procurement Regulations (the "PPR") in connection with the tender "SPD6/2023/045 - TENDER FOR PROVISION OF SERVICES TO UNDERTAKE A FEASIBILITY STUDY EXPLORING VARIOUS WASTE MANAGEMENT APPROACHES IN THE MALTESE ISLANDS" (hereinafter referred to as "the Tender")

1.2. The Appellants are laying out the chronology of facts leading to the present objection:-

(i) On the 30<sup>th</sup> June, 2023 tender "SPD6/2023/045 - TENDER FOR PROVISION OF SERVICES TO UNDERTAKE A FEASIBILITY STUDY EXPLORING VARIOUS WASTE MANAGEMENT APPROACHES IN THE MALTESE ISLANDS" was published.

(ii) Deadline for submission of tender was 31<sup>st</sup> July, 2023

(iii) On 28<sup>th</sup> July, 2023 the Appellants submitted its bid before the closing time.

(iv) On the 3<sup>rd</sup> October, 2023 the Appellants received the communication from the Department of Contracts dated 3<sup>rd</sup> October, 2023 by means of which the Appellants' (hereinafter "Rejection Letter").

# DINGLI & DINGLI

## LAW FIRM

1.3. The Appellants were and are aggrieved by the decision of the Contracting Authority that their bid was and is technically non-compliant and are hereby filing this present objection to overturn the recommendation of award of the Tender.

1.4. According to the Rejection Letter, the Contracting Authority has decided that *“EMCS was deemed uncompliant in the technical section due to their omission of a comprehensive work plan, lacking details on phase 5 tasks 7 and 8 which were required for the project. This was non-rectifiable”*<sup>1</sup>.

1.5. The **grounds underlying Appellants’ grievance** are clear and manifest and consist in the following:-

(i). The disqualification of Appellants on the basis of the Appellants’ *“omission of a comprehensive work plan, lacking details on phase 5 tasks 7 and 8 which were required for the project”* is unfounded both in fact and at law;

(ii) Without any prejudice to the first ground abovementioned, the Contracting Authority acted disproportionately when it decided straightaway to proceed outright with a declaration of non-compliance of the Appellant’s bid which was indeed technically compliant with the published Tender requirements because (i) it should have asked for clarifications and (b) this matter did not require a rectification but a clarification.

(iii) Without any prejudice to the first two grounds, the Tender Document breached the principle of transparency.

1.6. Appellants shall now submit their arguments in support of the grounds of their grievance and appeal.

## **2. SUBMISSIONS ON THE GRIEVANCES.**

**2.1. The First Ground:- The disqualification of Appellants on the basis of the Appellants’ “omission of a comprehensive work plan, lacking details on phase 5 tasks 7 and 8 which were required for the project” is unfounded both in fact and at law.**

2.1.1. The Rejection Letter speaks of “details” on phase 5 tasks 7 and 8 which were required for the project. The Tender Document requested in two different parts the following:-

---

<sup>1</sup> Rejection letter dated 3<sup>rd</sup> October, 2023

# DINGLI & DINGLI

## LAW FIRM

### In (C) Specifications (i) (2):-

2. A Work Plan, in the form of a Method Statement, demonstrating how each task shall be performed within the deadlines stipulated in the Terms of Reference <sup>(note 3)</sup>.

5

### In Section 7 of the Specific Conditions:-

#### *7.1 - Reporting Requirements*

The Contractor shall provide a Gantt chart and a work plan in the form of a Method Statement, at tender submission stage. The Gantt chart shall take into consideration mobilisation time, data acquisition time and the timeframes of deliverables of the Terms of Reference. Then, the Contractor shall submit a method statement of how the project shall be executed within the deadlines stated in the Gantt Chart, at tender submission stage. The method statement shall take into consideration mobilisation time, data acquisition time and the timeframes of deliverables of the Terms of Reference.

2.1.2 These are the two sections which speak of what needs to be submitted. It is undeniable that both the Specifications Section (the top extract) and the Reporting Requirements Section refers to time – it speaks of deadlines, mobilisation data, data acquisition time and the timeframes of deliverables of the Terms of Reference.

2.1.3. Appellants provided this information with respect to all the tasks, including Task 7 and Task 8. Just because there is no heading Task 7 and Task 8 does not mean that this information was not provided.

2.1.4. Judging from the Rejection Letter, however, it would appear that the Evaluation Committee wanted also details on phase 5 tasks 7 and 8. The point, however, is that the Tender Document and the Evaluation Committee seem to be in disagreement as to the “nature of the details”. In other words, what details did the Evaluation Committee want? Details on the timeline or details of the execution of the works? Or any other details?

2.1.5. If one goes back to the Tender Document, it is undeniable that the Tender Document wanted to make it very clear that the timeline of the project is critical to its success. The requirements in the two extracts abovementioned make it very clear. The Tender Document is telling the tenderers “ensure that what you do is within the

# DINGLI & DINGLI

## LAW FIRM

relative timelines which shall be supported by a relative Gantt chart". Deadlines and time are the heart of the requirements abovelisted.

2.1.6. It must also be stated that both the Work Plan and the Gantt Chart "*shall take into consideration mobilisation time, data acquisition time and the timeframes of deliverables of the Terms of Reference*". In other words, the Gantt Chart and the Work Plan are requesting identical information. Hence, they **must** be linked. If the Gantt Chart is to show the same information as the Work Plan and vice versa, then it is undoubted that the Gantt Chart and the Method Statement have to be interlinked – and it cannot be otherwise because the Contracting Authority seems primarily preoccupied with ensuring that the eventual contractor complies with the timelines.

2.1.7. It is **undeniable** that Appellants submitted this information in their offer. Whilst it is true that the ePPS system requested that the two documents (i.e. the Work Plan and the Gantt) were to be submitted separately, in real fact, the ePPS does not change the requirements of the Tender Document which required a GANTT Chart and a Method Statement ensuring that the work will be done and the service within the timeframes envisaged in the Tender Document.

2.1.8. Hence, the information requested was provided. The "work plan lacking details on phase 5 tasks 7 and 8" was not requested at tendering stage. What was requested was a Work plan in the Form of a Method Statement at tender submission Stage which shall take into consideration mobilisation time, data acquisition time and the timeframes of deliverables of the Terms of Reference. Appellants also refer to the first Section (Section 2) which requests that the tenderer was required to provide a Work Plan, in the form of a Method Statement, demonstrating how each task shall be performed within the deadlines stipulated in the Terms of Reference. Therefore, why is the Contracting Authority requesting details on phase 5 tasks 7 and 8 when the **time-sensitive** details were provided in the bid submission, including in the Method Statement which clearly makes reference to the Gantt Chart? It must also be said that the Gantt Chart was also accompanied by an explanation of how the Gantt Chart is explaining how it is to be read and completed indicating how the milestones and the completion of phases is indicated in the Gantt.

2.1.9. It is therefore clear, from the abovementioned, that Appellants provided the details required in the Tender Dossier.

2.1.10. From the above, therefore, it becomes amply clear that the conclusion of the Evaluation Committee that "the comprehensive work plan omitted, lacking details on phase 5, tasks 7 and 8 which were required for the project" is unfounded in fact and at law because the details required the Tender Document were indeed provided by

# DINGLI & DINGLI

## LAW FIRM

Appellants, as already submitted and the Contracting Authority should not have disqualified Appellants' submission.

2.1.11. It is submitted, therefore, this Honourable Review Board should uphold this first ground underlying Appellants' grievance.

**2.2. The Second Ground:- Without any prejudice to the first ground abovementioned, the Contracting Authority acted disproportionately when it decided straightaway to proceed outright with a declaration of non-compliance of the Appellant's bid which was indeed technically compliant with the published Tender requirements because (i) it should have asked for clarifications and (b) this matter did not require a rectification but a clarification.**

2.2.1. The principles of equal treatment of tenderers, non-discrimination, proportionality, and transparency are general principles of European Union Law which underpin public procurement<sup>2</sup> and which have also been accepted in Maltese Law public procurement law both through the transposition of the EU Public Procurement Acquis into Maltese Law and, also, the various case-law of the Maltese Court of Appeal and this Honourable Review Board. Indeed, it can be undoubtedly said that the principle of proportionality is a crucial principle of Maltese<sup>3</sup> and EU Public Procurement Law<sup>4</sup>. The CJEU has, over the years, accepted and acknowledged that a Contracting Authority may ask for clarifications from tenderers following the deadline for submissions and it also said that national laws authorizing the Contracting Authorities to request clarifications are not contrary to the EU Public Procurement acquis.

2.2.2. For instance, in its *Manova* judgment, the Court of Justice of the EU (CJEU), created some room for the flexible interpretation of the rules on formal compliance of

---

<sup>2</sup> *Due Diligence Obligations of a Contracting Authority in the EU Public Procurement Law*, Kadri Harginen; [https://dspace.ut.ee/bitstream/handle/10062/91390/harginen\\_kadri.pdf?sequence=1&isAllowed=y](https://dspace.ut.ee/bitstream/handle/10062/91390/harginen_kadri.pdf?sequence=1&isAllowed=y) last accessed on the 10<sup>th</sup> October, 2023 (11:48a.m.)

<sup>3</sup> Regulation 39(1) of the Public Procurement Regulations state that:- "Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner."

<sup>4</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26<sup>th</sup> February, 2014 on public procurement and repealing Directive 2004/18/EC of 26 February 2014 on public procurement and repealing Directive 2004/18/EC. Article 18(1) of the Directive states the following:- "Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner" which enunciation is transposed into Maltese Law by above-mentioned Regulation 39(1) of the Public Procurement Regulations.

# DINGLI & DINGLI

## LAW FIRM

bids submitted in public procurement procedures<sup>5</sup>. This judgment followed the *Slovensko* ruling<sup>6</sup> which stated unequivocally that Contracting Authorities may request for clarifications following the submission of a bid as long as the principles of equal treatment and transparency were observed and the clarifications did not mean the submission of a new tender. The *Manova* judgment also made it clear that too-strict implementation of formal requirements may be dispensed with as long as the principles of equal treatment and transparency were safeguarded. What is interesting is that these judgments came **before** Directive 2014/14 which included the principle of proportionality as one of the principles which should underpin Member States and public procurement<sup>7</sup>.

2.2.3 The corollary of the above reasoning and the next logical step is that if Contracting Authorities are required to act proportionately with all economic operators and if requesting clarifications of tenders submitted does not violate EU Law (as repeatedly held by the CJEU), **it is indeed an obligation** of Contracting Authorities to **request clarifications** on the tender submitted rather than disqualifying the relative tender/s submitted if they deem that the tender could have some information which is potentially lacking given that it is far less onerous to request clarification than to disqualify. Indeed, from the perspective of the principle of proportionality, the correction (including clarification) of tender submissions is a valid and lawful alternative to the rejection or disqualification of tenders as long as the principle of equal treatment is not affected<sup>8</sup>.

2.2.4. Indeed, this reasoning was also found approval from the the Maltese Honourable Court of Appeal and the Public Contracts Review Board with the latter having made clear in Case 1653 (CT 2263/2019) the following:-

---

<sup>5</sup> Ministeriet for Forskning, Innovation og Videregående Uddannelser / *Manova*, C-336/12, 10 October 2013

<sup>6</sup> *Najvyšší súd Slovenskej republiky — Slovak Republic*) — SAG ELV Slovensko a.s., FELA Management AG, ASCOM (Schweiz) AG, Asseco Central Europe a.s., TESLA Stropkov a.s., Autostrade per l'Italia SpA, EFKON AG, Stalexport Autostrady SA v Úrad pre verejné obstarávanie, C-599/10, 29<sup>th</sup> March, 2012

<sup>7</sup> *Op. cit.* note 2

<sup>8</sup> Codina García-Andrade, X. (2015) "Why *Manova* is not *Slovensko*: a new balance between equal treatment of tenderers and competition". *Public Procurement Law Review*, 4, pp. 109-117

# DINGLI & DINGLI

## LAW FIRM

Therefore, the Board opines that when considering the main issue at hand, it is essential that the Criteria for Award is duly kept in mind.

Consequently, what needs to be considered is whether the Contracting Authority would have acted diligently / proportionately or otherwise would it have went for the option of a clarification on item 18.

The Board opines, that should the Contracting Authority have opted for such an approach, in this specific case, it would not have constituted a new offer by the Appellant. This is an obvious case of a 'genuine human error'

Finally this Board upholds Appellant's grievances.

2.2.5 It is clear that the Public Contracts Review Board is clearly stating that what essentially matters is whether the tenderer would be resubmitting a fresh bid if asked for a clarification. If this is not the case, then the Contracting Authority should ask for a clarification.

2.2.6. In yet another case<sup>9</sup>, this Honourable Board noted that the Contracting Authority had another tool at its disposal other than disqualification, i.e., that of requesting clarifications and stated furthermore that, "*this Board is of the opinion that the principle of proportionality was not observed by the Contracting Authority*"<sup>10</sup> in not using said tool.

Hence this Board is of the opinion that the principle of proportionality was not observed by the Contracting Authority. The same could not be said, had the Contracting Authority contacted the 'End-user' and confirmed that such start / end dates did not fall within the requirements of the Tender dossier.

2.2.7. Indeed, the Tender in question did have the availability of the "tool" of clarification as clearly transpires from the Tender Document which stated the following in this regard:-

---

<sup>9</sup> Case 1656/2022

<sup>10</sup> Page 16 *ibid.*:- [https://pcrb.gov.mt/wp-content/uploads/2022/11/PCRB\\_Case\\_2022\\_1656.pdf](https://pcrb.gov.mt/wp-content/uploads/2022/11/PCRB_Case_2022_1656.pdf)

# DINGLI & DINGLI

## LAW FIRM

### Notes to Clause 5:

1. Tenderers will be requested to clarify/rectify, within five (5) working days from notification, the tender guarantee only in the following four circumstances: incorrect validity date, and/or incorrect value, and/or incorrect addressee and incorrect name of the bidder. Rectification in respect of the Tender Guarantee (Bid Bond) is free of charge. (currently Bid Bonds are not applicable)

2. Tenderers will be requested to either clarify/rectify any incorrect and/or incomplete documentation, and/or submit any missing documents within five (5) working days from notification.

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.

Requests for Clarifications and/or Rectifications concerning a previous request dealing with the same shortcoming shall not be entertained.

2.2.8. It must be said that only Note 3 applied in this case and Note 3 made it clear that:- “no rectifications shall be allowed. Only clarifications....may be requested”. It is undoubted, therefore, that even in the tendering procedure in question, request for clarifications were allowed.

2.2.9. In this case, as already submitted with respect to the first grievance, Appellants did provide the information and the work plan requested which clearly made reference to the Gantt Chart which clearly made reference to the timelines as required in the Tender. It is also worth pointing out that both the Work Plan and the Gantt Chart had to include information about deadlines and timeframes. Hence, the information was, undoubtedly, submitted **in the work plan itself**. What follows is an extract from the Method Statement:-

In terms of the specific deliverables established, below please find our proposed approach, which also takes into account the requirements of the ToRs. To complement this, in Section A.3. we are providing a Gantt Chart that illustrates how the work will be undertaken each month in order to implement the required activities within the project timeframes.

**It is clear, therefore, that the Work Plan is stating that the work plan is to be complemented by the Gantt Chart – which, in itself, was clearly demonstrating the completion of the tasks within the Terms of Reference within the timeframes provided in the Tender Document itself.**

2.2.10. Therefore, it is clear that the information requested was already provided in the submission itself and the Contracting Authority should have requested for a clarification if it had any doubts as to the information itself.



# DINGLI & DINGLI

## LAW FIRM

2.2.11. It is also very clear from Appellants' submission that all the tasks of the different phases were allocated a "space" in the Gantt chart. This is undeniable. Even Tasks 7 and 8 were allocated a time frame within the Gantt Chart – and referred to amply in the Gantt Chart and, it must also be said, that all the information which was requested in the Tender Document has been provided, as aforesaid.

2.2.12 Indeed, therefore, if the Appellants submission and rejection are viewed from this point of view, it becomes patently clear that the Contracting Authority breached the principal of proportionality when it decided to just declare the Appellant's bid as "technically non-compliant" without even asking for a clarification from the Appellant in relation to the information which the Contracting Authority deemed as having not been provided by the Appellant. Indeed, the Contracting Authority acted disproportionately and in breach of the said principle, considering the means at its disposal within its powers, i.e., the clarification route.

2.2.13. The Contracting Authority's position was also erroneous when it deemed that Appellants' submission would need to be "rectified" for it to be able to be considered compliant. **This is absolutely untrue**, as shall explained hereunder.

2.2.14. It must be, first of all, taken into consideration that the CJEU and the Maltese PCRB have decided that a clarification is a better tool than disqualification **as long as there is no distortion of the principle of equality of treatment and transparency**.

2.2.15. It is submitted, therefore, that **"rectifications" would amount to the submission of a fresh bid and hence the distortion of the principle of equality of treatment and transparency**. In this case, however, all the information was already there. It is clear that the Evaluation Committee did not understand it is there – or perhaps there was a misunderstanding of the tender requirements because they were not clearly expressed in the Tender Document in the first place and were not transparent (and this without any prejudice to what shall be submitted hereunder). However, it is undoubted that whatever clarifications would have been sought, they would not have amounted to a rectification.

2.2.16. But even if *dato ma non concesso*, the Evaluation Committee believed, at the point of evaluation, that requesting for clarifications could have amounted to a rectification, it could not just reject the tool of asking for clarifications and reject the tender offer and declare Appellants disqualified just because it believed that asking for clarifications would have amounted to a rectification.

2.2.17. In other words, it was premature – and disproportionate - for the Evaluation Committee to decide that the bid was non-compliant when it did not even ask for

# DINGLI & DINGLI

## LAW FIRM

clarifications and, before deciding that Appellants could not submit a rectification, it should have asked for clarifications and then decide if the information submitted would have amounted to a rectification or indeed a clarification.

2.2.18. And it is also submitted that had Appellants been requested to clarify their submission for some reason (which, it is humbly submitted, was not even necessary because the submission was indeed very clear), their reply to the clarification would not have involved the submission of any information which would have amounted to a fresh bid, but, rather, a confirmation and, perhaps, (and again, questionable on whether this was even required) an explanation of what had already been submitted. The offer would not have changed, the substance would not have changed, the price would not have changed.

2.2.19. This submission – and this ground – become even more poignant and the disqualification far more draconian when one considers that Appellants were the cheapest bidders. This tender was exclusively based on the cheapest offer and, hence, disqualifying the cheapest bidder is, in itself, highly disproportionate and distorts the whole tendering process. Hence, a decision to disqualify essentially deprived Appellants from being awarded the Contract when the matter could have easily been addressed by requesting a clarification.

2.2.20. It is for the above reasons that, it is Appellants' humble opinion that even this ground merits being upheld by the Honourable Review Board.

**Third Ground:- Without any prejudice to the first two grounds, the Tender Dossier breached the principle of transparency and the decision to disqualify was also for this reason disproportionate.**

2.3.1. From the above submission, and without any prejudice to any of them, the Tender Documents and its requirements were not clear at all and clearly and respectfully, it is submitted that the Tender Document did not reflect what the Contracting Authority wanted.

2.3.2. In this regard, the wording of the Tender Document are of extreme importance. First of all, in "Specifications" (Page 5 of the Tender Document) the Tender Document required a work plan in the form of a method statement demonstrating how each work task shall be performed within the deadline stipulated in the Terms of Reference. So, one has to ask the question:- what was required here?

2.3.3 Reference is hereby also being made to Clause 7.1. in Specifications (Page 22) which also states that the *method statement shall take into consideration the*

# DINGLI & DINGLI

## LAW FIRM

*mobilisation time, data acquisition time and the timeframes of deliverables of the Terms of Reference. The accent on time is clear and unequivocal – **and was provided by Appellants.***

2.3.4. Now, it must be said that the Evaluation Committee held the remainder of the submission fully compliant – it only referenced Tasks 7 and 8 as being missing. But why did it say so? Clearly because the Work Plan did not including a heading of “Task 7” and “Task 8”. Here it is critical to go back to what the Tender requested:- time and timelines. As already submitted, the work plan explained that the Gantt Chart is also to be taken into consideration – and a clear reference to the Gantt Chart was also made in the Work Plan. What follows is the relevant extract from the Work Plan:-

In terms of the specific deliverables established, below please find our proposed approach, which also takes into account the requirements of the ToRs. To complement this, in Section A.3. we are providing a Gantt Chart that illustrates how the work will be undertaken each month in order to implement the required activities within the project timeframes.

2.3.5. Indeed, the fact that Tasks 7 and Tasks 8 were not listed in the headings did not mean that the information related to them had not been provided in Appellants’ tender submission. The Tender Dossier did not mention anywhere that the tasks have to be clearly defined or that each task has to be discussed separately from the others. The requirements in the Tender Document made clear what was needed. Neither did the submission had to list each Task separately – as long as the timelines were clear. Indeed, tenderers in this tendering procedure could choose whichever way they wanted to present their submissions and there was not grounds in the Tender Document which would warrant penalisation on the basis of the mode of presentation of information.

2.3.6. It must also be said that the tenderer was not requested to upload each task in a separate field in the EPPS but, rather, the EPPS requested one upload for the “Method Statement” and one upload for the Gantt Chart (apart from the other considerations). Hence, the tenderers were free not to refer to the individual tasks under separate headings at all.

2.3.7. The Contracting Authority, however, seems to have wanted separate headings for each separate task – even if this was not required in the Tender Dossier itself. Indeed, the Rejection Letter says that:- *due to their omission of a comprehensive work plan, lacking details on phase 5 tasks 7 and 8 which were required for the project”.*

# DINGLI & DINGLI

## LAW FIRM

2.3.8. Indeed, the Rejection Letter seems to be referring to another tendering procedure not the one in question. Nowhere did the Tender Document request a “comprehensive work plan lacking details on phase 5 tasks 7 and 8”. The Tender document requested how each task will be performed within the deadlines stipulated in the Terms of Reference and Appellants’ submission gave that information, as aforesaid.

2.3.9. Without prejudice to the abovementioned, Appellants also question what the Contracting Authority was expecting taking into consideration the way the Tender Document was drafted. Task 7 consisted in the following<sup>11</sup>:-

### PHASE 5

#### Task 7 - Draft Report

A draft feasibility report shall be provided to the Contracting Authority on the 8<sup>th</sup> month into the contract. Communication will be carried out between the Contracting Authority and the Contract regarding the contents of the draft report and the final report will be provided to the Contracting Authority in the 9<sup>th</sup> month of the contract.

2.3.10. What exactly was the Contracting Authority expecting? What details? Appellants made it clear that the draft feasibility report shall be provided to the Contracting Authority on the 8<sup>th</sup> Month of the contract and showed how the milestones will be met for such delivery to be made. What else was required from tenderers?

2.3.11.1. The same can be said for Task 8 which involved the submission of a “Finalisation and final assessment Report”. It must be said, first of all, that all the information requested to be provided in the report itself will be the subject of all the work done by the Contractors in the previous statements. This is so much so that information relevant to Task 8 has been included all throughout the method statement submitted by the appellant. Table 1 below shows how **all** the information relevant to Task 8 has been provided in the Appellants’ submission and the Appellants reserve to prove and submit further during the hearing to be fixed by this Honourable Review Board.

---

<sup>11</sup> Page 22 of the Tender Document

Table 1:-

### Task 8 – Finalisation and final assessment report

The final feasibility report shall provide the detailed information below:

- a. A rationale for undertaking the feasibility study on the exploration of waste management approaches in the Maltese Islands.
- b. A detailed analysis of all the approaches being put forward in Section 2.2 - Specific Objectives, assessing comparatively all considerations of the tasks in Section 4.2 - Specific Activities Tasks 2-6.
- c. A comparative analysis assessing the strengths and weaknesses of the current commercial waste management approaches assessed in Section 4.2 - Specific Activities, Task 1c and the waste management approaches being proposed in Section 2.2 - Specific Objectives.
- d. Address data gaps that have been encountered, coupled with data which is a requisite for a better understanding of the commercial sector in terms of waste management.
- e. Information on the quality assurance/review processes carried out in the formulation of the feasibility study.
- f. Policy recommendations, where relevant, in relation to the waste management approaches being put forward, as well as any others (not mentioned in Section 2.2 - Specific Objectives) which may be suited to the context of the Maltese Islands.

**Page No. in Tender Submitted:-  
Task 8 – Point a – Page 2**

**Task 8 – Point b – Pages 3 to 5;**

**Task 8 - Point c – Pages 3 and Pages 4 – 5**

**Task 8 – Point d - Pages 4, 19 & 22**

**Task 8 – Point e – Page 3 & 16**

**Task 8 – Point f – Pages 8, 9, 13 and 22**

2.3.11.2. Consequently, the question arises:- what information, other than that provided by Appellants as aforesaid, should be provided in the submission? The Tender Document says nothing. It just speaks of timelines and timeframes. Nothing else.

2.3.12. Hence, the lack of transparency in the Tender Document becomes amply clear when the Tender Document speaks of a set of criteria and requirements and the Rejection Letter speaks of others. In spite of this, the Rejection Letter makes it clear that Appellants' "omission" related to "lacking details on phase 5 tasks 7 and 8". The question, however, which needs to be posed is:- which details could be actually provided when confirming that a report shall be submitted? The tender just asks "a work plan...demonstrating how each task shall be performed within the deadlines". In this case, what details can be given with respect to a report? What exactly did the Contracting Authority want? The Work Plan is not requesting "**details**" of the report". The Contracting Authority wants:- "**a demonstration how each task shall be performed within the deadlines**". The key point - indeed the substance and subject matter of the requirement - is the timelines; at least, that is the way the Tender

# DINGLI & DINGLI

## LAW FIRM

Document dossier is drafted. What the Contracting Authority wanted is, to a certain extent, irrelevant. What is relevant, and even more so in the context of this exercise, is what the Contracting Authority requested. It did not request a work plan with contents but with deadlines.

2.3.13. Given that it is clear from the tender submission that the submission, even through the Method Statement itself, clearly lists the provision of the report within the deadline, there was clearly no “omission of a comprehensive work plan”.

2.3.14. Given the above considerations, given that there clearly was misalignment between what the Contracting Authority **expected** and what it wrote in the Tender Document, it becomes amply clear that the Tender Document was not only non-transparent but, essentially, murky.

2.3.15. It is a general principle of law that tender documents should be transparent as much as a general principle of accepted case-law that tenderers have to be “diligent”.

2.3.16. Indeed, as Appellants well know and as has repeatedly been held by the CJEU in its jurisprudence, tenderers are expected to be reasonable and diligent and carry out the tendering exercise with circumspection and care. It is certain that, in the present case, there was no carelessness on the part of Appellants so much so that all the other submission of Appellants has not been declared to be non-compliant.

2.3.17. Indeed, as aforesaid, it is clear from the Rejection Letter that, in spite of all the diligence of Appellants, what the Contracting Authority wanted and what the Contracting Authority expressed in the Tender Document seem to not have been aligned at all and hence it resulted in the unjustified and illegal disqualification of Appellants from the Tendering Procedure.

2.3.18. Without prejudice to any of the above-submitted, the disqualification of Appellants becomes even more serious, grave and disproportionate considering that had the Contracting Authority been clearer, it would have undoubtedly seen in Appellants’ submission what it was expecting to see.

2.3.19. This makes even more relevant Appellants’ earlier submission that clarifications should have been sought – because all the abovementioned lack of transparency and lack of clarity.

### **3. Conclusion**

Therefore, in view of the above and for other reasons that may be adduced at the sitting to be set up by the Public Contracts Review Board, Appellants humbly submit

# DINGLI & DINGLI

LAW FIRM

that the same Board should respectfully, subject to any declaration or order that it deems fit and opportune:-

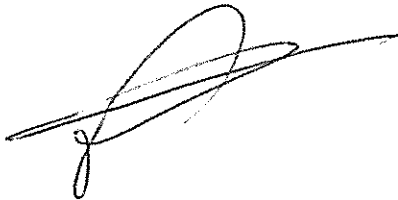
(a) declare that the Contracting Authority's decision contained in the Rejection Letter dated the 3<sup>rd</sup> October, 2023 was illegal and consequently proceed to quash it;

(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; and

(d) order the refund of the deposit paid by the Appellant to the Appellant.

Yours sincerely,



Avv. Lorna Mifsud Cachia  
Dingli & Dingli Law Firm



## Eurozone-SEPA payment

The status for payment 66306PP0238Z is: Forward dated instruction received by bank

### Debit account

Pay from EMCS LTD  
MT MTHBMTCA006-233019-001 EUR  
Debit currency EUR

### Payment details

Value date Wed 11 Oct 2023  
Payment service SEPA Credit Transfer  
Your payment reference Appeal deposit

### Transactions

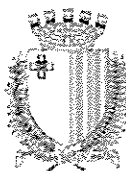
Entry	Beneficiary	Payment details	Amount (EUR)
1	Beneficiary name: Cashier Malta Government IBAN: MT55MALT011000040001EURCMG5001H SWIFT-BIC: MALTMTMT Reference: SPD6/2023/045	Remittance information: SPD6/2023/045-Tender ID 000196355	550.00

### Batch Summary

Total entries 1  
Batch amount EUR 550.00

Time of report: 10 Oct 2023 14:55:08 GMT





3<sup>rd</sup> October 2023

**EMCS Advisory Ltd**  
**Tender ID 000196355**

**SPD6/2023/045**

**SPD6/2023/045 SERVICES - TENDER FOR PROVISION OF SERVICES TO UNDERTAKE A FEASIBILITY STUDY EXPLORING VARIOUS WASTE MANAGEMENT APPROACHES IN THE MALTESE ISLANDS**

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:

EMCS was deemed uncompliant in the technical section due to their omission of a comprehensive work plan, lacking details on phase 5 tasks 7 and 8 which were required for the project. This was non-rectifiable.

The procurement was recommended for award to **Ecostack Innovations Limited having Tenderer's ID 000196432 for the amount of €65,000 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](mailto:info.pcrb@gov.mt) by **16:00hrs of 13<sup>th</sup> October 2023** against a deposit of **€550**.

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](http://www.etenders.gov.mt) and is also being attached for ease reference.

Yours sincerely,

Owen Aquilina (signed)  
Manager 1  
f/Sectoral Procurement Directorate