



MINISTRY FOR THE ENVIRONMENT,
ENERGY AND ENTERPRISE

Office of the Permanent Secretary
6, Qomni Road, Santa Venera, SVR 1302, Malta

To: The Public Contracts Review Board
Notre Dame Ditch, Floriana, FRN 1601

20th October 2023

Objection 108

Reasoned Letter of Reply Re: Objection dated 13th October 2023 regarding Tender Ref. No. SPD6/2023/045 – Tender for Provision of Services to Undertake a Feasibility Study Exploring Various Waste Management Approaches in the Maltese Islands

Dear Chairman and Members of the Board

I write on behalf of the Ministry for the Environment, Energy and Enterprise (hereinafter referred to as the 'Contracting Authority').

1. The Contracting Authority makes reference to the objection above-mentioned and herein answers to the same.
2. In its objection, EMCS Advisory Ltd (hereinafter referred to as the 'Appellant') raises three grievances, namely:
 - (i) That the disqualification of the Appellant is unfounded in fact and at law;
 - (ii) That the Contracting Authority acted disproportionately; and
 - (iii) That the tender document breached the principle of transparency.
3. The Contracting Authority is of the view that neither of the aforementioned three grievances are founded and this for the reasons contained below.

First Grievance: Compliance of the Appellant's Bid

4. As clearly stated in the Tender Document's Section 1(5)(C)(i)(2), the bidders' technical offer shall, *inter alia*, consist of 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". The Tender Document's Terms of Reference further stipulate in its section 2.3 that "A detailed workplan, in the form of a Method Statement together with a Gantt Chart should set out the

contractor's approach to the following activities: (i) Relevant fact finding/data collection required from reputable sources. From quantitative and qualitative sources; (ii) Identification of alternative solutions (if necessary) for the proposed project and their analysis in case the proposal as it is being recommended doesn't meet sufficiency levels; (iii) Methodologies to undertake a high-level economic assessment which also includes the environmental, social and governance feasibility; and (iv) **Preparation of the draft and final report/presentation of the study to Ministry officials and other relevant entities (where necessary)**". As such, it is ample clear that, contrary to what the Appellant is alleging in its objection, the Tender Document requested a Work Plan with contents and not with deadlines. Timeframes and deadlines belong in the Gantt Chart which is a separate and distinct document from the Work Plan and which Gantt Chart was requested separately under the Tender Document's Section 1(5)(C)(i)(3).

5. In its offer to the Contracting Authority, the Appellant failed to include within the aforementioned Work Plan its approach to the last activity above-mentioned i.e. 'Preparation of the draft and final report/presentation of the study to Ministry officials and other relevant entities', and thus the Appellant's technical offer is clearly not in conformity with the requirements of the Tender Document outlined in the preceding paragraph.
6. The Contracting Authority submits that the technical offer is a Note 3 document and pursuant to the *Notes to Clause 5* on Pages 7-8 of the Tender Document no rectifications shall be allowed and only clarifications on the submitted information may be requested. Since in its Work Plan, the Appellant, failed to submit information about its approach to the 'Preparation of the draft and final report/presentation of the study to Ministry officials and other relevant entities' no clarification was possible as the required information was missing and thus there was nothing that needed clarification.
7. In addition to the foregoing, the Contracting Authority further submits that contrary to whatever impression the Appellant may have, the same Appellant's bid is rather unambiguously technically non-compliant since it fails to satisfy the requirement/s outlined in Paragraph 4 above.

8. Without prejudice to the foregoing, the Contracting Authority further submits that Regulation 2 of the Public Procurement Regulations (S.L. 601.03) defines "irregular tenders" as *inter alia* "tenders which do not comply with the procurement documents". As such, in view that the Appellant's technical offer does not fully adhere to the requirements of the Tender Document, the Appellant's offer is also an "irregular tender" in terms of the said Public Procurement Regulations. Furthermore, Regulation 187(1) of the Public Procurement Regulations (S.L. 601.03) *inter alia* stipulates that an "irregular tender" shall be considered inadmissible, and Regulation 187(2) of the same Public Procurement Regulations *inter alia* provides that tenders which do not comply with the procurement documents shall be considered as unacceptable.

Second Grievance: Clarifications

9. In its second grievance, the Appellant is arguing that the Evaluation Committee should have sought a clarification from the Appellant despite the Appellant's offer being unambiguously technically non-compliant as aforesaid.
10. The case law of the European Court of Justice is now clear that a contracting authority should request a clarification where it is clear that a bid requires mere clarification to correct obvious material errors.¹ But "where the contracting authority regards a tender as imprecise or as failing to meet the technical requirements of the tender specifications, it cannot require the tenderer to provide clarification".²
11. In this case there is no doubt that the bid of the Appellant fails to meet the requirements of the Tender Document for all the reasons given under the First Grievance above.

Third Grievance: The Tender Document and its Requirements were not clear

12. Contrary to what the Appellant is alleging in its objection, the Tender Document was very clear and reflected exactly what the Contracting Authority wanted. It is

¹ Judgment of 10 October 2013, Case C-336/12 Manova, EU:C:2013:647, para. 32.

² *Ibid.*, para. 31.

the Appellant who mixed up the Gantt Chart with the Work Plan and failed to adhere to the requirements of the same Tender Document, as explained under the First Grievance above, with the consequence that the Evaluation Committee deemed its offer as being technically non-compliant.

13. Without prejudice to the preceding paragraph, even if for the sake of the argument the Tender Document was not clear and/or ambiguous, then, Appellant should have sought a remedy in terms of Regulation 262(1)(d) of the Public Procurement Regulations (S.L. 601.03) before the deadline for the submission of tenders. The Court of Appeal has already held in several of its judgments that once tenders have been submitted and evaluated, tender terms can no longer be removed or corrected even if they are ambiguous. For example, in the case **Security Service Malta Limited v. Id-Direttur tal-Kuntratti et**³ the Court of Appeal held in paragraphs 16 and 17 that:

Jekk dan huwa minnu, ir-rimedju kellha tfittxu fiż-żmien li tagħti l-liġi, viz. qabel id-data tal-għeluq tas-sejha, tañt it-Taqsima IX tal-L.S. 601.003, Rimedji qabel id-Data tal-Għeluq tas-Sejha, u mhux timxi bħallikieku l-kondizzjoni minnha impunjata titqies li ma torbotx...

Ladarba l-appellanti ma fittxitx dan ir-rimedju fil-waqt li fih kellu jintalab, ma tistax tfittxu issa. Il-kondizzjonijiet tas-sejha, fosthom dawk dwar l-uniformi, huma dawk li huma, l-appellanti ex admissis ma farsithomx, ukoll wara li ngħatat opportunità tagħmel tajjeb għan-nuqqas, u għalhekk l-awtorità kontraenti ma setgħetx flief twarrab l-offerta.

14. Last but not least, the Contracting Authority treated all economic operators equally and without discrimination as prescribed in Regulation 39(1) of the Public Procurement Regulations (S.L. 601.03) and respected the doctrine of self-limitation which has the objective to enforce the principle of equal treatment, *inter alia*, in accordance with the aforementioned Regulation 39(1) so that all tender conditions apply to all bidders equally. In fact, the case law of the General Court of the Court of Justice of the European Union (CJEU) defines clearly that

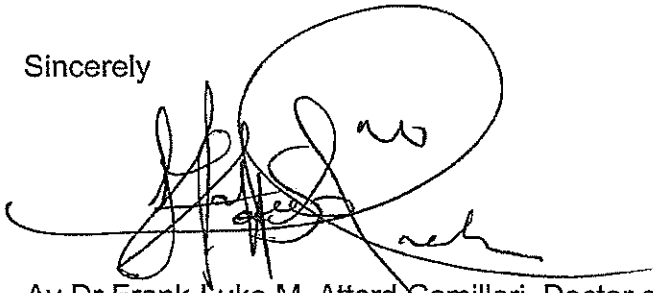
³ Court of Appeal, no. 105/2022, 22 June 2022.

the doctrine of self-limitation cannot be read without reference to the principle of equal treatment of economic operators:

It must be borne in mind at the outset that where, in the context of a call for tenders, the contracting authority defines the conditions which it intends to impose on tenderers, it places a limit on the exercise of its discretion and, moreover, cannot depart from the conditions which it has thus defined in regard to any of the tenderers without being in breach of the principle of equal treatment of candidates. It is therefore by reference to the principles of self-limitation and respect for equal treatment of candidates that the Court must interpret the tender specifications, for the purpose of establishing whether, as the applicant maintains, those specifications could permit the Joint Undertaking to accept the deviations.⁴

For all the reasons given above, all the three grievances of the Appellant should be rejected and the award decision confirmed and the relevant deposit to this appeal forfeited.

Sincerely

A handwritten signature in black ink, appearing to be 'Frank-Luke M. Attard', written over a large, light-colored circular stamp or watermark.

Av Dr Frank-Luke M. Attard Çamilleri, Doctor of Laws
Ministry for the Environment, Energy and Enterprise

⁴ Case T-415/10, *Nexans France v. European Joint Undertaking for ITER and the Development of Fusion Energy*, judgment of the 20th of March 2013, paragraph 80.