

PUBLIC CONTRACTS REVIEW BOARD

Case 1921 – CT2030/2023 – Outsourcing by the Internal Audit and Investigations Department (IAID) of Audits of (i) EU Funds, (ii) Funds Received Under Bi-Lateral Programmes, and (iii) EU Funds received under other EU Initiatives – Lot 2

12th October 2023

The Board,

Having noted the letter of objection filed by Mr Bernard Charles Gauci acting for and on behalf of KSi Malta, (hereinafter referred to as the appellant) filed on the 22nd September 2023;

Having also noted the letter of reply filed by Dr Daniel Inguanez on behalf of the State Advocate acting for and on behalf of the Internal Audit and Investigations Department within the Office of the Prime Minister (hereinafter referred to as the Contracting Authority) filed on the 2nd October 2023;

Having also noted the letter of reply filed by Dr Lorna Mifsud Cachia on behalf of Dingli & Dingli Law Firm acting for and on behalf of the Grant Thornton (hereinafter referred to as the Preferred Bidder) filed on the 2nd October 2023;

Having heard and evaluated the testimony of the witness Ms Erica Agius (Representative of KSi Malta) as summoned by Dr Daniel Inguanez acting for Internal Audit and Investigations Department within the Office of the Prime Minister;

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 9th October 2023 hereunder-reproduced;

Minutes

Case 1921 – CT 2030/2023 – Outsourcing by the Internal Audit and Investigations Department (IAID) of Audits of (i) EU Funds, (ii) Funds received under Bi-Lateral Programmes, and (iii) EU Funds received under other EU Initiatives

LOT 2

The tender was issued on the 12th May 2023 and the closing date was the 27th June 2023. The estimated value of this Lot, excluding VAT, was € 150,000.

On the 22nd September 2023 KSi Malta filed an appeal against the Internal Audit and Investigations Department, Office of the Prime Minister as the Contracting Authority objecting to their disqualification on the grounds that their offer was not technically compliant.

A deposit of € 750 was paid on this Lot.

There were seven bids on this Lot.

On the 9th October 2023 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Ms Stephanie Scicluna Laiviera as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – KSi Malta

Dr John Caruana	Legal Representative
Ms Erica Agius	Representative

Contracting Authority – Internal Audit and Investigations Department, OPM

Dr Daniel Inguanez	Legal Representative
Mr Roderick Vella	Chairperson Evaluation Committee
Ms Erica Gafa	Secretary Evaluation Committee
Ms Simone Sapiano	Evaluator
Ms Mariel Farrugia	Evaluator
Mr David McKeon	Evaluator
Ms Elaine Borg	Representative
Mr Stefano Manicolo	Representative

Preferred Bidder – Grant Thornton.

Dr Lorna Mifsud Cachia	Legal Representative
Mr Bernard Micallef	Representative
Dr Wayne Pisani	Representative
Mr George Vella	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 John Caruana Legal Representative for KSi Malta stated that their appeal followed their written submissions and concerned the fact that the firm was allowed to bid for three lots but when asked by the Authority it opted for Lot 2 and Lot 3. There was no conflict of interest as the key experts were different on all lots. He requested a witness be heard.

Ms Erica Agius (497590M) called to testify by the Appellant stated on oath that she was involved in the tender offer of KSi. She was not involved in the choice of options on the choice of bids.

This concluded the testimony.

Dr Caruana said that there was no bad faith in the selection of the lots chosen and a professional aspect was maintained in their work on the tender.

Dr Lorna Mifsud Cachia Legal Representative for Grant Thornton said that not following Public Procurement Regulations did not necessarily reflect bad faith. The fact is that the requirement to bid

for two lots was not followed. *Ab initio* the tender request was contravened. The role of the Evaluation Committee is to judge the submissions immaterial of what the ePPS accepted. Accepting of a clarification does not change the tender. Disadvantage to other bidders must not be created. The changes by Appellant demand that the appeal is not accepted.

Dr Daniel Inguanez Legal Representative for the Contracting Authority agreed with the submissions by Dr Mifsud Cachia. There is no allegation of bad faith. The ePPS is no guide to tender decisions - that role is reserved for the Evaluation Committee. Public Procurement Regulations and jurisprudence both demand that a bidder must be diligent and well-informed. The Authority issued a clarification but even after that it was clear that the Appellant was going to be advantaged as indicated in the reasoned letter of reply. The lots were substantially different and Lots 2 and 3 were advantageous to undertake. The offer was rendered non-compliant by submitting three bids initially.

The Chairman thanked the parties for their submissions and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 9th October 2023.

Having noted the objection filed by KSi Malta (hereinafter referred to as the Appellant) 22nd September 2023, refers to the claims made by the same Appellant with regards to the tender of reference CT2030/2030 – Lot 2 listed as case No. 1921 in the records of the Public Contracts Review Board.

Appearing for the Appellant:	Dr John Caruana
Appearing for the Contracting Authority:	Dr Daniel Inguanez
Appearing for the Department of Contracts:	Dr Mark Anthony Debono
Appearing for the Preferred Bidder:	Dr Lorna Mifsud Cachia

Whereby, the Appellant contends that:

- a) Choice of Lots -

Article 3.1 of Section 1 of the Tender Document entitled 'Instructions to Tenderers' had contained the following provision: *“Tenderers may submit a tender for several lots (one or more lots up to a total of 2 lots in all between Lot 1, Lot 2 and Lot 3). Hence, bidders may bid for a total of 3 Lots in all. This is aimed at mitigating against any potential issues of conflict of interest. In such case, it must be ensured that the objectives listed*

in section 2.1 of the Terms of Reference, are adhered to. In particular, those relating to the minimum number of Key Experts per Lot (as per key expert requirements), who need to be different for each Lot, since audit work on Lots 1, 2, and 3 will be carried out concurrently most of the time.”

A clarification was issued by the Evaluation Committee on 3rd August 2023, stating that the conditions of the e-PPS Core Information were not in line with the published conditions laid out in Article 3.1, Section 1 of the Tender Document.

KSİ Malta replied to the Evaluation Committee on 7th August 2023, declaring that Lot 2 and Lot 3 will be referred for evaluation, thus, complying with the tender document requirements that a firm can bid for a total of two lots from Lot 1, Lot 2 and Lot 3. Lot 4 was also listed, however, as per the Tender Document, this lot was separate from Lots 1 to Lot 3; thus, it was included for the sake of certainty in order so that the Contracting Authority would be fully appraised that Lot 4 shall be chosen.

As per the rejection letter entitled 'KSİ Malta TID 194984' the Firm was still deemed as non-compliant in view that the Firm submitted 3 lots instead of the allowable 2 lots as per Section 1, Article 3.1 of the Tender Document. The basis for such decision was however unjust and unfounded as KSİ Malta adhered to the Evaluation Committee's request and chose two lots accordingly.

b) Allocated Key Experts for Lot 4 -

Originally, whilst submitting the tender, we had chosen all four Lots. As per the above, after receiving the first clarification on the matter, we had clarified to the Evaluation Committee that we were choosing Lot 2 and Lot 3. Lot 4 was also chosen, because as clarified already, as it was entirely KSİ Malta's discretion to do so.

In this regard, a second clarification was issued by the Evaluation Committee on 22nd August 2023, with regards to the CVs which had been originally submitted for Key Experts allocated to Lot 4.

Given that Lot 1 was dropped, the Firm decided to shift the Key Experts which had been allocated to Lot 1 to Lot 4, as was its right to do so. No potential issues of conflict of interest can arise from such a decision given that such Key Experts were allocated solely for Lot 4. Thus, the Firm decided to submit an updated key expert form for Lot 4, wherein the Key Experts put forward for this engagement form part of the Firm's team, together with all the relevant supporting documentation, more specifically the key experts' CVs and qualifications.

For the avoidance of doubt, notwithstanding the fact that all Key Experts put forward for Lot 2, Lot 3 and Lot 4 are employees of KSİ Malta, a chosen employee proposed as a Key Expert was never allocated for more than one chosen Lot. Given that the Tender Document's requirement for

different Key Experts for each chosen Lot was adhered to, the decision of the Department of Contracts that the Firm was non-compliant was once again unjust and unfounded.

The sequence of events was therefore as follows:

- i. KSi Malta applied for the 3 lots in Section 1, being Lot 1, Lot 2 and Lot 3.
- ii. In addition, and separately, the Firm applied for Lot 4, which was in line with the tender document and at the discretion of the applicant.
- iii. The evaluation committee sought clarification and asked KSi Malta to specify which two of Lots 1, 2 and 3 will go for evaluation.
- iv. KSi Malta replied and sent Lot 2 and Lot 3 for evaluation. It also informed the committee that it had applied, separately and in its own right, for Lot 4.
- v. The evaluation committee not only answered, but also confirmed we are able to shift experts between lots.
- vi. KSi Malta receives rejection letter as it applied for 3 lots. The 3 lots in question were Lot 2, 3 and 4. Lot 4 did not have any impediments and was separate from Section 1. ^[1]Section 1 lots applied to post-clarification where Lot 2 and Lot 3, and therefore we were in line with the application requirements.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 2nd October 2023 and its verbal submission during the hearing held on 9th October 2023, in that:

- a) First ground of appeal: compliance with Art. 3.1 of the Tender Document -

That Art. 3.1 of the Tender Document prohibited the submission of more than two bids for Lots 1, 2, and 3 cannot be contested. At the outset, then, the Appellant's choice to bid for all three Lots irrespective of this tender condition is problematic. Nevertheless, seeking to respect the principle of proportionality, the Respondent issued a request for clarification rather than outright reject the bidder. The request for clarification in no way meant that the Respondent took any commitment to accept the Appellant's bid.

Firstly, the letter of request for clarification clearly expressly indicates that: *"This clarification/rectification opportunity is being sent without any commitment whatsoever on the part of the Contracting Authority, and does not imply that your offer will be accepted as it may still be deemed administratively, technically or financially non-compliant the evaluation process."*

Moreover, clarifications are intended to help an Evaluation Committee to make a more comprehensive evaluation of the bids rather than risking excluding a bid for merely obvious errors which have no consequence on the adjudication of the bids. After all, the case law of the European Court of Justice (ECJ) has always held that public procurement law does not preclude the correction or amplification of bids when *"they require mere clarification, or to correct obvious material errors,*

provided that such amendment does not in reality lead to the submission of a new tender." (Case C-599/10, SAG ELV Slovensko, 29 March 2012, EU:C:2012:191, para. 40).

Having evaluated the Appellant's bid, subsequently to the clarification request and response, it resulted that to allow the Appellant to choose two (2) from his three (3) submitted bids would distort competition in the procurement procedure.

In terms of Reg. 110(1) of the Public Procurement Regulations: *"Tenders shall be opened in public by two officers of the contracting authority. The names of the bidders and the prices quoted shall also be made public either through government's e-procurement platform or on the notice board at the contracting authority's premises."*

The tenders were opened according to the Regulations prior to the evaluation stage. Allowing the Appellant to choose his cheapest winning offer, knowing the prices quoted by the other bidders, would have distorted competition. And this to the detriment of the other bidders who, at the outset, submitted just two (2) bids amongst Lots 1, 2 and 3, the maximum allowed in the Tender Document.

b) Second ground of appeal: clarifications -

The second ground of appeal relates to the evaluation of Lot 4 rather than the evaluation of the Lot here at issue. This ground of appeal seems to be challenging the clarification request issued with respect to the nominated Key Experts for Lot 4. Being a separate Lot, this issue cannot be the subject of an appeal under Lots 2 or 3. In any case, the Respondent has evaluated the Appellant's bid in Lot 4 with the Key Experts initially nominated for Lot 1 as indicated in its reply to the second clarification request.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 2nd October 2023 and its verbal submission during the hearing held on 9th October 2023, in that:

a) Choice of Lots -

From the appeal application itself and from the evidence adduced thereto, it is incontrovertible that Appellants had submitted its tender offer for the three lots (i.e. Lot 1, Lot 2 and Lot 3) and, furthermore for Lot 4. The tender document itself made it very clear in Article 3.1. of Section 1 "Instructions to Tenderers" that *"Tenderers may submit a tender for several lots (one or more lots up to a total of 2 lots in all between Lot 1, Lot 2 and Lot 3)"*. That no bidder could tender for more than two lots for Lot 1, Lot 2 and Lot 3 was clear as day and unequivocal. Yet, Appellants decided to submit their tender offers for Lot 1, Lot 2 and Lot 3 and this in full violation of article 3.1 of Section 1. Appellants argue in their application that the Evaluation Committee gave them the opportunity to rectify or clarify their position in that they had submitted a bid for three (3) lots, that is, for Lot 1, Lot 2 and Lot 3 and, in so doing, therefore, their original position of non-compliance of their submission was "sanitised"

This argument is very dangerous and indeed, is the very thin end of the wedge. The problem with this argument is that it is not supported by case-law at all. The fact that a contracting authority gives a tenderer the opportunity to clarify its position does not mean that the "clarified position" renders valid a bid. The "clarified position" may render the position murkier or may create an opportunity of uneven playing field for all tenderers.

The case-law on requesting clarifications is varied and is based on the principle of proportionality. The principle of proportionality is also a crucial principle of Maltese and EU Public Procurement Law. The CJEU has, over the years, accepted that contracting authorities 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 (then) EU Public Procurement acquis. Indeed, 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 bids submitted in public procurement procedures. This judgment followed the *Slovensko* judgment which made it clear that Contracting Authorities may request for clarifications following the submission of a bid. The key factor, however, and the common thread running through all the CJEU decisions is that these enunciations are only valid 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 made it clear that all decisions relating to the request of clarifications and formal requirements were dispensable only as long - and subject to the express condition - that the principle of equal treatment and transparency were safeguarded.

The fact that the evaluation committee requested a clarification does not mean that if the operator is given any form of advantage over the others, the evaluation committee does not take this fact into consideration.

In this case, the request for clarification from the evaluation committee had two clear consequences:-i) Appellants could choose which lots to tender for - even with respect to price and thus give Appellants visibility of the other tenderers' prices and to choose, therefore, strategically which Lots to insist upon. Indeed, in this case, one of the Lots which Appellants went for was Lot 3, which Lot had far fewer bidders than Lot 1 and Lot 2; and ii) clearly also it gave Appellants the change to shift key experts from Lot 1 to Lot 4 - which was also an advantage to the detriment of (potentially) other tenderers because other tenderers who abided by the conditions of Article 3.1. of Section 1 did not have the "luxury" of swapping experts if the original experts submitted by them were to be found insufficient or not adequate.

It is clear, therefore, that the evaluation committee determined - very rightly - that the request for clarification made by it has resulted in an unfair advantage for the Appellants, an unfair disadvantage for the other tenderers or both and hence, it felt that it could not justify, on the basis of law and case-law, the infraction of the rule contained in Article 3.1. in Section 1.

Respondents submit that submitting three lots in Lot 1, Lot 2 and Lot 3 by Appellants could have very well been a strategy to further then strategize the choice of which lots to submit for evaluation when the prices are revealed.

b) Allocated Key Experts for Lot 4 -

It is submitted that the decision of the Evaluation Committee to disqualify Appellants from Lot 2 was also justified in the light of the fact that the tenderer had to shift key experts from one Lot to the other to be fully compliant with the tender requirements. The original aim of the tender was there to be total independence and no potential issues of conflict of interest. It was clear. However, in submitting a bid for all the three lots, Appellants could no longer guarantee that there be no conflict of interest. Irrespective of any submission they make in this regard, the point of fact remains that in matters of conflict of interest, the main point one has to bear in mind is not whether there is conflict of interest, but whether there is the potentiality of the conflict of interest and whether there is also the possibility of conflict of interest in the submitted bid. Whilst Respondents have no visibility of the key experts submitted for Lot 2, it is manifestly clear that, whichever key experts so submitted, they were submitted in a bid which was not compliant with the stipulation of Article 3.1. of Section 3. Strategising in bidding is obviously part of the process but strategising by flagrantly violating the rules should not be encouraged because it distorts the free competition process which should give level "racetrack and racing conditions" for all.

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 witness duly summoned, will consider now Appellant's grievances.

a) 1st grievance - Choice of Lots –

- i. At the outset this Board agrees with the Contracting Authority that both the regulations and jurisprudence demand that a bidder is to be assumed to behave as a 'reasonably well informed and diligent tenderer'. This has been discussed and documented in numerous cases.
- ii. Therefore it must be noted that *ab initio*, the appellant failed to meet the requirements of Article 3.1 of Section 1 of the Tender Document which states that "*Tenderers may submit a tender for several lots (one or more lots up to a total of 2 lots in all between Lot 1, Lot 2 and Lot 3).....*", when it bid for all the lots in the tender process. This certainly was not adhered to and it cannot be argued that the tender dossier was somewhat ambiguous in its drafting. Article 3.1 of Section 1 of the Tender Document was very clear in what it required.

- iii. Following the clarification request, the bid for Lot 1 was dropped and therefore the appellant is arguing that its bid should now be deemed as administratively and technically compliant.
- iv. What is deemed relevant to make a final decision is to analyse whether A) competition was indeed distorted and / or B) a same level playing field kept or otherwise.
- v. As per the chronological events, the appellant renounced to its bid of Lot 1 **only after** the number of bidders for each lot were known and also their respective financial bids were published.
- vi. It must therefore be stated that the appellant had the benefit of hindsight. This certainly created a situation of distortion of competition, the principle of same level playing field was not kept and it can also be argued that the offer of the appellant was hence materially changed. These are all matters / issues that are not acceptable within the realm of public procurement.

Therefore this Board does not uphold this grievance of the Appellant.

b) 2nd grievance - Allocated Key Experts for Lot 4 –

- i. It is to be noted that both the letter of appeal as well as the deposit paid by the appellant referred to Lot 2.
- ii. The grievance, as written by the appellant, makes reference to Key Experts initially submitted for Lot 1 and later transferred to Lot 4.
- iii. It is also to be noted that Lot 4 was awarded to the same appellant.
- iv. Hence this Board deems this grievance as being irrelevant to proceedings and will not consider it further.

The Board,

Having evaluated all the above and based on the above considerations, concludes and decides in relation to Lot 2:

- 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 Grant Thornton,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Dr Charles Cassar
Member

Ms Stephanie Scicluna Laiviera
Member