

# **PUBLIC CONTRACTS REVIEW BOARD**

## **Case 1922 – 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 3**

**12<sup>th</sup> 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 22<sup>nd</sup> 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 (IAID) within the Office of the Prime Minister (hereinafter referred to as the Contracting Authority) filed on the 2<sup>nd</sup> October 2023;

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 9<sup>th</sup> October 2023 hereunder-reproduced;

### **Minutes**

**Case 1922 – 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 3**

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

On the 22<sup>nd</sup> 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 three bids on this Lot.

On the 9<sup>th</sup> 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 Investigation 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

**Preferred Bidder – RSM Malta.**

Ms Miriam Filletti	Representative
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**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 said that it appeared to Appellants that the tender allowed submission of bids on four lots but subsequently they opted for Lots 2 and 3. There was no bad faith in this matter.

Dr Daniel Inguanez Legal Representative for the Contracting Authority stated that there was no claim of bad faith. Appellant was excluded as tenderers had to submit bids for only two lots. The ePPS is not there to check bids – this is the role of the Evaluation Committee. KSi requested to clarify their bid but it was obvious they would be disadvantaged by this as they were aware of all offers at this stage. It is necessary to make sure that competitiveness is maintained. Lots had different advantageous aspects. The rule of a tenderer being well informed and diligent has to be observed. CJEU Case 19/00 confirmed the directive that a tenderer must be fully aware of the tender conditions.

There being no further submissions the Chairman thanked the parties and declared the hearing closed.

End of Minutes

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**Hereby resolves:**

The Board refers to the minutes of the Board sitting of the 9<sup>th</sup> October 2023.

Having noted the objection filed by KSi Malta (hereinafter referred to as the Appellant) 22<sup>nd</sup> September 2023, refers to the claims made by the same Appellant with regards to the tender of reference CT2030/2030 – Lot 3 listed as case No. 1922 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:	Ms Miriam Filletti

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.

KSi 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 'KSi 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 KSi 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 KSi 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 KSi 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. <sup>[1]</sup>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 2<sup>nd</sup> October 2023 and its verbal submission during the hearing held on 9<sup>th</sup> 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, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties will consider now Appellant's grievances.

a) 1<sup>st</sup> 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) 2<sup>nd</sup> 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 3.
- 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 3:

- 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 RSM Malta,
- 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**