

PUBLIC CONTRACTS REVIEW BOARD

Case 1924 – 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 4

12th October 2023

The Board,

Having noted the letter of objection filed by Dr Robert Spiteri acting for and on behalf of PKF Malta Limited, (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 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 10th October 2023 hereunder-reproduced;

Minutes

Case 1924 – 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 4

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 € 187,500.

On the 22nd September 2023 PKF Malta Ltd filed an appeal against the Internal Audit and Investigations Department, Office of the Prime Minister as the Contracting Authority on the grounds that it has been prejudiced by the Authority's decision.

A deposit of € 937.50 was paid on this Lot.

There were five bids on this Lot.

On the 10th 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 – PKF Malta Ltd

Dr Carlos Bugeja	Legal Representative
Mr George Mangion	Representative
Dr Robert Spiteri	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
Mr Stefano Manicolo	Representative

Preferred Bidder – KSi Malta.

Dr John Caruana	Legal Representative
Ms Jessica Camilleri	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 Carlos Bugeja Legal Representative for PKF Malta Ltd said that the preferred bidder had bid for all four lots, had been disqualified on lots 1 to 3 and awarded Lot 4. Clause 3.1 in the tender was meant to open competition allowing bidders to bid for not more than three lots and once the preferred bid exceeded this it had contravened the tender terms. It was a mistake on the part of the Evaluation Committee not to disqualify it. This was a matter of law and not of interpretation citing Public Procurement Regulation 187(2) on tenders considered irregular. This bid is irregular and should have been disqualified.

Dr Daniel Inguanez Legal Representative for the Contracting Authority said that Clause 3.1 is very clear that a maximum bid of two out of three lots were allowed with Lot 4 being separate. The Authority was cautious in its approach and considered the bids separately since although this was one tender it had separate lots. The Evaluation Committee did not reject the bids outright but asked KSi what bids it wanted to retain. There would have been distortion of competition if any of the bids 1 to 3 had been awarded to them but not in Lot 4 which was separate. This was following the principle of proportionality citing CJEU Case 599/10 directing that a clarification should be sought to avoid having to publish a new tender and again CJEU Case 131/16 directing clarification to treat bidders equally. Unlike Lot 1 to 3, Lot 4 did not distort competition.

Ms Jessica Camilleri Representative for KSi Malta said that the system allowed submissions for all lots using the specific word 'may' and the position was not absolute. Lot 4 was separate and was so evaluated.

Dr Debono Legal Representative for the Department of Contracts said that the tender does not eliminate any bidder from submitting offers for any of the lots. In this case only Lot 4 is being contested and any other lots are not relevant to this hearing.

Dr Bugeja whilst pointing out that the word 'may' applies to the whole submission said that Clause 3.1 was not intended to mean that one could bid for all bids and hope for the best.

Dr Inguanez noted that Article 3.1 had been broken whether the word was 'may' or 'shall'.

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 10th October 2023.

Having noted the objection filed by PKF Malta Limited (hereinafter referred to as the Appellant) on 22nd September 2023, refers to the claims made by the same Appellant with regards to the tender of reference CT2030/2030 – Lot 4 listed as case No. 1924 in the records of the Public Contracts Review Board.

Appearing for the Appellant:	Dr Carlos Bugeja
Appearing for the Contracting Authority:	Dr Daniel Inguanez
Appearing for the Department of Contracts:	Dr Mark Anthony Debono
Appearing for the Preferred Bidder:	Ms Jessica Camilleri

Whereby, the Appellant contends that:

- a) Article 3.1 of the Tender document 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). Hence, bidders may bid for a total of 3 Lots in all.*"
- b) KSI Malta tendered for Lots 1, 2, 3, and 4 of the Tender, in breach of the above condition. This breach should have therefore disqualified KSI Malta from the bidding process *in toto* thereby nullifying its bids for all the 4 Lots of the Tender. KSI Malta was however awarded Lot 4 of the tender since it submitted the cheapest bid price and this to the detriment of the Complainant, which submitted the second cheapest bid price. The Complainant has therefore been prejudiced

by this decision since it would have been awarded Lot 4 of the tender had KSI Malta been rightly disqualified.

- c) The Department of Contracts should have instead decided, as it did for Lots 1, 2 and 3, where even though KSI Malta submitted the cheapest bid price, the second cheapest bidder for each lot was awarded the relative lot. Inversely, if the Department of Contracts did not deem KSI Malta's action to be a breach of the Tender conditions, then the Department of Contracts has prejudiced KSI Malta by not also awarding it Lots 1, 2 and 3 of the Tender.

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 10th October 2023, in that:

- a) It was clear in the Tender Document that whereas Lots 1, 2 and 3 would be evaluated jointly, the bids for Lot 4 would be evaluated separately.
- b) The general rule is that Lots are treated as distinct and separate procurement processes, with separate bids. Bids for different Lots may only be combined, according to Reg. 37 of the Public Procurement Regulations, where this possibility has been specified in the initial Tender Document: *"contracting authorities may award contracts combining several or all lots where they have specified in the contract notice or in the invitation to confirm interest that they reserve the possibility of doing so and indicate the lots or groups of lots that may be combined."*
- c) No such specification was made in the Tender Document. Therefore, Lot 4 is to be considered as a strictly separate and distinct lot from the other lots.
- d) This Honourable Board has also held that the evaluation of distinct lots should be carried out independently of the evaluation into the other lots: *"This Board opines that the two (2) separate and distinct lots, being the subject matter of the tender procedure, were to be evaluated independently of one another. In the Board's opinion, if the Evaluation Committee were to proceed as is being invited by the Appellant, this would have given rise to a clear case of breach of the principle of self-limitation which is imposed on Evaluation Committees."* (Case 1849 - SPD8/2022/107 - Supplies - Framework Contract for the Supply and Delivery of Laboratory Kits in Two (2) Lots - Lot 2, 28 February 2023, page 9). It follows that, treating Lot 4 separately from Lots 1-3, non-compliance with a condition applicable to Lots 1-3 should not bring about the exclusion from Lot 4.

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) Appellant bases his whole argument on article 3.1 of section 1 of the Tender Document whereby accordingly to his interpretation, since the tender stated *"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.....” and the recommended bidder submitted bids for all the four (4) lots, then all the bids submitted by the preferred bidder should have been deemed as non-compliant.

- b) It is however noted that nowhere in the tender document does it state that if an economic operator bids for all the four (4) lots, then his bids are to be deemed all as non-compliant. Hence, it is the opinion of this Board that further analyses is required to assess the actions and decisions taken by the Evaluation Committee.
- c) Even though the recommended bidder, *ab initio*, failed to meet the requirements of Article 3.1 of Section 1 of the Tender Document, as has been argued in PCRB cases 1921 and 1922 what needs to be analysed is whether A) competition was indeed distorted and / or B) a same level playing field kept or otherwise, when the evaluation committee deemed the bid for lot 4 as compliant.
- d) With specific reference to Lot 4, nowhere did the preferred bidder obtain a competitive advantage when they renounced their bid of Lot 1. Therefore, competition has not been distorted and the same level playing was kept between all economic operators.
- e) Therefore, it is the opinion of this Board that the Evaluation Committee correctly utilised the principle of proportionality and the tools available to them (clarification request issued to the preferred bidder on lots bid) when they deemed the preferred bidder’s lot 4 bid a compliant.

Hence this Board does not uphold the grievances of the appellant.

The Board,

Having evaluated all the above and based on the above considerations, concludes and decides in relation to Lot 4:

- 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 KSi 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