



26th October, 2023

Chairman
Public Contracts Review Board
Notre Dame Ditch
Floriana, FRN 1601

Dear Sir,

Re: Tender in Lots for the Provision of Group Life and Health Insurance Policies for the Malta Enterprise and its Subsidiaries - SPD7/2022/082 - Lot 1 - Group Life Insurance

By means of this present we are hereby filing the Reasoned Letter of Reply for and on behalf of the Malta Enterprise, as the contracting authority publishing the captioned tender (hereinafter referred to as the '**Contracting Authority**'), with reference and in response to the letter filed on the 19th of October, 2023 (hereinafter referred to as the '**Objection Letter**') by AIB Insurance Brokers Limited (hereinafter referred to as the '**Appellant**') in relation to the captioned tender.

By means of the Objection Letter the Appellant contested the reason for rejection, by claiming that the information which was missing in the Technical Questionnaire should not have led to the disqualification from the tender process but could have been solved by means of a clarification.

The Contracting Authority humbly submits the following:

1. The Technical Questionnaire forming part of the Tenderer's Technical Offer, in section 3, Article 4.2 clearly provided that economic operators were to provide whether there is an "Agreement to Terms of Reference **and** insert reference in technical literature where item specification may be found and verified (clearly reference where the information is to be found e.g. page

number, section etc)". Thus it is evidently clear that the Contracting Authority, in this section was not simply requesting whether there was an agreement with the terms of reference but also a clear reference where this may be found in technical literature.

2. The Appellant, *ex admissis*, failed to indicate in clear terms the reference where the documentation requested may be found in the policy / literature list. On the basis of this, the Contracting Authority proceeded to reject the offer made by the Appellant on the basis that it is not technically compliant. The reason provided was as follows: "*EO had to give reference in Technical Offer to demonstrate where it is found in policy / literature list but failed to do so. EO did not include reference in literature where item is to be found. Hence, offer was deemed Technically Not Compliant and cannot be considered further*".
3. It is pertinent to note that the Technical Offer forming part of the tender is subject to the conditions imposed under Note 3. This derives from the following:

- a. Clause 5(C) of the Instructions to Tenderers (Section 1) states that:

C) Specifications

(i) Tenderers Technical Offer in response to specifications to be submitted online through the prescribed Tender Response Format and by using the Tender Preparation Tool provided. (Note 3)

The Technical offer shall consist of the following for both lots:

- 1. Technical Questionnaire*
- 2. GDPR Questionnaire*
- 3. Declaration*

- b. The Technical Questionnaire which is the merit of this appeal, is included as forming part of the Technical Offer and thus subject to Note 3. The Technical Questionnaire then states that *"N.B. The Key Experts Form, the Statement of Availability Form, the Self-Declaration form for Key Experts (relating to public employees) and CVs & Literature are subject to Note 2. Any other components of the technical offer are under Note 3."* It is evident therefore that Section 3: Terms of Reference – Article 4.2: Specific Activities is subject to Note 3.
4. Now that this is established, it is pertinent to identify the implications and limitations of Note 3. The Notes to Clause 5 – Note 3 – state *"No rectifications shall be allowed. Only clarifications on the submitted information may be requested. Tenders will be requested to clarify the submitted information within five (5) working days from notification."*
5. It is being submitted that the Contracting Authority would have been completely out of order and in utmost discrimination with the other bidders should it have requested such clarification as is being suggested by the Appellant. The ultimate question which the Board needs to address is whether the answer to any such clarification would have led to an amendment or rectification of the offer. The answer for that is evidently in the affirmative since the second column of the Technical Questionnaire would have to be rectified in order to reflect that which was being requested by the tender documents. Thus the request for clarification by the Contracting Authority and the reply by the economic operator would have led to a situation which is prohibited by Note 3 in stating that **"No rectifications shall be allowed."** The second limb of the Note 3 states that *"Only clarifications on the **submitted information** may be requested"*. Thus the intention of this part of the note is to refer to situations where information is submitted but such information is not clear enough. However this is not reflective of the situation at issue, since the Appellant **did not submit any information**

whatsoever in relation to the “reference where item specification may be found and verified ...”.

6. It is being submitted that it is the obligation of the offerors to submit an offer which is clear and complete. Reference is made to section 5.3 of the General Rules Governing Tenders which states *“The Economic Operator must provide all information and documents required by the provisions of the procurement document. All such documents, without exception, must comply strictly with these conditions and provisions and contain no alterations made by the tenderer.”* It is thus the primary obligation of the economic operators to submit **all** information requested in the tender documents.
7. On a secondary note, it is not the duty of the Contracting Authority to fetch documentation which is not clearly present in the tender offer. The presumption is that an economic operator submits an offer which is clear and complete. The Contracting Authority should not be blamed for the negligence of the bidders. In this regard reference is made to the judgment delivered by the Court of Justice of the European Union with reference number C-599/10 **SAG ELV Slovensko a.s. and others vs Urad pre verejne obstaravnje** published on the 29th of March 2012 where it was stated:

*“In any event, it does not follow from Article 2 or from any other provision of Directive 2004/18, or from the principle of equal treatment or the obligation of transparency, that, in such a situation, the contracting authority is obliged to contact the tenderers concerned. **Those tenderers cannot, moreover, complain that there is no such obligation on the contracting authority since the lack of clarity of their tender is attributable solely to their failure to exercise due diligence in the drafting of their tender, to which they, like other tenderers, are subject.**”*

8. The Contracting Authority submits that the principles of proportionality, transparency, equal treatment and non-discrimination are of great relevance

to the case at issue. It is pertinent to note that the principle of proportionality would be severely prejudiced should it be expected that a Contracting Authority requests clarifications where this is not permitted and cannot lead to a rectification. Moreover, reference is made to judgment delivered by the Court of Justice of the European Union on the 10th of October 2013 in the names of **Ministeriet for Forskning, Innovation og Videregaende Uddannelser vs Manova A/S** where it was stated "*Lastly, as a general rule, when exercising its right to ask a tenderer to clarify its tender, the contracting authority **must treat tenderers equally and fairly**, in such a way that a request for clarification does not appear unduly to have favoured or disadvantaged the tenderer or tenderers to which the request was addressed, once the procedure for selection of tenders has been completed and in the light of its outcome*".

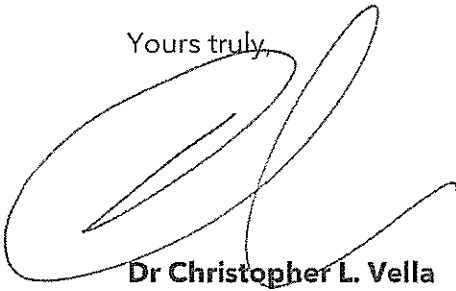
9. In view of this it is being submitted that the Contracting Authority would have been in breach of the principle of equal treatment between all bidders should it have proceeded to request clarifications and permitted rectifications from the Appellant in order to address the shortcomings found in the Technical Questionnaire.

10. It is being submitted that whether an offer is the cheapest priced offer has no relevance whatsoever on the administrative and technical compliance of the same offer. The first test that offers are expected to pass is whether an offer is administratively and technically compliant. A failure to pass from such test renders the offer without further consideration and therefore its financial implications are not even considered. Thus any implied comment that the Contracting Authority should have taken into consideration the fact that the Appellant's offer was a cheaper offer than the winning bid or that its exclusion had a "*detriment on the public coffers*" is largely immaterial.

On the basis of the foregoing, my client contends that the Public Contracts Review Board should find against the appellant and confirm the decision of the Contracting Authority.

Whilst thanking you for your kind attention, I remain,

Yours truly,



Dr Christopher L. Vella

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