

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1934 – SPD1/2023/010 – Service - Framework Contract for the Provision of Internal Audit to Jobsplus**

**7<sup>th</sup> November 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 20<sup>th</sup> September 2023;

Having also noted the letter of reply filed by Dr Dennis Zammit acting for the Jobsplus (hereinafter referred to as the Contracting Authority) filed on the 29<sup>th</sup> September 2023;

Having heard and evaluated the testimony of the witness Mr Martin Spiteri (Representative of the Accountancy Board) as summoned by Dr Peter Fenech acting for KSi Malta;

Having heard and evaluated the testimony of the witness Mr Bernard Gauci (Representative of KSi Malta) as summoned by Dr Peter Fenech acting for KSi Malta;

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 31<sup>st</sup> October 2023 hereunder-reproduced;

#### **Minutes**

#### **Case 1934 – SPD1/2023/010 – Service – Framework Contract for the Provision of Internal Audit to Jobsplus**

The tender was issued on the 24<sup>th</sup> March 2023 and the closing date was the 8<sup>th</sup> May 2023. The estimated value of this tender, excluding VAT, was € 70,000.

On the 20<sup>th</sup> September 2023 KSi Malta filed an appeal against Jobsplus as the Contracting Authority objecting to their disqualification on the grounds that their bid was deemed to be technically not compliant.

A deposit of € 400 was paid.

There were seven bids.

On the 31<sup>st</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 virtual public hearing to consider the appeal.

The attendance for this public hearing was as follows:

### **Appellant – KSi Malta**

Dr Peter Fenech  
Mr Bernard Gauci

Legal Representative  
Representative

### **Contracting Authority – Jobsplus**

Dr Dennis Zammit  
Mr Felix Borg  
Mr Christopher Micallef  
Ms Graziella Caruana  
Ms Mathea Formosa Gauci

Legal Representative  
Chairperson Evaluation Committee  
Evaluator  
Evaluator  
Representative

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Peter Fenech Legal Representative for KSi Malta said that this appeal arose out of the letter of rectification regarding the lack of a valid warrant certificate on the part of Appellants to act as auditors. The Appellant is a partnership and therefore there is no such certificate. It was explained to them that the Accountancy Board does not issue such a certificate and were told to refer the Authority to their registration on the website. This was not accepted by the Authority. In the end what was requested was provided and that is the issue of this appeal.

Dr Dennis Zammit Legal Representative for Jobsplus said that the tender request was specific. The Evaluation Committee could only accept either option 1 or 2 from the Selection Requirements. KSi provided a screens shot from the Accountancy Board site – this was not what was requested. A letter from the Accountancy Board was presented by the Appellant stating that KSi were registered as auditors. This was presented at the appeal stage. KSi appear to have kept on hanging to the individual option when they were a partnership.

Mr Martin Spiteri (321461M) called to testify by the Appellant explained on oath the process of registering with the Accountancy Board and how one can apply for a certificate in Auditing, Certified Public Accountant or both. Once the legal criteria, as laid down in the Accountancy Professional Act are met, one is registered in the records and a warrant holder certificate issued. The registration is then recorded on the online register for public use. A practising auditor is awarded a certificate – if this happens to be mislaid a certified true copy of the certificate is issued. Witness confirmed the issue of a letter dated 13<sup>th</sup> September confirming what is recorded in the file and that KSi have been registered since 1984 as recorded by their registration number.

In reply to a question from Dr Zammit, witness stated that the first communication from KSi requested a certificate and were advised that this is not issued; subsequently the letter of 13<sup>th</sup> September was issued.

Mr Bernard Gauci (401292M) called to testify by the Appellant stated on oath that the tender offered two options which stated what was required. He phoned the Accountancy Board and asked for a warrant certificate but was advised that this was not issued and instead was referred to the register and advised to submit a copy of its registration as confirmation. After this was rejected KSi asked the Accountancy Board for a formal letter of confirmation of their registration- the final objective of proving registration was achieved.

This concluded the testimonies.

Dr Fenech said that the appeal wants essentially to follow the spirit of the tender which is to prove that Appellant is properly registered. Appellant provided an extract of the register with a declaration of registration to strengthen their case. The spirit of the clause in the tender was to prove that a bidder was competent and authorised and based on the proof that it was registered it cannot be declared to be non-compliant.

Dr Zammit stated that the Authority has no doubts about the declaration of the 13<sup>th</sup> September. However, this was submitted with the appeal when the Evaluation Committee could do nothing about it as it was late. The tender did not ask for verification from the register but a clarification from the bidder – even if the evaluators had knowledge that KSi was registered they could not accept that without proof and this was not met till after the close of the evaluation.

Dr Fenech said that proof has been provided that KSi is certified and has a valid registration and hence subparagraph 2 of the tender has been satisfied despite the misunderstanding referred to by Mr Gauci in his testimony.

Dr Zammit said that if there was a misunderstanding between KSi and the Accountancy Board the Authority was not to blame. There is no doubt that KSi is registered but the fact is that the proof was not provided on time.

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 31<sup>st</sup> October 2023.

Having noted the objection filed by KSi Malta (hereinafter referred to as the Appellant) on the 20<sup>th</sup> September 2023, refers to the claims made by the same Appellant with regards to the tender of reference SPD1/2023/010 listed as case No. 1934 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Peter Fenech

Appearing for the Contracting Authority: Dr Dennis Zammit

Whereby, the Appellant contends that:

a) **Submission of Warrant and/or Certificate of Auditing Firm -**

A clarification was issued to KSi Malta to submit a copy of a valid Company Registration Certificate and/or Warrant Certificate to operate as an Auditor issued under the Accountancy Professional Act (Cap. 281 of the Laws of Malta) and to also provide the Malta Accountancy Board Registration

Number. Upon receipt of the clarification request, KSi Malta contacted the Accountancy Board to seek the requested documentation and we were informed that the requested certificates are not available for firms. The Accountancy Board makes available, at all times, an official register online of registered audit firm, and that this is to be used as official proof of authorisation. Therefore, the registration number available on the Accountancy Board's website suffices as proof of our Firm's registration status as an audit firm. Consequently, we, as the Firm, responded to the clarification received by submitting KSi Malta's firm registration number from the Accountancy Board portal, as well as an extract from the official online register that can be found at <https://accountancyboard.gov.mt/Registers/RegisteredAuditFirmsPrincipals.aspx>. With reference to the rejection letter received by the Firm from the Department of Contracts dated 12th September 2023, bearing reference number 'TID 191962 KSi Malta', the abovementioned document uploaded by the Firm to rectify KSi Malta's position was still found to be non-compliant.

**b) Declaration by the Malta Accountancy Board -**

In our earnest efforts to comply with the tender requirements, we have sought a declaration from the Accountancy Board, affirming the Firm's status as a duly registered Accounting and Audit Firm in accordance with the Accountancy Professional Act (Cap. 281 of the Laws of Malta). Again, the Accountancy Board of Malta confirmed that there is no "warrant certificate" available for firms and that we should direct the Public Contracts Review Board to their official online register. We continued to insist on a document, and they provided a confirmation letter.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 29th September 2023 and its verbal submission during the virtual hearing held on 31<sup>st</sup> October 2023, in that:

- a) Appellant states that after the clarification request, KSi contacted the Accountancy Board and were informed that the documents requested could not be provided by the Board for a firm. The Contracting Authority points out that the request was not necessarily for a Warrant Certificate from the Accountancy Board but there was also the option to present a Company registration Certificate. However, KSi produced only the Malta Accountancy Board registration number and an extract from the online register which can be found online.
- b) KSi could have produced a valid company registration certificate which would have satisfied the requirement. This requirement was a mandatory one and the evaluating committee had no other option than to find the appellant as administratively non-compliant.

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

- a) Relevant to this appeal is the following extract / requirement from the tender document.

*Bidders shall be and shall provide documentation confirming that:*

(i) *As an individual s/he shall hold a valid Warrant Certificate to act as Auditor issued under the Accountancy Profession Act (Cap. 281 of the Laws of Malta) and be registered with the Malta Accountancy Board in terms of the provisions of the same Act,*

*or*

(ii) *A firm shall be duly registered under the said Act and have a valid Company Registration Certificate and/or Warrant Certificate to operate as an Auditor.*

*The Malta Accountancy Board Registration Number is to be submitted online through the tender response format (Note 2)*

- b) KSi Malta, as declared by them and as could be duly evidenced, fall under the definition of a ‘firm’ and therefore it is part (ii) which applies to them. Moreover, since their original submission, in relation to this requirement, did not initially appear to be complete, they were duly provided with the opportunity to clarify and rectify their position.
- c) As part of their reply, they provided an extract from the **official registry** of the Accountancy Board of Malta. Within such extract, it can be clearly seen that KSi Malta are duly registered with the registration number AB/26/84/43. A list of their principals and the holders of a Practising Certificate in Audit together with their respective Warrant Numbers was also provided.
- d) During the testimony under oath of Mr Martin Spiteri, Secretary of the Accountancy Board, it was duly ascertained that warrants and certificates to practice audit are only issued to individual persons and not to firms. In fact he stated that “.....*the first communication from KSi requested a certificate and were advised that this is not issued*”. Therefore, firms are only issued with a firm registration number. This as corroborated from article 4(1) of the Accountancy Profession Act states that “*A warrant to practise the profession of accountant shall be issued by the Board to any **person** who satisfies the requirements of article 3(2).*” (bold emphasis added).
- e) Moreover, being a civil partnership, KSi Malta could not provide a Company Registration Certificate. This Board notes that having an audit firm duly registered as a Partnership rather than a Limited Liability Company is duly allowed under the Accountancy Profession Act (Cap 281 of the Laws of Malta).
- f) Therefore, once it has been ascertained that KSi Malta could not provide a ‘Company Registration Certificate’ and / or a ‘Warrant Certificate to operate as an Auditor’, this Board cannot understand why the appellant was deemed as non-compliant when they provided all the relevant information that could possibly have been provided! (reference to the extract from the official registry).

Therefore, this Board upholds the Appellant's grievances.

**The Board,**

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) To uphold the Appellant's concerns and grievances;
- b) To cancel the 'Cancellation Notice letter dated 12<sup>th</sup> September 2023;
- c) To cancel the Letters of Rejection dated 12<sup>th</sup> September 2023 sent to KSi Malta;
- d) To order the contracting authority to re-evaluate the bid received from KSi Malta in the tender, whilst also taking into consideration this Board's findings;
- e) after taking all due consideration of the circumstances and outcome of this Letter of Objection, directs that the deposit be refunded to the Appellant.

**Mr Kenneth Swain**  
Chairman

**Dr Charles Cassar**  
Member

**Ms Stephanie Scicluna Laiviera**  
Member