



**Public Contracts Review Board
Department of Contracts
Notre Dame Ravelin
Floriana VLT2000**

26 February 2024

Dear Sirs,

Re: Tender for Electrical a Mechanical Works and Supply and Installation of Pumps, Filtration, Plumbing and Effluent System for the Department of Fisheries and Aquaculture—Reference: SPD/8/2023/147 (the “Tender”)

1. We have been instructed by **Sammut Marine Limited (C-82608)** (the “**Appellant**”) to file an appeal in terms of Regulation 270 of the Public Procurement Regulations (Subsidiary Legislation 601.03) (the “**PPR**”) in connection with the above-captioned Tender.
2. The Appellant is aggrieved by the Contracting Authority’s decision to reject its bid as technically non-compliant and to cancel the Tender.

In brief, the Appellant strongly contests that *it was affected by any “potential conflict of interest” or “particular link with other tenderers or parties involved in the project”*. Rather, the Contracting Authority’s decision is disproportionate and less intrusive measures were not resorted to.

A. The Tender

3. On 25 October 2023, the Sectoral Procurement Directorate published the above-captioned Tender on behalf of the Department of Fisheries and Aquaculture (the “**Contracting Authority**”) for the electrical and mechanical works and supply and installation of pumps, filtration, plumbing and effluence system for the Department of Fisheries and Aquaculture.
4. The Tender requested the nomination of 1 Key Expert, being, an Electrical Engineer:

5. Selection and Award Requirements

(C) Specifications

[...]

(ii) Key Experts Form, the Statement of Availability Form, the Self-declaration form for Key Experts (relating to public employees) and CVs (Note 2)

Key Expert 1 - One (1) Electrical Engineer as per Chapter 321 Engineering Profession Act, holding a valid warrant in the electrical field issued by the Engineering Profession Board enabling him/her to practice locally.

5. Further, Notes to Clause 5 in Section 1 of the provided as follows:
 2. *Tenderers will be requested to either clarify/rectify any incorrect and/or incomplete documentation, and/or submit any missing documents within five (5) working days from notification.*
6. The Appellant reached out to Ing. Mario Sammut (the '**Key Expert**') and asked whether he would be willing to act as the Key Expert required by the Tender. The Key Expert accepted the Appellant's offer. The Key Expert, presumably by way of oversight, did not disclose to the Appellant any involvement in the Tender.
7. On 15 November 2023, the Appellant submitted its bid for the Tender. The Appellant was the only economic operator who submitted a bid.
8. On 15 February 2024, the Appellant received a letter of rejection from the Contracting Authority whereby it was informed that its offer was being rejected because it was technically non-compliant (attached and marked as "**Document SM1**"). The letter stated:

The main reason why your procurement proposal was non-compliant is as follows:

The Technical Evaluation Committee has noted that the Key expert nominated by the bidder is also the same body appointed by the Contracting Authority to serve as a technical advisor on this TEC. Furthermore, the same expert was appointed by the Contracting Authority to prepare the tender specifications and BOQ of this tender. In view of this conflict of interest, the TEC deemed this offer as

Technically noncompliant and is recommending to reject this offer on the basis of article of Article 21.2 of the General Rules Governing Tenders (v4.9 - July 2023) whereby: "Unless otherwise provided for in the procurement documents, when putting forward a candidacy or tender, the candidate or tenderer must declare that he is affected by no potential conflict of interest, and that he/she has no particular link with other tenderers or parties involved in the project. A false declaration shall lead to the disqualification of the candidate or economic operator. In instances where a state of conflict of interest exists the economic operator or candidate are to be excluded from the award of that particular tender unless such a conflict of interest cannot be remedied by a less intrusive manner. "

This procurement is being recommended for cancellation on the basis of article 21.2 of the Governing rules of Tenders(v4.9 - July 2023), which states that a false declaration shall lead to the disqualification of the candidate or economic operator and in instances where a state of conflict of interest exists, the economic operator or candidate are to be excluded from the award of that particular tender.

9. The Appellant is aggrieved by the decision taken and this for the following reasons:
 - a. First, the Appellant has complied with Article 21.2 of the General Rules Governing Tenders ('GRGT').
 - b. Second, the Contracting Authority has acted disproportionately and has ignored less instructive measures.
- B. First Ground of Appeal: The Appellant has complied with Article 21.2 of the GRGT**
10. The Appellant is aggrieved by the Contracting Authority's finding that *the* Appellant has a conflict of interest and that *the* Appellant's bid is technically non-compliant on the basis of Article 21.2 of the GRGT.
11. Article 21.2 of the GRGT states as follows:

*"Unless otherwise provided for in the procurement documents, when putting forward a candidacy or tender, the **candidate or tenderer** must **declare** that he is affected by no potential conflict of interest, and that*

he/she has no particular link with other tenderers or parties involved in the project.

A false declaration shall lead to the disqualification of the candidate or economic operator.

In instances where a state of conflict of interest exists the economic operator or candidate are to be excluded from the award of that particular tender unless such a conflict of interest cannot be remedied by a less intrusive manner.

Where a contracting authority is of the opinion that the conflict of interest can be remedied without excluding the tenderer in question, after obtaining the prior approval of the Director, it shall give three (3) working days to the tenderer in question to remedy such conflict of interest. In default, the tenderer in question shall be excluded."

12. As shall be submitted below, the Appellant has no conflict of interest, and further, it has complied with the requirements of Article 21.2 of the GRGT.
13. *First, Article 21.2 of the GRGT applies to "candidates or tenderers". This Article requires the disclosure of any "potential conflict of interest" or "link with other tenderers or parties involved in the project" that the candidate or tenderer has.*
14. In this case, the Appellant was not aware that the key expert nominated was allegedly same body appointed by the Contracting Authority to serve as technical advisor.

For the sake of the record, it must be said that the Key Expert was *not* involved in the drafting of the bid, whether from a technical or financial perspective. The Key Expert was simply asked to provide the following documentation:

- a. Statement of Availability Form
 - b. Self-declaration form for Key Experts (relating to public employees)
 - c. CV
15. Regulation 2 of the PPR provides:

For the purposes of these regulations:

"candidate" means an economic operator that has sought an invitation or has been invited to take part in a restricted procedure, in a

competitive procedure with negotiation, in a negotiated procedure without prior publication, in a competitive dialogue or in an innovation partnership;

[...]

"tenderer" means an economic operator that has submitted a tender;

Therefore, the economic operator who submits the bid, in this case the Appellant, and any sub-contractors or key experts, are separate.

16. In this case, and if at all, the Appellant submits that the relevant "conflict of interest" or "link" was had by the Key Expert, and not by the Appellant.
 17. *Second*, the Appellant has acted correctly and in line with Article 21.2 of the GRGT. The Appellant made the required self-declarations on conflict of interest in the European Single Procurement Documentation, as integrated in the Tender Response Format.
 18. However, the Appellant could not have disclosed a "conflict" or a "link" that: (i) first, did not affect the Appellant *qua* tenderer; and (ii) second, was *not* known to the Appellant.
 19. Furthermore, Article 21.2 of the GRGT goes on to provide that "*a false declaration shall lead to the disqualification of the candidate or economic operator*". The Appellant at no point made a false declaration because he was not aware of the conflict of interest in question for the above-mentioned reasons.
- C. Second Ground of Appeal: The Contracting Authority has acted disproportionately and has ignored less instructive measures**
20. The Appellant is further aggrieved by the fact that the Contracting Authority did not request a rectification of the Key Expert and/or did not give the Appellant the opportunity to explain its position on the perceived breach of Article 21.1 of the GRGT.
 21. The Appellant, respectfully, submits that the Contracting Authority opted for the *most onerous* option of disqualifying the Appellant's bid and of cancelling the Tender. The Contracting Authority ignored *les onerous* options which were available to it.
 22. *First*, the Appellant was entitled to rectify and to replace the Key Expert given that this was a Note 2 matter.

The Appellant has been deprived of any such opportunity—despite the clear and unambiguous wording of the Tender.

23. *Second*, even Article 21.2 of the GRGT considers “less intrusive” remedies to address a perceived conflict of interest. That Article provides that:

*In instances where a state of conflict of interest exists the economic operator or candidate are to be excluded from the award of that particular tender **unless such a conflict of interest cannot be remedied by a less intrusive manner.***

*Where a contracting authority is of the opinion that the conflict of interest can be remedied without excluding the tenderer in question, after obtaining the prior approval of the Director, **it shall give three (3) working days to the tenderer in question to remedy such conflict of interest.** In default, the tenderer in question shall be excluded.*

The first paragraph cited above reflects Regulation 194(b) of the PPR which permits the exclusion of an “economic operator”—not a tenderer or candidate—which is subject to a conflict of interest where it “*cannot be effectively remedied by other less intrusive measures*”.

This transposes the wording in Article 57(4)(e) of Directive 2014/24.

24. The Appellant submits that the *rectification request* for the replacement of the key expert is that *less intrusive measure*.
25. *Third*, and in any case, the Appellant was entitled to explain its position on the allegation that it has a “conflict” or a “link” which merited the disqualification of its offer.
26. As shall be submitted during the hearing, the case-law of the Courts of Justice of the European Union has held that the automatic exclusion of candidates or tenderers who are in a relationship with other economic operator who might have been subject to grounds of exclusion, in particular, breaches of competition law or conflict of interest is disproportionate.
27. Such an automatic exclusion would constitute an irrebuttable presumption that the tendered must be excluded for any failure attributable to a subcontractor or key expert without: (i) assessing, on a case-by-case basis, the particular circumstances

of the case: and (ii) the tendered being able to explain its position. This is disproportionate and unlawful.

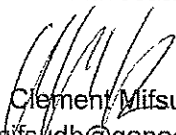
28. The duty to act proportionate requires a contracting authority, at the very least, to give the relevant candidate or tenderer the opportunity to explain itself and to show that its bid is unaffected by the purported ground of exclusion.
29. In view of the above, and as a result of its exclusion from the tendering procedure, the Appellant lost its opportunity to be awarded the Tender in question, and consequently, to derive the various financial and non-financial benefits that might result from the performance of the contract.
30. It is therefore evident that any conflict of interest—which is strongly refuted—on the Appellant's part has had no impact on the tendering procedure because in no way did the Appellant derive any benefit or otherwise from the purported conflict of interest and, in any case, the Appellant was the sole tenderer submitting a bid.
31. For the above-mentioned reasons, and others that may be brought in due course at law, the reasons for rejection are totally unfounded and ought to be quashed.


THEREFORE, in view of the above and for other reasons that may be brought in due course at law, the Appellant humbly demands that this Public Contracts Review Board:

- a. declares that the Contracting Authority's decision of 15 February 2024 to reject the Appellant's offer is unlawful and/or wrong;
- b. consequently, quashes the Contracting Authority's decision of 15 February 2024; and
- c. order the refund of the deposit paid upon filing of this appeal,

subject to any declaration or order as it deems fit and opportune.

Yours sincerely,
Ganado Advocates


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BOV

Bank of Valletta

Bank of Valletta p.l.c

Registration Number: C 2833

Registered Office: 58 Zachary Street, Valletta VLT 1130 - Malta

Pay third party

Printed by: Mr. David Sammut

Printed on: 24/02/2024 - 09:21

Document ID: 19201432

Transaction details

Beneficiary name: Cashier Malta Government

Relation: Retail

Reason: Purchase of Services

Payment details: Tender ID 000201452, Tender Reference SPD 8.2023.147

Currency: EUR - Euro

Beneficiary IBAN/Account: MT55MALT011000040001EURCMG5001H

Beneficiary IBAN/Account type: Valid IBAN of country - Malta

Bank name: Other bank

Bank address / Bank's BIC: Let the bank apply the beneficiary bank BIC

Beneficiary address: No

From account: 5001351954 1 (EUR)

Charges should be paid by: Shared - I pay BOV charges; Cashier Malta Government pays the beneficiary bank charges

Amount: EUR 2,165.00

BOV to transfer the money: as soon as possible

Receiving bank to get the money as: normal priority payment

Saved template: no

Additional Information

Credit amount: EUR 2,165.00

Debited amount (excluding charges): EUR 2,165.00

Estimated amount to be withdrawn from account: EUR 2,169.00

Transaction charge: EUR 4.00

Transaction result

Status: Your instructions have been received and will be reviewed. Please do not re-submit this payment.

Transaction ID: 139218460

Document SM1

DIPARTIMENT TAL-KUNTRATTI
Notre Dame Ravelin
Floriana FRN 1600 – MALTA
Direttorat għall-Akkwist Settorali



DEPARTMENT OF CONTRACTS
Notre Dame Ravelin
Floriana FRN 1600 – MALTA
Sectoral Procurement Directorate

Telephone: 23781508
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15th February 2024

Messrs Sammut Marine Ltd

Tender ID: 000201452

TENDER REFERENCE: SPD 8/2023/147

SUBJECT: Tender For Electrical And Mechanical Works And Supply and Installation Of Pumps, Filtration, Plumbing and Effluent System For The Department Of Fisheries And Aquaculture

Dear Sir/Madam,

Thank you for participating in the above-mentioned procurement procedure. However, this Ministry regrets to inform you that the procurement proposal submitted by your company was technically non-compliant.

The main reason why your procurement proposal was non-compliant is as follows:

The Technical Evaluation Committee has noted that the Key expert nominated by the bidder is also the same body appointed by the Contracting Authority to serve as a technical advisor on this TEC. Furthermore, the same expert was appointed by the Contracting Authority to prepare the tender specifications and BOQ of this tender. In view of this conflict of interest, the TEC deemed this offer as Technically noncompliant and is recommending to reject this offer on the basis of article of Article 21.2 of the General Rules Governing Tenders (v4.9 - July 2023) whereby: "Unless otherwise provided for in the procurement documents, when putting forward a candidacy or tender, the candidate or tenderer must declare that he is affected by no potential conflict of interest, and that he/she has no particular link with other tenderers or parties involved in the project. A false declaration shall lead to the disqualification of the candidate or economic operator. In instances where a state of conflict of interest exists the economic operator or candidate are to be excluded from the award of that particular tender unless such a conflict of interest cannot be remedied by a less intrusive manner. "

This procurement is being recommended for cancellation on the basis of article 21.2 of the Governing rules of Tenders(v4.9 - July 2023), which states that a false declaration shall lead to the disqualification of the candidate or economic operator and in instances where a state of conflict of interest exists, the economic operator or candidate are to be excluded from the award of that particular tender.

If you intend to object to this decision, the Public Procurement Regulations allow for an official objection which in this case has to be lodged electronically with the Public Contracts Review Board by sending an email on: info.pcrb@gov.mt by noon of 26th February 2024 against a deposit of €2,165.00

Payments are to be made through bank transfer in terms of the following details:

Name of Account Holder	Cashier Malta Government
Name of Bank	Central Bank of Malta
Address of Bank	Castille Place, Valletta
Account Number	40001EUR-CMG5-001-H
BIC	MALT MT MT
IBAN Code	MT55MALT011000040001EURCM5001H
Bank Code	01100

The official 'recommendation for cancellation' schedule can be accessed on the website: www.etenders.gov.mt)

Although this Ministry has not been able to make use of your services on this occasion, we trust that you will continue to take an active interest in its procurement opportunities.

Yours sincerely,

Colin Pace
f/Assistant Director SPU8