

# **PUBLIC CONTRACTS REVIEW BOARD**

## **Case 1962 – SPD1/2023/010 – Service Framework Contract for the Provision of Internal Audit to Jobsplus**

**14<sup>th</sup> February 2024**

The Board,

Having noted the letter of objection filed by Ms Anita Aloisio acting for and on behalf of Alecta Advisors, (hereinafter referred to as the appellant) filed on the 22<sup>nd</sup> January 2024;

Having also noted the letter of reply filed by Dr Dennis Zammit acting for Jobsplus (hereinafter referred to as the Contracting Authority) filed on the 1<sup>st</sup> February 2024;

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 8<sup>th</sup> February 2024 hereunder-reproduced.

### **Minutes**

#### **Case 1962 – 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 22<sup>nd</sup> January 2024 Alecta Advisors filed an appeal against Jobsplus objecting to their disqualification on the grounds that its offer was not administratively compliant.

A deposit of € 400 was paid.

There were seven bids.

On the 8<sup>th</sup> February 2024 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Dr Vincent Micallef as members convened a virtual public hearing to consider the appeal.

The attendance for this public hearing was as follows:

#### **Appellant – Alecta Advisors**

Ms Anita Aloisio

Representative

#### **Contracting Authority – Jobsplus**

Dr Dennis Zammit

Legal Representative

Mr Felix Borg

Chairperson Evaluation Committee

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|--------------------------|--------------------------------|
| Mr Marvic Bugeja         | Secretary Evaluation Committee |
| Eng Christopher Micallef | Evaluator                      |
| Ms Graziella Caruana     | Evaluator                      |
| Ms Charmaine Barbara     | Evaluator                      |

### **Preferred Bidder – Ksi Malta**

|                 |                      |
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| Dr John Caruana | Legal Representative |
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### **Department of Contracts**

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| Dr Mark Anthony Debono | Legal Representative |
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Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and mentioned that the Board noted that the Contracting Authority in their letter of reply raised the point that since the rejection letter was issued in September the appeal should have been filed within ten days of that letter. The Board would first wish to hear submissions on this point and to decide thereon.

Dr Dennis Zammit Legal Representative for Jobsplus stated that when Ms Aloisio on behalf of Alecta Advisors appealed she indicated that the tender was cancelled and therefore everything stopped till the fresh tender was issued. If Appellant was convinced on that point why was the appeal not filed within the September deadline? The letter of the 12th September should have been the trigger for the appeal, and if as claimed she is compliant now, why not appeal then?

Ms Anita Aloisio Representative for Alecta Advisors said that when the letter stating that no bid was compliant was received she expected a fresh tender to be issued. Why was a new tender to be issued when her bid was compliant? There was no indication in the letter that there was a re-integration of the offers. She expected all bids to have been compliant bearing in mind the competence of the bidders. She was convinced that a new tender would be issued.

Dr Debono Legal Representative for the Department of Contracts said that Regulation 271 clearly imposed a ten day limit in which to file an appeal; on that basis the Board should ignore this appeal.

After a short recess to enable the Board to consider the submissions made the Chairman directed as follows:

‘ This Board considers that the Regulation that is most relevant to the point raised before this Board this morning, on a preliminary point, is Regulation 271 of the Public Procurement Regulations, which states:

“271. The objection shall be filed within ten calendar days following the date on which the contracting authority or the authority responsible for the tendering process has by fax or other electronic means sent its proposed award decision or the rejection of a tender or the cancellation of the call for tenders after the lapse of the publication period”.

Emphasis is placed on the point that “it shall be filed within ten calendar days” as well as on “or the cancellation of the call for tenders” which, in fact, was what the original rejection letter of the 12th September sent to Alecta Advisors stated.

The Board considers that once the Appellant was given the reason for her exclusion and advised of her right to submit an appeal within ten days, namely by the 22nd September, and it failed to do so, it cannot now appeal on matters known to it at the time of the original evaluation.

Finally the Board would refer to its decision in Case 1934 published on the 6th November 2023 where on the appeal on this very self-same tender, the Board had specifically directed a re-evaluation solely of the bid made by Ksi Malta.

At this stage the Board has no alternative but to consider the appeal submitted by Alecta Advisors on the 22nd January 2024 as being *furi termine* and will refrain from considering this appeal.

This verbal decision will be confirmed in the final decision published by this Board.'

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 8<sup>th</sup> February 2024.

Having noted the objection filed by Alecta Advisors (hereinafter referred to as the Appellant) on 22<sup>nd</sup> January 2024, refers to the claims made by the same Appellant with regard to the tender of reference SPD1/2023/010 listed as case No. 1962 in the records of the Public Contracts Review Board.

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|--|------------------------|
| Appearing for the Appellant:               | Ms Anita Aloisio       |
| Appearing for the Contracting Authority:   | Dr Dennis Zammit       |
| Appearing for the Department of Contracts: | Dr Mark Anthony Debono |
| Appearing for the Preferred Bidder:        | Dr John Caruana        |

Whereby, the Appellant contends that:

- a) Our offer was submitted by Alecta Advisors which is my trading name. Therefore, I, Anita Aloisio trade under the name 'Alecta Advisors'. It is important to note that I trade as a sole practitioner in that capacity with my trading name (which is not a separate legal entity).
- b) In view that I am the sole practitioner and Aleca (sic) Advisors is a trading name and not a separate legal entity, further to my feedback on pt 1, I had provided my Malta Accountancy Board Registration number, which is also my warrant number when I submitted my offer.
- c) The referred original letter dated 12 September 2023 had communicated that the tender was cancelled as none of the bidders were compliant. That communication misled me to believe that

the tender awarding process was stopped until a new call for tenders was issued. Hence, the reason for the undersigned not submitting any objections at the time.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 1<sup>st</sup> February 2024 and its verbal submission during the hearing held on 8<sup>th</sup> February 2024, in that:

- a) The Contracting Authority submits that with regard to point 1, it was never an issue with having appellant submitting under a trade name. What the Contracting Authority requested was a warrant as an individual or a confirmation that the firm can act as an Auditor.
- b) In her second ground, the appellant states that she submitted the Malta Accountancy Board Registration number in her bid. The Contracting Authority reiterates that no such information was found in the bid during the eligibility stage, and thus the reason why a rectification was sent. Since appellant was deemed ineligible at the eligibility stage, the Evaluation Board did not proceed to evaluate further the bid.
- c) The appellant refers to the letter sent by the Department of Contracts dated 12<sup>th</sup> September 2023, informing bidders that tender was cancelled as none of the bidders was compliant. She states that this misled her and led her not to appeal at that point. With all due respect, Contracting Authority cannot understand how appellant was misled since the letter was clear, and it indicated that bidders, including appellant was (sic) not compliant. Appellant should have appealed during the appeals period after receiving the letter mentioned. The grounds for appeal being raised in this appeal, were already present and known to the appellant and there was no valid reason or anything which prevented appellant to lodge appeal during the prescribed period at law.
- d) The final ground of appeal by appellant is that the rectification request was not received by appellant as it had problems with its email system, but it tried to address the issue in the last week of May by sending an email to Tenders at Jobsplus. The Contracting Authority cannot agree with such ground since it is in the responsibility of the bidder to make sure that the email address provided is attended for and any such issues cannot impinge on the evaluation process. Furthermore, appellant had the facility to log on the ePPS to check for any tasks due from her end. Without prejudice to the above, the appellant's reply to the rectification request had to be submitted through the appropriate Electronic Public Procurement (ePPS) module as per Article 2.10 of the Standard Operating Procedures for the Evaluation Committees. This states that during evaluation, any communication concluded during the adjudication stages with the bidders must be made only through the ePPS. Contrary to this appellant had sent her communication to an email address of the Contracting Authority. Furthermore, the reply to the rectification request had to be sent by 18<sup>th</sup> May 2023 while the appellant is admitting that it only realised that relevant emails were sent to it in the last week of May, that is, well after the official deadline.

Before proceeding to the merits of the case, this Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties, will initially consider the Contacting Authority's arguments mentioned in paragraph (c) above.

- a) The Board makes reference to the verbal decision dictated during the hearing.
- b) In addition to that, this Board makes reference to Court of Appeal judgement in the name Avukat Dottor Victor George Scerri u Marthese Scerri Said (l-appellanti) vs. Awtorità tal-Artijiet u ċ-Chairman tal-Bord tal-Gvernaturi tal-Awtorità tal Artijiet, with decision dated 22 June 2020 whereby: *"Il-Qorti tirrileva illi d-dispożizzjonijiet generali li jirregolaw il-preskrizzjoni taht il-Kodici Ċivili, jirregolaw preskrizzjonijiet akkwizittivi u estintivi ta' jeddijiet. Il-każ odjern huwa perijodu ta' dekadenza stabbilit bil-liġi, li b'differenza mir-regoli ta' preskrizzjoni generali, mbux sugġett għar-regoli ta' sospensjoni jew ta' interruzzjoni, u lanqas għal dak li jipprovi l-artikolu 2111 tal-Kap. 16, b'tali mod li jekk min għandu jedd ta' azzjoni, jonqos milli jeżerċitah fit-terminu mogħti lili bil-liġi, dan jitlef darba għal dejjem u b'mod irrimedjabbli l-jedd tiegħu ta' azzjoni. Ladarba azzjoni bhal din ma tistax tiġi eżerċitata aktar jekk jgħaddi t-terminu stabbilit mil-liġi, il-Qorti tista' u għandha tirrileva dan ex officio".*
- c) Reference is now also made to the Court of Appeal judgement in the names Salina Wharf Marketing Limited vs. Malta Tourism Authority decided on 12th December 2007: *"Innegabilment, it-termini għall-appell minn sentenza, kemm taht il-liġi ritwali ordinarja, kif ukoll taht il-liġijiet speċjali, jiddekorru għal fatt materjali tat-trapass taż-żmien. Huma termini perentorji u dwarhom, di regola, ta' proroga, u lanqas ta' sospensjoni jew interruzzjoni, jekk mbux fil-każijiet eċċezzjonalment mil-liġi previsti. Ad eżempju, fejn il-ġurnata tal-iskadenza tat-terminu tabbat nbar ta' Sibt jew Hadd jew xi ġuranta festiva. Din in-natura inderogabbli tat-termini proċesswali għib b'konsegwenza illi dwarhom ma jistgħux jiġu applikati provvedimenti sanatarji jew ta' rimessjoni, anke d-dekors inutli tagħhom ma jkunux imputabli lill-parti interessata. Dan għall-motiv illi dik l-improrogabbli b'hekk neċessarja għal raġuni ta' certezza u wkoll, t'uniformità. Sewwa hafna ġie ritenut minn din il-Qorti diversament presjeduta illi "l-osservanza tat-termini stabbiliti fil-Kodici ta' Organizzazzjoni u Proċedura Ċivili u fliġijiet speċjali obra li jirregolaw il-kondotta tal-proċeduri quddiem il-Qorti u quddiem it-Tribunal huma ta' ordni pubbliku u ma jistgħux jiġu bl-ebda mod injorati u lanqas bil-kunsens tal-partijiet rinunzjati jew mibdula." (Giuseppina Caruana vs Charles Psaila – Qorti tal-Appell (Komp. Inf.) 21.03.1997). "Huwa evidenti illi t-terminu utli għal liema jirreferi l-Art. 14(9) tal-Att imsemmi ma ġiex f'dan il-każ rispettad ad unguem, u l-appell ikollu allura jitqies irrimedjabbilment irritwali. Huwa veru li ż-żmien ġie oltrepassat b'ġurnata imma, kif ukoll ritenut, "of course the fact that the delay was only of one day cannot unfortunately for the appellant help him (A.B. vs Commissioner of Inland Revenue, Każ Numru 85, Appell 05.03.1971 u Joseph Camilleri vs Kummissarju tat-Taxxi Interni, Appell, 09.05.2007). F'dan il-każ, il-kliem tal-liġi huwa tassattiv u jimponi fuq il-persuna li tkun giet affettwata b'xi deċiżjoni tal-Awtorità, l-obbligu li din tressaq l-oġġezzjoni tagħha quddiem it-Tribunal ta' Reviżjoni Amministrattiva fi żmien għoxrin ġurnata minn meta din il-persuna tirċievi tali deċiżjoni. In-nuqqas li persuna tressaq azzjoni bhal din fit-terminu stipulat, ifisser li dik il-persuna titlef darba għal dejjem il-jedd li tressaq l-azzjoni tagħha quddiem it-Tribunal. Huwa in vista ta' dawn il-*

*konsiderazzjonijiet, li din il-Qorti qiegħda tiċhad l-aggravji kollha sollevati mill-appellanti, filwaqt li tikkonferma d-deċiżjoni tat-Tribunal.”*

- d) These cases mentioned above, are deemed relevant because this appeal was not filed on a ‘new’ tender as initially thought by the appellant. The reasons for rejection, i.e. technical non-compliance, were known by the appellant as from 12<sup>th</sup> September 2023. The appellant was duly informed on 12<sup>th</sup> September 2023 that “*A rectification was sought as in regard to the suitability criteria forms - that is for the warrant and/ or certificate of auditing firm. Also, your company had to provide the Malta Accountancy Board Registration number. Your company did not rectify within the stipulated timeframe hence, his (sic) offer is deemed to be non-compliant and could not proceed for the next stage of the evaluation.*” They were also informed that “*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 **22nd September 2023** against a deposit of €400.*” (bold & underline emphasis added)

Hence this Board upholds Contracting Authority’s plea and dismisses the appeal.

#### **The Board,**

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

- a) Upholds the Contracting Authority’s plea referenced (c) in their written submissions;
- b) Upholds the Contracting Authority’s decision in the recommendation for the award of the tender,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

**Mr Kenneth Swain**  
Chairman

**Mr Lawrence Ancilleri**  
Member

**Dr Vincent Micallef**  
Member