

PUBLIC CONTRACTS REVIEW BOARD

Case 1970 – SPD7/2023/070 – Services - Framework Contract for a Physical Offsite Archival Services for the Malta Financial Services Authority (MFSA)

11th March 2024

The Board,

Having noted the letter of objection filed by Mr John Farrugia Randon acting for and on behalf of Rentastore Malta, (hereinafter referred to as the appellant) filed on the 13th February 2024;

Having also noted the letter of reply filed by Dr Maurice Meli acting for and on behalf of the Malta Financial Services Authority (hereinafter referred to as the Contracting Authority) filed on the 22nd February 2024;

Having heard and evaluated the testimony of the witness Mr Gilbert Camilleri (Chairperson of the Evaluation Committee) as summoned by Dr Reuben Farrugia acting for Rentastore Malta;

Having heard and evaluated the testimony of the witness Mr Anthony Buttigieg (Representative of ELV Engineering Ltd) as summoned by Dr Reuben Farrugia acting for Rentastore Malta;

Having heard and evaluated the testimony of the witness Mr Alvaro Ferreira (Representative of Firetech Ltd) as summoned by Dr Reuben Farrugia acting for Rentastore 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 5th March 2024 hereunder-reproduced.

Minutes

Case 1970 – SPD7/2023/070 – Services – Framework Contract for a Physical Offsite Archival Services for the Malta Financial Services Authority (MFSA)

The tender was issued in on the 23rd November 2023 and the closing date was the 14th December 2023

The estimated value of this tender, excluding VAT, was € 49,125.

On the 13th February 2024 Rentastore Malta filed an appeal against the Malta Financial Services Authority objecting to the failure of the offer by the preferred bidder to fulfill the stipulated requirements of the tender.

A deposit of € 400 was paid.

There were two bids.

On the 5th March 2024 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Rentastore Malta

Dr Reuben Farrugia	Legal Representative
Mr John Farrugia Randon	Representative
Mr Luke Tabone	Representative

Contracting Authority – Malta Financial Services Authority

Dr Maurice Meli	Legal Representative
Mr Gilbert Camilleri	Chairperson Evaluation Committee
Mr Reuben Camilleri	Secretary Evaluation Committee
Mr Kevin Scicluna	Evaluator (Online)
Mr James Schembri	Representative
Mr Mark Agius	Representative

Preferred Bidder – Maltapost plc

Ms Jocelyn Fauzza	Representative
Mr Mauro Portelli	Representative
Mr Charles Cilia	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 Maurice Meli Legal Representative for the Malta Financial Services Authority stated that the Contracting Authority had two preliminary pleas to raise. Firstly Mr John Farrugia Randon had no legal status in the Appellant company and therefore no authority to represent them and secondly the appeal letter did not meet the requirements of Regulation 270 of the PPR in giving in a clear manner the reasons for the appeal. PCR cases 1848 and 1119 were cited in support.

Dr Reuben Farrugia Legal Representative for the Appellant said that proceedings should not be overcome by formality. Mr Farrugia Randon as representative of the Company was fully entitled to represent it. For clarity the appeal was based on Clarification Note No. 1 which refers to inert gas. The preferred bidders offer does not meet this requirement and the contention is that Maltapost fails to meet this very specific requirement.

Dr Meli said that this is nothing more than an attempt to now make up for the lack of clarity in the letter of appeal.

Dr Debono on behalf of the Department of Contracts said that the lack of clarity of the appeal letter hinders the Contracting Authority from dealing properly with the appeal. Regulation 270 is very relevant.

Dr Farrugia said that equivalence allows substitution of acts. Paragraph 2 of the appeal letter is clear what it is referring to. Appellant is at a disadvantage as it is the only party not in possession of, or with access to, the submissions. What is a fact is that Maltapost does not have the system requested in the

tender and if it is stated that they do then that statement is fraudulent. All that Appellant is requesting is a re-evaluation to clarify this point.

The Chairman said that the Board will have a short recess to consider the preliminary points raised.

On resumption the Chairman stated that the Board having deliberated on the submissions made on the preliminary pleas decided that there is sufficient information and reasons in the appeal letter filed on the 13th February 2024 to enable the case to be heard.

Therefore, at this stage it directs that this appeal shall proceed on the merits of the case.

Dr Farrugia said that the basis of the appeal is that the preferred bidder does not have the right system to meet the tender requisites and requested that witnesses be heard.

Mr Gilbert Camilleri (60479M) called to testify by the Appellant stated on oath that he was the Chairperson of the Tender Evaluation Committee (TEC). He was referred to Clarification Note No 1 and agreed that the major technical requirement of the tender in 6.1.vi was that the fire suppression request was for Argonite or equivalent inert gas system which left no residue. Witness then said that in his view the system Firepro was an Argonite system but went on to state that he is not aware of the difference between an Argonite system and an aerosol system. He conceded that there was no reference to Argonite in the Firepro literature. The self-declaration by the preferred bidder confirmed that the system offered was based on Argonite and the question of equivalence had not been gone into by the TEC.

In reply to a question from Dr Meli, witness said that both Argonite and aerosols were types of gases.

Mr Anthony Buttigieg (311860M) called to testify by the Appellant stated on oath that he was the Managing Director of ELV Engineering Ltd and had installed the Firepro system at Maltapost. This was an aerosol not Argonite system and after use left a slight residue.

Questioned by Dr Meli, witness stated that aerosols worked on different technology and explained how it reacted against flames. He is not aware if aerosol is an inert gas.

In reply to questions from Dr Debono, witness stated that he is qualified in fire extinguishing systems apart from electronics and confirmed that aerosol is recognised as a fire extinguishing system.

Mr Mauro Portelli, representing Maltapost, referred witness to a document stating that aerosols contain an inert gas. Witness said that once the aerosol system was activated particles were left as a residue in the form of dust.

Mr Alvaro Ferreira (817230) called to testify by the Appellant stated on oath that he is a Fire Engineer employed by Firetech Ltd and went on to explain the technical differences between aerosol and Argonite. The latter reduces oxygen to suppress flames and leaves no residue and is the system installed at Rentastore premises. Firepro is an aerosol which reacts chemically with flames but leaves salt particles as residue. It is not an Argonite system.

In reply to question from Dr Meli witness stated that inert gas is not a concept of aerosols systems which tend to generate particles.

Questioned by Mr Portelli, witness confirmed that Argonite is a gas which does not leave any residue.

This concluded the testimonies.

Dr Farrugia said that the Chairperson of the TEC stated that the basis for their decision was the self-declaration. Maltapost claimed that Firepro was an Argonite system which is incorrect and no proof has been submitted that the system they offered is Argonite - the case can therefore stop here as the self-declaration is false. The TEC have the right to confirm the self-declaration but the supporting documents produced contradict this. Witnesses have stated that Argonite and aerosols are different and that the latter leaves a residue. The clarification makes it clear that what the Authority wanted was a product that would not 'leave any form of residue'. Witnesses clearly stated that Firepro leaves a residue which therefore fails to meet the specifications.

Dr Debono said that the facts show that the TEC based its decisions on statements made by the bidder and no proof has been provided that the preferred bidder does not meet the requirements.

Dr Meli stated that the tender requests a well maintained fire system with Argonite or equivalent but did not state specifically that it has to be Argonite. Two witnesses tried to prove that the offer of the preferred bidder was not compliant. Aerosol and Argonite both use inert gas and the self-declaration cannot be ignored. The reply to the clarification note refers to inert gases that do not leave residue and thus the preferred bidder meets the tender request and the decision of the TEC should be confirmed.

There being no further submissions the Chairman thanked the parties and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 5th March 2024.

Having noted the objection filed by Rentastore Malta (hereinafter referred to as the Appellant) on 13th February 2024, refers to the claims made by the same Appellant with regard to the tender of reference SPD7/2023/070 listed as case No. 1970 in the records of the Public Contracts Review Board.

Appearing for the Appellant:	Dr Reuben Farrugia
Appearing for the Contracting Authority:	Dr Maurice Meli
Appearing for the Department of Contracts:	Dr Mark Anthony Debono
Appearing for the Preferred Bidder:	Mr Mauro Portelli

Whereby, the Appellant contends that:

- a) Upon thorough review and examination of the materials provided, it has come to our attention that the archives of the proposed awardee do not meet the prescribed standards regarding the inert gas technology Fire Suppression system, as explicitly detailed and confirmed in Clarification Note 1.
- b) As per the terms and conditions set forth in the tender, compliance with all specified requirements is imperative for consideration and eligibility for the award. Given the significance of the Fire Suppression system in ensuring the safety and security of archival materials, its absence or inadequacy presents a substantial deviation from the stated criteria.
- c) We therefore request a comprehensive reassessment of the proposals submitted, with particular attention to adherence to all prescribed technical specifications and requirements. It is imperative that the awarding process remains transparent, fair, and in strict accordance with the established guidelines.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 22nd February 2024 and its verbal submission during the hearing held on 5th March 2024, in that:

- a) ***1st Preliminary Plea - The Appeal Is Null And Void As Mr. John Farrugia Randon Does Not Have Judicial Nor Legal Representation Of The Objector -***

On a preliminary basis and without prejudice to further submissions made by the Contracting Authority, the objector did not present evidence to show that Mr. John Farrugia Randon, the person that signed the objection, had the authority and the right to file this objection as a legal and/or judicial representative of the objector at the time of filing of the objection. For this reason, this appeal ought to be rejected *in toto*.

- b) ***2nd Preliminary Plea - The Appeal Is Null And Void As The Appeal Is Not Clear -***

Secondly, and without prejudice to the above and to further submissions made by the Contracting Authority, the Contracting Authority submits that the appeal is null and void as it did not explain its objection in a clear manner. The Contracting Authority finds itself in an impossibility to answer the objection raised on the merits due to the fact that the objection filed by the objector is not clear at all. The objector states that; *"...it has come to their attention that the archives of the proposed awardee do not meet the prescribed standards regards the inert gas technology Fire Suppression system"*

The objector then made reference to Clarification Note 1 but provided absolutely no explanation nor any reasoning to show or to explain how or why the preferred bidder's system does not meet the prescribed standards as described in the conditions of the tender. Thus, the Contracting Authority has a number of legitimate questions; i. Which specific standard is the objector referring to? ii. What system is the objector referring to? iii. How does the system of the preferred bidder not meet the prescribed standards? iv. What evidence does the objector have to substantiate such

allegations? The above questions emanate naturally from the lack of clarity of the appeal filed by the objector and need to have a clear answer for the Contracting Authority to be able to answer in a fair manner. Said questions would never have arisen had the objection been clear.

The Contracting Authority submits that said clarity is expressly required by the law precisely to allow parties to answer accordingly and to know what the issues at hand are. Reference is hereby being made to regulation 270 of the Public Procurement Regulations; “270. *Where the estimated value of the public contract meets or exceeds five thousand euro (€5,000) any tenderer or candidate concerned... may file an appeal by means of an objection before the Public Contracts Review Board, which shall contain **in a very clear manner** the reasons for their complaints.*” [Emphasis added]

Every objection filed before the Public Contract Review Board needs to be "very clear". All parties involved in this process have the right to know what the objection is about in order to be able to address the objection in a fair manner. The present objection clearly and evidently does not adhere to this principle as it is anything but clear.

c) ***3rd Preliminary Plea - III - The Appeal Is Null And Void Due To The Requests Made By The Objector. And The Lack Thereof***

Thirdly, and without prejudice to the above and to further submissions made by the Contracting Authority, the Contracting Authority submits that the appeal is null and void due to the requests made by the objector, and the lack thereof. By means of this appeal the objector asked the Board to carry out a; "*comprehensive reassessment of the proposals submitted*" With all due respect, the Board's role is to determine whether a tender process was carried out in accordance with the law or not, and not to substitute itself with the Contracting Authority in evaluating or reassessing the offers made. Moreover, the objector has not made a request for the setting aside of the Award Decision.

d) ***On The Merits -***

Without prejudice to all preliminary pleas raised above, the Contracting Authority submits the following; As stated above it is impossible for the Contracting Authority to reply to the objector on the merits as the appeal was submitted in such a manner as to make it impossible for the Contracting Authority to address the objector's appeal. The appeal is unclear and it is neither the Contracting Authority's nor the Board's responsibility to try to determine the objector's grievances. The only submission the Contracting Authority can make at this stage is that it has adhered scrupulously to all of its obligations at law. Having submitted that, whilst reiterating that the objector ought not to be given the opportunity to clarify its appeal, the Contracting Authority reserves the right to make further submissions on the merits should the Board allow the objector to clarify their appeal.

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 now consider Appellant's grievances.

a) **Preliminary Pleas –**

Reference is made to the decree read out during the hearing, in that the Board proceeded to continue hearing the case on its merits. The Board notes that sufficient reasons were listed in the letter of appeal filed on 13th February 2024. Specific reference was made, in the letter of appeal, to Clarification Note 1 which in turn makes specific reference to the 'Fire Suppression' system that was required as per specification 6.1.vi of the tender dossier.

The Board also notes that Mr John Farrugia Randon is entitled to file said appeal in representation of the company he works for.

b) **Merits –**

- i. Initially reference is made to the tender dossier specification 6.1.vi which states *"A well-maintained fire suppression system that prioritises the preservation of the stored paper material, whilst extinguishing the fire, with Argonite or equivalent."* Moreover, clarification 1 further states that *"The Contracting Authority confirms that "or equivalent" is restricted to other inert gases, not foam, powder or liquid or any other substance which may damage documents **or leave any form of residue**"* (bold & underline emphasis added)
- ii. Mr Gilbert Camilleri, during his testimony under oath, confirmed that:
 1. *"... There was no reference to Argonite in the Firepro literature."* (Firepro is the system as proposed by the preferred bidder)
 2. *".... I am not aware of the difference between an Argonite system and an Aerosol system"*
 3. *"The self-declaration by the preferred bidder confirmed that the system offered was based on Argonite and the question of equivalence had not been gone into by the Evaluation Committee."*
- iii. At this juncture, this Board deems it opportune to point out that in the self-declaration of the preferred bidder it was stated that *"In case of fire, this system emits **an inert gas (Argonite)** which will extinguish any fire in a very short timeframe, and which will not damage the documents stored within these areas."* (bold & underline emphasis added) However, on the other hand, the literature submitted by the same preferred bidder is entitled "Fire Pro – Fire Extinguishing **Aerosol** Systems" As per tender dossier *"The scope of the literature is to corroborate a fully compliant technical offer."* Hence the purpose of the technical literature was to 'confirm' and corroborate what was stated in the original offer. But obviously the technical literature submitted is contradicting the self-declaration as submitted!
- iv. During the testimony, under oath, of both Mr Anthony Buttigieg and Mr Alvaro Ferreria it was established that 'Argonite' and 'Aerosol' systems are definitely not the same and even though they both can achieve the objective of extinguishing fires, they achieve this in different methods.

- v. In this Board’s opinion, the major difference is that an Aerosol system (as submitted by the preferred bidder) leaves salt (potassium) particles as residue in the form of dust. This goes contrary to the same Clarification 1 as issued by the Contracting Authority which stated that “..... or leave **any form of residue**”. (bold emphasis added)

Once it has been ascertained that the Preferred Bidder made a factually deceiving self-declaration and that the system offered by them did not comply with the clarification note as issued by the Contracting Authority, this Board cannot but uphold the appellant’s grievance.

The Board,

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

- a) To uphold the Appellant’s grievance;
- b) To cancel the ‘Notice of Award’ letter dated 6th February 2024;
- c) To cancel the Letter of Rejection dated 6th February 2024 sent to Rentastore Malta;
- d) To order the contracting authority to re-evaluate the bid of Maltapost p.l.c through a newly constituted Evaluation Committee composed of members which were not involved in the original Evaluation Committee, 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

Mr Lawrence Ancilleri
Member

Dr Charles Cassar
Member