



LETTER OF THE CONTRACTING AUTHORITY



The Secretary

The Public Contracts Review Board

Notre Dame Ravelin

Floriana

4th March 2024

Dear Sir

RE: SPD8/2023/147 – Tender for Electrical and Mechanical Works and Supply and Installation of Pumps, Filtration, Plumbing and Effluent System for the Department of Fisheries and Aquaculture

In reply to the objection filed by Sammut Marine Limited (C82608) against the decision finding its offer as being non-compliant for 421- SPD8/2023/147 *Tender for Electrical a Mechanical Works and Supply and Installation of Pumps, Filtration, Plumbing and Effluent System for the Department of Fisheries and Aquaculture*, the Department of Fisheries and Aquaculture (hereinafter “DFA”) wants to submit the following:

1. It is agreed that, at the relevant stage of the procurement process at which the decision was issued the bone of contention for the TEC’s finding of non-compliance was related to a conflict of interest between the Key Expert identified by Sammut Marine Limited (hereinafter “SML”). This Key Expert also acted and was meant to act and continue to act as technical advisor for the Department of Fisheries and Aquaculture for the works and supplies involved in this tender process. Given that this particular finding was deemed fatal, no other considerations were made and this is without prejudice to other possible shortcomings that could result should the procurement process start where it left off upon the challenged decision. Nonetheless, while the main reason was as identified in Document SM1 as found in SML’s appeal, there are and could be other pertinent reasons at law leading to a disqualification or lack of award.
2. By virtue of the letter of objection by SML, it seems uncontested that Ing. Mario Sammut and his role with both SML and the DFA is the contested issue in these proceedings. In this regard, the DFA would like to tackle the grounds of appeal filed by SML. The recollection of the facts is generally accepted in SML’s appeal to the PCRB (section A of the same), **save for what will be stated hereunder.**
3. DFA refers to para. 6 in SML’s appeal and the reference to an alleged “oversight” by its Key Expert, Ing. Mario Sammut, to disclose any conflict of interest to SML for SML’s consideration and eventual submission in this procurement process.

DFA states that this is:

- (i) highly untenable considering the time period in which said Ing. Mario Sammut was involved as a technical advisor to the Contracting Authority and also apparently involved with SML’s tendering and eventual implementation of the project should it have been awarded the tender.



DFA also states that this is:

(ii) a *res inter alios acta* between SML and its Key Expert, who in the matter was in the least negligent with respect to both SML and the Contracting Authority. In this regard, with prudence being an important consideration, it cannot be accepted as a matter of fact that this was a simple case of an “oversight” by a presumably highly experienced warranted professional for which conflicts of interest are also provided against in their professional codes of ethics (and as we shall see, not only).

4. As quoted in SML’s appeal and attached thereto as Document SM1, the facts upon which the Technical Evaluation Committed found the offer to be non-compliant are clearly listed therein, and do not require repetition here.
5. Turning to the grounds of appeal, as to **the first ground of appeal by SML**, it states that SML has complied with Article 12.2 of the GRGT. It must be stated *ab initio* that conflict of interest is not only to be considered according to Article 12.2 of the applicable GRGT, but also *inter alia* by the definitions and provisions in the Public Procurement Regulations (S.L. 601.03, hereinafter “PPR”) themselves, and these define conflicts of interest as follows:

*“conflicts of interest” shall **at least** mean **any situation** where **any person**, including staff members of the contracting authority or of a procurement service provider acting on behalf of the contracting authority, **who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence** in the context of the procurement procedure;” (emphasis added)*

6. With respect, in relation to the aforementioned Ing. Mario Sammut, who falls in the least under “any person”, is definitely subject to a conflict of interest by his dual role with the tenderer SML and the contracting authority DFA. Emphasis is laid on the fact that his situation vis-à-vis the parties is in the least a situation (“any situation”) in the procurement procedure which in the least “might be perceived to compromise their impartiality and independence”. In this regard, reference is made to the TEC’s finding of non-compliance referred above, and the roles of Ing. Mario Sammut with both parties, and also his involvement “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”.
7. In continuation with the previous two paragraphs, it is to be noted that “conflicts of interest” are defined at law on an “at least” basis, meaning that that is a minimum level and the TEC and anyone involved in the procurement procedure can or should also adopt a higher standard if reasonably fit to do so. This is being said by way of legal interpretation, not as a declaration as to the TEC’s actions in this case. In this regard though, it further shows that the TEC was *a fortiori* more than justified to apply the provisions involved when it gained knowledge of the dual role of Ing. Mario Sammut, as referred above.
8. Turning now specifically to the points raised by SML in its first ground of appeal, DFA states that the semantic legal acrobatics involved in distinguishing between SML and its Key Expert as well as the



apparent wording of the law, betrays a literal interpretation of the same that stultifies the actual principles of the public procurement legislation and would render it a parody of itself. DFA refers to points raised above, particularly in paras. 5 to 11. Moreover, given that the PPR are a transposition of Directive 2014/24/EU of the European Parliament and of the Council of 26 February, 2014, on public procurement and repealing Directive 2004/18/EC (reg. 1(2) PPR), it is apt to highlight that in preamble 16 of said EU Directive it emphatically stated that *“(16) Contracting authorities should make use of all possible means at their disposal under national law in order to prevent distortions in public procurement procedures stemming from conflicts of interest. This could include procedures to identify, prevent and remedy conflicts of interests.”*

9. DFA further submits that in the context of this case, SML and its chosen Key Expert had and are to be considered as one package, so to speak, for the purposes of the reasonable consideration of SML's offer. Any other consideration in the context of this case is untenable.
10. Further to the first ground of appeal by SML, particularly para. 19 of SML's appeal, it should be noted that the offer made by SML is factually false in the sense that a blatant conflict of interest could in the least be perceived through its choice of Key Expert and this situation is the doing of the latter and, or SML, plus it is a matter that should be between themselves to redress. DFA submits that “false declaration” does not require an intent to deceive and, or gain advantage, but includes an objective finding of a lack of truthfulness in the submissions or offer made. Moreover, Article 21.2 of the GRGT provides as a whole on more than a “false declaration” or rather that “false declaration” should be interpreted in the light of the whole provision. DFA humbly submits that SML seems to seek to ascribe a conveniently restrictive, limited meaning to “false declaration” in the field of “conflicts of interests”. This is incorrect especially considering that these provisions are meant to be of wide interpretation due to their prudential underpinning and the public financial interests they are meant to safeguard. In this sense, it could be that SML is interpreting “false declaration” akin to criminal law provisions, which requires an intent and are necessarily restrictive in interpretation. This should not be applied in this given case by the Honourable Board.
11. Turning to **the second ground of appeal by SML**, this relates to possible remedies to its situation which SML burdens the Contracting Authority or DFA for their application. In relation to the second ground of appeal, DFA believes that this ground ought to be refused and the reason is shown above and also in the testimony that DFA can provide in relation to the conflicts of interest situation generated by the involvement of Ing. Mario Sammut with both DFA and SML. With respect, any rectification or remedy referred by SML in its appeal cannot and could not be entertained, as may be proven in due course in these proceedings.
12. Ing. Mario Sammut was too deeply involved in the procurement process for SML to rectify the situation. In this regards a substitution of the same Key Expert by SML would not resolve the situation on two accounts: (i) DFA cannot reasonably dismiss potential conflicts of interest and inside knowledge as to the procurement procedure which could have already been passed on to SML or could be passed on to it. Naming another Key Expert does not ensure an adequate level of security and transparency. Possibly more importantly (ii) it is to be understood that for the whole situation to be rectified, and without prejudice to point (i), it is not enough for SML to change its apparent Key Expert but the Contracting Authority must also make substantial fundamental changes to ensure it at least prevents a potential conflict of interest considering the involvement of Ing. Mario Sammut with the Contracting Authority. In this regard, changes need to be done at the Contracting Authority's end to ensure that no conflicts of interests could be reasonably perceived. This scenario makes the



application of the remedies referred by SML in its second ground of appeal inapplicable in the given case.

13. In view of the preceding paragraph, DFA submits that what SML was subject to was not an "automatic exclusion" as it incorrectly stated, but a duly considered decision borne out of the situation the TEC was faced with in SML's offer and due to its Key Expert and his role(s) in the interests of SML and of DFA itself.
14. DFA would also like to make a submission on the fact that SML was the only bidder for this tender. This would not rectify the situation brought about by SML and its Key Expert and we seem to be going as far as to infer that SML should be awarded the tender by virtue of it being the only tenderer. This is untenable, and given that the finding of non-compliance was made at evaluation stage, and the one finding at issue in these proceedings was fatal (rendering consideration of other grounds an academic exercise), there could be other grounds for the non-award of the contract should this conflicts of interests ground be adjudged untenable.
15. With utmost respect, this quandary could well have been avoided if disclosure was forthcoming and it would be farcical to believe that either the concerned warranted professional does not perceive a potential and apparent conflict of interest (being one where there is no actual conflict of interest in action, but it could still be perceived as such by reasonable persons) and had the capability to disclose it, or that his role as Key Expert was not informed by the knowledge he gained as technical advisor to the Contracting Authority.

In consideration of the above, and other pleas and submissions that may be raised during these proceedings, it is being requested that the Public Contracts Review Board dismisses all grounds of appeal and this appeal *in toto*, with the deposit being forfeited.

Yours sincerely,

Bjorn Callus

Head of Contracting Authority

Department of Fisheries and Aquaculture